



Aukot & another v Chebukati & 2 others; Thirdway Alliance Kenya & 18 others (Interested Parties) (Petition E325 of 2022) [2022] KEHC 11221 (KLR) (Constitutional and Human Rights) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11221 (KLR)

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

PETITION E325 OF 2022

HI ONG'UDI, J

JULY 29, 2022

BETWEEN

EKURU AUKOT 1ST PETITIONER

MIRURU WAWERU 2ND PETITIONER

AND

WAFULA CHEBUKATI 1ST RESPONDENT

**INDEPENDENT BOUNDARIES AND ELECTORAL COMMISSION 2ND
RESPONDENT**

REGISTRAR OF POLITICAL PARTIES 3RD RESPONDENT

AND

THIRDWAY ALLIANCE KENYA INTERESTED PARTY

RAILA AMOLO ODINGA INTERESTED PARTY

WILLIAM RUTO INTERESTED PARTY

DAVID MWAURE WAIHIGA INTERESTED PARTY

GEORGE LUCHIRI WAJACKOYA INTERESTED PARTY

AZIMIO LA UMOJA ONE KENYA INTERESTED PARTY

JIMMY WANJIGI INTERESTED PARTY

WALTER MONG'ARE INTERESTED PARTY

REUBEN KIGAME INTERESTED PARTY

ELIUD KARIARA MUTHIORA INTERESTED PARTY



MWANGI WA IRIA	INTERESTED PARTY
DOROTHY KEMUNTO NYANGORI	INTERESTED PARTY
GIBSON NGARUIYA NGAN	INTERESTED PARTY
GEORGE MUNYOTTAH	INTERESTED PARTY
JEREMIAH NYAGAH	INTERESTED PARTY
JAMES KAMAU	INTERESTED PARTY
JUNE JULIET MUNYEKI	INTERESTED PARTY
JUSTUS JUMA	INTERESTED PARTY
PETER MUMBIKO KING'ORI	INTERESTED PARTY

RULING

1. This Ruling is in respect of the 1st and 2nd respondents' preliminary objections dated 11th July 2022 and 12th July 2022 respectively on the petition and application dated 27th June 2022.
2. The petitioner's case in a nutshell is that the presidential nomination exercise was riddled with multiple illegalities, inconsistencies and bias thus rendering the entire process defective and incapable of supporting the forthcoming elections scheduled for 9th August 2022.
3. The petitioners in their petition seek orders that:
 - a. A declaration that the 1st & 2nd respondents did not verify the signature lists as alleged prior to the disqualification of the Petitioners;
 - b. A declaration that the nomination exercise was not carried out in accordance with provisions of Article 137 and Regulation 18 of the Elections (General) Regulations 2012 is inferior to Article 137;
 - c. A declaration that by failing to provide a written detailed account of the results of the supporter lists and identity cards verification exercise to the presidential aspirants, the 1st and 2nd respondents contravened Article 47 as well as denying the petitioners the right to information under Article 35 of the Constitution;
 - d. A declaration that by failing to accord the petitioners a similar opportunity to rectify the alleged non-responsiveness of their supporters lists, the 1st and 2nd respondents contravened Article 27 of the Constitution;
 - e. A declaration that the failure by the 1st and 2nd respondents to allow the interested parties' agents and observers made the process obscure and thus violated Articles 10(1)(c) & 10(2)(c), 88(4)(h) and 232(1)(e)&(f) of the Constitution;
 - f. A declaration that the 1st Respondent having verified the over 6.4 million supporter items without hiring casuals as was the case in the verification of the Punguza Mizigo and BBI signatures wasted public funds during the verification of the two referenda signatures thus violating Article 201(d) of the Constitution;



