Alexander Gitonga & 2 others v Registrar of Political Parties & another; Chama Cha Uzalendo (Interested Party) (Petition 1 of 2022) [2022] KEHC 12505 (KLR) (30 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12505 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

PETITION 1 OF 2022

GV ODUNGA, J

MAY 30, 2022

IN THE MATTER OF ARTICLES 2 (4), 10 (1), 19 (2), 20 (1), (2), (3), AND (4), 22 (1), 23 (3), 25, 27 (4), 35, 36 (1), 38 (3) (C), 47, 48, 50 (1), 159,165, 232 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT NO. 11 OF 2011

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEED UNDER THE CONSTITUTION

BETWEEN

ALEXANDER GITONGA NYAGA ..... 1ST PETITIONER

LAWRENCE NZAU NGOVI ..... 2ND PETITIONER

MAUR ABDALLA BWANAMAKE ..... 3RD PETITIONER

AND

THE REGISTRAR OF POLITICAL PARTIES ..... 1ST RESPONDENT

PHILLIPE OPIYO SADJAH ..... 2ND RESPONDENT

AND

CHAMA CHA UZALENDO ..... INTERESTED PARTY

RULING

Introduction

1. The Petitioners herein contend that they are members of the Interested Party, Chama Cha Uzalendo (hereinafter referred to as "the Party") while the 2nd Respondent is described as suspended member of the Party. The 1st Respondent is an office established under Section 33 (1) of the *Political Parties Act*, 2011 (hereinafter referred to "the Act")

2. The facts of this petition, according to the Petitioners, are that on 6th March 2017, the court delivered a judgment in Judicial Review Miscellaneous Application No. 67 of 2017 - Chama Cha Uzalendo vs. The Registrar of Political Parties and ordered inter alia that:

> "An order of mandamus do issue compelling the Respondent to cause a notice of the Changes and alterations on the Party Officials List, namely the National Executive Council list of officials of the Chama cha Uzalendo as per the Applicant's letter dated 17th January 2017 to be published in the Kenya Gazette forthwith pursuant to Section 20 (1) of the *Political Parties Act*.

3. Before the decree stated above was effected, it was pleaded that the then Interested Party's Leader Hon. Wavinya Ndeti resigned from the party prompting the party officials to convene a National Executive Council (hereinafter referred to as the NEC) Meeting on 29th March 2017 wherein new officials were appointed and the 1st Respondent, the Registrar of Political Parties (hereinafter referred to as "the Registrar") was notified of the newly appointed party officials during the NEC meeting of 29th March 2017 vide a letter dated 24th April 2017.

4. However, the 1st Respondent declined to Gazette the proposed officials on the grounds that some of the proposed names were not party members a position which the Party successfully refuted through a search of the Records in the Registrar's office which showed that the proposed parties were in fact members of the Party. Subsequently, it was pleaded, the Registrar advised the Party to advertise the proposed party officials in local daily newspapers as required by law, vide a letter dated 19th February 2018. Before the Party could comply with the Registrar's directive in its aforementioned letter dated 19th February 2018, the Registrar published in the Gazette Notice No. 8652 dated 29th July 2019, a notice of officials illegally and unprocedurally proposed by the 2nd Respondent who was at the time the Secretary General of the Party. According to the Petitioners:

    i. The said officials were appointed without the endorsement/resolution of the rightful members of the 1st Interested Party's NEC;

    ii. The list of officials was Gazetted before being published in the local daily newspapers in contravention of Section 20 (2) of the *Political Parties Act*, 2011;

    iii. The list was prepared and forwarded to the Registrar by the 2nd Respondent who had been suspended by the Party and therefore had no authority in law and fact to transact on behalf of the Party, a fact which the Registrar had been notified of; and

    iv. The Party's constitution which the 2nd Respondent was relying on had been forged.

5. Aggrieved by the Registrar's action of publishing the aforesaid list of officials in the Gazette Notice, the officials of the Party challenged the said Gazette Notice in the Political Parties Tribunal via Appeal

No. 14 of 2019 and in its judgment delivered on 6th March, 2020, the Tribunal found that the Gazette Notice No. 8652 dated 29th July 2019 was issued non-procedurally and proceeded to revoke it in its entirety.

6. Without the authority or resolution of the rightful Party's Officials, the Registrar published the same list that had been revoked by the Political Party Disputes Tribunal's judgment dated 21st August 2020 in the Gazette Notice No. 8652 dated 29th July 2019. According to the Petitioners, this action emanated from the document the 2nd Respondent furnished the Registrar of Political parties Suo Motto purporting to act on behalf/ and in the capacity of an official of the Party.

7. Thereafter, the Party, through its then advocates Messrs. Otieno Ogolla & Company Advocates, informed the Registrar that it had advertised its party's officials in a newspaper of nationwide circulation and also forwarded to the Registrar records of proof of membership to the party for some of the members whose membership had been disputed by the Registrar vide the letter dated 3rd September 2020. However, in complete disregard and contravention of the Party's letters dated 29th July 2017, 12th September 2018 and 3rd September 2020, the Registrar further published another Gazette Notice Number 1992 of 25th February 2022, of "Change of Officials" as presented by the 2nd respondent.

8. According to the Petitioners, the Gazette Notice No. 6399 of 21st August 2020 and No. 1992 of 25th February 2022 are null and void for the reasons that the meetings when the purported resolutions to amend the names of the members were passed, were convened by the 2nd Respondent who had been suspended from acting as Secretary General by the Party awaiting disciplinary action against him hence he had no legal authority or mandate to convene any meetings on behalf of the Party's National Executive Council (NEC); the resolutions to substitute the Party's officials were not made by the Interested Party's National Executive Council, its National Governing Council or the National Delegate Conference and are therefore not binding on it; the meeting held on 8th January 2022 was convened by the 2nd Respondent was unprocedural and unlawful as the Registrar was privy to the fact the he had been suspended by the Party and could therefore not convene any such meeting on behalf of the Party.

9. From the foregoing, it was pleaded that it was always within the knowledge of the Registrar that the 2nd Respondent did not have any locus/authority to transact on behalf of the Party as a member of the National Executive Council (NEC) but still entertained/enabled; and acted in concert with the 2nd Respondent to change the membership and leadership of the Party without the knowledge and consent of the members. According to the Petitioners, the Registrar's actions in causing the Gazettement of the list of officials forwarded by the 2nd Respondent were unlawful and ultra vires and in abrogation of the Registrar's duty to monitor, investigate and supervise political parties.

