



**Buoga v Attorney General & another (Constitutional Petition E290 of 2022)  
[2022] KEHC 13214 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13214 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E290 OF 2022**

**AC MRIMA, J**

**SEPTEMBER 30, 2022**

**BETWEEN**

**VICTOR BUOGA ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

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

**JUDGMENT**

**Introduction:**

1. Every election cycle attracts varying disputes regarding academic eligibility of persons intending to stand for political seats. The divergent appreciation of constitutional and statutory requirements considered alongside judicial pronouncements is a cause for litigation among the players in the political space.
2. The Petition before this Court is one such dispute. Victor Buoga, the Petitioner herein, describes himself as a public-spirited citizen out to defend and protect the Constitution in accordance to the provisions of Articles 22 and 258 of the *Constitution*.
3. It is his case that the requirement making a person eligible to vie for position of a County Governor is as spelled out in Article 180(2) of the *Constitution* and as such, the qualification set by section 22(2) of the *Elections Act*, No. 24 of 2011 (hereinafter referred to as ‘the Impugned section’) is unconstitutional.
4. The Petitioner further urges that the application by the Independent Electoral and Boundaries Commission (hereinafter referred to as ‘the IEBC’ or ‘the 2<sup>nd</sup> Respondent’ or ‘the Commission’) of



the threshold set by the impugned section has discriminated against persons wishing to contest the Governor seat, in violation of the Article 27 of the *Constitution*.

5. The Petition was opposed by both Respondents.

**The Petition:**

6. On the foregoing background, the Petitioner sought this Court's redress through the Petition dated 16<sup>th</sup> June, 2022, supported by the Petitioner's Affidavit deposed to on the even date.

7. Contemporaneously with the filing of the main Petition was the filing of an application by way of a Notice of Motion of even date. The application was brought under certificate of urgency and was also supported by the Petitioner's Affidavit deposed to on the even date.

8. The Petitioner's main contention is, therefore, that the qualifications set by the Constitution must be reflected by the *Elections Act* and that the impugned section ought not to be applied by the IEBC since that stifles the peoples' political rights, freedom of expression and is discriminatory.

9. The Petitioner referred to one of the disputes before the IEBC's Dispute Resolution Committee referenced as IEBC/DRC/CRG/56/2022 where the issue was the eligibility of a Gubernatorial candidate one Wavinya Ndeti where it was contended that she was ineligible since as she did not possess a genuine degree from a recognized university. The Petitioner contended that there is no provision in the Constitution that candidates vying for election of County Governor must have an academic degree.

10. The Petitioner posited that by invoking the impugned section to oust persons aspiring to stand for the position of Governors and who have no degree qualifications, the IEBC was in contravention of Articles 2(2), 24(1), 27, 33 and 38(2) of the *Constitution*.

11. On remedies, the Petitioner prayed for the following orders in the application: -

1. Spent

2. That pending the hearing and determination of this Notice of Motion this Honourable Court be pleased to issue an interim order to the 2<sup>nd</sup> Respondent staying the implementation and enforcement of section 22(2) of the *Elections Act* No. 24 of 2011.

3. That conservatory Orders do issue *ex-parte* restraining the 2<sup>nd</sup> Respondent and its complaint commission from hearing and determining eligibility of candidates for election of county governors on account of their academic degree qualifications pending hearing and determination of this application/petition.

4. That pending hearing and determination of this application/petition the IEBC herein the 2<sup>nd</sup> Respondent be restrained from printing ballot papers for elections of county governors.

5. That the costs of this application be provided for.

12. In the main Petition, the Petitioner prayed for the following reliefs:

1. A declaration that section 22(2) of the *Elections Act* No. 24 of 2011 is inconsistent and incongruous with Article 180(2) of the *Constitution*.

2. A declaration that the minimum qualification for elections of County Governor is similar to the eligibility for election as a Member of the County Assembly.



## The Submissions:

13. To further urge its case, the Petitioner filed written submissions dated 5<sup>th</sup> July, 2022.
14. It was his case that the Petition was instigated by the judgment in Petition Nos. E229, E226, E249 & 14 of 2021 (consolidated) *County Assembly Forum & 6 other -vs- Attorney General & 2 others* where the Court was of the finding that Section 22(1)(b)(ii) of the *Elections Act* is unconstitutional and in violation of Article 10(2)(a), 24, 27, 38(3) and 56 of the *Constitution* and therefore inoperational and of no legal effect.
15. The Petitioner subsequently challenged the Respondents' jurisdictional contest stating that he is covered by Article 258(1) of the *Constitution* which gives him the right to institute Court proceedings, claiming that the Constitution has been violated or is threatened with contravention and Article 22(1) of the *Constitution* that also gives him right to institute Court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
16. With respect to the submission by the Respondents that the Petition is caught up by exhaustion doctrine for failing to petition Parliament under Article 181 of the *Constitution*, the Petitioner in reference to the decision in *Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* submitted that the doctrine of exhaustion is an administrative law tool where the High Court exercises its supervisory jurisdiction pursuant to Article 165(6) of the *Constitution*.
17. It was his case that the question of constitutionality of a statute or a section of a statute is not an administrative matter and that petitioning under Article 119 of the *Constitution* is not a judicial Petition, but moving the Parliament with respect to enact, amend or repeal any law.
18. In so far as the decision in *County Assembly Forum & 6 other -vs- Attorney General & 2 others* had not been set aside by the Court of Appeal, the Petitioner submitted that the 2<sup>nd</sup> Respondent was in no position to set the threshold of academic qualification.
19. The Petitioner submitted that the interpretation of Article 180(2) of the *Constitution* should be that it does not alter, abrogate or destroy the essential features of the Constitution, relevant to this case, the concept of devolution.
20. On the foregoing, it was stated that it is absurd to sever qualification for election of a County Governor or a Deputy Governor from the qualification for election of a Member of a County Assembly. Essentially, Article 180(2) of the *Constitution* must be read alongside Article 193(1)(b) on the basis that no one provision of the Constitution is to be segregated from the others and be considered alone.
21. It was the Petitioner's case that the *Constitution* is silent on the disqualification of a candidate for election of County Governor and therefore, it can be deduced that Article 180(2) of the *Constitution* puts qualification for election of County Governor in the same standard as that of Member of County Assembly.
22. In enacting the impugned section, the Petitioner asserted that Parliament ought to have conformed with the Constitution otherwise it would be caught up with Article 2(4) which makes invalid any law inconsistent with the *Constitution*.
23. Separately, the Petitioner submitted that the impugned section is against devolution for clustering academic qualifications for President, The Deputy President, County Governor and Deputy County Governor. It was his case that the President and Deputy President are peoples' representatives in National Government while Governors and Deputy Governors represent the people in counties.



