



**Okello & another v Wajackoyah & another; Kenya National Human Rights and Equality Commission & 3 others (Interested Parties) (Petition E344 of 2022) [2022] KEHC 11074 (KLR) (Constitutional and Human Rights) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11074 (KLR)

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

**PETITION E344 OF 2022**

**HI ONG'UDI, J**

**JULY 29, 2022**

**BETWEEN**

**BENARD ODERO OKELLO ..... 1<sup>ST</sup> PETITIONER**

**KEVIN NDOHO MACHARIA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**GEORGE LUCHIRI WAJACKOYAH ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**KENYA NATIONAL HUMAN RIGHTS AND EQUALITY  
COMMISSION ..... INTERESTED PARTY**

**BRITISH HIGH COMMISSION TO KENYA ..... INTERESTED PARTY**

**NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST ALCOHOL AND  
DRUG ABUSE (NACADA) ..... INTERESTED PARTY**

**BRITISH HIGH COMMISSION IN KENYA ..... INTERESTED PARTY**

**RULING**

1. The petitioners filed the petition dated July 8, 2022 alongside a notice of motion of even date in which they seek the following orders:-

(i) Spent.



- (ii) That pending the *inter partes* hearing and determination of this application and petition, the court be pleased to issue conservatory orders suspending printing of the name of the 1<sup>st</sup> respondent in the list of presidential candidate's ballot paper on, before or after the July 15, 2022.
- (iii) That pending the *inter partes* hearing and determination application and petition, the court be pleased to issue conservatory orders suspending the nomination and or clearing of the respondent from contesting for the position of the president of the Republic of Kenya.
- (iv) That pending the inter pares hearing and determination of the application and petition, the court be pleased to issue orders directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents to provide information as to the mental aptitude or status and or provide mental assessment tests of the 1<sup>st</sup> respondent from a certified government examiner.
- (v) That pending the inter partes hearing and determination of this application and petition, the court be pleased to issue temporary against 1<sup>st</sup> respond be and is hereby order to present himself for a compulsory mental test before the government examiner.
- (vi) That pending the inter parties hearing and determination of the application and petition, the court be pleased to issue orders directing he 1<sup>st</sup> and 2<sup>nd</sup> respondent and 4<sup>th</sup> interested party to provide information as to the citizenship status of the respondent to clarify his qualification to contest for the position of the president to the republic of Kenya.
- (vii) That pending the inter partes hearing and determination of the application and petition, the court be pleased to issue conservatory that the 1<sup>st</sup> respondent be and is hereby ordered to stop any disbursement of public funds and or resources to the 1<sup>st</sup> respondent for purposes of campaigning.
- (viii) That pending the inter parties hearing and determination of this application and petition, the court be pleased to issue orders directing 2<sup>nd</sup> respondent to subject all presidential candidates and other persons contesting for public offices to a compulsory mental assessment test by a government examiner to determine their fitness to run for public office.
- (ix) That the 2<sup>nd</sup> respondent be and is hereby ordered not to cause to be printed the name of the 1<sup>st</sup> respondent in the ballot papers as a presidential candidate.
- (x) That the 1<sup>st</sup> respondent be and is hereby disqualified from running for the office of the president of the Republic of Kenya
- (xi) That the 2<sup>nd</sup> respondent be and is hereby ordered to compel all presidential candidates and indeed all other candidates for public offices to compulsory mental assessment test and at all times during the elections have details of the said assessment printed and shared with the general public.
- (xii) That each party shoulders their costs being that this petition is brought in the interest of the public.



2. They again filed another notice of motion dated July 8, 2022 seeking the following orders:-

1. This notice of motion application be heard in priority to the petition filed herein.
2. That pending the inter partes hearing and determination of the petition, the court be pleased to issue summons to the following persons to assist the court in dispensing justice in regards to the best evidence rule:
  - a. The Chairman of IEBC or his authorized representatives to produce:
    - i. The 1<sup>st</sup> respondents Voter Registration and Register entry number.
    - ii. The 1<sup>st</sup> respondent's application form to vie for presidency of the Republic of Kenya.
    - iii. Details of how the 1<sup>st</sup> respondent registered as a Kenyan voter specifically how IEBC verified he is a Kenyan Citizen or whether he is a dual citizen; and
    - iv. The mental test results in respect to the 1<sup>st</sup> respondent who has applied and been cleared to vie for the presidency of the Republic of Kenya.
  - b. The Television Production Editor of Kenya national media houses who televised the interviews and rallies of the 1<sup>st</sup> respondent in order to produce certified video evidence as intimated and set out in the petitioner's CDs and list of documents.
  - c. That leave be granted and summons issue to the British Equivalent of the Kenyan Registrar of Persons to produce the citizenship/subject status/residency status of the 1<sup>st</sup> respondent in respect to the United Kingdom of Great Britain and Northern Ireland and information as to whether the 1<sup>st</sup> respondent swore allegiance to the Crown of the said Kingdom.
3. That pending the inter parties hearing and determination of the petition, the court be pleased to grant leave for the 2<sup>nd</sup> petitioner to be joined to the instant petition herein as a second petitioner and the amended petition heretofore filed be deemed to be duly filed and served upon payment of the requisite court filing fees.
4. That each party bears their cost being that this petition is brought in the interest of the public.

