



**Aluochier v Senate & 2 others (Constitutional Petition E489 of 2022)
[2023] KEHC 1045 (KLR) (Constitutional and Human Rights) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 1045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E489 OF 2022**

M THANDE, J

JANUARY 30, 2023

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER PETITIONER

AND

SENATE 1ST RESPONDENT

JEREMIAH M. NYENGENYE, CLERK OF THE SENATE 2ND RESPONDENT

AMASON JEFFAH KINGI 3RD RESPONDENT

Court declines to invalidate the election for the position of speaker of the Senate

The petitioner was a shortlisted candidate for the position of speaker of the Senate who was aggrieved by the results of the final election. He alleged that out of the 7 candidates he was the only one who had met the eligibility requirements set out in article 99(1) as read together with article 85 and, sections 13(1) and 22(1)(a) and 24(1) of the Elections Act. In the petition, the petitioner claimed violation of his constitutional rights under articles 38(3) and 47 and sought orders to quash the nomination of the other candidates and the subsequent election of the 3rd respondent as speaker of the senate, among others. However, the petitioner failed to provide evidence to demonstrate how the 2nd respondent had infringed his constitutional rights and the other allegations made. Subsequently, other claims on the petitioner being the candidate who ought to have been declared speaker of Senate could not hold, thus the petition was dismissed.

Reported by Caroline Kennedy and John Ribia

Constitutional Law – fundamental rights and freedoms – political rights – right to be a candidate for public office – whether the 2nd respondent violated the petitioner’s rights under article 38(3)(c) of the Constitution by the declaring the 3rd respondent as the duly elected speaker of the Senate – where the petitioner had not won the disputed election – Constitution of Kenya, article 38(3).

Constitutional Law – fundamental rights and freedoms – right to fair administrative action – decision to deny a Senator candidature to vie for position of Senate Speaker - whether the 2nd respondent violated the petitioner’s



rights under article 47(2) of the Constitution by failing to give the petitioner a written reason as to why he was denied his political right under article 38(3)(c) – Fair Administrative Action Act (Cap 7L) section 4 – Constitution of Kenya, article 47.

Civil Practice and Procedure – preliminary objections – nature of preliminary objections – preliminary objection must raise pure points of law – where the preliminary objection was on the jurisdiction of the court – whether the preliminary objection on jurisdiction was merited.

Electoral Law – in house parliamentary elections – elections for speaker of the Senate – procedure for election of speaker for senate – whether the election of the Speaker of the Senate was based on the concept of universal suffrage – whether article 99(1)(c) of the Constitution applied to the position of speaker of the Senate – Constitution of Kenya, articles 99 and 106.

Jurisdiction – jurisdiction of the High Court – jurisdiction to determine dispute over the legality or constitutionality of the election of the Speaker of the Senate – where the matter was governed by internal procedures of a legislative arm of government – where the petitioner approached the High Court without first filing a petition before the National Assembly – whether the High Court had jurisdiction to determine a dispute on the legality/constitutionality of the election of a Speaker of the Senate – whether the right to petition Parliament to consider any matter within its authority ousted the constitutional authority of the High Court to determine the constitutionality of any act done by the Senate – Constitution of Kenya, articles 22, 23, 119 and 165.

Law of Evidence – burden of proof – burden of proof in constitutional petitions – proof of alleged infringement to constitutional rights – whether the petitioner had sufficiently demonstrated the manner in which his rights had been violated or infringed by the 2nd respondent – Evidence Act (Cap 80) section 107.

Brief facts

The petitioner was a shortlisted candidate for the position of speaker of the Senate and was aggrieved by the results of the final election. He alleged that out of the 7 candidates he was the only one who had met the eligibility requirements set out in article 99(1) as read together with article 85 and, sections 13(1) and 22(1)(a) and 24(1) of the Elections Act. The petitioner further alleged that because the nomination results were released at 6pm, he did not have sufficient time to lodge a dispute with IEBC and have the same determined on the same day. As required by Senate Standing Order No. 11, the petitioner, being the only candidate duly nominated at the expiry of the nomination period, ought to have been declared as the duly elected speaker of the Senate. Thus, declaration of the 3rd respondent and not the petitioner as duly elected speaker, the 2nd respondent who had conduct of the elections, contravened the Constitution and the law.

The petitioner further contended that the unlawful action of the 2nd respondent could only be remedied by the court invalidating the nomination and election of the 3rd respondent and, replacing him with the petitioner. Further that under article 226(5) of the Constitution, the 2nd respondent was liable for the loss of all the public funds being the remuneration paid to the 3rd respondent who was illegally occupying the office of Speaker of the Senate.

Issues

- i. What principles were applicable in the operation of preliminary objections?
- ii. Whether the High Court had jurisdiction to determine a dispute on the constitutionality of the election of a Speaker of the Senate.
- iii. Whether the right to petition Parliament to consider any matter within its authority ousted the constitutional authority of the High Court to determine the constitutionality of any act done by the Senate.
- iv. Whether the election of the Speaker of the Senate was based on the concept of universal suffrage.
- v. Whether article 99(1)(c) of the Constitution applied to the position of speaker of the Senate.
- vi. Whether the 2nd respondent violated the petitioner's rights under article 38(3)(c) of the Constitution by the declaring the 3rd respondent as the duly elected speaker of the Senate.



- vii. Whether the 2nd respondent violated the petitioner's rights under article 47(2) of the Constitution by failing to give the petitioner a written reason as to why he was denied his political right under article 38(3)(c).
- viii. Whether the petitioner had sufficiently demonstrated the manner in which his rights had been violated or infringed by the 2nd respondent.
- ix. Whether the orders sought by the petitioner could be granted.

