



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VIHIGA**

**CONSTITUTIONAL PETITION NO. E008 OF 2021**

**FRANCIS ANGUEYAH OMINDE.....1<sup>ST</sup> PETITIONER**

**JOSEPH MUKUNA SIMEKHA.....2<sup>ND</sup> PETITIONER**

**AND**

**VIHIGA COUNTY EXECUTIVE**

**COMMITTEE MEMBERS FINANCE AND**

**ECONOMIC PLANNING AND 3 OTHERS.....RESPONDENTS**

**THE CONTROLLER OF BUDGET AND 10 OTHERS.....INTERESTED PARTIES**

**RULING**

1. The 3<sup>rd</sup> and 4<sup>th</sup> respondents, upon being served with the petition herein, raised grounds of opposition and a preliminary objection, both dated 5<sup>th</sup> July 2021, and filed herein on even date. This ruling is on the preliminary objection, which seeks that the petition be struck out on grounds that:

- a. it is fatally defective, frivolous, vexatious, misconceived and totally devoid of merit; and
- b. it is a non-starter and an abuse of the court process.

2. Directions were taken on 6<sup>th</sup> July 2021, for the preliminary objection to be canvassed by way of written submissions, to be filed and exchanged by the parties.

3. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed written submissions on 9<sup>th</sup> July 2021, of even date. They argue that the points raised in the notice of preliminary objection and grounds of opposition brought the matter within the prescription of a preliminary objection on a point of law. According to *Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Ltd* [1969] EA 696 (Sir Charles Newbold P, Duffus VP and Law JA), a preliminary objection on a point of law ought to arise from clear implication out of the pleadings, and, if argued, could dispose of the matter in its entirety. It is submitted that both the petition and the Motion are supported by one affidavit, rather than one for each of the two filings, and that, in any event, the affidavit is purportedly sworn by one of the petitioners on behalf of the other, yet there is no signed authority by the other. The decisions, in *East African Portland Cement Ltd vs. Capital Markets Authority & 4 others* [2014] eKLR (M. Ngugi J) and *Andrew Ireri Njeru – Embu Nyangi Ndiiri Proposed Society Chairman & others vs. Daniel Ng'ang'a Kangi & another* [2015] eKLR (Muchemi J), are cited, for the proposition that a suit filed without the authority of one of the parties, where there are more than one, is a non-starter and ought to be dismissed, for non-compliance with the law. *Kitty Njiru vs. Nature & Style Fun Day Events & another; Rebecca Muriuki t/a Kahaari (Proposed Third Party)* [2020] eKLR (JA Makau J), *Karl Wehnere Claasen vs. Commissioner of Lands & 4 others* [2019] eKLR (Githinji, Okwengu and Mohamed JJA) are cited for the point that the Civil Procedure Rules apply to constitutional petitions where there are gaps in the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, and those provisions give the court inherent power to make such orders as may be necessary for the ends of justice. It is submitted that the issue of deficiency in the affidavit in question is not a question of mere technicality, curable by Article 159 of the Constitution, and *Patricia Cherotich Sawe vs. Independent Electoral Commission (IEBC) & 4 others* [2015] eKLR (Rawal DCJ & VP, Ibrahim, Ojwang, Wanjala and Njoki SCJJ), is cited to support that proposition. The affidavit in question was purportedly sworn at Vihiga, while the address on the stamp of the Commissioner for Oaths indicates Nairobi, and it is submitted that that made the affidavit fatally defective and not properly commissioned as per the provisions of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya, which means that the petition is not supported by an affidavit. *K Too vs. K Edwin Sitienei* [2018] eKLR (Ombwayo J) and *Regina Munyiva Nthenge vs. Kenya Commercial Bank Ltd.* [2005] eKLR (Wendoh J) are cited to support that argument. The second submission turns on sections 106A and 106B of the

Evidence Act, Cap 80, Laws of Kenya, on admission of electronic evidence. It is argued that the petitioners are relying on evidence obtained electronically from screenshots of a discussion on the diary the 1<sup>st</sup> respondent, and that no affidavit was attached to confirm the mobile phone from which the communication was extracted. The third submission is that the petition did not meet the constitutional threshold set in *Anarita Karimi Njeru vs. Republic (No. 1)* [1979] KLR 154 (Trevelyan and Hancox JJ) and *Mumo Matemu vs. Trusted Society of Human Rights Alliance* [2014] eKLR (Mutunga CJ & P, Rawal DCJ & VP, Tunoi, Ibrahim, Ojwang and Ndung'u SCJJ).