10. It was averred that the members of the Party raised objections to the Gazettement of new officials in the Gazette Number 1992 but the Registrar failed to investigate and act on those complaints in contravention of Section 34 of the Act. The Petitioners insisted that the meeting dated 24th January 2022 was not convened by the rightful NEC members and the same had only 5 attendees in contravention of the Article 18.3 of the Interested Party's Constitution which provides that the quorum for all meetings shall be a third of the membership thereof.

11. It was pleaded that on 10th January 2022, the 2nd Respondent; purporting to be the Party's Secretary General of the Party and in contravention of Article 18.2 (i) of the Party's Constitution, issued a notice for an ordinary meeting of the NEC to be convened on the 24th January 2022. Though the members aggrieved by the above meeting filed their objections to the meeting, their objections were ignored in toto. According to the Petitioners, as members of the Party, they are entitled to be sent the notice of

the ordinary meeting but the same was not served upon them hence they had no knowledge of the meeting and did not participate in the same in contravention of their political rights guaranteed under Article 38 (1) (a) and (b) of *the Constitution*. They further pleaded that there was no publication of a notice of intention to change or amend the party's NEC officials in at least two daily newspapers having nationwide circulation contrary to section 20 (1) and (2) of the Act. The Registrar was further accused of neglecting her duty of monitoring political parties, by not verifying whether in fact the notice of intention under section 20 (1) of the Act had been published before publishing the changes of officials in the official Gazette, a failure which contravened the right to public participation under Article 10 and right to access of information under Article 35 of *the Constitution*, as read with the *Access to Information Act* No.31 of 2016.

12. It was contended that upon the issuance of the Gazette Notice, two members of the Party filed objections dated 25th February 2022 and 3rd March 2022 to the Gazette Notice under Section 20 of the Act within the timeframe to raise objections to the same. Subsequently, on 2nd March 2022 the Registrar's office wrote to the 2nd and 4th Petitioners acknowledging it was within their right to file their objections to the intended change. However, since the objections to the notice of intended change were lodged, there has been no revocation/withdrawal of the Gazette Notice; thus, it is still in force.

13. The Petitioners averred that the failure/refusal to address the objections lodged was a violation of fair hearing rights and the rights to access justice as guaranteed by Articles 48 and 50 of *the Constitution*; and an unfair administrative action within the meaning of Article 47 of *the Constitution* and the *Fair Administrative Action Act*.

14. The Petitioners lamented that due to the unlawful actions of the Respondents, the rightful members of the Party are unable to run the affairs of the Party, do not have access to information including but not limited to the party nominations of various candidates for the August 2022 general elections.

15. The Petitioners therefore prayed for:

    a. A declaration that the Registrar contravened the Petitioners' rights under Articles 10, 35, 38, 47, 48, 50 of *the Constitution*

    b. A declaration that the Gazette Notices No. 6399 -dated 21st August 2020 and 1992 -dated 22nd February 2022 were issued illegally and in contravention of the Party's Constitution and Section 20 of the *Political Parties Act*.

    c. A declaration that the meeting held on 24th January 2022 was convened in contravention of Articles 18.2 (i) and 18.3 of the Party's Constitution.

    d. A declaration that the 2nd Respondent did not have the capacity/authority to convene the meeting of 8th January, 2022, 24th January 2022 or any other meeting on behalf of the Party, or at all.

    e. An order quashing the resolutions of the meeting held on 10th January, 2022.

    f. An order of Certiorari quashing Gazette Notices No. 6399- dated 21st August 2020 and 1992- dated 22nd February 2022.

    g. An order of mandamus compelling the Registrar to Gazette the Notice of Change of Membership as per the list submitted by the Party on 29th March 2017.

    h. The costs of this Petition be awarded to the Petitioners.

16. These allegations were re-affirmed in the affidavit in support of the petition.

17. Together with the petition, the Petitioners file an application seeking the following orders:

    1. This application be certified as urgent and be heard ex parte at the first instance.

    2. Pending the inter parties hearing of this application; a CONSERVATORY ORDER be issued STAYING/HALTING implementation of the Gazette Notice No. 6399 dated 21st August, 2020.

    3. Pending the inter parties hearing of this application; a CONSERVATORY ORDER be issued STAYING/HALTING implementation of the Gazette Notice No. 1992 dated 22nd February, 2022.

    4. Pending the inter parties hearing and determination of this application; a CONSERVATORY ORDER do issue stopping any further restraining of the old founding members from participating and contesting in the 2022 general elections using the political party.

    5. Pending the hearing and determination of this Petition; a CONSERVATORY ORDER do issue stopping any further/precipitate implementation/operationalization of new membership and change of officials of the interested party as per the list Gazetted via the Gazette Notice No. 1992 of 22nd February 2022.

    6. Costs be in the Cause.

Preliminary Objections

18. In response, the Interested Party filed a notice of preliminary objections raising the following grounds:

    1. THAT the dispute at hand in this Petition filed herein is strikingly similar to Mombasa Constitutional Petition No. E013 of 2022: Chama Cha Uzalendo versus Registrar of Political Parties & Others which was filed in Mombasa albeit by different Petitioners. The same was dismissed on 17th May 2022. The Petitioner are abusing the Court Process by engaging in forum shopping.

    2. THAT this Honourable Court has no jurisdiction to hear and determine the Application and Petition herein because the issues raised concern the Political Parties Dispute Tribunal established under section 39 of the *Political Parties Act* No. 11 of 2011.

    3. THAT the High Court has determined that section 40(1) and 40(2) of the *Political Parties Act* No. 11 of 2011 provides that all disputes between members of a political party or a party and its members have to be referred to a party's internal dispute resolution mechanism before a dispute is referred to the Political Parties Dispute Tribunal and thereafter the High Court as an Appellate Court.

    4. THAT section 41 of the *Political Parties Act* No. 11 of 2011 provides for the determination of disputes and procedures to be followed; in case of a dispute, the same is to be lodged with the Political Parties Dispute Tribunal in the first instance be fire invoking the jurisdiction of this Honourable Court. The High Court does not have primary jurisdiction in such matters, it has appellate jurisdiction.

    5. THAT pursuant to Article 159(2) of *the Constitution* of Kenya 2010 as read together with the provisions of the *Political Parties Act*, the grievances alleged in this Petition, whether meritorious or not fall under the purview of the Political Parties Dispute Tribunal.

ACCORDINGLY, this Court has no jurisdiction to her and determine the Application and Petition filed and the same should be struck out with costs.

19. The 2nd Respondent also took out a notice of preliminary objections. Though in the said Notice, the 2nd Respondent, inappropriately so dwelt on factual maters as opposed to points of law, the substance of the objection were that:

    1. The Petitioners had exhausted neither the Political Parties' Disputes Tribunal nor the internal political party dispute resolution precursor set out in section 40(2) of the *Political Parties Act* No. 11 of 2011.

