



REPUBLIC OF KENYA



**Kibeh v Waibara & another (Civil Appeal E468 of 2020)
[2022] KECA 388 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 388 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E468 OF 2020
HM OKWENGU, K M'INOTI & KI LAIBUTA, JJA
MARCH 4, 2022**

BETWEEN

ANNIE WANJIKU KIBEH APPELLANT

AND

CLEMENT KUNG'U WAIBARA 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(Korir, J) delivered on 7th October 2020 in HC Milimani Constitutional
Petition No. 210 of 2020 Formerly Kiambu HC Petition No. 8B of 2019)*

The law did not prohibit a member of County Assembly from being nominated by a political party to vie for a parliamentary seat.

Reported by Ribia John

***Electoral Law** – public elective posts – qualifications to vie for public elective posts – requirement for public officers to resign before vying for public elective posts – whether candidates intending to vie for any political seat established by the Constitution had to be qualified to do so at the time of nomination – whether the law prohibited a member of county assembly from being nominated to vie for a parliamentary seat by a political party on account that a member of county assembly was a state officer – Constitution of Kenya, 2010 article 99(2); Elections Act, No. 24 of 2011, sections 22(1) and 43.*

***Electoral Law** – election – what constituted an election for public office – nominations – whether the nomination of a member of county assembly to contest for a parliamentary seat was an election - Constitution of Kenya, 2010 article 99.*

***Statutes** – interpretation of statutes – conflict of statutory and constitutional provisions – Elections Act, No. 24 of 2011, section 43 viz-a-viz the Constitution of Kenya, 2010 article 99 – whether there was inconsistency between section 43 of the Elections Act that allowed a member of a county assembly to contest a political seat while holding*



that position and article 99 of the Constitution that required public officers to resign from office before vying for public elective posts – Constitution of Kenya, 2010 article 99(2); Elections Act, No.24 of 2011, section 43.

Brief facts

The matter was an appeal against the judgment of the High Court in *HC Milimani Constitutional Petition No. 210 of 2020 Formerly Kiambu HC Petition No. 8B of 2019* delivered on October 7, 2020. The 1st respondent had challenged the election of the appellant as the Member of the National Assembly for Gatundu North Constituency.

The appellant's election had been challenged earlier before the High Court and the Court of Appeal. Her election was initially successfully challenged in the High Court by the 1st respondent in *Election Petition No. 1 of 2017* wherein it was held: that the election of the appellant contravened constitutional and statutory provisions governing elections; that the appellant was not validly declared as the Member of Parliament for Gatundu North Constituency; and that the declaration issued by the Independent Election and Boundaries Commission (2nd respondent) was invalid, null and void. The judgment of the High Court was overturned by the instant Court in *Election Petition Appeal No. 1 of 2017*, and the appellant was declared validly elected as the member of the National Assembly for Gatundu North Constituency.

The 1st respondent then filed a constitutional petition seeking a declaration that the appellant was holding office as the member of the National Assembly for Gatundu North Constituency in violation of article 103(1)(g) as read with article 99(2) (d) of the Constitution of Kenya, 2010 (the Constitution) because she was not qualified to contest for election as a member of the National Assembly on the date of her election. That petition was initially dismissed by the High Court but upon appeal to the Court of Appeal, and in a judgment delivered on August 14, 2019, the Court of Appeal allowed the appeal and ordered that the petition be remitted back to the Constitutional and Human Rights Division of the High Court for a new trial. The new trial culminated in the orders the subject of the instant appeal.

The High Court having re-heard the matter allowed the petition holding *inter alia* that the appellant was a nominated Member of the County Assembly of Kiambu on June 27, 2017 when her nomination to run for the Gatundu North National Assembly seat was gazetted by the 2nd respondent (IEBC). It therefore followed that at the time of her election on August 8, 2017 she was ineligible for election as a Member of Parliament as she was disqualified by article 99(2) (a) & (d) of the Constitution from contesting. Her participation in the election and her subsequent election was therefore unconstitutional, null and void. The High Court thus declared the seat of the Member of the National Assembly for Gatundu North Constituency had become vacant by operation of article 103(1)(g) of the Constitution.

Aggrieved, the appellant filed the instant appeal challenging the High Court decision on grounds of; constitutional and statutory interpretation of article 99 of the Constitution and section 43 of the Elections Act; determination of unpleaded issues; and disregard of the doctrine of *stare decisis*.

Issues

- i. What was the definition of a public officer?
- ii. Whether candidates intending to vie for any political seat established by the Constitution had to be qualified to do so at the time of nomination.
- iii. Whether the law prohibited a member of county assembly from being nominated by a political party to vie for a parliamentary seat on account that a member of county assembly was a state officer.
- iv. Whether nomination of a member of county assembly to contest for a parliamentary seat was an election within the meaning of article 99 of the Constitution.
- v. Whether there was inconsistency between section 43 of the Elections Act that allowed a member of a county assembly to contest a political seat while still holding that position and article 99 of the Constitution that required public offers to resign from office before vying for public elective posts.

