REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima J.)

CONSTITUTIONAL PETITION NO. E536 OF 2021

-BETWEEN-

ERIC OMARI WANYAMAH.....PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC).....RESPONDENT

RULING NO. 1

Background:

1. By a Petition dated 9th December, 2021, the Petitioner herein, *Eric Omari Wanyamah,* challenged the constitutionality of Section 43(5) of the Elections Act, 2011 (hereinafter referred to as ***'the impugned section'***).

2. In response to the Petition, the Respondent herein, The Independent Electoral and Boundaries Commission, filed a Notice of Motion dated 24th December, 2021.

3. The application sought the following orders: -

> *1. The Petitioner's petition dated 9th December, 2021 be struck out for being res judiata;*
>
> *2. In the alternative to (1) above, the petitioner's Petition dated 9th December, 2021 be stayed pending the hearing and determination of* ***County Government of Embu & Another Vs Eric Cheruiyot & 15 Others*** *before the Court of appeal;*
>
> *3. Costs of this application be in the cause.*

4. The application was supported by an Affidavit sworn by one *Chrispine Owiye*, the Respondent's Acting Director; Department of Legal and Public Affairs on 24th December, 2021.

5. The Respondent also filed written submissions dated 3rd January, 2022 and a List of Authorities.

6. The application was opposed by the Petitioner. To that end, the Petitioner filed a Replying Affidavit he swore on 24th December, 2021 as well as written submissions dated 4th January, 2022.

Analysis and Determinations:

7. Having carefully considered the application, the response thereto, the submissions filed and the decisions referred to, I hereby discern the following issues for determination: -

> *(a) Whether the Petition is res judicata;*

(b) If the answer to (a) above is in the negative, whether the Petition be stayed on the basis of the doctrine of sub-judice;

(c) Costs.

8. I will begin with a consideration of the first issue.

· **Whether the Petition is *res judicata*:**

9. In discussing this issue, I will look at the parties' cases.

The Respondent's case:

10. The Respondent posited that since the enactment of impugned section, the issue of constitutionality thereof has been litigated in various Courts and facets including: -

a. In 2012, the Constitutional and Human Rights Court was called upon in *Charles Omanga & Another V Independent Electoral & Boundaries Commission & Another* [2012] eKLR to and determined that the impugned provision was constitutional. That the decision was ever appealed against.

b. In 2014, the Constitutional and Human Rights Court was called upon again in *Evans Gor Semelang'o v Independent Electoral and Boundaries Commission & Another* [2014] eKLR to determine whether the provisions of Section 43(5) of the Elections Act, 2011, were applicable where a *nominee* was a 'free citizen'. The Court agreed with the interpretation of *Charles Omanga* in *obiter,* but held the section did not apply to the Petitioner as he was no longer a public official.

c. In 2014, the Constitutional and Human Rights court was again called upon in *Kenya Union of Civil Servants & 2 Others V Independent Electoral and Boundaries Commission & Another* [2015] eKLR to determine the Constitutionality of Section 43(5) of the Elections Act *strictly in relation to by-elections.*

d. In 2017, Eric Cheruiyot and Others filed two ELRC Petitions challenging the Constitutionality of *Section 43(5) of the Elections Act* on grounds of infringement of right to participate in elections, discrimination, exclusion, and labour rights amongst others. In summation, the ELRC Court allowed the Petition and declared Section 43(5) of the Elections Act unconstitutional. The Respondents appealed vide ***Civil Appeal Nos. 119 and 139 of 2017*** on the premise that the issue of interpretation of constitutionality of the impugned Section was *res judicata,* having been determined in *Charles Omanga in finality,* and that the ELRC accorded itself jurisdiction vested on the High Court. In the preliminary, the Court of Appeal granted a stay of the execution of the judgment of the ELRC pending appeal.

11. The Respondent posited that following the foregoing, various Courts, albeit unaware of the Appeal, have proceeded to apply the judgment in *Eric Cheruiyot* like in *Kennedy Irungu Ngodi & Another V Mary Waithera Njoroge* [2021] eKLR; to the effect that the issue of unconstitutionality of the impugned section had been upheld without any appeal thereto.

