



REPUBLIC OF KENYA



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**Kiwoi v Samboja & another; Kenyatta University & 3 others (Interested Parties)
(Petition 11 of 2022) [2022] KEHC 17105 (KLR) (1 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 17105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 11 OF 2022**

MN MWANGI, J

AUGUST 1, 2022

**IN THE MATTER OF ARTICLES 1, 2, 3, 19, 20, 21, 22, 23, 157(4),
165(3), 258, 259 AND 260 OF THE CONSTITUTION OF KENYA
2010 FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND
FREEDOMS.**

AND

**IN THE MATTER OF INFRINGEMENT OF THE PROVISION OF
ARTICLES 10, 47, 73, 88(4)(E) & (F), 88 (5), 180(2), 193(1)(B), 248(2)
(C), 249(1)(C) 252(1)(A) AND 159(2)(A)(E), OF THE CONSTITUTION
OF KENYA 2010.**

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLE 47 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE POWER VESTED IN THE INDEPENDENT
ELECTORAL AND BOUNDARIES COMMISSION (IEBC) UNDER
ARTICLES 248(2)(C), 249(1)(C) AND 252(1)(A) OF THE CONSTITUTION
OF KENYA 2010 TO PROMOTE CONSTITUTIONALISM AND TO
CONDUCT INVESTIGATIONS ON ITS OWN INITIATIVE OR ON A
COMPLAINT MADE BY A MEMBER OF THE PUBLIC.**

AND

IN THE MATTER OF THE POWER VESTED IN THE INDEPENDENT



**ELECTORAL AND BOUNDARIES COMMISSION (IEBC) UNDER
ARTICLES 88(4) (E) &(F), 88(5), 180(2), AND 193(1)(B) OF THE
CONSTITUTION OF KENYA 2010 TO BAR ANY PERSON WHO DOES
NOT SATISFY ANY MORAL AND ETHICAL REQUIREMENTS
PRESCRIBED IN LAW FROM VYING IN ELECTIONS FOR STATE
OFFICE.**

AND

**IN THE MATTER OF THE MANDATE OF THE ETHICS AND ANTI-
CORRUPTION COMMISSION TO REQUEST A STATE ORGAN TO
ASSIST IT IN ENSURING COMPLIANCE WITH AND ENFORCING
CHAPTER SIX OF THE CONSTITUTION UNDER ARTICLE 79 OF THE
CONSTITUTION AND SECTION 4(3) OF THE LEADERSHIP AND
INTEGRITY ACT, 2012.**

AND

**IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION
COMMISSION ACT NO. 22 OF 2011.**

AND

IN THE MATTER OF ELECTIONS ACT NO. 24 OF 2011,

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION
ACT, 2015**

BETWEEN

BETWEEN

JEREMIAH KIWOI PETITIONER

AND

**GRANTON GRAHAM SAMBOJA 1ST RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

AND

**KENYATTA UNIVERSITY INTERESTED PARTY
ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY
KENYA NATIONAL EXAMINATIONS COUNCIL INTERESTED PARTY
KENYA NATIONAL QUALIFICATIONS AUTHORITY ... INTERESTED PARTY**



JUDGMENT

1. The petition herein is dated 27th June, 2022. It was filed contemporaneously with a Notice of Motion of even date brought under the provisions of Article 23 of the Constitution of Kenya, Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and & Fundamental Freedoms) Practice and Procedure Rules and all other enabling provisions of the law. This Court notes that said application has been overtaken by events. It will also be evident at the end of this Judgment why the prayer sought in paragraph 8 of the Notice of Motion could not be sustained. That being the case, the most prudent thing was to write a judgment instead of a ruling.
2. In the petition, the petitioner avers that on 6th June, 2022, the 2nd respondent cleared the 1st respondent to vie for elections as a gubernatorial candidate in Taita-Taveta County. That the petitioner herein being aggrieved by the said decision filed a complaint against the 2nd respondent's decision on 10th June, 2022, in accordance with the Constitution and the 2nd respondent's rules of procedure on settlement of disputes.
3. The gist of the petitioner's complaint is that the 1st respondent is not qualified to vie for the position of Governor for lack of integrity as confirmed by the 2nd interested party (the Ethics and Anti-Corruption Commission) which investigated and established that the 1st respondent did not meet the educational, moral and ethical requirements under Chapter Six of the Constitution and in particular, under Article 180(2) as read together with Article 193(1)(b) of the Constitution and Section 22 of the Elections Act, 2011.
4. To support the said claim, the petitioner relied on a replying affidavit sworn on 13th June, 2022 by one Pius Ndiwa, an Ethics & Compliance Officer of the 2nd interested party, the Ethics and Anti-Corruption Commission, wherein he deposed that that the 1st respondent breached Article 73(2) of the Constitution by holding himself out as a holder of a Degree, Diploma and a Certificate from the 1st interested party, thereby placing reliance on fake academic certificates to pass the eligibility criteria to hold a state office.
5. The petitioner averred that despite the above confirmation by the 2nd interested party that the 1st respondent was of questionable integrity for fabricating academic certificates, the 2nd interested party swore another affidavit on 15th June, 2022 through another officer, Emily Ibeere in total contravention of its constitutional and statutory mandate.
6. The petitioner stated that the 2nd interested party's averments that it did not identify any issues arising from the 1st respondent's current self-declaration form or the document annexed in support thereof presented in the upcoming 2022 general elections amounts to an attempt by the 2nd interested party to "sanitize" and/or clear the 1st respondent of integrity issues. He stated that the 2nd respondent had lied under oath that he has never misrepresented information to the public or falsified official or personal records.
7. The petitioner contended that the 1st respondent presented false information to EACC and IEBC contrary to Section 46 of the Leadership and Integrity Act, in that he had not accurately and honestly presented information to the public contrary to Section 13(1)(c) of the Leadership and Integrity Act, hence he had failed to observe and maintain the ethical and moral requirements outlined under Section 13(1) of the Leadership and Integrity Act. The petitioner claimed that the respondent had continued



to contravene Chapter Six of [the Constitution](#), thus he is not eligible to vie for election as a Governor in the general elections slated for 9th August, 2022.

