



**Karani & another v Attorney General & 4 others (Constitutional
Petition 321 & 331 of 2017 & Petition 331 of 2007 (Consolidated))
[2017] KEHC 2184 (KLR) (Election Petitions) (15 November 2017) (Judgment)**

Stephen Wachira Karani & another v Attorney General & 4 others [2017] eKLR

Neutral citation: [2017] KEHC 2184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
ELECTION PETITIONS**

**CONSTITUTIONAL PETITION 321 & 331 OF 2017
& PETITION 331 OF 2007 (CONSOLIDATED)**

JM MATIVO, J

NOVEMBER 15, 2017

BETWEEN

HON STEPHEN WACHIRA KARANI PETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

**RETURNING OFFICER LAIKIPIA WEST CONSTITUENCY 3RD
RESPONDENT**

JUBILEE PARTY 4TH RESPONDENT

PATRICK MARIRU 5TH RESPONDENT

**AS CONSOLIDATED WITH
PETITION 331 OF 2007**

BETWEEN

WAHOME NDEGWA PETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT



JUDGMENT

Introduction

1. This judgement disposes two consolidated Petitions, i.e. Petition No. 321 of 2017 ("the first Petition") and No. 331 of 2017 ("the second Petition").
2. Even though the two Petitions were triggered by events related to the general elections held on August 8th 2017, the parties felt that the Petitions raise issues that are still ripe for determination notwithstanding the fact that the elections have since been held.
3. The interpretive question before the Court is whether Article 99 (2) (d) of *the Constitution* disqualifies a Member of a County Assembly or a Speaker of a County Assembly from being nominated as a candidate to contest as a Member of Parliament; and whether if elected, such election would be a violation of the said provision. Relevant to this determination is the proper construction of Section 43 (5) & (6) of the *Elections Act*.^[1]
4. The point of departure for the two Petitions is that whereas "the first Petition" invites the court to find and hold that a serving Member of a County Assembly (including a Speaker of a County Assembly) is ineligible to be nominated and to contest for a Parliamentary seat by dint of the said provision, "the second Petition" invites the court to find and hold that the law does not bar a sitting member of a County Assembly from being elected as a Member of Parliamentary.
5. A common ground between the two Petitions is that by the time such a person is 'nominated' as a Parliamentary candidate by his political party, he is still a sitting Member of a County Assembly. Another point of departure between the two Petitions is whether if elected, such a person can be deemed to be holding two offices, in which event, such a person would be ineligible under Article 99 (2) (d).
6. In a recent decision of this court in *Law Society of Kenya v Kenya Revenue Authority & Another*,^[2] I observed that:-

“Courts have at one time or the other felt the need to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.”

Litigation history

7. On 19th July 2017, it was ordered by consent that:- (a) Margaret Kiiru be admitted in these proceedings as the first Interested Party; (b) the two Petitions were consolidated; (c) records to remain in Petition No. 321 of 2017; (c) the Petitioner in Petition No. 321 of 2017 became the second Interested Party in the consolidated Petition; (d) All the parties to file submissions within seven days from the said date; (e) Mention on 27th July 2017.



8. However, for unclear reasons, the matter was not listed on 27th July 2017. At the request of Mr. Mungai, and in the absence of the court file and the other counsels, I directed that the file be mentioned on 31st July 2017 and the other advocates be notified. On the said date, Prof. Ojienda SC indicated that he needed 3 days to file his submissions. The other Advocates present had no objection except Mr. Kibet, holding brief for Mr. Mungai who indicated that Mr. Mungai was ready to proceed at 11.30am the same day.
9. Upon consideration, I allowed the adjournment and directed the Respondents to file their submissions within 3 days and fixed a date for highlighting submissions on 24th October 2017. Shortly after the above, Mr. Mungai appeared and in the absence of the other advocates sought to mention the file stating that he was ready to proceed. I declined to mention the matter in the absence of the other advocates. The following day he filed a certificate of urgency seeking to revise the above order. Odunga J upon consideration declined to certify the matter as urgent.
10. On 24th October 2017 all the counsels (except Mr. Ojienda SC for the Petitioner in "the second Petition") appeared and opted to adopt their written submissions and asked the court to proceed and render judgement.
11. Mr. Mungai indicated that the files were not consolidated, hence the court could proceed to determine the two files separately. Upon retiring to write the judgement, I confirmed from the record that the two files were actually consolidated, hence, it would require a court order de-consolidating them to determine them separately. I was satisfied that it would be in order to dispose the two files in this judgement.
12. It is also relevant to mention that the date for highlighting was taken in court by consent of all the advocates and that all the counsels filed their submissions which I have considered in this judgement.

