



Mogonchi v Jaramogi Oginga Odinga University of Science and Technology & 2 others; Commission for University Education & 2 others (Interested Parties) (Petition 10 of 2022) [2022] KEHC 12468 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
PETITION 10 OF 2022**

REA OUGO, J

JULY 26, 2022

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE POLITICAL
RIGHT UNDER ARTICLE 38 (2) OF THE CONSTITUTION**

BETWEEN

NASHON KEMBERO MOGONCHI PETITIONER

AND

**JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE AND
TECHNOLOGY 1ST RESPONDENT**

SIMBA ARATI 2ND RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSIONEBC 3RD
RESPONDENT**

AND

COMMISSION FOR UNIVERSITY EDUCATION INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

ODM-PARTY INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner herein, Nashon Kembero Omogonchi, is a male adult and a resident of Kisii County.
2. The 1st respondent was established under Legal Notice No 56 as a constituent college of Maseno University and as a successor of Bondo University College.



3. The 2nd respondent is the candidate nominated by Orange Democratic Movement (ODM) Party to contest the gubernatorial seat in Kisii County.
4. The 3rd respondent was established under article 88 of the Constitution and responsible for conducting or supervising elections to any elective body or office established by the Constitution.
5. The 1st interested party is a public body established under section 3 (1) of the Ethics and Anti-Corruption Commission Act, 2011 with the mandate to combat and prevent corruption, economic crime and unethical conduct in Kenya.
6. Section 4 of the Universities Act No 42 of 2012 establishes the 2nd interested party and it is responsible for approving and inspecting university academic programs.
7. The 3rd interested party is a political party registered under the Political Parties Act 2011.

Petitioner's Case

8. The petitioner through a petition dated June 29, 2022 seeks the following orders;
 1. That, this honourable court be pleased to issue declaratory orders that conferment of the Bachelor of Arts in International Relations with IT upon the 2nd respondent is invalid null and void ab initio for want of compliance with program approval requirement by the University Council.
 2. That, this honourable court be pleased to issue declaratory orders that the conferment of the Bachelor of Arts in International Relations with IT upon the 2nd respondent is invalid, null and void ab initio for want of accreditation by the Commission for University Education.
 3. That, this honourable court be pleased to issue declaratory orders that the conferment of the Bachelor of Arts in International Relations with IT upon the 2nd respondent is invalid, null and void ab initio for want of registration in accordance of the approved admission criteria for independent admissions.
 4. That, this honourable court be pleased to issue declaratory orders that the conferment of the Bachelor of Arts in International Relations with IT upon the 2nd respondent is invalid, null and void ab initio for want of passing all core and required units in each year of study being requirements for graduation, award of degrees and issuance of certificates and transcripts under section 13.1 of the University Examination Policy.
 5. That, this honourable court be pleased to issue declaratory orders that the conferment of the Bachelor of Arts in International Relations with IT upon the 2nd respondent is invalid, null and void ab initio for want of compliance and adherence to the requirement of regular enrolment and attendance of lectures.
 6. That, this honourable court be pleased to issue declaratory orders that the conferment of the Masters in Business Administration (Strategic Management) upon the 2nd Respondent is invalid, null and void ab initio for want of registration in accordance to the approved admission criteria for independent admissions.
 7. That, this honourable court be pleased to issue a declaration that the 2nd respondent obtained the BA degree by means of fraud, misrepresentation and/or other corrupt practices.



