



REPUBLIC OF KENYA



**Aluochier v County Assembly of Migori & 2 others (Constitutional Petition
E006 of 2022) [2023] KEHC 1493 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CONSTITUTIONAL PETITION E006 OF 2022**

RPV WENDOH, J

FEBRUARY 21, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 27, 38, 47, 50 AND 88 (4) (E) OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
81, 178 (1) AND(3)AND 226 (5) OF THE CONSTITUTION**

**IN THE MATTER OF SECTION 9A (1) OF THE COUNTY GOVERNMENT
ACT IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT**

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER PETITIONER

AND

COUNTY ASSEMBLY OF MIGORI 1ST RESPONDENT

VINCENSIA AWINO KIOGE CLERK OF THE COUNTY ASSEMBLY

MIGORI 2ND RESPONDENT

CHARLES OWINO LIKOWA 3RD RESPONDENT

Court quashes the election of the Speaker of Migori County Assembly

The failure to place in the ballot a party that had applied and complied with the requirements of being nominated for the position of Speaker of a County Assembly, and the failure to afford said person the reasons for failure to be included in the ballot was violation of the petitioner's right to fair administrative action and a violation of article 196 of the Constitution that required County Governments to discharge their mandate in openness and transparency.

Reported by John Ribia

Jurisdiction – jurisdiction of the High Court vis-à-vis the jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine a dispute challenging the holder of the office of the Speaker of a County Assembly - whether a dispute challenging the holder of the office of the Speaker of a County Assembly was to be determined via constitutional petition in the High Court, via an election petition before the High Court, or as an employment



dispute via a claim before the Employment and Labour Relations Court - Constitution of Kenya articles 194; Elections Act sections 75A, 78, 86; Election Petition Rules, rule 19.

Constitutional Law – *fundamental rights and freedoms – right to fair administrative action – challenge on the process of nomination and election of a County Government’s Speaker – duty of a County Government to conduct its business in the spirit of openness and transparency - whether the failure to place in the ballot a party that had applied and complied with the requirements of being nominated for the position of Speaker of a County Assembly, and the failure to afford said person the reasons for failure to be included in the ballot, was violation of the petitioner’s right to fair administrative action – whether such conduct was a violation of the duty of County Governments’ to conduct their business in the spirit of openness and transparency - Constitution of Kenya, 2010 article 47 and 196; Migori County Assembly Standing Orders standing order 5.*

Civil Practice and Procedure – *sub judice – challenge that a court lacked jurisdiction to determine a matter due to the petition offending the sub judice rule – conditions for a matter to be categorized as sub judice - whether a petition that challenged the election of a Speaker of the Senate was sub judice due to the same party having filed another suit challenging the election the Speaker of a County Assembly – Constituion of Kenya, 2010 article 106(1) (a) and 193(1); Civil Procedure Act section 6 and 7.*

Devolution – *County Government employees – elected vis-à-vis appointed – representative vis-à-vis employee – status of County Government Speakers - whether once elected, a Speaker of a County Assembly becomes an employee of the County Assembly and was subject to the Employment Act.*

Brief facts

The petitioner, a member of the County Assembly of Migori, was interested in the position of Speaker of County Assembly. After the assembly’s first sitting on November 21, 2022, the acting County Clerk stated that the election of the Speaker of the County Assembly would take place on the same day. The petitioner claimed that he collected the nomination forms and secured the relevant support needed to qualify for nomination and presented his papers before the office of the Clerk.

The petitioner contended that despite fulfilling all relevant conditions to be nominated for the election of Speaker of Migori County Assembly, the petitioner was not nominated or offered reasons as to why he was not nominated. Aggrieved the petitioner filed the instant petition challenging the decision not to nominate him alleging that it was a breach of his right to fair administrative action.

Issues

- i. Whether a petition that challenged the election of a Speaker of the Senate was *sub judice* due to the same party having filed another suit challenging the election the Speaker of a County Assembly.
- ii. Whether a dispute challenging the holder of the office of the Speaker of a County Assembly was to be determined via constitutional petition in the High Court, via an election petition before the High Court, or as an employment dispute via a claim before the Employment and Labour Relations Court.
- iii. Whether once elected, a Speaker of a County Assembly becomes an employee of the County Assembly and was subject to the Employment Act.
- iv. Whether the High Court could go against the doctrine of separation of powers to determine a dispute on the election of a Speaker of a County Assembly where there was unconstitutional exercise of legislative powers.
- v. Whether the failure to place in the ballot a party that had applied and complied with the requirements of being nominated for the position of Speaker of a County Assembly, and the failure to afford said person the reasons for failure to be included in the ballot, was violation of:
 1. the petitioner’s right to fair administrative action;
 2. article 196 of the Constitution that required County Governments to discharge their mandate while guided by the spirit of openness and transparency



Held

1. The petitioner did not provide to the court pleadings of the case he alleged was pending before another court or tell the court if the matter had been determined. The term *sub-judice* meant a matter that was before the court or judge for determination. For a matter to offend the *sub - judice* rule, it had to be between the same parties, on the same subject matter. The petitioner in Petition E489 of 2022 was allegedly challenging the election of the Speaker of the Senate. In the instant petition, the same petitioner was challenging the election of the Speaker of the County Assembly of Migori. In those two offices, the qualifications of a Speaker as provided for under the Constitution and other relevant laws was different. For a person to qualify as a Speaker of the Senate, he or she was required to fulfil the qualifications under article 106(1)(a) of the Constitution while for a person to be considered for election as the Speaker of the County Assembly, the person should fulfil the qualifications under article 193(1) of the Constitution. The subject matter before the two courts was different. The petition did not offend the principle of *sub – judice*.
2. Once the issue of jurisdiction of a court was raised, it should be determined at the first instance.
3. The procedure for election of a Speaker of a County Assembly was provided for under section 21 of the Elections Act. The Act provided that the election shall be conducted in accordance with the Standing Orders of the County Assembly. Standing Order 6 of the Migori Standing Orders provided that the procedure for voting for the Speaker of the County Assembly shall be through a secret ballot. If at all the Speaker of the County Assembly was elected through a secret ballot, the Clerk of the County Assembly was only expected to announce the winner. There was no legal requirement that the Speaker - elect of the County Assembly should be gazetted before assumption of office. Unlike all other elective posts during a general or by - election, the Independent Electoral and Boundaries Commission (IEBC) was mandated under section 39 (1), (1A) and (1B) of the Elections Act to tally, determine, declare and publish the results of an election at the close of a polling station.
4. The procedure for removal of other Members of County Assembly apart for the Speaker was found in article 194 of the Constitution. The procedure was distinct from the procedure of removal of a Speaker of the County Assembly. The Speaker of County Assembly was removed by a resolution but for other Members of the County Assembly, for instance, their eligibility to hold office could be challenged through an election petition pursuant to section 86 of the Election Act when it was filed in the relevant elections court. Further, there was no requirement that the election of a Speaker to the office must be challenged within a certain time frame like other elective posts. Any person who wished to challenge the election of Member of County Assembly was required to do so within 28 days from the date of declaration.
5. The doctrine of separation of powers must be adjudicated in the context of the petitioner’s political rights. However, where there was unconstitutional exercise of legislative or executive powers, the National Assemblies (Parliament and Senate) of the County Assemblies could not be shielded from judicial scrutiny in the name of separation of powers.
6. A Speaker of the County Assembly could not be equated to be a Member of the County Assembly. The procedure in which the Speaker and the Member of the County Assembly assumed office was distinct and provided for clearly under the law. The Speaker was an ex-officio member who was elected by the Members of the Assembly while the Members of the County Assembly were a direct choice of the electorate.
7. The Speaker did not become an employee of the County Assembly because they were elected to the office through a secret ballot, but eventually once he took the Oath of Office, he became a public officer who was bound to serve the public bearing in mind the dictates of the Constitution. Unlike employees of other sectors in different institutions whose terms of employment were either causal, contractual or permanent, the same could not be termed of a person who held the office of Speaker Member of County Assembly. The Speaker of the Member of County Assembly could not be said to be subjected