The First Petition-(No. 321 of 2017)

13. The Petitioner in the "first Petition" who was the incumbent Member of Parliament for Laikipia West Constituency avers that the fifth Respondent was at the material time the Speaker of the County Assembly of Laikipia, but was nominated by the Jubilee Party as its Parliamentary candidate for Laikipia West constituency for the Elections which were held on 8th August 2017.
14. He avers that Article 99 (2) (d) of *the Constitution* stipulates that a person is ineligible for election as a Member of Parliament if he is a Member of a County Assembly, hence the fifth Respondent was by dint of the said provision, disqualified from being elected as a Member of Parliament. Further, Section 43 (5) of the *Elections Act*[3] provides that a Public officer desiring to contest an election under the Act is enjoined to resign from public office at least six months before the date of the election.
15. He also avers that under Section 31 of the *Elections Act*[4] as read with Article 2 (1) 3,10 and 91 (1) and (9) of *the Constitution*, all political parties are enjoined to ensure that any candidate nominated to vie for an office established by *the Constitution* meets all the Constitutional and statutory requirements and the party's nomination rules. Hence, the fifth Respondents nomination to contest in the said election contravened the said provisions. Also, to the extent the Party's nomination Rules permit the fifth Respondent to be nominated, they contravene the above constitutional and statutory provisions.

The second Petition (Pet. 331 of 2017)

16. The Petitioner in "the second Petition" was the Speaker of the Nyandarua County Assembly and the Chair person of the Nyandarua County Service board. He avers that a literal reading of Articles 99 (2) (d) and 180 (2) of *the Constitution* could lead to an absurdity in the sense that while a Member of



County Assembly qualifies to be elected as a Governor, a member of County Assembly is disqualified from being elected as a Member of Parliament.

17. He further avers that the above provisions if read literally would mean that *the Constitution* restricts the political office which an outgoing Member of County Assembly can contest in violation of Article 38 (3) of *the Constitution* and that having been duly nominated to contest for the position of a Member of Parliament, a party nominee cannot be deemed to be a member of the County Assembly for the purposes of Article 99 (2) of *the Constitution*.
18. He invites this court to read the above provisions harmoniously and find that Article 99 (2) of *the Constitution* can only mean that a Member of County Assembly cannot be allowed to run for elections as a member of the National Assembly if the effect would be to have the aspirant hold the office of the Member of Parliament concurrently with the office of the Member of County Assembly.
19. He also avers that the above provisions ought not to be extended to cover the office of the Speaker on grounds that the Section 12 (6) of the *County Governments Act*[5] do not envisage the Speaker as one of the officers who hold office after the term of the County Assemblies come to an end and that nomination by a political party to contest as a Member of Parliament is not an election for the purposes of Article 99 (2) of *the Constitution*, hence a sitting Speaker cannot be barred under Article 99 (2) (d) of *the Constitution* from contesting as a Member of Parliament after being nominated by his party.

First Respondents Replying affidavit to the "first Petition"

20. Stephen Ombasa in a Replying Affidavit filed on 18th July 2017 in opposition to the first Petition avers that:- (a) the petition is without merit; (b) that the Petitioner's interpretation of Article 99 (2) (d) of *the Constitution* is erroneous; (c) Section 43 (6) of the *Elections Act*[6] provides that the section does not apply to a Member of the County Assembly; (c) that the decision rendered by the High Court in Employment and Labour Relations Court, Petition No. 1 of 2017, Kericho cited by the Petitioner only declared Section 43 (5) of the *Elections Act*[7] as unconstitutional yet this case falls under section 43 (6); (d) there is clear distinction in law between an election under the *Elections act*[8] and nomination of a candidate in accordance with *the constitution*. Article 99 (2) talks of disqualification from being elected as a Member of Parliament and not nomination.