Held

1. A preliminary objection must be on a point of law. A preliminary objection consisted of a point of law which had been pleaded, or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was usually on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion.
2. An election of the speaker of the Senate was an election *sui generis* (of its own kind). Article 106 of the Constitution provided that the speaker shall be elected by the Senate in accordance with the Standing Orders. Article 124 empowered the Senate to make Standing Orders for the orderly conduct of its proceedings. The procedure for the election was set out in Standing Orders 4 to 12 of the Senate Standing Orders. Standing Order 5 made elaborate provisions regarding nomination of candidates from collection and return of the nomination papers, close of nominations, availing to the Senators of the names of duly nominated candidates, to preparation of the ballot papers.
3. The Constitution and Standing Orders did not envisage an election based on universal suffrage. It was an election where the electoral college comprised county representatives who exercised their will, to choose their speaker. The election of speaker was an example of the proceedings of the Senate that were governed by the Standing Orders made under article 124. The election of the Speaker was thus a function of the Senate and an internal affair of the Senate.
4. The rights had to be adjudicated in the context of the doctrine of separation of powers and, the constitutional and legislative provisions that govern the organisation of the county assembly. A plain reading of article 38 as read with articles 178 and 196, the County Government Act, the Elections Act, 2011 and the Standing Orders did not envisage the election of the speaker as one based on universal suffrage. It was an internal election governed by special rules contained in the First Schedule to the Elections Act, 2011 and the Standing Orders which were all underpinned by statutory and constitutional provisions. The County Assembly, as a legislative assembly, was entitled to regulate its own proceedings including the election of the speaker.
5. Under article 165(3) of the Constitution, the High Court had jurisdiction to hear and determine the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution. The election of speaker of the Senate was governed by the Standing Orders of the Senate and was done under the authority of the Constitution. By dint of article 165(3) therefore, the High Court had the requisite jurisdiction to entertain the petition which had raised the question as to whether the disputed election was done in contravention of the Constitution.
6. Article 119 of the Constitution granted every person the right to petition parliament to consider a matter. The remedy available under article 119 to a right to petition parliament to consider any matter within its authority did not oust the constitutional authority of the court to determine the constitutionality of any act done by the Senate. The petitioner had exercised the right to opt for the avenue he deemed to offer the most efficacious remedy. The authority of parliament included the enactment, amendment and repeal of legislation. That was one avenue for rectifying unconstitutional legislation that could have genuinely slipped through the keen eyes of parliamentarians. The remedy did not, however, oust the constitutional authority of the High Court under article 165 of the



- Constitution to determine the constitutionality of any enactment by the legislature and to hear any question regarding the interpretation of the Constitution. The assertion by the 1st and 2nd respondents that the petitioner ought to have first petitioned the Senate before going to the High Court was without merit.
7. The interpretation of the Constitution called for a delicate balance in the respective mandates of the different arms of government. All organs of State were all subject to the Constitution. The High Court had the power to strike out a law or legislation passed by parliament which was in conflict with the Constitution. The same applied to any privileges, immunity or powers claimed by parliament which were in conflict with the Constitution. Nothing was immune from the court's scrutiny, if in conflict with the Constitution.
 8. No arm of Government was above the law. Being a constitutional democracy, the Constitution was the guiding light for the operations of all State organs. The court's mandate, where it applied, was for the purpose of averting any real danger of constitutional violation. Any unconstitutional exercise by the Senate of its mandate, could not be shielded from judicial scrutiny on account of the doctrine of separation of powers.
 9. Jurisdiction was everything. Without it a court had no power to make one more step. Where a court had no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court's jurisdiction flowed from either the or legislation or, both. A court could not arrogate itself jurisdiction exceeding that which was conferred upon it by law.
 10. Jurisdiction gave the court the power, authority and legitimacy to entertain a matter before it. By dint of articles 23 and 165 of the Constitution, the petition fell squarely within the jurisdiction of the High Court thus, the preliminary objection failed.
 11. Article 106(1)(a) of the Constitution provided that there shall be a speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who were qualified to be elected as members of parliament but were not such members. Article 99 stipulated the qualifications and disqualifications for election as member of Parliament.
 12. A plain reading of article 106 showed that the speaker shall be elected by the Senate in accordance with the Standing Orders. The persons who shall be elected speaker must be qualified to be elected as a Member of Parliament but must not be a current Member of Parliament. The qualifications of a member of parliament were set out in article 99(1). The eligibility requirements for election as a member of the Senate were that a candidate must be a registered voter. Such candidate must also comply with any constitutional and statutory requirements relating to education, morals and ethics. Such candidate must also be nominated by a political party. In the case of an independent candidate, such candidate must be supported by a minimum of 2000 registered voters in the county.
 13. There was nothing in the cited provisions to show that a distinction had been made in the qualifications of elected members of the Senate and an ex-officio member of the Senate. All were members of the Senate and all must comply with article 99(1)(c) of the Constitution. Article 106 was unequivocal that the speaker was to be elected from among persons who were qualified to be elected as members of parliament but were not such members. Had there been an intention to make a distinction, then article 106 would have done so.
 14. Standing Order 5(3) of the Senate Standing Orders left no doubt in the mind that article 99(1)(c) was applicable in the election of speaker of the Senate. It provided that the nomination papers of a candidate shall be accompanied by the names and signatures of two senators-elect who support the candidate and a declaration by them that the candidate was qualified to be elected as a Member of Parliament under article 99 of the Constitution and was willing to serve as speaker of the Senate. Thus, article 99(1)(c) of the Constitution was applicable to the election of speaker of the Senate.
 15. Article 47 of the Constitution provided for fair administrative action. In compliance with article 47(3) Parliament enacted the Fair Administrative Action Act (FAAA), to give effect to the rights stipulated in