    2. The present Petition is similar to a Petition filed in Mombasa dated 4th April, 2022: Constitutional Petition No. E013 of 2022 pitting the same parties that has since been dismissed on the 17th May, 2022.

20. The present Petition as filed is fatally defective as it contravenes and offends Order I Rule 13 of the Civil Procedure Rules, 2010 (Rules under Section 81 of Cap. 21 Laws of Kenya) and the same ought to be struck out for using one voice to address the court, without the express and filed written consent from the rest.

21. The interested party also file a replying affidavit to which the pleadings in the said Mombasa case were attached.

1st Respondent/Registrar's Submissions

22. On behalf of the Registrar, it was submitted based on the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Other (2012) eKLR and Motor Vessel "Lillian S" vs. Caltex Oil(Kenya) Limited (1989) eKLR that this court has no jurisdiction to hear and determine the application and petition herein in terms of Article 169(1) (d) of *the Constitution* and Sections 40(1), 40(2), and 41(2) of the Act. Therefore, this court was urged to down its tools.

23. Additionally, it was submitted, based on Speaker of National Assembly vs. Karume [1992] KLR 21, that it is trite law that where there is a clear procedure for redress of a certain grievance, that prescribed procedure should be strictly followed.

24. According to the Registrar, this suit presents circumstances where petitioners seem to be informing this court that they are aggrieved with Gazette notices that led to the change of party officials and that they are aggrieved by the conduct of the 2nd Respondent who is a member of the Interested party. That they essentially have a case against the 1st Respondent by reason of having published aforementioned Gazette Notices and various meetings convened by the 2nd Respondent. It therefore goes that the present suit ought to seek refuge under Article 169(1) (d) of *the Constitution* and Sections 40(1), 40(2), and 41(2) of the Act. The Registrar set out Section 40 of the Act as setting out the jurisdiction of the Political Parties Tribunal to include;

    i. disputes between the members of a political party

    ii. disputes between a member of a political party and the political party; and

    iii. appeals from decisions of the Registrar under this Act

25. It was submitted that except for appeals from decisions of the Registrar, Section 40(2) of the Act demands that disputes between the members of a political party and disputes between a member of a political party and the political party must at the first instance be subjected to party internal dispute

resolution before the Tribunal entertains them. It is only after the Tribunal has entertained the said matters, in terms of Section 41 of the Act, that an aggrieved person may approach the High Court.

26. While noting that it is possible to dress up the said Section 40 disputes and pass them off as constitutional issues, it was submitted that that does not negate the fact that the said disputes already have shelter under Section 40 of the Act. Further, given the clear procedures of law, a litigant cannot rush straight to the High Court. In this regard reference was made to Republic vs. Registrar of Political Parties & 6 others Exparte Edward Kings Onyancha Maina & 7 others [2017] eKLR, where the position of the Court of Appeal sitting in Kisumu in Eliud Wafula Maelo vs. Ministry of Agriculture and 3 Others [2016] KLR. In that case the Court associated itself with Mumbi Ngugi, J's position in Rich Productions Limited vs. Kenya Pipeline Company & Another [2014] eKLR.

27. Besides, it was submitted that with the enactment of the Political Parties (Amendment) Act, 2011, Section 40(2) does not even demand exhaustion of internal dispute resolution mechanisms but that a party to a dispute has adduced evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms. The present suit, it was submitted, does not contain an iota of an attempt.

28. It was submitted that the principle of adherence to laid down procedure has refuge in the doctrine of exhaustion that must guide this Court and reliance was placed on the decision of the Court of Appeal in Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR.

29. It was submitted that there is no exceptional circumstance before this court that would warrant this court to entertain the present suit and the court was urged to be persuaded by the reasoning in Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others, High Court (Nairobi) Constitutional Petition No. 356 of 2012, whereby the Court observed that public interest requires citizens to refrain from litigation where there are effective alternative procedures for resolving a particular dispute. It was further urged that Article 159 of *the Constitution* requires this Court to promote alternative dispute resolution methods. This cannot be achieved if the Court takes away from political parties an opportunity to hear and determine internal party disputes; this claws back on the efforts made under the Act to ensure that political parties live up to their elements under *the Constitution* as institutions of governance.

30. In the Registrar's submission, the nature of disputes in the political arena such as the one presented here are of a unique nature in that the parties, especially the petitioners, 2nd Respondent and Interested Party that seem to be at opposite sides today end up needing each other within no time. It is therefore important that less belligerent measures are employed with respect to dispute resolution- this is through the internal dispute resolution. In this regard reference was made to Amani National Congress Party v Godfrey Osotsi & Another [2021] eKLR.

31. As to what amounts to a preliminary objection, it was submitted based on Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A 696 that this court does not need to receive evidence to enable it determine whether it has the jurisdiction to sit on this Petition since the grounds herein boil down to whether or not this Petition offends the provisions of Section 40 of the Act, 2011.

32. It was further submitted that the High Court sitting in Mombasa through Constitutional Petition E013 of 2022 Chama Cha Uzalendo versus Registrar of Political Parties & Others has had occasion to entertain a petition fashioned in the same way; the petitioners therein included all the petitioners before this court, the Respondents and Interested party therein included the Respondents in this suit. The said Petition challenged, inter alia, the very Gazette notices being challenged in this court; the

import of the judgment was that the court was not clothed with jurisdiction to hear and determine the issues therein.

33. It was therefore submitted that the Petitioners are knowingly engaging in forum shopping with the hope of chancing upon a favourable order which is not only a waste of court's time but also a recipe to embarrass this Court. The Court was therefore urged to dismiss the Application and Petition with costs.

2nd Respondent's Submissions

34. On behalf of the 2nd Respondent, it was submitted that an interrogation of the prayers from the petitioners reveals that the threshold of res judicata is met as the prayers have a mirror-like congruence to those in the Mombasa Petition E013 of 2022 on the 18th of May 2022. But then the petitioners are repackaging the substance of Mombasa Petition E013 of 2022, which the court decided against the Petitioners' substance and presenting it afresh in this matter. For instance, seeking conservatory orders of certiorari on the Registrar of Political Parties the petition sought in the Notice of Motion filed on the 28th of April 2022 against the Gazette Notices 6399 of 21st August 2020 and Gazette Notice 1992 of 22nd February 2022 are identical to Mombasa Petition E013 of 2022. It was submitted that the Machakos Petition is directly and substantially in issue in the concluded Mombasa Petition, meeting all the thresholds that the law sets out for res judicata. Furthermore, the Mombasa Petition is from a Court of identical stature-the High Court. This submission was based on Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited [2017] eKLR.