Second Respondents Replying affidavit the "second Petition"

21. In support of the second Petition is the Replying Affidavit of Douglas Borgoret, IEBC's Senior Legal Officer. He states that:- (a) a literal interpretation of Article 99 (2) (d) of *the Constitution* would result in an absurdity as a Member of the County Assembly would be barred from being elected as a Member of Parliament, thus limiting his political rights; (b) a purposive interpretation would only mean that a member of the County Assembly vying for the position of Member of Parliament does not hold office for the two offices concurrently; (c) that the term of office for the two offices expires on the date of the general elections, hence a member of a County Assembly is not disqualified from contesting an election as a Member of Parliament by virtue of Article 99 (2) (d) of *the Constitution*.

Issues for determination

22. Upon analysing the facts, I find that only one issue falls for determination, namely, whether Article 99 (2) (d) of *the Constitution* properly construed bars a sitting Member of a County Assembly from being nominated to vie and be elected as a Member of Parliament in a general election.



Guiding principles on Constitutional interpretation

23. Determining this issue involves interpreting provisions of *the Constitution* and the relevant provisions of the *Elections Act*,^[9] hence, it is important to bear in mind the relevant guiding principles^[10] of Constitutional and statutory interpretation.
24. Article 2 (4) of *the Constitution* provides that any law, that is inconsistent with *the Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of *the Constitution* is invalid.
25. Article 259 of *the Constitution* provides that *the Constitution* shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law; and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistently with this, when the constitutionality of anything done or said to be done under the authority of *the constitution* is in issue, the court is under a duty to examine it and satisfy itself that it conforms with *the Constitution*.^[11]
26. The purposive approach (sometimes referred to as purposivism,^[12] or purposive construction,^[13] or purposive interpretation,^[14] or the modern principle in construction)^[15] is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (a statute, part of a statute, or a clause of a constitution) within the context of the law's purpose.
27. In *R. v. Big M. Drug Mart Ltd.*,^[16] Justice Dickson, speaking for the majority of the court, wrote, at paragraph 116:-

“[T]he proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts.”(Emphasis added)

28. The leading case in which purposivism was definitively accepted by the House of Lords was *Pepper v Hart*.^[17] The case established the principle that when primary legislation is ambiguous and certain criteria are satisfied, courts may refer to statements made in the House of Commons or the House of Lords in an attempt to interpret the meaning of the legislation. Before the ruling, such an action would have been seen as a breach of parliamentary privilege. The House of Lords held that courts could now take a purposive approach to interpreting legislation when the traditional methods of statutory construction are in doubt or result in an absurdity.



29. To find what Parliament intended, all sources including Hansard may be consulted. Lord Griffiths stated:-

“My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?”

30. Our Constitution requires a purposive approach to constitutional and statutory interpretation. The technique of paying attention to context in statutory construction is now required by *the Constitution*. [18] As pointed out above, *the constitution* introduces a mandatory requirement to construe it and every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.

31. Purposivism focuses on understanding the law in relation to both the people who passed it and the people who must live with it.[19]

32. *The Constitution* is the creation of a sovereign act. It is the result of an extraordinary legislation approved directly by the people acting in their sovereign capacity enabling the government structure to be set up, laying down the methodology and extent of distribution of its powers, the methods and principles of its operation, as well as embracing the spirit of a nation. Ordinary laws address certain contingencies, situations or areas whereas *the Constitution* is rigid and cannot be easily amended. It is framed for the future and is intended to be permanent.[20]

33. Under the textual interpretation, the most important is the language of *the Constitution*. Justice Marshall wrote in *Sturges v. Crowninshield*[21]

“Although the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. ... if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.”