8. That, this honourable court be pleased to issue a declaration that the 2nd respondent did not deserve to be conferred the BA degree during the 9th graduation ceremony held on May 27, 2016.
 9. That, this honourable court be pleased to issue a declaration that the 2nd respondent did not deserve to be conferred the MBA degree during the 9th graduation ceremony held on April 22, 2022.
 10. That, this honourable court be pleased to issue a declaration that the 2nd respondent was ineligible for nomination as a gubernatorial candidate for the general elections slated for August 9, 2022.
 11. That, this honourable court be pleased to issue an injunction upon the 2nd respondent against seeking election either as President, Deputy President, Governor or Deputy Governor in any elections on the basis of the said invalid degrees including the general elections slated for August 9, 2022.
 12. That, this honourable court be pleased to issue mandamus directing the 1st respondent to exercise its powers under section 10(2) of the University Charter and Statute XXVII to accordingly withdraw the degree of Bachelor of Arts in International Relations with IT awarded to the 2nd respondent on May 27, 2016.
 13. That, this honourable court be pleased to issue an order of mandamus directing the 1st respondent to exercise its powers under section 10(2) of the University Charter and Statute XXVII to accordingly withdraw the degree of Masters in Business Administrations- Strategic Management option awarded to the 2nd respondent on April 22, 2022.
 14. That, this honourable court be pleased to issue declaratory orders that the authenticity of a University degree for purpose of legal requirements for section 22 (2) of the [Elections Act](#) shall be anchored on the integrity of adherence to quality standards and procedures leading to the conferment of the said degree; including the holder having satisfied the admission criteria and having undertaken an approved course of study for the prescribed period of study.
 15. That, this honourable court be pleased to issue such further consequential order(s) and declarations as it may deem just and expedient for the ends of justice.
 16. That, costs of the petition be in the cause.
9. The petition was filed contemporaneously with a notice of motion seeking conservatory orders restraining the 3rd respondent from printing ballot papers for Kisii County gubernatorial elections slated for August 9, 2022. The petitioner also sought production orders directed at the 1st respondent for to produce various documents. The notice of motion was equally filed without a supporting affidavit therefore rendering the application incompetent. In any event, the orders sought in that notice of Motion are now spent as the petitioner sought the said orders pending hearing and determination of the application inter-partes without seeking any substantive orders. The only issue before the court is a determination of the petition on its merits.
 10. A brief background to the petitioner's case is that he challenges the 2nd respondent's academic qualification of the degree certificates issued by the 1st respondent, that is, a Bachelor of Arts in International Relations with IT and his MBA degree. According to the petitioner, the 2nd respondent did not complete his diploma in Tourism Management at Kenya Polytechnic between 2001 and 2003 and was therefore not a holder of a KNEC Diploma and thus ineligible to undertake a Bachelor of



- Arts degree. He averred that the 1st respondent's criteria for admission of prospective applicants for their Bachelor of Arts degree includes: A KCSE mean grade of C+(plus), with a C+ (plus) in English or Kiswahili or a foreign language; in the alternative, a KCSE mean of C- (minus) plus a relevant KNEC Diploma from an accredited institution. The 2nd respondent was therefore ineligible for admission at the 1st respondent's institution.
11. The petitioner therefore wrote to the Vice-Chancellor of the 1st respondent seeking information on the education background of the 2nd respondent. On May 10, 2022, the 1st respondent wrote back confirming that the 2nd respondent was a former student with registration Nos B151/4398/2016 and Z731/3602/2014 for bachelors and post graduate studies respectively. The petitioner argues that this is irregular as it shows the 2nd respondent's postgraduate registration preceded his registration for his undergraduate studies. The 2nd respondent was therefore registered to pursue a postgraduate program for academic year 2014/2015 registered under registration No Z731/3602/2014 yet he was not a holder of a bachelor's degree.
 12. The petitioner alleged that assuming the 1st respondent commenced his studies on January 1, 2014, he would not have been able to complete 8 trimesters and his internship by May 27, 2016 when the 2nd respondent is said to have graduated. The 2nd respondent was therefore permitted to graduate prematurely without attending all the 8 trimester course units. The 2nd respondent was a full time legislator in the National Assembly and thus could not have been available to undertake studies on a full time basis. The standards and quality of education was therefore compromised by the 1st respondent to accommodate the 2nd respondent.
 13. The petitioner did not however get a response from the 1st respondent on whether the undergraduate degree offered to the 2nd respondent was done without the approval of the University Council contrary to section 29 (1) of the 1st respondent's Charter. The petitioner advanced that the University Council and the 2nd interested party are the lawfully recognized lead agencies for quality assurance of higher education offered by chartered universities. However, the bachelor's degree offered to the 2nd respondent was made without the approval of the university council and the 2nd interested party. The petitioner scrutinized the documents publicized by the 2nd interested party titled 'Approved Academic Programs offered in Chartered Universities in Kenya in Accordance with the Universities Act' and noted that the Bachelor of Arts program offered to the 2nd respondent had not been approved by the 2nd interested party for offer by the 1st respondent.
 14. The petitioner again wrote back to the 1st respondent concerning the 2nd respondent's integrity and suitability to contest the Kisii gubernatorial elections. It was further pleaded that the 1st respondent thereafter unreasonably withheld information relating to the 2nd respondent's academic background on the pretext of restrictive legal requirements under the Data Protection Act, No 24 of 2019. He alleged that he had requested the said information in exercise of his right under article 35 (1) (b) of the Constitution. The petitioner contends that the 1st respondent was in violation of articles 10(1), 10(2) (c), 232 (1) (a), (c), (e) & 232 (a) & (b), and 73 (2) (b), (c), (d) of the Constitution of Kenya. The 1st respondent conferred an illegitimate degree to 2nd respondent, which he then presented to the 3rd respondent in compliance with section 22 (2) of the Elections Act thus threatening article 38 (2) (c) of the Constitution.