35. It was submitted that the issues in contention were directly and subsequently in issue in Mombasa Petition E013 of 2022.

36. As regards the parties, it was submitted that the High Court suits Mombasa Petition E013 of 2022 and Machakos Petition 1 (Odd) of 2022 see a repeat in the parties that are suing and responding in the latter. The petitioners appear on the same side of the adversarial divide, Alexander Gitonga Nyaga of the Machakos petition is Alex Nyaga in the Mombasa Petition. Maur Abdalla Bwanamaka remains named so in both petitions. The Lawrence Ngovi of the Mombasa Petition becomes Lawrence Nzau Ngovi in Machakos. Furthermore, the parties are still arguing under the same title. According to the 2nd Respondent, even the petitions are essentially asking for the same substance. Again here, the petitioners are seeking to overturn the effect of the Gazette Notices 6399 of 21st August 2020, and 1992 of 21st February 2022 and that the court that formerly heard and determined the issue was the High Court at Mombasa. It remains competent to try this subsequent suit in Machakos.

37. Accordingly, this Court was urged to strike out this suit as well for the same reasons that the High Court in Mombasa did but now with costs to the 2nd Respondent.

38. It was further submitted that as a constitutional court, the High Court in Mombasa had no jurisdiction to hear the Petitioners and their Petition without first having exhausted all the dispute resolution mechanisms contemplated under the Act and more specifically Section 40 of the said Act, and rightly excluded itself from deciding the matter on any merits since it was already clear that the petitioners had not utilized the escalation matrix cumulatively set out in Section 40 and 41 of the *Political Parties Act*.

39. It was submitted that the law is crystal clear on the escalation matrix for disputes within and across political parties in the Republic of Kenya. The Act reveals these steps cumulatively, setting out the jurisdiction of the Tribunal first then using that premise to define the escalatory ambit of the law. According to the 2nd Respondent, Section 40 of the PPA holds that the Political Parties Dispute Tribunal shall (in mandatory term) determine disputes between members of a political party as well

as disputes between the members of a political party, as well as disputes between a member (s) of a political party and the party itself. Section 40 (2) of the Act is even more specific. It notes that disputes shall not escalate to the Political Parties Tribunal, and in extension therefore cannot go to Appeal to the High Court and then Court of Appeal without first having those issues ventilated at the party level using the internal party dispute resolution mechanisms. On seeing the offending Gazette Notices, it was submitted that the petitioners made not the slightest attempt to cause the creation of the internal dispute resolution committee. Instead, they moved to write letters of complaint to the Registrar of Political Parties. The Registrar promptly responded to the letter, detailing the procedural aptitude that preceded the latest Gazette Notice. Further the Registrar of Political Parties invited them to escalate their concerns and appeal the decision to the Political Parties Dispute Tribunal, as the Act stipulates. But then the Petitioners instead choose to bring these complaints to the High Court, giving the Political Parties Dispute Tribunal a wide berth. According to the 2nd Respondent, what the Petitioners are attempting to do in the three prayers is to circumvent the procedure of the law by seeking outcomes outside of the procedures that the law provides.

40. It was noted that in the Constitutional Court at Mombasa's Petition E013 of 2022, the court distanced itself from the dispute simply because there was no proof that the Petitioners had exhaustively engaged the dispute resolution mechanism present not only per the Act, but also as enshrined in the Chama Cha Uzalendo's Constitution. That presents a precedent worth emulating in this matter, if for one moment the court were willing to interrogate whether there is any merit in the Petitioner's case.

41. The Court was therefore urged not to entertain this matter since any determination in its current form would be an idle gesture.

Interested Party's Submissions

42. The Party, on its part submitted that the dispute at hand in this Petition is strikingly similar to Mombasa Constitutional Petition No. E013 of 2022: Chama Cha Uzalendo versus Registrar of Political Parties & Others which was filed in Mombasa. A careful look, will disclose a fact that in both Petitions and Applications, the Orders and Prayers prayed for therein are couched in a similar manner.

43. Specifically, the similarity of the two matters can be seen from the prayers being sought by the Petitioners: prayers in the undated Notice of Motion by the Petitioners filed in this Court on 4th May 2022 seeking conservatory orders in respect of the decisions of the Registrar of Political Parties on Chama Cha Uzalendo contained in Kenya Gazette Notice Number 6399 of 28th August 2020 and Kenya Gazette Notice Number 1992 of 25th February 2022 are similar to the prayers sought by the Petitioners in Notice of Motion dated 4th April 2022 filed in Mombasa Petition E013 of 2022.

44. Secondly, Prayers in the Petition filed in this Court on 4th May 2022 seeking final orders in respect of the decisions of the Registrar of Political Parties on Chama Cha Uzalendo contained in Kenya Gazette Notice Number 6399 of 28th August 2020 and Kenya Gazette Notice Number 1992 of 25th February 2022 are similar to the prayers sought by the Petitioners in Notice of Motion dated 4th April 2022 filed in Mombasa Petition E013 of 2022.

45. Thirdly, Alexander Gitonga Nyaga, Lawrence Nzau Ngovi and Maur Abdalla Bwanamaka are parties in this Petition and at the same time they appear as Alex Nyaga, Larence Ngovi and Maur Abdalla Bwanamaka in Mombasa Petition E013 of 2022. A complete reading of the pleadings and all documents in both Petitioners clearly show that they are one and the same.

46. Finally, the narration of facts in both Petitions are outstandingly similar because they all revolve around the decision of the Registrar of Political Parties on Chama Cha Uzalendo contained in Kenya Gazette

Notice Number 6399 of 28th August 2020 and Kenya Gazette Notice Number 1992 of 25th February 2022.

47. According to the Party, the issues raised in this Petition are substantially the same as those already disposed of in Mombasa Petition E013 of 2022 hence this is a perfect candidate for condemnations for it is an abuse of Court Process.

48. On the issue of jurisdiction, it was submitted that the gravamen in this Petition is the issue touching on the decision of the Registrar of Political Parties on Chama Cha Uzalendo contained in Kenya Gazette Notice Number 6399 of 28th August 2020 and Kenya Gazette Notice Number 1992 of 25th February 2022 which qualifies as an intra-party dispute. The dispute in question is between members of a political party and a political party which is covered under section 40(1)(b) of the Act. This then demands that even before such a matter can be handled by the Political Party Tribunal, the must a matter of law and fact must be subjected to the internal dispute resolution mechanism or an attempt at the same by the political party in question.