- article 47(1). Section 4 of the Act reiterated the provisions in article 47. The right to fair administrative action could not be opposed. The right encompassed action that was expeditious, efficient, lawful, reasonable and procedurally fair. Where a person's right or fundamental freedom had been, or was likely to be adversely affected by administrative action, such person must be given reason in writing, for such action. That requirement ensured that administrative bodies discharged their mandate within constitutional and statutory limits. The actions of such bodies must conform to statutory provisions and must pass Constitutional muster.
16. Article 47(1) of the Constitution marked an important and transformative development of administrative justice. It not only laid a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenched the right to fair administrative action in the Bill of Rights. The right to fair administrative action reflected some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies were then subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.
 17. Article 47(1) of the Constitution was in mandatory terms that every person had a right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Sub article 2 made it even more forceful that if a right or fundamental freedom of a person had been or was likely to be adversely affected by administrative action, the person had the right to be given written reasons for that action.
 18. Article 38(3) of the Constitution provided that every adult citizen had the right, without unreasonable restrictions:
 1. to be registered as a voter;
 2. to vote by secret ballot in any election or referendum; and
 3. to be a candidate for public office, or office within a political party of which the citizen was a member and, if elected, to hold office.
 19. The petitioner exercised his right under article 38(3)(c) of the Constitution, to participate in the election of speaker of the Senate. To be declared winner and holding that office was predicated upon winning the election. By fact, he did not win the election. Accordingly, the petitioner could not say that any right to hold the office that he aspired to, had accrued or that the same having accrued, had been adversely affected. Thus, his right to hold office was not adversely affected and the provisions of article 47(1) and (2) were inapplicable in the circumstance.
 20. There was no evidence to support the petitioner's claim that he was the only candidate qualified to be duly nominated for the election. As per section 107 of the Evidence Act, he who alleged must prove. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person was bound to prove the existence of any fact it was said that the burden of proof lies on that person.
 21. It was not enough for the petitioner to argue that by submitting that article 99(1)(c) was inapplicable to the position of speaker, the respondents implicitly admitted that the 2nd respondent did not ascertain the eligibility of the candidates for the election. The petitioner was required to place cogent proof before the court to support his allegations. He was also required to support, with evidence, his claim that only he met the qualifications for election to the office of speaker of the Senate.
 22. A party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought was available. Hence the legal *dictum* that he who alleges must prove. The petitioner had not demonstrated that his right under article 38 and 47 of the Constitution had been violated.



23. The orders sought by the petitioner would only be available in circumstances where he had proved his case. The position was that the petitioner had failed to establish his claim. It followed therefore that the orders sought could not be granted.

Petition dismissed with costs.

Citations

Cases

Kenya

1. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR); [2015] eKLR - (Followed)
2. *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* Petition 404 of 2017 - (Followed)
3. *Kenya National Commission on Human Rights v Attorney General & another* Petition 132 of 2013; [2015] eKLR - (Followed)
4. *Macharia & another v Kenya commercial Bank Limited & 2 Others* Application 2 of 2011; [2012] eKLR; [2012] 3KLR 199 - (Followed)
5. *Makola, Frank Mulisa v Felix G. Mbiuki, Transition Authority, County Assembly Speaker B.N. Mungata, County Governor Dr. Alfred Mutua & Machakos County Assembly* Election Petition 5 of 2013; [2013] KEHC 967 (KLR) - (Followed)
6. *Mate, Justus Kariuki & Jim G Kauma v Martin Nyaga Wambora & County Assembly of Embu* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Followed)
7. *Ngoge v Kaparo & 4 Others* Misc Civ Appli 22 of 2004(OS) 22 of 2004; [2007] KEHC 202 (KLR); [2007] 2 KLR - (Followed)
8. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 - (Followed)
9. *Pharmaceutical Society of Kenya & another v Attorney General & 3 others* Petition 85 of 2018; [2021] KEHC 85 (KLR) - (Followed)
10. *Wakhu, Stephen Wasike & Another v Security Express Limited* Civil Suit 292 of 2002; [2006] KEHC 1320 (KLR) - (Followed)

Regional Court

Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 - (Followed)

Statutes

Kenya

1. Access to Information Act (cap 7M) section 6 - (Interpreted)
2. Constitution of Kenya articles 1(1); 1(3); 22; 23(1); 27; 31; 38; 38(3)(c); 47(1); 47(2); 85; 99(1); 99(2); 106(1); 165(3); 165(3)(a); 165(3)(d); 119; 124; 178; 196; 226(5) - (Interpreted)
3. County Governments Act (cap 265) In general - (Cited)
4. Elections Act (cap 7) sections 13(1); 22(1)(a); 24(1); Schedule I - (Interpreted)
5. Evidence Act (cap 80) section 107 - (Interpreted)
6. Fair Administrative Action Act (cap 7L) sections 4(1); 4(2); 4(3); 4(4); 6(1); 6(3)- (Interpreted)
7. Parliamentary Powers and Privileges Act (cap 6) section 12(3)- (Interpreted)