24. The Petitioner argued that the impugned section was a non-obstante clause for taking away what the Constitution gave, an unfathomable scenario. Reference was made to *Raj Krushna Bose -vs- Binod Kanungo* AIR 1954 SC 202 where it was observed as follows: -

It is usual when one section of an Act takes away what another confers, to use a non-obstante clause and say that 'notwithstanding anything contained in section so and so, this or that will happen'; otherwise, if both sections are clear, there is a head-on clash. It is the duty of Courts to avoid that and, whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise...

25. The Petitioner maintained that since section 22(1)(b)(ii) of *Elections Act* was declared unconstitutional pursuant to Article 180(2) of the *Constitution*, the standard of qualification of a County Governor is pegged on the eligibility that of a Member of County Assembly.
26. On the foregoing, the Petitioner submitted that the logical conclusion is that the impugned section is otiose, null and void for making university degree a qualification.
27. In the end, the Petitioner submitted that the requirement in the impugned section violated Article 27 of the *Constitution* which prohibits discrimination and unequal application of the law.
28. The Petitioner submitted that he had discharged the burden of proof on the constitutionality of the impugned section and asked the Court to allow the Petition as prayed.

### **The Responses:**

#### **The 1<sup>st</sup> Respondent's case:**

29. The Hon. Attorney General opposed the Petition through Grounds of Opposition dated 23<sup>rd</sup> June, 2022.
30. It was its case that the Petition is fatally defective for ignoring the fact that the impugned section ought to be interpreted in harmony with Article 193(1)(b) of the *Constitution* which provides for qualification for election as a Member of County Assembly.
31. It was urged that educational requirements as per the decision in *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* (*supra*) can be differentiated on a higher threshold on the Office of the Governor based on differences between the functions, roles and responsibilities of the said office as opposed to functional roles and responsibilities in the Office of the Member of the County Assembly.
32. The Honourable Attorney General stated that the Petition is an abuse of Court process as it fails to appreciate that Section 22(1)(b)(ii) of *Elections Act* is by implication a derivative of the provisions of Articles 180(2) and 193(1) of the *Constitution* and that in interpreting the said Section, therefore, a Court of law must measure and balance its objects against the constitutional provisions as well the executive authority of the County Governments.
33. It was further its case that the Petition is defective on the ground that it fails to appreciate that academic qualification for Governors and Deputy Governors are different due to the nature of their functions, a finding arrived at after extensive public participation by the Taskforce in Devolved Government in the year 2012.
34. The Attorney General further stated that the Petition lacked clarity and precision for failing to disclose constitutional provisions violated or threatened with violation.



35. The 1<sup>st</sup> Respondent did not file any written submissions.

**The 2<sup>nd</sup> Respondent's case:**

36. The Commission opposed the Petition through the Replying Affidavit of Chrispine Owiye, the Commission's Director of Legal Services, deposed to on 28<sup>th</sup> June, 2022 and an evenly dated Response to the Petition.
37. In the Replying Affidavit, Mr. Owiye deposed that qualification for eligibility for election as a County Governor is provided for in Article 180(2) of the Constitution as read with Article 193 and Article 2(3) all of which cannot be challenged before any Court.
38. It was his deposition that any Act of Parliament that prescribes educational requirements for election for purposes of Article 180(2) and 193(1)(b) of the Constitution is an extension of the Constitution and is not subject to challenge.
39. On the foregoing, it was his case that the Courts are obligated to respect uphold and defend the provisions of Article 180(2) and 193(1)(b) of the Constitution as read with Acts of Parliament.
40. He further deposed that the decision in County Assembly Forum & 6 Others -vs- The Attorney General & Another is not good law for being inconsistent with the Constitution.
41. It was his deposition further that that Petitioner has failed to exhaust remedy provided for in Article 119 of the Constitution and allowing this Petition would result in infringement of legislative authority of Parliament.
42. In rejecting the invitation to issue restraining orders against the 2<sup>nd</sup> Respondent in respect of the dispute in IEBC/DRC/CRGE/56/2022, he deposed that the dispute had already been heard to conclusion and is now overtaken by events.
43. While speaking to the timelines set by the 2<sup>nd</sup> Respondent, Mr Owiye deposed that the process of facilitating preparation of 9<sup>th</sup> August 2022 is already in the progress and the printing of ballot papers is on-going.
44. He further deposed that the enforcement of the impugned section is already in place and has been fully enforced on candidates. He deposed that if the Petition is granted, it would be prejudicial to other persons and will throw the 2022 election into turmoil. He stated that it was against public interest as it would affect the preparedness of the scheduled date.
45. He further stated that this Court ought to consider the purposive approach in interpreting section 22 of the Elections Act by considering the language of the provision, its context and the statutory scheme in which the language is found.
46. It deposed that the use of the words 'notwithstanding subsection(1)(b)' in the proviso of section 22(2) depicts the intention of Parliament regarding eligibility requirements for one to be nominated for election as a County Governor.
47. It was his case that the County Governor being the Chief Executive Officer of the County Government, they are higher in hierarchy as compared to Members of Parliament who represent a constituency or a sub-county. He averred that the County Governor was like a mini President, hence, the elevated educational threshold.