- g. A declaration that the presidential nominations certificates issued by the 1st respondent are illegal, null and void ab initio;
- h. A declaration that the 1st respondent degazettes and or stops the process of gazetting of the nominated candidates and stops printing of presidential ballot papers;
- i. A declaration that the presidential nomination exercise was not done in accordance with Article 137 of the Constitution;
- j. A declaration that the 1st and 2nd respondents violated Section 27, 28 and 29 of the Elections Act 2011;
- k. An Order of Mandamus compelling the 1st & 2nd respondents to accord the petitioners the treatment accorded to Prof. Luchiri Wajackoya & David Waihiga Mwaure who the respondents cleared despite having had shortfalls that they asked to rectify;
- l. An order of Mandamus that the 1st and 2nd respondents tables before this Court university degree certificates of all presidential aspirants and selected presidential candidates for independent court-supervised scrutiny and verification;
- m. A mandatory injunction compelling the 1st & 2nd respondents to print ballot papers including the names of all the candidates qualified as under Article 137 of the Constitution;
- n. The costs of this petition be borne jointly and severally by the respondents;
- o. Any other orders that this honourable Court may deem fit after the scrutiny of the supporter lists and identity documents.

4. Owing to this, the 1st and 2nd respondents logged their objection on the summarized grounds that:

- 1. The jurisdiction of this Court to entertain the matter has been wrongly and prematurely invoked for the reasons that:
 - a) The application and petition raise matters for which this Court cannot sit as a first-instance forum.
 - b) The application and the petition offend the doctrine of exhaustion as regards the channels of recourse available pursuant to Article 88(4)(e) of the Constitution of Kenya, Section 74 of the Elections Act, Section 4(e) of the Independent Electoral and Boundaries Commission and Regulation 13 of the Rules of Procedure on Settlement of Disputes.
 - c) The application and petition are presented before this Court yet the petitioners have not sought and obtained exemption under Section 9(4) of the Fair and Administrative Action Act, 2015.
- 2. The jurisdiction of this Court has been wrongly invoked as the petitioners have not exhausted the available remedies under the Access to Information Act which entails presenting any complaint regarding any request for provision for



information to the Commission on Administrative Justice prior to instituting a suit.

5. Likewise the 2nd respondent filed its preliminary objection on the summarized grounds that:
 - i. The suit is fatally defective, bad in law, incompetent, and is otherwise an abuse of the Court process and so should be dismissed in limine with costs to the 2nd respondent.
 - ii. This Court lacks the requisite jurisdiction to entertain the petition since some of the matters in issue relate to a pre-election nomination dispute which have not been subjected to the jurisdiction of the Independent Electoral and Boundaries Commission's Dispute Resolution Mechanism.
 - iii. The petitioners have not made any application for access to information as envisaged under the Access to Information Act, No. 31 of 2016 and neither have they exhausted the dispute resolution mechanism provided for under the Act.
 - iv. The petitioners have not exhausted the dispute resolution mechanism provided for under the Data Protection Act, No. 24 of 2019 with regard to their grievances concerning protection of the data collected by the 2nd respondent. As such the petitioners have not been diligent in protection of their interest within the mechanisms in place for resolution outside the Court.
 - v. Some of the matters herein are directly and substantially in issue in Nairobi High Court Constitutional Petition No. E160 of 2022, between the same parties, and a decision rendered by this Court on 5th July, 2022 hence some of the matters raised are res judicata.
 - vi. The instant petition and application are non-starters, since some of the orders sought have already been overtaken by events and issuance of the same shall be an exercise in futility in breach of the cardinal principle that a Court shall not issue orders in vain.
 - vii. The petition seeks to irregularly and unprocedurally introduce new causes of action on behalf of some of the interested parties offending the principle for admission of an interested party.
6. The preliminary objections were opposed by the petitioners who made their response vide their replying affidavit dated 20th July 2022 sworn by the 2nd petitioner. It is averred that the objections are based on a misapprehension of the facts of the case as acts of constitutional violation and pre-election nominations grievances are mutually exclusive and cannot co-exist.
7. He deposes that this suit raises various constitutional violations by the 1st and 2nd respondents under Articles 10(1)(c), 10(2)(c), 88(4)(h), 201(d) and 232(1)(e) & (f) of the Constitution during the nomination process. He asserts that this issue cannot be entertained by the 2nd respondent's dispute resolution committee as the original jurisdiction to interpret the Constitution and handle allegations of its violations lies in this Court.
8. On the ground of failure to exhaust the Access to Information procedure, he makes known that the petitioners wrote to the 1st respondent on 6th and 9th June 2022 but the letters went unanswered leading to filing of this suit.