Advocates

None mentioned

JUDGMENT

1. In his Petition dated 30.10.22, the petitioner seeks orders that:



1. The decision of the 2nd respondent, on behalf of the 1st respondent, communicated on the Parliament of Kenya Facebook page on September 7, 2022 that the following seven persons were duly nominated as candidates for the contest of Speaker of the Senate, be quashed, with the said candidates being:
 1. Aluochier Isaac Alouch Polo,
 2. Musyoka Stephen Kalonzo,
 3. George Bush,
 4. Kingi Amason Jeffah,
 5. Kinyua Beatrice Kathomi,
 6. Karuri Frederick Muchiri, and
 7. Kuria George Njoroge.
 2. The only duly nominated candidate for the election of Speaker of the Senate, being the only one fully compliant with all legal requirements for election to the said office, was the petitioner-Isaac Alouch Polo Aluochier.
 3. Pursuant to Senate Standing Order 11, the petitioner, Isaac Alouch Polo Aluochier being the only duly nominated person, was the Speaker-elect upon expiry of the nomination period at 2.30pm on September 7, 2022.
 4. The purported election of the 3rd respondent, Amason Jeffah Kingi, is hereby quashed, as he was not lawfully nominated as a candidate for the election of Speaker of the Senate.
 5. The petitioner, Isaac Alouch Polo Aluochier, be sworn in as soon as practically possible as the Speaker of the Senate, being the Speaker-elect following the expiry of the nominations at 2.30pm on September 7, 2022.
 6. Monetary compensation be paid to the petitioner, equivalent to the remuneration he would have earned in office as Speaker of the Senate, commencing the first sitting of the Senate on September 8, 2022, payable by or on behalf of the 1st respondent.
 7. The 2nd respondent to repay the public all public funds losses on account of the unlawful installation into office of the 3rd respondent as Speaker of the Senate, including but not limited to any remuneration paid to the 3rd respondent.
 8. Costs be paid to the petitioner, as against the 1st and 2nd respondents.
 9. Or such other order(s) as this honourable court shall deem just.
2. The petitioner averred that following the general elections of 9.8.22 Kenya Gazette Notice No. 10528 from the President of Kenya was published, notifying that the first sitting of the Senate was to be on 8.9.22 at 9.00 am. In Gazette Notice No. 10531, the 2nd respondent notifying that the election of the Speaker would take place on that day. He invited interested parties to collect nomination papers from his office, which were to be returned duly completed, by 2.30 pm on 7.9.22. The petitioner being interested in the position took the forms and returned them duly completed within the time specified. On 7.9.22, the 2nd respondent announced on the Parliament of Kenya's Facebook page that 7 candidates had been duly nominated for the said election. Among the 7 were the The petitioner and



- the 3rd respondent. On 8.9.22, the 3rd respondent won the vote and declared elected as Speaker of the Senate. He was sworn in thereafter.
3. The petitioner goes on to state that on 28.9.22, he wrote to the 2nd respondent seeking information on the nomination process with a view moving to court for the purpose of upholding his political rights. 30 days after, no response had been received as required under section 6(3) of the *Fair Administrative Action Act* (FAAA). As such the petitioner contends that articles 38(3)(c), 47(1) and (2) and 106(1) have been violated. Further that section 4(1), (2), (3) and (4), 6(1) and (3) of the *FAAA* have also been violated.
 4. It is the petitioner's case that out of the 7 candidates, only he was in law, duly nominated as a candidate for the office of Speaker of the Senate. The other candidates did not fulfil the eligibility requirements set out in article 99(1) as read together with article 85 and sections 13(1) and 22(1)(a) and 24(1) of the *Elections Act*. The petitioner further contends that because the nomination results were released at 6pm on 7.9.22, he did not have sufficient time to lodge a dispute with the IEBC and have the same determined on the same day. As required by Senate Standing Order No. 11, the petitioner, being the only candidate duly nominated at the expiry of the nomination period, ought to have been declared as the duly elected Speaker of the Senate. As such, by declaring the 3rd respondent and not the petitioner as duly elected, the 2nd respondent who had conducted the elections, contravened the Constitution and the law.
 5. The petitioner further contends that the unlawful action of the 2nd respondent has resulted in a tragedy which can only be remedied by the court invalidating the nomination and election of the 3rd respondent and replacing him with the Petitioner. Further that under article 226(5), the 2nd respondent is liable for the loss of all the public funds being the remuneration paid to the 3rd respondent who is illegally occupying the office of Speaker of the Senate.
 6. The Petition is opposed by the 1st and 2nd respondents vide a preliminary objection (PO) dated 23.11.22. The objections are that the Court lacks jurisdiction to determine the Petition which is an electoral dispute challenging the election of Speaker of Senate; that questioning the proceedings of the Senate in respect of the elections of the Speaker, the petition undermines and contravenes the doctrine of separation of powers; that the court lacks jurisdiction as the petitioner has not first petitioned the Senate under article 119 before filing the present Petition.
 7. The 1st and 2nd respondents further opposed the Petition vide a replying affidavit sworn on even date by the 2nd respondent. It was averred that the election of the Speaker was conducted in strict conformity to the *Constitution*, Standing Orders and relevant laws. The 2nd respondent stated that through Gazette Notice No. 10531 of 5.9.22 and pursuant to Standing Order 5, he invited nominations for the election of Speaker of the Senate. 41 persons collected nomination papers. He then verified all nomination papers returned and confirmed that out of the 13 candidates who returned the nomination papers, 7 candidates had met the eligibility requirements stipulated in article 106 and Standing Order 5(3). During the election, the 3rd respondent got 46 votes while all other candidates got no votes. Having obtained the 2/3 threshold, the 2nd respondent declared the 3rd respondent as the duly elected Speaker, pursuant to Standing Order 7. The 2nd respondent further deposed that having garnered 0 votes, the petitioner cannot accuse the 2nd respondent of violating his rights under article 38. The petitioner participated in the ballot and should therefore accept the will of the members of the Senate who exercised their rights.
 8. The 2nd respondent further deposed that the claim by the Petitioner that the other candidates other than himself did not meet the eligibility requirements is mere allegations without proof; that the



