



Langat v Independent Electoral and Boundaries Commission; Attorney General & 4 others (Interested Parties) (Petition E317 of 2022) [2022] KEHC 11518 (KLR) (Constitutional and Human Rights) (17 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E317 OF 2022
HI ONG'UDI, J
AUGUST 17, 2022**

BETWEEN

PHILIP K. LANGAT PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

AND

THE ATTORNEY GENERAL INTERESTED PARTY

THE NATIONAL ASSEMBLY INTERESTED PARTY

THE SENATE INTERESTED PARTY

THE COUNTY ASSEMBLIES FORUM INTERESTED PARTY

VICTOR KIPNGENO TUM INTERESTED PARTY

JUDGMENT

1. The petitioner filed an amended petition dated 7th July 2022 under Articles 2, 3(1), 10, 22(1), (2), 22(2) (c), 23(1), 27, 38(2), 38(3)(c), 81(d), and 165(2)(b), 165(2)(d)(I) of *the Constitution*. Accordingly, the petitioner seeks the following orders:

- a) A declaration that Section 43(5) of the *Elections Act*, 2011 is unconstitutional only to the extent that it should apply to a public officer who intends to seek the position of a county assembly speaker as it is discriminatory and unreasonable thus violating the constitutional rights under Article 27 and 38(3)(c) of *the Constitution*.



- b) A declaration that the provisions of Section 43(5) of the *Elections Act*, 2011, in respect of elections for a Speaker of county Assembly vis-à-vis the provisions of *the Constitution* are illegal, discriminatory, unfair, unreasonable, disproportionate, go against the doctrine of legitimate expectation, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Human Rights and the International Covenant on Civil and Political Rights, hence unconstitutional and unlawful as the six months' resignation period before the election of a county assembly speaker is not reasonable.
- c) Consequent upon prayer (a) and (b) hereinabove, a permanent injunction restraining the respondent (IEBC) its agents, assigns and or representatives from preventing, stopping or in any other way barring any public officer from contesting, in an election for the position of speaker of a County Assembly on the grounds that the public officer has not resigned from his public office six months before the election, as the six months' resignation cannot be justified specifically with regards to the position of a county speaker.
- d) The Honourable court do issue an order directing the 1st, 2nd, and 3rd interested parties, in collaboration, to comply with prayer (a), (b) and (c) hereinabove and make the relevant and/or necessary amendments to Section 43(5) of the *Elections Act*, 2011.
- e) Costs of the petition to be borne by the respondent.

The Petitioner's case

2. A summary of his case is that, under Section 43(5) of the *Elections Act*, a public officer intending to contest an election shall resign from public office at least six months before the date of the election. Further Section 2 of the said act defines election to mean a presidential, parliamentary or county election and includes a by-election further defining a county election as the election of a county governor and a member of a county assembly.
3. The speaker of the county assembly pursuant to Article 177 (1)(d) of *the Constitution* is an ex-officio member as such his, membership in the county assembly is neither through an election nor is it through nomination as contemplated in Section 177(a) and (b) of *the Constitution*. His election is also presided over by the Clerk of the respective county assembly and not the Independent Electoral and Boundaries Commission; the election date for the speaker is neither predetermined nor known and the seat becomes due only after the general elections. Hence any public officer intending to contend for that seat needs not to resign as stipulated herein above.
4. Unlike other elective seats, the speaker only becomes a member of the assembly after he is elected by elected and nominated members of the county assembly. His election is also not an election contemplated under Article 38(2) as read with Article 81 (d) of *the Constitution* and by extension Section 43(5) of the *Elections Act*, 2011.
5. By reason of the aforesaid, the doctrine of universal suffrage, Articles 38(3) (c) and 27(3) are violated.

Petitioner's response to the Respondent's application

6. The petitioner filed a replying affidavit sworn by himself on 21st July 2022. He deposed that it is his constitutional right to institute a court proceeding claiming that a right is threatened under Article 22 (1), that right being Article 38 (3)(c) of *the Constitution*. It is precipitated by the Election Petition No. 1 of 2013; Kipkemoi Terer vs John Langat & IEBC and another.



7. He is therefore apprehensive that because of the said case, section 43(5) of the [Elections Act](#) will be applied to public officers who intend to vie the position of a county assembly speaker hence the instant suit.
8. He asserted that he is in Court because Section 43(5) applies to a county assembly speaker contrary to the respondent's assertion. He urged the respondent to familiarize itself with Kipkemoi Terer vs John Langat & IEBC (supra). Thus it is preposterous for the respondent to contest that it has nothing to do with the election of a county assembly speaker yet in the above stated case, it withdrew the clearance of a candidate for having not resigned six months before his election as the county Speaker of Bomet. They are also the ones to verify whether persons who intend to vie for position of county assembly speaker are registered voters and also issue a certificate of clearance.
9. The instant petition is seeking an interpretation of Section 43(5) of the [Elections Act](#), 2011 because of the two positions taken by the respondent. Unless this court intervenes in terms of interpreting whether the said Section applies to a county assembly speaker or not, then a political right under Article 38(3) (c) is under imminent threat. This is since immediately after the general elections, the first order of business in the county assembly meeting is to elect a speaker.
10. His petition is not seeking to suspend Section 43(5) of the [Elections Act](#), 2011 in its entirety but in as far as the county assembly speakers' position is concerned as such the amended petition is well merited.

The Petitioner's response to the Respondent's grounds of opposition

11. The petitioner filed his response dated 21st July 2022 raising the following points:-
 - i. He has a locus under Article 22(1) of [the Constitution](#) to bring this constitutional petition because a political right enshrined in Article 38(3)(c) is under imminent threat.
 - ii. He is apprehensive that Section 43(5) of the [Elections Act](#), 2011 shall be applied to public officers who intend to vie for the position of county assembly speaker.
 - iii. His apprehension is not founded on fanciful ideas but a real decided case where Section 43(5) of the [Elections Act](#) was applied to a county assembly speaker.
 - iv. The case of Kipkemoi Terer Vs. John Langat, IEBC & Another: Election petition No. 1 of 2013 eKLR is a set precedent where the court and the respondent herein agreed that Section 43 (5) of the [Elections Act](#) applies to a county assembly speaker.
 - v. The respondent herein has a legal duty to clear a person wishing to run for county assembly through their county returning officers who normally stamp on the nomination document of a candidate for the speaker's position.
 - vi. The decision in Kipkemoi Terer Vs. John Langat, IEBC & Another; election petition No. 1 of 2013 eKLR indicates that the respondent was and still is responsible for clearing a candidate for the position of county assembly speaker.
 - vii. That under the [Elections Act](#), Section 2 the definition of county elections includes the election of a member of county assembly.



- viii. That in the above stated decision the courts interpreted that a speaker is a member of county assembly just as it is indicated in the Constitution under Article 177(1)(d) and that Section 43(5) was then applicable to such candidates.
- ix. THAT the decision in Kipkemoi Terer Vs. John Langat, IEBC & Another: Election petition No. 1 of 2013 eKLR has never been challenged and since it stands, there is a real apprehension that Section 43(5) of the Elections Act, 2011 shall be used against public officers who intend to contest the seat of a county assembly speaker and subsequent violation of their rights under Article 38(3) (c) of the Constitution.
- x. The amended petition and application is merited based on the grounds stated above.

The Petitioner's response to the 2nd Interested party's Notice of preliminary objection

12. The petitioner filed his reply raising the grounds that:

- i. This Court has jurisdiction to hear a constitutional petition under Article 165(3) (b) as read with Article 23(1) of the Constitution. It has the jurisdiction to hear proceedings where a constitutional right is under threat, that right being a political right under Article 38(3)(c) of the constitution.
- ii. This matter is ripe for determination, the justiciable issue herein being the applicability of Section 43(5) of the Elections Act, 2011 to a county assembly speaker. The petition is built on a real life event that is in the public domain being the case of Kipkemoi Terer vs John Langat & IEBC where the court and the respondent herein agreed that Section 43(5) of the Elections Act, 2011 applies to the county assembly speaker.
- iii. The petition is properly before the court since if the case of Kipkemoi Terer vs John Langat & IEBC is anything to go by then many public officers who desire to contest for position of County Assembly will be denied their constitutional political rights under article 38(3)(c).
- iv. The petitioner's petition and application is framed to address an impending threat to a political right under Article 38 (3) (c) of the Constitution. His locus is grounded on Article 22(1) of the Constitution and the case of Kipkemoi Terer vs John Langat & IEBC is ground for this cause of action which requires the urgent need for interpretation of Section 43(5) of the Elections Act, 2011 and its applicability to the county assembly speaker.
- v. That unless the 2nd interested party is familiar with the precedent it will never understand why this is a constitutional petition seeking to avert the impending threat of Article 38(3) (c) of the Constitution.
- vi. That the 2nd interested party's preliminary objection is a work of poor research and therefore is blind to real-life challenges and impending constitutional threat and so should be dismissed.