34. Writing on purposive interpretation, Barak Aharon states:-

“My starting point is the purpose of the law. For me, every law has a purpose. These purposes include, among others, the ethical, social, and economic, objectives that law as a social institution must fulfill. If law has a purpose, and if any specific legal norm has its purpose, then interpretation has to be a tool for effectuating the law's purpose. My theory



of interpretation of the legal text recommends the choice within the range of possible literal meanings, of that particular meaning which, more than any other, furthers the purpose of the norm embodied in the text. If one wishes, one can call it "purposive interpretation." Thus, just as the aim of interpreting a will or a contract is to further its purpose, the aim of interpreting a statute or a constitution is to further its purpose. This theory furthers the democratic notions of representative government, separation of powers, and the rule of law. Since it furthers the basic values of the society, it furthers human rights and other values that it is the law's function to fulfill.

Thus, the object of interpretation of a given legal text is to make a choice, within the literal zone, that furthers the purpose of the norm embodied in the text, not the intent of the creator of the text. The purpose of a norm is not a psychological concept. It is a normative concept. It is not something to be "found" or "discovered" in the text. It is a legal concept, an abstraction, a construction, to be created outside the text." [22]

35. A contextual or purposive reading of a constitution must of course remain faithful to the actual wording of the document. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine *the Constitution* or the particular statute and all the facts that gave rise to it.
36. The question then is always to ascertain the purpose of the provision or the intent of the framers. The view is that the context of *the Constitution* has to be read in the social and linguistic context in which it was adopted. For example, under the pre-2010 Constitution, the President had powers to prorogue or dissolve Parliament which was once described as a "secret weapon." Under the 2010 Constitution, the term of Parliament and County Assemblies is constitutionally prescribed.
37. A Constitution unlike other Acts is intended to provide an enduring instrument to serve through a long lapse of ages without frequent revision. It is not only designed to meet the needs of the day when it is enacted but also the needs of the altering conditions of the future. The fields of legislation, the ideals and the rights are expressed in general terms which are compressed sentences if not chapters. It is left to the court to discern the meaning of the chapters and compressed sentences.
38. In the interpretation of constitutional documents words are but a framework of concepts and concepts may change more than words themselves. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth.
39. Constitutional questions must be determined in formidable terms guided by some constitutional principles that transcend the case at hand and which are applicable to all comparable cases. Court decisions cannot be had hoc but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case. [23] A constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.
40. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language.



41. The Supreme Court of Kenya addressed the question of holistic interpretation of *the constitution* as follows:-[24]

“But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.”

42. As the eminent retired Chief Justice of Israel, Aharon Barak has observed, “...one who interprets a single clause of *the constitution* interprets the entire constitution.”[25]

43. In this process of interpretation, the court is more concerned with weighing the competing values of a free society. Framing a Constitution and working it are two different processes. Founders framed it not only for the country as it existed, but for the country's future to guide its people from generation to generation.

44. With all the best intellect, talent and foresight, the framers could not have envisaged all situations and problems that might be faced in future in the working of *the Constitution*. In *Weems v. United States*:-[26]

“Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.”

45. It is equally important that the court should also as far as possible, avoid any decision or interpretation of *the constitution*, which would bring about the result of rendering *the Constitution* unworkable in practice or create a situation that will go against other provisions of *the Constitution* governing the subject in issue. In this case, it is important to bear in mind the goal and objects of the drafters of *the constitution*. What was the mischief the drafters intended cure. For example, one of the goals of the drafters of the 2010 Constitution was to remove the control of the calendar of Parliament from the hands of the executive.[27]

46. There are important principles which apply to the construction of statues such as (a)presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result; (b)the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result



and, lastly,(e)the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise."

47. The court as an independent arbiter of *the Constitution* has fidelity to *the Constitution* and has to be guided by the letter and spirit of *the Constitution*. In interpreting *the constitution*, the court should give life to the intention of the drafters instead of stifling it. The foundation of the courts' power, as explained by the Indian Supreme Court [28]is the theory that *the Constitution* which is the fundamental law of the land, is the 'will' of the 'people' which must prevail.