9. The petitioners aver that this matter is not res judicata and the 2nd respondent's assertion otherwise is based on generalities that do not disclose any of the particular issues which it alleges were substantially in issue in Nairobi High Court Constitutional Petition No. E160. Moreover, that the petition through the interested parties does not frame new issues only supports the petitioners' case as far as the verification of the supporter lists is concerned.

The Parties submissions

The 1st and 2nd respondents submissions

10. In support of their preliminary objection dated 11th July 2022, the 1st and 2nd respondents through their advocates G & A Advocates LLP filed written submissions and a list of authorities dated 14th July 2022. Equally, Counsel filed further submissions and a supplementary list of authorities dated 21st July 2022.
11. Counsel submits the issues for determination to be:
- i. Whether this petition is properly before this Court as a first-instance forum.
 - ii. The appropriate orders in the circumstances.
12. On the first issue, Counsel submits that the petitioners have wrongly invoked the powers of this Court because the issues set out for determination ought to be presented before the 2nd respondent's Dispute Resolution Committee (DRC) at first instance. Nevertheless, it is submitted that the issues before this Court have already been determined in totality by the Committee and that the petition seeks to introduce new issues.
13. In view of this, it is argued that the petitioners have failed to comply with the set procedure for resolution of nomination disputes and so these proceedings are premature for lack of exhaustion of the prescribed mechanism. Counsel submits that the procedure is set out under Article 88(4) e of the Constitution, Section 4(e) of the Independent Electoral and Boundaries Commission Act and Rule 13 of the Rules of Procedure on Settlement of Disputes.
14. Counsel relying on the case of R Vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR argues that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Similar reliance was placed on the cases of David Ramogi & 4 Others Vs. The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others [2017]eKLR, In the Matter of the Mui Coal Basin Local Community, [2015] eKLR, Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR
15. He submits hence that the Constitution is clear on resolution of pre-election disputes, including disputes relating to, or arising from nominations. These are to be resolved by the 2nd respondent's Committee on Dispute Resolution as provided for by Section 12 of the enabling Act or where applicable, by the Political Parties Disputes Tribunal as emphasized by the Supreme Court in the case of Sammy Ndung'u Waity Vs. Independent Electoral & Boundaries Commission & 3 others [2019] eKLR.
16. Equally Counsel relied on the cases of Mohamed Abdi Mahamud Vs. Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR, Silverse Lisamula Anami Vs. Independent Electoral & Boundaries Commission & 2 others [2019] eKLR which held the same sentiments. In light of this he contends that this Court lacks jurisdiction at first instance.



17. On the doctrine of exhaustion, Counsel relying on the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR submits that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. Additional reliance on this was placed on the case of Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR
18. Counsel submits that the petitioners have failed to exhaust the available remedies under the Access to Information Act and the Fair Administrative Action Act. In support, he cited cases that have addressed this issue and upheld that the mechanisms set in place must be exhausted. Such cases are: James Mweri Kahunyo & 6 others Vs. Commissioner for Co- operative Development & 2 others [2019] eKLR, Republic Vs. Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR and Republic Vs. Council for Legal Education Exparte Desmond Tutu Owuoth [2019] eKLR.
19. In conclusion Counsel submits that owing to the case made out the only remedy available is for this Court is to down its tools as was held in the case of Owners of the Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Ltd (1989) KLR 1 and reiterated in the case of United Millers Limited Vs. Kenya Bureau of Standards & 5 others [2021] eKLR, among others.
20. In its further submissions in response to the petitioners assertion that this matter is constitutional in nature, Counsel relied on the Supreme Court case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (2016) eKLR where it was noted that allowing electoral disputes to be transmuted into a petition for vindication of fundamental rights carries the risk of opening up a parallel electoral dispute-resolution regime.