- to the Employment Act. It was a misconception of the law to equate a petition challenging the election of a Speaker of a County Assembly to an election petition.
8. The High Court had jurisdiction to address the instant petition under article 165(3)(b) of the Constitution to address matters of threat to or denial, violation, infringement of fundamental rights and freedoms guaranteed in the Bill of Rights.
 9. The petitioner stated the genesis of the petition and how in particular the actions of the 2nd respondent allegedly violated his rights. The petitioner also outlined the articles which had allegedly been infringed although not in a consequential manner. The court only took issue with the verbosity of the petition and the drafting technique. It was difficult for the court to decipher and sift through the petitioner's petition to identify whether his case made any sense. While the petitioner was not a qualified Advocate of the High Court of Kenya, being a seasoned litigator, he ought to be in a position to master the art of expressing his views by getting straight to the point. The petitioner could also give the courts an easy time by making subheadings in his pleadings. Nevertheless, the court could not fault the petition for failing to reach the constitutional petition threshold as enumerated in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
 10. The 2nd respondent did not try to defend her actions or inactions to demonstrate that she followed the laid down procedure before the election of the Speaker of the County Assembly of Migori. The 2nd respondent did not even at the very least file a copy of the ballot paper that was used in the elections to justify why the five candidates therein made it to the ballot and not the others. The 2nd respondent did not file a list or the register which she maintained to show that all the interested persons submitted their papers for the nomination on time.
 11. The 2nd respondent being a public officer, when called upon by the members of the public to give an account of her actions, was duty bound to do the same as per the Constitution. Even if the Standing Orders of the Migori County Assembly did not expressly provide for communication to unsuccessful candidates, once she was called upon to exercise her Constitutional duties, she ought to have done the same expeditiously.
 12. The petitioner, believing that he had complied with the requirements of being a candidate nominated for the position of Speaker of the Migori County Assembly but he was excluded from the ballot, had a right to know why he was excluded and he requested for the information addressed to the office of the 2nd respondent. The 2nd respondent did not respond to the letter and the petitioner's rights under article 47 of the Constitution to be given reasons for the administrative actions were contravened.
 13. Under standing order 5(4) of the Migori County Assembly Standing Orders (Standing Orders) it was mandatory for the 2nd respondent to maintain a register which showed the date and time when each of the candidate's nomination papers were received and the 2nd respondent should ascertain if such a candidate was qualified to be elected under article 193 of the Constitution. Standing Order 5(5)(a) and (b) mandated the 2nd respondent immediately after the closure of the nomination period to publicize to all members the list showing qualified candidates and make available copies of the curriculum vitae of the qualified members. Standing Order 5 (6) provided that at least 2 hours before the meeting of the County Assembly to undertake the voting process, the 2nd respondent must prepare ballot papers showing the names of all the candidates.
 14. The 2nd respondent had not demonstrated to the court that in conducting the nomination exercise of the persons qualified to be Speakers of the Migori County Assembly leading up to the elections, she employed openness, transparency and public participation as required under article 196 of the Constitution. The actions of the 2nd respondent were shrouded in mystery on how she handled the exercise in a devolved forum which directly affected the well - being of the people of Migori County.
 15. Article 196 of the Constitution provided that in discharging its mandate, the County Assembly must be guided by the spirit of openness and transparency. The election of the Speaker was one of the businesses of the County Assembly which should have been conducted in an open manner. The office



of the 2nd respondent did not properly discharge its mandate in accordance with article 196 of the Constitution and standing order 5 of the Migori County Assembly Standing Orders. The dignity of the Constitution must be upheld and a mockery made out of it, could not be sanitized or entertained by the court.

16. Inasmuch as the County Assemblies had their own internal procedures which the court should not interfere with, when it is established that the Constitution was infringed, the court should not hesitate to interfere with the unconstitutional actions of the person or organs which have infringed the Constitution.

Petition partly allowed.

Orders

- i. *The petitioner failed to prove that he was the only qualified Candidate to be nominated as Speaker for Migori County Assembly.*
- ii. *Declaration made that the rights of the petitioner under Article 47 (2) of the Constitution (right to fair administrative action) by the 2nd respondent was infringed in that he was denied information.*
- iii. *Declaration issued quashing the election of the 3rd respondent Charles Owino Likowa as the Speaker of the County Assembly of Migori County for the 2nd respondent's failure to comply with Standing Orders 5(2), 5(4), 5(5) of the Migori County Assembly Standing Orders and article 196 of the .*
- iv. *Within 21 days from the date of the instant judgment, fresh elections for the Speaker of Migori County were to be conducted starting from the submitting of nomination papers of interested persons.*
- v. *Each party was to bear its own costs.*

Citations

Cases

1. Anarita Karimi Njeru v Republic Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); (no1) (1979) 1 KLR 154 — (Followed)
2. Dabelo, Jaldesa Tuke v Independent Electoral & Boundaries Commission & another Civil Appeal 37 of 2014; [2015] KECA 1005 (KLR) — (Explained)
3. Hamisi , Kakuta Maimai v Peris Pesi Tobiko, Independent Electoral & Boundaries Commission & Returning Officer Kajiado East Constituency Election Petition 5 of 2013; [2013] KEHC 127 (KLR) — (Followed)
4. Havi , Nelson Andayi v Law Society of Kenya & 2 others Civil Application 28 of 2018; [2018] KECA 731 (KLR) —(Explained)
5. Kalpana H. Rawal & 2 others v Judicial Service Commission & 3 others [2016] KESC 4 (KLR) — (Explained)
6. Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) Advisory Opinion Reference 1 of 2017; [2020] KESC 54 (KLR)— (Explained)
7. Kuria , Charles Kaindo & 20 others v Technical University of Kenya Petition 607 of 2014; [2019] KEHC 7292 (KLR) — (Explained)
8. Macharia & another v Kenya Commercial Bank Limited & others [2012] 3 KLR 199 — (Followed)
9. Makola , Frank Mulisa v Felix G. Mbiuki & 4 others Election Petition 5 of 2013; [2013] KEHC 967 (KLR) — (Explained)
10. Marwa, David Kerario v Boaz Awiti Okoth & Clerk to County Assembly of Migori Election Petition 10 of 2017; [2018] KEHC 8839 (KLR) — (Explained)
11. Matem, Mumo v Trusted Society of Human Rights Alliance & 5 others Civil Application 29 of 2014; [2014] KESC 6 (KLR) — (Mentioned)
12. Ngoge , Peter O v Francis Ole Kaparo & 4 others Misc Appli 22 of 2004; [2007] KEHC 1433 (KLR)) — (Explained)



13. Njoya, Timothy v Attorney General & another ([2014] eKLR) — Mentioned
14. Republic v Transitional Authority & Another Ex-Parte Crispus Fwamba & 4 others Judicial Review 110 of 2013; [2013] KEHC 6518 (KLR)— (Explained)
15. United States International University (USIU) v Attorney General Petition 170 of 2012; [2012] KEHC 5516 (KLR)— (Explained)
16. Waweru , Robert & 3 others v DPP & Others Nairobi Petition No 106 and 160 of 2021) — (Mentioned)

Nigeria

Ocheja Emmanuel Dangana v Hon Atai Aidoko Aliusman & 4 others Nigeria Supreme Case No 11 of 2012; (2020) 37 E-WRN / 45 (SC) — Mentioned

Statutes

1. Constitution of Kenya, 2010 (Const2010) — articles 22(1)(3)(e);23(3); 27(1)(2)(4)(5); 35(1);38(3)(c); 47(1)(2); 50; 81; 87; 88(4)(e); 94(5);95(5);105; 106(1)(a)(2); 162(2)(a); 165(3); 177;178(1)(3); 193(1); 194;196(1)(a)(b); 226(5) — (Interpreted)
2. Civil Procedure Act (cap 21) — section 6 — Interpreted
3. County Government Act (cap 265) sections 2, 9A(1);11 –(Interpreted)
4. , 2013 (cap 7 Sub Leg) rule 9 – (Interpreted)
5. Elections Act (cap 7C)— sections 2, 13 (1);21;39(1)(1A)(IB);75 (1) (A);74;75 (4);80 (3);86; (1A) (1B) — Interpreted
6. Employment Act (No 11 of 2007) — In general — Interpreted
7. Employment And Labour Relations Court Act (cap 8E) — section 12 (1) (a); 162(2) — (Interpreted)
8. Evidence Act (cap 80) — sections 80;106 B — (Interpreted)
9. Fair Administrative Action Act (cap 7L) — section 9A (1); 6(3) ;8; 4(3),6 — Interpreted
10. Independent Electoral And Boundaries Commission Act (cap 7C) section 74(3) – (Interpreted)
11. Leadership And Integrity Act (185 C) — section 13(2) — Interpreted
12. Privileges And Immunities Act (cap 179) — (Cited) In general

Advocates

Mr. Obiero for 1st , 2nd and 3rd Respondents.