The petition and notices of motion are all supported by the grounds on their faces and the affidavits by the 1<sup>st</sup> petitioner.



## Preliminary Objections

3. Mr Okubasu for the 1<sup>st</sup> respondent filed a preliminary objection dated July 15, 2022 raising the following grounds:-
  - (i) That contrary to the guiding principles laid out by Supreme Court of Kenya in *Mohamed Abdi Mohamud v Ahmed Abdullabi Mohamad & 3 others, Ahmed Ali Mukta (Interested Party)* [2019] eKLR, both the petition and notice of motion application negate the doctrine of exhaustion in as far as they invoke the court's original and not appellate/supervisory jurisdiction in contestation of nomination of the 1<sup>st</sup> respondent as a presidential candidate.
  - (ii) That both the petition and application raise issues bordering on election nomination disputes and which disputes fall within the jurisdiction of the Independent and Boundaries Commission by virtue of article 88(4) of the *Constitution* as read together with section 74 of the *Elections Act*, section 4 of the *Independent Electoral and Boundaries Commission Act* and regulation 99 of the *Elections (General) Regulation, 2012* ("the General Regulation's") as well as the *Rules of Procedure on Settlement of Disputes* ("the Settlement of Disputes Rules").
  - (iii) That this honourable court lacks jurisdiction to entertain both the petition and application since the same would amount to usurping the powers of the Independent and Boundaries Commission which should be the first port of call in handling/determining the issues raised therein.
  - (iv) That both the petition and application are incompetent, fatally defective, misconceived and an abuse of court process.
  
4. Mr Olendo for the 2<sup>nd</sup> respondent filed a preliminary objection dated July 15, 2022 raising the following grounds:-
  - (i) That the petition and application be dismissed want of jurisdiction as the application and by extension this court are in effect usurping the IEBC's independence, jurisdiction and mandate under articles 82, 88 and 249(2) (a) and (b) of the *Constitution, 2010*, sections 23 and 109 of the *Elections Act, 2011* and regulation 16 to 19 of the *Elections (General) Regulations, 2012* to nominate, validate or invalidate the 1<sup>st</sup> respondent's nomination as a presidential candidate in the 2022 general elections.
  - (ii) That the petition and application be dismissed want of jurisdiction as the application and by extension this court are in effect usurping the IEBC's independence, jurisdiction and mandate under articles 82, 88 and 249(2)(a) and (b) of the *Constitution, 2010*, the *Elections Act, 2011* and the *Elections (General) Regulations, 2012* to nominate, validate or invalidate all the other candidates in the 2022 general elections.
  - (iii) That the petition and the application be dismissed as they seek this court to interfere and direct the IEBC on how to carry out their mandate under the *Constitution* and the *Elections Act*.



- (iv) That the petition and the application be dismissed in part for want of jurisdiction and prematurity by dint of article 88(4)(d) and (e) of the Constitution, 2010 as read with section 74 of the Elections Act, 2011 and the Rules of Procedure on Settlement Disputes that mandates and grants the IEBC authority and jurisdiction to resolve disputes relating to or arising from nominations of candidates including the 1<sup>st</sup> respondent for the forthcoming general elections.
- (v) That the petition and the application be dismissed for want of jurisdiction and prematurity by dint of article 84 of the Constitution, 2010, section 110 of the Elections Act as read with paragraph 15(1) of the second schedule to the Elections Act, as read with regulation 15 of the Rules of Procedure on Settlement of Disputes [LN 139/2012] that grants the IEBC and the Electoral Code of Conduct Enforcement Committee the original jurisdiction to receive, hear, determine and even penalize on the petitioner's complaints against the 1<sup>st</sup> respondent and against the IEBC that it cannot subject the 1<sup>st</sup> respondent to a disciplinary process.
- (vi) That the petition and application be dismissed for want of jurisdiction and prematurity as the petitioner has never applied to the IEBC under sections 7, 8, 9, 10 and 11 of the Access to information Act, 2016 (herein the ATIA) to be furnished with any information on the criterion used to clear candidates for the election; on their citizenship status; their allegiance to the country and their mental soundness or any other issue.
- (vii) That the petition and the application be dismissed for want of jurisdiction and prematurity as the petitioner has not exhausted the dispute resolution mechanisms at sections 14, 21 and 22 of the ATIA.
- (viii) That this petition should be dismissed and/or struck out for being *sub judice* to the petition in Nairobi High Court, Constitutional and Human Rights Division, Constitutional Petition No E326 of 2022 (Richard K Sibilibili v IEBC & 6 others).
- (ix) That the petition be dismissed of jurisdiction by virtue of article 163(6) of the Constitution, 2010 as this court has no jurisdiction to give advisory opinions indirectly sought by the petitioner, which is an exclusive preserve of the Supreme Court of Kenya.

### **The Petitioners/Applicants' Case**

#### **(Notice of Motion Dated July 8, 2022)**

5. A summary of the grounds and the supporting affidavit by the petitioners is that the Constitution is under serious threat by the 1<sup>st</sup> respondent who has promised to suspend it if elected president in the forthcoming elections.
6. It is averred that the 1<sup>st</sup> respondent in his campaigns and in his manifesto has violated the Constitution by stating that if elected he would:-
  - (a) legalize bhang cannabis;



- (b) snake farming;
- (c) export dog meat;
- (d) hang the corrupt;
- (e) suspend the Constitution;
- (f) shutting done the Standard Gauge Railway;
- (g) Four-day work week;
- (h) Move Kenya's capital city to Isiolo;
- (i) Create eight States;
- (j) Deport all idle foreigners.