12. The Respondent drew the Court's attention to *Section 7* of the *Civil Procedure Act, 2010,* which provides for the criteria of whether a matter is *res judicata*. It was argued that is settled that the Applicant must demonstrate that: -

(a. the issue in a current suit must have been decided by a competent court;

(b. it must be directly or substantially in dispute between the parties in the suit;

(c. the parties in the former suit should have been the same in the current suit or parties under whom or any of them claim or are litigating.

13. According to the Respondent, the *Charles Omanga* Petition was filed by public-interest litigants challenging the constitutionality of the impugned section. In their description, the Petitioners therein averred that that they were *'ordinary citizens'* litigating on public interest. The Petitioners then averred that they were concerned that the pool of their desired candidate would be limited by the application of the impugned section, thereby curtailing their right to participate in free and fair elections, amongst others.

14. The Respondent herein argued further that the Petitioners in *Charles Omanga* case averred that the requirement for resignation under the impugned section *'would affect the exercise of their rights under Article 38 of the Constitution to vote in a free and fair, even playing field and to vote for a candidate or candidates of their choice and be voted for if the wish to vie for positions.'*.

15. According to the Respondent, the Court in considering the Petition concluded that the wholesome issue for determination was whether Section 43(5) of the Elections Act, 2011 was inconsistent with the rights and fundamental freedoms under the Constitution, particularly Article 27 on equality and non-discrimination.

16. It was the Respondent's submission that there is commonality of the Petitioners in *Charles Omanga* and the current Petitioner is that both Petitions were filed by persons who described themselves as '*ordinary citizens'* commonly concerned that their pool of candidates is limited by the impugned section and that the impugned section falls short of *Article 27* and *38* of the Constitution and therefore unconstitutional, hence *res judicata*.

17. The Respondent further submitted that Courts have distinguished the requirement for *res judicata* in civil suits and Constitutional matters. In relation to Constitutional Petitions, it was submitted that the Petitioner need not be a direct party to the previous dispute, but it was sufficient to demonstrate that the initial dispute was one of public interest thereby there is a presumption that the dispute was litigated on behalf of the common good.

18. It was the Respondent's further submission that the above argument was buttressed by Court of Appeal in *John Njue Nyaga v Attorney General & 6 Others [*2016] eKLR where the Court held that: -

> *…. We are equally persuaded by the words of the Court of Appeal of Tanzania in LOTTA VS TANAKI& OTHERS [2003] 2 EA 556 (CAT) where the Court held as follows with regard to the doctrine of res judicata;*
>
> *Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit". Further that "a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit"*. See also *E.T VS ATTORNEY GENERAL &ANOTHER (2012) eKLR*
>
> *… makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Further that "a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit.*

19. To the Respondent, the above holding is in consonant with *Explanation 6* under *Section 7 of the* Civil Procedure Act which states that *'Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating'*.

20. The Respondent urged this Court to uphold the objection on the basis of the doctrine of *res judicata* and to strike out the Petition.

The Petitioner's case:

21. The application was vehemently opposed by the Petitioner. The Petitioner concurred that as a general legal principle once a matter has been decided by a Court of competent jurisdiction, the same matter cannot be reopened.

22. Referring to Section 7 of the Civil Procedure Act, 2010, the Petitioner argued that for a matter to be *res judicata* then the same must attain the threshold of having already been decided by a Court of competent jurisdiction in a matter that involved same parties, or parties litigating under the same title.

23. He argued that in this instance, the Petitioner had also pleaded that the issue of constitutionality of impugned section had been previously determined in finality by the Constitutional Court and Human Rights Court in *Charles Omanga* where the constitutionality of the impugned section was upheld. The Petitioner, however, was of a contrary position.

24. He argued that in the *Charles Omanga* case, the parties were different from the Petitioner herein as the current Petition was presented by a voter apprehensive that enforcement of the impugned section that required resignation of public officers will infringe on his personal right to choose a particular candidate of his choice.

25. To the contrary, the Petitioner herein argued that the Petitioner in the *Charles Omanga* case also challenged the unconstitutionality of resignation at least 7 months and that the same infringed on the Respondent's ability to conduct a free and fair election and that the Respondent cannot exercise its mandate as an impartial arbiter or referee of the elections. The Petitioner argued that the position therein was quite different from the present Petition since as much the same challenges the constitutionality of impugned section it is to the extent that the Petitioner's constitutional right to vote a candidate of their choice was infringed.