Response To Petition

15. The petition was opposed by the 1st and 2nd respondent who filed their various responses. The 3rd respondent elected not to respond to the petition despite being served.



16. The 1st respondent filed a preliminary objection in response to the petition on July 21, 2022 on the following grounds:
 1. That the petition is fatally defective in form and substance as the remedies sought by the petitioner/applicant against the 1st respondent cannot be granted by virtue of a petition.
 2. That the reliefs sought by the petitioner can only be granted through a judicial review as per the provisions of section 7 and 8 of the Law Reform Act, order 53 of the Civil Procedure Rules, 2010.
 3. That the petition as drafted does not conform to the provisions of rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
 4. That the petition filed and the evidence thereof do not conform to section 107 (1) and (2) of the Evidence Act, cap 80 of the laws of Kenya.
 5. That no constitutional issues are discernable in the entire petition to warrant its admission and adjudication before the honourable court.
 6. The claim against the 1st respondent is an abuse of this court process and the petition and notice of motion has been instituted with ulterior motive to gain some collateral advantage and which is an illegitimate use of the court process.
 7. Petition is bad in law, misconceived and discloses no reasonable cause of action as against the 1st respondent thus rendering it fatally and incurably defective.
17. The 1st respondent's grounds of opposition were as follows:
 1. That the petition upon which the said notice of motion application is premised is grossly incompetent as it does not assert to a reasonable degree the provisions of infringement under the constitution.
 2. That the petitioner/applicant has not specified the particulars of violation under the Constitution with specificity and the manner of infringement.
 3. That the petitioner/applicant did not apply the doctrine of exhaustion in addressing the pre-election disputes raised in the petition as he failed to exhaust the available dispute resolution mechanisms.
 4. That the application and petition are improperly filed as the documents are dated June 29, 2022 but officially received in court on June 18, 2022.
 5. That the petition as drafted does not conform to the provision of rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
 6. That the petition filed and the evidence thereof do not conform to section 107 (1) and (2) of the Evidence Act, cap 80 of the laws of Kenya.
 7. The application and petition are in bad law, frivolous, vexatious, misconceived, and incompetent and an abuse of the due process of the court.
 8. The application and petition are incompetent, lack merit and the same ought to be struck out with costs.
18. The 2nd respondent filed a statement of grounds of opposition to the petitioner's notice of motion, a replying affidavit to the petitioner's notice of motion and a list of authorities and digest in opposition



- to the notice of motion and the petition. The 2nd respondent did not file a response to the petition but at the hearing of the petition expressed that he wished to rely on his replying affidavit to the petitioner's notice of motion as his response to the petition.
19. According to the 2nd respondent, the petitioner had approached the court as an election court, yet the court has no jurisdiction to entertain the petition, the petitioner having failed to first exhaust the adequate mechanism provided to deal with the pre-election disputes. The petitioner did not lodge any complaint with the returning officer in regard to the 2nd respondent's alleged academic credentials during the nomination period. The petitioner was aware of the disputes that were widely reported both in print and electronic media being IEBC Dispute Resolution Committee Complaint No 73 of 2022 by Moses Ayieko Ntabo and Wesley Obwang'i and IEBC Dispute Resolution Committee Complaint No 235 of 2022 by Charles Ontomwa Nyamwange, whose outcome he has not been challenged. In both cases before the IEBC Dispute Resolution Committee, the complainants challenged the validity of the degree certificate held by the 2nd respondent.
 20. The 2nd respondent explained that he completed his primary education at Rigena Primary School and attained 391 marks, then proceeded for his secondary education at Suneka Secondary School and attained a mean grade of C-. Upon completing his secondary education, he undertook a Diploma Course in Personnel Management under the Business Technical Education Program (TEP) and was issued with a Diploma Certificate by the Kenya National Examination Council (KNEC) in the year 2012. He therefore met the minimum requirements of the 1st respondent when he applied and enrolled for a degree course in bachelor of arts in International Relations with IT. He graduated with a second class honors (upper division) on May 27, 2016 and applied for a Master's Degree in Business Administration (Strategic Management Option) in August 2016 at the same university. He sat for all his units for the Master's program, undertook his Research for his thesis in his area of interest namely; "Effect of Marketing Strategy on Performance of Pepsi-Cola Limited in Kenya," and graduated from the University with the said master's degree on April 22, 2022.
 21. In the complaints lodged before the IEBC Dispute Resolution Committee, the 1st respondent through Dr Agnes Salome Awuor, the administrator at the 1st respondent, also swore an affidavit regarding his education at the institution. IEBC Dispute Resolution Committee Complaint No 73 of 2022 was withdrawn while complaint No 235 of 2022, proceeded to full hearing. The complaint was heard and dismissed on the grounds that the 2nd respondent had proper academic qualifications for nomination as a candidate for the position of governor in the upcoming general elections in Kisii County. According to the 2nd respondent the petition is based on generalized omnibus assertions without any such specificity. The petition is therefore moot as the issues being raised have been determined with finality by the IEBC Dispute Resolution Committee sitting at Nairobi whose decision has not been challenged and remain binding. The petition is also incompetent for want of jurisdiction.