49. It was therefore submitted that this court has no jurisdiction to deal as the primary arbiter in matters dealing with the internal affairs or resolution of a political party as in this case and that the Jurisdiction of this court is appellate in nature. It was submitted that the Petitioners have neither exhausted the Political Parties Dispute Tribunal nor the internal political party dispute resolution mechanism provided for in section 40 of the Act and reference was made to the case of Kieru John Wambui & Another vs. Jubileee Party; Secretary General, Jubilee Party & 2 others (Interested Parties) [2021] eKLR.

50. It was submitted that the Petitioners have approached this Court directly and bypassing both the internal dispute resolution mechanism and the Tribunal with a view of having this Court to revoke the said Gazette Notices by the Registrar of Political Parties. In the absence of the exhaustion of the legislative option in section 40 of the Act, it was the Party's position that this Court cannot be properly be seized of this matter since the High Court has appellate jurisdiction and not the primary jurisdiction.

51. Furthermore, the office of the Registrar of political Parties has already demonstrated the veracity of the process used to arrive at the said Gazette Notices within the Party and has further invited objections from the general public including the membership of the party. The Petitioners are therefore prematurely before this Court, there is no indication at all, that they have invoked the internal party dispute resolution mechanism. They have also not shown to this court any evidence of any proceedings of the Tribunal seeking an appeal from the Party decision or any review application at the Tribunal level for the said notices.

52. From the foregoing, the Court was urged to exercise its discretion and in the interest of justice allow the Preliminary Objection by the Party.

Petitioners' Submissions

53. It was submitted on behalf of the Petitioners that for res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit and reliance was placed on the decision of the Supreme Court in John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR.

54. The Party also referred to the case of Invesco Assurance Company Limited & 2 others vs. Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)

[2020] eKLR and submitted that the first hurdle to resolve is that of parties. The Petitioners in Constitutional Petition No. E013 of 2022, it was submitted, were five and included Maur Abdalla Bwanamaka. The Respondent in that matter were Registrar of the Political Parties, Ann Nderitu and the Hon. Attorney General with Philipe Opiyo Sadja, Nzioka Waita and the Commission of Administrative of Justice named as Interested parties. In the Petitioners' view, the Petitioners/ Applicants are clearly not the same as in the present suit since the only common denominators are Maur Abdalla Bwanamaka and Registrar of the Political Parties as 3rd Petitioner and 1st Respondent respectively as well as Philipe Opiyo Sadja as the 2nd Respondent. The titles of the parties have clearly shifted/changed in the present Petition.

55. It was submitted that a cross reference to the legislative demands of section 7 of *Civil Procedure Act* vis-a vis Constitutional Petition No. E013 of 2022 it is apparent on the face of it, not only were the parties different, with different titles but also the cause of action and prayers sought therein were quite different. For instance, the interested party in this case was the 1st Petitioner in the Mombasa Petition in pursuit of different reliefs while herein it is joined in as the interested party and opposes this petition. Further and as acknowledged by Mativo, J not only is it apparent that the matter was dismissed at a preliminary level for want of jurisdiction and therefore cannot be said to have had the benefit of being judicially examined on merit to finality but equally the prayers herein differ in substance as was the ruling of the Judge.

56. According to the Petitioners, in the case of John Florence Maritime Services Limited & another -Vs- Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, the Court of Appeal had occasion to address the issue of whether res judicata is applicable in Constitutional Petitions.

57. It was further submitted that other courts stated that the doctrine of res judicata applied with equal force to constitutional litigation though it was important that caution was exercised lest a person whose rights were being violated afresh was unjustly locked out from the wheels and seat of justice and reference was made to William Kabogo Gitau v. Ferdinand Ndung'u Waititu [2016] eKLR.

58. Based on the foregoing, it was submitted that the ground of Res judicata has been improperly raised by the Respondents and Interested Party herein and the same should fail for being incongruent to the legal statutory provisions and legal precedent.

59. On the issue of jurisdiction, the Petitioners cited Articles 23(1), 47 165(3)(b) 259(1) of *the Constitution* and submitted that the Constitutional Petition filed before this Court is due to the actions of the 1st Respondent which are guided by the Article 47 of *the Constitution* of Kenya and the *Fair Administrative Action Act*. To them, the matters canvassed in the said Petition is constituted as grievance against the complained acts of omission and commission against the office of Registrar of Political Party, the 1st Respondent. In their view, the matter before the court does not constitute a dispute between members of the political party as stipulated in section 40(1)(a) and (b) of the *Political Parties Act* or an appeal of the decision of the Registrar of Political party as provided in Section 40(1)(f) of the Act. Therefore, the Political Party Dispute Tribunal does not have jurisdiction over this dispute.

60. It was contended that this Petition is about the procedural fairness in the steps the 1st Respondent took when handling the whole process before and after publication of the two Gazette Notices. Secondly the Registrar of Political Parties, 1st Respondent, in their letter dated 2nd March, 2022 which was addressed to the 1st and 3rd Petitioners who had raised objections against the Gazette Notice No. 1992 dated 22nd February 2022 in their respective letters dated 25th February, 2022, and 3rd March, 2022 acknowledged that it was within their right to file any objections to the Gazette Notice as stipulated in section 20 of the Act which meant that there was no final decision made yet thus the window stage of raising the objections.

61. In addition, it was submitted that section 34(a)of the Act provides that the Registrar of Political Parties has an investigative role on matters brought before them. In the above scenarios the office only scrutinized what was forwarded to them by the 2nd Respondent without considering other public members' input including the objections raised by the Petitioners.

62. According to the Petitioners, they approached this Court because while the 1st Respondent was executing their statutory duties so as to administer fair administrative action they failed vehemently to observe and accord fairness to all public members including the Petitioners. Reference was made to Forum for the Restoration of Democracy- Kenya vs. Office of the Registrar of Political Parties Ann. N. Nderitu & Another; David Eseli Simiyu & Another (Interested Parties) [2020] eKLR.

63. It was contended that the Petitioners approached this court which has the duty bestowed upon it to uphold their Rights which were infringed and reliance was placed on Rose Wangui Mambo & 2 Others vs. Limuru Country Club & 17 Others (2014) eKLR.

64. The Petitioners therefore maintained that this Court has Jurisdiction to hear and determine this Petition before it because there are allegations of breach of fundamental rights and freedoms of the Petitioners therefore this dispute cannot be dispensed by the Political Parties Dispute Tribunal.