The Respondent's case

- 13. The respondent in opposition to the petitioner's amended petition and application dated 7th July 2022 filed the following grounds of opposition dated 15th July 2022:
 - i. The respondent is an unnecessary party to the petition.



- ii. The petitioner has no locus standi in bringing this petition as Section 43(5) of the *Elections Act* does not apply to the election of Speakers of the County Assemblies.
- iii. The respondent legally has nothing to do with the election of Speakers of the County Assemblies.
- iv. The respondent's mandate is unequivocally spelt out in *the Constitution*, the *Elections Act* and the *Independent Electoral and Boundaries Commission Act* and does not include the petitioner's contentions.
- v. The election of Speakers of the County Assemblies is conducted and presided over by the Clerks of the respective County Assemblies as regulated by *the Constitution* and the Standing Orders and Rules of the House of the respective County Assemblies.
- vi. Section 9A of the County Government Act as read with Section 14(8) of the Act informs that the Speaker of a County Assembly is to be elected, in accordance with standing orders of the respective county assemblies, from among persons who are eligible to be elected as members of a County Assembly.
- vii. Article 193(2) of *the Constitution* sets out the disqualification for election as a Member of the County Assembly and Article 193(2)(a) provides that one of the disqualifications is that if the person is a State officer or public officer.
- viii. Article 178 of *the Constitution* provides that each county assembly shall have a speaker elected by the County Assembly from among persons who are not members of the assembly and clearly the respondent has no legal obligation over such an election.
- ix. According to Section 9A of the County Government Act the disqualification for election of the Speaker of the County Assembly is similar to the disqualification of Speakers of the Senate and the National Assembly as stipulated under Article 106(1)(a) of *the Constitution*.
- x. Article 99(2) of *the Constitution* sets out the disqualification for election as a Member of Parliament and Article 99(2)(a) provides that one of the disqualifications is if the person is a State officer or other public officer.
- xi. Whereas Section 43(5) of the *Elections Act* is not applicable to elections of Speakers of the County Assembly the common constitutional thread and standard is that such a person seeking to be elected as a Speaker of the County Assembly should not be State officer or other public officer and even if Section 43(5) of the *Elections Act* is rendered unconstitutional Section 9A of the County Government Act will still apply and retain the qualification espoused in Section 45(5) of the *Elections Act*.
- xii. The petition severely falls short of the constitutional petitions threshold.
- xiii. The petition is convoluted and does not disclose any violation of any of the petitioner's right or freedom and neither does it disclose what the petitioner really seeks.



- xiv. The petition is a reference for an advisory opinion disguised as a constitutional petition.
 - xv. The petitioner has not demonstrated how he has been discriminated against and in reference to whom has been given preference in the application of Section 43(5) of the *Elections Act*.
 - xvi. The petitioner has not demonstrated that he is such a person who is a public officer and seeks to be elected as a Speaker of a County Assembly.
14. The respondent in addition filed a notice of motion application dated 15th July 2022 under Rules 3 and 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling provisions of the Law. The application seeks orders that:
- i. This Court be pleased to strike out and/or dismiss the Amended Petition and Application herein for want of reasonable cause of action and locus standi.
 - ii. The Costs of this application be granted.
15. The application was supported by the grounds that:
- i. The petition lacks a reasonable cause of action.
 - ii. The petition is frivolous groundless, without substance and fanciful.
 - iii. The *Elections Act* and specifically Section 43(5) does not apply to the election of Speakers of the County Assembly.
 - iv. The respondent's mandate under *the Constitution*, the *Elections Act* and the *Independent Electoral and Boundaries Commission Act* does not include the conduct and supervision of the election of Speakers of the County Assembly.
 - v. The procedure for election of the Speakers of the County Assemblies is set out in Section 9A of the County Government Act.
 - vi. The disqualification for election of a Speaker of the County Assembly under Section 9A of the County Government Act is that one must neither be a state officer nor a public officer.
 - vii. The requirement of a candidate for election as Speaker of the County Assembly also applies to speakers of the Senate and the National Assembly.
 - viii. Even if Section 43(5) of the *Elections Act* is declared unconstitutional Section 9A of the County Government Act will sustain with conditions in Section 43(5) of the *Elections Act*.
 - ix. The petition is therefore incompetent and ought to be struck out.
16. The application was furthermore supported by the averments in Chrispine O. Owiye's, the respondent's Director of Legal and Public Affairs affidavit dated 18th July 2022 which reiterated the contents of the respondent's grounds of opposition and the grounds outlined in its application.



The 1st Interested party's case

17. The 1st interested party did not file any response to the amended petition and application but filed written submissions.

The 2nd Interested party's case

18. The 2nd interested party in rejoinder filed a notice of preliminary objection dated 27th July 2022 in opposition to the petitioner's case on the grounds that:

- i. This Court lacks the requisite jurisdiction under Article 163(6) as read together with Article 165(5)(a) of *the Constitution* as the petition and the consequential orders sought therein are in form of an advisory opinion disguised as a petition, a role that is vested in the Supreme Court of Kenya.
- ii. The petition as framed offends the principle of justiciability on account of the doctrine of ripeness which requires that the factual claims underlying the litigation be concretely presented and not based on speculative or anticipatory future contingencies.
- iii. The petition is fatally defective and the Court lacks jurisdiction to grant the orders as framed as it would amount to imposing judicial restraint on a matter that is not ripe for the interrogation of this Court.
- iv. The petition and notice of motion do not comply with Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, as the petitioner has not demonstrated the violation or threat of violation of rights to him or any other identified person.
- v. The petition as framed does not disclose a cause of action or any triable legal issues to be addressed by this Court hence is frivolous, incompetent, vexatious, misconceived and an outright abuse of the Court process.
- vi. The petition does not disclose any right that is being infringed or threatened with infringement as to affect the petitioner.

The 3rd Interested party's case

19. The record reflects that the 3rd interested party did not file any response or written submissions to the petitioner's case, the respondent's notice of motion application and the 2nd interested party's preliminary objection.

The 4th Interested party's case

20. The 4th interested party filed his replying affidavit by Hon. Ndegwa Wahome sworn on 29th July 2022. He deposed that Section 43(5) of the *Elections Act*, 2011 applies to all public officers who intend to contest in an election of a county assembly. He noted that a county assembly speaker is a member of the county assembly. Moreover, that a speaker's elections qualify as "elections" under the said Act hence required to resign from the public offices six months before the date of the elections.

21. According to him, the petition is premature, speculative and an academic exercise. He states that the same is also res judicata owing to the cases of Charles Omanga & another vs Independent Electoral and Boundaries Commission and another [2012] eKLR; Union of Civil Servants and 2 others vs



Independent Electoral and Boundaries Commission & another [2015] eKLR; and Kipkemoi Terer vs John Langat and 3 others [2013] eKLR.

The 5th Interested party's case

22. The 5th interested party filed his replying affidavit sworn on 1st August 2022. He deposed that the petition and statement are incompetent and fatally defective as they do not particularize the facts, grounds, and the law upon which the petitioner alleges violation of his fundamental rights and freedoms.
23. That pursuant to Article 178(3) of *the Constitution* the election of speaker was enacted in Section 21 of the *Elections Act* and rules set out in the first schedule of the Act. This is also enacted in Section 9 of the County Government Act. The preamble of the *Elections Act* states that the Act applies to a county assembly. The election of the speaker is thus governed by the said Act, hence bound by its provisions including Section 43(5) of the Act.
24. He averred that having established that the election of the speaker of County Assembly is an election under the *Elections Act*, any person who intends to vie for the said position must meet the qualifications stipulated in Article 193 of *the Constitution* and Section 24(2) of the *Elections Act*. Failure to which such a person stands disqualified by virtue of Article 193(2) (a) of *the Constitution* and Section 25(2) (a) of the *Elections Act*.
25. He deposed that the role of the respondent is limited to ensuring compliance with Article 193 of *the Constitution* and Section 25 of the *Elections Act*. Further that the applicability of Section 43(5) of the *Elections Act* in relation to the election of the speaker of the county Assembly was interpreted in Election Petition No. 1 of 2013; Kipkemoi Terer v John Langat & 3 others (2013) eKLR hence nothing for this court to interpret.
26. According to him, the requirement of Section 43(5) of the *Elections Act* is constitutional and non-discriminatory and applicable to every public or state officer vying for an electoral position. Section 43(6) of the *Elections Act* sets out the persons exempted.
27. He deposed that contrary to the petitioner's assertions and pursuant to Section 1 of the First Schedule of the *Elections Act*, Section 9(3) of the County Government Act, the date of the election of the speaker of the county assembly is definite being 14 days after a general election.
28. Lastly he averred that the issues raised by the petitioner are insufficiently developed and speculative contrary to the doctrine of ripeness. No right or fundamental freedom accruing to the petitioner has been violated or infringed.