26. The Petitioner argued that in *Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another* [2015] eKLR the same *Lenaola, J* (as he then was) held that the impugned section was unreasonable in limiting the rights of public officers under Article 38(3)(c) of the Constitution to vie in a by-election.

27. Responding to the decision in *Evans Gor Semelang'o v Independent Electoral & Boundaries Commission & another* [2014] eKLR, the Petitioner argued that the decision did not apply to the circumstances of the Petitioner herein since it dealt with an instance where a person was barred to contest in a by election on the premise that he had not resigned as a public officer.

28. The Petitioner re-emphasized that the current Petition as different in that raised a different issue since its brought by a voter in person who was apprehensive that his right to choose a candidate of his own choice may be limited by dint of the restriction in the impugned section.

29. The Petitioner submitted that there is confusing jurisprudence on the issue of constitutionality of the impugned section and urged this Court on the basis of Article 165(1)(b) and (d) of the Constitution to determine whether a right has been infringed and to interpret the Constitution on the conflicting positions of the impugned section.

30. In the end, the Petitioner urged the Court to disallow the objection based on *res judicata* and to proceed to determine the dispute.

The Analysis:

31. The doctrine of *res judicata* is not novel. Its genesis is in *Section 7* of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya which provides that: -

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

32. The Supreme Court in a decision rendered on 6th August, 2021 in ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR*** comprehensively dealt with the different facets making up the doctrine of *res judicata*.

33. In the first instance, the Apex Court framed the issues for determination as follows: -

> a) *Did the High Court procedurally consider the plea of res judicata?*
>
> *b) Did the finding by the High Court on res judicata infringe on the Petitioner's right to fair hearing condemning them unheard?*
>
> *c) Were the learned Judges of the Court of Appeal justified in holding that the doctrine of res judicata applied to the current case; was the Paluku case the same as the Appellants' herein?*
>
> *d) Is this doctrine of res judicata applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?*
>
> *e) If the doctrine of res judicata is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases?*
>
> *f) What constitutes such "rarest and clearest" of cases?*
>
> *g) Who bears the costs of the suit.*

34. On the procedure for raising the plea of *res judicata*, the Supreme Court alluded to the position that the plea is anchored on evidential facts and that such facts ought to be properly raised in a matter. In that case, the plea of *res judicata* had been raised by way of Grounds of opposition and in the Replying Affidavit.

35. The Court, in dismissing the argument that the issue was improperly raised before Court, stated as follows: -

> *[53] Instead, and contrary to the Appellants submissions, the plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of JR No. 130 of 2011 was introduced through an affidavit to bolster the plea of res judicata.*
>
> *[54] It is further evident that the Appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the Court accorded the Appellants the two justiciable elements of fair hearing: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.*
>
> *[55] This ground of appeal must therefore fail*.

36. Applying the foregoing to this case, this Court finds that the plea of *res judicata* was properly raised by way of a Notice of Motion. The application was heard *inter partes* by way reliance on the application, affidavits, written submissions and oral highlights on the submissions.

37. On whether the doctrine of *res judicata* applies to constitutional Petitions, the Supreme Court endeavoured an extensive discussion and comparative analysis in various jurisdictions. It also captured the various opposing schools of thought on the issue.

38. In the end, the Court found that the doctrine, rightly so, applies to constitutional Petitions. This is what the Court partly stated: -

> *81. We reaffirm our position as in the **Muiri Coffee case** that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively……*
>
> *[82] If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.*

39. The Apex Court went ahead and rendered itself on the threshold for proving the applicability of the doctrine. The Court stated as follows: -

[86] We *restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:*

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action

40. On the commonality of the parties, the Court noted as follows: -

[*93]* ***The*** *commonality is that the Appellants herein and the Applicants in Jr 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.*

41. In dealing with the contention as to whether the issues raised in the two suits therein were directly and substantially the same, the Supreme Court noted that the initial suit was instituted by way of a judicial review application whereas the subsequent suit was by way of a constitutional Petition. The Court also noted that the issues raised in the constitutional Petition were more than those decided in the judicial review application.