65. To them, one can only invoke the Court on Preliminary Objection on matters of law which cannot be blurred with factual details. The Court should not be subjected to go through facts or look at evidence but just the point of law. This attempt by the 1st and 2nd Respondents and Interested Party, they contended, is an anomalous attempt of dispensing of the matter through a Preliminary Objection so that it does not go for a full trial therefore denying the Petitioner's cardinal right to be heard and in this regard they relied on Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, (1969) EA 696 and Oraro vs. Mbaja(2005) I KLR 141 and submitted that the alleged actions resulting to the impugned gazette notices are issues bordering on criminal culpability outside the ambit of the Political Parties Tribunal of the 2nd Respondent as he forged the political parties membership constitution to serve his selfish needs to the exclusion of the petitioners herein to fairly participate in the electoral process in the upcoming general elections.

66. According to the Petitioners, the issue therefore of the Gazette Notices impugned by the Petitioners is one that is a matter of fact and criminal in nature and therefore cannot be brought within the purview of a preliminary objection which solely must be based on points of law

67. In the premises it was argued that this Petition is properly before this court and the preliminary objections on the basis of this ground should fail and the Court was urged to dismiss the preliminary objections with costs and allow parties to dispose of the petition and the application expeditiously and on merit.

Determinations

68. I have considered the issues raised in the preliminary objection which in my view are as follows:

    1. Whether this Court has the jurisdiction to entertain this petition in light of the provisions of section 40 of the *Political Parties Act*?

    2. Whether this petition is res judicata in light of the proceedings in Mombasa Constitutional Petition No. E013 of 2022: Chama Cha Uzalendo versus Registrar of Political Parties & Others.

69. Before dealing with the said matters it is important to set out the gist of the matter before me. In this petition, the petitioners' complaint is that based on the incorrect information furnished by the 2nd Respondent, a suspended official of the Interested Party, the 1st Respondent, the Registrar has, without following the laid down law and procedure effected the misrepresentations given by the 2nd Respondent as regards the management of the Interested Party.

70. It is also important to set out the principles guiding preliminary objections.

71. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another this Court expressed itself, inter alia, as follows:

> " Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion...In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication." [Emphasis added].

72. In arriving at that decision, the Court relied on the celebrated case of Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696 in which case Law, JA was of the following view:

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

73. Per Newbold, P:

> " A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."

74. In Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177 it was held that:

> " The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the

litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters... What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."

75. It is therefore clear that a preliminary objection is an objection based on law that is argued on the assumption that the facts as pleaded are correct. In other words, a person raising a preliminary objection must be prepared to argue the same on the assumption that the facts as they are pleaded are correct. As long as that is done, it is not objectionable for the party raising the objection to refer to the facts on record. What the Court does not permit is the attempt to reconcile factual disputes in a preliminary objection.

76. The first ground of objection is based on Section 40 of the *Political Parties Act* which provides as hereunder:

The Tribunal shall determine—

a. disputes between the members of a political party;

b. disputes between a member of a political party and the political party;

c. disputes between political parties;

d. disputes between an independent candidate and a political party;

e. disputes between coalition partners;

f. appeals from decisions of the Registrar under this Act; and (fa) disputes arising out of party nominations.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) or (fa) unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.

(3) A coalition agreement shall provide for internal dispute resolution mechanisms.

77. It is not in doubt that the Petitioners and the 2nd Respondent are members of the Interested Party, a political party. The dispute revolves around the actions of the 2nd Respondent who purports to be the secretary general of the interested party. The 1st Respondent is accused of not lawfully resolving the matter. According to the Respondents and the Interested Party, the substance of the dispute falls within Section 40 of the aforesaid Act since this suit presents circumstances where petitioners seem to be informing this court that they are aggrieved with Gazette notices that led to the change of party officials and that they are aggrieved by the conduct of the 2nd Respondent who is a member of the Interested party. That they essentially have a case against the 1st Respondent by reason of having published aforementioned Gazette Notices and various meetings convened by the 2nd Respondent.

78. It was submitted that except for appeals from decisions of the Registrar, Section 40(2) of the Act demands that disputes between the members of a political party and disputes between a member of a political party and the political party must at the first instance be subjected to party internal dispute resolution before the Tribunal entertains them. It is only after the Tribunal has entertained the said matters, in terms of Section 41 of the Act, that an aggrieved person may approach the High Court.

79. While noting that it is possible to dress up the said Section 40 disputes and pass them off as constitutional issues, it was submitted that that does not negate the fact that the said disputes already have shelter under Section 40 of the Act.

80. On their part the Petitioners cited Articles 23(1), 47 165(3)(b) 259(1) of *the Constitution* and submitted that this Petition is due to the actions of the 1st Respondent which are guided by the Article 47 of *the Constitution* of Kenya and the *Fair Administrative Action Act*. To them, the matters canvassed in the said Petition is constituted as grievance against the complained acts of omission and commission against the office of Registrar of Political Party. In their view, the matter before the court does not constitute a dispute between members of the political party as stipulated in section 40(1)(a) and (b) of the *Political Parties Act* or an appeal of the decision of the Registrar of Political party as provided in Section 40(1)(f) of the Act. Therefore, the Political Party Dispute Tribunal does not have jurisdiction over this dispute since the Petition is about the procedural fairness in the steps the 1st Respondent took when handling the whole process. In addition, it was submitted that section 34(a)of the Act provides that the Registrar of Political Parties has an investigative role on matters brought before them. In the above scenarios the office only scrutinized what was forwarded to them by the 2nd Respondent without considering other public members' input including the objections raised by the Petitioners.

81. In determining this issue, it is my view that the Court must focus on the substance of the dispute rather than the consequential actions. While it may be argued that the Petitioners are aggrieved by the actions or inactions of the Registrar, one cannot close his eyes to the genesis of the dispute since in determining the issues raised herein this Court will have to deal with the actions that led to the complaints that were placed before the Registrar. Unless, the matter is approached from that angle, nothing would be easier than for parties who want to evade the requirement for resorting to alternative mode of dispute resolution to simply complain to the Registrar and then escalate the dispute to the High Court under the guise that the complaint is against the actions or inactions of the Registrar and not a political party.

82. In this case, there are two levels of disputes. The primary dispute pits the Petitioners against the 1st Respondent and it was that dispute that mutated to the secondary dispute which found its way before the Registrar. The primary dispute was the management of the Interested Party. It is not in dispute that such a dispute ought to have been placed before the Interested Party and attempts made to resolve the same by invoking the internal party resolution mechanisms. In this case there is no evidence that the said mechanisms was ever invoked. In that event, can this court seize the jurisdiction simply because the complaint is now that the Registrar did not act or acted inappropriately, where the party who missed the essential steps in the proceedings are petitioners?

83. Whereas I associate myself with the decision in Forum for the Restoration of Democracy- Kenya vs. Office of the Registrar of Political Parties Ann. N. Nderitu & Another; David Eseli Simiyu & Another (Interested Parties) [2020] eKLR, in this case, in order to determine the dispute between the Petitioners and the Respondent with finality, the merits of the dispute will have to be gone into.