Parties' Submissions

The Petitioner's submissions

29. The petitioner through the firm of McDonald and Company Advocates filed written submissions dated 25th July 2022 and 28th July 2022 respectively. Both submissions raised the same issues.
30. He reiterated that pursuant to Articles 23(1) and 165(3) of *the constitution* this court has jurisdiction to hear this petition. Pursuant to Article 22(1) he has the locus to institute this suit for a threat under Article 38(3) (c) of *the Constitution*.
31. On the cause of action, he argued that it is pegged on and informed by the decision in Election Petition No. 1 of 2013; Kipkemoi Terer vs John Langat & IEBC.



32. On whether Section 43(5) of the Election Act applies to an election of the county assembly speaker or not, he argued that the said section should not apply as such position is only obtainable after the general elections. He made reference to the case of Charles Omanga & another v IEBC and another Constitutional Petition No. 2 of 2012 where he argued that the purposive interpretation applied therein cannot be applied in this case. According to him the position whose constituents are not known until after the general elections, like the position of the county assembly speaker, Section 43(5) of the [Elections Act](#) 2011 should not apply.
33. On whether the respondent takes part in elections of a county assembly speaker or not, he submitted that the respondent plays a critical role in the election of a county assembly speaker. This is by clearing and issuing a certificate of clearance to a candidate and ensuring such a candidate is a voter as per the requirements of Article 193(1) of [the Constitution](#).

The Respondent's submissions

34. The firm of Olendo, Orare & Samba LLP on behalf of the respondent filed written submissions dated 29th July 2022. Counsel raised the following issues for determination:
- i. Whether Section 43(5) of the [Elections Act](#) is applicable to the election of speakers of the county assemblies.
 - ii. Whether the application is unconstitutional if (i) is in the affirmative.
 - iii. Whether the respondent presides over the election of speakers of the county assemblies.
35. Counsel commenced by submitting that Article 178 of [the Constitution](#) provides for the election of speakers of the county assemblies by members of the assemblies from among persons who are not members of the assembly. Further that Article 178(3) of [the Constitution](#) provides that parliament was to enact legislation to this effect. In this case he submits that the [County Governments Act](#), 2012 under Section 9A(1) as read with Section 14(8) provides that the election of a speaker of a county assembly is to be conducted in accordance with the standing orders of the counties from among persons who are eligible to be elected as members of a county assembly as stipulated under Article 193 of [the Constitution](#).
36. He further submitted that the contested issue was premised on Article 193(2)(a) of [the Constitution](#) which disqualifies a public officer or a state officer from being elected as a speaker of a county assembly. In view of the impugned Section Counsel submitted that this requirement applies to elections conducted under the Act. According to Counsel these elections are defined as those of the president, parliament or county election under Section 2.
37. In essence Counsel stated that the impugned Section does not include the election of a speaker of a county assembly. Moreover, it was noted that the county assemblies standing orders did not provide for the impugned prerequisite. In support reliance was placed on the case of David Kerario Marwa - v- Boaz Awiti Okoth & another [2017]eKLR where it was noted that unlike the other members of the Assembly, the election of the Speaker is not subjected to the rigorous election processes based on universal suffrage under Article 38 of [the Constitution](#). The election is instead governed by an internal process in the Assembly. Similar reliance was placed on the case of Frank Mulisa Makola v Felix G. Mbiuki & 4 others [2013]eKLR.
38. From the foregoing he submits that the respondent's mandate under [the Constitution](#), the [Elections Act](#) and the [Independent Electoral and Boundaries Commission Act](#) does not include conduct of the election



of speakers of county assemblies. On the contrary the First Schedule to the Elections Act provides for the procedure of the election of the speaker and provides that the clerk of the assembly is the one mandated to preside over the speaker's election in accordance with the standing orders of the county assembly. This in effect makes it an internal process governed by the County Assembly as held in the case of Douglas Bundi Kirimi v Joseph Kaberia Arimba, Speaker County Assembly of Meru & 3 others [2018] eKLR.

39. Counsel additionally opposed the petitioner's reliance on Election Petition No. 1 of 2013 (Kipkemoi Terer -v- John Langat & IEBC (supra). He noted that despite the heavy reliance on the authority which was the basis of the institution of the instant petition, the decision was that of a subordinate court hence its not binding on this Court.
40. Counsel furthermore submitted that the petition was a disguised reference for an advisory opinion. This is because there is no identifiable relief that the petitioner is actually seeking besides the interpretation and this court's opinion on Section 43(5) of the Election Act with regard to the county assembly. Counsel submits thus that this is a preserve of the Supreme Court which may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government as held in the Matter of the Speakers of the 47 County Assemblies [2016] eKLR. To that end he contended that the petition lacks merit and ought to be dismissed.

The 1st Interested party's submissions

41. The 1st interested Party through senior state counsel Mr. Macheso Dan Weche filed written submissions dated 26th July 2022. Counsel identified the issues for determination as:
 - i. Whether the election contemplated under the Elections Act, 2011 is similar to the one contemplated under Article 38(2) as read together with Article 81 (d) of the Constitution.
 - ii. Whether a speaker is a member of county assembly in the strict sense or just an ex officio member whose membership is not subject to Section 43 (5) of the Elections Act, 2011.
 - iii. Whether Section 43(5) of the Elections Act, is applicable to public officers who are seeking the position of a county assembly speaker.
42. On the first issue Counsel answered in the negative. This is because a general election encompasses the doctrine of universal suffrage as provided under Article 38 of the Constitution whereas the election of a county speaker is an internal process whereby the other members of the county assembly vote for the speaker as provided in Article 178 of the Constitution. In support reliance was placed on the case of Frank Musila Maloka (supra) where it was noted that the election of a speaker of a county assembly is sui generis.
43. He likewise submitted that a general election is supervised by the respondent under Article 88(4) of the Constitution while the election of a speaker is conducted by the clerk of the county assembly as stipulated under the First Schedule, of the Elections Act. With regard to the results of an election, Section 39 of the Elections Act requires that the respondent declares and publishes the results of an election immediately after close of polling. This is not a requirement as per standing order of the county assembly number 12 and 13. The clerk is to only announce the speaker-elect who then takes oath of office and assumes the duties of a speaker immediately. This was affirmed in the case of David Kerario Marwa v Boaz Awiti Okoth & another [2017]eKLR which Counsel relied on.
44. Counsel on the second issue submitted that according to Article 177 (1) (d) of the Constitution as read together with Section 7(1) of the County Government Act, the speaker of a county assembly



- is an ex officio member. This means that the speaker-elect does not become a member of the county assembly through the regular election processes. Moreover, Counsel adds that the grounds for removal of a speaker and member of county assembly are marked with distinction on the procedure. This can be seen from the grounds for the removal of the speaker under Section 21(5) of the Election Act and the removal of the other members of the assembly under Article 194 of *the Constitution*.
45. Taking this into consideration, he argues that whereas the speaker is engaged by the assembly that cannot be said of the other members of the assembly who are the direct choice of the people. Fundamentally therefore the way the election of a Speaker is challenged must be different from that of any other member of the assembly as held in the case of David Kerario Marwa (supra).
 46. On the third issue, Counsel stated that by enacting Section 43(5) of the *Elections Act*, Parliament sought to give full effect to the provisions of Articles 99, 137, 180, and 193 of *the Constitution* so as to promote neutrality and impartiality in elections. It was noted that the importance of the impugned provision was emphasized in the case of Charles Omanga & another v Independent Electoral & Boundaries Commission & another [2012] eKLR which was cited in support.
 47. In view of this counsel submitted that due to the sui generis nature of a speaker's election, the question that begged an answer was whether Section 43(5) of the Election Act as a limitation applies to the election of a county assembly speaker and whether it is reasonable and justifiable.
 48. Counsel stated that the reasonability and fairness test of Section 43 (5) of the Election Act, to the extent it applies to the election of a county assembly speaker, should be weighed on the circumstances surrounding the said election. To buttress this point Counsel relied on the case of the Coalition for Reform and Democracy & 2 others vs The Republic and others Petition No. 628 of 2014 where it was noted that a limitation must be reasonable and justifiable in a free and democratic society, and that all relevant factors should be taken into account.
 49. In light of this, and while comparing the elections of a speaker to that of a by – election counsel submitted that the election dates were uncertain and so one was not able to know when they would take place making it hard to prepare for them in terms of resigning and even campaigning. In support Counsel cited the case of Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another [2015] eKLR where the provisions of Section 43(5) of the *Elections Act* in the case of a by-election were found not to meet the fairness and reasonability test as provided for under Article 24 of *the Constitution*.
 50. In the context of this case Counsel submitted that the election of a speaker, as provided for in Paragraph 1 of the First Schedule of the *Elections Act*, happens on the first meeting of the county assembly after the general elections. With this in mind, the exact date of the meeting is not provided in any legislation which makes it nearly impossible to estimate the time six months should begin lapsing. In the event that a public officer has not resigned in accordance with Section 43(5) of *the Constitution*, he or she is then disqualified from participating in the elections of a county assembly speaker.
 51. In a nutshell Counsel submitted that the impugned Section violates the rights under Article 27 (3) and Article 38 (3)(c) of *the Constitution*. This is because it infringes on equal treatment between public officers and other persons qualified under Article 178 (1) of *the Constitution* and puts an unreasonable restriction on the enjoyment of the right outlined in Article 38 (3) (c) of *the Constitution*. He concluded that Section 43 (5) of the *Elections Act* for that reason was unconstitutional in its applicability to a county assembly speaker and so unreasonable and unfair.