The 2nd respondent's submissions

21. In the same way, Counsel for the 2nd respondent, Ngeri, Omiti & Bush Advocates LLP in support of the preliminary objection dated 12th July 2022 filed written submissions dated 14th July 2022. Counsel submits that the issues for determination are:
 - i. Whether this Court is clothed with jurisdiction to entertain this matter.
 - ii. Whether the Orders sought herein have been overtaken by events.
 - iii. Whether the issues raised by the 17th Interested Party through her supporting affidavit offend the cardinal principle that an interested party's stake cannot take the form of an altogether new issue to be introduced before the Court.
22. Counsel on the first issue submits that this Court is not clothed with the jurisdiction to hear and determine this petition. This is because as submitted earlier, the petitioners have not exhausted the dispute resolution mechanisms provided for under the Elections Act, 2011, the Data Protection Act, 2019 and the Access to Information Act, 2016. Additionally, some of the matters in issue relate to a pre-election nomination dispute, which have not prior to the filing of this petition, been subjected to the jurisdiction of the 2nd respondent's dispute resolution mechanism.
23. In support of the point on lack of jurisdiction reliance was placed on the cases of Speaker of National Assembly vs. Njenga Karume, Civ. Application NAI 92 of 1992 (NAI 40/92 UR), [1992] eKLR, Charles Apudo Obare & Another vs. Clerk, County Assembly of Siaya & Another (2020) eKLR, International Centre for Policy and Conflict & 5 Others vs. The Hon. Attorney-General & 5 Others [2013] eKLR, Republic vs. Transition Authority & Another Ex parte Kenya Medical Practitioners,



- Pharmacists & Dentists Union (KMPDU) & 2 Others, JR No. 317 of 2013, Patrick Njoroge Kimani & 5 Others vs. National Transport and Safety Authority (2016) eKLR and Geoffrey Muthinja & another vs. Samuel Muguna Henry & 1756 others [2015] eKLR.
24. Counsel submits that the jurisdiction to settle electoral disputes is bestowed on the 2nd respondent under Article 88 (4)(e) of the Constitution and confirmed by Section 74 (1) of the Elections Act, Section 4(e) of the Independent Electoral and Boundaries Commission Act. This position has been confirmed by the Court in various authorities which Counsel cited in support being Mohamed Abdi Mahamud (supra) and Isaiah Gichu Ndirangu & 2 others vs. Independent Electoral and Boundaries Commission & 4 Others [2016] eKLR.
 25. Turning to the issue of res judicata, Counsel submits that some of the issues raised in this dispute have already been heard and determined by this Court in Nairobi High Court Constitutional Petition No. E160 of 2022. Additionally, Counsel submits that the issues pertaining to the nomination of the 7th, 8th and 9th interested parties have been presented before this Court and decisions rendered.
 26. While relying on the case of Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 others (2010) eKLR, counsel notes that a matter is res judicata where the matter in issue is identical in both suits, the parties in the suit are the same, same title/claim, concurrence of jurisdiction and finality of the previous decision. Supplementary reliance was placed on the case of James Njuguna Chui vs John Njogu Kimani [2017] eKLR.
 27. Counsel thus argues that this matter is res judicata because the issues raised revolve around grievances on lack of a framework for data protection, alleged failure by the 2nd respondent to cross-check the supporters lists as against the copies of identity cards and allegations of differential treatment giving rise to discrimination.
 28. Turning to the second issue, Counsel submits that the orders sought by the petitioners in this matter have already been overtaken by events and are, therefore, moot. To buttress this point reliance was placed on the Supreme Court case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others SC Petition No. 2B of [2014] eKLR where it was held that the constitutional sensitivity on “timelines and timeliness”, was intended to redress the aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation. Further reliance was placed on the case of Evans Kidero v Speaker of Nairobi City County Assembly & Another (2018) eKLR.
 29. On the final issue Counsel while relying on the Supreme Court case of Francis Kariuki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR submits that an interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court. Additional reliance was placed on the case of Meme v. Republic [2004] 1 EA 124; [2004] 1 KLR 637. To this end Counsel beseeches this Court not to allow the petitioners petition as it is an abuse of the Court process.

The 3rd respondent’s submissions

30. The 3rd respondent in support of the preliminary objections filed its submission dated 20th July 2022 through its Counsel Wafula Wakoko. Counsel notes that the only issue for determination is whether the jurisdiction of this Court has been properly invoked.