Petition is in fact an electoral dispute that has been cunningly crafted to appear that there has been a violation of the petitioner's rights and fundamental freedoms; that the doctrine of separation of powers demands that courts do not interfere with the internal arrangements of Parliament; that the actions of the 2nd respondent as the returning officer for the election of Speaker fall under the immunity under section 12(3) of the Parliamentary Powers & Privileges Act; that he responded to the petitioner's letter dated 28.9.22 requesting for information regarding the election of Speaker; that vide a letter date 3.10.22, he furnished the petitioner with the information required, except copies of nomination papers, and explained to him that this would violate article 31 of the Constitution and section 6 of the Access to Information Act (AIA); that this court cannot review an administrative action or decision unless internal mechanisms and all available remedies have been exhausted; that the petitioner ought to have lodged his complaint with the Commission on Administrative Justice before coming to court. The Respondents urged that the Petition be dismissed as it does not disclose any reasonable cause of action or violation of the petitioner's fundamental rights and freedoms.

9. The 3rd respondent opposed the Petition vide his replying affidavit sworn on 23.11.22. He reiterated the averments of the 2nd respondent which I need not repeat. He further deposed that the petitioner being aggrieved by the outcome of the election of Speaker ought to have in the first instance petitioned the Senate before coming to Court. The 3rd respondent averred that contrary to the petitioner's allegation, he met the eligibility threshold for election as Speaker, as stipulated in article 106 of the Constitution and Standing Order 5; that he submitted a duly completed nomination paper accompanied by the names and signatures of 2 senators-elect; he submitted an affidavit indicating that he is a registered voter in Magarini Constituency, he satisfied the educational, moral and ethical requirements and is not disqualified from being elected as a Member of Parliament under article 99(2); that the election of Speaker is governed by an internal process in Parliament provided for under the Standing Orders; that the Petition should be dismissed with costs as the Petitioner has not provided any evidence to support his allegations regarding the eligibility of other candidates.
10. I have given due consideration to the submissions filed by the parties. This issues that fall for determination are:
 1. Whether the preliminary objection is merited.
 2. Whether article 99(1)(c) of the Constitution applies to the position of Speaker of the Senate.
 3. Whether the 2nd respondent violated the petitioner's rights.
 4. Whether the orders sought should be granted.

Whether the preliminary objection is merited

11. The respondents have challenged the jurisdiction of this court to entertain the Petition on 3 grounds. First, that the Petition is an electoral dispute disguised as a constitutional petition. Second, that the Petition undermines the doctrine of separation of powers as regards the internal proceedings regulated by the Standing Orders of the Senate. Third, that the petitioner has not exercised his right under article 119 of the Constitution before coming to this court.
12. The petitioner counters this by stating that his contention herein is violation of his right under article 38(3)(c) to without unreasonable restrictions, be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office, and his right under article 47(1) to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and his right under article 47(2) to be given written reasons for any administrative action that has been



or is likely to affect his right or fundamental freedom. This is a factual matter that does not meet the threshold of a preliminary objection.

13. It is a well settled principle of law that a preliminary objection must be on a point of law. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Court of Appeal addressed its mind to what constitutes a preliminary objection. At page 700 paragraphs D-F Law JA as he then was had this to say:

A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

14. The question whether the election of the Speaker should be challenged before this court or an election Court is a point of law. What this court must establish is whether the challenge to the election in question is an election petition and whether this Court has the requisite jurisdiction to entertain the Petition herein.
15. The election of the Speaker of the Senate is an election *sui generis*. Article 106 of the [Constitution](#) provides that the Speaker shall be elected by the Senate in accordance with the Standing Orders article 124 empowers the Senate to make Standing Orders for the orderly conduct of its proceedings. The procedure for the election is set out in Standing Orders 4-12 of the Senate Standing Orders . Of relevance to the proceedings herein is Standing Order 5 which makes elaborate provisions regarding nomination of candidates from collection and return of the nomination papers, close of nominations, availing to the Senators of the names of duly nominated candidates, to preparation of the ballot papers. The Constitution and Standing Orders do not envisage an election based on universal suffrage. It is an election where the electoral college comprises county representatives who exercise their will, to choose their Speaker. The election of Speaker is an example of the proceedings of the Senate that are governed by the Standing Orders made under article 124. The election of the Speaker is thus a function of the Senate and an internal affair of the Senate.
16. In this regard, I associate with the sentiments of Majanja, J who in the case of [Frank Mulisa Makola v Felix G. Mbiuki & 4 others](#) [2013] eKLR, considered a similar matter and stated:

The petitioner's rights under article 38 must be adjudicated in the context of the doctrine of separation of powers and the constitutional and legislative provisions that govern the organisation of the county assembly which I have set out above. In this respect I agree with Mr Kilukumi that the election of a Speaker is an election *sui generis*. A plain reading of article 38 as read with articles 178 and 196, the [County Government Act](#), the [Elections Act, 2011](#) and the Standing Orders do not envisage the election of the Speaker as one based on universal suffrage; it is an internal election for Speaker governed by special rules contained in the First Schedule to the [Elections Act, 2011](#) and the Standing Orders which are all underpinned by



statutory and constitutional provisions I have cited. The County Assembly, as a legislative assembly, is entitled to regulate its own proceedings including the election of the Speaker.