8. The petitioner stated that despite overwhelming evidence that the 1st respondent did not qualify for election as a Governor as provided under Article 180(2) as read together with Article 193(1)(b) of [the Constitution](#), the 2nd respondent's Dispute Resolution Committee dismissed the petitioner's complaint and upheld the the 2nd respondent's decision to clear the 1st respondent to vie for elections as a gubernatorial candidate in Taita-Taveta County.
9. The petitioner contended that the 2nd respondent's Dispute Resolution Committee's decision has grossly violated [the Constitution](#) and the petitioner's fundamental rights and freedoms provided in [the Constitution](#) and that unless this Court intervenes, the violations will continue unabated to the detriment of the petitioner, the people of Taita-Taveta and Kenyans at large. He states that the 1st respondent is likely to be appointed by Azimio La Umoja One-Kenya Coalition Political Party as its flag bearer despite him being unqualified.
10. The petitioner stated that unless the 2nd respondent is restrained by an order of the Court, it will proceed to include the name of the 1st respondent in its statement of persons nominated for County election to be held on 9th August, 2022, in furtherance of the violation of the provisions of [the Constitution](#) and the petitioner's constitutional rights.
11. It was stated that the Director of the Public Prosecutions wrote a letter dated 18th June, 2022 to the Inspector General of the National Police Service urging him to take up his constitutional mandate and investigate the authenticity of the academic certificate presented by Hon Johnson Sakaja and Hon. Wavinya Ndeti to the IEBC for clearance, and similarly, the 1st respondent's case falls under similar circumstances, thus there is need for the Inspector General of the National Police Service to investigate the academic certificate presented by the 1st respondent to the IEBC for clearance.
12. The petitioner contended that the people of Taita-Taveta and Kenyans at large stand to suffer irreparable loss and damage if the orders sought are not granted. He prayed for reliefs under Article 23(3)(e) of [the Constitution](#) being conservatory orders, the declaration of violation of the provisions of [the Constitution](#) and judicial review orders.
13. The petitioner's case was anchored on the following constitutional provisions which he claimed had been violated, are threatened and/or have taken place or are likely to take place-
 - i. Article 47 of [the Constitution](#) provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The the 2nd respondent's Dispute Resolution Committee's quasi-judicial proceedings fell short of the qualifications under Article 47 of [the Constitution](#); the act of the 2nd respondent's Dispute Resolution Committee of dismissing the petitioner's complaint in light of overwhelming evidence that the 1st respondent lacked statutory and constitutional qualifications to vie for election as a Governor was unreasonable;
 - ii. The act of the 2nd respondent's Dispute Resolution Committee of dismissing the petitioner's complaint in light of overwhelming evidence that the 1st respondent lacked the moral and ethical requirements to vie for election as a Governor violated the provisions of Article 180(2) as read together with Article 193(1)(b) of [the Constitution](#);
 - iii. The 2nd interested party's averments that it did not identify any issues arising from the 1st respondent's current self-declaration form or the document annexed in support thereof as presented for clearance for the upcoming 2022 elections contravened Article 73(2) of [the Constitution](#);



- iv. Failure to enforce Articles 180(2) and Article 193(1)(b) of the Constitution violates/threatens Article 10(2) on the national values and principles of governance and in particular, Article 10(2)(c) on “integrity”; and
 - v. Failure of the 2nd respondent to properly exercise its mandate under Articles 88(4)(e) and 252(1)(d) of the Constitution violated the petitioner’s rights under Article 47 of the Constitution which provides for fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
14. The petitioner prays for-
- a. A declaration that the 2nd respondent is under a duty to exercise its powers under the Elections Act in accordance with the provisions of Articles 2, 10 and Article 73 contained in Chapter 6 of the Constitution and in particular when clearing candidates to vie for election and/or when hearing disputes relating to or arising from nominations.
 - b. A declaration that the 2nd respondent is under a duty under Article 73 in Chapter 6 of the Constitution read with the Fifth and Sixth Schedules to the Constitution, to have regard to the personal integrity, character, competence and suitability of candidates when clearing candidates to vie for election and/or when hearing disputes relating to or arising from nominations.
 - c. A declaration that the 2nd respondent failed to have regard to the personal integrity, character, competence and suitability of the 1st respondent at the time of clearing him to vie for election for the position of governor Taita-Taveta.
 - d. A declaration that the 2nd respondent failed to have regard to the personal integrity, character, competence and suitability of the 1st respondent at the time it was hearing the dispute relating to or arising from his nominations.
 - e. A declaration that the 2nd respondent’s failure and omission to have regard to the 1st respondent’s personal integrity, character, competence and suitability at the time of clearing him to vie for election for the position of Governor Taita-Taveta is unlawful and unconstitutional.
 - f. A declaration that the 2nd respondent’s failure and omission to have regard to the 1st respondent’s personal integrity, character, competence and suitability at the time it was hearing the dispute relating to or arising from his nominations was unlawful and unconstitutional.
 - g. A declaration that the clearance of the 1st respondent to vie for election for the position of Governor Taita-Taveta was unconstitutional for failure to comply with the requirements of Section 22 of the Elections Act, 2011 and Articles 180(2) and Article 193(1)(b) of the Constitution; and is therefore null and void.
 - h. A declaration that the decision of the Dispute Resolution Committee of dismissing the petitioner’s complaint violated the petitioner’s rights under Article 47 of the Constitution and is therefore null and void ab initio.
 - i. An order quashing the decision made on 6th June 2022 to clear the 1st Respondent to vie for the position of governor and the subsequent decision upholding the 2nd respondent’s decision to clear him made on 10th June, 2022 by the Dispute Resolution Committee.



- j. A declaration that the 2nd interested party's averments that it did not identify any issues arising from the 1st respondent's current Self-Declaration Form or the document annexed in support thereof as presented for clearance for the upcoming 2022 election contravened Article 73(2) of *the Constitution*.
 - k. A declaration that the 2nd interested party was under a duty under Section 11(1)(e) of Ethics and Anti-Corruption Commission and Article 79 of *the Constitution* to recommend to the 2nd respondent an appropriate action to be taken against the 1st respondent for engaging in unethical conduct.
 - l. Any other orders and/or relief befitting the circumstances.
 - m. The costs of this petition.
15. The petition is premised on the affidavit sworn on 27th June, 2022 by Jeremiah Kiwoi, the petitioner herein. The 1st respondent on 6th July, 2022 filed a Notice of Preliminary Objection and on 13th July, 2022, he filed a replying affidavit on 13th July, 2022, sworn by himself on 12th July, 2022. The 2nd respondent filed a Notice of Preliminary Objection on 15th July, 2022 and a replying affidavit sworn by Crispine Owiye on 13th July, 2022. The 2nd interested party filed grounds of opposition on 15th July, 2022. The 1st interested party filed a replying affidavit on 18th July, 2022.

Petitioner's submissions

16. Mr. Mwangi K.M, learned Counsel for the petitioner, in highlighting the petitioner's written submissions stated that in determining whether the 1st respondent's Preliminary Objection has merit, this Court must be guided by the principle laid down in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696, where it was held that a Preliminary Objection may only be raised on a pure point of law and to discern such points of law, the Court has to be satisfied that there is no contest as to the facts.
17. He submitted that paragraphs 6, 7, 8, 9, 10, 11 and 13 of the 1st respondent's Preliminary Objection raise factual issues which were being contested by the petitioner. He stated that the 1st respondent was contending that the facts and substratum of this petition are the same as in HCCR Petition No. E078 of 2021, *Okiya Omtatah Okoiti vs Granton Samboja, Kenyatta University and Ethics and Anti-Corruption Commission*, which seeks a declaration that the 1st respondent's academic certificates are fake and for a judicial review relief to quash the said certificates. Mr. Mwangi K.M submitted that this Court would not be able to dispose of the issues raised in paragraphs 6, 7, 8, 9, 10, 11 and 13 without first evaluating the facts and evidence arising out of the two petitions, and for the said reason, the 1st respondent's Preliminary Objection does not meet the threshold of a sustainable one.
18. On the issue of jurisdiction, the petitioner's Counsel outlined the brief facts giving rise to the petition herein being that the 2nd respondent cleared the 1st respondent to vie for elections as a gubernatorial candidate in Taita-Taveta County and that the petitioner being aggrieved by the 2nd respondent's decision of clearing the 1st respondent filed a complaint against the said decision in accordance with the Article 88(4)(e) of Constitution, Section 74(1) of the *Elections Act* and the 2nd respondent's Rules of Procedure on Settlement of Disputes. He further stated that the gist of the petitioner's complaint was that the 1st respondent is not qualified to vie for the position of Governor for lack of integrity as confirmed by the 2nd interested party, the Ethics and Anti-Corruption Commission which conducted investigations and established that the 1st respondent did not meet the educational, moral and ethical



requirements under Chapter Six of *the Constitution* and in particular under Articles 180(2) and 193(1)(b) of *the Constitution*.