Relevant provisions of the Law

Constitution of Kenya, 2010



Article - 99. Qualifications and disqualifications for election as member of Parliament

(2) A person is disqualified from being elected a member of Parliament if the person--

(a) is a State officer or other public officer, other than a member of Parliament;

Article 103 - Vacation of Office of Member Of Parliament

(1) The office of a member of Parliament becomes vacant—

(g) if the member becomes disqualified for election to Parliament under Article 99 (2) (d) to (h).

Elections Act , No. 24 of 2011

Section 43 - Participation in elections by public officers

(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.

(5A) A public officer who intends to contest in a by-election under this Act shall resign from public office within seven days of the declaration of a vacancy.

(6) This section shall not apply to-

(a) the President;

(b) deleted by Act No. 36 of 2016, s. 16;

(c) the Deputy President;

(d) a member of Parliament;

(e) a county governor;

(f) a deputy county governor;

(g) a member of a county assembly.

Held

1. The 1st appellant tendered her application for nomination on March 3, 2017 and was gazetted by the Independent Electoral and Boundaries Commission on June 27, 2017 as the duly nominated candidate to contest in the 2017 general elections as the Jubilee party candidate for MP for Gatundu North Constituency. At the time of her nomination and gazette, the appellant was a member of the Kiambu County Assembly, and she was elected as Member of Parliament for Gatundu North on August 8, 2017 when the general election took place. Article 99 of the Constitution, dealt with qualification and disqualification for election as member of Parliament. The 1st appellant, being a member of a county assembly, was the holder of a state office and therefore a state Officer. That was ascertainable from article 260 of the Constitution which defined a state officer as a person holding a State office and a member of a County Assembly as a State Office.
2. The proper meaning of public officer, for purposes of the electoral law, was that embodied in article 260 of the Constitution as read together with section 2 of the Elections Act. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the constitutional provision. The proper meaning of public officer currently was:
 1. the person concerned was a State officer; or
 2. any other person who held public office – an office within the national government, county government, public service;
 3. a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.
3. Article 99(2)(a) of the Constitution provided that a person was disqualified from being elected as a member of parliament if the person was a state officer other than a member of parliament. Article 99(2) (d) provided that a member of the county assembly fell within those state officers who were disqualified from being elected as a Member of Parliament.



4. A reading of article 99(2) of the Constitution showed that the disqualification related to election as a member. They did not relate to nomination. The conditions provided for disqualification had to be present at the time of election as a member of parliament. That was when the issue of whether the candidate was eligible for election came into play. Article 99 of the Constitution dealt with qualifications and disqualifications for elections as Member of Parliament, which was a stage after nomination.
5. The High Court misdirected itself in holding that nomination to contest membership of Parliament was an election within the meaning of article 99 of the Constitution. That article did not state that for one to vie for any political seat established by the Constitution, he or she had to be qualified to do so at the time of nomination. The High Court had conflated election, which was the subject of disqualification in article 99 of the Constitution, with nomination for election, which was the subject of section 22(1) of the Elections Act.
6. The law did not prohibit a member of county assembly from being nominated to vie for a parliamentary seat by a political party, as nomination to contest as a member of parliament was not an election within the meaning of article 99 of the Constitution. Nomination for election and elections were actually two distinct stages in the electoral process that could not be conflated. Nomination had to first take place and, thereafter, those who were nominated contest the election.
7. Section 43(5) of the Elections Act required a public officer who intended to contest an election under the Act to resign from public office at least six (6) months before the date of that election. Section 43(6) of the Elections Act exempted particular state officers from the requirement in section 43(5). Under section 43(6)(g) of the Elections Act, a member of a county assembly was one of the public officers exempted from that section. Unlike other public officers who were expected to resign from their public office at least 6 months before the date of election, the officers identified in section 43(6) of the Elections Act, including a member of a county assembly, did not have to resign before the date of elections, and were not disqualified from contesting for a political position by virtue of those positions.
8. There was no inconsistency between section 43 of the Elections Act and article 99 of the Constitution. The section did not allow a member of a county assembly to contest a political seat while still holding that position, but the member of county assembly did not have to resign because they automatically ceased to hold the position by the election date. If anything, the requirement for public servants to resign from the public office was in tandem with the disqualification of public officers provided under article 99(2) of the Constitution and gave public officers a specific timeline within which to resign from their offices should they wish to contest an election. That timeline was pegged on the election date and, for a member of county assembly, the disqualification would not be applicable on the election date, as their term in the county assembly would have ended.
9. Article 137 of the Constitution dealt with nomination for election as President, and subsection 2(b) of that article, specifically disqualified a public officer from being nominated. That was distinct from article 99(2)(d) of the Constitution which disqualified a public officer from being elected. Similarly, article 137(3) of the Constitution excluded the president, deputy president and member of parliament from the disqualification in article 137(2)(b), just as article 99(2) (a) of the Constitution excluded a member of Parliament from the disqualification in that article. Article 193 of the Constitution provided for qualification for election as member of county assembly and expressly provided for disqualification of state officers other than a member of county assembly. Although in articles 99 and 193 of the Constitution the disqualification related to election and the disqualification and the exemptions provided in article 137 of the Constitution related to nomination, the articles were all consistent with section 43 of the Elections Act to the extent that a state officer was not qualified to contest at the time of elections.
10. The rationale for excluding public officers mentioned in section 43(6) of the Elections Act from the obligation to resign 6 months before the elections was understandable. They all held positions of a



