



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E335 OF 2021

**IN THE MATTER OF ARTICLE 1, 2(1), 3(1), 10, 19, 20, 22, 23, 27, 38, 47, 73, 89, 159(2), (a)
and (e) 165(3), 232, 248, 249, 252, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL FREEDOMS
UNDER ARTICLES 10, 27, 38 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 73, 75,
89(2), 232(2), 248, 249 AND 252 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF LEADERSHIP AND INTEGRITY ACT, NO.19 OF 2012

AND

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION ACT, NO.9 OF 2011**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF PUBLIC OFFICER ETHICS ACT, CHAPTER 183 LAWS OF KENYA

BETWEEN

SAMUEL CLINTON ELIJAH.....PETITIONER

AND

WAFULA CHEBUKATI..... RESPONDENT

AND

RULING

1. **Samuel Clinton Elijah** “the petitioner” filed the petition dated 23rd August, 2021 against the **Wafula Chebukati** (“the respondent”) and Independent Electoral Boundaries Commission (IEBC) and the **Attorney General** (A.G.).....1st and 2nd interested parties.

2. He seeks the following reliefs:

(a) A declaration that the impugned actions of the respondent as enumerated in paragraphs 40 to 44 and 50 to 73 above have violated the Constitution of Kenya, 2010.

(b) A declaration that the respondent has contravened chapter 6 of the Constitution and specifically Article 73 (1), by presiding over a commission that lacks requisite quorum to discharge its constitutional mandate.

(c) An order that costs of this petition be borne by the respondent.

(d) Any other relief that this Honourable Court may deem fit to issue in the interest of justice.

3. Alongside the petition he filed a notice of motion of even date seeking the following orders:-

(i) & (ii) spent

(ii) A conservatory order do issue barring the respondent from leading the 1st interested party in carrying out its business relating to preparation form the upcoming August, 2022 General elections pending the hearing and determination of this application.

(iii) A conservatory order do issue barring the Respondent from leading the 1st interested party in carrying out its business relating to preparation for the upcoming August 2022 General elections pending the hearing and determination of this petition.

(iv) A conservatory order do issue restraining the respondent from leading the other two commissioners of the 1st interested party pending the swearing-in of the four newly appointed commissioners of the 1st interested party, who are awaiting vetting by the National Assembly.

(v) The costs of this application be provided for.

4. The respondent and 1st interested party filed a preliminary objection (P.O.) dated 24th Sept. 2021 which is the subject on this ruling. The respondent raised the following 14 grounds to support his Preliminary Objection:

(i) The instant Application and Petition seek conservatory orders barring the Respondent from leading the 1st Interested Party and declaratory orders citing the Respondent for breach of Chapter six of the Constitution of Kenya, 2010 and placing culpability on the Respondent with respect to the nullification of the 2017 presidential election. To the extent that this Court has been called upon to issue the aforesaid orders which purport to oust the Respondent, the subject Application and Petition are in blatant contravention of Article 251(1), (2), (3), (4), (5) and (6) of the Constitution of Kenya, 2010 which clearly stipulates how a member of the 1st Interested Party may be removed from office; the 1st port of call being presentation of a petition to the National Assembly and formation of a Tribunal to investigate and make recommendations to the President.

(ii) The Petition and the prayers sought therein further offend the clear provisions of Article 251(1) (2), (3), (4), (5) and (6) of the Constitution of Kenya, 2010 to the extent that they contravene the doctrine of exhaustion.

(iii) The Court is not clothed with competent jurisdiction to issue the prayers sought in the Petition and the Application since it is not the institution of first instance to interrogate the grounds set out under Article 251(1). At first instance, it is the prerogative of the National Assembly and the Tribunal envisaged under Article 250(5) to make the declarations sought in the instant Petition which declarations are anchored in Article 251(1) of the Constitution.

(iv) The subject Application and Petition, to the extent that they purport to blame the Respondent and the 1st Interested Party for failing to fill the vacancies that were occasioned by resignation of 4 commissioners, fly in the face of Article 250(2) which clearly speaks to the procedure for filling of vacancies in the 1st Interested Party; the Respondent and the 1st Interested Party are not the appointing authority, neither do they have an active role to play in appointment of new commissioners.

(v) The instant Application and Petition contradicts the clear provisions of Section 7A(2) and (3) of the Independent Electoral and Boundaries Commission Act, 2011 which, in no uncertain terms, stipulates what ought to happen in case a seat falls vacant in the 1st Interested Party.

(vi) Pursuant to the above, it is abundantly clear that expeditious filling of vacancies in the 1st Interested Party is solely predicated

upon the President's action, hence any apportionment of blame on the Respondent or the 1st Interested Party for the delay in filling of vacancies occasioned resignation of the 4 commissioners is in bad taste and in contradiction of Section 7A(2) and (3) of the Independent Electoral and Boundaries Commission Act, 2011.