4. In their written submissions, the 1<sup>st</sup> and 2<sup>nd</sup> respondents raise 6 points. The first is that the petition is not in public interest at all, and it is submitted that the petitioner was masquerading that the petition was brought in public interest, when it was quite clear that he had a personal interest in the matter. Reference is made to Rules 4 and 10 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, correspondence between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and one of the petitioners, and the decision in *Brian Asin & 2 others vs. Wafula W. Chebukati & 9 others* [2017] eKLR (Matiwo J). The second submission is about the jurisdiction of the court. It is argued that not every dispute ought to find its way into the courts, and where the law provides a procedure for resolution of any dispute then that procedure ought to be followed. *Charles Apudo Obare vs. Clerk, County Assembly of Siaya & another* [2020] eKLR (Aburili J) is cited to support the contention. The case by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is that the County Governments Act, No. of 17 of 2012, Laws of Kenya, has a procedure, which gives rights to citizens, aggrieved by acts or decisions of a County Government, to challenge the same. Section 88 is about the right to petition the county Government on any matter under the responsibility of the County Government. Section 15 is about petitioning the County Assembly with respect to matters that are within its authority. It is argued that the instant petition is about a Finance Bill, and should have been brought under section 15 of the County Governments Act. The decision, in *Inter Tropical Trading Limited & another vs. Rural Electrification and Renewable Energy Corporation & 19 others* [2021] eKLR (JA Makau J), was cited to make the point that constitutional petitions that ought to have been brought through other statutory processes ought to be struck out. The third issue raised is about the verifying affidavit of Francis Angueyah Ominde being fatally and incurably defective, for it was allegedly sworn at Vihiga but commissioned before a Commissioner for Oaths based in Nairobi. Section 5 of the Oaths and Statutory Declarations Act, is cited, which requires that the Commissioner for Oaths, before whom an oath or affidavit is sworn or made, should state the place and date on which the oath or affidavit is taken or made. The decisions, in *Regina Munyiva Nthenge vs. Kenya Commercial Bank Ltd* [2005] eKLR (Wendoh J) and *CMC Motors Group Limited vs. Bengeria arap Korir trading as Mmarben School & another* [2013] eKLR (Kasango J), are cited, where affidavits were struck out because they had been sworn or executed by a deponent who was at a location different from that of the Commissioner for Oaths who allegedly commissioned the same. It is submitted that the affidavit of Francis Angueyah Ominde, the 1<sup>st</sup> petitioner, ought to suffer a similar fate, be struck out, and, without it, the petition would be without legs. The fourth issue is that the petition and the Motion are founded on inadmissible evidence. It is argued that the evidence relied on is correspondence exchanged between the Deputy Governor and other individuals, and the petitioner was relying on social media posts. It is submitted that an affidavit must be based on matter of which the deponent is able to prove of his own knowledge. It is submitted that the 1<sup>st</sup> petitioner cannot, of his own knowledge, prove that there was correspondence between the Deputy Governor and other persons, nor that there had been no executive committee meeting on the budget and that no approval of the budget was given, as he is not a member of that committee. It is also argued that the downloads were also against the provisions of the Evidence Act on production of electronic evidence. The fifth argument relates to the 2<sup>nd</sup> petitioner. It is submitted that his name ought to be struck out, for he is a stranger in the matter. Various provisions of the Civil Procedure Rules are cited to support that contention. Sixthly, and finally, it is submitted that the petition is against public good, for the petitioners are said to be overzealous litigants. The decision, in *Attorney General & another vs. Tolphin Nafula & 5 others: Attorney General (Interested Party)* [2021] eKLR (Nambuye, Kiage and Kantai JJA), is cited to support the argument.