political nature by virtue of their elections or nominations. Those included the president, deputy president, member of parliament, governor, member of county assembly, who were elected for a 5-year term, that ordinarily terminated at the next general elections. If those State officers were to resign 6 months before the general elections, their term would be reduced to four and a half years. There would also be a vacuum as the constituencies they represented would be left without a representative for 6 months as no by-elections could be held within that period. That was further reinforced by article 103(1)(f) of the Constitution which provided that the office of a member of parliament became vacant at the end of the term of the relevant House.

11. The members of parliament did not need to resign before the elections, as their positions would automatically cease at the end of the 5-year term to facilitate the elections and a new term in the House. Under article 194(1)(f) of the Constitution, a member of a county assembly would serve until the term ended automatically at the end of the term of the assembly when new elections were held and the term of a new assembly started.
12. In any litigation, the dispute between the parties was circumscribed by the parties through their pleadings and statement of agreed issues, if any. The issue of eligibility of a member of county assembly, governor or deputy governor, to contest the presidential election, or the president or deputy president to contest a county assembly election without resigning as head of state, was not before the High Court and it was not open to the High Court to make pronouncements in that regard. The only issue before the court was qualification and disqualification of a member of the county assembly for election as a member of parliament. That was what the High Court ought to have restricted itself to.
13. At the time of the elections on August 9, 2017, the appellant was not a member of the county assembly as her term had ended with the term of the county assembly. The disqualification in article 99(2)(a) and (d) of the Constitution that dealt with the disqualification of state officers and members of county assembly for election as members of parliament, would otherwise have been applicable to the appellant if she was still a member of county assembly, was no longer applicable to her.

Appeal allowed.

Orders

Costs awarded to the appellant and the 2nd respondent.

Citations

Cases

Kenya

1. *Galaxy Paints Co Ltd v Falcon Guards Ltd* [2000] EA 885 - (Explained)
2. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR); [2014] 2 KLR 356 - (Mentioned)
3. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Mentioned)
4. *Karani, Stephen Wachira v Attorney General & 4 others* Constitutional Petition 321 & 331 of 2017; [2017] KEHC 2184 (KLR) - (Explained)
5. *Mwau v Independent Electoral and Boundaries Commission & 2 others* Presidential Election Petition 2 & 4 of 2017 (Consolidated); [2017] KESC 53 (KLR) - (Explained)
6. *Mwawasi, Donald Kisaka v Attorney General & 2 others* Civil Appeal 280 of 2013; [2014] KECA 561 (KLR) - (Mentioned)
7. *Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates* [2013] 3 KLR 637 - (Explained)
8. *Outa, Frederick Otieno v Jared Odoyo Okello & 4 others* Petition 6 of 2014; [2014] eKLR - (Explained)
9. *Waibara, Clement Kungú v Anne Wanjiku Kibeh & another* Petition 210 of 2020; [2020] KEHC 2834 (KLR) - (Mentioned)



10. Statutes

Kenya

1. Constitution of Kenya articles 99(1)(2)(a)(d); 103(1)(f)(g); 137(1)(2); 193; 194(1)(f); 260- (Interpreted)
2. Elections Act (cap 7) sections 2, 22(1); 43(5)(6)- (Interpreted)

Advocates

Prof Ojienda Senior Counsel, and *Mr Onderi* for the appellant

Mr Awele and *Mr Owuocha* for the 1st respondent

Mr Nyachiro for the 2nd respondent

JUDGMENT

1. This is an appeal arising from a judgment of the High Court (Korir, J) in a petition in which Hon Clement Kung'u Waibara (Hon Waibara) challenged the election of Hon Annie Wanjiku Kibeh (Hon Kibeh), as the Member of the National Assembly for Gatundu North Constituency. Hon Kibeh is now the appellant before us and Hon Waibara the 1st respondent and the Independent Electoral and Boundaries Commission (IEBC) the 2nd respondent.
2. Since her election on August 8, 2017, Hon Kibeh has had a checkered history in her quest to retain her seat as Member of the National Assembly for Gatundu North Constituency. Her election was initially successfully challenged in the High Court (Ngugi, J), by Hon Waibara in Election Petition No 1 of 2017 wherein Hon Waibara obtained orders: that the election of Hon Kibeh contravened constitutional and statutory provisions governing elections; that Hon Kibeh was not validly declared as the MP for Gatundu North constituency; and that the declaration issued by the IEBC was invalid, null and void. Hon Waibara's success was short lived as the judgement of the High Court was overturned by this Court (Nambuye, Gatembu & Murgor, JJA) in Election Petition Appeal No 1 of 2017, and Hon Kibeh declared validly elected as the member of the National Assembly for Gatundu North Constituency.
3. Hon Waibara then filed a constitutional petition seeking a declaration that Hon Kibeh was holding office as member of the National Assembly for Gatundu North Constituency in violation of article 103(1) (g) as read with article 99(2)(d) of the Constitution because she was not qualified to contest for election as a member of the National Assembly on the date of her election. That petition was initially dismissed by the High Court (Achode, J), but Hon Kibeh appealed to this court, and in a judgement delivered on August 14, 2019, the court (Asike Makhandia, F Sichale & J Mohammed, JJA) allowed the appeal and ordered that the petition be remitted back to the Constitutional and Human Rights Division of the High Court for a new trial. The new trial culminated in the orders that are now the subject of this appeal.
4. In his Constitutional petition in the High Court, Hon Waibara contended that the election of Hon Kibeh was in violation of article 103(1) (g) as read with article 99(2)(d) of the Constitution, because she was still serving as a member of the County Assembly, Kiambu County, and therefore was not eligible for nomination to contest the election as a Member of the National Assembly for Gatundu North Constituency.