48. The deponent differently appreciated the decision in *County Assembly Forum & 6 Others -vs- The Attorney General & Another* by stating that it acknowledged that there is need for differentiated qualifications for different academic qualifications as each position attracts different responsibilities.
49. In the end, he urged the Court to dismiss the Petition in toto.

**The submissions:**

50. The 2<sup>nd</sup> Respondent further urged its case through written submissions dated 12<sup>th</sup> July, 2022.
51. At the outset, it reiterated that since the Petition is an inquiry into constitutionality of Article 180(2) and 193(1)(b) of the *Constitution*, this Honourable Court lacks jurisdiction on account of Article 2(1) of the *Constitution* which forbids any Court from challenging validity of the Constitution.
52. According to the 2<sup>nd</sup> Respondent, a proper interpretation of Article 193(1)(b) of the *Constitution* requires that the educational qualification for election as a Member of County Assembly was to be prescribed in an Act of Parliament.
53. It was, therefore, its position that any Act of Parliament that prescribes educational requirement for election purposes as envisaged under Articles 180 (2) and 193 (1) (b) of the *Constitution* is an extension of the Constitution.
54. The 2<sup>nd</sup> Respondent submitted that the Court has no role in the prescription of educational qualification or requirement and whether the educational requirement is reasonable or not depends entirely on the discretion of Parliament.
55. The 2<sup>nd</sup> Respondent reiterated that to the extent the decision of *County Assembly Forum & 6 Others vs The Attorney General & Another* [2021] eKLR purported to challenge the power of Parliament in prescribing educational requirement for election of Members of the County Assembly, the said decision is in contravention of Article 193(1)(b) of the *Constitution* and, therefore, null.
56. The 2<sup>nd</sup> Respondent further urged that statutes are presumed to be constitutional and to prove the contrary a Petitioner must plead and demonstrate with sufficient specificity how the impugned provision is inconsistent with the Constitution.
57. Support of the foregoing position was drawn from the decision in *Okiya Omtatah Okioti -vs- Director of Public Prosecutions; Inspector General of National Police Service & another (Interested Parties) International Commission of Jurists (Kenya Section) (Amicus Curiae)* [2022] eKLR where it was observed that: -

One of the principles to be borne in mind in determining whether an Act of Parliament violates the Constitution, is the general presumption that Acts of Parliament are enacted in conformity with the Constitution. This principle was enunciated by the Court of Appeal of Tanzania in *Ndyanabo v Attorney General* [2001] EA 495 as follows:

...until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative... the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption... where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction.



58. Further reference was made to the foregoing decision where the Court spoke to any challenge on the constitutionality of a statute in the following manner: -

140. When a Court is called upon to decide on the constitutionality of a statute or its provisions, its duty is to check whether the challenged provision aligns with the provision of the Constitution said to have been violated by the impugned law, the duty of the Court was expressed in the *United States case of U.S. v Butler* 297 U.S. 1 [1936] as follows: -

When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.....

59. On the foregoing, the 2<sup>nd</sup> Respondent submitted that, in determining the constitutionality of the impugned section, this Court should examine the object and purpose of the said provision in order to avoid an interpretation that clashes with the Constitution.

60. Court was implored to arrive at an interpretation that promotes the spirit and purpose of the Constitution.

61. In submitting on the implication of the term ‘notwithstanding’ as used in the impugned section, reference was made to the decision in [\*National Super Alliance \(Nasa\) Kenya v Independent Electoral & Boundaries Commission & 2 others\*](#) [2017] eKLR.

62. The 2<sup>nd</sup> Respondent submitted that upholding the Petitioner’s interpretation would mean that there would be no academic requirements at all for the elective positions of President, Deputy President, County Governor or Deputy County Governor.

63. The 2<sup>nd</sup> Respondent rebutted the claim of discrimination by referring to the Court of Appeal decision in [\*John Harun Mwau v Independent Electoral & Boundaries Commission & Another\*](#) [2019] eKLR where it was stated that setting standards in regard to education qualifications for leaders seeking positions of power and responsibility cannot be discriminatory.

64. In the end, the 2<sup>nd</sup> Respondent urged the Court to dismiss the Petition with costs.

**Issues for Determination:**

65. From the foregoing factual and legal matrix, the issues that arise for determination are as follows: -

- i. Whether this Court has jurisdiction over the dispute and if so, whether the Petition meets the precision requirement.
- ii. Depending on (i) above, the principles in constitutional and statutory interpretation.
- iii. The constitutionality of section 22(2) of the [\*Elections Act\*](#).