7. They assert that through the 1<sup>st</sup> respondent it has clearly been revealed that:
- (a) The 1<sup>st</sup> respondent either holds citizenship of another country or allegiance to a foreign country and or has ties or commitment to another country;
  - (b) His manifesto openly reveals threat to the Constitution either in part or whole; and
  - (c) The 1<sup>st</sup> respondent being in serious violations of both the Constitution, revealing his intentions to dishonor Kenya's obligation to the international community;
  - (d) The 2<sup>nd</sup> respondent has remained adamant and reluctant, in total omission of its constitutional duty to either disqualify the 1<sup>st</sup> respondent from running for the position of the president of the republic of Kenya or recall his nomination as cleared to run for the said position.
8. The deponent avers that the summons applied for will enable the court dispense justice efficaciously, as those summoned will avail the best evidence to the court. To him this is part of discovery during litigation. It is their case that the sought for information is very important to them since the 1<sup>st</sup> respondent is vying for presidency of the Republic of Kenya.
9. Its on the above grounds and averments that the petitioners seek to have the 1<sup>st</sup> respondent's candidature suspended.

### **The Respondents' Case**

10. The 1<sup>st</sup> respondent did not file any response to the petitioners' applications.

### **The 2<sup>nd</sup> Respondent**

11. The 2<sup>nd</sup> respondent through Mr Olendo filed combined grounds of opposition to both the petition and application dated July 8, 2022. A summary of the grounds relevant to the application are that this court has no capacity to assess the mental capacity of the 1<sup>st</sup> respondent without any evidence to rely on. Further that the petitioners' apprehension is unsubstantiated as per article 84 of the Constitution and section 110 of the Elections Act and paragraph 15(1) of the second schedule to the Elections Act as read with regulation 15 of the Rules of the Procedure on Settlement of Disputes (LN 139/2012) (the Rules).



12. He refers to regulation 15(4) of the Rules which provides for the sanctions that may be imposed for misconduct. He further refers to paragraph 7(b) (iii) and paragraph 9 of the second schedule of the Elections Act. Another ground raised is to the effect that the petitioners should have sought the information they want from IEBC. That there is no evidence that they did. Further that there is no demonstration of how the 1<sup>st</sup> respondent's promises and manifesto will contravene or threaten the petitioners rights and freedoms. Its stated that there are legal provisions governing the issues raised in the 1<sup>st</sup> respondent's campaigns.
13. The 2<sup>nd</sup> respondent filed the following grounds of opposition to the petitioners application dated July 8, 2022 for production of documents/information:-
- (i) The petitioner has no case and therefore seeks to subtly construct one by fishing for additional evidence to sustain the petition that discloses no reasonable cause of action;
  - (ii) Per section 6 and 6A of the Elections Act the Register of Voters is opened for inspection by members of the public at all times for the purpose of rectifying the particular and for verification of biometric data by members of the public. It is therefore available to the petitioners without applying to court where they can find the 1<sup>st</sup> respondent's entry number;
  - (iii) There are standard application forms for nominations of presidential candidates that stipulate the information requires of the candidates per regulation 16 in form 12, and regulation 18 in form 13 of the Elections (General) Regulations, 2012. The information in the forms will not assist the petitioners or this court in any way as they are general information.
  - (iv) The nomination forms are exclusively for use by IEBC to conduct the nomination and not for use by any other person;
  - (v) The 1<sup>st</sup> respondent duly presented the legally prerequisite documents for registration as a voter, as any other voter did as set out in section 5(3) and (4) of the Elections Act and regulation's 13, 13A, 14, 15 and 16 of the Elections (Registrations of Voters) Regulations 2012 and he was duly registered by capturing of the information required in form A to the schedule to the Regulations;
  - (vi) The only way and best way to determine that a person is a Kenyan is through the national identification card or the traveling passport issued by the Government of Kenya;
  - (vii) The IEBC like any public or state office or institution does not carry out mental assessment of the prospective occupants of the respective offices including the elective offices and therefore the mental test results on the 1<sup>st</sup> respondent or nay other candidate is not available.
  - (viii) The applicant has not and can't demonstrate how the information and/or documents sought will assist in the exercise of protection of any of his right or fundamental freedom.



- (ix) The application is entirely unmerited, an abuse of the process and should be dismissed with costs.

### **The Petitioners' Response To The Preliminary Objections**

14. The petitioners filed grounds of opposition to the preliminary objection by the 1<sup>st</sup> respondent which are dated July 20, 2022. They are as follows:-