Determination

48. Mr. Kibe Mungai for the Petitioner in the first Petition invites the court to declare that under Article 99 of *the Constitution*, Members of a County Assembly are not eligible to be nominated by their political parties to contest and be elected as Members of Parliament. He argues that in the event of being elected, this will result in an "unconstitutionality."
49. Prof. Ojienda, for Petitioner in the "second Petition" invites the court to find and hold the opposite. He argued that:- (a) there is a clear misinterpretation of Article 99 (2) (d) of *the Constitution*; (b) Article 177 (4) and 194 (f) clearly provide that the term of a County Assembly expires at the end of term of five years, hence, there is no legal requirement for the petitioner to resign from the post of Speaker if he intends to vie as a Member of Parliament; (c) that a Member of the County Assembly is not barred from being elected as a Member of the National Assembly. Counsel urged the court to adopt an harmonious and holistic interpretation of *the constitution*. [29]
50. Counsel for the I.E.B.C. supported Prof. Ojienda's position. He argued that:- (a) a literal interpretation of Article 99 (2) (d) of *the Constitution* would result in absurdity as a Member of the County Assembly would be barred from being elected as a member of Parliament limiting his political rights; (b) a Member of a County Assembly is eligible for election as a Member of Parliament; (c) Article 99 (2) (d) does not expressly disqualify such a member from being elected as such; (d) Section 43 (6) of the *Elections Act*[30] expressly excludes a Member of a County Assembly.
51. Counsel for fifth Respondent termed the "first Petition" as devoid of merit and based on speculative construction of Article 99 and called for its dismissal. The first interested party's counsel supported the "second Petition."
52. It is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. *The constitution* must be read as an integrated and cohesive whole. [31]It is an elementary rule of constitutional construction that no one provision of *the constitution* is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. [32]
53. Article 99 (2) (d) provides that:- (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; (d) is a member of a county assembly.
54. Article 177(4) of *the Constitution* provides that "A county assembly is elected for a term of five years." Article 102 (1) of *the Constitution* provides that "The term of each House of Parliament expires on the date of the next general election."



55. The above provisions leaves no doubt that the term of the County Assemblies and Parliament expire on the same day, that is, on the date of the "next general elections." The general election for both the County Assemblies and Parliament are held on the same day in Kenya.
56. The "first Petition" states that a sitting member of a County Assembly is not eligible to be "nominated" to vie as a Member of Parliament because such a person is not eligible under Article 99 (2) (d). A reading of Article 99 shows that it deals qualifications and disqualifications for election of Members of Parliament. It does not mention "nominations" or "qualifications for nominations by political parties." Regulation of nomination processes and qualifications for nominations are dealt with by the relevant statutes.
57. Section 22 of the *Elections Act*[33] deals with qualification for nomination of candidates. Sub-section (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.
58. The *Elections Act*[34] is an "An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and County Assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes."
59. The "first Petition" cites Section 43 (5) of the *Elections Act*[35] which reads "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." Sub-section (5A) provides that in the event of by-election, he shall resign within seven days of the declaration of a vacancy.
60. However, Section 43 (6) of the *Elections Act*[36] provides in clear terms that the section does not apply to the President, the Deputy President, a member of Parliament, a County Governor, a Deputy County Governor and a Member of a County Assembly. It is clear that a Member of a County Assembly is exempted from the provisions of Section 43 (5) of the *Elections Act*. [37]
61. Article 260 defines a public offices as follows:-
public officer means—
(a) any State officer; or
(b) any person, other than a State Officer, who holds a public office;
public office means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;
62. Article 260 defines a state office to include (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government.
63. In my view, a purposive and liberal construction of the provisions reveals that the law prohibits a situation whereby a Member of a County Assembly would upon being elected as a Member of Parliament end up holding the two offices concurrently.
64. I must, for the sake of clarity and good jurisprudence make it clear that the above construction cannot apply in the event of a by-election for a Member of Parliament in the event a Member of County Assembly desires to contest. This is because the term of the County Assembly will still be running. In the event of a by-election, to be eligible, a Member of a County Assembly will be required to resign as the law demands.