42. The Supreme Court disagreed with the Court of Appeal and found that the doctrine was not applicable in the matter. The Court held that: -

> ***[97]*** *From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same.* ***However****, the Appellants herein predicated their petition on inter alia grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the Respondents contravened Article 2. They further alleged that the Respondents herein purported to usurp to the role of Parliament and in doing so contravened Articles 94(5) and (6) of the Constitution. They further alleged that the FERI and COD certificates threatened to infringe their right to property under Articles 40(1)(a) and (2)(a) when the Respondents threatened to arbitrarily deprive them of their property.* ***The Court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues.*** *We therefore find that the principle of res judicata was wrongly invoked on this ground.* (emphasis added).

43. On the competency of the Court deciding the matters in issue, the Supreme Court noted the close relationship between the issue as to whether the current suit had been decided by a competent court and whether the matter in dispute in the former suit between the parties was directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.

44. The Apex Court had a lengthy discussion on the matter. It made reference to several decisions and in the end rendered itself as follows: -

> *[107] The Court when determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the Court can do when determining a constitutional petition. Further the Court is further empowered to grant not just judicial review orders but any other relief is deems fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This Court in its decision in* ***Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa*** *(Amicus Curiae) [2021] eKLR went ahead to reaffirm use of structural interdicts and supervisory orders to redress the violation of a fundamental right in order to allow the development of Court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.*
>
> *[108] We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.*
>
> *[109] The Court in hearing a constitutional petition may very well arrive at the same conclusion as the Court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the Court will be playing fairly different roles.*
>
> *[110] We consequently arrive at the conclusion that the Court of Appeal erred in holding that the doctrine of res judicata applied to the current case. The Court of Appeal should have at that point found that the High Court was wrong in its conclusion.*

45. The Supreme Court also discussed two exceptions to the doctrine of *res judicata*. The Court stated as follows: -

> ***[84]*** *Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party*

seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

[85] *In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.*

46. The Supreme Court had earlier expressed itself on the doctrine of *res judicata* in ***Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*** [2014] eKLR where it delimited the operation of the doctrine of *res-judicata* in the following terms;

[317] The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.

[318] This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:

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

[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.

[320] So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.

[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. ***Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route"*** *(Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).*

[334] Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."

[352] The Judicial Committee of the Privy Council, in Thomas v. The Attorney-General of Trinidad and Tobago, [1991] LRC (Const.) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, Daryao & Others v. The State of UP & Others, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of res judicata. The Indian Court also rejected the notion that res judicata could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:

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

[353] Kenya's High Court recently pronounced itself on the issue of the applicability of res judicata in constitutional claims. In ***Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others,*** *High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, Lenaola J. (at paragraph 64) thus stated:*

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

[354] On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.

47. The Court of Appeal in ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** (which decision was overturned by the Supreme Court) also, and so correctly, discussed the doctrine of *res judicata* at length. The Court stated in part as follows: -

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

48. Having endeavored an elaborate discussion on the doctrine of *res judicata*, this Court will now apply the foregoing to the matter at hand.

49. I will begin with unraveling the commonality of the parties. To be able to do so, a look at the two cases in issue is inevitable. The cases are the current Petition and ***Charles Omanga & Another V Independent Electoral & Boundaries Commission & Another*** [2012] eKLR.

50. The current suit was initiated by one Eric Omari Wanyamah. The Petitioner pleaded that he brought the Petition on his own behalf and in public interest. The Petitioner further alluded in paragraph 14 of the Petition as follows: -

14. The Petitioner is a youth and most Aspirants who are prejudiced by Section 43 (5) of the Elections Act, 2011 are mostly youth since the requirement to resign affects their financial capability to even contest elections and fend for themselves. The youth are at their initial stages of development and have not secured proper financial capability and hence requiring them to resign is highly prejudicial, it is an impediment to economic development and offends Article 55 (b) (c) of the Constitution of Kenya, 2010 where the

state is required to take measures to ensure that the youth have opportunities to associate, be represented and participate in political, social, economic and other spheres of life as well as access to employment.

51. The Petitioners in the *Charles Omanga* case (supra) were Charles Omanga and Patrick Njuguna. According to the Court (Lenaola, J as he then was) *'The Petitioners have styled themselves "**individual ordinary Kenyans**" and members of an entity known as the "Kenya Youth Parliament" whose business is "**in educating and empowering Youth and Kenyan citizens on issues concerning the Constitution and Constitutional implementation**".*

52. The Court in fact lauded the Petitioners in the *Charles Omanga* case (supra) as hereunder: -

12. Firstly, the Petitioners should be lauded for being vigilant and ensuring that whenever an opportunity arises, they should place before this Court important constitutional questions for interpretation. Our nascent Constitution requires warriors of constitutionalism and crusaders for its implementation.