5. Following the order for retrial, the learned Judge having re-heard the matter allowed the petition holding *inter alia* that:

“The 1st respondent (Hon Kibeh) was a nominated Member of the County Assembly of Kiambu on June 27, 2017 when her nomination to run for the Gatundu North National Assembly seat was gazetted by the 2nd respondent (IEBC). It therefore follows that at the time of her election on August 8, 2017 she was ineligible for election as Member of Parliament as she was disqualified by article 99(2)(a) & (d) of the Constitution from contesting. Her participation in the election and her subsequent election was therefore unconstitutional, null and void.”

6. The learned Judge proceeded to declare that the seat of the Member of the National Assembly for Gatundu North constituency currently held by Hon Kibeh had become vacant by operation of article 103 (1) (g) of the Constitution.
7. Hon Kibeh, being aggrieved, has challenged the judgment of the High Court on 15 grounds which she condensed in her submissions into 3 issues. The issues are: constitutional and statutory interpretation of article 99 of the Constitution and section 43 of the Elections Act; whether the learned judge erred in determining unpleaded issues; and whether the learned judge disregarded the doctrine of *stare decisis*.
8. Hon Kibeh submitted that, although the learned Judge fully appreciated the constitutional interpretation doctrines, his decision was flawed and contra the canons of interpretation. She faulted the learned judge for interpreting article 99(2) of the Constitution, which reads: “a person is disqualified from being elected as a member of Parliament if the person is...” by reading in the word “nomination” to interpret the section as stating, “a person is disqualified from being nominated as a member of parliament if the person is...” She contended that the transposition of the word nomination for election was a misconstruction of a clear constitutional text.
9. Hon. Kibeh submitted that article 99(1) of the Constitution in fact distinguishes between nomination and election, as the two words are used in the section in different contexts; and that a candidate’s election is pegged on her being nominated, and therefore the two terms cannot mean the same thing. Hon Kibeh cited Bishop Donald Kisaka Mwawasi vs Attorney General & 2 others [2014] eKLR (Bishop Mawasi decision), on the distinction between contesting an election and holding an elective office.
10. In addition, Hon. Kibeh referred to article 137(1) & (2) of the Constitution, arguing that the section was clear on nomination and that, if the intention of the framers of the Constitution in article 99(2) was, that a person be disqualified from being nominated as a member of the national assembly, the intention would have been expressly provided for.
11. As regards section 43(6) of the Elections Act, it was submitted that the judge’s decision has rendered valueless the purposes and rich history that led to the enactment of that section. Hon Kibeh referred to decisions adopting two opposing interpretations of section 43(6) of the Elections Act. One interpretation is that the requirement for resignation is reasonable and therefore constitutional, and the other interpretation is that, the section was unconstitutional for being unjustifiable, irrational, unreasonable, oppressive, and discriminatory, and undue limitation of public servants’ rights.
12. Hon Kibeh cited Stephen Wachira Karani & Anor vs Attorney General & 4 others [2017] eKLR in which Mativo, J held that article 99(2) (d) prohibited the concurrent holding of the office of Member of Parliament (MP) and Member of County Assembly (MCA), and ruled that a nomination was not an election for the purpose of article 99(2) (d) of the Constitution.