66. I will hence deal with the issues sequentially.



## Analysis and Determination:

### (a) Whether this Court has jurisdiction over the dispute and if so, whether the Petition meets the precision threshold:

67. This issue raises two sub-issues. They are whether the Court has jurisdiction over the dispute and whether the Petition meets the precision threshold.
68. The sub-issues will be dealt with separately.

### The Court's jurisdiction:

69. The centrality of a Court's jurisdiction cannot be gainsaid.
70. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 County *Government of Embu & Another vs. Eric Cheruiyot & 15 Others* (unreported) spoke to the doctrine of jurisdiction in general as follows: -
  36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows: -

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity abinitio, and such a decision is amenable to setting aside ex debito justitiae.



39. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:
- ...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.
40. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:
- (68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.
71. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -
- Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;
- 1) .....
  - 2) The jurisdiction either exists or does not ab initio ...
  - 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
  - 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
72. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -
- [44] ... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...
73. The jurisdictional challenge in this matter is two-fold. That yields two limbs. First, is the contention that the instant Petition ought to have been lodged before Parliament instead of this Court pursuant to Article 119 of the *Constitution*. It was, therefore, claimed that the Petition was caught up by the exhaustion doctrine. Second, it was contended that since Section 22 of the *Elections Act* derives its mandate from Articles 180(2) and 193(1)(b) of the *Constitution* (a normative derivative), then the



statutory provision is part of the Constitution and as such it cannot be challenged courtesy of Article 2(3) of the Constitution.

74. Going forward, I will deal with the two limbs.

#### **Petition to be lodged in Parliament?**

75. Responding to the sub-issue, the Petitioner argued that this Court was clothed with jurisdiction by virtue of Articles 22 and 258(1) of the Constitution. He maintained that he was invoking the jurisdiction of the High Court under Article 165(6) of the Constitution, hence, the applicability of the exhaustion doctrine does not arise.

76. Given the two opposing positions, a brief look at the doctrine of exhaustion suffices.

77. The exhaustion doctrine has been the subject of deliberation among many Courts. Recently, in Constitutional Petition 169 of 2020, Jeremiah Memba Ocharo vs- Evangeline Njoka & 3 Others [2022] eKLR this Court, in reference to various decisions, discussed the subject in the following manner: -

20. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others* (Interested Parties) (2020) eKLR. The Court stated as follows:

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in *R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.



This is *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

21. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. Vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by *Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.



78. The extent of the Court’s intervention in matters which Parliament can exercise jurisdiction over has been a subject of litigation. For instance, in the High Court at Nairobi in *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated)) [2021] KEHC 304 (KLR) (Constitutional and Human Rights) (15 October 2021), the Court dealt with an objection which was raised by the National Assembly over its jurisdiction since the matter before Court was also being handled by the National Assembly through a public petition.
79. In delimiting the Court’s involvement in proceedings touching on matters before Parliament, the Court stated as follows: -
178. In determining this contention, I will first resort to Article 119 of the *Constitution* which provision was heavily relied upon by the 3<sup>rd</sup> Respondent in its argument aforesaid. It provides as follows: -
119. Right to petition Parliament
- (1) Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.
- (2) Parliament shall make provision for the procedure for the exercise of this right.
179. The National Assembly is part of the Parliament of Kenya. Its primary function is codified in Articles 94 and 95 of the *Constitution*. It largely provides that the National Assembly exercises legislative authority on behalf of the people. Under Article 95, its role is to represent the people of the constituencies and special interests in the National Assembly, deliberate on and resolve issues of concern to the people and enacts legislation in accordance with Part 4 of Chapter 8.
180. There has been judicial discussion as to whether Courts have jurisdiction over matters which are subject of pending Petitions before Parliament. In Petition 381 & 430 of 2014 (Consolidated) *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR the Court dismissed the argument that Courts did not have such jurisdiction. The Learned Judges referred to an earlier decision in *The Council of Governors and Others vs. The Senate* Petition No. 413 of 2014 and made the following emphatic remarks: -

.... It is also incumbent on the Court to consider its jurisdiction in relation to the present matter, which revolves around the functions and distribution of powers between the national and county governments. This is in light of the argument by the AG that the petitioner should have approached Parliament if it was dissatisfied with the provisions of the CGAA, implying that the court has no jurisdiction to deal with this matter and that any dispute with regard to its provisions should be addressed to Parliament.

This argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. At Article 165(3)(d)(i), this Court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2 by proclaiming, at Article 2(4), that “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”



Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to “... institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.” As this Court held in *The Council of Governors and Others vs. The Senate* (supra):

We are duly guided and this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court’s jurisdiction to address the Petitioner’s grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court”.

181. In *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR the Learned Judges interpreted the right to Petition Parliament under Article 119 and whether it takes away the right to approach the High Court as follows: -

... The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under Articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under Article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including “the question whether any law is inconsistent with or in contravention of” the Constitution, or under Article 165(3)(d)(iii), to determine 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”?

In our view, the answer must be in the negative. Doubtless, Article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that Article 119 is not intended to cover situations such as is presently before this Court.

It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and Articles 2(4) and 165(3)(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.



This Court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Similarly, Article 258(1) thereof donates the power to every person to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. If this Court were to shirk its constitutional duty under Article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under Article 119(1) is without merit.