The 2nd Interested party's submissions

52. The 2nd interested party through its counsel S.M. Mwendwa filed written submissions dated 1st August 2022 and identified the issues for determination as:
- i. Whether this Court has the jurisdiction to entertain the petition.
 - ii. Whether the petitioner's petition was pleaded with reasonable precision as per the required standard in constitutional petitions.
 - iii. Whether Section 43(5) of the *Elections Act* No. 24 of 2011 applies to a public officer who intends to seek the position of a county assembly speaker.
 - iv. Whether the petition is barred by the doctrine of res judicata.
53. Counsel commenced by submitting that this Court lacks jurisdiction to hear and determine the petition since the petition does not raise any constitutional issue. In essence Counsel noted that the petitioner was attempting to bring before this Court a request for an advisory opinion on issues concerning County Governments which is within the Supreme Court's jurisdiction pursuant to Article 163(6) of *the Constitution*.
54. Likewise Counsel submitted that this Court lacks jurisdiction on the principle of justiciability, in particular, the doctrine of ripeness. In support reliance was placed on the case of Simon Kiprotich & 2 others v Principal Secretary, Ministry of Devolution and Planning & 4 others [2018] eKLR where the Court noted that justiciability refers to the types of matters that the courts can adjudicate. To be justiciable therefore the court must not be offering advisory opinion, the petitioners must have standing and the issues must be ripe for determination. Further reliance was placed on the cases of Kiriro Wa gugi & 19 others v Attorney General & 2 others [2020]eKLR, Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR.
55. In view of this Counsel argued that the petitioner had not adduced any evidence of persons who had been barred from participating in the election of the speaker, and, neither had he shown that any of the parties in this petition had barred any aspirant. For this reason, he submitted that the petition was based on general and hypothetical issues with no evidence of infringement or intended infringement of the said rights.
56. Turning to the second issue, Counsel submitted that the petition failed to meet the threshold of a constitutional petition as established in the case of Anarita Karimi Njeru v The Republic [1979] eKLR. This is because the petitioner had not precisely pleaded the infringement alleged to demonstrate violation of Article 27 and Article 38(3)(c) of *the Constitution* and particularization of the same in a precise manner. As such he asserted that it was not clear from the petition the manner in which the rights were violated or threatened to be violated. In effect he argued that the petitioner had failed to discharge the burden of proof.
57. Moreover, Counsel noted that in order for the Court to find violation of Article 27, it must be shown that persons within the same category, in this case, public officers intending to vie for the position of a county assembly speaker have been subjected to different treatment by the law. Correspondingly he indicated that not every differentiation amounts to discrimination as held in the case of Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR. Supplementary reliance was placed on the case of Leonard Otieno vs Airtel Kenya Ltd (2018) eKLR.
58. On the third issue, Counsel argued that Parliament was required under Article 178 of *the Constitution* to enact legislation providing for the election and removal from office of speakers of the county



assemblies. Accordingly the 2nd interested party made necessary provisions for the election of speakers of a county assembly under Section 21 and the First Schedule of the [Elections Act](#) and under Section 9A(1) of the [County Governments Act](#), 2012. From these provisions he submitted that the intention of the legislature was to provide that a person seeking election as a speaker of a county assembly ought to meet the qualification required for a person to be elected as a speaker of a county assembly under Article 193 of [the Constitution](#) and further reiterated under Section 25 of the [Elections Act](#).

59. He contended that pursuant to Article 193(2)(a) and Section 25(2) of the [Elections Act](#) a person is disqualified from being elected a member of a county assembly if the person is a state officer or other public officer, other than a member of the county assembly. Accordingly he reasoned that it is a requirement of the law that a person seeking to be elected as a speaker of the county assembly must adhere to all the requirements of the [Elections Act](#) for members of county assembly including the requirements of Section 43(5) of the [Elections Act](#).
60. Counsel hence submitted that this Court in interpreting the impugned provision ought to be guided by the principle of interpretation that the words of a statute must be given their ordinary, literal and grammatical meaning. In support reliance was placed on the Court of Appeal case of County Government of Nyeri & another. Vs. Cecilia Wangechi Ndungu [2015] eKLR where it was held that interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. As such, that intention must be determined by reference to the precise words used, their documentary and factual context, and, where identifiable, their aim and purpose.
61. Lastly Counsel submitted that the petition is res judicata since the constitutionality of the provisions of Section 43(5) of the [Elections Act](#) was conclusively determined by the Court of Appeal in the case of Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 [KLR]. The Court observed that the purpose of the impugned provision was to ensure that public officers are impartial and neutral, further, that the requirements of integrity and good governance as espoused in Article 10(2) of [the Constitution](#) are upheld. A similar holding was made in the case of Charles Omanga (supra) which was cited in support.

The 4th Interested party's submissions

62. The 4th Interested party through the firm of Ken Ochieng' and company Advocates filed written submissions dated 1st July 2022.
63. On whether the petition offends the doctrine of ripeness, while relying on Kiriro Wa Ngugi & 19 others vs Attorney General & 2 others (2012) eKLR and Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR counsel argued that no decision has been made by the respondent nor has anyone denied any public officer who intends to seek the position of county assembly speaker the candidacy on account of Section 43(5) of the [Elections Act](#).
64. On whether the petition is res judicata, and relying on Section 7 of the [Civil Procedure Act](#), he argued that the petitioner failed to make this claim in petitions involving Charles Omanga & another v IEBC & another (supra) and Union of Civil Servants and 2 others (supra). The said suits were public interest suits instituted by various petitioners under whom the petitioners herein also with a similar suit, could have claimed, and litigated under the same representative title and courts of competent jurisdiction would have tried them. They relied on the explanation 6 of section 7 of the [Civil Procedure Act](#). Both this court and subordinate court have previously and fully rendered themselves on the constitutionality or otherwise of Section 43(5) of the [Elections Act](#).
65. He submitted that res judicata encompasses issues that ought to have been raised therefore the question whether Section 43(5) of the [Elections Act](#) is unconstitutional only to the extent that it should apply



- to a public officer who intends to seek the position of a county assembly as it is discriminatory and unreasonable thus violating Article 27 and 38(3) (c) should have been raised. As such the court cannot be used as a forum for litigating in installments. He relied on *Omondi v National Bank of Kenya & others* (2001) EA 177; *Daryao & others vs the State of UP & others* [1961] 1SCR 574; and *John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 others*(2015) eKLR for the argument that *res judicata* applies to constitutional petitions.
66. As to whether Section 43(5) of the *Elections Act* applies to a public officer who intends to seek the position of a county assembly speaker he answered this question in the affirmative relying on Articles 260, 176, 73 and Chapter 10 on the values and principles of public service under Article 232 of *the Constitution*.
 67. He submitted that Section 43(5) of the *Elections Act* applies to all public officers who intend to contest in an election of a county assembly speaker. Relying on *Republic vs El Mann* (1969) EA 357 and *David Kerario Marwa vs Boaz Awiti Okoth & Another* [2017] eKLR he argued that if an election of the county assembly speaker was not an election as per Section 2 of the *Elections Act*, the framers of the provision should have stated so.
 68. On whether Section 43(5) of the Election Act is unconstitutional for being illegal, discriminatory, unfair, unreasonable, disproportionate, against the legitimate expectation and unlawful thus violating Articles 27 and 38(3)(c) of *the Constitution*, it is submitted that the petition does not meet the requirements of a constitutional petition. That the petitioner has not demonstrated to the required standard of proof how the subject rights and fundamental freedoms were violated, infringed or threatened by the respondent. It is submitted that no evidence has been adduced to demonstrate the alleged violations. Further that the petition does not set out with precision the rights that have been violated and in what manner. Relied on is *Anarita Karimi Njeru* (supra); *Mumo Matemo v Trusted Society of Human Rights Alliance* [2013] eKLR; and *David Mathu Kimirigi vs SMEC International PTY Limited* [2021] eKLR.
 69. Relying on Sections 107, 108, 109 of the *Evidence Act* and the cases of *Leonard Otieno* (supra); *Githunguri Dairy Farmers Cooperative Society Ltd vs The Attorney General and 2 others* (2016) eKLR, counsel argued that there was need for the petitioner to provide particulars and evidence where and when the respondent declined to allow a public officer and or which said public officer failed to contest for the office of county assembly speaker on account of not having resigned. Additionally there was need to show as a result of the foregoing that Articles 27 and 38 (3) (c) of *the Constitution* were violated.
 70. On whether Section 43(5) of the *Elections Act* is discriminatory, unreasonable and unfair thus violating the petitioner's constitutional rights under Articles 27 and 38(3) (c) of *the constitution*, counsel relied on *Jacques Chal Hoffman v South African Airways, CCT 17 of 2000 and Nyarangi & 3 others vs Attorney General* [2008] KLR 688 and contended that the argument that public officers are treated differently is correct but does not constitute discrimination in law. Referring to *Mohammed Aduba Dida v Debate Media Limited & Another* [2018] eKLR it was argued that provisions and rules that create differentiation amongst affected persons do not of necessity give rise to unequal or discriminatory treatment prohibited by Article 27 of *the constitution* unless it can be demonstrated that such selection or differentiation is unreasonable.
 71. In view of this, it was argued that the petitioner had failed to provide and prove particulars of discrimination occasioned by the actions complained of. He also failed to show how illegal, unfair, unreasonable, disproportionate, unlawful and against legitimate expectation the said section is to the required standard.