53. In both Petitions, the Independent Electoral and Boundaries Commission, the Respondent herein, was a common Respondent.

54. There is no doubt that the parties in the *Charles Omanga* case were acting in public interest. Therefore, to the extent that the Petitioner in the current suit and those in the *Charles Omanga* case (supra) were all acting in public interest, this Court finds in favour of the commonality of the parties.

55. The next consideration is whether the issues raised in the two suits therein were directly and substantially the same.

56. The Petitioners in the *Charles Omanga* case (supra) in challenging the constitutionality of the impugned section prayed for the following reliefs: -

(a) A declaration that the provisions of Section 43(5) of the Election Act, 2011 requiring the resignation of State officers seven (7) months prior to the elections while at the same time excluding other categories of State or public officers is discriminatory, accords an unfair advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional.

(b) A declaration that the requirement under Section43(5) of the Election Act, 2011 impacts or affects the exercise of the right of the Kenyan citizens to a free and fair elections where the electorate including the Petitioners' can fully and without let or hindrance exercise the political rights under Article 38 of the Constitution.

(c) A declaration that the 1st Respondent herein; the Independent Electoral and Boundaries Commission cannot properly exercise its mandate as an impartial arbiter or referee of the elections as envisaged under Articles 81 and 88(4) of the Constitution under the circumstances in which some of the prospective candidates deemed to be in publicservice are required to resign seven (7) months prior to the elections.

(d) An Order of Injunction permanently suspending the operations or implementation of Section 43(5) of the Elections Act, 2011 and restraining the 1st Respondent from enforcing the requirement for State officers/public officers to resign seven (7) months prior to elections if they intend to take up or participate in parliamentary or other elections under the current Constitution.

57. In dealing with the Petition, the Court framed the issues for determination as follows: -

(1) Whether the provisions of Section 43(5) of the Election Act, 2011 requiring the resignation of State officers seven (7) months prior to the elections while at the same time excluding other categories of State of public officers is discriminatory, accords an unfair advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional

(2) Whether the requirement under Section 43(5) of the Constitution impacts or affects the exercise of the right of the Kenyan citizens to a free and fair elections where the electorate including the Petitioner can fully and without let or hindrance exercise the political rights under Article 38 of the Constitution.

(3) Whether the 1st Respondent herein; the Independent Electoral and Boundaries Commission can properly exercise its mandate as an impartial arbiter or referee of the elections as envisaged under Articles 81 and 88(4) of the Constitution under the circumstances in which some of the prospective candidates deemed to be in public service are required to resign seven (7) months prior to the elections.

58. In the present case, the Petitioner in challenging the constitutionality of the impugned section prayed for judgment in the following manner: -

i. A declaration be and is hereby issued that Section 43(5) of the Elections Act, 2011 is unconstitutional to the extent that it contradicts the provisions of Article 38(1) (2)(3) as read together with Article 81(a)(d) of the Constitution of Kenya, 2010

ii. A declaration be and is hereby issued that the implementation of Section 43(5) of the Elections Act, 2011 by the Respondent is discriminatory and violates the aspirants who are public officers' right to equality and freedom from discrimination thereby offending Article 27 of the Constitution of Kenya, 2010 in so far as it discriminates against public officers vis-à-vis other incumbent elected members

iii. The respondent be and is hereby directed to accept the registration documents of aspirants who are public officers desirous to run for elective positions in the general elections 2022 provided that they have complied with all the registration requirements and that resignation from public office at least six months to the general election will not be a mandatory requirement.

iv. Any such further and/or other relief that this Honourable Court may deem fit and just to grant in the interests of justice and that may become apparent and necessary in the course of these proceedings;

v. The costs of the petition be borne by the respondents.

59. In a bid to distinguish the current case from the *Charles Omanga* case (supra), the Petitioner herein argued that the instant proceedings were brought by a voter whose right to elect a representative of his choice was curtailed by the impugned section as opposed to the Petitioners in the *Charles Omanga* case (supra) where the issue was whether the impugned section infringed on the Respondent's ability to conduct a free and fair election and whether the Respondent would exercise its mandate as an impartial arbiter or referee of the elections. It was also submitted that the Petitioners therein were employees.