182. I am in agreement with the above. I, however, wish to add that the power of Parliament under Article 119 of the Constitution to enact, amend or repeal any legislation is not in any way curtailed by the High Court's exercise of its jurisdiction under Article 165(3) of the Constitution. Whereas Parliament has the preserve to enact, amend or repeal any legislation, Courts have the duty to ensure that Parliament inter alia keeps within the constitutional borders while discharging its mandate. That is where the difference lies. As such, the Court's exercise of its jurisdiction in determining whether Parliament acted within the Constitution in coming up with the impugned law cannot be seen as an affront to the doctrine of separation of powers. The two are distinct mandates under the Constitution.

183. In this case, the Petitioners contend that the National Assembly in passing the amendment that resulted to the impugned Section 22(1)(b)(ii) of the *Elections Act* did not act within the Constitution. That is very different from the Parliament's power to reconsider and possibly amend or repeal the impugned provision. In any event, there is no proposition that the decision of Parliament on the Public Petitions is binding on this Court.

184. As a result, this Court finds that the contention that the consolidated Petitions are caught up by the doctrine of ripeness fails and is hereby dismissed.

80. Returning to the matter at hand, it is imperative to note that there is no pending Petition in Parliament over the educational eligibility of persons seeking the elective positions of County Governors.

81. That aside, this Court has carefully perused the Petition herein. It is plain that the Petition seeks the interpretation of Articles 180(2) and 193(1)(b) of the *Constitution* as well as the constitutionality of Section 22(2) of the *Elections Act*. To that extent, it is distinguishable from the *County Assembly Forum & 6 others v Attorney General & 2 others* case (*supra*).

82. Interpretation of the Constitution is a preserve of the High Court by dint of Article 165(3)(d) of the *Constitution*. As the Petition seeks the interpretation of the Constitution, then, the argument that the High Court lacks jurisdiction falls by the way side.

83. The first limb of the jurisdictional sub-issue is, hence, dismissed.

#### **Whether Petition infringes Article 2(3) of the Constitution:**

84. An interesting argument was made by the 2<sup>nd</sup> Respondent that Section 22(2) of the *Elections Act* is a normative derivative of the Constitution, hence, it cannot be challenged.



85. The argument that all laws are normative derivatives of the Constitution and as such they are always constitutional rests on the Kelsen's Pure Theory of Law based on the grundnorm.
86. The Supreme Court in Petition No. 19 of 2018 *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR dealt with the applicability of the Kelsen's theory of law into the 2010 Constitution. While recognising that the Kelsen's theory cannot be considered as illogical, the Court emphasized that the 2010 Constitution was a fusion of declarations of general principles and statements of policy and that called for a different interpretational approach.
87. The Supreme Court had the following to say: -

[46] ..... In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR, this Court disabused an abstract interpretation of the *Munya 1* decision when Counsel in the matter argued that the *Munya 1* decision had opened up the Court to hear all types of appeals from the Court of Appeal and urged the Supreme Court to depart from it. This Court in dismissing Counsel's invitation to depart from that case emphasised the need to understand the *Munya 1* case in its context, thus:

[134] Learned counsel, Mr. Abdullahi's argument that, "all laws are normative derivatives of the Constitution", while by no means illogical, had in our view taken an abstract point out of the context of the real dispute being redressed within the judicial system. If the Constitution is equated to Kelsen's grundnorm in the hierarchy of norms, then it follows that all laws are "normative derivatives" of the Constitution, as they derive their validity therefrom. And since the Constitution vests the legislative authority in Parliament, then all laws that the latter enacts "derive from the Constitution".

[135] However, the Constitution itself, for its meaningful implementation, and with definite socio-political goods accruing to the people, has duly empowered the judicial system and this Supreme Court to establish operational beacons. Such is the role this Court has played in settling disputes, a typical example in this regard being, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012, in which the Court, considering the Attorney-General's reference on the proper effect of Article 81 (b) of the Constitution, thus expounded the critical questions of principle which learned counsel in the instant case should take into account (paragraph 54):

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favor of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should



be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.”

[136] The Court’s statement in *Munya 1* is to be perceived in the context of the foregoing passage, which sought to unlock the frontiers of Article 81(b) of the Constitution, as read with other provisions of the Constitution. The Court was advancing and applying the interpretative schema of the Constitution, in the light of its transformative character. In this regard, plain abstract theory founded upon the Kelsenian grundnorm, rested upon a secondary pedestal.

88. With the foregoing constitutional direction in the manner the Constitution ought to be interpreted, the 2<sup>nd</sup> Respondent’s argument cannot hold.
89. As such, the second limb of the jurisdictional sub-issue equally fails.
90. The Court will now consider the second sub-issue.

#### **Whether the Petition meets the precision threshold:**

91. As a matter of principle, Constitutional Petitions must be pleaded with some measure of precision and specificity as what provision of the Constitution has been violated and in what manner.
92. The foregoing requirement finds credibility in the fact that a Respondent needs to know the violation one is accused of and manner of violation so as to be in a position to respond. That goes to the heart of fair trial.
93. The foregoing was fittingly captured in in Miscellaneous Criminal Application 4 of 1979, *Anarita Karimi Njeru v Republic* [1979] KLR where the Court observed as follows: -

... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...