31. Depending on Article 88 (4) (e) of the Constitution and Section 74 (1) of the Elections Act, Counsel submits that these provisions mandate the 2nd respondent to determine disputes of the nature set out in this petition. In essence, he submits that the 2nd respondent ought to have been the first point of call in addressing the grievances stipulated by the petitioners.
32. In support Counsel cited the case of Rich Productions Limited vs. Kenya Pipeline Company & another [2014] eKLR where it was held that the reason why the Constitution and law establishes different institutions and mechanisms 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. As such the court cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.
33. Additionally Counsel submits that the Supreme Court in the case of Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR affirmed that the 2nd respondent has the exclusive mandate to resolve any dispute in relation to the electoral nomination exercise and a party can only approach the High Court once this process has been exhausted. Supplementary reliance was placed on the case of Speaker of National Assembly v Karume [1992] KLR 21, Geoffrey Muthiga Kabiru & 2 others - vs- Samuel Munga Henry & 1756 others [2015] eKLR.
34. To this end Counsel submits that there are no special circumstances that have been submitted to this Court to accord the petitioner the leeway not to adhere to the laid down procedures and so this Court should lay down its tools as guided by the case of Owners of Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Limited (1989) eKLR.

The 2nd and 6th interested parties written submissions

35. The 2nd and 6th interested parties in support of the preliminary objections, filed written submissions dated 18th July 2022 through the firm of Paul Mwangi & Company Advocates and further written submissions dated 21st July 2022 in response to the petitioners replying affidavit. Counsel identifies the issues for determination as:
 - i. Whether this Court has Jurisdiction to hear and determine the instant application and petition as a first instance forum.
 - ii. Whether the Petitioners Application and Petition offends the doctrine of exhaustion by invoking the jurisdiction of the Court.
36. Counsel on the first issue states as submitted by the other parties that the petitioners have wrongly invoked the jurisdiction of this Court. This is because they have set out issues which ought to be for determination before the 2nd respondent's Dispute Resolution Committee (DRC). In support of this position Counsel relied on the provisions under Article 88(4)(e) of the Constitution, Section 74 (1) of the Election Act and Section 4 (e) of the Independent Electoral and Boundaries Commission Act.
37. Similarly Counsel notes that the exclusive mandate of the 2nd respondent in pre-elections disputes has been affirmed by numerous authorities including Republic -v- The National Alliance Party of Kenya and another Ex-Parte Dr. Billy Elias Nyonge [2012] eKLR and Diana Kethi Kilonzo and another -v- IEBC and others [2013] eKLR, Republic -v- IEBC ex parte Charles Ondari Chebet, Nakuru High Court Judicial Review Application No. 3 of 2013 and Francis Gitau Parsimei & 2 Others -vs- National Alliance Party & 4 others (2012) eKLR.



38. He submits that the decision on the issues that were brought by the petitioners before the 2nd respondent's DRC have never been overturned since the petitioners failed to file a judicial review proceeding within the requisite time of ten (10) days after delivery of the said decision. As a consequence, the petitioners are bound by the decision of the 2nd respondent's DRC as it was not set aside, or reviewed, as stated in the case of *Justus Kariuki Mate & Anor vs Martin Nyaga Wambora & Another* (2014).
39. Counsel further submits that the petitioners have introduced new issues in this petition that were not pleaded, litigated and determined by the 2nd respondent's DRC. In view of this Counsel emphasizes that 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 as held in the case of *International Centre for Policy and Conflict & 5 Others v. Attorney General and 4 Others* [2013] eKLR.
40. Additional reliance was placed on the cases of *Isaiah Gichu Ndirangu & 2 others -v- Independent Electoral and Boundaries Commission & 4 others* [2016] eKLR, *Moses Mwicigi & 14 Ors v. I.E.B.C* (2016) eKLR, *Peter Ochara Anam & 3 Ors v. Constituencies Development Fund Board & 4 Ors*, *Kisii High Court Petition No. 3 of 2010*. From the foregoing counsel submits that this Court does not have jurisdiction to entertain this petition as a first instance forum.
41. On the second issue, Counsel submits that the petitioners seek a declaration that by failing to provide a written detailed account of the results of the supporter lists and identity cards verification exercise to the presidential aspirants, the 1st and 2nd respondents contravened Article 47 of the Constitution as well as denied the petitioners the right to information under Article 35 of the Constitution.
42. He submits that Section 9(2) of the Fair Administrative Action Act bars the High Court from reviewing an administrative action or decision under the Act unless the internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. To support this view Counsel similarly relied on the cases of *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and others Nairobi Petition No. 155A of 2011 (Unreported)* and *Andrew Omtatah Okoiti V Attorney General & 2 others* [2011] eKLR
43. One of these mechanisms as submitted is provided for in the Access to Information Act with respect to a request for information. Counsel as such submits that the petitioners have failed to demonstrate that a specific request was made and declined.
44. To this end, Counsel submits that this matter offends the doctrine of exhaustion under Article 88(4) (e) of the Constitution, Section 74(1) of the Election Act 2011, Section 4 (e) of the Independent Electoral and Boundaries Commission Act, 2011, Section 9(2) of the Fair Administrative of Action Act and Section 14 of the Access to Information Act No. 31 of 2016 and thus the petition is premature.