- (i) The preliminary objection raises issues of fact that would involve the court delving into the pleadings to find out whether the matter is an election dispute or a pure constitutional petition raising in substance threats and violations of the Constitution.
- (ii) The nature of the petition filed herein is cross cutting with its main foundation based on constitutional interpretation and application as remedies sought are anchored on constitutional declarations.
- (iii) The nature of the litigation herein is integral to the protection of the Constitution as the 1<sup>st</sup> respondent has made a covenant in his manifesto to suspend the Constitution.
- (iv) The petition seeks a declaration on the place of political manifestation during elections and after elections.
- (v) The remedies sought are far reaching beyond jurisdictional limits of the 2<sup>nd</sup> respondent.
- (vi) The jurisdiction of this court granted in the Constitution and cannot be ousted.
- (vii) If the 1<sup>st</sup> respondent's ideas and core promises are let to stand, it will create a dangerous precedent that other political parties may seek to adopt should they come to power.
- (viii) The Constitution protects itself by granting Kenyan's the locus standi and the duty to protect against any and all threats to the Constitution.
- (ix) If the petition and applications attached therein are not heard and determined before the elections, the damage done will be such as without remedy.
- (x) To avoid such irremediable damage, the petitioners have shewn grounds that the Courts ought to declare and grant directions.
- (xi) Alike the Beer Hall Putsch of Adolf Hitler and his threats against the Jews and other European nations on the superiority of the Aryan Race, together with his idea of lebensraum, the failure of the German courts to hold him accountable and prevent his ascension to power in the subsequent treason trial led to dire ramifications to the world. Herein, the same may be said of the 1<sup>st</sup> respondent who seeks to suspend the Constitution, kill judges and politicians he presumes to be corrupt and violate the moral fabric of the nation by outlandish ideas such as legalizing bhang to the great detriment of the rule of law and maintenance of public law, order and morality.
- (xii) The 1<sup>st</sup> respondent presents an existential threat to the Republic and the petitioners pray in their applications and petition merit the judicious consideration of the court at full trial.



- (xiii) The 1<sup>st</sup> respondent's notice of preliminary objection is misguided, misconceived and amounts to abuse of court process as it seeks to delay the determination of the petition and will in some back door way grant the 1<sup>st</sup> respondent a loophole to vie for office on dangerous constitutional blasphemies bordering on treason.
- (xiv) The preliminary objection ought to be dismissed in limine.
15. The petitioners also filed grounds of opposition to the 2<sup>nd</sup> respondent's preliminary objection. They are dated July 24, 2022. Though these grounds are shown as referring to the 2<sup>nd</sup> respondent's preliminary submissions the body of the same refer to those of the 1<sup>st</sup> respondent. They are as follows:-
- (i) The preliminary objection raises issues of fact that would involve the court delving into the pleadings to find out whether the matter is an election dispute or a pure constitutional petition raising in substance threats and violations of the Constitution.
  - (ii) The nature of the litigation herein is integral to the protection of the Constitution as the 1<sup>st</sup> respondent has made a covenant in his manifesto to suspend the Constitution.
  - (iii) If the 1<sup>st</sup> respondent's ideas and core promises are let to stand, it will create a dangerous precedent that other political parties may seek to adopt should they come to power.
  - (iv) The Constitution protects itself by granting Kenyan's the *locus standi* and the duty to protect against any and all threats to the Constitution.
  - (v) If the petition and applications attached therein are not heard and determined before the elections, the damage done will be such as without remedy.
  - (vi) To avoid such irremediable damage, the petitioner's have shewn grounds that the courts ought to declare and grant direction.
  - (vii) Alike the Beer Hall Putsch of Adolf Hitler and his threats against the Jews and other European Nations on the superiority of the Aryan Race, together with his idea of lebensraum, the failure of the German courts to hold him accountable and prevent his ascension to power in the subsequent treason trial led to dire ramifications to the world. Herein, the same may be said of the 1<sup>st</sup> respondent who seeks to suspend the Constitution, kill judges and politicians he premises to be corrupt and violate the moral fabric of the nation by outlandish idea such as legalizing bhang to the great detriment of the rule of law and maintenance of public law, order and morality.
  - (viii) The 1<sup>st</sup> respondent presents an existential threat to the Republic and the petitioners prayers in their applications and petition merit the judicious consideration of the court at full trial.
  - (ix) The 1<sup>st</sup> respondent's notice of preliminary objection is misguided, misconceived and amounts to abuse of court process as it seeks to delay the determination of the petition and will in some backdoor way grant the 1<sup>st</sup> respondent a loophole to vie for office on dangerous constitutional blasphemies bordering on treason.



- (x) The preliminary objection ought to be dismissed *in limine*.