13. The judgment of Korir, J was faulted for equating nomination to election, and equating being elected to contesting an election, thereby misdirecting himself and departing from the binding precedent of the Bishop Mawasi decision. In addition, the learned Judge's holding that section 43(6) of the [Elections Act](#) was inconsistent with the [Constitution](#) in so far as it seeks to override the express provision of article 99, 137 and 193 of the [Constitution](#), broke ranks with the holding of other High Court Judges who had previously held that the provision was constitutional and that the distinction between elected State Officers and other (appointed/non-elected) State/public officers, was well meaning. The court was urged to affirm the decision of Mativo, J. as it represents the proper interpretation of the [Constitution](#) and Statute
14. On unpleaded issues, Hon Kibeh submitted that the parties to a dispute determine the terrain of their contest as demarcated in their pleadings; that in striking down section 43(6) of the [Elections Act](#), the learned Judge determined a non-pleaded issue erroneously and made sweeping pronouncements that transcended the parties in the case. These were: that an MCA cannot contest a presidential election before quitting membership of the County Assembly; that Governors or their deputies cannot contest a presidential election without relinquishing their seat; that the President cannot contest in a County Assembly election without resigning as the head of state; that the Deputy President cannot contest in a County Assembly election without resigning as deputy head of state; that an MP cannot contest in a County Assembly election without resigning from Parliament, and that any holder of an elective political office who wants to move from the county government to the national government, or vice versa, must first relinquish his or her post before his or her nomination papers are accepted; and that these findings limit article 38, constitutional rights of the cited State officers without hearing them.
15. On *stare decisis*, it was submitted that the learned judge erred in disregarding the binding precedent of this court in the Bishop Mawasi decision and thereby disregarded the doctrine of horizontal *stare decisis*. It was argued that the learned judge had no justifiable reason for departing from this court's decision and other decisions that have held that section 43(6) of the [Elections Act](#) rightly distinguishes State elected officers from other State/Public Officers. The court was therefore urged to allow the appeal.
16. IEBC fully supported Hon Kibeh's appeal and filed written submissions. In its view, the issues for determination were twofold: whether the learned judge misinterpreted article 99 of the [Constitution](#) and section 43 of the Election Act; and whether the IEBC upheld the tenets of the [Constitution](#) in declaring Hon Kibeh eligible to contest for the seat of the Member of Parliament for Gatundu North Constituency. IEBC relied on the Supreme Court Advisory Opinion in the [Interim Independent Electoral Commission](#) [2011] eKLR for the proposition that the [Constitution](#) favours a purposive approach to interpretation as opposed to formalism, and the Supreme Court Advisory Opinion [In the matter of Kenya National Commission on Human Rights](#) [2014] eKLR, for a holistic interpretation as the contextual analysis of a constitutional provision.
17. IEBC submitted that the learned judge's reasoning on the interpretation of the [Constitution](#) was out of context as he failed to distinguish between election and nomination. IEBC referred to the interpretation of election and nomination as defined in section 2 of the [Elections Act](#) and noted that the electoral process has several components, nomination being one of them. Even though nomination is inseparable from elections in an election process, the two are different activities in the singular electoral process, nomination being the first activity in the electoral process, and election being the last activity, which results in the election of a candidate.
18. IEBC argued that both the [Constitution](#) and the Election Act have expressly distinguished the two terms and pegged a candidate's election on being nominated. The two terms cannot therefore be



construed to mean the same thing and the learned judge failed to appreciate the distinction between contesting an election and holding an elective office. In addition, the learned judge disregarded the *ratio decidendi* in the Bishop Mawasi decision in which this court had distinguished between contesting of elective office and holding elective office.

19. IEBC submitted that the provisions of section 43(5) of the [Elections Act](#) and article 99(2) of the [Constitution](#) only prohibit a person from occupying the office of a member of the County Assembly concurrently with the office of a Member of Parliament; that Hon Kibeh was a holder of an elective constitutional post and her nomination to run for election as Member of Parliament did not in any way contravene section 43(5) of the [Elections Act](#); and that in allowing Hon Kibeh to run for election as Member of Parliament for Gatundu North Constituency, IEBC applied the exception under section 43(6) of the [Elections Act](#).
20. Like Hon. Kibeh, the IEBC urged the court to affirm and follow the judgment of Mativo, J in the Stephen Wachira Karani case urging that the interpretation of Korir, J that section 43(6) of the [Elections Act](#) was inconsistent with the [Constitution](#) in so far as it seeks to override the express provisions of articles 99,137 and 193 of the [Constitution](#) was not only short of context but a mockery to the principal of *stare decisis*.
21. On whether IEBC upheld the tenets of the [Constitution](#) in declaring Hon Kibeh eligible to contest for the seat of MP for Gatundu North Constituency, IEBC maintained that it conducted the elections in accordance with the [Constitution](#) and the requisite election law; that the decision of Korir, J was not only contradictory and erroneous but also contrary to the canons of interpretation of article 99 of the [Constitution](#); that the issue of Hon Kibeh to contest as a member of the National Assembly has already been dealt with by courts of competent jurisdiction; and that election and nomination is distinguished in section 99(1).
22. IEBC maintained that it acted in accordance with article 99 in declaring Hon Kibeh eligible to contest for the Gatundu North constituency seat. IEBC further cited the decisions in the *Stephen Wachira Karani* case and Petition No 210 of 2020 - *Kung'u Waibara v Ann Wanjiku Kibeh & anor* [2020] eKLR where it was held that the term for members of the County Assembly including County Assembly Speakers, expire on the date of the next general election; that a member of the County Assembly is not disqualified from being nominated to contest in a general election as a Member of Parliament by virtue of article 99(2)(d) of the [Constitution](#); and that the law only prohibits the election of a Member of Parliament if such would result in the person holding the office of member of County Assembly and Member of Parliament concurrently.
23. IEBC argued that nomination to contest for elections is not an election for purposes of article 99(2) of the [Constitution](#) and, therefore, that article does not disqualify a member of County Assembly from being nominated to contest in a general election. IEBC concluded that the decision of the learned Judge, subject of the appeal, was illogical and the interpretation adopted impractical and averse to public interest.
24. The 1st respondent, Hon. Waibara, did not file any written submissions in response to the appeal. During the hearing of the appeal, Prof Ojienda SC and Mr Onderi appeared for Hon Kibeh, while Mr Awele and Mr Owuocha appeared for Hon Waibara, and Mr Nyachiro for IEBC Mr Awele who had initially been acting for Hon. Waibara explained to the court that he had not been able to get instructions from his client on the appeal, and had learnt that Hon Waibara had instructed Mr Owuocha. Learned counsel Mr Owuocha confirmed that he had initially been instructed by Hon Waibara in regard to Civil Application No NAI 390 of 2021 involving the same parties which was also