72. On whether Section 45(3) of the *Elections Act* is unconstitutional for being discriminatory and unfair thus violating Article 27 and 38(3) (c) of *the Constitution*, it was submitted that the right can be limited subject to Article 24 as read with Article 25 of *the Constitution*. On determining whether a Section of an Act of Parliament is unconstitutional, reliance was placed on the case of Institute of Social Accountability & Another vs National Assembly & 4 others [2015] eKLR.
73. According to it, the object parliament intended to achieve by the impugned Section was stated in Charles Omanga & Another v IEBC & another [2012] eKLR and reiterated in Union of Civil Servants and 2 others v IEBC & another [2015] eKLR.
74. Relying on the case of County Assemblies Forum & 6 others v Attorney General & 2 others [2021] eKLR, it is submitted that a party seeking to strike out a provision of a statute must demonstrate how the particular enactment is unfair, irrational and against the values or the spirit of *the Constitution*. In view of this he argues that it is easier for public officers to coerce potential voters and extend favours. They can also use their offices to interfere with the electoral process and misuse public resources in campaigning for political office. Reliance was placed on Evans Gor Semalang'o vs IEBC & another (2014) eKLR. It was noted that the applicable principal of constitutionality of legislation was stated by the Supreme Court of India in Hambardda Wakhana vs Union of India Air[1960] AIR 554.
75. It was submitted that political rights, the rights to equality and freedom from discrimination can be limited upon a test of reasonability and justifiability. On this point reliance was placed on S v Makwanyane and Another CCT3/94 (1995) 2A 83; Coalition for Reforms and Democracy & 2 others vs The Republic Petition No. 628 of 2014; R vs Oakes (1986) 1SCR and Queen vs Big M. Drug Mart limited, 1986, LRC (Const.) 332 that set the criteria for limitation to a right or fundamental freedom and the objective test and proportionality test. It is further submitted that the question is whether Section 43(5) of the *Elections Act* fits the above criteria. It is their argument that the said test would apply.
76. Counsel finally submits that the limitation to the right to enjoyment of political rights under Section 43(5) of the *Elections Act* vis a vis Articles 27 and 38(3) (c) of *the Constitution* is justified in the context of a public officer who intends to seek the position of a county assembly speaker and that it was the intention of the legislature to so provide. Relying on Ndyababo vs Attorney General (2001) EA 495 it was submitted that the petitioner has not rebutted the presumption of the constitutionality of Section 43(5) of the *Elections Act* with regard to the election of a county assembly speaker.

The 5th Interested party's submissions

77. The 5th interested party's written submissions are dated 1st August 2022. On whether the election of the speaker is an election under the *Elections Act*, 2011, he reiterated the contents of his replying affidavit affirming the position while relying on the case of Wanja Maina Hannah v IEBC & 2 others (2017)eKLR.
78. He goes further to submit that having established that the election of the speaker is an election under the *Elections Act*, then the election of the speaker is governed by the Act and bound by its provisions. According to him, Section 43(5) is not an exception but rather gives full effect to Article 193(2) (a) by giving the time when a public or state officer is required to have resigned from office. Further that the office of the Speaker of county assembly does not fall under the exceptions stipulated under Section 43(6) of the *Elections Act*. He relied on the case of Kipkemoi Terer vs John Langat & 3 others (supra), in support.



79. On whether Section 43(5) of the *Elections Act* is unconstitutional and discriminatory with regards to the elections of the speaker of the county assembly, he argued that the said section gives effect to Article 232(1) of *the Constitution*, Section 23(2) of the *Leadership and Integrity Act*, Section 12(1) of the *Political Parties Act*, and Clause 24(2) of the Public Service Code of Conduct and Ethics.
80. It is his case that the said section is constitutional, non-discriminatory and applicable to every public or state officer intending to vie for an electoral position except those stipulated under Section 43(6) of the *Elections Act*. He relied on the Court of Appeal case of Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119&139 of 2017(consolidated) [2022] KECA (KLR).
81. On whether the election date of the speaker is definite and known, and while reiterating his averments in the replying affidavit, he argued that the election of the speaker after the general elections is a regular election whose date is defined and known. On the role of the respondent in the elections of the speaker, he reiterated his averments in his replying affidavit confirming the same and he relied on Kipkemoi Terer vs John Langat & 3 others (supra) in support.
82. On whether the instant petition is contrary to the doctrine of ripeness, and relying on Republic v National Employment Authority & 3 others Ex-parte Middle East Consultancy Service Limited (2018) eKLR, he argued that the petitioner has not demonstrated how Section 43(5) is applicable to him as he is neither a public officer nor stated to be such an officer and how his rights have been infringed.

Analysis and Determination** ___

83. I have carefully considered the background of this case, the pleadings, all submissions, cited authorities, issues raised plus the law. I find the main issues for determination to be as follows:
 - i. Whether this Court has jurisdiction to entertain this petition in view of:
 - a. The doctrine of res judicata;
 - b. Whether the petition offends the principle of justiciability owing to the doctrine of ripeness; and
 - c. Whether the petition qualifies as an advisory opinion under Article 163(6) of *the Constitution*.
 - ii. Whether the petitioner has locus standi to file this suit.
 - iii. Whether the petition meets the threshold set out for constitutional petitions.
 - iv. Whether Section 43(5) of the *Elections Act* No. 24 of 2011 applies to a public officer who intends to seek the position of a county assembly speaker.
 - v. Whether the petitioner is entitled to the reliefs sought.

Whether this Court has jurisdiction to entertain this petition

- a) Whether the petition offends the doctrine of res judicata
84. The petitioner stated that the case of Kipkemoi Terer v John Langat & IEBC(supra) is a set precedent in court where the court and the respondent agreed that Section 43(5) of the *Elections Act* applies to a county assembly speaker. He also noted that that decision has never been challenged.



85. The 2nd interested party submitted that the constitutionality of the provisions of Section 43(5) of the Elections Act was conclusively determined by the Court of Appeal in Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal No. 119 & 139 of 2017 (Consolidated)[2022] KECA 15(KLR) and also in Charles Omanga case. The 4th interested party submitted that the petitioner failed to make this claim in the Charles Omanga case; Union of Civil Servants and 2 others v IEBC & another and Kipkemoi Terer case.
86. The Civil Procedure Act Cap. 21 Laws of Kenya under Section 7 provides for the doctrine of res judicata as follows:-

SUBPARA 7.

Res judicata

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

Explanation. (1)— The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)— Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating

87. The rationale for this doctrine was discussed in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR where the Court stated as follows:

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



88. For operation of this doctrine in the case of *E.T. v Attorney General & Another* (2012), eKLR, the Court stated;

“SUBPARA 53.

For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of *Karia and Another v The Attorney General and Others* [2005] 1 EA 83, 89).”

Also see:

- i. *National Land Commission v Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another* [2019] eKLR and;
 - ii. *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR.
89. On the applicability of the doctrine to constitutional petition, in *Okiya Omtatah Okoiti & Another v. The Attorney General and Another* Petition No. 593 of 2013 [2014] eKLR Lenaola J. (as he then was) held as follows:

“It therefore follows that the essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi v. National Bank of Kenya Ltd and Others* (2001) EA 177.

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

90. Further in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR, the Supreme Court held that:

“(82) If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes.....

(83) However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the *Danyluk Case* from Canada the court cited the dissenting opinion of Jackson J.A., in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated:



“The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.”

- (84) Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
- (85) In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.

91. Also see:

- i. Silas Make Otuke v. Attorney General and 3 others [2014] eKLR
- ii. Kenya Commercial Bank Ltd v Muiri Coffee Estate Ltd and another. Motion No. 42 of 2014 [2016] eKLR
- iii. Wycliffe Gisebe Nyakina v. Attorney General and another [2014] eKLR.
- iv. William Kabogo Gitau v. Ferdinand Ndung'u Waititu [2016] eKLR.