JUDGMENT

1. The petitioner commenced these proceedings by way of a petition dated 8/11/2022 alleging contravention of his fundamental rights and freedom under articles 22(1), 47(3), 165(3), 27, 38, 47, 50, 88(4)(e), 81, 178(1),(3) and 226(5) of the Constitution. The petitioner also brought this petition under the provisions of section 9A(1) of the County Government Act and the Fair Administrative Action Act.
2. The facts of the petition as pleaded by the petitioner is that by a Gazette Notice No. 11006 dated 14/9/2022, the Governor of Migori County stated that the first sitting of the County Assembly would be on 21/9/2022; that a Gazette Notice from the Acting County Clerk of the Migori County Assembly also stated that the election of the Speaker of the County Assembly would take place on the same day.
3. The petitioner claimed that on 16/9/2022 he collected the nomination forms for Speaker of the County Assembly; that on 17/9/2022 and 18/9/2022 the petitioner secured the support of the East and North Kamagambo MCAs respectively; that on 18/9/2022 at about 3.26 PM the petitioner proceeded to the office of the Clerk of the County Assembly to submit his nomination papers and



noted down his name as the third person, the other two being Gradus Oluoch and Tom Mungai Ouma; that in addition to the documents required when submitting one's nomination papers, the petitioner filed the following documents not specified to demonstrate compliance with article 193(1)(a) of the Constitution:-

- a) Letter addressed to the Clerk of Migori County Assembly.
 - b) Voter Registration details from the Independent and Electoral Boundaries Commission (IEBC).
 - c) Self - declaration Form as per section 13(2) of the *Leadership and Integrity Act*
 - d) Nomination Certificate from the Justice and Freedom Party of Kenya dated 25/3/2022 to show that he was nominated to contest for the position of Speaker of the County Assembly.
4. The petitioner stated that after his nomination papers had been received and duly stamped, he took a photograph of them using his mobile phone and left the Clerk's office; that on 18/9/2022, he sent the earlier submitted documents via email at 2234 Hrs and having not heard from the Clerk's office after 9.00 AM on 19/9/2022 on the candidate's nominated to run for the Speaker's position, he sent a message *via* WhatsApp to the 2nd respondent at 1839 Hrs asking if the names of those nominated for the election of Speaker have been released and he was answered at 8.00 a.m. the following day; that the petitioner responded and said that he would hopefully make to the 2nd respondent's office by then but he was told that the communication would be done and there was no need to go to the office.
5. The petitioner further alleges that he did not receive any communication from the 2nd respondent as anticipated but through the MCA Plenary on 21/9/2022 after the swearing in ceremony, he got to learn that there are 3 candidate who had returned their nomination papers but had not been included in the ballot paper, some had not returned their papers with support from at least 2 MCAs and one had the MCA proposer revoke his support; that the 2nd respondent did not specify the persons affected. Further, the petitioner alleges that on 20/9/2022 he received a phone call from his proposer that the Clerk was pressuring him to drop his support for the petitioner but instead maintain his proposal for the 3rd respondent.
6. The petitioner pleaded that he made inquiries from the 2nd respondent through a phone call and he was told that there was nothing wrong in an MCA proposing more than one candidate; the petitioner further inquired which standing order the 2nd respondent was relying on, but she became hostile towards the petitioner; that it was in the public domain that the Orange Democratic Movement Party (ODM) had not complied with the law and he asked the 2nd respondent to comply with the law in the process of nomination of candidates to contest for the position of the Speaker; that on 26/9/2022 the petitioner wrote to the 2nd respondent requesting for information on the nomination of the Speaker which information was not furnished contrary to the provisions of section 6(3) of the *Fair Administrative Action Act*.
7. The petitioner pleaded that Standing Order 11 of the Migori County Assembly provides that despite the provisions of Part III of the Standing Orders, if there is only one eligible candidate nominated for election as Speaker, that person shall be nominated forthwith without any ballot being cast; that at the expiry of the nomination period, there was only one person duly nominated who is the petitioner, in compliance with article 193 (1) of the Constitution and section 13(1) of the *Elections Act*; that the 2nd respondent therefore contravened the aforesaid provisions of the law as read together with section 9A(1) of the County Government Act.



8. Mr. Aluochier further pleaded that the 3rd respondent had yet to return his nomination papers on 18/9/2022 thus the 2nd respondent had no legal basis to exclude the petitioner from the election for Speaker; that the role of the 2nd respondent at the expiry of the nomination period ended save for informing the MCAs of which candidates had been duly nominated and give them copies of the curriculum vitae of the duly nominated candidates; that the 2nd respondent arrogated herself post nomination period powers to alter pre-nomination expiry decision and therefore all her decisions were null and void; that the 2nd respondent did not publicize the names of the listed qualified candidates 48 hours prior to the first sitting as required under Standing Order 5(5) of the Migori County Assembly Standing Orders.
9. The petitioner further contended that there was no legal basis for the 2nd respondent to claim that an MCA can only propose one candidate while the law as per Standing Order 6 stated that an MCA can only vote once but propose more than one person.
10. On the jurisdiction of this court, the petitioner pleaded that Constitutional Petition No E489 of 2022 Isaac Aluoch Polo Aluochier v The Senate & 2 others is partly similar to the instant petition to the extent that the petitioner was the only eligible candidate in the Office of the Speaker but he was not declared forthwith; that the difference is that the parties are different and section 6 of the Civil Act only prohibits suits between the same parties; that section 8 of the *Fair Administrative Actions Act* provides that the hearing and determination of this petition is limited to 90 days and therefore this court does not have the luxury of staying this suit; that in relation to the time when the nomination results were released by the 1st and 2nd respondents there wasn't time to lodge an electoral dispute with the Independent and Electoral Boundaries Commission (IEBC) and have the IEBC determine the same pursuant to the provisions of section 74 (3) of the *IEBC Act*.
11. It is against this background that the petitioner seeks the following orders:-
 - a) The decision of the 2nd respondent, on behalf of the 1st respondent, communicated at plenary on 21/9/2022, that five persons who returned nomination papers were duly nominated as candidate to contest for the Speaker County Assembly of Migori, with three candidates who returned nomination papers not duly nominated as candidates be quashed.
 - b) The only duly nominated candidate for the election of Speaker of the County Assembly of Migori, being the only fully compliant with all legal requirements for elections to the said office, was the Petitioner - Isaac Aluoch Polo Aluochier.
 - c) Pursuant to Migori County Assembly Standing Order 11, the petitioner - Isaac Aluoch Polo Aluochier being the only duly nominated persons, was the Speaker - elect upon expiry of the nomination period at 9.00 a.m. on 19/9/2022.
 - d) The petitioner, Isaac Aluoch Polo Aluochier be sworn in as soon as practically possible as the Speaker of the County Assembly of Migori, being the Speaker – elect following the expiry of the nominations at 9.00 a.m. on 19/9/2022.
 - e) Monetary compensation be paid to the Petitioner equivalent to the remuneration he would have earned in office of Speaker of the County Assembly of Migori, commencing the first sitting of the Assembly on 21/9/2022 payable by or on behalf of the 1st respondent.
 - f) The 2nd respondent to repay the public all funds expended on account of the unlawful installation into office of the 3rd respondent as Speaker of the County Assembly, including but not limited to any remuneration paid to the 3rd respondent.