19. It was submitted that despite overwhelming evidence that the 1st respondent was not qualified to vie for election as a Governor for lack of moral and ethical requirements as required by Articles 180(2) and 193(1)(b) of *the Constitution*, the 2nd respondent's Dispute Resolution Committee dismissed the petitioner's complaint and upheld the the 2nd respondent's decision to clear the 1st respondent to vie for elections as a gubernatorial candidate in Taita-Taveta County.
20. It was further submitted that being aggrieved by the decision made by the the 2nd respondent's Dispute Resolution Committee, the petitioner filed this petition seeking judicial review orders under Article 23(3) of *the Constitution* which gives this Court powers to grant reliefs such as a declaration of rights and an order of judicial review among others.
21. The petitioner's Counsel urged that this Court has jurisdiction under Article 165 of *the Constitution* to entertain this petition as Article 165(1) of *the Constitution* establishes the High Court and vests it with vast powers, including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. That in addition, the High Court has the jurisdiction to hear any question respecting the interpretation of *the Constitution*, including the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*.
22. He submitted that Article 165(6) of *the Constitution* provides that the High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function. He asserted that any person aggrieved by the decision of an administrative body may seek judicial orders either by way of judicial review proceedings or by filing a constitutional petition in cases where his/her rights or fundamental freedoms have been or are likely to be adversely affected or where the provisions of *the Constitution* have been violated.
23. He relied on the decision in *Ernst & Young LLP v Capital Markets Authority & another* [2017] eKLR, where the Court held that judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but it is now a constitutional principle. That the Court further held that the judicial review powers that were previously regulated by the common law and the principles developed by the Courts to control the exercise of public power are now regulated by *the Constitution*. He also relied on the case of *Ferdinand Ndung'u Waititu v Benson Riitho Mureithi* (suing on his behalf and on behalf of the general public) & 2 others [2018] eKLR.
24. The petitioner's Counsel submitted that this Court has jurisdiction to hear the petition and in particular, to determine the issue of whether the 2nd respondent addressed the issue of competence, integrity and suitability of the 1st respondent before it cleared him to vie for elections as a gubernatorial candidate in Taita-Taveta County.
25. On the issue of whether the petition herein offends the doctrine of sub judice in view of HCCR Petition no E078 of 2021, *Okiya Omtatah Okoiti vs Granton Samboja, Kenyatta University and Ethics and Anti-Corruption Commission*, the petitioner's Counsel stated that Section 6 of the *Civil Procedure Act* provides that no Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.



26. He submitted that in order for the doctrine of sub judice to apply, the matter in issue in the suits or proceedings must be directly and substantially the same; there must exist two or more suits filed consecutively; the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim; they must be litigating under the same title; and the suits must be pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.
27. He expressed the view that this can be ascertained from the pleadings in HCCR Petition no E078 of 2021, Okiya Omtatah Okoiti vs Granton Samboja, Kenyatta University and Ethics and Anti-Corruption Commission, which are different from the petition herein. That the parties are different, the subject matter is not substantially the same and the reliefs sought are not the same.
28. He relied on the decision in Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya [2020] eKLR, where it was held that the sub judice rule like other maxims of law has a salutary purpose which is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief, to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two Courts in respect of the same relief and it is aimed at preventing a multiplicity of proceedings. He stated that the test for applicability of the doctrine of sub judice rule is whether a final decision reached in the previously instituted suit would operate as res judicata in the subsequent suit. He stated that if HCCR Petition No. E078 of 2021, Okiya Omtatah Okoiti vs Granton Samboja, Kenyatta University and Ethics and Anti-Corruption Commission is determined, the present petition would not be res judicata. He prayed for the petition to be allowed.

1st respondent's submissions

29. Mr. Muyuri, learned Counsel for the 1st respondent highlighted the 1st respondent's written submissions dated 13th July, 2022. He submitted that the gist and substratum of the petition dated the 27th June, 2022 is premised upon allegations and contestations against the eligibility of the 1st respondent to vie and/or run for the Taita-Taveta gubernatorial seat based on his academic qualifications, hence the petition purports to call to question the 1st respondent's integrity.
30. Further, it purports to impugn and/or dispute the 1st respondent's nomination and/or clearance as the duly nominated candidate set to vie for the Taita-Taveta gubernatorial seat due to dissatisfaction with the decision of the 2nd respondent's Dispute Resolution Committee and purports to execute a veiled attempt at calling upon this Court to set aside and/or overturn said decision.
31. Mr. Muyuri submitted that this Court lacks jurisdiction to seize this matter by reason that it has not been moved pursuant to its appellate jurisdiction. He relied on the case of the Owners of the Motor Vessel "Lilian S" –vs- Caltex Oil (Kenya) Limited (1989) KLR, which espoused and propounded that jurisdiction is everything and without it, a Court has no power to make one more step and that where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.
32. He contended that a constitutional petition before the High Court cannot substitute to replace an appeal against the decision of the 2nd respondent's Dispute Resolution Committee; thereby, utilizing or applying the petition as an avenue to set aside and/or overturn the decision of the Tribunal. He further contended that the above goes to the root of the jurisdictional competence of this Court to seize and determine the contestation against the decision of a Tribunal, albeit veiled as a constitutional petition, instead of being moved pursuant to the substantive procedure as provided by statute.