94. In Constitutional Petition No. E265 of 2021, *Kenya Medical Practitioners, Pharmacists and Dentists’ Union -vs- University of Nairobi & another* [2021] eKLR, the Court discussed the need for precision in approval to the precedent in *Anarita Karimi* decision and observed as follows: -

87. The foregoing finding (*Anarita Karimi Njeru*) received endorsement from the Court of Appeal in Nairobi Civil Appeal No. 290 of 2012, *Mumo Matemu v Trusted Society of Human Rights Alliance* when the Learned Judges remarked on the importance of compliance with procedure under Article 159 of the Constitution, the overriding objective principle under section 1A and 1B of the Civil Procedure Act and need for precision in framing issues in constitutional Petitions. It was observed thus: -

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands



neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

88. The Learned Judges further bolstered the foregoing finding by making reference to the decision of Jessel, M.R in *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 where he made the following findings: -

... 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....

89. In making a finding that the High Court was right in its assessment that the Petition before it had not been drafted with the necessary precision, the Learned Appellate judges reaffirmed the Anarita Karimi Njeru principles and made the following findings: -

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> 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.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent.

95. The Apex Court has, as well, discussed the issue. That was in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR where the Court stated as follows: -

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



a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

96. Further, in *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR the Supreme Court emphasized the need for precision as follows: -

(48) Consequently, it is our determination that where a party in an election petition invokes this Court's jurisdiction under Article 163(4)(a) of the Constitution, it is not enough for one to generally allege that the Court of Appeal erred in its decision(s) and that its reasoning and conclusions took a constitutional trajectory. The constitutional trajectory stated by this Honourable Court is not illusionary. It is tangible and should be discernable from a party's pleadings. A party is under a constitutional forensic duty to clearly set out the particulars of the constitutional transgressions that in his/her opinion the Court of Appeal committed in their interpretation and/or application. Those grounds must be pleaded with precision and the constitutional principle and/or provision alleged to have been violated clearly set out.

97. Having laid out the foundation for lodging constitutional Petitions, this Court will now interrogate how the instant Petition squares with the established principles.

98. The Petition is founded on the interpretation of Article 180(2) as read with Article 193(1)(b) of the *Constitution*. In paragraph 10, the Petitioner draws the Court's attention to the alleged inconsistency in *Elections Act* and the Constitution.

99. Further, in paragraphs 35 to 40, the Petitioner elaborates the constitutional provisions violated and the manner of violation by stating how Section 22(2) of the *Election Act* is consistent with the Constitution and by fronting the manner in which Article 180(2) as read with Article 193(1)(b) of the Constitution ought to be interpreted.

100. Without much ado, this Court finds that the Petition is clear on what is alleged to have been violated and the manner of the violations. The constitutional provisions alleged violated are also apparent in the Petition.

101. Resulting therefrom, it is this Court's finding that the Petition passes the precision test.

102. Having considered the two sub-issues and since the sub-issues are both in favour of the Petitioner, this Court finds that this Court has the jurisdiction to entertain the Petition which Petition also satisfies the precision threshold.

103. With such a finding, a consideration of the second issue follows.

**(b) The principles in constitutional and statutory interpretation:**

104. As stated above, the Petition calls for interpretation of some of its provisions and also looks into the constitutionality of a statutory provision. Resulting from the issues raised in this matter, it is imperative to run through the principles that guide Courts when called upon to interpret the Constitution as well as the constitutionality of statutes.

105. The consideration will no doubt lay a solid basis for consideration of the rest of the issues.

106. The High Court in *David Ndi v Attorney General & others* [2021] eKLR (famous referred to as 'the BBI case') captured with precision the manner in which our transformative Constitution ought to be interpreted. The Learned Judges presented themselves thus: -



399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

- a) First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR thus (at paragraph 26):

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

- b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle in *Re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

- c) Third, the Constitution has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in *In Re the Speaker of the Senate & Another v Attorney General & 4 Others*, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR. (paragraphs 155-157):

(155) In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others* Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our



jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

(156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

d) Fourthly, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the Communications Commission of Kenya Case. It stated thus:

(356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

(357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014 left off (see paragraphs 227- 232). In paragraphs 232 and 233 he stated thus:

(232) ...References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.



(233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya.

400. With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these Consolidated Petitions.....

107. Adding its voice to the principles of constitutional and statutory interpretation, the Court of Appeal in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR stated as follows: -

[21] .... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

- that as provided by Article 259 the Constitution 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.
- that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
- that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- that 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).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; 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 the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, 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. .... 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.

108. A Court dealing with the statutory interpretation must also subject the statutory provision to the three tests developed in the Canadian case in *R. vs. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103. The tests are the objective test which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.
109. The Court will now deal with the elephant in the room; that is whether Section 22(2) of the *Elections Act* (hereinafter referred to as ‘the impugned section’) is in tandem with the Constitution.

**(c) Constitutionality of Section 22(2) of the *Elections Act*:**

110. For ease of this discussion, I will reproduce the impugned section verbatim.
22. Qualifications for nomination of candidates:
- (2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, County Governor or deputy county Governor only if the person is a holder of a degree from a university recognised in Kenya.
111. The subsection (1)(b) referred to above states as follows: -
- (1) A person may be nominated as a candidate for an election under this Act only if that person—
- (b) holds—
- (i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or
- (ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.
112. In this matter, the contest on constitutionality of the impugned section is two-pronged. That leads to two sub-issues. Firstly, the Petitioner contended that the impugned section makes an additional academic requirement upon persons seeking to contest the seat of County Governor over and above the qualifications set by the *Constitution* in Article 180(2).
113. Secondly, the Petitioner challenged the constitutionality of the impugned section on the basis that, since the Court in *County Assembly Forum & 6 Others -vs- Attorney General & 2 Others* (2021) eKLR declared Section 22(1)(b)(ii) of the *Elections Act* unconstitutional for failure to conduct public participation, it then follows that the Section 22(2) is equally unconstitutional.
114. I will deal with the two sub-issues separately, but first the constitutional provisions on the qualifications to stand for an election as a County Governor.
115. Article 180(2) the *Constitution* provides as follows: -
180. Election of county governor and deputy county governor:
- (1) .....