3rd interested party's submissions

45. The firm of Mutuma Gichuru & Associates Advocates on behalf of the 3rd interested party filed written submissions dated 19th July 2022 in support of the preliminary objections. Counsel submits the issues for determination to be as follows:
 - i. Whether this Court has the requisite Jurisdiction to hear and determine this matter.
 - ii. Whether the instant suit by the petitioners offends the doctrine of exhaustion.



46. On the first issue, Counsel relying on the Supreme Court case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR submits that a Court's jurisdiction flows either from the Constitution or legislation or both and without it, it cannot entertain a matter as held in the Lillian 'S' case (supra). He submits therefore that in the given instance the jurisdiction of this Court has been improperly invoked and hence this Court does not have the mandate to decide on the issues before it.
47. On the second issue Counsel submits that this suit offends the doctrine of exhaustion. He in effect reiterated the legal provisions and authorities already cited by the other parties. To that end, he urges this Court to be guided by the principles established in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited (1969) E.A 696*.

The petitioners submissions

48. The petitioners' in opposition to 1st and 2nd respondents' preliminary objections filed a list of authorities dated 20th July 2022 through the firm of Kosgei, Muriuki & Koome Company Advocates.
49. Furthermore, Mr. Kosgei made oral submissions during the Court hearing on 22nd July 2022. In response to Mr. Mutuma's assertion that the petitioners' affidavit introduced facts instead of points of law, Counsel submitted that the response was to all the issues raised in the preliminary objections. He submitted that a preliminary objection is not based on factual matters as held in the case of Republic v Eldoret Water & Sanitation Company Limited Ex-parte Booker Onyango & 2 others [2007] eKLR.
50. He submitted that the petitioners' prayers were not solely based on the 2nd respondent's decision. He informed that the petition also deals with the issue of discrimination. He argued that the petition was based on constitutional issues. The petitioners' case is hence allowed under Article 3(1) of the Constitution and their locus standi expanded by Article 22(2) of the Constitution.
51. In support Counsel relied on the case of Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR where it was held that the High Court has unlimited jurisdiction under Article 165(3)(b) of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. As such Counsel submits that Article 23 of the Constitution allows this Court to grant judicial review orders hence leave is not necessary.
52. Counsel in addition submitted that data protection was also not the only issue raised in the petition and even so no one is barred from approaching the Court on such issues. Reliance was placed on the Court of Appeal case of Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR where it was held that there was no ouster clause in the Wildlife and Conservation Management Act, that bars a party from seeking relief outside the process provided for under that Act. That an ouster, or privative clause specifically divests the court of jurisdiction to hear or entertain any matters arising from the specific statute.
53. Counsel informs that the petition challenges the manner in which the nominations were conducted. He argues that in the process of verification the respondents' conduct violated their constitutional rights. Moreover, that finances were also mishandled by the 2nd respondent in turn violating their rights. In view of this he submits that this petition is rightly before this Court.

Analysis and determination

54. I have considered the preliminary objections, the submissions of the parties and also the well-known authorities cited. It is clear that the preliminary objections main challenge is that this Court lacks jurisdiction to entertain this matter based on the exclusive nature of electoral disputes, the doctrine



of res judicata and doctrine of exhaustion. In view of this I find that the key issues for determination are as follows:

- i. Whether the preliminary objections dated 11th & 12th July 2022 have met the requisite threshold and if so;
- ii. Whether the jurisdiction of this Court has been properly invoked.