33. He submitted that Section 74(1) of the *Elections Act* No. 24 of 2011, provides that in accordance to Article 88(4)(e) of *the Constitution*, the 2nd respondent shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations excluding election petitions and disputes subsequent to the declaration of election results. He stated that it follows that upon resolution and/or determination of a dispute by the 2nd respondent, the only avenue for an aggrieved party to seek redress is by appealing to the High Court sitting as a judicial review Court or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution* of Kenya, 2010.
34. Mr. Muyuri relied on the Supreme Court decision in Hon. Mohammed Abdi Mohamud vs Ahmed Abdullahi & others SCK Pet. No. 7 of 2018 [2019] eKLR, where it was held that where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in the exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution*, and that the High Court shall hear and determine the dispute before the elections, and in accordance with the constitutional timelines.
35. He submitted that the overall effect of this decision is that the jurisdiction of the High Court to seize and determine pre-election disputes such as those regarding suitability and eligibility for nomination of candidates can only be invoked in an appellate manner under judicial review and/or the supervisory role of the High Court under Article 165(3) and (6) of *the Constitution* of Kenya, 2010.
36. Mr. Muyuri contended that the petitioner had neither moved this Court on appeal under judicial review nor had he moved it pursuant to its supervisory role under Article 165(3) and (6) of *the Constitution* of Kenya, 2010.
37. The Counsel for the 1st respondent stated that Order 53 Rule 1 of the Civil Procedure Rules, 2010, provides the procedure to be followed when an aggrieved party seeks to quash the decision and/or determination of a Tribunal and/or quasi-judicial body. He added that it is provided in mandatory terms that a party may obtain such relief only upon leave being sought and granted.
38. He posited that in the present petition, the petitioner has not invoked the requisite procedure under Order 53 Rule 1 of the Civil Procedure Rules, 2010, in order to obtain the reliefs sought to quash the decisions of the 6th June, 2022, clearing the 1st respondent to vie for the Taita-Taveta gubernatorial seat and the decision of the 10th June, 2022, by the 2nd respondent's Dispute Resolution Committee, dismissing the complaint.
39. He relied the decision in *Re Francis Gitau Parsimei & others v. National Alliance Party and others Nairobi Petition No. 356 of 2012* (unreported) as cited in the case of *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR, where it was held that where *the Constitution* and/or statute establishes a dispute resolution procedure, then that procedure must be followed.
40. Mr. Muyuri contended that the petitioner had failed to abide by the substantive procedure laid down by statute and ought to fail as it was not open for him to bypass that procedure by concealing and/or veiling his contestation of the decisions by the 2nd respondent as a constitutional petition.
41. He cited on the Supreme Court decision in *Samuel Kamau Macharia and another - v - Kenya Commercial Bank Ltd and 2 others* (supra) and relied on by the Court of Appeal in *Kibos Distillers Limited & 4 others v Benson Ambuti Adegwa & 3 others* [2020] eKLR, to the effect that jurisdiction can neither be conferred by way of judicial craft or innovation nor can it be conferred by the art and craft of Counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or other institution by *the Constitution* or statute.



42. The Counsel for the 1st respondent also relied on the decision in the Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where the Court of Appeal held that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
43. He cited the Supreme Court in the decision in Samuel Kamau Macharia and another -v- Kenya Commercial Bank Ltd and 2 others (supra), which stated that jurisdiction flows from either *the Constitution*, legislation or both and that a Court can only exercise jurisdiction as conferred by *the Constitution* or other written law and that it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
44. Mr. Muyuri urged this Court to find the matter before it void for not having been moved by way of an appeal under judicial review proceedings and/or under the Court's supervisory authority in the proper procedure, and as such, this Court lacks jurisdiction to seize and determine this matter.
45. On the issue of if the petition herein is sub judice, the Counsel for the 1st respondent relied on the case of Joyce Cherop Kaspanjoy & 609 others v Kenya Power and Lighting Company [2019] eKLR, where Justice Mativo (as he then was), while citing the South African Constitutional Court matter between Vuyile Jackson Gcaba v Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC stated that in the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor as they contain the legal basis of the claim under which the applicant has chosen to invoke the Court's competence.
46. Mr. Muyuri submitted that in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, Mativo J (as he then was) observed and determined that the basic purpose and underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and the same relief. That the Judge went on to hold that it is not the form in which the suit is framed that determines whether it is sub judice, but the substance of the suit and that there can be no justification in having two cases being heard parallel to each other.
47. He submitted that in the present suit, the facts and reliefs sought are wholly if not substantially similar to those sought in Nairobi High Court Petition E078 of 2020 and that it is demonstrable and discerned that the substratum of both petitions is a challenge against the 1st respondent's eligibility to vie for the Taita Taveta gubernatorial seat premised on an allegation of lack of integrity arising from his academic certificates. He stated that it is inevitable that the Courts, in both these matters, shall be required to interrogate the allegations levelled against the 1st respondent, in terms of academic qualifications, integrity, moral and ethical requirements as provided for in *the Constitution* of Kenya, 2010, in order to arrive at a finding.
48. He submitted that upon the Justice Mrima rendering his decision in HCCR Petition No. E078 of 2021, Okiya Omtatah Okoiti vs Granton Sumboja, Kenyatta University and Ethics and Anti-Corruption Commission, that decision shall become binding upon the parties; thereby rendering this present petition moot and of no utilitarian value. He indicated that two different Courts of concurrent jurisdiction were being called upon to seize and determine matters that arise from the same cause of action; thereby, rendering this impugned petition as falling within the parameters of that which the Supreme Court has defined as res sub judice.
49. Mr. Muyuri stated that a perusal of HCCR Petition No. E078 of 2021, Okiya Omtatah Okoiti vs Granton Sumboja, Kenyatta University and Ethics and Anti-Corruption Commission together with the present petition discloses that in both suits the petitioners have moved the Courts under the



provisions of Article 258 of *the Constitution* of Kenya, 2010, in that they claim to be acting in the interest of a group or class of persons and in the public interest, which is demonstrable that the petitioner in both suits is the same person.

50. He stated that in the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* (supra), it was held that the mere addition of a party or parties to a suit does not alter the pith and substance thereof.
51. He was of the view that it is imperative and desirable that these issues be adjudicated and resolved by only one Court in order to avoid conflicting decisions or any complications arising therefrom. He stated that if this Court was to seize and determine the instant suit, it shall be tantamount to it sitting on its own appeal.
52. He relied on the case of *Mukuru Munge v Florence Shingi Mwawana & 2 others* [2016] eKLR, where the Court of Appeal held that a Court altering and/or varying its own orders is the equivalent of sitting on its own appeal which is not within the jurisdiction and/or authority of a Court.
53. While relying on the provisions of Section 107 of the *Evidence Act*, Cap 80, Mr. Muyuri stated that the petitioner had not discharged the burden of proof as he had not adduced and/or presented an iota of evidence to substantiate and/or buttress any of the allegations put forth. He cited the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR, where the Court of Appeal determined that the legal burden is discharged by way of evidence with the opposing party having corresponding duty of adducing evidence in rebuttal; with the initial burden resting on the party laying the claim. He also cited the decision in *EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party* [2021] eKLR, where Judge Makau stated that aspersions and suspicions do not amount to an order of the Court or a quasi-judicial body in order to suffice as probative or evidentiary material. He concluded his submissions by stating that the petitioner had failed to discharge the legal burden of proof.