92. At this juncture, it is imperative that this court examines whether this instant petition really offends the doctrine of res judicata. I have looked at the cases of Public Service Commission (supra); Charles Omanga & another (supra); Union of Civil Servants (supra); and Kipkemoi Terer (supra). The parties are not the same save for the respondent who appears in all the suits. The main issue raised in the Public Service Commission case, was whether Section 43(5) of the *Elections Act* and the period of six months for resignation of public officers intending to contest in the general election is justifiable, reasonable and rational under *the Constitution*. Also, whether Section 43(5) of the *Elections Act* is discriminatory or a limitation of a public officer's rights under Articles 27, 38 and 41 of *the Constitution*.

93. In the Charles Omanga case, the issue was whether the provisions of Section 43(5) of the *Elections Act* requiring resignation of state officers seven months prior to the elections while at the same time excluding other categories of state or public officers is discriminatory, accords an unfair advantage to some, breaches the requirement for fairness, equality and proportionality and therefore unconstitutional.

94. In Union of Civil Servants case the issue was the applicability of Section 43(5) of the *Elections Act* to by- elections. The question of the constitutionality or otherwise of Section 43(5) of the *Elections Act* vis-à-vis Articles 27 and 38(3) (c) of *the Constitution* in the context of all parliamentary and county assembly by-elections.

95. In the Kipkemoi Terer case, the issues raised were as follows:-

- i. Whether the 1st respondent was eligible to vie as the speaker of Bomet County Assembly.



- ii. Who was responsible for the conduct of the Elections of the speaker of the Bomet County Assembly.
 - iii. If the answer to the first issue is in the negative, then who was responsible;
 - iv. Did the petitioner have locus standi to file the petition?
 - v. Is the petition against the 3rd and 4th respondents competent?
96. I have intentionally set out the issues in the said cases, to demonstrate that the issues are not similar to the issues raised herein. The issue raised herein is as to the applicability of Section 43(5) of the *Elections Act*, 2011 to the election of the county assembly speaker, and therefore, calling this court to make a declaration that the said section is unconstitutional as far as it is applicable to the speaker of the county assembly.
97. The prayers sought in the instant petition are well set out at paragraph 1 of this judgment, and I shall not rehash them here.
98. A look at the cases cited above reveals that they did not touch on the elections of the speaker of the county assembly. The only case that came close to determining that issue was that of *Kipkemoi Terer vs John Langat & 3 others*. Even so the issue of constitutionality of the said section was not determined in that suit. This court by virtue of Article 165(3) (b) and (d) (ii) of *the Constitution* has the jurisdiction to determine whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. It also has the jurisdiction to determine whether anything said to be done under the authority of this Constitution is inconsistent with or in contravention of *the Constitution*. The lower court even spoke to that issue but it is not vested with the jurisdiction to determine the constitutionality of Section 43(5) of the *Elections Act* as far as its applicability to the county assembly speaker is concerned. That is the mandate of this court. My finding is therefore that this suit is not res-judicata.
- b) Whether the petition offends the principle of justiciability owing to the doctrine of ripeness.
99. The petitioner submitted that the matter is ripe for determination and the justiciable issue being the applicability of Section 43(5) of the *Elections Act*, 2011 to a county assembly speaker. That it is built on the case of *Kipkemoi Terer vs John Langat and IEBC* where the court and the respondent agreed that the said section applies to the county assembly speaker.
100. The respondent submitted that the petition does not disclose any violation of the petitioner's rights neither does it disclose what the petitioner really seeks. That he has not demonstrated how he has been discriminated against or whether he is a person who is a public officer and seeks to be elected as a county assembly speaker.
101. The 2nd interested party submitted that the petition offends the principle of justiciability on account of the doctrine of ripeness. That the petitioner had not adduced any evidence of persons barred from participating in the elections nor any aspirant barred. The 4th interested party submitted that the petition is premature, speculative and an academic exercise. The 5th interested party submitted that the issues raised by the petitioner were insufficiently developed and speculative contrary to the doctrine of ripeness.



102. A number of decisions have been made in respect of the principle of justiciability owing to the doctrine of ripeness. I will refer to a few of them. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015* [2016] eKLR, Onguto J stated:

“(27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases.....The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”

103. In *John Harun Mwau & 3 Others V Attorney General & 2 Others* [2012] eKLR, the court stated:

“

“ 118. We also agree with the submissions of Prof. Ghai that this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret *the Constitution* conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy. In this case the dispute before the court falls squarely within the province of Article 258 of *the Constitution*.”

Also see

- i. *Nairobi constitutional Petition No. 254 of 2019; Kiriwa wa Ngugi & 19 others v. Attorney General & 2 others* [2020] eKLR
- ii. *Jesse Kamau & 25 Others –v- Attorney General Misc. Application 890 of 2004*
- iii. *National Assembly of Kenya and another v institute for Social Accountability & 6 others. Nairobi civil Appeal No. 92 of 2015* [2017] eKLR.
- iv. *Simon Kiprotich & 2 others v Principal Secretary, Ministry of Devolution and Planning & 4 others* [2018] eKLR

104. This court is tasked with the question on whether the petition is ripe for determination, in relation to the applicability of Section 43(5) of the *Elections Act*, 2011 to the elections of the county assembly speaker. The respondent, the 2nd, 4th and 5th interested parties have submitted that the petitioner has not demonstrated that the said section has been applied or whether there is a state officer who has been barred from running the seat of county assembly speaker on account of that section. He is also not vying for that seat. Therefore, it is premature and there is no real controversy or dispute involved.

105. I do not agree with the respondent and interested parties, because what the petitioner is seeking is an interpretation of section 43(5) of the *Elections Act* in as far as the election of the county assembly speaker is concerned. The said election is just about the corner.



106. The other issue to note is that although the decision in the Kipkemoi Terer case (supra) was appealed against, the High Court struck it out not on merits but on the premise of representation. Therefore, that decision still stands to date. This matter is not therefore hypothetical and needs to be addressed by this court pursuant to its jurisdiction under Article 165(3) (d) of [the Constitution](#).
- c) Whether the petition qualifies as an advisory opinion under Article 163(6) of [the Constitution](#)
107. The jurisdiction of this Court under this subheading was challenged by the respondent and 2nd interested party who argued that the petition sought to have this Court issue an advisory opinion. This is because the issues raised concerned the County Government which is within the Supreme Court’s jurisdiction under Article 163(6) of [the Constitution](#).
108. The Supreme Court under Article 163(6) of [the Constitution](#) is vested with the jurisdiction to:
- “give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.”
109. Giving an advisory opinion is therefore a reserve of the Supreme Court. Article 165 (5)(a) of [the Constitution](#) excludes that jurisdiction from this court.
110. To guide on the application of Article 163(6), the Supreme Court in the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR opined as follows:
- “(17) In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court’s Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the [Supreme Court Act](#), 2011 (Act No. 7 of 2011), of developing “rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth.
- (18) The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of [the Constitution](#).”
111. To entertain a matter as an advisory opinion the Supreme Court drawing from the cited authority in the Matter of an Advisory Opinion under Article 163(6) of [the Constitution](#) [2021] eKLR outlined the principles which guide it in the exercise of its jurisdiction under Article 163 (6) of [the Constitution](#). Guided by the Supreme Court’s opine, I find that although the questions raised in this petition involve the county government, the core question revolves



around the interpretation of Section 43(5) of the *Elections Act*. This Court’s jurisdiction to interpret *the Constitution* is set out in Article 165 3(d) which spells it out as follows:

Jurisdiction—

- (i) the question whether any law is inconsistent with or in contravention of this Constitution;
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws under Article 191;

See *A.O.O & 6 Others v Attorney General & another* [2017] eKLR

112. I am satisfied that this Court has jurisdiction to entertain this petition as its clear from Article 165(3)(d) of *the Constitution* that the Court has jurisdiction to hear any question respecting the interpretation of *the Constitution* and the question whether any law is inconsistent with *the Constitution* as raised in this petition. As such the petition raises constitutional questions needing interpretation and answers. In the end this court as a court of first jurisdiction in this regard is required to make an apt determination on the prayers sought in this petition.

(ii) Whether the petitioner has locus standi to file this suit

113. The respondent raised an issue that the petitioner did not have the locus standi to institute this suit. The petitioner on the other hand opposed this indicating that by virtue of Article 22(1) of *the Constitution* he has the locus standi to bring a suit for the threat of violation of Article 38(3) (c) of *the Constitution*.

Article 22 of *the Constitution* provides for the enforcement of Bill of rights. Further Article 258 of *the Constitution*, provides for enforcement of *the Constitution*.

114. The Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR held as follows:

“(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take



the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of *the Constitution*.

- (29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*.”