60. When Counsel for the Petitioner made the above submission, this Court asked him whether he had read the decision in the *Charles Omanga* case (supra) and Counsel answered in the affirmative. However, from his submission it was clear that Counsel may not have properly so understood the gist of the said decision or he may have confused the decision in *Charles Omanga* case (supra) with that of ***Eric Cheruiyot & 15 Others Vs Hon. Independent and Electoral Boundaries Commission & Others*** [2017] eKLR wherein the Petitioners brought the action as employees who were allegedly affected by the impugned section.

61. A careful consideration of the issues in the *Charles Omanga* case (supra) and the current case reveal the fact that the issues in both cases were indeed similar in all four corners.

62. In both cases, the main issue was the alleged discriminatory nature of the impugned section to the extent it affected the rights under Articles 27, 38 and 81 of the Constitution. As such, this Court finds and hold that the issues raised in the *Charles Omanga* case (supra) and the current case were directly and substantially the same.

63. As to the competency of the Courts in dealing with the *Charles Omanga* case (supra) and the current Petition, this Court finds that both cases were initiated by way of Constitutional Petitions.

64. The competency of the High Court in dealing with constitutional Petitions was reiterated by the Supreme Court in ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others*** case (supra) where the Court stated that *'the High Court in exercising its mandate to hear Constitutional petitions, it does so pursuant to Articles 22, 23 and 165 of the Constitution'*.

65. The High Court, being a competent Court, found the impugned section to be constitutional in its decision rendered on 2nd August, 2012. Counsel for the Respondent submitted that the decision was never appealed against. Counsel for the Petitioner did not controvert the position.

66. As there are no pending proceedings regarding the *Charles Omanga* case (supra), then the decision thereof is deemed a final judgment on the impugned section.

67. Having said so, this Court remains alive to the proceedings before the Court of Appeal in Civil Appeal No. 139 of 2017: ***County Government of Embu & Another V Eric Cheruiyot & 15 Others*** (now consolidated with Civil Appeal No. 119 of 2017: *Public Service Commission & 3 Others V Eric Cheruiyot & 17 Others)* where a subsequent decision by the Employment and Labour Relations Court declaring the impugned section unconstitutional was challenged.

68. Even so, the Court of Appeal granted a stay order hence reverting to the position that the impugned section remains constitutional.

69. Be that as it may, on the basis of the Supreme Court's finding in ***Republic v Karisa Chengo & 2 others*** [2017] eKLR on the jurisdictional uniqueness of the High Court and the Courts of equal status, the pendency of the proceedings before the appellate Court does not negate the fact that the current Petition is *res judicata* Charles Omanga case (supra).

70. Given that this Court is persuaded that the doctrine of *res judicata* applies in this matter, a consideration of the other issue as to whether the Petition is *sub-judice* does not arise since a matter cannot be both *res judicata* and *sub-judice* at the same time.

Costs:

71. The Petitioner mounted a vicious opposition to the Notice of Motion dated 24th December, 2021. He filed a Replying Affidavit and submissions. The Petitioner affirmed his opposition even after the Court sought to know whether Counsel for the Petitioner had interacted with the *Charles Omanga* case (supra).

72. In view of the foregoing and on the basis of the Supreme Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** SC. Petition No. 4 of 2012: [2014] eKLR, this Court finds that costs in this matter ought to be awarded to the Respondent.

Disposition:

73. Flowing from the foregoing discussion, this Court makes the following final orders: -

(a) The Notice of Motion dated 24th December, 2021 is merited.

(b) The Petition and the Notice of Motion dated 9th December, 2021 are *res judicata* *Charles Omanga & Another vs. Independent Electoral & Boundaries Commission & Another* **[2012] eKLR.**

(c) The Petition and the Notice of Motion dated 9th December, 2021 are hereby struck out.

(d) Costs shall be borne by the Petitioner.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **25th** day of **January, 2022.**

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Makaka, Counsel for the Petitioner.

Miss Ng'ang'a and **Mr. Owuor,** Counsel for the Respondent.

Elizabeth Wanjohi – Court Assistant.