coming up for hearing before us, but had just been instructed to take over this appeal. Mr Awele then sought to be released by the court from appearing for Hon Waibara and his request was granted.

25. Following submissions that were made by Prof Ojienda, SC and Mr Nyachiro highlighting the submissions of Hon Kibeh and the IEBC respectively, although Hon Waibara did not file any submissions in response to the appeal, Mr Owuocha urged the court to affirm the decision of the learned Judge. It is noteworthy that in Civil Appeal (Application) No 390 of 2021, Hon Waibara challenged the jurisdiction of this court to entertain the appeal on account of lapse of time, contending that the statutory timelines within which the appeal was to be heard and determined had lapsed.

We have today given a ruling in regard to that application. Suffice to state that we have found that the statutory timelines relied upon by Hon Waibara do not apply to this appeal.

26. This being a first appeal, we reiterate and assert our duty as a first appellate court as stated in [Abok James Odera T/A A/Odera & Associates vs John Patrick Machira T/A Machira & Co Advocates](#) [2013] eKLR:

“...namely to reevaluate, reassess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way.”

27. With that duty in mind, we have keenly perused the record and considered this appeal in light of the written submissions that were orally highlighted before us, the authorities cited, and the facts that were before the learned Judge, with a view to making our own conclusions, taking into account the appropriate law.

28. It is not disputed that Hon Kibeh tendered her application for nomination on March 3, 2017 and was gazetted by IEBC on June 27, 2017 as the duly nominated candidate to contest in the 2017 general elections as the Jubilee party candidate for MP for Gatundu North Constituency. It is also common ground that as at the time of her nomination and gazettement, Hon. Kibeh was a member of Kiambu County Assembly, and that she was elected as Member of Parliament for Gatundu North on August 8, 2017 when the general election took place.

29. The bone of contention is whether under article 99(2)(a) & (d) of the [Constitution](#), Hon Kibeh being a member of Kiambu County Assembly was disqualified from being nominated as the Jubilee party candidate for MP for Gatundu North Constituency. In addressing this issue, the learned Judge quoted extensively from the judgment in the Stephen Wachira Karani case wherein Mativo J held that the law does not prohibit a member of County Assembly from being nominated by a political party to vie for a parliamentary seat as nomination to contest as a Member of Parliament is not an election within the meaning of article 99.

30. We reproduce herein verbatim what the learned judge stated after considering the judgment of Mativo, J:

“ 53. I hold a different view on some of the holdings by the learned judge. At paragraph 57 he finds that the [Elections Act](#) and section 22(1) provides –

“That a person may be nominated as a candidate for an election under the Act only if inter alia, he is qualified to be elected to that office under the [Constitution](#) and the Act. The Constitution at article (99(1)(a) & (d) clearly states that State Officers and other public officers and all members of a county assembly are disqualified from election as members of Parliament. Clause (a) is clear that the



only persons not disqualified by the rule are members of Parliament. This shows that the drafters of the Constitution intentionally excluded sitting members of county assemblies from contesting parliamentary elections. How then can a member of a county assembly be nominated to run for parliament without violating section 22(1) of the Elections Act?’

56. I also hold a different view on the statement that nomination to contest membership of parliament is not an election within the meaning of article 99 of the Constitution. In my view, for one to vie for any political seat established by the Constitution, he or she must be qualified to do so. In nominating candidates for various seats, political parties need to ensure that the candidates meet the requirements of the Constitution and the Elections Act. At the time of receiving nomination papers from candidates, the IEBC is duty bound to confirm that the candidates are not disqualified from contesting. Clearance by the electoral body to vie for an election is part and parcel of the election process.
60. My understanding of the cited case law, leads me to the conclusion that there is an unbreakable link between nominations and elections, for without nominations there cannot be elections. In determining whether to accept or reject nomination papers of a candidate, the IEBC bases its decision on the qualifications and disqualifications in the Constitution and any other constitutionally compliant law.
61. In my view the IEBC has no authority to accept the nomination papers of a candidate barred from contesting for membership of any of the two houses of parliament by article 99(2) of the Constitution. Doing so amounts to a violation of clear constitutional provisions.”
31. Thus, the learned judge took a position that was diametrically different from that of Mativo, J We have perused the judgment of the learned Judge, the memorandum of appeal and the submissions made before us. We discern the issue that we must address as whether article 99(2) barred Hon Kibeh, who was a member of County Assembly in Kiambu County, from being nominated and gazetted as a Jubilee candidate for Member of the National Assembly representing Gatundu North Constituency, and whether the learned judge arrived at the correct conclusion in holding that her election as member representing Gatundu North Constituency in the National Assembly was in violation of article 99(2) (a) & (d) of the Constitution.
32. In his judgment, the learned judge held that the Constitution at article 99(1) (a) and (d) clearly states that State Officers and other public officers or members of a county assembly are disqualified from election as members of Parliament; that under Clause (a), the only persons not disqualified by article 99(1)(a) are members of Parliament; and that under article 99(1)(a) & (d) the drafters of the Constitution intentionally excluded sitting members of county assemblies from contesting parliamentary elections. We believe that the reference to article 99(1)(a) & (d) in the judgment is a typographical error as the context of the judgment shows that the article under consideration was article 99(2)(a) & (d).
33. The learned judge also held that the Elections Act at section 22(1) provides “that a person may be nominated as a candidate for an election under the Act only if *inter alia* he is qualified to be elected to that office under the Constitution and the Act”, and that a member of a County Assembly cannot be nominated to run for Parliament without violating section 22(1) of the Elections Act. The learned judge