- g) Costs be paid to the petitioner, as against the 1st and 2nd respondents.
- h) Or such other orders (s) as this court shall deem just.
12. The petitioner filed a response to the objection dated 21/12/2022. The petitioner stated that article 162(2)(a) of the Constitution establishes the courts of equal status to the High Court to determine disputes relating to or arising out of employment matters between the employer and employee as per section 12(1)(a) of the Employment and Labour Relations Court Act. The petitioner further contended that this is a pre-election or nomination dispute concerned with the election of a Speaker of the County Assembly and this dispute falls under the jurisdiction of the Independent Electoral and Boundaries Commission; that disputes arising prior to persons elected to State Offices in elections are not disputes related to employment and labour relations. It was further stated that such disputes are covered under articles 87, 88 and 105 of the Constitution. The petitioner urged this court to dismiss the objection with costs.
13. The petitioner also filed a response to the 2nd respondent's replying affidavit. On the petition meeting the threshold in terms of the case of Anarita Karimi Njeru case (*supra*), the petitioner deposed that paragraphs 2 and 4 identify and demonstrate the petitioner's rights which were violated and the manner of the contravention; that the 2nd respondent has failed to discharge her burden of proof to prove or disprove any assertions made by the petitioner with respect to the nomination process which information is contained in the nomination papers in her custody.
14. In respect to paragraph 3 of the 2nd respondent's replying affidavit, the petitioner stated that the instant petition is a constitutional petition but not an election petition and it is not filed under Rule 9 of the Election (Parliamentary and County Elections) Petition Rules, 2013.
15. On the allegations that the petitioner did not ask for any information, the petitioner stated that he did so via email sent to the 2nd respondent on 26/9/2022. On the allegations that the petitioner did not meet the mandatory requirements, the petitioner stated that had the 2nd respondent provided the petitioner with the information requested for on 26/9/2022, this court would have the benefit of making its assessment of the 2nd respondent's assertions; that the 2nd respondent has not provided this court with the nomination papers that formed the basis of her decisions to enable this court to assess the legality of her actions.
16. The petitioner filed his submissions dated 23/12/2022. On whether the nomination of the election of a Speaker was conducted in accordance with the law, he submitted that the qualifications for election of MCA is under article 193 of the Constitution and Standing Order 5. The petitioner further submitted that the 2nd respondent contravened articles 2 (2), 94(5) of the Constitution.
17. On whether the petitioner is the Speaker - elect, the petitioner submitted that he demonstrated that he was the only legible candidate and as per Standing Order 11, if there is only one candidate nominated for election as Speaker at the expiry of the nomination period, that candidate shall be declared forthwith to have been elected Speaker without any ballot or vote; that the 2nd respondent did not comply with articles 178(1) and (3) of the Constitution as read with section 9A (1) of County Government Act that require the Speaker to be elected in accordance with the Standing Orders.
18. On whether the petitioner's political rights under article 38(3)(c) were contravened, it was submitted that since he was the only eligible candidate, he ought to have been declared forthwith without any ballot or vote being taken.
19. The petitioner further submitted that he has demonstrated under paragraphs 4.12 to 4.22 of the petition that his rights under sections 4(3), 6 of the Fair Administrative Actions Act as read with articles



- 47(1) and (2), 35(1) of the Constitution were contravened because the 2nd respondent did not respond to his letter of 26/9/2022.
20. On whether the petitioner was discriminated against, by the 2nd respondent, it was submitted that at the expiry of the nomination period, the 2nd respondent became functus officio and her actions of favouring the 3rd respondent over the petitioner were discriminatory and contrary to articles 27(1),(2), (4) and (5) of the Constitution.
 21. On whether the petitioner was given a fair hearing under article 50 (1) of the Constitution, it was submitted that if the 2nd respondent abided by the County Assembly of Migori Standing Orders 5(5) (a) and 11 any aggrieved person would have sought a remedy by way of dispute resolution in the appropriate independent and impartial tribunal or body pursuant to articles 88(4)(e) as read together with section 74 of the Elections Act.
 22. On whether the 2nd respondent contravened the general principles for the electoral system in article 81(e), it was submitted that the 2nd respondent contravened the article by not complying with the principles set out therein; that the act of the 2nd respondent pressuring the North Kamagambo MCA to withdraw his support for the petitioner and her post nomination conduct was in contravention of the said article.
 23. On whether compensation should be paid to the petitioner, it was submitted that article 22(3)(e) of the Constitution provides that a court may grant appropriate relief including an order for compensation. In this case, as the petitioner is the valid Speaker – elect, who was to be sworn in on 21/9/2022, his remuneration should have commenced then; that as per the Gazette Notice No 8796 of the Salaries and Remuneration Commission the salary of a speaker is Kshs 525, 525 which should be paid by the County Assembly Board on behalf of the County Assembly of Migori.
 24. On whether the 2nd respondent should reimburse the public for losses arising from her unlawful conduct, it was submitted that article 226(5) of the Constitution provides that if a holder of a public office approves public funds contrary to the law or instructions, the person is liable for any loss arising from that loss and shall make good the loss whether the person remains in office or not.
 25. On costs, the petitioner submitted that it is not mandatory but discretionary and costs should follow the event. The petitioner asked this court to order that the 1st and 2nd respondents do pay him costs.
 26. The petitioner filed further submissions dated 25/1/2023. On the issue of jurisdiction, he submitted that it has already been addressed in his petition at paragraph 6. On the precision of the petition, it was submitted that it was responded to via the petitioner’s response dated 21/12/2022 to the 2nd respondent’s replying affidavit. On the violation of the petitioner’s rights, it was submitted that the same was addressed in the petitioner’s submissions dated 23/12/2022.
 27. The respondents through the firm of C Obiero & Associates opposed the petition. The respondents filed a notice of preliminary objection and a replying affidavit sworn on their behalf by the 2nd respondent both dated 27/11/2022. The grounds of objection are:-
 - a) That the petition as presently brought against the respondents contravenes the provisions of articles 162(2) of the Constitution of Kenya, 2010 as read together with article 162(2) of the Employment and Labour Relations Court Act Law of Kenya.
 28. In her replying affidavit, the 2nd respondent deposed that she is the Acting Clerk of the 1st respondent; that the petition is fatally defective, incompetent, bad in law and should be struck out with costs; that the petition falls short of the constitutional petition threshold as was established in Anarita Karimi