17. This Court, under article 165(3) of the Constitution, has the jurisdiction to hear and determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution. The election of Speaker of the Senate is governed by the Standing Orders of the Senate and is done under the authority of the Constitution. By dint of article 165(3) therefore, this court has the requisite jurisdiction to entertain this Petition which has raised the question as to whether the said election was done in contravention of the Constitution.
18. The second objection is that the petitioner has not exercised his right under article 119 of the Constitution, grants to every person the right to petition parliament to consider a matter as follows:
 - (1) 1) Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.
 - (2) Parliament shall make provision for the procedure for the exercise of this right.
19. The remedy available under article 119 does not oust the constitutional authority of the court to determine the constitutionality of any act done by the Senate. The Petitioner has indeed exercised the right to opt for the avenue he deemed to offer the most efficacious remedy.
20. In the case of Pharmaceutical Society of Kenya & another v Attorney General & 3 others (Petition 85 of 2018) [2021] KEHC 85 (KLR) (Constitutional and Human Rights) (22 September 2021) (Judgment), Korir, J. (as he then was) considered the jurisdiction of this court in light of article 119 and stated:

I am guided accordingly and I find myself entirely in agreement with the cited authorities. The Constitution provides several avenues to the people of Kenya of finding solutions to the day to day governance issues. Article 119 mandates every person to petition Parliament to consider any matter within its authority. The authority of Parliament includes the enactment, amendment and repeal of legislation. That is one avenue for rectifying unconstitutional legislations that may have genuinely slipped through the keen eyes of parliamentarians. This remedy does not, however, oust the constitutional authority of this Court to determine the constitutionality of any enactment by the legislature.

21. Similarly, in the case of Kenya National Commission on Human Rights v Attorney General & another [2015] eKLR, Lenaola, J (as he then was) stated:

The law above is clear and requires no more than a literal interpretation. While the Petitioner had the right to petition Parliament, I do not know if Parliament has made provisions on how the Petitioner can exercise that right.

In any event, the right to petition Parliament itself does not in my view oust the power of this Court under article 165(3)(d) to hear any question regarding the interpretation of the Constitution. The Court must therefore interrogate any impugned legislation and decide whether or not it is inconsistent with or in contravention of the Constitution. I have done so in this Petition.

22. Flowing from the foregoing, it is quite evident that the assertion by the 1st and 2nd respondents that the petitioner ought to have first petitioned the Senate before coming to this court is without merit.



23. I now turn to the objection on ground that the Petition violates the doctrine of separation of powers. Article 1(1) of the *Constitution* vests all sovereign power upon the people of Kenya and provides that the same shall be exercised only in accordance with this Constitution. Under article 1(3), that sovereign power, is delegated to the 3 arms of government namely, the Legislature, the Executive and the Judiciary. The *Constitution* has further made clear provisions of separation of powers between these co-equal arms of government, ensuring that each carries out those functions assigned to it and that none encroaches on the authority or functions of the others unless there is breach. In this regard, it is trite that the interpretation of the Constitution calls for a delicate balance in the respective mandates of the different arms of government.

24. In the case of *Peter O. Ngoge v Francis Ole Kaparo & 4 Others* [2007] eKLR, a 3-Judge bench of this Court stated:

We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the *Constitution*. The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the *Constitution*. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the *Constitution*. Nothing is immune from the courts scrutiny, if in conflict with the *Constitution*

25. And in the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR the Supreme Court stated:

A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.

26. Flowing from the cited authorities, it is not in doubt that any unconstitutional exercise by the Senate of its mandate, cannot be shielded from judicial scrutiny on account of the doctrine of separation of powers.

27. The court is also mindful that the petitioner's complaint is that the 1st and 2nd Respondent acted in contravention with the provisions of the *Constitution*. Article 22 of the *Constitution* provides for enforcement of the Bill of Rights and guarantees to every person the right to move to court for redress for denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights. To this end, article 23(1), has conferred upon this court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Further, under article 165(3)(a), this court has unlimited original jurisdiction in criminal and civil matters. Under Clause (3)(b), the Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Additionally, under Clause (3)(d)(iii) the court has jurisdiction to determine the question whether anything said to be done under the authority of this *Constitution* or of any law is inconsistent with, or in contravention of, this *Constitution*.

28. The *locus classicus* on jurisdiction is the oft cited case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1., where Nyarangi, JA. famously stated:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment



it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.

29. And in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court held as follows:

(68). A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

30. From the cited authorities, one can readily see that it is a truism that jurisdiction is everything. Jurisdiction gives a court the power, authority and legitimacy to entertain a matter before it. By dint of articles 23 and 165 of the *Constitution*, this court finds that the question of determining whether the petitioner's rights have been violated and whether the *Constitution* has been violated by the respondents, falls squarely within the jurisdiction of this court. In view of the foregoing, the preliminary objection must fail.

Whether article 99(1)(c) of the Constitution is applicable to the election of Speaker of the Senate

31. The petitioner contends that he was the only candidate who met the qualifications for election of Speaker.

32. Article 106(1)(a) provides:

(1) There shall be—

(a) a Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members;

33. Article 99 stipulates the qualifications and disqualifications for election as member of Parliament. The petitioner submitted that the main issue in contention is the applicability of article 99(1)(c) in the election of the Speaker and that it is upon this that his Petition will turn.