- (2) To be eligible for election as County governor, a person must be eligible for election as a member of the county assembly.

116. Article 193 of the Constitution further provides for the qualification of a Member of County Assembly. The Article states as follows: -

193. Qualifications for election as member of county assembly:

- (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—
- (a) is registered as a voter;
  - (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and
  - (c) is either-
    - (i) nominated by a political party; or
    - (ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.
- (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) has, at any time within the five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
  - (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
  - (d) is of unsound mind;
  - (e) is an undischarged bankrupt;
  - (f) is serving a sentence of imprisonment of at least six months; or
  - (g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six.
- (3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

117. The two provisions of the Constitution [Articles 180(2) and 193] both provide for the qualifications of a County Governor.

118. I will now deal with the first sub-issue.



**Whether the impugned section makes additional academic requirements to those set by the Constitution:**

119. Whereas Article 180(2) of the Constitution provides that for one to be elected as a County Governor, a person must be eligible for election as a Member of the County Assembly (hereinafter referred to as 'MCA'), Article 193 gives further qualifications.
120. In such a case, the harmonious interpretation of the two provisions of the Constitution behoves this Court to preserve the principle that neither of the two provisions destroy each other, rather, they sustain each other as to effectuate the great purpose of the Constitution.
121. Taken together, the harmonious purpose of the two constitutional provisions, is to complement each other in setting the academic qualifications for election of a person seeking to be a County Governor, a Deputy Governor or an MCA.
122. The two provisions cannot, therefore, be divorced from each other.
123. Having said so, it is imperative to note that Article 180(2) of the Constitution sets the general eligibility criteria for the County Governor and Deputy Governor by providing that one must be eligible for election as an MCA.
124. It is Article 193 of the Constitution which provides the actual qualifications. The provision gives a raft of qualifications. One of them is on educational requirements which the Constitution states that they shall be prescribed by the Constitution itself or an Act of Parliament.
125. The Constitution does not provide for any academic qualifications for a person standing for election as an MCA.
126. The legislation contemplated under Article 193(1)(b) of the Constitution is the [Elections Act](#), No. 24 of 2011.
127. Section 22 of the [Elections Act](#) is on the qualifications for nomination of candidates.
128. As at now, Section 22(1)(b)(i) and Section 22(1)(b)(ii) of the [Elections Act](#) were both declared unconstitutional. Section 22(1)(b)(ii) of the [Elections Act](#) was so declared in County Assembly Forum & 6 others -vs- Attorney General & 2 others case (supra) whereas Section 22(1)(b)(i) was so declared in High Court at Nairobi Petition No. 28 of 2021 (as consolidated with Petition Nos. E549 of 2021, E077 of 2022, E037 of 2021 and No. E065 of 2021) Paul Macharia Wambui & 10 Others vs. The Speaker of National Assembly & 6 Others (2022) eKLR. In both cases, the unconstitutionality resulted from the failure by the National Assembly to conduct public participation.
129. Save for the attempt in this Petition, the impugned section has not been declared unconstitutional.
130. The impugned section, however, uses the word 'notwithstanding' in Section 22 thereof.
131. The Black's Law Dictionary 10<sup>th</sup> Edition defines the word 'notwithstanding' in page 1231 as follows: -
  1. Despite; in spite of ....
  2. Not opposing; not availing to the contrary ....
132. The Britannica Dictionary defines notwithstanding to mean: -

without being prevented by (something)



133. The Cambridge Dictionary defines the word ‘notwithstanding’ as follows: -  
 not considering or being influenced by; despite
134. Deriving from the foregoing, the use of the word ‘notwithstanding’, therefore, connotes a scenario where a provision or act cannot be prevented by a contrary provision or act.
135. Applying the above to the case at hand, it, hence, means that Section 22(2) of the *Elections Act* is a stand-alone provision regardless of whether Section 22(1)(b) of the *Elections Act* stands or not. In other words, Section 22(2) of the *Elections Act* does not depend on or derive from or is not prevented or contradicted by Section 22(1)(b) of the *Elections Act*.
136. Having said as much, the question which now begs to be answered is whether the impugned section introduced additional academic requirements to those set by the Constitution. To be able to answer the question, I will, first deal with the second sub-issue.

**The effect of the decision in County Assembly Forum & 6 Others -v Attorney General & 2 Others (2021) eKLR to the impugned section:**

137. As stated before, the decision in *County Assembly Forum & 6 Others -vs- Attorney General & 2 Others case (supra)* and *Paul Macharia Wambui & 10 Others vs. The Speaker of National Assembly & 6 Others case (supra)* declared Section 22(1)(b) of the *Elections Act* as unconstitutional on the basis of failure to undertake public participation.
138. Perhaps, it is imperative that the history of Section 22(1)(b) of the *Elections Act* is properly understood.
139. Section 22(1)(b) of the *Elections Act* was introduced by amendments *vide* the Election Laws (Amendment) Act No. 1 of 2017. The Act was assented to on 9<sup>th</sup> January, 2017 and commenced on 30<sup>th</sup> January, 2017.
140. The amendments to Section 22 of the *Elections Act* which were introduced by the 2017 Act were as follows: -

Section 22 of the *Elections Act*, 2011 is amended—

- (a) in subsection (1) by deleting paragraph (b) and substituting therefor the following new paragraph —
- (b) holds-
- (i) in the case of a Member of Parliament, a degree from a university recognized in Kenya; or
- (ii) in the case of member of a county assembly, a degree from a university recognized in Kenya.
- (b) by inserting the following new subsections immediately after subsection (1)—
- (1A) Notwithstanding subsection (1), this section shall come into force and shall apply to qualifications for candidates in the general elections to be held after the 2017 general elections.
- (1B) The provisions of this section apply to qualifications to nomination for a party list member under section 34.