rejected the view that nomination to contest membership of Parliament is not an election within the meaning of article 99, and held that for one to vie for any political seat established by the Constitution he or she must be qualified to do so; that in nominating candidates for various seats, political parties need to ensure that the candidates meet the requirements of the Constitution and the Elections Act; and that IEBC must confirm that the candidates are not disqualified from contesting.

34. We have considered article 99 of the Constitution, which deals with qualification and disqualification for election as member of Parliament. That article states as follows:

“99

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



- (3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.
” (Emphasis added)

35. That Hon Kibeh being a member of a County Assembly, was the holder of a State office and therefore a State Officer, is clear from article 260 of the Constitution which defines a State Officer as a person holding a State office and a member of a County Assembly as a State Office. We are fortified in this by the Supreme Court decision in Fredrick Otieno Outa v Jared Odeyo Okello & 4 others [2014] eKLR, where the Supreme Court in defining a public officer stated as follows:

“Strictly speaking, the proper meaning of public officer, for purposes of the electoral law, is that embodied in article 260 of the Constitution as read together with section 2 of the Elections Act. The different definition in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” – currently is:

- i. The person concerned is a State officer; or
- ii. Any other person who holds “public office” – an office within the national government, county government, public service;
- iii. A person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer”

36. Article 99(2)(a) provides that a person is disqualified from being elected as a member of Parliament if the person is a State Officer other than a Member of Parliament. Article 99(2)(d) makes it clear that a member of the County Assembly falls within those State Officers who are disqualified from being elected as a Member of Parliament. A reading of article 99(2) shows that the disqualification relates to election as a Member of Parliament. They do not relate to nomination. This means that the conditions provided for disqualification must be present as at the time of election as a Member of Parliament. This is when the issue whether the candidate is eligible for election comes into play. Article 99 deals with qualifications and disqualifications for elections as Member of Parliament, which is a stage after nomination.

37. A reading of the judgment shows that the learned judge did not draw any distinction between the qualifications and disqualifications for “nomination”, and the qualification and disqualification for “election.” While article 99 dealt with the latter, it did not deal with the former. The learned judge also rejected the view that nomination to contest membership is not an election, stating that for one to vie for any political seat established by the Constitution, he or she must be qualified to do so, and that in nominating candidates for various seats, political parties need to ensure that the candidates meet the requirements of the Constitution and the Elections Act, and IEBC must confirm that the candidates are not disqualified from contesting.

38. We find that the learned judge misdirected himself in holding that nomination to contest membership of Parliament is an election within the meaning of article 99 of the Constitution. That Article does not state that for one to vie for any political seat established by the Constitution, he or she must be qualified to do so at the time of nomination. It is evident that the learned judge has conflated “election”, which is the subject of disqualification in article 99 of the Constitution, with “nomination for election”, which is the subject of section 22(1) of the Elections Act.



39. We are in agreement with the finding of Mativo, J in the *Stephen Wachira Karani* case that the law does not prohibit a member of County Assembly from being nominated to vie for a parliamentary seat by a political party, as nomination to contest as a Member of Parliament is not an election within the meaning of article 99. Nomination for election and elections are actually two distinct stages in the electoral process that cannot be conflated. Nomination must first take place and, thereafter, those who are nominated contest the election. That is our understanding of the explanation of nomination by the Supreme Court in *John Harun Mwan & 2 others vs IEBC & 2 others* [2017] eKLR:

“...nomination is a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek. It is a critical component of an electoral process, without which there would be no election.”

40. In regard to the finding that section 43(5) & (6) of the *Elections Act* in so far as it seeks to override the express provisions of articles 99, 137 and 193 of the *Constitution*, was unconstitutional, we set out herein the provisions of section 43(5) & (6) of the *Elections Act*, which deal with participation in election by public officers:

“(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.

(a) a public officer who intends to contest in a by-election under the Act shall resign from public office within 7 days of the declaration of vacancy.