- Njeru v Republic [1979]* eKLR; that the petition offends the provisions of Rule 9 of the *Election (Parliamentary and County Elections) Petition Rules* 2013; that the issues raised in the petition are purely speculative; that the petitioner has not produced evidence that any person had been barred including himself from participating in the Speaker's elections. The 2nd respondent further averred that the petitioner did not meet the mandatory requirements as persons who proposed him withdrew the same before shortlisting. The 2nd petitioner asked this court to dismiss the petition with costs.
29. The respondent filed their submissions dated 18/1/2023. They submitted that this court has no jurisdiction to hear and determine this petition by virtue of article 162 (2) of the *Constitution* and section 12 of the Employment and Labour Relations Court Act; that the petitioner is challenging the election/employment of the 3rd respondent disguised as a constitutional petition; that article 165(5) ousts the High Court's jurisdiction and it is limited to matters reserved for the court envisaged under article 162(2) of the *Constitution* as was held in *United States International University (USIU) v Attorney General [2012]* eKLR.
 30. The respondents further submitted that the petition is on the election of a Speaker who is an *ex-officio* member of the Assembly by dint of article 117 of the *Constitution*; that section 75(1)(A), 75(4) and 80(3) as read with section 2 of the *Elections Act* vests jurisdiction to challenge the election of a Speaker (Member of a County Assembly) on the Magistrate's court and not the High Court.
 31. The respondents contended that if the matter was to be considered as a constitutional petition, then the Magistrate's Court has no jurisdiction and if the matter is to be considered as an Election Petition, then the High Court had no jurisdiction; that the matters raised in the petition being an election petition should have been precise as was held in Anarita Karimi case (*supra*). The respondents submitted that that the jurisdiction of this court is captured at paragraph 6.2 of the petition wherein the petitioner pleaded that article 88 (4) (e) of the *Constitution* as read together with section 75 of the *Elections Act* ousts this court's jurisdiction. The respondent relied on the decision in *Jaldesa Tuke Dabelo v Independent Electoral Boundaries Commission & another (2015)* eKLR where it was held that if there is a clear procedure of redress prescribed by the law, it should be followed. The respondent submitted that this court cannot be the first port of call in addressing the issues to do with the nomination and subsequent employment of the 3rd respondent as the Speaker of the 1st respondent.
 32. On whether the petition has met the threshold of the constitutional petition, the respondent submitted that the petitioner has only identified the provisions but failed to state how the said provisions have been infringed. The petition as drawn is not clear on clear whether it's a constitutional, nomination, election petition or an employment issue and therefore it is not clear what the petitioner is seeking from this court; that the petitioner has not precisely pleaded the infringement alleged, to demonstrate violation of articles 27 and 38 of the *Constitution* of Kenya. It was also submitted that there is breach of production of evidence as per the provisions of section 80 and 106 B of the *Evidence Act* respectively; that the certificates which are public documents have not been certified by the issuing institution and the conversation and electronic evidence have not been accompanied by appropriate electronic certificate. Reliance was placed in the case of *Nairobi Petition No. 106 and 160 of 2021 Robert Waweru & 3 others v DPP & others*.
 33. Further to the foregoing, the respondents submitted that in order for the court to find violation of article 27 it must be shown that the persons within the same category have been subjected to different treatment by the law; that no such evidence was provided in the petition but the petitioner relied on hearsay. The respondent stated that not every differentiation amounts to discrimination as was held in the case of *Nelson Andayi Havi v Law Society of Kenya & 3 others* eKLR.



34. On whether the petitioner's rights have been violated, it was submitted that the petitioner has not adduced any evidence to show that he has been barred from participating in the elections of the Speaker and the petition is based on general hypothetical issues. In conclusion the respondents asked this court to take judicial notice of the fact that he has already sued the Senate in Petition No E489 of 2022 *Isaac Aluochier v Senate & 2 others* where he also claimed to be the only fit candidate for the position of Speaker. The respondents urged the court to dismiss the petition with costs.
35. I have carefully considered the petition, its supporting affidavit, the respective annexures, the response to the petition, the notice of preliminary objection and the rival submissions. On that account, it is this court's considered opinion that the issues for determination which arise therefrom are:-
- a) Whether this court has jurisdiction to hear and determine this petition.
 - b) Whether the petition meets the threshold of a constitutional petition.
 - c) Whether the Petition dated 11/8/2022 is merited.
 - d) Whether the orders and reliefs sought should be granted.
36. The issue of jurisdiction shall be addressed in two - fold: -
- i. Whether the present petition offends the sub judice rule in light of Petition No E489 of 2022 *Isaac Aluochier v Senate & 2 others*.
 - ii. The legal standing of a Speaker of County Assembly under the law.
37. The petitioner disclosed that he had filed a petition in the High Court in Nairobi challenging the election of the Speaker in the Senate via Petition No E489 of 2022. The petitioner pleaded that the petition earlier filed, is partly similar to the instant petition to the extent that the petitioner was the only eligible candidate in the Office of the Speaker but he was not declared forthwith but the parties are different and section 6 of the Civil Act only prohibits suits between the same parties. Section 6 of the *Civil Procedure Act* provides:-
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
39. When a matter is still pending before another court for determination and the same issues are presented before another court for determination at a later stage, the latter court is obligated under the law, if it comes to its knowledge, to stay the proceedings until the matter earlier filed, is heard and determined. If the latter court proceeds to determine the matter during the pendency of the matter earlier filed, it would offend the sub - judice rule. The petitioner did not provide to this court the pleadings in Petition E489 of 2022 or tell this court whether the petition has been determined or not.
40. Addressing the same issue in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2021])* eKLR the Supreme Court of Kenya stated as follows:
- “The term ‘sub-judice’ is defined in the Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same



subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

41. For a matter to offend the sub - judice rule, it has to be between the same parties, on the same subject matter. The petitioner in Petition E489 of 2022 is allegedly challenging the election of the Speaker of the Senate. In the instant petition, the same petitioner is challenging the election of the Speaker of the County Assembly of Migori. In these two offices, the qualifications of a Speaker as provided for under the Constitution and other relevant laws is different. For a person to qualify as a Speaker of the Senate, he or she is required to fulfil the qualifications under article 106(1)(a) of the Constitution while for a person to be considered for election as the Speaker of the County Assembly, the person should fulfil the qualifications under article 193(1) of the Constitution. The subject matter before the two courts is different and it is this court's considered view that the present petition does not offend the principle of sub - judice.
42. The respondents' objection is premised on the basis that the petition contravenes the provisions of article 162(2) of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. It was contended that the 3rd respondent is an employee of the County and therefore any issue which arises as to his eligibility to hold office should be canvassed in the Employment and Labour Relations Court. The respondent further argued that since the 3rd respondent held the office of the Speaker of Migori County Assembly, his assumption of office could only be challenged *via* an election petition and the appropriate jurisdiction would be the Magistrate's Court. For the aforesaid reasons, this court has no jurisdiction to hear and determine the instant petition.
43. The issue of jurisdiction is central and determinative as it is through it, a court is given its lifeline to determine the disputes before it. The Supreme Court of Kenya in Civil Application No 11 of 2016 Hon (Lady) Justice Kalpana H Rawal v Judicial Service Commission & others Ibrahim JSC while referring to the issue of jurisdiction, referred to the Nigerian decision Supreme Court of Nigeria Supreme Case No 11 of 2012 Ocheja Emmanuel Dangana v Hon Atai Aidoko Aliusman & 4 others where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows: -

“...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”
44. The Supreme Court further elaborated on the court's source of jurisdiction in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others [2012] eKLR as follows: -

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue



as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...where the Constitution exhaustively provides for the jurisdiction of a Court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

45. Therefore, once the issue of jurisdiction of a court is raised, it should be determined at the first instance and if the court finds that it has no jurisdiction, it should down its tools instead of undertaking proceedings “that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.” As it was held by the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR.

The jurisdiction of the High Court is set out in article 165(3) which states;

(3). Subject to clause (5), the High Court shall have —

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

46. article 177 of the [Constitution](#) outlines the composition of the County of Assembly as follows:-

177.

- (1) A county assembly consists of—
 - (a) a members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;



- (b) b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
- (c) c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
- (d) d) the Speaker, who is an ex officio member.

48. Article 178 of the Constitution further provides:-

- (1) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.
- (2) A sitting of the county assembly shall be presided over by –
 - (a) the speaker of the assembly; or
 - (b) in the absence of the speaker, another member of the assembly elected by the assembly.
- (3) Parliament shall enact legislation providing for the election and removal from office of speaker of the county assemblies.

49. The legislation enacted under article 178(3) of the Constitution is the County Government Act (CGA). Under section 2 of the CGA, a Speaker is defined as “the speaker of a county assembly elected under article 178 of the Constitution.”