### The Parties Submissions

16. The parties filed written submissions which were later highlighted. The petitioners submissions to the 1<sup>st</sup> & 2<sup>nd</sup> applications dated July 8, 2022, and dated July 20, 2022 respectively. On whether the petitioners/applicants have demonstrated that they are entitled to grant of the conservatory orders sought counsel submits that if the interim orders are not granted they and the members of public will suffer irreparable loss as the 1<sup>st</sup> respondent who has a huge following may find this way to the ballot box rendering the petition an academic exercise.
17. They submit that they have demonstrated through the affidavits that the 1<sup>st</sup> respondent is in clear breach of the Constitution. That he has threatened to suspend the Constitution. They accuse the 2<sup>nd</sup> respondent of continuing to fund the 1<sup>st</sup> respondent irrespective of all he is doing.
18. As to whether the substratum of the petition will be lost if the interim orders are not granted they submitted that the substratum is limited by time. They seek to have interim orders in terms of all their prayers claiming that if that is not done and the 1<sup>st</sup> respondent wins the elections their petition will die a natural death.
19. They submit that the 1<sup>st</sup> respondent's behavior leaves a lot to be desired, and the public should be protected against all that. They are keen to know the mental status of the 1<sup>st</sup> respondent as a presidential candidate. Relying on the case of David Ndii & others v Attorney General & others [2021] eKLR they submit that election is a process right from the closure of the dispute resolution committee to the swearing in of the President elect. They argue that their applications are not opposed save for the preliminary objection by the 1<sup>st</sup> respondent.
20. In respect of the preliminary objection raised by the 1<sup>st</sup> respondent they have submitted that under rule 99 of the Election (General) Regulation, 2012 owing to the timelines set the 2<sup>nd</sup> respondent will not be able to conduct or hold a session in order for the petitioners to exercise the doctrine of exhaustion before coming to this court. Its their contention that under the Fair Administrative Action Act they were at liberty to access the court to ventilate their grievance. They urge this court to find that it has jurisdiction to handle this matter. The petitioners did not file any submissions. In respect of the 2<sup>nd</sup> respondent's preliminary objection.
21. In their highlights the 1<sup>st</sup> petitioner submitted that the issue of mental assessment was one issue of fact. That since the respondents filed a reply to the petition the same can't be struck out. They argued that the substance of the petition goes beyond the issues of elections. That it's brought on the basis of articles 1, 2 & 3 of the Constitution. Further that it is premised on the political manifesto of the 1<sup>st</sup> respondent. Reliance was placed on the case of Sabina W Chege v IEBC [2022] eKLR and they argued that their reliefs are purely constitutional and are supported by substance.
22. Also referred to is the Hon Mike Mbuvi Sonko v The Clerk County Assembly of Nairobi City & others, Supreme Court Pet No 11 (E008) of 2022 where the court held that chapter six (6) of the Constitution is not a cosmetic one. It's their submission that the petition seeks to protect he constitution from the 1<sup>st</sup> respondent's threats, and it's not about elections. They add that if the court is convinced by the preliminary objections raised they urge the court to be guided by the decision in Eunice Ng'ang'a v HELB & others [2020] eKLR where the court dismissed the preliminary objection on exhaustion.



## The 1<sup>st</sup> Respondent's Submissions

23. The 1<sup>st</sup> respondent's submissions to the preliminary objection are dated July 22, 2022 and filed by Okubasu Munene & Kazungu advocates. Mr Okubasu submitted on the issue of jurisdiction. He urged that the permeating issue in the petition and application revolves around the suitability of the 1<sup>st</sup> respondent to contest in the oncoming presidential elections. He has raised the issue of this court's jurisdiction to hear this matter as held in the case of *Phoenix of EA Assurance Company Ltd v SM Thiga t/a Newspaper Service* [2019] eKLR. He also referred to *Owners of the Motor Vessel "Lillian S" v Caltex (Kenya) Ltd* [1989] KLR 1.
24. On the authority to clear candidates to contest in an election plus any other process, counsel referred to article 88(4) of the *Constitution*, regulations 16, - 19, 38, 42 – 43, 46 – 48, & 51 of the *Election (General) Regulations, 2012*. He submitted that all this was the reserve of the 2<sup>nd</sup> respondent. On settlement of disputes arising from nominations counsel referred to article 88(4) of the *Constitution*, section 74 of the *Elections Act* & section 4 of the *IEBC Act*. Rules 8, 9 (1) & 15 of the *Rules of Procedure on Settlement of Disputes*. On the basis of all the above provisions counsel submitted that IEBC wields the original jurisdiction and all that has been raised clearly falls within the jurisdiction of the IEBC. That courts have held that this IEBC jurisdiction runs upto the election date. See *Diana Kethi Kilonzo & another v IEBC & 10 others* [2013] eKLR.
25. He submits that this court's jurisdiction with regards to issues concerning suitability of a political candidate to be nominated can only be properly invoked by way of:-
- (i) Judicial review.
  - (ii) The court exercising its supervisory jurisdiction under article 165(3) & (6) of the *Constitution*. He relied on *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 others, Ahmed Ali Mukta (Interested Party)* [2019] eKLR in support.
26. On the issue of exhaustion of all available remedies he cited the High Court cases of:-
- (i) *Leina Konchellah v IEBC & 2 others; Jubilee Party of Kenya (Interested Party)* [2019] eKLR.
  - (ii) *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR
  - (iii) *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR.
  - (iv) *In the matter of the Mui Coal Basin Local Community* [2015] eKLR.
27. Counsel finally submitted that the call for this court to settle disputes relating to or arising from nominations in the first instance, and to disqualify a candidate duly cleared by the IEBC on the grounds raised in the instant petition is misplaced and should be dismissed for want of jurisdiction.

## The 2<sup>nd</sup> Respondent's Submissions

28. The 2<sup>nd</sup> respondent's submissions in respect of the preliminary objection dated July 15, 2022 are dated July 25, 2022. Mr Olendo submitted that in determining whether a court has jurisdiction regard is made to the *Constitution*, statute law and principles laid out in judicial precedents.
- See;
- (i) *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR.