Submissions By Parties

22. The petitioner filed his submissions on July 21, 2022. His submissions rehashed the averments contained in his petition and supporting affidavit. The petitioner also made oral submissions and argued that rule 15 (1) of the [*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013*](#) provides that the attorney general or any other State organ shall within 14 days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit. He submitted that the 1st respondent has failed to file its replying affidavit.



23. The 1st respondent filed its submissions on July 21, 2022. Ms. Nyamita, counsel for the 1st respondent, also made oral submissions. She argued that the burden of proof naturally rests upon the petitioner who wishes for the court to rule in his favor. The 1st respondent called into aid the case of *Levi Simiyu Makali v Koyi John Waluke & 2 others* [2018] eKLR, Bungoma High Court Election Petition No 4 of 2017 where the court held that the burden of proof is comprised of the legal burden of proof and the evidential burden of proof. The court in the Levi Simiyu Makali case (*supra*) observed as follows:

(ii) The evidential burden of proof: -

26. The petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the court that an election ought to be impugned, then it becomes the burden of the respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.

27. ...

28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -

[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

29. It therefore follows that the legal burden of proof is static and rests on the petitioner throughout the trial. It is only the evidential burden of proof which may shift to the respondents depending on the nature and effect of evidence adduced by a petitioner."

24. It was submitted that the petitioner in his list of documents in support of the petition dated July 29, 2022 merely listed the documents he anticipates to rely on. He has however not adduced before the honorable court credible and substantial evidence to support his claim. The 1st respondent being the originator of the academic certificates issued to the 2nd respondent stands by its conferment of the Bachelor of Arts in International Relations with IT and Masters of Business Administration in



Strategic Management to the 2nd respondent and communicated the same to the petitioner via a letter dated May 10, 2022.

25. It was further submitted that section 6 (1) of the [Access to information Act](#) provides for limitations of the right to access to information. Section 6(1)(d) of the [Access to information Act](#) states that the right is limited if it involves the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made. Section 30 (1) (a) of the [Data Protection Act](#) No 24 of 2019, laws of Kenya also provides that a data controller or data processor shall not process personal data, unless the data subject consents to the processing for one or more specified purposes. There is no indication that the Petitioner sought the 2nd respondent's consent to have his personal data and academic information submitted to the petitioner and therefore, the 1st respondent had no obligation to submit the information as requested.

26. The 2nd respondent, through Counsel Mr Nyandieka, made oral submissions opposing the petition on July 21, 2022. Mr Nyandieka challenged the jurisdiction of the court to entertain the petition. He argued that the dispute ought to have been resolved by the IEBC Dispute Resolution Committee. He called into aid the case of [Mohamed Abdi Mahamud v Ahmed Abdullahi Mobamad & 3 others; Ahmed Ali Muktar \(Interested Party\)](#) [2019] eKLR where the court made rules of determination of pre-election disputes:

(68) So as to ensure that article 88 (4) (e) of the [Constitution](#) is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election court under article 105 of the [Constitution](#), the court developed the following principles:

- (i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
- (ii) where a pre-election dispute has been conclusively resolved 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](#), such dispute shall not be a ground in a petition to the election court;
- (iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to 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](#); the High Court shall hear and determine the dispute before the elections, and in accordance with the constitutional timelines;
- (iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court;
- (v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to 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](#), even after the determination of an election petition;
- (vi) in determining the validity of an election under article 105 of the [Constitution](#), or section 75 (1) of the [Elections Act](#), an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner



was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.