Also see Timothy Otuya Afubwa & Another vs. County Government of Trans Nzoia & 3 others [2016] eKLR.

115. This suit was brought pursuant to Article 22(1) of *the constitution* which allows any person to institute court proceedings claiming the violation, infringement or a threat of a right and/ or fundamental freedom in the bill of rights. The Petitioner is championing for the rights of the future aspirants for the county assembly speaker’s seat and there is no ulterior motive that has been displayed. In my view, he has the locus standi.

iii. Whether the petition has met the threshold set out for constitutional petitions

116. The respondent in its grounds of opposition dated 15th July 2022 argued that the petition did not meet the threshold for constitutional petitions. This was opposed by the petitioner.
117. In a constitutional petition, a party that alleges violation of rights must plead his or her case with reasonable precision on the way the rights have been violated. This principle was set out in the case of Anarita Karimi Njeru v The Republic [1976-1980] KLR 1272 which was upheld by the Court of Appeal in the case of Mumo Matemu(supra) which observed as follows:

“...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, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 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.”



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.”

118. Similarly, the Court in the case of Timothy Njoya v Attorney General & another [2014] eKLR held that: -

“...The petitioner must also plead his case with some degree of precision and set out the manner in which *the Constitution* has been violated, by whom and even state the Article of *the Constitution* that has been violated and the manner in which it has been violated.”

119. It is evident that for a constitutional petition to be sustainable the petitioner must cite constitutional provisions, and precisely identify the provisions that are alleged to have been violated or threatened to be violated. He/she must also demonstrate the manner in which the said provisions have been violated or are threatened with violation from the facts and evidence of the case.

PARA 120.

A perusal of the material presented before this Court by the petitioner shows that the petitioner has set out the purported constitutional violations in his affidavit. He has however failed to list the particulars in terms of facts or evidence that led to the pleaded conclusion that public officers vying for the speaker seat will be barred by the respondent thus violating their rights under Article 27 and 38(3) (c) of *the Constitution*. He does not show whether he or others have been barred from vying based on the application of Section 43(5) of the *Elections Act*. He only anticipates the same owing to the case Kipkemoi Terer case (supra). In essence this means that the petition fails to satisfy the threshold set for a constitutional petition.

SUBPARA (iv)

Whether Section 43(5) of the *Elections Act* No. 24 of 2011 applies to a public officer who intends to seek the position of a county assembly speaker

121. This issue being the heart of the petition was passionately contested by the parties. According to the petitioner, the speaker of the county assembly pursuant to Article 177 (1)(d) of *the Constitution* is an ex-officio member and so his appointment ought not to be equated to that of elective positions. The respondent argued that the election of the speaker was not an election under the *Elections Act* and further that it did not conduct the said elections, hence their joinder in the suit was unnecessary.

122. The 1st interested party in making its case contended that the precincts of the Election Act referred to a general election which encompasses the doctrine of universal suffrage as provided under Article 38 of *the Constitution* whereas the election of a speaker was an internal process conducted by the respective Houses. Opposing this view, the 2nd interested party opined that the impugned Section was applicable reminding the Court that the principle of statutory



interpretation requires that the words of a statute be given their ordinary meaning and where identifiable their purpose.

123. The 4th interested party stressed that the impugned Section applied to all public officers who intended to contest in the election of a county assembly including that of the speaker of a county assembly. The 5th interested party concurring with the 4th interested party added that the impugned provision gave effect to Article 232(1) of *the Constitution*, Section 23(2) of the *Leadership and Integrity Act*, Section 12(1) of the *Political Parties Act*, and Clause 24(2) of the Public Service Code of Conduct and Ethics.

124. The challenge to Section 43(5) of the Election Act is not novel. This Section provides as follows:

‘A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.’

125. The Courts in making a pronouncement on this Section in the case of Charles Omanga & another (supra) held as follows:

“24. It is their common argument that public officers need to be restricted in their political activities so that while in office they should not be seen to be engaged in partisan political activities and which may impede the objective discharge of their duties. That the requirement that they should resign from public office seven months before the date of elections is therefore reasonable and Section 43(5) and (6) are not in contravention of *the Constitution*.

25. I have considered the rival arguments and it does not take much persuasion for me to agree with the Respondents. I say so, with respect to the Petitioners and the Interested Parties, because the purpose of the two Sections are obvious to me. For the Government at the national and devolved levels to function during an election period, certain functions cannot be suspended including those of the President and County Governor, otherwise there would be chaos. How would the government function without the Head of State and other such Officers? The same Constitution in any event also differentiates between elected officials and other public officials because the former have specific time frames within which they must serve – invariably for five years.”

126. The Court of Appeal went on to settle the constitutionality of this Section in the case of Public Service Commission & 4 others(supra) where it opined as follows:

“82. Our view therefore is that the provisions of sections 43(5) and 6 are justifiable and reasonable and are not in contravention of any provisions of *the Constitution*.”

From the foregoing it is undoubtedly clear that the requirement of Section 43(5) of the Election Act is mandatory and constitutional.

127. The contention in this matter albeit has a similar storyline to that of the two cited cases but is distinct in that the cited cases contested the applicability of the impugned Section to elective



seats as enshrined under Article 38 of *the Constitution* saying the instant case does not fall within the purview of an elective seat to invoke the impugned Section. According to the petitioner and 1st interested party the office of the speaker should not fall under this prerequisite as the nature of his or her election is sui generis.

128. In making this determination the court must bear in mind the relevant guiding principles in interpretation of both *the Constitution* and an Act of Parliament. This court must be alive to its mandate under Article 259 of *the Constitution* where it is charged with the duty to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, among others. In exercising its judicial authority, this court is obliged under Article 159(2) (e) of *the Constitution* to protect and promote the purposes and principles of *the Constitution*.
129. It is set in law and principle that *the Constitution* must be interpreted broadly, liberally and purposively. The Court of Appeal resounded this principle in the case of Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR. The principles are that:
 - a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by Article 259.
 - b. The spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
 - c. It must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”
 - d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”
130. In the interpretation of an Act of Parliament, the first principle observed is the general presumption that an Act of Parliament is enacted in conformity with *the Constitution* as affirmed by the Court of Appeal of Tanzania in Ndyanabo vs. Attorney General [2001] EA 495.
131. Likewise, the case of Isaac Robert Murambi v Attorney General & 3 others [2017] eKLR on the said principles noted as follows:

“A statute should be construed according to the intention expressed in the statute itself as confirmed in the Court of Appeal case County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR when it stated that:

The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”



132. Further the case of Council of County Governors v Attorney General & another [2017] eKLR highlighted another significant principle as follows:

“A law which violates the Constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the “direct and inevitable effect” of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.”

133. The Constitution makes known under Article 177 that the membership of a county Assembly as restated under Section 7 (1) of the County Governments Act comprises of:

- (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
- (b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
- (d) the Speaker, who is an ex officio member.

134. Accordingly, the office of the Speaker of county assembly is established under Article 178 of the Constitution which provides as follows:

- (1) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.
- (2) A sitting of the county assembly shall be presided over by--
 - (a) the speaker of the assembly; or
 - (b) in the absence of the speaker, another member of the assembly elected by the assembly.



- (3) Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.
135. To qualify as a member of a county assembly *the Constitution* provides under Article 193 which is repeated under Section 25 of the *Elections Act*. Section 25(1) provides for the qualifications. Section 25(2) provides:
- (2) A person is disqualified from being elected a member of a county assembly if the person--
- (a) is a State officer or other public officer, other than a member of the county assembly;
- (b)
- (c)
136. In view of the foregoing it is clear that a candidate seeking to be elected as the speaker of the County Assembly is disqualified from being elected if the person is a state officer or public officer. A public officer and the nature of the office is defined under Article 260 of *the Constitution* as follows:
- a) any State officer; or
- (b) any person, other than a State Officer, who holds a public office.
- “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.
- “public service” means the collectivity of all individuals, other than State officers, performing a function within a State organ.
137. That said, the next question to examine is whether the election of a speaker qualifies as an election under the *Elections Act*. This Act in its preamble provides as follows:
- “An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.
138. Of importance is the election of a county assembly. This is defined under Section 2 of the Act as follows:
- “county assembly” means a county assembly constituted in accordance with Article 177 of *the Constitution*.
- “county election” means one of the election of a county governor or a member of a county assembly.
139. The Act with reference to the county assembly elections under Section 9 of the *Elections Act* provides that:



Initiation of county assembly elections

- (1) Whenever a county assembly election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in the electronic and print media of national circulation—
 - (a) in the case of a general election, at least sixty days before the date of general election; or
 - (b) in any other case, upon the office of a member of a county assembly becoming vacant.
140. Speaking to the election of the speaker of the county assembly the Act under Section 21 states that:
1. The speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.
 2. For the purpose of the election of the speaker of the county assembly after the first election under *the Constitution*, the procedure set out in the First Schedule shall apply.
141. The first schedule under paragraph 1of the Act provides as follows:
- A speaker of a county assembly shall be elected when the county assembly first meets after a general election and before the county assembly proceeds with the dispatch of any other business.
- It is therefore not correct as the 1st interested party claims that the time of election of the speaker of the county assembly is unknown.
142. A reading of *the Constitution* under Article 177 divulges that the members of the county assembly include the speaker of the County assembly who is an ex-officio member. Besides, Article 178(3) of *the Constitution* required the Parliament to enact legislation providing for the election and removal from office of the speaker of the county assembly. This requirement was fulfilled through the enactment of the *County Governments Act*, which provides for the election and removal of the speaker of the county assembly under Sections 9A and 11 of the said Act. The *Elections Act* further sets the timeline for the resignation of the Public and state officers.
143. At this juncture it is my discernment that parliament in enacting the two legislations was to provide a singular and homogeneous law that would encapsulate the election process. The Election Act in its provisions does not seclude or make a distinction of elections conducted for elective positions under Article 38 of *the constitution* or other positons in the Act as suggested by the 1st interested party.
144. If it were so then Parliament would have enacted a separate law to cater for other types of elections. For this reason I humbly disagree with the respondent who submitted that the election of a speaker of a county assembly was not an election within the meaning of the Act



and that it had no role to play in the speaker's election, yet it issues certificates after clearing candidates.