- (ii) [\*IEBC v Jane Cheperenger & 2 others\*](#) [2015] eKLR.
29. On the complaint on the nomination and / or qualification of the 4<sup>th</sup> respondent as a presidential candidate counsel has outlined the provisions in article 88(4) (e)& (f) of the [\*Constitution\*](#) and section 4 of the [\*Independent Electoral and Boundaries Commission Act\*](#) which sets out the functions of the Independent Electoral and Boundaries Commission. He refers to section 109 of the [\*Elections Act\*](#) by which the IEBC formulated and gazetted the [\*Elections \(General\) Regulations, 2012\*](#). He submits that regulation 43 outlines the powers of returning officers in the nominations of candidates, while article 137 of the [\*Constitution\*](#) sets out the qualification and disqualification of presidential candidates. Counsel further submits that IEBC is charged with regulating the conduct of candidates and their supporters in the electioneering period. A code of conduct has been developed pursuant to article 88(4) (j) of the [\*Constitution\*](#). Complaints are forwarded to IEBC and parties are heard. He refers to:
- (i) [\*Eric Kyalo Mutua v Wiper Democratic Movement Kenya & another\*](#) [2017] eKLR;
- (ii) [\*Fredrick Odhiambo Oyugi v Orange Democratic Movement & 2 others\*](#) [2017] eKLR in support. He asserts that courts have desisted from interfering with such functions as those of the IEBC. Reference is made to [\*Tom Dola & 2 others v Chairman, National Land Commission & 5 others\*](#) [2020] eKLR.
30. It is counsel's submission that as has been held in various decisions by the Court of Appeal, where a dispute resolution mechanism exists outside the courts the same must be exhausted before the court's jurisdiction is invoked. In support he cited the cases of:
- (i) [\*Geoffrey Muthinja & another \(supra\)\*](#)
- (ii) [\*Kenya Revenue authority v Universal Corporation Ltd\*](#) [2020] eKLR among others.
31. On constitutional avoidance he submits that it shuns the practice of forging every other dispute into a constitutional petition when there are legally available averments to address such disputes, in order to circumvent those processes. He relied on the cases of:
- (i) [\*Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another\*](#) [2016] eKLR
- (ii) [\*Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission and 3 others\*](#) [2019] eKLR.
32. Counsel further submitted that this petition is sub-judice to Nairobi Constitutional Petition No E326 of 2022. He argues that if the two petitions go to full hearing the final decisions will be unimaginable parallels and worse still they could be contradictory.

### **Analysis and Determination**

33. I have carefully considered the pleadings, the applications, the preliminary objections, the written and oral submissions, cited authorities and the law. I find the issues falling for determination to be as follows:-
- (i) Whether what has been raised by the respondents is a preliminary objection.
- (ii) Whether this court has jurisdiction



- (iii) Whether the petitioners have established a *prima facie* case for issuance of the reliefs they seek whether the respondents have raised a real preliminary objection.

34. What constitutes a preliminary objection was set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. This was later emphasized by the supreme Court of Kenya in the case of *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* [2014] eKLR as follows at paragraph 31:

“To restate the relevant principle from the precedent in setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696:

“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 is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

35. The Supreme Court further pronounced itself on the purpose of a preliminary objection in the case of *Independent Electoral & Boundaries Commission v Jane Cheprenger & 2 others* [2015] eKLR as follows:-

“(21) – The occasion to hear this matter accords us opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: Firstly, it serves as a shield for the originator of the objection – against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time. So it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” (Emphasis added).

36. The respondents are challenging this court’s jurisdiction to entertain this constitutional petition. According to them the petitioners ought to have first approached the 2<sup>nd</sup> respondent and thereafter only come to this court in the form of an appeal or Judicial review. I am in agreement with them that the issue of jurisdiction is a point of law. This has been confirmed by the Supreme Court in:

- (i) Hassan Ali Joho & another (*supra*).
- (ii) Mary Wambui Munene v Peter Gichuki Kingara & six others [2014] eKLR.

## **(ii) Whether this court has jurisdiction**

37. In their notices of preliminary objection the respondents have challenged this court’s jurisdiction to handle this petition and application. Their objection is based on the ground that by hearing this matter the court will be usurping the independence, jurisdiction and mandate of the 2<sup>nd</sup> respondent under articles 82, 88, 249(2)(a) & (b), sections 23 & 109 of the *Elections Act* 2011, and regulations 16 – 19



of the *Elections (General) Regulations 2012* to nominate, validate or invalidate the 1<sup>st</sup> respondent's nomination as a presidential candidate in the 2022 general elections.

38. The *locus classicus* on jurisdiction is the case of "*Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya)* [1989] KLR 1 where Nyarangi, JA held:-

"...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 tools in respect of the matter before it the moment it holds the opinions that it is without jurisdiction."

39. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR Application No 2 of 2011 the Supreme Court held as follows:-

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

Also see:

- (i) *In the matter of Interim Independent Electoral Commission* [2011] eKLR.
- (ii) Nakuru Civil Appeal No 119 of 2017, *Public Service Commission & 2 others v Eric Cheruiyot & 16 others* Consolidated with Civil Appeal No 139 of 2017 *County Government of Embu & another v Eric Cheruiyot & 15 others* [2022] eKLR.

40. The instant petition relates to a dispute to the elections scheduled for August 9, 2022. The petitioners are dissatisfied with the nomination of the 1<sup>st</sup> respondent as a presidential candidate. The nomination was not done by the voters. It was done by a body that is mandated to carry out that exercise. This body is called the Independent Electoral & Boundaries Commission (IEBC).

41. This mandate to the IEBC is anchored in the *Constitution* and statutes. Article 82(1) of the *Constitution* provides:-

Parliament shall enact legislation to provide for:-

- a) .....
- b) The nomination of candidates
- c) ...
- d) The conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections.