34. Article 99(1) provides as follows:

(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.



35. The respondents contended that the Speaker is an ex officio member of the Senate and that the election to that office is *sui generis*. The election of Speaker is done by senators and not by universal suffrage and is governed by the Standing Orders and not the Elections Act as for other members of the Senate. They submitted that requiring a candidate for position of Speaker must be nominated by a political party or supported by 2000 registered voters in the county if an independent candidate as stipulated in article 99(1)(c) amounts to an absurd, impractical and illogical result. They contended that if this were the intention of the drafters of the Constitution, the same ought to have been provided for in article 106 of the Constitution. They further submitted that this requirement would be discriminatory and unreasonable and would violate the constitutional rights under articles 27 and 38(3)(c) of interested candidates. They concluded that article 99(1)(c) cannot apply to the election of Speaker.
36. In rejoinder, the petitioner submitted that all senators must be compliant with article 99(1)(c) of the Constitution. The petitioner further contended that having the same eligibility requirements for all senators, elected, nominated and the Speaker is not discriminatory and does not violate articles 27. He asserted that lowering the requirement for the Speaker is what would violate article 27.
37. A plain reading of article 106 shows that the Speaker shall be elected by the Senate in accordance with the Standing Orders. The persons who shall be elected Speaker must be qualified to be elected as a member of Parliament but is not a member. The requirement is that a candidate must meet the qualifications to be elected as a member of Parliament but must not be a member.
38. The qualifications of a member of Parliament are clearly set out in article 99(1). The eligibility requirements for election as a member of the Senate are that a candidate must be a registered voter. Such candidate must also comply with any constitutional and statutory requirements relating to education, morals and ethics. Such candidate must also be nominated by a political party. In the case of an independent candidate, such candidate must be supported by a minimum of 2000 registered voters in the county.
39. The foregoing is the import of article 106 as read with article 99(1) of the Constitution in so far as the qualification of Speaker of Senate is concerned. Accordingly, the contention by the respondents that to require a candidate for election of the office of Speaker, who is a member of the Senate, must be nominated by a political party or supported by 2000 registered voters in the county, if an independent candidate as stipulated in article 99(1)(c) is absurd, illogical and impractical, is to clearly misapprehend the said provisions of the Constitution. There is nothing in the cited provisions to show that a distinction has been made in the qualifications of elected members of the Senate and an ex-officio member of the Senate. All are members of the Senate and all must comply with article 99(1)(c). Indeed Article 106 is unequivocal that the Speaker is elected from among persons who are qualified to be elected as members of Parliament but are not such members. Had there been an intention to make a distinction, then article 106 would have done so.
40. Further, a plain reading of Standing Order 5(3) leaves no doubt in the mind that article 99(1)(c) is applicable in the election of Speaker of the Senate. It provides as follows:
- The nomination papers of a candidate shall be accompanied by the names and signatures of two Senators-elect who support the candidate and a declaration by them that the candidate is qualified to be elected as a Member of Parliament under article 99 of the Constitution and is willing to serve as Speaker of the Senate. (emphasis mine)
41. In light of the foregoing, the court makes the inevitable finding that article 99(1)(c) of the Constitution is applicable to the election of Speaker of the Senate. To determine otherwise as the respondents would want this court to do, would a violation of both the Constitution and the Senate Standing Orders.



Whether the 2nd Respondent violated the Petitioner's rights.

42. The petitioner contends that the 2nd respondent violated his right under article 38(3)(c) by the declaration of the 3rd respondent as the duly elected Speaker of the Senate. The petitioner further accused the 1st and 2nd respondents of violating his right under article 47(2) by failing to give him a written reason as to why he was denied his political right under article 38(3)(c) to hold office of Speaker of the Senate.
43. Article 47 of the Constitution provides for fair administrative action as follows:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
44. In compliance with article 47(3) Parliament did enact the Fair Administrative Action Act (FAAA), to give effect to the rights stipulated in article 47(1). Section 4 of the Act provides:
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision -
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (1) The administrator shall accord the person against whom administrative action is taken an opportunity to—
 - (a) attend proceedings, in person or in the company of an expert of his choice;



- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

45. The right to fair administrative action cannot be gainsaid. This right encompasses action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, where a person's right or fundamental freedom has been, or is likely to be adversely affected by administrative action, such person must be given reason in writing, for such action. This requirement ensures that administrative bodies discharge their mandate within constitutional and statutory limits. The actions of such bodies must conform to statutory provisions and must pass Constitutional muster.

46. In the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal had this to say about the right to fair administrative action:

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

47. A similar position was adopted in the case of *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR, where Mwita, J. stated:

33. Article 47(1) of the *Constitution* is in mandatory terms that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub article 2 makes it even more forceful that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action.

48. Having laid the foundation for fair administrative action, I now turn to consider the petitioner's claim that he was denied his political right under article 38(3)(c), to hold office of Speaker of the Senate.

49. The petitioner contends that the 3rd Respondent did not comply with the requirements of articles 99(1)(c) and 106(1)(a) and Standing Order 5(3) and (4). As such he did not qualify to be on the ballot and is thus not the lawful Speaker of the Senate. The petitioner insists that he was the Speaker-elect at the close of nominations, because of the 7 candidates only he, was duly qualified. By not having him sworn in as Speaker of the Senate, the 1st and 2nd respondents prevented the petitioner from holding office following his election, thereby contravening his article 38(3)(c) of the *Constitution*.