84. The Petitioners therefore maintained that this Court has Jurisdiction to hear and determine this Petition before it because there are allegations of breach of fundamental rights and freedoms of the Petitioners therefore this dispute cannot be dispensed by the Political Parties Dispute Tribunal.

However, as appreciated by Emukule, J in Revital Healthcare (EPZ) Limited & Another vs. Ministry of Health & 5 Others [2015] eKLR at paragraph 10 where he cited with approval the case of Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004:-

> "...where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."

85. I associate myself with Majanja J's views in Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012 that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of *the Constitution* of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights.

86. In Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000, the Court of Appeal expressed itself as follows:

> "Although section 60 of *the Constitution* gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit...If the Court acts without jurisdiction, the proceedings are a nullity...The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by *the constitution* but also, that which *the constitution* or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister...Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute".

87. In the result I am of the view and I hold that the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament.

88. As this Court appreciated in Republic vs. Political Parties Tribunal & 2 Others ex parte Susan Kihika and 2 Others [2015] eKLR:

> " ...the intention of enacting the Act was to provide a mechanism with which disputes arising between members of political parties or between political parties or between coalitions can be expeditiously resolved taking into account the need to respect the internal party governance and to resolve the same in a specialised Tribunal without the necessity of subjecting them to the time consuming process of litigation. Political issues, it is usually prudent that they as much as possible be sorted outside the arena of the Courts due to their inherent nature. Therefore Parliament in its wisdom decided that such disputes be in the first instance resolved within the party itself and if for any reason such a resolution cannot be found at that level by the Political Parties Tribunal and only thereafter may the parties approach the Court. If section 40 of the Act empowers the Tribunal to resolve disputes arising between political parties or even between coalitions, to argue that the Tribunal cannot resolve disputes between members of a coalition even if from different parties therein, in my view, amounts to splitting the hairs. This Court ought to adopt an interpretation that favours the spirit of the Act rather than one which renders the Act stillborn or ineffective... It is similarly my view that bodies which have been established by Parliament especially those tasked with resolution of political matters ought to be allowed to grow and the Courts should only step in to ensure that they carry out their mandate in accordance with *the Constitution* and the legislation."

89. I defer to the decision of Msagha, J (as he then was) in Amani National Congress Party vs. Godfrey Osotsi & Another [2021] eKLR where he expressed himself as hereunder;

> " Before I conclude I must observe that judicialisation of political disputes has become common place in our jurisdiction. It is highly recommended that all efforts must be applied to ensure that, internal dispute resolution mechanisms address such issues to the satisfaction of the parties such that, recourse to the courts of law is minimized. Alternative disputes resolution may enhance peaceful coexistence. To apply such systems may infuse collegiality in political parties where the players need one another from time to time even after serious fall outs."

90. This spirit was correctly captured by Mumbi Ngugi, J (as she then was) in Stephen Asura Ochieng & 2 Others vs. ODM & 2 Others [2011] eKLR where the learned Judge expressed herself as follows:

> " The question that arises is this: can it be properly argued that a dispute cannot be referred for determination to the Political Parties Tribunal because the political party has failed or refused to activate the internal party dispute resolution mechanism, thus leaving an aggrieved party with no option but to turn to the High Court for redress? I think not. To hold otherwise would mean that parties could, by failing to resolve disputes internally, frustrate the operations of the Tribunal and render it totally redundant. To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of *the Constitution* which provides for the exercise of judicial power by courts and tribunals established under *the constitution* and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which

disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases. To my mind, the provisions of Section 40 (2) of the *Political Parties Act* must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners' grievance and the parties involved."

91. As was held in Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 2 Others, Constitutional Petition No. 359 of 2013:

> "We note that *the Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as they comply with *the Constitution* and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing *the Constitution*, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

92. I agree with Mativo, J's views in the Mombasa Petition that:

> "Despite the vast jurisdiction vested into the PPDT, the claw back clause is to be found is subsection (2) which provides that "Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms." The above provision underscores the fact that party members should have recourse to civil courts in the event of disputes between the members or between members and the officials, but only after exhausting internal dispute-resolution mechanisms, where such mechanisms exist."

93. I also concur with the views expressed in the case of Kieru John Wambui & Another vs. Jubileee Party; Secretary General, Jubilee Party & 2 others (Interested Parties) [2021] eKLR that: -

> "The Act, further in subsection (2) of section 40, gives a condition for the jurisdiction of the Tribunal with regard to disputes covered in (a), (b), (c), and (e), to have them first subjected to internal political party dispute resolution mechanisms."

94. Even in cases where issues relating to fundamental rights are being alleged in the political party processes, it has been held that as long as the Tribunal is seized of jurisdiction, such matters are better left to be handled by the relevant bodies in the first instance. This was the position of Lenaola, J (as he then was) in H.C.Petition No. 203 of 2012 - Kapa Oil Refineries Limited vs. The Kenya Revenue

Authority, The Commissioner of Customs Services and The Attorney General, in which he expressed himself at page 15:

> " I am also aware that even if this Court has jurisdiction to determine violation of fundamental rights and freedoms, it must also first give an opportunity to other relevant bodies established by law to deal with the dispute as provided in the relevant statute."

95. In my view bodies which have been established by Parliament especially those tasked with resolution of political disputes ought to be allowed to grow and the Courts should only step in to ensure that they carry out their mandate in accordance with *the Constitution* and the legislation. It must be appreciated that these are specialised Tribunals set up specifically for the purposes of dealing with political disputes which are not ordinary civil disputes between private parties but are disputes which affect the rights of the members of the party and the exercise of their rights under Article 38 of *the Constitution*. Mumbi Ngugi, J (as she then was) in Rich Productions Limited vs. Kenya Pipeline Company & Another [2014], explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> " The reason why *the Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."

96. The intrusion of the Courts in such matters was explained by the House of Lords in Chief Constable vs. Evans [1982] 3 ALL ER 141, where the Lord Chancellor, Lord Hailsham of St. Marylebone, stated at p 143 as follows with respect to the judicial review remedy:

> " This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner".

97. In International Centre for Policy and Conflict and 5 Others -vs- The Hon. Attorney-General & 4 others [2013] eKLR the Court recognized the need to let relevant statutory bodies deal with matters within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of law:

> " ...must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other

designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted..."

98. I associate myself with the opinion expressed by the Court of Appeal in Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR that;

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

99. In this case, it would be splitting hairs to hold that the dispute herein does not fall within the ambit of section 40 of the *Political Parties Act*. Since there is no evidence that the mechanisms contemplated thereunder have been triggered, this petition is not properly before this Court.