Whether the preliminary objections have met the requisite threshold

55. This Court takes cognizance of the definition of preliminary objections as adopted in the case of Mukisa Biscuit Manufacturing Co. Ltd (Supra) as correctly observed by all learned counsel in their submissions.

56. Similarly, in the case of Dismas Wambola v Cabinet Secretary, Treasury & 5 others (2017) eKLR Mativo J noted:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence.”

57. In the same way the observation in the case of Oraro v Mbaja(2005)eKLR offers significant insight as it notes:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which if argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

58. The premise of the preliminary objections in this matter revolves around the jurisdiction of this Court to entertain this matter. The objection as raised finds its bearing in the Constitution and the Electoral laws. This matter will be determined by the application of the pertinent law and interpretation of the legal principles. This means that this determination is sustainable without the examination of the facts and substantive issues of the case. In essence the challenge of this Court’s jurisdiction is a pure point of law. Considering this, it is even handed to conclude that the preliminary objections satisfy the threshold as spelt out in the Mukisa Biscuit case (supra). The next question to answer is whether the preliminary objections are merited.



Whether the jurisdiction of this Court was properly invoked

59. It has been observed by our Courts that jurisdiction is everything and without it a Court cannot exercise its judicial authority to render a determination in a matter. This was well stated in the case of Owners of the Motor Vessel “Lillian S” (supra) as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

60. Likewise, the Supreme Court in the case of Samuel Kamau Macharia (supra) affirmed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

61. This Court’s jurisdiction is anchored on Article 165(3) (d) of the Constitution which states:

- (3) Subject to clause (5), the High Court shall have--
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and



(e) any other jurisdiction, original or appellate, conferred on it by legislation.

62. It is clear from a reading of this Article that the High Court's jurisdiction is conferred upon it by the Constitution and legislation. The jurisdiction can either be original or appellate. The question to be answered consequently is the scope of this Court's jurisdiction in the electoral disputes. An examination of the electoral laws is prudent at this stage.

63. The Constitution under Chapter 7 provides for the electoral system and processes. With respect to the matters raised in this matter this chapter provides as follows:

Article 87(1) - Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

64. The Constitution went ahead to establish the Independent Electoral and Boundaries Commission with its mandate spelt out under Article 88(4) as follows:

The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for--

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

65. Similarly the 2nd respondent's mandate is provided for under Section 4(e) of the Independent Electoral and Boundaries Commission Act as follows:

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established



by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results.

66. In line with Article 87 of the Constitution, Parliament enacted the Elections Act and Electoral laws. The Elections Act No. 24 of 2011 under Part VII provides for the Election Disputes Resolution procedure as follows:

Dispute Resolution by the Commission

74. Settlement of certain disputes

- (1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
- (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.
- (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

67. The Court of Appeal in the case of *Kennedy Moki v Rachel Kaki Nyamai & 2 others* [2018] eKLR while discussing the electoral dispute resolution held as follows:

“52. Upfront, we wish to point out that the jurisdiction of the High Court in Electoral Disputes Resolution is a special jurisdiction conferred by the Constitution and the Elections Act. This special jurisdiction should not be confused with the High Court and unlimited jurisdiction in civil and criminal matters or the High Court’s supervisory jurisdiction over inferior bodies and tribunals. This position was affirmed by the Supreme Court at Paragraphs 82 of its judgment in *Lemanken Aramat -v- Harun Meitamei Lempaka & 2 others* [2014] eKLR where it was stated:

“[82] The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3) (a) of the Constitution, is unlimited. In addition, the High Court has a special jurisdiction in electoral matters, conferred by the Constitution, and given effect under the Elections Act.

68. The Court went on to state that:

“...whether a court has jurisdiction in any matter is a matter of law. To this extent, we affirm the principle that where there exists sufficient and adequate mechanism 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.

We bear in mind that an election court is a court with special jurisdiction and availability of alternative remedies and procedures under general law should not be a bar to remedies and procedures under the electoral law. Where the Constitution provides for two or three



methods of resolving disputes none can exclude the other. In such cases, the decision of the forum that has constitutional finality in resolving the dispute and cause of action prevails. In electoral disputes, it is the electoral law that applies and any electoral dispute must be resolved by way of an election petition and not through judicial review process.”