5. The 1<sup>st</sup> petitioner, in his written submissions, addresses several issues. Firstly, that the preliminary objection does not raise pure points of law, and, therefore, it does not fall within the prescriptions in *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors* [1969] EA 696 (Sir Charles Newbold P, Duffus VP and Law JA) and *Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others* [2015] eKLR (Mutunga CJ & P, Ibrahim, Ojwang, Wanjala and Njoki SCJJ). He argues that the preliminary objection is in general terms and is without specifics, as it merely alleges that the petition is fatally defective, premature, vexatious, frivolous and an abuse of the court process, without giving specifics as to how that is so. Secondly, on the affidavit, it is submitted that the same affidavit cannot be used to support both the petition and the Motion. Thirdly, that it is the 2<sup>nd</sup> petitioner who ought to be complaining or objecting that he has been made a party to the proceedings without his consent or authority, and he relies on *Hussein Issa Abdi & 2 others vs. Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR (Ougo J). Fourthly, that the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, at Rule 11, does not even require that the petition be supported by an affidavit, so that if the court were to hold the affidavit herein defective, that would have no effect whatsoever on the competence of the petition, as was pointed out in *Joan Akoth Ajuang & another vs. Michael Owuor Osodo the Chief of Ukwala Location & 3 others; Law Society of Kenya & another* [2020] eKLR (Aburili J). Fifthly, that section 5 of the Oaths and Statutory Declarations Act talks about place and date of oath, and not address of the Commissioner for Oaths, and, therefore, the place of oath ought not be confused with the said address. The address indicated in the rubberstamp of the Commissioner for Oaths should not be taken, it is submitted, to be the place of address, as was stated in *Lazaro Kabebe vs. Ndege Makau & another* [2004] eKLR (F. Ochieng Ag. J) and *Ibrahim Musa & Sons Ltd & Another vs. First National Finance Bank & another* [2002] eKLR (Onyango Otieno J). Sixthly, that the issue of reliance on electronic evidence ought not be raised at the preliminary stage, but at the hearing of the petition, and, in any event, it is not a matter of law. Seventhly, and finally, that the fact that the court granted conservatory orders, and the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed affidavits in response to the petition, meant that the threshold, in *Anarita Karimi Njeru vs. Republic (No. 1)* [1979] KLR 154 (Trevelyan and Hancox JJ), had been met.

6. The 2<sup>nd</sup> petitioner, in his written submissions, argues several points. One, that there is no competent preliminary objection, within the meaning of the term, in *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors* [1969] EA 696 (Sir Charles Newbold P, Duffus VP and Law JA), as the same is not founded on pure points of law, instead it is distorted with alleged facts, which invite the court to ascertain facts. Two, that the petition complies with Rule 11 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, as it is supported by an affidavit. Three, that it is only the 2<sup>nd</sup> petitioner who can disavow the 1<sup>st</sup> petitioner, with respect to his joinder to the petition. Four, that Article 3(1) of the Constitution obliges any person to respect, uphold and defend the Constitution, which means that the petitioners have a duty, in public interest, to bring the petition, and they did not require the authority of anyone to bring such a petition. Five, that the address of a Commissioner for Oaths is not among the matters that the Commissioner for Oaths is required to state in the jurat. Six, that the petition does set out the issues in controversy, the infringed provisions of the Constitution and the law, and the manner in which they were infringed, in compliance with *Anarita Karimi Njeru vs. Republic (No. 1)* [1979] KLR 154 (Trevelyan and Hancox JJ) and *Mumo Matemu vs. Trusted Society of Human Rights Alliance* [2014] eKLR (Mutunga CJ & P, Rawal DCJ & VP, Tunoi, Ibrahim, Ojwang and Ndung'u SCJJ). Seven, that the High Court has jurisdiction, under Article 165(3)(d)(i)(ii)(iii) of the

Constitution, to hear and determine questions relating to interpretation of the Constitution, and whether anything done under the authority of the Constitution or any law is consistent with or in contravention of the Constitution, and any matter relating to constitutional powers of the county governments and any matter relating to the constitutional relationship between the levels of government. Eight, that Article 258 of the Constitution grants a right to any person to move the High Court, claiming that the Constitution has been infringed or violated or is likely to. Nine, that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are all subject to the Constitution, and are charged under it to uphold its provisions, on behalf of the people of Vihiga. Among others.