51. The procedure for election of a Speaker of a County Assembly is provided for under section 21 of the Elections Act. The Act provides that the election shall be conducted in accordance with the Standing Orders of the County Assembly and the procedure set out in the First Schedule shall apply. section 21 of the Elections Act provides:-

- (1) The Speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.
- (2) For purposes of the election of the speaker of the county assembly after the first election under the Constitution, the procedure set out in the First Schedule shall apply.

52. Standing Order 6 of the Migori Standing Orders provides that the procedure for voting for the Speaker of the County Assembly shall be through a secret ballot. Standing Order 7 provides that a person is elected as a Speaker when he garners at least 2/3 of the votes by the members. If no candidate has 2/3 of the votes, the candidate (s) who receive the highest number of votes shall stand for elections in a further ballot and the candidate who receives the highest number of votes in the further ballot shall be the Speaker. Standing Order 12 provides that immediately after the election of the Speaker, the Clerk shall administer an Oath or Affirmation of Office to the Speaker in the presence of the Members of County Assembly. On the nature of knowing the person who has been validly elected as the Speaker of the County Assembly, Standing Order 10 provides that the results are to be declared. In some exceptional circumstances, where there is only one duly nominated and eligible candidate, that candidate shall be declared forthwith to have been elected speaker without any ballot. This is as per paragraph 14 of the Fourth Schedule to the Standing Orders.



53. If at all the Speaker of the County Assembly is elected through a secret ballot, the legal position is that the Clerk of the County Assembly is only expected to “announce” the winner. There is no legal requirement that the Speaker - elect of the County Assembly should be gazetted before assumption of office. Unlike all other elective posts during a general or by - election, the IEBC is mandated under section 39(1),(1A) and (1B) of the [Elections Act](#) to tally, determine, declare and publish the results of an election at the close of a polling station.
54. In referring to the mandate of the IEBC in an election process, Mrima J in [David Kerario Marwa v Boaz Awiti Okoth & another \[2017\]](#) eKLR held as follows:-
- “From the reading of the above provision of the law at least three distinct activities must be carried out at the end of voting by the Commission. They are the tallying of the votes, the announcement of the votes garnered by each candidate and who the winner of that election is and lastly the declaration of the results of that election. The declaration usually takes the form of the issuance of the Certificate to the winning candidate by the relevant returning officer and immediately time starts running for any challenge to that election (See the Supreme Court of Kenya decision in Petition No 10 of 2013 *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*).”
55. Majanja J in [Frank Mulisa Makola v Felix G Mbiuki & 4 others](#) [2013] eKLR held: -
- “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.”
56. Section 11 of the [CGA](#) provides for the removal of the Speaker in the following terms: -
- (1) A Speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the County assembly.
 - (2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all members of the county assembly stating the grounds for removal.
 - (3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9(4).
 - (4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.
57. The procedure for removal of other Members of County Assembly apart for the Speaker is found in article 194 of the [Constitution](#). The procedure is distinct from the procedure of removal of a Speaker of the County Assembly. The Speaker of County Assembly is removed by a resolution but for other Members of the County Assembly, for instance, their eligibility to hold office can be challenged through an election petition pursuant to section 86 of the [Election Act](#) when it is filed in the relevant elections court. Further, there is no requirement that the election of a Speaker to the office must be



challenged within a certain timeframe like other elective posts. Any person who wishes to challenge the election of Member of County Assembly is required to do so within 28 days from the date of declaration.

58. Section 75(A) of the [Elections Act](#) provides:-

“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

59. Rule 10 of the Election Petition Rules provides that the IEBC and the returning officer of the particular electorate should be party to an election petition. The Second Schedule of the Elections Act defines an electoral area as “ward”, “county” or “constituency.” section 78 of the [Elections Act](#) provides for the different amounts a petitioner should deposit in court as security for costs when challenging the different elective posts. If at all the procedure to challenge the holder of the office of the Speaker of Member of County Assembly was to be done in a designated election court, the question therefore becomes in which particular court should the petition be filed? What are the security for costs payable before the parties are heard in court? Which electoral area does the particular Speaker of the County Assembly whose office is being challenged represent?

60. In [Republic v Transitional Authority & another Ex-Parte Crispus Fwamba & 4 others](#) [2013] eKLR Korir J held:-

“One may then ask why the election of a speaker of a county assembly has been included in the Elections Act. In my humble view, such inclusion was just a matter of convenience. It can be compared to the inclusion of Order 53 in the Civil Procedure Rules. This Order which deals with judicial review applications has no nexus with the other Civil Procedure Rules. In summary, I express a guarded view that a dispute concerning the election of a speaker of a county assembly need not be addressed through an election petition. The best means for addressing such a dispute is through a judicial review application or constitutional petition. On the issue as to whether this application is properly before this court, I therefore find and hold that the applicants have knocked on the right door. This court has jurisdiction to entertain their application and I will proceed to consider the same.”

61. Bearing in mind the doctrine of separation of powers between the three arms of the government vis a vis the petitioner’s political rights under article 38 of the [Constitution](#), article 38 must be adjudicated in the context of the doctrine of separation of powers. In the case of [Frank Musila Makola](#) (*supra*) the court held:-

“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 organization of the county assembly...the County Assembly, as a legislative assembly, is entitled to regulate its own proceedings including the election of the Speaker.”

62. Nyamu, J (as he then was), Wendoh and Dulu, JJ in the case of [Peter O Ngoge v Francis ole Kaparo](#) (2007) eKLR when dealing with a matter on the election of the Speaker of the National Assembly had the following to say: -

“The invitation to the court to intervene in the matter of the election of a Speaker which is clearly regulated by the Standing Orders and which is required to be the first item of the agenda of a new session would in itself be a clear breach of the Constitution in that it is not the function of this court to interfere with the internal arrangements of Parliament unless they violate the Constitution. The



- doctrine of separation of powers as regards the internal arrangements of parliament demands that we do not interfere with and such internal arrangement. The internal arrangements are those normally regulated by the Standing Orders of the House. There cannot therefore be a valid cause of action based on what would clearly be a violation of the Constitution by the court if it was to intervene. The declarations and order sought in this regard would be plainly in contravention of the Constitution.
63. Moreover, it would result in the court interfering with the immunity granted to Parliament on such internal matters which have nothing to do with any violation of the Constitution. The powers, privileges and immunities of Parliament are provided for by the National assembly (*Powers and Privileges and Immunities Act* cap 16 Laws of Kenya). Our view is that the court would only be entitled to intervene to uphold the provisions of the Constitution. An application which in substance invites the court to violate a constitutional provision or doctrine of separation of powers is itself an abuse of the court process and is also incompetent and ought to be dealt with summarily.”
 64. Where there is unconstitutional exercise of legislative or executive powers, the National Assemblies (Parliament and Senate) of the County Assemblies cannot be shielded from judicial scrutiny in the name of separation of powers.
 65. Flowing from the above discourse, this court holds the view that a Speaker of the County Assembly cannot be equated to be a Member of the County Assembly. The procedure in which the Speaker and the Member of the County Assembly assume office is distinct and provided for clearly under the law. The Speaker is an *ex-officio* member who is elected by the Members of the Assembly while the Members of the County Assembly are a direct choice of the electorate.
 66. In addition, it cannot also be said that the Speaker becomes an employee of the County Assembly because they are elected to the office through a secret ballot, but eventually once he takes the Oath of Office, he becomes a public officer who is bound to serve the public bearing in mind the dictates of the Constitution. Unlike employees of other sectors in different institutions whose terms of employment are either causal, contractual or permanent, the same cannot be termed of a person who holds the office of Speaker Member of County Assembly. The Speaker of a County Assembly cannot be said to be subjected to the *Employment Act*. It is therefore a misconception of the law to equate a petition challenging the election of a Speaker of Member County Assembly to an election petition. The second limb on the jurisdiction of this court based on the question of the legal standing of a Speaker of the County Assembly is now well settled.
 67. The High Court therefore has jurisdiction under article 165(3)(b) of the *Constitution* to address matters of threat to or denial, violation, infringement of fundamental rights and freedoms guaranteed in the Bill of Rights. This court has jurisdiction to hear and determine the instant petition challenging the assumption of office of the 3rd respondent as the Speaker Migori County Assembly.
 68. On whether the petition meets the threshold of a constitutional petition, the petitioner claimed his various Constitutional rights under the Constitution have been violated. The jurisdiction of the High Court is as set out in article 165(3) (*supra*). article 165 (3) (b) provides that this court has the mandate to hear matters where there is an alleged breach or violation of an individual’s rights.
 69. Article 259 of the *Constitution* invites this court to interpret the Constitution in a manner that promotes its purpose, values, principles and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights.
 70. The petition before this court raises various issues of denial, violation or infringement of the petitioner’s fundamental rights and freedoms guaranteed in the Bill of Rights and as such it is an appropriate one to be handled by this Court. The petitioner’s main grievance is that he was barred



from participating in the election of the Speaker of County Assembly of Migori and his political rights under article 38 of the *Constitution* among others, were violated. The petitioner also seeks to have a declaration that the current Speaker of the Migori County Assembly, the 3rd respondent is illegally in office and should be declared as the Speaker.