2nd respondent's submissions

54. The 2nd respondent, the IEBC, opposed the application by way of a replying affidavit sworn by the Director Legal Services, Crispine Owiye, on 27th June, 2022. The 2nd respondent also filed a Notice of Preliminary Objection. Like Mr. Muyuri, Mr. Muganda, learned Counsel for the 2nd respondent submitted that the petition herein is an abuse of the Court process because it is res judicata as the issues in the present petition were adjudicated in Constitutional and Human Rights Division Petition No. 382 of 2017 *EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party* (supra) as per a ruling by the HHonorable Judge Makau dated 11th March, 2021.
55. He stated that in the above petition, the Judge Makau was confronted with issues similar to the petition herein, where similar prayers were sought by the petitioner in questioning the character and integrity of the 1st respondent. That Judge Makau in his ruling declared that the role of the 2nd respondent was limited and it has no duty in law to investigate the validity and legitimacy of academic certificates supplied to it by various candidates. That the said Judge held that the duty and functioning of the IEBC in clearing candidates for the election of a Governor is premised on Article 193 of *the Constitution*, Section 22(2) of the *Elections Act* as read with Regulations 47 of the *Elections (General) Regulations, 2012*.
56. Mr. Muganda contended that the suit herein is incompetent, fatally defective and an abuse of Court process and ought to be struck out with costs to the 2nd respondent. He submitted that the petition



- herein is res judicata to EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra), as the petition herein is not only raising similar issues but is also against the same respondents being Granton Graham Samboja, IEBC and Kenyatta University, save for the petitioners in both suits who are different. He stated that the two petitions challenge the integrity of the 1st respondent and faults the mandate of the 2nd respondent in undertaking registration of candidates for election. He stated that the issues raised in the present petition were conclusively determined by the Court in the above case.
57. He relied on Section 7 of the [Civil Procedure Act](#), 2010 and the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, where the Court observed that for the bar of res judicata to be effectively raised and upheld on account of a former suit, several elements must all be satisfied, as they are rendered not in disjunctive, but in conjunctive terms. That the suit or issue was directly and substantially in issue in the former suit, the former suit was between the same parties or parties under whom they or any of them claim, those parties were litigating under the same title, the issue was heard and finally determined in the former suit; and the Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
58. The Counsel for the 2nd respondent elaborated on his submission that the suit herein is res judicata by stating that the issues for determination herein are substantially the same in the two matters, in that in EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra), the petitioner therein challenged the mandate of the 2nd respondent in regard to the verification of the 1st respondent's integrity, which is also the subject of the instant petition wherein the petitioner is faulting the 2nd respondent for clearing the 1st respondent despite questions of his integrity. Mr. Muganda stated the issue was conclusively determined in the former suit.
59. He indicated that the instant suit and the former suit, EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra) were filed against the same parties save for the petitioners who are different.
60. He stated that this suit is equally litigated under the same title and that the former suit, EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra) was a constitutional petition alleging violation of a number of rights by the IEBC. He submitted that the same title has been used by the petitioner in this suit, which raises substantially similar issues and seeks the same prayers as in the previous constitutional petition.
61. He contended that the issues currently raised by the petitioner were heard and determined in the former suit EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra), wherein Justice Makau delivered his ruling on 11th March, 2021 settling the issues of the role of the 2nd respondent in undertaking its mandate in clearance and registration of candidates for election under Article 88 of [the Constitution](#).
62. Mr. Muganda submitted that the former suit EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra), was filed before the Constitutional and Human Rights Court which has the same and concurrent jurisdiction as the instant Court and that the said Court had jurisdiction to make a determination on the issues that were raised before it.
63. He stated that the decision in the former suit EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra),



- has never been set aside, varied and or quashed by any Court, thus the determination by the Court on the issues before it is still binding. He stated that the suit herein is defective and an abuse of Court process.
64. Mr. Muganda urged that the suit herein is sub judice and as such, this Court lacks jurisdiction to hear it as a similar suit raising substantially similar issues is pending determination before Justice Mrima in Nairobi High Court Constitutional & Human Rights Petition No. E078 of 2021, Okiya Omtata Okioti versus Granton Graham Samboja & others.
 65. In order to demonstrate that the said doctrine is applicable herein, he stated that the parties in the instant suit and Nairobi High Court Constitutional & Human Rights Petition No. E078 of 2021, Okiya Omtata Okioti versus Granton Graham Samboja & others, are the same save for the petitioners. He indicated that this fact can be deduced from the recital/title of the cases as attached by the 1st respondent at pages 4 to 38. He also stated that the matters in issue in the instant suit are directly and substantially similar as the issues raised in the above petition.
 66. He relied on the case of the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR, where the Supreme Court held that a party that seeks to invoke the doctrine of res sub judice must establish that there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before Courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.
 67. He submitted that the instant suit meets the sub judice test and as such, this Court cannot move any further in making any determination to avoid embarrassment. He urged that this Court is barred by the doctrine of sub judice from making a determination on the issues raised.
 68. The third issue that Mr. Muganda addressed is on the 2nd respondent's role in undertaking investigations as the petitioner's argument is that the 2nd respondent's Dispute Resolution Committee violated his rights by dismissing his complaint against the 1st respondent, and alleged that this action, grossly violated his rights because it gave leeway to the 1st respondent to be the registered as the gubernatorial candidate for the forthcoming general elections for Taita-Taveta County despite the surrounding questions his integrity.
 69. Mr. Muganda stated that in making the above allegation, the petitioner relied on the affidavit of the 2nd interested party who purportedly undertook investigations on the integrity of the 1st respondent and reverted that he lacked educational, moral and ethical conduct under Chapter Six of *the Constitution*. Further, that the 2nd interested party sanitized the 1st respondent by swearing another affidavit where it stated that it had not identified any issues arising from the documents presented by the 1st respondent in respect of the upcoming general elections.
 70. The 2nd respondent's Counsel submitted that the 2nd respondent is established under Article 88(1) of *the Constitution*, 2010 and is mandated inter alia to conduct and supervise referenda and elections to any elective body or any office established under *the Constitution* and any other elections as prescribed by an Act of Parliament which role extends to the registration of the candidates for election under Article 88(4)(f) of *the Constitution* and section 4(f) of the *Independent Electoral and Boundaries Commission Act* 2011.
 71. He stated that in addition to the above mandate, the 2nd respondent under Article 88(4)(d) of *the Constitution* is required to regulate the process by which parties nominate candidates for elections. That under Article 88(5) of *the Constitution*, the 2nd respondent is expected to exercise its powers and perform its functions in accordance with *the Constitution* and national legislation, which includes



- compliance with the general principles for the electoral systems in Kenya which demands free and fair elections which are free from violence, intimidation, improper influence or corruption as provided under Article 81 of *the Constitution*.
72. Mr. Muganda submitted that in the discharge of its mandate, the 2nd respondent is bound by constitutional principles and the election laws and it does not have any powers to investigate the issues of integrity of the 1st respondent as purported by the petitioner.
73. He further submitted that Court in EACC -vs- Granton Graham Samboja 1st Respondent, Kenyatta University 1st Interested Party and Dominic Mwambi Mwasaru 2nd Interested Party (supra), settled the issue as to the role of IEBC in relation to verification of academic certificates when the Court held that the Constitutional mandate of the IEBC does not include authenticating academic certificates and it lacks power to investigate and/or determine the validity or otherwise of the certificates presented by the intending candidates as long as on the face of it, the candidate presents a prima facie valid document.
74. He stated that the 2nd respondent does not have any investigative powers in undertaking its mandate of registration of the candidates but relies on other constitutional bodies, including the 2nd interested party, to make informed decisions.
75. He submitted that the IEBC, ODPP, CUE and EACC are all independent bodies, with each Commission having its responsibilities strictly cut out in law. He stated that the 2nd respondent does not have any role in investigating the integrity of the 1st respondent or the documents that the 1st respondent submits in meeting the test for being cleared to run for any seat subject to the 2nd respondent receiving all the documents stipulated under Article 193 of *the Constitution* and Section 22 of the *Elections Act* as read with Regulation 47 of the Elections (General) Regulations.
76. Mr. Muganda indicated that the 2nd respondent was supplied with the requisite documents by the 1st respondent to enable the Returning Officer review his qualifications for nomination as a candidate for the upcoming general elections as a member of the County Assembly pursuant to Article 193, Section 22(2) of the *Elections Act* and Regulation 47 of the Elections (General) Regulations 2012.
77. That the 1st respondent equally produced a letter from the Commission of University Education confirming that the Universidad Empresarial De Costa Rica is a recognized institution and that the qualifications awarded by the said institution are also recognized in Costa Rica and by Convention in Kenya pursuant to Section 24 of the *Elections Act* and Regulation 47 of the Elections (General) Regulations.
78. He submitted that based on the above ground, it was only prudent for the 2nd respondent to register the 1st respondent pursuant to Article 88 of *the Constitution* as there is no statutory obligation upon the 2nd respondent to investigate the authenticity of the academic certificates of the candidates, and no Court order had been presented in terms of Article 75 of *the Constitution* disqualifying the 1st respondent from being cleared to run for the position of Governor. He stated that in the absence of a Court order, the 2nd respondent was bound to clear the 1st respondent to run for the seat.
79. The fourth issue submitted on by the 2nd respondent's Counsel was that the suit is defective in form and substance as it fails to plead violation of the petitioner's constitutional rights with precision and therefore, the petition does not disclose a single violation of any constitutional right and in turn, not a single constitutional issue falls for determination from the instant petition.
80. To buttress the above submission that the petitioner's petition had not been pleaded with precision, the 2nd respondent's Counsel relied on the decision of the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013].