7. In its written submissions, the 12<sup>th</sup> interested party argues several points. One, it is submitted that the preliminary objection invites the court to ascertain the facts in dispute, which then makes the objection untenable, in view of the decisions in *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors* [1969] EA 696 (Sir Charles Newbold P, Duffus VP and Law JA) and *In re Estate of Late Philip Njoka Kamau (Deceased)* [2021] eKLR (T. Matheka J). It is further argued that the preliminary objection does not raise pure points of law, as it alleges the petition to be fatally defective, frivolous, vexatious, misconceived and totally devoid of merit, and to establish, whether the petition is fatally defective, frivolous, vexatious, misconceived and totally devoid of merit, would require probing by way of evidence, as demonstrated in *Henry Wanyama Khaemba vs. Standard Chartered Bank Ltd & another* [2014] eKLR (Gikonyo J) and *Muhu Holdings Ltd vs. James Muhu Kangari* [2017] eKLR (Ohungo J). Two, on the joinder of the 2<sup>nd</sup> petitioner, it is submitted that the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 does not provide for filing of authority or consent to plead to be given by a co-petitioner, where there is more than one petitioner. It is argued that, whereas the Civil Procedure Rules make provision for such authority, the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 does not. It is also submitted that even, with respect to the provisions in the Civil Procedure Rules not being complied with, by way of not filing the authority, with the want of the authority, the courts routinely allow the parties to comply, by filing such authority, rather than striking out the pleadings. Rules 4, 5(c)(d) and 11 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are cited to demonstrate that there is no such requirement with respect to constitutional petitions. It is further argued that to ascertain whether or not there is such authority entails having to examine facts, yet ascertainment of facts is not within the province of a preliminary objection. Three, the decisions relied on by the 3<sup>rd</sup> and 4<sup>th</sup> respondents are distinguished. *K Too vs. K Edwin Sitienei* [2018] eKLR (Ombwayo J), on grounds that the pleadings were not signed and the affidavit in support was not commissioned, which is not the case here. *Karl Wehnere Claasen vs. Commissioner of Lands & 4 others* [2019] eKLR (Githinji, Okwengu and Mohamed JJA), on grounds that the petition in that case had abated as a result of the death of the petitioner, and the petition was founded on the private rights as regards right to property under Article 40 of the Constitution, which is not the case here. It is pointed out that, even then, the Court of Appeal, in the latter case, applied Article 159 of the Constitution to promote the principles of the Constitution. *Kitty Njiru vs. Nature & Style Fun Day Events & another; Rebecca Muriuki t/a Kahaari (Proposed Third Party)* [2020] eKLR (JA Makau J) is distinguished on grounds that it was founded on private rights and touched on third party notice proceedings, which is not the case here. There are similar submissions regarding *East African Portland Cement Ltd vs. Capital Markets Authority & 4 others* [2014] eKLR (M. Ngugi J), and others. The 12<sup>th</sup> interested party has also submitted on the points raised in the written submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. One, the submission that the petition is not in public interest is a matter that calls for examination of facts, which then removes the same out of the realm of a preliminary objection. Two, that the petitioners did not identify the persons on whose behalf they had brought the petition was also not a pure point of law. Three, on the exhibits attached to the deponent's affidavit, it is submitted that again was not a pure point of law. Four, on the alternative dispute mechanisms, it is argued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have not shown the alleged alternative mechanisms. It is submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had purported to pass an illegal budget without due regard to the law, as set out in the Constitution and the relevant statute, and that it was not denied that there was no public participation. Five, on the supporting affidavit not being clear on whether it was executed in Nairobi or Vihiga, it is submitted that that was not a pure point of law, for the court will have to interrogate whether it was sworn in Nairobi or Vihiga. Six, on inadmissibility of the annexures or evidence, again, it is submitted that is not a pure point of law. Seven, on the 2<sup>nd</sup> petitioner, that he was a stranger to the suit, again, not a pure point of law, for the court has to ascertain facts to determine that. Eight, on whether the petition was against public good, the court would still have to ascertain the facts.

8. What is for determination is a fairly straightforward matter, whether there is a preliminary point of law, upon which I ought to strike out the petition herein. So what constitutes a point of law? The case *classicus* on this is *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors* [1969] EA 696 (Sir Charles Newbold P, Duffus VP and Law JA), where the court stated that a preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct, in the sense that they are not disputed or contested. It was further stated that it cannot be raised if any fact had not been ascertained or if what is sought is the exercise of judicial discretion. That was echoed in *Nitin Properties Ltd vs. Jaajit S. Kalsi & another* [1995] eKLR (Gicheru, Kwach & Shah JJA), in precisely the same terms. In *Oraro Mbaja* [2005] 1 KLR 141 (Ojwang J), it was pointed out that the point of law must not be blurred with factual details, liable to be contested and which have to be proved through the processes of evidence. The court asserted that any objection which bears factual aspects, calling for proof or seeking adducing of evidence for its authentication, would not be a preliminary objection, and the court should not allow it to proceed; anything that requires investigation of facts, or disputed facts, or derive its foundation from factual information which stand to be tested by normal rules of evidence. In *Quick Enterprises Ltd vs. Kenya Railways Corporation* Kisumu HCCC No. 22 of 1999 (unreported), the court said, of preliminary objection, it should be capable of disposing the matter preliminarily without the court having to resort to ascertain the facts from elsewhere apart from looking at the pleadings.