71. A party who alleges violation of his rights must plead his or her case with precision as was held in the case of *Anarita Karimi Njeru* (*supra*). The court in *Timothy Njoya v Attorney General & another* [2014] eKLR held:-

“...The petitioner must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated, by whom and even state the article of the Constitution that has been violated and the manner in which it has been violated.”

72. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the Court of Appeal had this to say: -

“...The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, MR said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

73. I have patiently and painstakingly read through the petition. The petitioner stated the genesis of the petition and how in particular the actions of the 2nd respondent allegedly violated his rights. The petitioner also outlined the articles which have allegedly been infringed although not in a consequential manner. For instance, the petitioner pleaded that the 2nd respondent by failing to include his name as one of the qualified candidates, infringed his constitutional rights under article 38(3)(c) of the *Constitution* under paragraphs 4.9 and 4.10 of the petition. The petitioner has also pleaded that he tried to request for certain information through an email dated 26/9/2022 which did not elicit any response and therefore his right under article 47(2) of the *constitution* was infringed since this administrative action fundamentally affected him.

74. This court only takes issue with the verbosity of the petition and the drafting technic. It is generally difficult for the court to decipher and sift through the petitioner’s petition to identify whether his case makes any sense. While it is understandable that the petitioner is not a qualified Advocate of the High Court of Kenya, being a seasoned litigator, he ought to be in a position to master the art of expressing his views by getting straight to the point. The petitioner can also give the courts an easy time by making subheadings in his pleadings. Be that as it may, this court cannot fault the petition for failing to reach the constitutional petition threshold as enumerated in the case of *Anarita Karimi Njeru* (*supra*).

75. The petitioner claims that he was the only candidate who duly complied with the requirements to be nominated as the Speaker of the Migori County Assembly. It was his contention that following a Gazette Notice of 14/9/2022 that the Migori County Assembly will elect its Speaker at the first sitting, he collected his nomination papers on 16/9/2022. On 16/9/2022 and 17/9/2022 he secured the support of the East and North Kamagambo Members of County Assembly respectively. On



18/9/2022 he proceeded to the office of the 2nd respondent and submitted his nomination papers. The petitioner further claimed that at the time of submitting his papers, they were two other Candidates namely Gradus Oluoch Adis and Tom Mungai Ouma on the list.

Section 21(1) and (2) of the [Elections Act](#) provides:-

“The speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.

76. For the purpose of the election of the speaker of the county assembly after the first election under the Constitution, the procedure set out in the First Schedule shall apply.”
77. Article 178(1) of the [Constitution](#) provides that a Speaker of the County Assembly is elected by County Assembly Members from persons who are not members of the Assembly. Under Standing Order 5(3) a person who qualifies to be elected as a Speaker of the Assembly is one who is also suitable to be elected as a Member of County Assembly under article 193 of the [Constitution](#). A person who wishes to vie for Speaker of the Member of County Assembly should fulfil the following requirements:-
 - a) Be a registered voter.
 - b) Satisfy educational, ethical and moral requirement prescribed in the Constitution or an Act of Parliament.
 - c) Be nominated by a Political Party or;
 - d) Be an independent candidate supported by at least 500 voters in the electorate concerned.
 - e) Fill the requisite nomination papers.
 - f) Have at least two Members who support his or her candidature and a declaration by them that the person is qualified as a Speaker.
 - g) Submit their curriculum vitae.
78. In addition to the above, the nomination application form stipulates that the following documents are mandatory and should accompany the nomination form of the interested candidates:-
 - i. Valid Certificate of Good Conduct from the National Police Service;
 - ii. Certificate from the Higher Education Loans Board where applicable;
 - iii. Tax Compliance Certificate from the Kenya Revenue Authority/Copy of the Personal Identification Number (PIN);
 - iv. Clearance Certificate from the Ethics and Anti - Corruption Commission;
 - v. Copy of the National Identity Card;
 - vi. Clearance from the Credit Reference Bureau (CRB);
 - vii. A duly filled nomination form;
 - viii. Curriculum Vitae;
 - ix. Certificate of clearance from the Independent and Electoral Boundaries;
 - x. Duly completed Nomination form.



79. Standing Order 5(5)(a) and (b) requires that upon close of the nomination period, the Clerk shall publicize the names of all persons who qualified and make available copies of their curriculum vitae. Standing Order 5(6) provides that the ballot paper should be prepared at least 2 hours before meeting of the County Assembly which shows all the names of the qualified candidates.
80. In her response, the 2nd respondent did not attempt to lead this court and show that she complied with the laid down procedure in the Constitution, the relevant legislation and the Migori County Assembly Standing Orders. The 2nd respondent being the officer responsible for conducting the elections of the office of the Speaker of the County Assembly, filed her response in a rather lucklustre manner and did not give this petition the seriousness it deserves. Even if in her view, this court lacked the requisite jurisdiction to hear and determine the instant petition or her misgivings on the person of the petitioner whom she termed has a litigious tendencies; the onus of proving that the process was lawful lay on her.
81. It is quite surprising that the 2nd respondent did not try to defend her actions or inactions to demonstrate that she followed the laid down procedure before the election of the Speaker of the County Assembly of Migori. The 2nd respondent did not even at the very least file a copy of the ballot paper that was used in the elections to justify why the five candidates therein made it to the ballot and not the others. The 2nd respondent did not file a list or the register which she maintained to show that all the interested persons submitted their papers for the nomination on time.
82. I have carefully considered the documents produced by the petitioner, annexed to his petition. The petitioner submitted the following documents:-
- i. Certificate of registration of county elections from the Independent and Boundaries Commission clearing the petitioner to run as a Member of County Assembly on 9/8/2022;
 - ii. Details of voters from the Independent and Boundaries Commission website;
 - iii. A self declaration form from the Ethics and Anti-Corruption Commission dated 25/5/2022;
 - iv. Application form for the position of Speaker Migori County dated 16/9/2022;
 - v. Nomination paper for election to the office of Speaker of the County Assembly Migori dated 16/9/2022;
 - vi. Affidavit of candidate for election as Speaker of the County Assembly dated 16/9/2022;
 - vii. Curriculum Vitae;
 - viii. Copy of National ID;
 - ix. Copy of Personal Identification Number (PIN);
 - x. Compliance from the Higher Education Loans Board dated 2/3/2022;
 - xi. Police Clearance Certificate dated 23/1/2020;
 - xii. Statutory declaration for purposes of nominations for parliamentary and county elections dated 26/8/2022;
83. From the mandatory checklist of the documents which should accompany the nomination form of a candidate who wishes to vie for the position of Speaker County Assembly, the petitioner failed to submit a Tax Compliance Certificate from the Kenya Revenue Authority, A Clearance Certificate from the Credit Reference Bureau and a Valid Certificate of Good Conduct from the National Police. The Certificate of Good Conduct produced is the one dated 23/1/2020. It is common knowledge that



a Certificate of Good Conduct from the Directorate of Criminal Investigation must be taken out on a yearly basis for it to be a valid certificate. The petitioner cannot now say that he believes that he was the only eligible candidate who complied with the law for him to have been declared as the Speaker - elect. The petitioner has not demonstrated to this court how he believes that the 3rd respondent or all other interested candidates failed to meet the mandatory minimum requirement. The 2nd respondent is not required by law to publish the documents of the persons who have met or have not met the mandatory requirements.