145. Coming back to the main question, whether Section 43(5) of the Election Act applies to public and state officers seeking to be elected as the speaker of the County Assembly, the answer is, absolutely in the affirmative.
146. On the distinction of an elective post and that of a speaker, it is noted that the Act categorically uses the word 'public officer' in the impugned Section. This is instead of 'candidate' which is defined under Section 2 as meaning a person contesting for an elective post. To my mind if Parliament intended that the requirement only applies to elective posts, the wording could have been unmistakably plain to read a candidate not public officer.
147. In its ordinary language Section 43(5) of the Act shows that this prerequisite applies to a public officer who intends to contest for an election under the Act which is elaborated under Section 2 as a presidential, parliamentary, or county election, including a by-election. The only public officers exempted from this requirement are listed under Section 43(6) as:
 - (a) the President;
 - (b) deleted by Act No. 36 of 2016, s. 16(b);
 - (c) the Deputy President;
 - (d) a member of Parliament;
 - (e) a county governor;
 - (f) a deputy county governor;
 - (g) a member of a county assembly.
148. Unless the public officer keen to be elected for the position can prove that they fall within this category, they are unequivocally required by the law to adhere to the dictates of Section 43(5) of the Act.
149. Taking this into consideration I find myself respectfully rejecting the petitioner's, respondent's and 1st interested party's argument to the effect that the dictates of Section 43(5) of *the Constitution* do not apply to the speaker of the county assembly. I say so because the Act adopts a consistent meaning of the word public officer as envisaged in *the Constitution*.
150. It is crucial to note that the Speaker of the county assembly is not the only Speaker established under *the Constitution*. This fact was brought up by the respondent in its grounds of opposition where it was noted that the disqualification of the speaker of the county assembly is similar to the disqualification of the speakers of the National Assembly and Senate as stipulated under Article 106(1)(a) of *the Constitution*. All the election of speakers take place after the general elections. It is also noted that the 2nd interested party which is the national assembly opposed the petition arguing that the dictates of the impugned section were mandatory as required by *the Constitution*.
151. A look at Article 106(1)(a) of *the Constitution* provides as follows:
 - (1) There shall be--



- (a) a Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members;

Section 9A (1) “The speaker of a county assembly shall be elected in accordance with standing orders of the respective county assemblies from among persons who are eligible to be elected as members of a county assembly but not such members.

152. It must be born in mind that the qualifications for a speaker of the county assembly are similar to those of a member of the county assembly. Similarly those of the speaker of parliament and senate are similar to those of the member of parliament and the senate respectively. One of the disqualifications is if any one of them is a state officer or public officer. This applies to ALL the houses i.e. Senate, Parliament and County Assembly. The qualifications of the speaker of a Parliament as dictated above are stipulated under Article 99 of [the Constitution](#) and reiterated under Section 24 (1) of [Elections Act](#).

Section 24(2) of the Act provides:

- (2) A person is disqualified from being elected a member of Parliament if the person--
 - (a) is a State officer or other public officer, other than a member of Parliament;
 - (b)

153. The standing orders of each house are there to give guidance on how the elections are to be conducted. The qualifications are already set out by [the constitution](#) and the statutes. They can only be interfered with through an amendment.

154. In considering all this the court is referred back to the principle set out by the Court of Appeal in the case of Center for Rights Education and Awareness (supra) which requires that in adopting an interpretation the entire Constitution must be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument. My understanding of this principle is that there must be harmonization in interpretation of [the Constitution](#). It would thus be absurd to find that the impugned legislation is not applicable to one house while the other houses are governed by the same qualifications. The petition in singling out the speaker of the County assembly seeks a restrictive approach and interpretation of [the Constitution](#) which is offensive to the spirit and letter of [the Constitution](#).

155. The Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR cautioned against such an interpretation when it observed that:

- (167) *In Pepper v. Hart [1992] 3 WLR*, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves,



and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

156. Similarly, the Court in the case of *Stephen Wachira Karani & another v Attorney General & 4 others* [2017] eKLR opined that:

“45. It is equally important that the court should also as far as possible, avoid any decision or interpretation of *the constitution*, which would bring about the result of rendering *the Constitution* unworkable in practice or create a situation that will go against other provisions of *the Constitution* governing the subject in issue. In this case, it is important to bear in mind the goal and objects of the drafters of *the constitution*. What was the mischief the drafters intended cure...

46. There are important principles which apply to the construction of statues such as (a) presumption against "absurdity" – meaning that a court should avoid a construction that produces an absurd result; (b) the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces "unworkable or impracticable" result; (c) presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and (d) the presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,(e) the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise."
47. The court as an independent arbiter of *the Constitution* has fidelity to *the Constitution* and has to be guided by the letter and spirit of *the Constitution*. In interpreting *the constitution*, the court should give life to the intention of the drafters instead of stifling it. The foundation of the courts' power, as explained by the Indian Supreme Court is the theory that *the Constitution* which is the fundamental law of the land, is the 'will' of the 'people' which must prevail.”
157. I am hence guided and in agreement with the cited authorities. The election process and its governing legislation is a continuous related process with all the parts intertwined as captured by the *Elections Act*. This Court cannot thus purport to divorce the process and the law. This is because the governing authority is *the Constitution* which desired a uniform system in the conduct of elections in Kenya. As such the import of the impugned provision was exhaustively



determined by the Court of Appeal in the case of Public Service Commission & 4 others v Cheruiyot & 20 others(supra) when it held as follows:

“SUBPARA 72.

The provisions of sections 43(5) are not hollow Lenaola, J in the Charles Omanga petition (supra) observed as follows at paragraph 26 of his judgment:

“26. I also wish to state the impartiality of public servants is a cardinal value enshrined in article 232(1)(a) of *the Constitution* which provides that the public servant and service must be responsive, prompt, impartial and equitable in the provision of services. How can a public servant espouse those principles if he is allowed to remain in office until the election date?

Suppose a Judge who intends to run for an elective post (it is his right) is allowed to sit on the bench and preside over election related cases until the election date, where is his impartiality? Similarly, how can a Commissioner of the Independent Election and Boundaries Commission serving his last year in office and with ambition to run for elective office, be allowed to remain in office and oversee an election in which he is a candidate? The absurdity of both situations merely serves to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they will be candidates.”

73. The requirements for neutrality and impartiality of public officers are also provided for in other relevant statutes and regulatory framework related to the conduct of public officers. Section 23(2) and (3) of the *Leadership and Integrity Act*, 2012 provides that:
75. The importance of political neutrality and impartiality of public officers during the term of employment cannot be overemphasized. We therefore fully agree with the findings of Lenaola, J in the Charles Omanga petition on the necessity for public officers desirous of running for elective posts to resign in good time. The provisions of sections 43(5) and (6) also seek to promote, inter alia, the principle of good governance and the value of the integrity contemplated under articles 10(2)(c) of *the Constitution*.”
158. In light of the case made out in this analysis, it is my humble conclusion that Section 43(5) of the *Elections Act* applies equally to a public officer seeking to be elected as a speaker of the county assembly, the national assembly and the senate. Had there been need for any distinction in respect of the speaker of the county assembly the *County Governments Act* would have done it. There is nothing that has been placed before this court to make it treat the election of the speaker of the county assembly in a different manner from that of the national assembly and senate speakers. My finding is that the impugned provision is constitutional as far as the election of the speaker of the county assembly is concerned.
159. The upshot is that the amended petition dated 7th July 2022 lacks merit and is dismissed.
160. This being a public interest case I order each party to bear its own costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 17TH DAY OF AUGUST, 2022 IN OPEN COURT AT NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