9. What I have to consider is whether the objection raised herein is a pure point of law, or whether it is blurred with factual details. The starting point of course is that the objection, as framed, is in very general terms, and gives no specifics on what is being objected to or about. The 3<sup>rd</sup> and 4<sup>th</sup> respondents merely argue that the petition is frivolous, vexatious, misconceived, devoid of merit and an abuse of the court process. The notice of preliminary objection does not state in what respect the petition is frivolous, vexatious, devoid of merit and an abuse of the process of court. I have closely perused through the written submissions of the parties who support the preliminary objection, and I have not any submission, which supports the contention that the petition is frivolous, vexatious, devoid of merit and an abuse of process. Not a single decision has been cited, which turned on pleadings that were frivolous, vexatious, unmeritorious and filed in abuse of court process. In any event, whether a pleading is frivolous or vexatious or unmeritorious or in abuse of court process, calls for presentation of facts to demonstrate the same. For the court to make a determination on whether the constitutional petition is frivolous, vexatious, devoid of merit or an abuse of court process, it must delve into the nature of the petitioners' case, and the particulars or details of the allegations made by the petitioners against the respondents. See *Muhu Holdings Ltd vs. James Muhu Kangari* [2017] eKLR (Ohungo J). One of the issues raised by the petitioners is issuance of a conservatory order staying or suspending the execution or implementation of the impugned Vihiga County annual budget for the financial year 2021-2022, on grounds that the budget estimates had not been discussed and approved by the County Executive Committee. That allegation is one of fact, that the court will have to ascertain, by analysing the evidence to be produced in support of the petition. Clearly, from the framing of the preliminary objection, it should be plain that the same is not founded on pure points of law. I

am not persuaded, therefore, that the objection raised brings the matter within the threshold of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors* [1969] EA 696 (Sir Charles Newbold P, Duffus VP and Law JA), and the other decisions that came after it.

10. The parties have raised and addressed very many issues. Most of them are not germane to the issue at hand, as discussed in paragraph 9 above, but I shall seek to address some of them.

11. On the matter of the joinder of the 2<sup>nd</sup> petitioner, it should be pointed out that the constitutional petitions are governed and regulated by the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the Civil Procedure Act, Cap 21, Laws of Kenya. So far as procedure is concerned, the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 captures the spirit of Article 159(2)(d) of the Constitution, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of the Constitution. The focus is trained on substance rather than process. The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.

12. Two issues are raised with respect to the above. One, it is about the 1<sup>st</sup> petitioner initiating the proceedings jointly with the 2<sup>nd</sup> petitioner, but without filing an authority executed by the 2<sup>nd</sup> petitioner to include him in the petition. I have carefully and scrupulously scoured through the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, and I have been unable to find a provision or rule which requires such an authority. It is a requirement under the Civil Procedure Rules, but the proceedings before me were not initiated under the Civil Procedure Act, and they are not subject to the Civil Procedure Rules, but the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013.

13. A related issue is with respect to the supporting affidavit. It is averred that only one was filed, and submitted that the petition was not supported by a verifying affidavit as it was presumed that the affidavit supported the Motion. The answer to this submission is to be found in the Rule 11 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, which is clear that the requirement for filing an affidavit to support the petition is not mandatory. The provision in Rule 11(1) uses the permissive “may.” Rule 11(2), with respect to documents to be attached in the process, provides that such documents should be attached to the affidavit, and where the petition is not supported by an affidavit, to the petition itself. Clearly, the filing of an affidavit to support the petition is not mandatory, and where there is no supporting affidavit, the petition would still stand. Related to that is the matter of a defective affidavit. If the supporting affidavit is found to be defective, and is struck out, the same would have no effect on the competence of the petition, in view of Rule 11 of the the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013.