141. Section 22(2) of the *Elections Act*, which was in existence before the amendments in 2017 was, therefore, not affected in anyway by the amendments.
142. As such, the decisions in *County Assembly Forum & 6 Others -vs- Attorney General & 2 Others* case (*supra*) and *Paul Macharia Wambui & 10 Others vs. The Speaker of National Assembly & 6 Others* case (*supra*) which only dealt with the constitutionality of the 2017 amendments did not relate to Section 22(2) of the *Elections Act* (the impugned section). However, the decision in *County Assembly Forum & 6 Others -vs- Attorney General & 2 Others* case (*supra*) had an impact over the impugned section as it will soon be demonstrated.
143. Having said so, I now return to the first sub-issue.
144. On one hand, the decision in *County Assembly Forum & 6 Others -vs- Attorney General & 2 Others* case (*supra*) meant that the requirement for one to hold a degree from a university recognized in Kenya to be eligible to vie for the position of an MCA no longer existed.
145. On the other hand, the impugned section re-introduced the degree requirement on the part of a person standing for the position of a County Governor.
146. Article 180(2) of the *Constitution* sets the eligibility for election as County Governor at par with those for a person seeking election as an MCA. The prevailing position is that one does not require a degree from a recognised university to vie for the position of an MCA. That is, therefore, the position with one vying for the position of a County Governor.
147. However, Section 22(2) of the *Elections Act* introduced the requirement of a degree for those vying as County Governors. Further, Section 22(2) made it clear that ‘Notwithstanding subsection (1)(b), County Governor must possess a degree from a university recognized in Kenya.
148. By doing so, Section 22(2) being the impugned section, created an avenue for differentiation between the eligibility requirements between MCAs and County Governors. To that end, the impugned section ran contra Article 180(2) of the *Constitution*.
149. This Court, therefore, agrees with the Petitioner that the impugned section, to the extent of calling upon those vying for the position of County Governor to possess a degree recognized by a university in Kenya regardless of whether such a requirement applies to the eligibility of an MCA, makes additional academic requirements for County Governors than those set by the Constitution.
150. In the end, to the extent of relating to County Governors, Section 22(2) of the *Elections Act* is unconstitutional.

**Conclusion:**

150. The Petition is successful.
151. As I come to the end of this judgment, I must reiterate what I stated in *Paul Macharia Wambui & 10 Others vs. The Speaker of National Assembly & 6 Others* case (*supra*) that: -
  226. The reality is that Kenya is a member of the international community and has so far taken several steps and programmes in attaining some of the globally agreed standards. Such include the effort in attaining the Sustainable Development Goals (SDGs) as well as political rights through various initiatives including, but not limited to, execution of international covenants. Therefore, a time is soon catching up with us when the dictates of global demands and trends will make a university degree qualification or its equivalent an inevitable necessity in every elective position.



227. However, at the moment, I do not think that the impugned provision was well thought out. To equate the academic qualifications of all elective positions in Kenya at par, without any differentiation, without regard to the different attending responsibilities and by disregarding the different remuneration and benefits, the impugned provision runs contra several provisions of the Constitution.
228. There is, therefore, the need for the impugned provision to be relooked at, at least with a view of taking into account the need for differentiated qualifications and in keeping with the prevailing and targeted social, economic and educational realities in Kenya.
152. As this Court is bound by and can only move, but within the Constitution, the Court has no option other than upholding the Constitution in this matter.
153. Consequently, the Petition and the Notice of Motion dated 16<sup>th</sup> June, 2022 are determined as follows: -
- a. A Declaration hereby issues that pursuant to Article 180(2) as read with Article 193 of the Constitution, the qualification for the election of a County Governor is similar to the eligibility for election as a Member of County Assembly.
  - b. A Declaration hereby issues that Section 22(2) of the Elections Act, No. 24 of 2011 contravenes Article 180(2) of the Constitution by creating an avenue for differentiation between the eligibility requirements between Members of County Assembly and County Governors, hence, unconstitutional.
  - c. As the country has just held a General election and there is a likelihood of filing of election Petitions variously contesting the gubernatorial positions, then, with a view of forestalling an avalanche of Petitions by those who were ineligible by dint of the impugned section and coupled with the late filing of the instant Petition, the declaration of unconstitutionality of Section 22(2) of the Elections Act shall take effect in the next General election.
  - d. Being a public interest litigation, each party shall bear its costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

Mr. Arunda, Learned Counsel for the Petitioner.

Mr. Thande Kuria, Learned Counsel for the 1<sup>st</sup> Respondent.

Mr. Ochwa and Mr. Wafula, Learned Counsel for the 2<sup>nd</sup> Respondent.

Kirong/Benard – Court Assistant.