50. He further argued that by the respondents submitting that article 99(1)(c) was inapplicable to the position of Speaker, they implicitly admitted that the 2nd respondent did not ascertain the eligibility of the candidates for the election. As such, the 2nd respondent did not undertake fair administrative action, thereby violating the Petitioner's rights under article 47(1) and (2).



51. For the 2nd respondent, it was submitted that he facilitated the petitioner in his quest for election as Speaker. He was given equal opportunity to participate in the ballot alongside other candidates who had met the qualifications. It was further submitted that the petitioner could not have been declared as duly elected without a ballot, as he was not the only eligible candidate. Declaring him as Speaker elect would have violated the rights of the other candidates as guaranteed under article 38.
52. The 3rd respondent submitted that he met the eligibility threshold as stipulated in article 106 of the Constitution and Standing Order 5 and all applicable laws. He further submitted that the Speaker of the Senate was an ex-officio member of the Senate. As such, to require the Speaker to be nominated by a political party or if an independent candidate, to be supported by at least 2,000 registered voters in the county would amount to an absurd, impractical and illogical result.
53. Article 38(3) provides:
- (3) Every adult citizen has the right, without unreasonable restrictions—
- (a) to be registered as a voter;
- (b) to vote by secret ballot in any election or referendum; and Freedom of association. Assembly, demonstration, picketing and petition. Political rights. The Constitution of Kenya.
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.
54. The undisputed facts herein are that the petitioner was duly nominated as a candidate for election as Speaker of the Senate. Indeed, the petitioner and the 3rd Respondent were among the 7 candidates announced by the 2nd respondent on 7.9.22, on the Parliament of Kenya's Facebook page, to have been duly nominated for the said election. There is nothing on record to show that having been so nominated, the petitioner was denied the opportunity to participate in the election nor does he claim such denial to participate.
55. It must be noted that article 38(3)(c) guarantees to every citizen the right to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. The right to hold office is contingent upon a candidate being elected. The result of the election clearly shows that the Petitioner did not garner any votes in the election of Speaker. Having been duly nominated and allowed to participate in the election, he exercised his rights under article 38. The Petitioner's claim that his rights under article 38(3)(c) were violated, is therefore unfounded.
56. The petitioner contended that the 1st and 2nd respondents were required under article 47(2) to furnish him with reasons for denying him the right to be declared the duly elected Speaker of the Senate and being sworn in as such. The exhibited Hansard Report of 8.9.22 indicates that the 2nd respondent announced the results of the election that out of the total 46 votes cast, the 3rd respondent garnered 46 votes. All other candidates including the petitioner, got 0 votes each.
57. Article 47(2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. As stated above, the Petitioner did exercise his right under article 38(3)(c) of the *Constitution*, to participate in the election of Speaker of the Senate. His being declared winner and holding that office was predicated upon winning the election. The truth of the matter is that he did not win the election. Accordingly, he cannot say that any right to hold the office that he aspired to, had accrued or that the same having accrued, had been adversely affected. In the premises, the court finds that his right to hold



office was not adversely affected. Accordingly, the provisions of article 47(1) and (2) of the Constitution are inapplicable herein.

58. The court notes that petitioner claims that only he qualified to be duly nominated for the election. He contends that he made a request to the 2nd respondent to be furnished with the nomination papers of all candidates, which he required, to enable him move to court seeking protection and enforcement of his rights. The respondent however declined to supply him with the information sought. The question that then begs is, if the petitioner did not have sight of the nomination papers of the other candidates, on what basis can he then claim that they did not meet the eligibility criteria for election as Speaker and that only he qualified. It is only upon receipt of the nomination papers and confirming that the other candidates did not in fact meet the eligibility requirements, that the petitioner would be able to claim with authority, that he alone was qualified to vie for the position of Speaker and that he ought to have been declared the Speaker without a vote under Standing Order 11.
59. It is trite law that he who alleges must prove. Section 107 of the Evidence Act provides:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
60. It is not enough for the petitioner to argue that by submitting that article 99(1)(c) was inapplicable to the position of speaker, the respondents implicitly admitted that the 2nd respondent did not ascertain the eligibility of the candidates for the election. The petitioner was required to place before the court, cogent proof to support his allegations. He was also required to support, with evidence, his claim that only he met the qualifications for election to the office of Speaker of the Senate. In this regard, I associate with the sentiments expressed in the case of Stephen Wasike Wakhu & Another v Security Express Limited [2006] eKLR where the Court stated:
- A party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that “he who alleges must prove”.
61. In view of the foregoing, I find and hold that the petitioner has not demonstrated that his right under article 38 and 47 of the Constitution have been violated.

Whether the orders sought should be granted.

62. The petitioner seeks an order quashing the nomination of all candidates other than himself for the election of Speaker of the Senate. He also seeks that the election of the 3rd respondent as Speaker of the Senate be quashed and that the petitioner be sworn as Speaker instead, being the duly nominated candidate at close of nominations, pursuant to Standing Order 11. Additionally, the petitioner seeks compensation equivalent to the remuneration he would have earned as Speaker of the Senate from date he 8.9.22. The petitioner further sought an order compelling the 2nd respondent to refund all public funds lost on account of the 3rd respondent assuming office of Speaker of Senate. He also seeks costs. The orders sought would only be available to the petitioner in circumstances where he has proved his case. The position herein is that the Petitioner has failed to established his claim. It follows therefore that the orders sought cannot be granted.
63. In the end and in view of the foregoing, I make a finding that the Petition dated 30.10.22 lacks merit and the same is hereby dismissed with costs.



DATED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the 1st & 2nd Respondents

..... for the 3rd Respondent

..... Court Assistant