14. While still on the matter of defective affidavit, it is submitted that the petition herein is unsupported, because it is premised on a defective affidavit, which ought to be struck out, and that such striking out should render the petition invalid. I reiterate what I have stated above, that such striking out would have no effect whatsoever on the competence of the petition. The argument is that the jurat of the affidavit does not make it clear as to the place of swearing of the affidavit, and it is submitted that that violates section 5 of the Oaths and Statutory Declarations Act. Several decisions have been cited by both sides on the matter. My understanding of section 5 is that the jurat should indicate where the affidavit was sworn. In the instant case, the affidavit was purportedly sworn at Vihiga, but the stamp of the Commissioner for Oaths bears a Nairobi address. The respondents argue that there is no clarity as to whether the place of commissioning was Vihiga or Nairobi. The other side argue that the affidavit is clear that the place of swearing was Vihiga, Nairobi was just the address of the Commissioner for Oaths, which is not even required by section 5. *Edwin K Too vs. K Sitienei* [2018] eKLR (Ombwayo J), *Regina Munyiva Nthenge vs. Kenya Commercial Bank Ltd.* [2005] eKLR (Wendoh J) and *CMC Motors Group Limited vs. Bengeria arap Korir trading as Mmarben School & another* [2013] eKLR (Kasango J) appear to say that where the affidavit is sworn at one place by the deponent, and executed by a Commissioner for Oaths at a different place, it would be invalid, for it would suggest that the deponent did not appear before the Commissioner for Oaths, at the time the affidavit is alleged to have been filed. That would be a correct statement of the law, for the deponent of the affidavit is required to appear before the Commissioner for Oaths for the purpose of the commissioning of the affidavits, because the oath ought to be taken in the presence of the person administering it. The other decisions, in *Lazaro Kabebe vs. Ndege Makau & another* [2004] eKLR (F. Ochieng J) and *Ibrahim Musa & Sons Limited and Another vs. First National Finance Bank & another* [2002] eKLR (Onyango Otieno J), appear to say that the court ought not use the address on the rubberstamp of the Commissioner for Oaths to conclude that the signing of the document by the deponent and the commissioning by the Commissioner for Oaths happened at different places, and, therefore, the deponent did not appear before the Commissioner for Oaths, which would render the affidavit void. According to these cases, the address on the rubberstamp is not an indication of where the Commissioner for Oaths was at the time of commissioning the oath, for the address on the rubberstamp is not even a requirement under the Oaths and Statutory Declaration Act. I agree with both positions. If there is evidence to show that the deponent did not appear before the Commissioner, and the execution of the affidavit and the commissioning happened at two different places at different times then the affidavit would be invalid. However, in the absence of any other evidence, the court ought not conclude, by merely looking at the address on the rubberstamp of the Commissioner for Oaths, that the deponent did not appear before the Commissioner for Oaths, for the said address is not a requirement under the Act, and all what it does is to indicate the address of the Commissioner for Oaths, it does not indicate where the Commissioner for Oaths was when he affixed or embossed the stamp. Either way, it would still boil down to a question of fact, as to the place and date when the affidavit was signed by the deponent and the place and date when it was commissioned by the Commissioner for Oaths, effectively taking the matter out of the realm of a preliminary objection.

16. There are arguments that the documents attached to the affidavit. It is argued that some violate the provisions of the Evidence Act, with respect to electronic evidence, since they are print-outs from WhatsApp messages. It is also argued that the contents of the documents are not adequate to set up a case for intervention by way of constitutional remedies. There is also argument about admissibility of the documents. I agree with the petitioners and the 12<sup>th</sup> interested party, that this is an invitation to the court to ascertain facts. Whether the contents are adequate for a constitutional remedy is not a matter that can be dealt with summarily, parties have to be heard. These are contested facts. Whether the documents are in the form of electronic evidence, being print-outs from WhatsApp messages, again is a matter of fact. The invitation, to have a look at these documents, to assess their value one way or the other, takes the matter out of the purview of a preliminary objection. I will leave it at that.

16. There is also the argument that the petitioners had alternative remedies, which they should have exhausted before mounting the constitutional petition. I have been told that the alternative processes are set out in the County Governments Act, where petitions can be launched with the County Executive or Assembly, by aggrieved citizens. I have very closely read through the provisions in that statute, that were cited to me, and I have found nothing in them that commits citizens to that process, at the exclusion of the constitutional petition route. No court decision has been cited to me that turned on that particular point.

17. Overall, there is no merit in the objections set out in the notice of preliminary objection, dated 5<sup>th</sup> July 2021, and I hereby disallow the said objections and dismiss them. There shall be no order as to costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF AUGUST 2021**

**W MUSYOKA**

**JUDGE**