65. It is my view that the law only prohibits a person occupying the office of a Member of Parliament concurrently with the office of a Member of the County Assembly. As stated earlier, the law is clear on when the term of County Assemblies ends. Thus, at the time the person is elected at the general election, he cannot be said to be occupying two offices concurrently.
66. The law does not prohibit a Member of County Assembly from being nominated to vie for a Parliamentary seat by a political party. Nomination to contest as a Member of Parliament is not an election within the meaning of Article 99.
67. A purposive reading of Article 92 demonstrates that it is aimed at promoting the legitimate state interest of ensuring a Member of a County Assembly does not hold a Parliamentary office concurrently. The spirit, purpose, architecture and scheme of *the Constitution* aims at ensuring accountability and transparency in public affairs and good governance.
68. Effective government requires that those responsible for policy-making, implementation and public expenditure are held to account for their actions and performance, and parliamentary scrutiny is a central mechanism for ensuring that this occurs. Parliament exercises an oversight role over County Assemblies, hence the reason why it would not be tenable for a Member of the County Assembly or a state officer to be elected in both offices concurrently. This is the mischief which the law prohibits, a Member of a County Assembly sitting concurrently as a Member of Parliament.
69. A contextual interpretation will also require an examination of the history of this Country and appreciate the mischief the 2010 Constitution addressed in these provisions. Under the pre-2010 constitution the President had powers to dissolve Parliament. Hence, to pave way for the general elections Parliament had to be dissolved. Similarly, the Minister responsible for Local Government had powers to dissolve the local authorities, and they would be dissolved to pave way for general elections. Such dissolution meant there would be a vacuum and any business however urgent had to await the convening of the next Parliament or local authority.
70. The drafters of the 2010 constitution entrenched the term of Parliament and local authorities in *the Constitution* to eliminate a vacuum and to ensure that the peoples sovereignty and will is exercised should the need arise prior to the general elections. A reading of Article 194 on vacation of office of a Member of County Assembly shows that among the grounds listed, nomination to contest a Parliamentary seat is not included. Equally, Members of Parliament, Governors or even the President and Deputy offering themselves for re-election are not required to resign in order to be eligible to contest.
71. The law also protects the term of Parliament and the County Assemblies to ensure that there is no vacuum. The above provisions should be construed with this as one of the intentions of *the Constitution*.
72. In my view, an argument that a Member of a County Assembly is required to vacate office on any other ground other than those stipulated in Article 194 would in my view raise constitutional questions on the people's right to representation.
73. It is also clear that the law does not prohibit a Member of a County Assembly from being nominated to contest for a Parliamentary seat in a general election. It is also clear that the term of office ends on the date of the general election. However, if the election in question is a by-election which would ordinarily take place before the term of the County assembly expires, then, such a Member would obviously be required to resign.



74. The term of County Assemblies terminates on the date of the elections or in the case of the Speaker who is the secretary of the County Service Board, upon losing his seat or upon a new person being elected to the office of the Speaker. The law as it stands today, does not contemplate or even permit a person occupying the office of a Member of County Assembly concurrently with the office of Member of the National Assembly.
75. Article 177 (1) (d) of *the Constitution* on the composition of a County Assembly provides that it comprises of among others the Speaker who is its ex-official member who also serves as the chairperson of the County Assembly Service Board established under Section 12 of the County Government Act. [38] His term comes to an end upon vacating the office of the Speaker or a new member is appointed in the next assembly.
76. I find that the provisions of the *Elections Act*[39] which give effect to Article 99 of *the Constitution* do not limit the Rights under Article 38, and if they do, then the limitation is reasonably justifiable in a modern democratic society in that the provision aims at achieving a legitimate aim of avoiding a Member of a County Assembly sitting as Member of Parliament at the same time which would compromise the oversight role of Parliament.
77. Further, I find nothing unconstitutional in the Jubilee Party Nomination Rules and find that the challenged nomination is within the dictates of the law. Nomination by a political party to contest as a Member of Parliament is not an election for the purposes of Article 99 (2), but only one of the qualifications for election as a Member of Parliament under article 99 (1) (c).
78. In view of my conclusions hereinabove, I find that the "first Petition" lacks merit and the prayers sought are not warranted. Further, I find and hold that the "second Petition" succeeds. Consequently, I order as follows:-
- a) That Petition number 321 of 2017 be and is hereby dismissed.
 - b) That a declaration be and is hereby issued that the term of Members of the County Assembly including County assembly speakers expires on the date of the date of the next general election.
 - c) That a declaration be and is hereby issued that a Member of a County Assembly is not disqualified from being nominated to contest in a general election as a Member of the Parliament by virtue of Article 99 (2) (d) of *the Constitution*.
 - d) That a declaration be and is hereby issued that the law only prohibits the election of a Member of Parliament if such election would result in such a person holding the office of County Assembly and Member of Parliament Concurrently.
 - e) No orders as to costs.
- Orders accordingly