69. The petitioners’ main argument is that their matter generally concerns violation of constitutional principles and rights and not an electoral dispute issue. The respondents have opposed this submission since the suit as pleaded touches on the 2nd respondent’s mandate and the electoral process.
70. A perusal of the matter before this Court unveils that the petitioners presented their complaint (Complaint No.129 of 2022) dated 7th June 2022 to the 2nd respondent’s DRC. The said Committee rendered its decision on 17th June 2022 dismissing the petitioners’ case. The record does not reflect pursuit of the matter further in that regard. Soon after the instant petition and application were filed before this Court.
71. At this juncture, I am inclined to reject the petitioners’ assertion. It is my considered view that while the petition and application raise constitutional issues prima facie, the substratum of this suit has its roots in the electoral disputes’ resolution process. This is discernable from the petitioners’ prayers in the petition.
72. Guided by the law, it is clear that the 2nd respondent has the exclusive jurisdiction to handle all pre-electoral disputes. This way, this Court does not enjoy original jurisdiction as conferred under Article 165 (3) of the Constitution. This Court’s jurisdiction in the election process is dictated by the provisions of the Constitution and legislation on the elections dispute resolution procedure.
73. The Supreme Court in the case of *Silverse Lisamula Anami* (supra) speaking on whether an election Court has jurisdiction to settle pre-election disputes opined as follows:
 - “49. In the above context, it is not in doubt that the IEBC has been given the mandate to settle electoral disputes (including disputes relating to or arising from nominations) excluding election petitions and disputes subsequent to the declaration of results. Hence, even though the Constitution has not defined what “electoral disputes” in this regard means, it specifically provides that some of those envisaged disputes, which are under the purview of the IEBC, would emanate from nominations...”
74. The Court went on to state as follows:
 - “54. How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts? Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. Where a matter or an issue has been so determined, then the election Court cannot assume



jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the Constitution.”

75. The Court then finally concluded by holding that:

“ 56. Consequently, our holding in the present case enriches the jurisprudence in this area by expounding on the broader powers of an election Court with regard to determining questions of validity of an election. To put our holding into context therefore, there is evidence that the question whether the 3rd Respondent was a registered voter in Shinyalu Constituency by fact of a difference in names – Justus Kizito Mugali as opposed to Justus Gesito Mugali M’Mbaya – was determined by the IEBC Dispute Resolution Committee which resolved that the names referred to the same person and proceeded to issue a nomination certificate to the 3rd Respondent. No appeal or judicial review proceedings were instituted to challenge that decision and although the Petitioner was not a party to the proceedings, it has not been shown that he was unaware of them or that when he became aware of the same, he took any action save the filing of the election Petition before the election Court. On what basis can this Court now find otherwise? We submit none. In any event, the decision of that quasi-judicial body within the IEBC stands and has never been overturned. The election Court and the Court of Appeal were bound by it and therefore properly declined to assume jurisdiction on that matter. We see no reason to overturn that decision.”

76. I stand guided by the Supreme Court’s direction in this matter. The petitioners invoked this Court’s jurisdiction under Article 165(3)(d) of the Constitution in filing this matter as a constitutional petition. It is evident that this matter is not an appeal or judicial review from the 2nd respondent’s DRC decision, but a fresh suit guised as a constitutional issue notwithstanding the electoral issues element.

77. In view of this, this Court cannot exercise its jurisdiction under Article 165(3)(d) of the Constitution for a pre-electoral dispute, as this would be in error. Moreover, a comparison of the orders sought in this Court and the 2nd respondent’s DRC reveal parallels which ought to have been canvassed in an appeal or review from the decision which is not the case in this suit.

78. According to the law set out above and cited authorities the petitioners are required to adhere and exhaust the set out procedure in law before invoking this Court’s jurisdiction. In view of this, it is my humble finding that this Court’s jurisdiction has been invoked wrongly and as a consequence, this Court must down it’s tools at this juncture.

79. From the foregoing analysis and circumstances of this case, I am persuaded that the 1st and 2nd respondent’s preliminary objections dated 11th and 12th July 2022 are merited and are consequently allowed. The petition and application are struck out with costs.

Orders accordingly.

DELIVERED, VIRTUALLY DATED AND SIGNED THIS 29TH DAY OF JULY 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