84. The petitioner alleged that the 2nd respondent infringed his rights under article 38(3)(c) of the Constitution to become a candidate for public office. As I have outlined hereinabove, from the documents presented by the petitioner in this court being the same ones submitted to the office of the 2nd respondent, did not meet the threshold for the mandatory documents required for him to be cleared as a candidate for the position of Speaker of the County Assembly of Migori. He therefore cannot claim that he was unfairly locked out of the process of which he did not meet the threshold. It is this court's view that the petitioner's right under article 38(3)(c) of the Constitution was not violated.

85. The petitioner also claimed that his rights under article 47(2) of the Constitution on the Fair Administrative Action right were contravened. The said article provides:-

“(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.”

86. The petitioner pleaded under paragraphs 4.19 - 4.22 of his petition that prior to the 2nd respondent making her decision to decide that he is not a fit candidate to participate in the elections of the Speaker of County Assembly, she ought to have communicated the decision to him. In the absence of the communication, the petitioner alleged that his rights under article 47(2) were contravened. This court has demonstrated that the 2nd respondent is not bound under the law to communicate to each and every party of her decision to exclude them from being in the ballot paper prior to participating as candidates in the elections of the Speaker of the County Assembly.

87. However, the 2nd respondent being a public officer, when called upon by the members of the public to give an account of her actions, is duty bound to do the same as per the Constitution. Even if the Standing Orders of the Migori County Assembly do not expressly provide for communication to unsuccessful candidates, once she is called upon to exercise her Constitutional duties, she ought to have done the same expeditiously. In Charles Kaindo Kuria & 20 others v Technical University of Kenya [2019] eKLR the court held:-

“Fair administrative action, as per article 47 of the Constitution of Kenya 2010, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. article 47 of the Constitution codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.”



88. The petitioner, believing that he had complied with the requirements of being a candidate nominated for the position of Speaker of the Migori County Assembly but he was excluded from the ballot, had a right to know why he was excluded and he requested for the information via a letter dated 26/9/2022 addressed to the office of the 2nd respondent. The 2nd respondent did not respond to the letter and it is this court's view that the petitioner's rights under article 47 of the Constitution to be given reasons for the administrative actions were contravened.
89. The petitioner also alleged that he was unfairly discriminated against and his rights under article 27 of the Constitution were infringed. The petitioner submitted that the action of the 2nd respondent to call one of his proposers to withdraw his endorsement from him amounted to discrimination but they have not been proved. It would have been beneficial to this court had the petitioner called the North Kamagambo MCA as a witness. Under this, I find that the alleged infringement of article 27 has not been proved.
90. The petitioner also stated that his right to fair hearing under article 50 of the Constitution was infringed since he was not able to file the dispute in time pursuant to article 88(4)(e) of the Constitution to the appropriate independent body or tribunal. On this issue, this court has extensively addressed itself on its jurisdiction. The petitioner already approached the appropriate forum through a Constitutional petition. He therefore cannot claim that his right to fair hearing was infringed.
91. article 196(1)(a) and (b) of the Constitution provides:-
- “(1) A county assembly shall—
- (a) a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and
- (b) b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.”
92. Standing Order 5(4) uses the word “shall” and therefore makes it mandatory that the 2nd respondent maintains a register which shows the date and time when each of the candidate's nomination papers were received and the 2nd respondent should ascertain if such a candidate is qualified to be elected under article 193 of the Constitution.
93. Standing Order 5(5)(a) and (b) mandates the 2nd respondent immediately after the closure of the nomination period to publicize to all members the list showing qualified candidates and make available copies of the curriculum vitae of the qualified members. Standing Order 5(6) provides that at least 2 hours before the meeting of the County Assembly to undertake the voting process, the 2nd respondent must prepare ballot papers showing the names of all the candidates.
94. The Gazette Notice inviting members interested in the position of Speaker of the Migori County Assembly was published on 14/9/2022 and the first sitting would be on 21/9/2022. Standing Order 5(2) states that persons who are interested in the seat of the Speaker of the County Assembly should return their nomination papers at least 48 hours before the time scheduled for the first sitting of the Assembly. The first sitting being on 21/9/2022, the persons interested in the seat of the Speaker of the County Assembly ought to have submitted their nomination papers on or before 18/9/2022. The 2nd respondent has not endeavoured to demonstrate to this court that this procedure which is mandatory under the Standing Orders of the County Assembly was followed.



95. The 2nd respondent has also not demonstrated to this court that in conducting the nomination exercise of the persons qualified to be Speakers of the Migori County Assembly leading up to the elections, she employed openness, transparency and public participation as required under article 196 of the Constitution. The actions of the 2nd respondent are shrouded in mystery on how she handled the exercise in a devolved forum which directly affects the well - being of the people of Migori County.
96. article 196 of the Constitution provides that in discharging its mandate, the County Assembly must be guided by the spirit of openness and transparency. The election of the Speaker is one of the businesses of the County Assembly which should have been conducted in an open manner. This court fails to see how the office of the 2nd respondent properly discharged its mandate in accordance with article 196 of the Constitution and Standing Order 5 of the Migori County Assembly. The dignity of the Constitution must be upheld and a mockery made out of it, cannot be sanitized or entertained by the court.
97. In as much as the County Assemblies have their own internal procedures which the court should not interfere with, when it is established that the Constitution (which is the supreme law of the land which binds all persons and all State Organs at both levels) is infringed, the Court should not hesitate to interfere with the unconstitutional actions of the person or organs which have infringed the Constitution. article 23 of the Constitution calls upon this court to uphold and enforce the Bill of rights. Article 23(3) of the Constitution also provides that this court can grant appropriate reliefs in addition to the ones listed therein. It is this court's humble view that the elections of the Speaker of the County Assembly of the Migori County, being the 3rd respondent cannot be termed to have been conducted lawfully.
98. As I come to the end of this judgement, the petitioner filed an application dated 30/1/2023 asking for orders that this petition be placed before another appropriate court for delivery of judgement before the lapse of 90 days as per section 8 of the Fair Administrative Action Act. The petitioner was apprehensive that the lapse of 90 days which was on 6/2/2023 would render this petition moot as this court was on compassionate leave. The petitioner should understand that what he filed before this court is a constitutional petition and there is no time limit in determining constitutional petitions. The application and the apprehension was unnecessary.
99. In the end, I find that the petition partly succeeds and the following orders do issue:-
- i. The Petitioner failed to prove that he was the only qualified Candidate to be nominated as Speaker for Migori County Assembly.
 - ii. A declaration be and is hereby made that the rights of the Petitioner under article 47 (2) of the Constitution by the 2nd respondent was infringed in that he was denied information.
 - iii. A declaration be and is hereby issued quashing the election of the 3rd Respondent Charles Owino Likowa as the Speaker of the County Assembly of Migori County for the 2nd Respondent's failure to comply with Standing Orders 5(2), 5(4), 5(5) of the Migori County Assembly Standing Orders and article 196 of the Constitution.
 - iv. Within 21 days from today, fresh elections for the Speaker of Migori County be conducted starting from the submitting of nomination papers of interested persons.
 - v. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 21ST DAY OF FEBRUARY, 2023

R. WENDOH



JUDGE

Judgement delivered in the presence of;

Aluochier the Petitioner.

Mr. Obiero for the 1st , 2nd and 3rd Respondents.

Nyauke - Court Assistant