42. Article 88 of the *Constitution* establishes the IEBC. Sub-article (4) provides for its functions as follows:-

"(4).....

- (a) – (d) .....



- (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) - (k) ....."

43. Section 74 of the [Elections Act](#) further provides for the settlement of disputes as follows:-

"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."

44. Section 4 of the [IEBC Act](#) stipulates the function of the Commission to be as follows:

- 4. Functions of the Commission as provided for by article 88(4) of the [Constitution](#), the commission is responsible for conducting or supervision 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 & disputes subsequent to the declaration of election results;
  - (f) the registration of candidates for election.

45. Article 249(2)(a) & (b) of the [Constitution](#) provides for the independence of commissions as follows:

- (2) The commissions and the holders of independent offices—
  - (a) are subject only to this [Constitution](#) and the law; and
  - (b) are independent and not subject to direction or control by any person or authority.

46. Pursuant to the provisions of the [Elections Act](#) there are in place [Rules of Procedure on Settlement of Disputes](#) enacted through Legal Notice No 139 of 2012. Rule 3 provides that the object of these rules is to provide a procedure and mechanisms for the expeditious, efficient, lawful, reasonable and procedurally fair settlement of disputes including those contemplated under article 88(4) of the



Constitution and section 74 of the Act. Rule 4(1) provides for the application of rules to disputes or complaints arising from

- "(b) nomination of candidates;
- (c) violations of the electoral code of conduct; and
- (d) any other election related complaint."

47. Rule 8 provides for initiation of a complaint, rule 9 provides for disputes arising from nomination of candidates;

Rule 10 provides for when the returning officer or the commission acting on appeal may decline to accept a dispute;

Rule 11 provides for powers of the returning officer to decide on any dispute arising from a nomination of a candidate within the electoral area;

Rule 12 provides for the decision of the returning officer and obligates him / her to issue a written decision and record the reasons for the decision;

Rule 13 provides for appeal of the returning officer's decision to the commission; and,

Rule 14 provides for the power of the commission to delegate to the committee the power to settle disputes.

48. Regulation 43 of the Elections (General) Regulation, 2012 provides for the validity of nomination papers and sub section (2) provides for when the returning officer shall hold a nomination paper invalid.

49. I have set out the above rules, and regulation to demonstrate that indeed the 2<sup>nd</sup> respondent has the mandate to hear pre-election disputes including the ones touching on nomination of candidates. They also have powers to nominate, validate or invalidate a nomination.

50. From the petitioners brief – the 2<sup>nd</sup> respondent released the names of the successful nominees for the position of the President in the forthcoming general elections, on June 7, 2022. After the release the 1<sup>st</sup> respondent continued with his campaigns and telling Kenyans what he stood for, his vision among many others. He then launched his Manifesto on June 30, 2022. On July 1, 2022 the 2<sup>nd</sup> respondent had the names of the presidential candidates gazetted and the 1<sup>st</sup> respondent's name was among them. The campaigns by the 1<sup>st</sup> respondent continued. It was not until the July 12, 2022 that the petition herein was filed before this court.

51. The release of the names of the presidential nominees which was made on June 7, 2022 was not a secret. It was in the public domain in line with section 27(1) of the IEBC Act which provides:

- (1) The Commission shall publish and publicise all important information within its mandate affecting the nation.
- (2) A request for information in the public interest by a citizen—
  - (a) shall be addressed to the secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and



(b) may be subject to confidentiality requirements of the Commission.

52. Since the petitioners were dissatisfied with the nomination of the 1<sup>st</sup> respondent for whatever reason what step did they take? There is no evidence of them having filed any complaint with the 2<sup>nd</sup> respondent over the alleged violations of the Constitution by the 1<sup>st</sup> respondent. From the provisions of the law already cited above, the first point of call when one is aggrieved by a nomination is the IEBC. The Rules provide for the procedure in lodging a complaint.
53. The petitioners have also questioned the 1<sup>st</sup> petitioners conduct and his utterances. The second schedule of the Elections Act provides for the Electoral Code of Conduct. It provides:-

"Paragraph 1.

- (1) This Code shall be subscribed to by—
- (a) every political party participating in the election of a president, a member of Parliament, a county governor, a member of a county assembly;
  - (b) every candidate; and
  - (c) every leader, chief agent, agent or official of a referendum committee.
- (2) This Code shall, in so far as it is applicable, bind the Government and every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.
- (3) All registered political parties and referendum committees shall execute this Code through the hand of their respective registered officials to signify their acceptance to be bound by the provisions of this Code and their commitment to strive to ensure that their members and any person who supports the political party abide by the code at all stages of elections and referendum.