Signed, Dated at Nairobi this 15th day of November, 2017

JOHN M. MATIVO

JUDGE

[1] Act No. 4 of 2011

[2] Petition No. 39 of 20117

[3] Act No. 24 of 2011

[4] Ibid



- [5] Act No. 17 OF 2012
- [6] Supra
- [7] Supra
- [8] Supra
- [9] Supra
- [10] See *The Institute of Social Accountability & others v The National Assembly & Others*, Pet No. 497 of 2014
- [11] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.
- [12] Posner, Richard. *Pragmatism versus Purposivism in First Amendment Analysis*. Stanford Law Review Vol. 54, No. 4, Apr., 2002, p. 737-7520
- [13] Bourchard, Ron A. *Living Separate and Apart is Never Easy: Inventive Capacity of the PHOSITA as the Tie that Binds Obviousness and Inventiveness in Pharmaceutical Litigation*. *University of Ottawa Law & Technology Journal*, January 2007 (Canada)
- [14] Barak, Aharon. *Purposive Interpretation In Law*. Princeton University Press. (Princeton, New Jersey), 2005
- [15] Driedger, E.A. *Construction of Statutes*. Butterworth & Co. (Canada) 2d ed., 1983, p. 83
- [16] 1985
- [17] {1993} AC 593
- [18] Ngcobo J while interpreting a similar provision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).
- [19] Jennifer M. Bandy, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 *Duke Law Journal* 651-691 (2011). <http://scholarship.law.duke.edu/dlj/vol61/iss3/3> (Accessed on 13 November 2017)
- [20] *History of Constitution Making in Kenya* © Media Development Association & Konrad Adenauer Foundation,
- [21] (L Ed p.A 550)
- [22] Barak, Aharon, "Hermeneutics and Constitutional Interpretation" (1993). *Faculty Scholarship Series*. Paper 3701. http://digitalcommons.law.yale.edu/fss_papers/3701, Accessed on 13 November 2017
- [23] See Wechsler, {1959}. *Towards Neutral Principles of Constitutional Law*, Vol 73, *Havard Law Review* P. 1.
- [24] *In the Matter of the Kenya National Commission on Human Rights, Advisory Opinion Reference No. 1 of 2012*; [2014] eKLR (at paragraph 26):
- [25] Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) 308.
- [26] 217 U.S. 349 (1910)
- [27] Article 102 (1)
- [28] *Advocates on Record Association & Others v Union of India* {1993} 3SCC 441
- [29] Counsel cited *Andrew Kiplimo Sang Muge & 2 others v IEBC & Another* {2017}eKLR, *SDV Transami Kenya Ltd & 19 Others v A.G & 2 Others* {2016}eKLR, *Association of Retirement Benefits Schemes v A.G*



& 3 Others {2017}eKLR and Centre for Rights Education and Awareness (CREAW) & 7 oTHERS v a.g {211}eKLR

[30] Supra

[31] Paul Ssemogerere and Others v. The Attorney General, Constitutional Appeal no. 1 of 2002) [2004] UGSC10)

[32] Smith Dakota v. North Carolina, 192 US 268(1940)

[33] Act No. 24 of 2011

[34] Ibid

[35] Ibid

[36] Supra

[37] Ibid

[38] Act No. 17 of 2012

[39] Ibid