81. Mr. Muganda submitted that the petitioner had failed to set out the manner in which *the Constitution* has been violated by the 2nd respondent or to demonstrate a nexus between the 2nd respondent and the said violations and even demonstrate the manner in which specific Articles of *the Constitution* had been violated. He stated that the petitioner had also failed to show how the decision of the 2nd respondent's Dispute Resolution Committee violated his fundamental and constitutional rights. The 2nd respondent urged this Court to dismiss the instant suit with costs and to uphold the 2nd respondent's Preliminary Objection dated 15th July, 2022.
82. Mr. Mwathe, learned Counsel for the 1st interested party did not file any written submissions. He stated that he was relying on the replying affidavit filed by the 1st interested party on 18th July, 2022. He adopted the contents of the said affidavit. He indicated that the 1st interested party had only given information on the correspondence that took place between the 1st respondent and the 1st interested party. He stated that he would take a neutral ground on the determination of this matter as they played no role in the year 2022 in regard to the 1st respondent's academic qualifications.
83. In the affidavit of Aaron Tanui, a Legal Officer working for the 1st interested party, Kenyatta University, he deposed that in so far as the university is concerned, on or thereabouts of the 12th of April, 2017 the Kenyatta University received a letter from the 2nd interested party, the Ethics and Anti-Corruption Commission, addressed to its Vice Chancellor, dated the same day and referenced "Request for Document/Information". He stated that in the said letter, the 2nd interested party requested for certain particulars that related to the 1st respondent, Granton Graham Samboja, identity No. 1254974. That the letter indicated that the investigation was pursuant to its constitutional and statutory mandate under Article 252(1)(a)(d) of *the Constitution*, Section 11 of the EACC Act, 2011 and Section 4(2) and 42(10) of the *Leadership and Integrity Act*, 2012.
84. The 1st interested party deposed that the EACC had information that the 1st respondent had presented documents which, on the face of it, indicated that he had undertaken various courses with the 1st interested party and for which he had been awarded certificates that had been impugned and were suspect, and to aid in their investigations, the 2nd interested party requested the 1st interested party to confirm whether the aforementioned was a student at the institution, the student course application information, courses undertaken and duration, certificates awarded and any other relevant information. It was deposed that attached to the letter were copies of the Bachelor of Commerce Human Resource Management Certificate for the graduating class of 2009, Human Resource Management Diploma Certificate for the graduating class of 2005, a Certificate in Project Management for the year 2002.
85. It was stated that based on the documents supplied to them and information, the 1st interested party's staff were instructed to scour the records to ascertain not only their authenticity but also to elucidate the circumstances under which they had been issued.
86. The 1st interested party averred that the internal search revealed that the 1st respondent had not applied for, obtained admission or at any one point attended Kenyatta University as a student for a Bachelor of Commerce Human Resource Management Certificate for the graduating class of 2009, Human Resource Management Diploma Certificate for the graduating class of 2005 or a Certificate in Project Management for the year 2002 and at no point was he issued with Certificates to that effect.
87. He averred that with the said information, the Vice Chancellor of the 1st interested party wrote to the 2nd respondent through his letter dated the 24th April, 2017, referenced "Request for Document/Information" for Mr. Granton Graham Samboja of national identity card number 12549741 which stated that there were no records in the University to indicate that Mr. Granton Graham Samboja of



ID No. 12549741 was a student of Kenyatta University and graduated with a Bachelor of Commerce degree in the year 2009. Mr. Tanui further averred that from the above therefore, Mr. Granton Graham Samboja was not a student of Kenyatta University during the period referred. He also averred that at the time of writing the letter, the 1st interested party was relying on the documents availed for verification by the EACC.

88. The 1st interested party further averred that the upon further investigations more information came to the fore-
- i. That Granton Samboja did not graduate with a Bachelor of Commerce in the year 2009, nor a Diploma in Human Resources Management, nor a Certificate in project management from Kenyatta University as per the copies sent by EACC and that the Certificates were and are fake.
 - ii. That he had applied to be admitted for Master of Business Administration MBA (Entrepreneurship) Degree in the School of Business using Certificates from Costa Rica.
 - iii. That in his application for admission for MBA, he stated that he had
 - a. A degree in business management from Universidad Impresarial de Costa Rica in 2013;
 - b. A diploma in business management (2008) Cambridge Association of Managers 2009; and
 - c. KCSE Certificate (1994) and scored a mean grade of C plan.
89. That on the basis of the foregoing the 1st respondent was admitted for an MBA (Entrepreneurship) course and the question of his eligibility for admission for MBA (Entrepreneurship) was confirmation by the Commission for University Education (CUE) vide its letter dated 4th October, 2017 that Universidad Impresarial de Costa Rica is a recognized institution in Costa Rica and therefore the qualification awarded by it is also recognized in Costa Rica and by convention in Kenya. That in the premises, the said letter of CUE means and implies that there was no legal basis to question the validity or authenticity of the said undergraduate degree on the basis of which the 1st interested party admitted the 1st respondent for MBA (Entrepreneurship).
90. The 1st interested party deposed that the integrity of the academic courses and Certificates of the 1st interested party have not been impugned by this petition and neither has its training, evaluation and award procedures been questioned therein. That no collision between the 1st interested party and the 1st respondent has been alleged therein either.
91. Ms Kibogy, learned Counsel for the 2nd interested party stated that she filed grounds of opposition dated 15th July, 2022 as prayer No. 5 was against the 2nd interested party. She relied on the said grounds of opposition and had nothing more to say.

ANALYSIS AND DETERMINATION.

92. There is no need to belabour the point that the constitutional petition herein was filed as a consequence of the decision made by the Dispute Resolution Committee of the IEBC on 6th June, 2022, that allowed the 1st respondent to vie for the gubernatorial seat of Taita-Taveta County. The petitioner herein filed a complaint with the Dispute Resolution Committee of the IEBC, and the same was considered and dismissed on 10th June, 2022.