27. He submitted that in there were already 2 matters filed before the IEBC Dispute Resolution Committee, of the 2 matters, one was withdrawn and the other determined with finality. The 2nd respondent submitted that the petitioner therefore ought to have filed a judicial review challenging the decision of the IEBC Dispute Resolution Committee. In *Silverse Lisamula Anami v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR the Supreme Court held 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.”

28. The 2nd respondent argued that the petition failed to meet the threshold established by the court in the case of *Anarita Karimi Njeru v The Republic* [1976-1980] KLR 1272. The petitioner failed to demonstrate how the provisions of the *Constitution* were violated. He also pointed out that the requirement for a master’s degree was not one of the qualifications required of candidates contesting a governor’s seat. He argued that for the petitioner to make his case under article 35 of the *Constitution* he was required to prove that he had sought to be furnished with the documents but was denied.
29. Miss Kamau, counsel for the 2nd interested party was present at the hearing of the petition, she indicated that they have nothing to say.

Analysis And Determination

30. I have considered the pleadings by the parties, their oral and written submissions and note that the jurisdiction of this court has been challenged by the 1st and 2nd respondent. The 2nd respondent challenges the jurisdiction of this court on the basis that the petitioner ought to have approached the court by way of judicial review for reasons that there exists a decision by the IEBC Dispute Resolution Committee that has not been challenged. The 2nd respondent argued that the petitioner had approached the court as an election court.
31. The 1st respondent also attacked the jurisdiction of the court arguing that that the petition failed to meet the threshold set for constitutional matter.
32. This court has therefore to make a determination of whether it is clothed with jurisdiction to determine the petition before it. Jurisdiction is central to every matter that is before any court. It is the authority by which courts or tribunals adjudicate matters before them. It can be unlimited or limited by the



Constitution and or statute. Therefore, when a court acts without being clothed with the requisite jurisdiction, it acts in vain. It is for this reason that when the issue of jurisdiction is raised, the court must quickly resolve the jurisdictional question. The Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR on the issue of jurisdiction stated that:

(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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.... Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

33. The 2nd respondent has questioned whether this court has jurisdiction to entertain a matter after a complaint filed before the IEBC Dispute Resolution Committee in Complaint No 235 of 2022 has been heard and determined.
34. It is not in dispute that the petition challenges the credibility of the undergraduate and postgraduate certificates held by the 2nd respondent. The same issue was also the subject of IEBC Dispute Resolution Committee in Complaint No 235 of 2022, however, the petitioner herein was not a party in the IEBC Committee.
35. The Silverse Lisamula Anami case cited by the 2nd respondent is a Supreme Court decision and one of the issues before the court was whether the election court has jurisdiction to determine pre-elections disputes. The appellant before the Supreme Court faulted the decision of the High Court and Court of Appeal that held that where any party is dissatisfied with the decision of the IEBC Dispute Resolution Committee, such a party should file either an appeal or a review of the said decision. In that case no appeal or review had been filed against the decision of the IEBC Committee. Although the appellant was not a party in the matter before the IEBC Committee, he proceeded to file a separate suit before the election court raising similar issues that were before the IEBC Dispute Resolution Committee, and the Supreme Court made the following finding:

“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.”

36. The issue raised by the petitioner on the 2nd respondent's undergraduate and postgraduate certificates is one that touches on the 2nd respondent's qualification as a candidate and therefore an issue arising out of nominations. The proviso to section 22 of Elections Act, 2010 provides that a person may be nominated as a candidate for election as governor only if the person is holder of a degree from



a university recognized in Kenya. Articles 88(4)(e) of the Constitution vests jurisdiction on IEBC to resolve disputes arising from nominations. It provides as follows:

“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—

- f. 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.”

37. However, it is clear that the Silverse Lisamula Anami case was concerned with the jurisdiction of an election court in determining pre-election dispute. I do not agree with the submissions of the 2nd respondent that the petitioner has approached the court as an election court as the dispute before the court does not relate to an election petition and neither is it a dispute that arose subsequent to the declaration of election results.

38. Although the complaint raised in the petition relates to a pre-election dispute on nomination the correct forum for its resolution would be the IEBC or PPDT, and if aggrieved the complaint can be settled by way of an appeal to 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. The Supreme Court in the Sammy Ndung’u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR observed that:

“This twin approach ensures that article 88 (4) (e) of the Constitution is not rendered inoperable while at the same time preserving the efficacy and functionality of an election court under article 105 of the Constitution. To achieve this noble objective, we think that now is the time to issue certain guiding principles.