(6) This section shall not apply to –

(a) the president

(b) deleted

(c) the deputy president

(d) a member of parliament

(e) a county governor,

(f) a deputy county governor

(g) a member of a county assembly.”

41. Section 43(5) of the *Elections Act* requires a public officer who intends to contest an election under the Act to resign from public office at least 6 months before the date of that election. Nonetheless, section 43(6) of the *Elections Act* exempts particular State officers from the requirement in section 43(5). Under section 43(6) (g), a member of a County Assembly is one of the public officers exempted from that section. This means that unlike other public officers who are expected to resign from their public office at least 6 months before the date of election, the officers identified in section 43(6), including a member of a County Assembly, do not have to resign before the date of elections, and are not disqualified from contesting for a political position by virtue of these positions.

42. We do not see how section 43 is inconsistent with article 99 that we have already set out at paragraph 34 of this judgment. The section does not allow a member of a County Assembly to contest a political seat while still holding that position, but the member of County Assembly does not have to resign because



they automatically cease to hold the position by the election date. If anything, the requirement for public servants to resign from the public office is in tandem with the disqualification of public officers provided under article 99(2) and gives public officers a specific timeline within which to resign from their offices should they wish to contest an election. This timeline is pegged on the election date and, for a member of County Assembly, the disqualification would not be applicable on the election date, as their term in the County Assembly would have ended.

43. Article 137 of the [Constitution](#) states:

- “(1) A person qualifies for nomination as a presidential candidate if the person –
- a. is a citizen by birth;
 - b. is qualified to stand for election as a member of parliament;
 - c. is nominated by a political party or is an independent candidate; and
 - d. is nominated by not fewer than two thousand voters from each of the majority of counties.
- (2) A person is not qualified for nomination as a presidential candidate if the person is –
- a. owes allegiance for foreign state; or
 - b. is a public officer, or is acting in any State or other public office.
- (3) Clause 2 (b) shall not apply to the President, the Deputy President or a member of Parliament.

44. It is evident that article 137 deals with nomination for election as President, and subsection 2(b) of that article, specifically disqualifies a public officer from being “nominated.” This is distinct from article 99(2) (d) which disqualifies a public officer from being “elected”. Similarly, article 137(3) excludes the President, Deputy President and Member of Parliament from the disqualification in article 137(2) (b), just as article 99(2) (a) excludes a member of Parliament from the disqualification in that article. Likewise, article 193 of the [Constitution](#) provides for qualification for election as member of County Assembly and expressly provides for disqualification of State officers other than a member of County Assembly. Although in article 99 and 193 the disqualification relates to “election” and the disqualification and the exemptions provided in article 137 relates to nomination, the articles are all consistent with section 43 of the [Elections Act](#) to the extent that a State officer is not qualified to contest at the time of elections.

45. We understand the rationale for excluding public officers mentioned in section 43(6) of the [Elections Act](#) from the obligation to resign 6 months before the elections. They all hold positions of a political nature by virtue of their elections or nominations. These include the President, Deputy President, Member of Parliament, Governor, member of County Assembly, etc. who are elected for a 5-year term, that ordinarily terminates at the next general elections. If these State officers are to resign 6 months before the general elections, their term would be reduced to 4½ years.

46. There would also be a vacuum as the constituencies they represent would be left without a representative for the 6 months as no by-elections can be held within that period. This is further reinforced by article 103(1) (f) of the [Constitution](#) which provides that the office of a Member of Parliament becomes vacant at the end of the term of the relevant House. The members of Parliament



do not therefore need to resign before the elections, as their positions would automatically cease at the end of the 5-year term to facilitate the elections and a new term in the House. Similarly, under article 194(1) (f), a member of a County Assembly would serve until the term ends automatically at the end of the term of the Assembly when new elections are held and the term of a new assembly starts.

47. As was held in *Galaxy Paints Co Ltd v Falcon Guards Ltd* [2000] EA 885, in any litigation the dispute between the parties is circumscribed by the parties through their pleadings and statement of agreed issues, if any. The issue of eligibility of a member of County Assembly, Governor or Deputy Governor, to contest the presidential election, or the President or Deputy President to contest a county assembly election without resigning as head of State, was not before the learned judge and it was not open to the learned judge to make pronouncements in this regard. The only issue before the court was qualification and disqualification of a member of the County Assembly for election as a Member of Parliament. That is what the learned judge ought to have restricted himself to.
48. In view of the foregoing, we come to the conclusion that, at the time of elections on August 9, 2017, Hon Kibeh was not a member of the County Assembly as her term had ended with the term of the County Assembly. The disqualification in article 99(2)(a)&(d) that deals with disqualification of State officers and member of County Assembly for election as members of Parliament, that would otherwise have been applicable to Hon Kibeh if she was still a member of County Assembly, was no longer applicable to her.
49. Consequently, we allow this appeal, set aside the judgment of the High Court and all the orders made thereunder, and substitute thereof an order dismissing Hon Waibara's petition. We award costs in the High Court and this court to the appellant and the 2nd respondent.

Those shall be the orders of the court.

DATED AND DELIVERED IN NAIROBI ON THIS 4TH DAY OF MARCH, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