100. The second objection is based on the doctrine of res judicata. That whether a matter is res judicata or not can properly be taken as preliminary objections as long as the other conditions precedent are satisfied was appreciated in Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177 where it was held that the objection as to the legal competence of the Plaintiffs to sue and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections. That must be so because a court is barred from entertaining an issue which has been finally determined by a Court of competent jurisdiction.

101. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

> " 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."

102. As regards the rationale of the doctrine of res judicata, reliance was placed on the decision of the Court of Appeal in Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR.

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

103. In the Maina Kiai case (supra), the Court quoted with approval the Indian Supreme Court in the case of Lal Chand vs. Radha Kishan, AIR 1977 SC 789 where it was stated;

> " The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

104. In Lotta vs. Tanaki [2003] 2 EA 556 it was held as follows:

> " The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It 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. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

105. In Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA stated as follows:

> " A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

106. The application of the doctrine in constitutional matters was tackled by the Supreme Court in John Florence Maritime Services Limited & Another vs. Cabinet Secretary, Transport and Infrastructure & 3 Others [2021] eKLR, where it was held that:

> " However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court cited the dissenting opinion of Jackson J.A., in Iron v. Saskatchewan (Minister of the Environment & Public Safety), 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated:
>
> "The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard."
>
> (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.

(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."

107. That was the position of the Court of Appeal in the case of John Florence Maritime Services Limited & another -Vs- Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, where it expressed itself as follows:-

"(1) The doctrine of res judicata is applicable in 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 clearest of cases."

108. Onguto, J had occasion to comment on the issue in William Kabogo Gitau v. Ferdinand Ndung'u Waititu [2016] eKLR where he held as follows:

" 59. In the cases of Aggrey Chiteri v. Republic [2016] eKLR and Edward Okongo Oyugi & 2 Others v. The Attorney General [2016] eKLR, this Court held that the doctrine of res judicata applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh was unjustly locked out from the wheels and seat of justice. So said the court in Edward Okongo Oyugi & 2 Others v. The Attorney General [supra]:

> "[11] The application of the principle of res judicata has the potential of locking out a person from the doors of justice or even reaching the out-stretched arms of justice if the claim is disposed off without venturing into the merits. Consequently, the factors and circumstances ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case."

109. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties

in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the *Civil Procedure Act*, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

110. In the cases of Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790 and *Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28* it was held that:

> " However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:
>
> "The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application."

111. In Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR the Court quoted the case of E.T vs. Attorney General & Another (2012) eKLR wherein the court noted thus:

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and 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.' In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely

because he gives his case some cosmetic fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata....."

112. It is therefore clear that parties are not to evade the application of res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

113. Therefore, for the principle to apply certain conditions precedent must be shown to exist:

a. The suit or issue was directly and substantially in issue in the former suit.

b. The former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

114. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 of 1993 - Nyanza Garage vs. Attorney General in which the Court held that:

> "In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

115. It was therefore held in Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012] eKLR that:

> "...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the *Civil Procedure Act*, Section 6 will still apply. This is so because the overriding objective of the *Civil Procedure Act* is for expeditious and proportionate resolution of civil disputes between parties. My view is that the circumstances obtaining in 1953 when the Jadna Karsan – vs- Harnam Singh Bhogal was decided are completely different from the circumstances obtaining now. The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the *Civil Procedure Act* were that there is constraint in judicial time and therefore a lot of pressure on the courts to expedite resolution of civil disputes. My view therefore is, if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the precious judicial resources."

116. To determine whether or not res judicata applies, it is necessary to interrogate the subject matter of Mombasa Constitutional Petition No. E013 of 2022: Chama Cha Uzalendo versus Registrar of Political Parties & Others. In that petition, the Learned Judge summarised the case as hereunder:

> "The nub of the Petitioners' grievance as I glean it from the Petition is that the 2nd to 5th Petitioners are aggrieved by a change of office bearers of the party effected vide the impugned Gazette Notice(s). They contend that the changes as communicated in the impugned

Gazette Notice were done illegally and without approval of the party organs. It's on the basis of this contestation that the Petitioners a raft of declarations/orders evidently directing their wrath against the Registrar of Political Parties for publishing the impugned Gazette Notice thereby bringing the said changes into effect."

117. It is therefore clear that the substratum of that petition was Gazette Notice No. 1992 of 25th February, 2022 and Gazette Notice No. 6399 of 21st August, 2020. In whichever way one looks at it the other prayers revolved around these two gazette notices. It is those same gazette notices that are the subject of this petition. The fact that there are other prayers does not derogate from the fact that they revolve around the legality of the said two gazette notices. In determining whether or not res judicata applies, it is not the manner in which the pleadings are framed that counts, but the cause of action. Accordingly, I have no hesitation in finding that the matter in issue in this petition was also be directly and substantially in issue in Mombasa Constitutional Petition No. E013 of 2022: Chama Cha Uzalendo versus Registrar of Political Parties & Others.

118. The second issue is whether the proceedings are between the same parties, or between parties under whom they or any of them claim, litigating under the same title. The petitioners in this case are Alexander Gitonga Nyaga, Lawrence Nzau Ngovi and Maur Abdalla Bwanamaka. In the Mombasa Petition E013 of 2022, the Petitioners were the Interested Party herein, Alex Nyaga, Lawrence Ngovi, Maur Abdalla Bwanamaka and Pius Makani. Apart from the interested party which was a petitioner in the earlier suit and Pius Makani who does not feature in this petition, the other petitioners are the same. In my view one cannot escape the application of res judicata by merely changing the positions of the players in the suit when it is clear that there is no major change in the capacity in which the suit is brought. In this case, I find that the three petitioners herein were also the petitioners in the earlier suit. As for the Respondents, the 1st Respondents herein was also the 1st Respondent in the Mombasa petition while the 2nd Respondent herein was named as an interested party.

119. In Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 the former East African Court of Appeal stated as follows:

> " Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

120. The last two conditions pose no difficulty at all. There is no doubt at all that Mativo, J who was properly seized of the matter heard and finally determined the former suit.

121. A holistic consideration of this petition leads me to an inescapable conclusion that the current petition is caught up by the doctrines of exhaustion of remedies and res judicata.

122. In the premises I find merit in the two preliminary objections and hold that this petition is incompetent. It is hereby struck out with costs to the 2nd Respondent only since the preliminary objection was taken by the 2nd Respondent and the Interested Party and in order to encourage reconciliation between the members of the Interested Party.

123. It is so ordered

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS

30TH DAY OF MAY, 2022

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Nicholas for the Petitioners

Miss Muema for the 2nd Respondent

Mr Wanyama for the Interested Party

CA Susan