....

- (iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to 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. The High Court shall hear and determine the dispute before the elections and in accordance with the constitutional timelines.”

39. Further the petitioner has invoked the jurisdiction of this court under article 165 (3) of the Constitution. Although the petition as presented is proper before the court, it is expected a petition brought challenging an infringement of constitutional rights under the Constitution must meet the threshold of a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR stated:

“Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a



foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

40. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the court rendered itself thus:

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

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

- (43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.”

41. The court in *RC v KKR* [2021] eKLR explained that:

“...a constitutional issue is, therefore, one which confronts the various protections laid out in a *Constitution*. Such protections may be in respect to the bill of rights or the *Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters*, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...”

42. It was not clear from the reading of the petition, how the 1st respondent violated articles 10(1), 10(2) (c), 232 (1) (a), (c), (e) & 232 (a) & (b), and 73 (2) (b), (c), (d) of the *Constitution of Kenya*.
43. Secondly, it clear that petitioner’s main grievance revolves around the academic qualifications of the 2nd respondent, however, it is not clear how his right to education under article 43 (1) (f) of the *Constitution*



was violated. The petitioner also claims that his right under article 38 (2) of the Constitution was violated. Article 38 (2) provides as follows:

“38 (2) Every citizen has a right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

- a. Any elective public body or office established under this Constitution; or
- b. Any office of any political party of which the citizen is a member.”

44. The petitioner argues that the 1st respondent illegally conferred a bachelors and postgraduate degree on the 2nd respondent and therefore the right under article 38 (2) (c) of the Constitution was threatened. The 1st respondent argued that the petitioner failed to specify how his rights under article 38 (2) of the Constitution would be violated. The petition challenges the validity of the 2nd Respondent’s undergraduate degree certificate for reasons that: the program was offered without approval of University Council; without accreditation of the 1st interested party; that there was no compliance with section 13.1 of the University Examination Policy; and that the 2nd respondent failed to attend lectures. The petitioner therefore seeks the withdrawal of the 2nd respondent’s undergraduate and postgraduate degrees. The petitioner has however not demonstrated how the acts of the 1st respondent were infringing the provisions of article 38(2) of the Constitution.

45. In any event, even if this court was to consider the merits of the petition, there was no evidence by the petitioner to prove that the undergraduate degree program was offered without approval of University Council; without accreditation of the 1st interested party; that there was no compliance with section 13.1 of the University Examination Policy; and that the 2nd respondent failed to attend lectures. He also failed to prove that the 2nd respondent did not complete his diploma in Tourism Management at Kenya Polytechnic. Mativo, J in Leonard Otieno v Airtel Kenya Limited [2018] eKLR observed as follows on the burden of proof placed on a petitioner:

“65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

46. The petitioner annexed a letter from deputy vice-chancellor (academic affairs) of the 1st respondent confirming that the 2nd respondent was indeed a former student at the institution. His registration numbers are stated to be B151/4398/2016 and Z731/3602/2014 respectively for the bachelors and postgraduate studies. While it makes no sense that the 2nd respondent pursued his postgraduate studies before his undergraduate studies, the confusion created by the vice-chancellor’s letter is cleared by the transcripts of the 2nd respondent marked as PSA 3 showing that his registration number during his undergraduate studies was Z731/3602/2014 and B151/4398/2016 for his postgraduate program. It is clear that the petitioner has not proved any of the allegations contained in the petition.

47. From the foregoing, it is clear that the petition before the court lacks merit and has been brought to test waters at the last minute, 2 weeks before the general elections. Each and every Kenyan is now eagerly waiting for the 2022 general elections to exercise their democratic rights and for the petitioner to even



suggest that this court should stop the gubernatorial elections without reasonable grounds is clearly not within public interest. The petition dated June 29, 2022 is dismissed with costs to the 1st and 2nd respondent. The 2nd interested party EACC chose not to respond to the petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF JULY 2022

RE OUGO

JUDGE

In the presence of:

Mr Masita, petitioner, in person.

Miss Nyamita for the 1st respondent.

Mr Nyandieka for the 2nd respondent.

3rd respondent, absent.

1st interested party, absent.

2nd interested party, absent.

3rd Interested party, absent.

Ms Aphline, Court Assistant.