93. The 1st respondent has challenged the jurisdiction of this Court to hear the petition herein due to the manner in which the petitioner has approached this Court. According to the Counsel for the 1st respondent, this Court is not seized of jurisdiction to hear the present constitutional petition. The said issue was raised in the Preliminary Objection (PO) filed by the 1st respondent. The petitioner's Counsel is of the view that the said PO does not raise pure points of law as it has a mixture of both facts and law. In this context, he referred to paragraphs 6, 7, 8, 9, 10, 11 and 13 of the said PO. The said paragraphs are outlined here below-

- “6. THAT in the alternative and without prejudice to the foregoing, the Application and Petition are incompetent and bad at law by reason that categorical perusal derives that the substratum thereof is contestation as to the integrity, moral and ethical stature of the 1st Respondent within an electioneering process, items which are similarly and substantially comprised within High Court Constitutional & Human Rights Petition E078 of 2021 (Nairobi); Okiya Omtatah Okoiti vs Granton Graham Samboja & Others which currently pends ruling before the Learned Justice Mrima which this Honourable Court ought to be pleased to take Judicial Notice of.
7. THAT consequently, pursuant to the settled and trite principle of Sub-Judice, as envisaged and contained under Section 6 of the *Civil Procedure Act*, this matter cannot be properly seized and determined by this Honourable Court by reason that it is presently before a different judge and/or under consideration of a different court of similar jurisdiction.
8. THAT it is trite and settled law that no court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
9. THAT this present Application and Petition are incompetent and bad at law by reason that by the substratum of the impugned Application and Petition having being substantially seized and pending determination, pursuant to the directions of the 17th November, 2021, by the Learned Justice Mrima in HCCHR Petition E078 of 2021 this Honourable Court is divested of jurisdiction to properly seize this matter.
10. THAT further, it is trite and settled at law that in order to avoid abuse of court process, to diminish the chances of courts, with competent jurisdiction, from issuing conflicting decisions over the same matter and to avoid multiplicity of suits the Honourable Courts are forbidden and ousted from seizing matters which are proceeding and/or pending before other courts.
11. THAT further, in the alternative and without prejudice to the foregoing contestations, were this Honourable Court to seize this matter, any conflicting and/or contradictory proceeding/determination between this and HCCHR Petition E078 of 2021 shall be tantamount to this Honourable Court sitting on its own appeal contrary to the provisions of Article 165 (6) of *the*



Constitution of Kenya, 2010, as both courts are of similar and/or concurrent jurisdiction.

12.

13. THAT further, too, in the alternative and without prejudice to the foregoing, this present Application and Petition are incompetent and bad at law by reason that they do not meet the muster and/or threshold for Constitutional Petitions as they are based on aspersions, conjecture and do not raise issues with reference to concrete facts; thereby, entreating this Honourable Court to act predicated upon perception and not evidentiary material contrary to the provisions of Sections 107 & 108 of the Evidence Act, Cap 80 of the Laws of Kenya.”

94. I do agree with Mr. Mwangi K.M that the issue of the present petition being sub judice cannot be taken as a Preliminary Objection on a pure point of law as in order for this Court to make a determination on the said issue, the 1st respondent would have to exhibit in an affidavit in response to the petition herein, the proceedings in High Court Constitutional & Human Rights Petition E078 of 2021 (Nairobi); Okiya Omtatah Okoiti vs Granton Graham Samboja & others for this Court to peruse. This Court notes that the said proceedings were indeed annexed to the 1st respondent’s replying affidavit and as such, the issue of the present proceedings being sub judice should be in the said affidavit.

95. The 1st respondent raised 14 grounds in its Notice of Preliminary Objection and by so doing, he ran afoul of transgressing into factual issues, as he did. In this Court’s considered opinion, grounds of preliminary objection should be clear, concise, crisp and to the point, by making reference to the constitutional or legal provisions being relied on. Lengthy details and explanations should be avoided as one can easily transgress into factual issues.

96. A case in point is Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696, where Law, J.A held as follows–

“...so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...”

Sir Charles Newbold P. added as follows at page 701:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

97. The Supreme Court of Kenya in the case of Independent Electoral & Boundaries commissions v Jane Cheperenger & 2 others [2015] eKLR, expressed itself as follows on the issue of Preliminary Objections

–
“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections the true Preliminary Objection serves two purposes of merit; Firstly, it serves as a shield for the originator of the objection-



against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce Judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on merits.” (emphasis added).

98. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* (supra) stated as follows on the issue of Preliminary Objections-

“(78) The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others*, Civil Application No. 23 of 2014; and in *Aviation & Allied Workers Union Kenya vs. Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, in which the Court further stated at paragraph 15;

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).”

99. Having noted that the Notice of Preliminary Objection filed by the 1st respondent raises both points on law and factual issues, it does not meet the test laid out in the two cases cited above. I therefore strike out the said Notice of Preliminary Objection.

100. To put things into perspective, it is important to bear in mind the provisions of Article 88(4) of *the Constitution* as it confers the IEBC with certain powers for different processes during the pre-election period, during elections and post elections. The said Article provides as follows –

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

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters’ roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;



- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.”

101. Provisions for resolution of election disputes by the 2nd respondent, IEBC, are stipulated under Section 74 of the *Elections Act*. It states as follows –
- (1) Pursuant to Article 88(4)(e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nomination but excluding elections petitions and disputes subsequent to the declaration of election results.
 - (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the commission.
 - (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.” (emphasis added).
102. Mr. Mwangi K.M stated that the petitioner being aggrieved by the decision made by the the 2nd respondent’s Dispute Resolution Committee, filed this petition seeking judicial review orders under Article 23(3) of *the Constitution* which gives this Court powers to grant reliefs such as a declaration of rights, and an order of judicial review among others.
103. The petitioner’s Counsel urged that this Court has jurisdiction under Article 165 of *the Constitution* to entertain this petition as Article 165(1) of *the Constitution* establishes the High Court and vests it with vast powers, including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. That in addition, the High Court has the jurisdiction to hear any question respecting the interpretation of *the Constitution*, including 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
104. He submitted that Article 165(6) of *the Constitution* provides that the High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function. He asserted that any person aggrieved by the decision of an administrative body may seek judicial orders either by way of judicial review proceedings or by filing a constitutional petition in cases where his/her rights or fundamental freedoms have been or is likely to be adversely affected or where the provisions of *the constitution* have been violated.
105. He relied on the decision in *Ernst & Young LLP v Capital Markets Authority & another* (supra), where it was held that judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. That the Court further held that the judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power are now regulated by *the Constitution*. He also relied on the case of *Ferdinand Ndung’u Waititu v Benson Riitho Mureithi* (suing on his behalf and on behalf of the general public) & 2 others (supra).