Paragraph 7. Where, in the opinion of the Commission, any political party or referendum committee participating in any election or referendum or the leader, office-bearer or member of a political party or person who supports the political party or referendum committee or any candidate at any election, in any way infringes any provision of this Code, the Commission may—

- (a) in the case of a political party and, subject to sub-paragraph (b), and in the case of the leader, any office-bearer or member of a political party or person who supports the political party referendum committee or candidate, impose upon that political party one or more of the following penalties or sanctions which any or all may be suspended on specific conditions—
  - (i) a formal warning;
  - (ii) a fine determined by the Commission;



- (iii) notwithstanding the provisions of any other written law, an order prohibiting the political party, whether permanently or for a specified period, from utilizing any public media time, through the television or radio broadcasting service of such media as have been or may be allocated to the political party for electoral purposes;
- (vi) an order prohibiting the political party, referendum committee or candidate from—
  - (aa) holding particular public meetings, demonstrations or marches, or any kind of meeting, demonstration or march;
  - (bb) entering any specified electoral area for purposes of canvassing for membership, or for any other electoral purpose;
  - (cc) erecting placards or banners, or from publishing and distributing campaign literature;
  - (dd) publishing or distributing campaign literature and electoral advertising or limiting the rights of the political party to do so, and such prohibition or limitation shall be notified to the relevant regulating officers under the *Public Order Act* (cap 56) in the affected places or electoral areas for purposes of the Act;
  - (ee) in the case of the leader, candidate, an office-bearer or member of a political party or person who supports the political party or referendum committees impose any one or more of the penalties or sanctions referred to in subparagraph
    - (a)(i) or (ii) of this paragraph;
    - (b) Where a political party, referendum committee, leader or any office bearer, member or person who supports the political party, referendum committee or any candidate at an election fails, neglects or refuses to comply with the orders of the Commission issued under paragraph 7(a), the Commission shall impose upon the defaulting party any of the following sanctions which may be suspended on specific conditions—



- (i) in case of fine imposed, prohibit the defaulting party from participating in ongoing and future elections as candidates in case of a defaulting candidate or prohibit the political party or the referendum committee official from participating in ongoing elections and referendum, and future elections or referendum or any activity facilitated by the Commission until such fine has been paid;
- (ii) in case of failure to comply with any other sanctions imposed, cancel the right of such political party or candidate to participate in the next election; and
- (iii) file execution proceedings in the High Court to enforce the recovery of the fine.

Paragraph 15.

- (1) The Commission shall set up the Electoral Code of Conduct Enforcement Committee which shall comprise of not less than five members of the Commission and shall be chaired by a member appointed by the Chairperson; the Commission may nominate a member of its staff to be the secretary to the Committee.
- (2) The Chairperson of the committee shall be a person who is qualified to hold the office of Judge of the High Court.
- (3) Every candidate, official and agent shall—
  - (a) acknowledge the authority of the Committee to enforce the provisions of this Code on behalf of the Commission;
  - (b) ensure compliance with summons issued to the party, its candidates or representatives by the Committee;
  - (c) co-operate in the official investigation of issues and allegations arising at election period; and
  - (d) respect and comply with the orders issued by the Committee.
- (4) The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.



(5) In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation."

54. I have set out the above provisions of the Electoral Code of Conduct to clearly show that we have sufficient machinery entrenched under the [Elections Act](#) to manage and settle disputes and complaints regarding breach of the code of conduct. Such should be reported to the 2<sup>nd</sup> respondent. No complaint has been made to the 2<sup>nd</sup> respondent along these lines.

55. In this petition the petitioners are seeking orders to compel some offices, bodies etc to avail certain evidence or material to the court. It is them who are making allegations against the 1<sup>st</sup> respondent. It's their duty to avail evidence to the court in support of their claims. The principle of law is that he who alleges a fact must prove it.

56. Sections 107 – 109 of the [Evidence Act](#) provide as follows:-

"107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

57. The 2<sup>nd</sup> respondent in nominating the 1<sup>st</sup> respondent as a presidential candidate actually made a decision. The [Elections Act](#), [IEBC Act](#), have set out the [Rules](#) and [Regulations](#) governing the challenging of such a decision. It has to be in form of a complaint, review or appeal to IEBC. The position is that the decision by the IEBC stands, since it has not been overturned or set aside.

58. The Supreme Court in the case of [Silverse Lisamula Anami v Independent Electoral & Boundaries Commission & 2 others](#) [2019] eKLR.

"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 dismissing 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.

Nomination is one of the qualifications through which one becomes eligible to participate in an election. The IEBC in that context is expressly excluded from adjudicating over election petitions. That mandate is pursuant to article



105 donated to the High Court..... 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.”

59. This decision by the Supreme Court guides us on the process and procedure of handling pre-election matters/disputes.
60. After due consideration of the material before me I find that the petitioners did not follow or even attempt to follow the process for dispute resolution under the *Elections Act* and the *IEBC Act*, before filing this petition. For that reason they clothed their claim as a constitutional petition while in actual fact their issue is challenging the nomination of the 1<sup>st</sup> respondent as a Presidential candidate by the 2<sup>nd</sup> respondent. They therefore failed to adhere to the doctrine of exhaustion.
61. All these rules, regulations / processes were not enacted just for the sake of it. They are meant to guide Kenyans on what should be done before, during and after elections. For the above reasons I find that the IEBC decision to nominate the 1<sup>st</sup> respondent to vie for presidency still stands. What is before this court is neither an appeal or review.
62. This petition was filed prematurely before exhausting the dispute resolution process in place. I therefore find merit in the preliminary objections raised. They are allowed. The petition and applications are struck out with costs.

Orders accordingly.

**DELIVERED VIRTUALLY SIGNED AND DATED THIS 29<sup>TH</sup> DAY OF JULY 2022 IN OPEN COURT AT MILIMANI NAIROBI.**

**HI ONG'UDI**

**JUDGE OF THE HIGH COURT**