106. Through the replying affidavit sworn by the 1st respondent in opposition to the petition, he has deposed that this Court lacks jurisdiction to seize and determine the impugned petition by reason that it has not been approached and/or moved pursuant to its appellate authority under Section 74(1) of the *Elections Act*. He further deposed that this Court lacks jurisdiction to seize and determine the impugned petition by reason that upon the 2nd respondent, through its Dispute Resolution Committee, having exercised its mandate under Article 88(4)(c) of *the constitution* of Kenya, 2010 and rendering its decision accordingly, the only manner in which intervention of this Court may be invoked, by the petitioner is by way of appeal. He relied on the decision of the Owners of the Motor Vehicle “Lilian S” –vs- Caltex Oil (Kenya) Limited (supra).
107. Mr. Muyuri’s contention is that the petitioner has neither moved this Court on appeal under judicial review nor has he moved it pursuant to its supervisory role under Article 165(3) and (6) of *the Constitution* of Kenya, 2010. He submitted that Order 53 Rule 1 of the Civil Procedure Rules, 2010, provides the procedure to be followed when an aggrieved party seeks to quash the decision and/or determination of a Tribunal and/or quasi-judicial body. He added that it is contained in mandatory terms that a party may obtain such relief only upon leave being sought and granted accordingly.
108. He further submitted that the petitioner has not invoked the requisite procedure under Order 53 Rule 1 of the Civil Procedure Rules, 2010, in order to obtain the reliefs sought to quash the decisions of the 6th June, 2022, clearing the 1st respondent to vie for the Taita-Taveta gubernatorial seat and that of the 10th June, 2022, by the 2nd respondent’s Dispute Resolution Committee, dismissing the complaint. He cited the case of Re Francis Gitau Parsimei & others v. National Alliance Party and others Nairobi Petition No. 356 of 2012 (unreported)
109. As Mr. Mwangi K.M aptly put it, judicial review was initially confined to the provisions of Order 53 of the Civil Procedure Rules but is now one of the reliefs that can be granted under the provisions of Article 23(3) of *the Constitution* of Kenya. It must be noted that in the case of Ernst & Young LLP v Capital Markets Authority & another (supra), the petitioner had been served with a Notice to Show Cause following an inquiry that it had allegedly not participated in pursuant to the decision and issuance of the said Notice. The petitioner thus claimed that its rights to a fair hearing under Articles 47 and 50 of *the Constitution* and Sections 4(2), 3(3)(a) of the *Fair Administrative Action Act* had been violated.
110. The Court of Appeal in *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR, addressed the issue of jurisdictional challenges in suits filed without following the right procedure and stated the following-
- It is our considered view that the jurisdictional competence of a court and the statutory procedure for commencing a cause of action are aimed at facilitating and enabling a party to be heard. A litigant cannot ignore the jurisdictional competence of a court or the procedure for commencing a cause of action and then aver that he has not been heard. Article 159 of *the Constitution* or the Overriding Objective principles are not blanket provisions that shelter a party who disregards the proper forum or jurisdictional competence of a court or fails to follow the procedure for commencing a cause of action. In totality, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.”
111. In *Republic v Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others* (Interested Parties); Ex-parte Applicant: Pravin Galot [2020] eKLR, Judge Mativo (as he then



was) considered the import of the provisions of Article 165(3) and (6) of *the Constitution* and stated as follows-

This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee*, AIR 1951 Cal. 193 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere. See *D. N. Banerji v. P. R. Mukherjee* 1953 SC 58”

112. In the case of *Ferdinand Ndung’u Waititu v Benson Riitho Mureithi* (suing on his behalf and on behalf of the general public) & 2 others (supra), the appellant moved to the Court of Appeal as the 1st appellate Court after a decision was rendered against him by the constitutional division of the High Court following a representative petition filed by Benson Riitho Mureithi. It is therefore evident that in the two cases above, the petitioners had filed constitutional petitions in the High Court under its original jurisdiction and not appellate jurisdiction as is the case in the petition herein. I am therefore not persuaded by the submission by Mr. Mwangi K.M that this Court is properly seized of the petition before it as an appellate Court.
113. The Supreme Court in the case of *Mohammed Abdi Mohamud vs Ahmed Abdullahi & others* (supra), held that where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in the exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution*, and the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines.
114. Further, the Supreme Court in *Sammy Ndung’u Waity v Independent Electoral and Boundaries Commission & 3 others*, SC petition No. 33 of 2018, in the majority decision laid out the guiding principles on how to deal with pre-election disputes as follows-

QUOTE

(69)The starting point in our view is to recognize the mandate of the IEBC or any other Organ such as the PPDT, of resolving pre-election disputes, including those relating to or arising from nominations, whether such disputes revolve around the qualification of a candidate or otherwise. The next logical step is to ensure that an election court or the judicial process for that matter is not helpless when faced with a critical factor to determine the validity of an election. This twin approach ensures that Article 88 (4) (e) of *the Constitution* is not rendered inoperable while at the same time preserving the efficacy and functionality of an election court under article 105 of *the Constitution*. To achieve this noble objective, we think that now is the time to issue certain guiding principles.

- i. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.



- ii. Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, such dispute shall not be a ground in a petition to the election Court.
 - iii. Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.
 - iv. Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.
 - v. The action or inaction in (4) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, even after the determination of an election petition.
 - vi. In determining the validity of an election under Article 105 of *the Constitution* or Section 75 (1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election. (emphasis added).
115. Another illuminating decision of the Supreme Court is the case of *Silverse Lisamula Anami v. Independent Electoral and Boundaries Commission & 2 others*, SC Petition No. 30 of 2018, where the said Court being cognizant of the fact that there were conflicting decisions by Election Courts and the Court of Appeal stated as follows-
- (54) How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts? Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically, and that whereas the IEBC and PPDT are entitled, nay, empowered by *the Constitution* and Statute to resolve pre-election disputes including nominations, there are instances where the election Court, in determining whether an election is valid, may look to issues arising during the pre-election period, only to the extent that they have previously not been conclusively determined on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution*. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity, since that jurisdiction is not conferred on it by *the Constitution*.”
116. This Court cannot regard the manner in which the petitioner has approached it as being a procedural technicality. It goes to the root of jurisdiction. I am bound by the doctrine of stare decisis and it is more than crystal clear that once a decision has been rendered by the IEBC Dispute Resolution Committee, an aggrieved party can only move to the High Court by way of appeal under judicial review or under the Court’s supervisory jurisdiction under Articles 165(3) and (6) of *the Constitution*. If the Supreme Court intended that appeals from the DRC of the IEBC should be by way of constitutional petitions, it would have explicitly said so in the guiding principles given in the decision of *Sammy Ndong’u Waity v Independent Electoral and Boundaries Commission & 3 others* (supra).



117. I therefore hold that I am not seized of the requisite jurisdiction to determine the constitutional petition before me. That being the case, I will not delve into the issue of whether the present petition is sub judice or not, as at this point I have to lay down my pen. The petition herein is incompetent and it is hereby struck out.

118. Since this Court had been moved to determine a pre-election dispute each party shall bear its own costs.
It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 1st day of August, 2022. Judgment delivered through Microsoft Teams online platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mwangi K.M for the petitioner

Mr. Muyuri for the 1st respondent

Ms Kungu and Mr. Muganda for the 2nd respondent

Mr Mwathe for the 1st interested party

No appearance for the 2nd, 3rd and 4th interested parties

Mr. Oliver Musundi – Court Assistant.