(vii) The instant Application and Petition offend the clear provisions of Section 15 of the Independent Electoral and Boundaries Commission Act, 2011 which protects members of the Independent Electoral and Boundaries Commission from personal liability for any action, claim or demand.

(viii) The Application and the Petition are in flagrant violation of Article 249(2) of the Constitution of Kenya, 2010 and Section 26 of the Independent Electoral and Boundaries Commission Act, 2011 which seek to protect independence of the Independent Electoral and Boundaries Commission, the 1st Interested Party herein.

(ix) The instant Application and Petition offend the provisions of the First Schedule of the Independent Electoral and Boundaries Commission Act, 2011 which clearly outline the procedure for filling of vacancies; it does not in any way place the onus on the Respondent or the 1st Interested Party.

(x) The law under Articles 250(2) and 251(1), (2), (3), (4), (5) and (6) of the Constitution of Kenya, 2010, Section 7A(2) and (3) of the Independent Electoral and Boundaries Commission Act, 2011, and the First Schedule thereof, explicitly stipulates specific procedure for resolving disputes. Consequently, the doctrine of exhaustion requires that parties should resort to that mechanism first before purporting to invoke the inherent jurisdiction of the court.

(xi) It is a preserve of the National Assembly and the Tribunal to issue the orders sought in the Petition at first instance pursuant to Article 251 (3) and 251 (5) of the Constitution of Kenya, 2010; this Court can only exercise its judicial review jurisdiction or appellate jurisdiction in the matter.

(xii) Pursuant to Article 251(1), (2), (3), (4), (5) and (6) of the Constitution of Kenya, 2010, the Honourable Court lacks substantive jurisdiction to entertain this suit.

(xiii) The subject Petition seeks declaratory orders citing the Respondent for breach of Chapter six of the Constitution of Kenya, 2010 and placing culpability on the Respondent with respect to the nullification of the 2017 presidential election. The Court has been called upon to issue orders on issues raised and conclusively addressed by the Supreme Court in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** and the High Court in **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** and in **Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another [2018] KLR**. The Petition is, therefore, res judicata, offends the clear provisions of Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya and the principle of closure and ought to be struck out forthwith.

(xiv) The instant petition and application is misconceived, gravely incompetent, frivolous and an abuse of the Court process and ought to be struck out forthwith with costs to the respondent and the 1st interested party.

5. The respondents and the 1st interested party filed joint submissions on the P.O. through E. K. Mutua & Co. and Murugu, Rigoro And Co. Advocates dated 22nd October, 2021. They have submitted that this court lacks jurisdiction to entertain this suit as its jurisdiction was prematurely invoked. It is their contention that the net effect of the allegations made against the respondent is to have him eventually found unfit to hold office and pave way for his removal. Any such removal they argue has a procedure set out in Article 251 of the constitution. Further that it is the National Assembly which has the jurisdiction to entertain this manner of allegations. If the allegations are found to have basis the National Assembly will present a petition to the president who then appoints a tribunal to deal with the matter.

6. It is their further submission that it is only the appointed tribunal that has the mandate to carry out an investigation on the allegations. They submit that this court cannot investigate the respondent as it does not have that mandate. Counsel referred to a suit or scenario in the case of **Philomena Mbete Mwilu Vs Director of Public Prosecutions and 3 others; Stanley Muluvi Kiimo (interested party); International Commission of Jurists Kenya Chapter (Amicus Curie) [2019] eKLR** where the High Court stated as follows:

"...where there is a specific legal framework for dealing with misconduct and or removal of judges, cases involving misconduct with a criminal element committed in the course of official judicial function or so closely proximate or linked to the judicial office must first be referred to the body responsible and the disciplinary or removal process commenced.

Under the provisions of Article 168(1) of the constitution one of the grounds upon which a judge may be removed from office is for gross misconduct or misbehavior. As stated earlier such misconduct or misbehavior could be criminal in nature. Yet because proceedings triggered under Article 168(2) can lead to the removal of the judge, allegations of misconduct within the scope of duty or which otherwise amount to official misconduct must first be processed by the JSC. To allow allegations of that nature to be determined through a criminal trial without initial recourse to JSC would be to expose judges and judicial officers to the possibility of harassment and intimidation from executive agents in a manner that would be incompatible with the constitution and inimical to the independence of the judiciary..."

(xv) Also referred to is the case of **Githu Muigai and another v. Law Society of Kenya & another [2015] eKLR** where the court stated as follows:

"Pursuant to the provisions of Article 156(4) (c) of the constitution, Parliament enacted the office of the Attorney General Act, No.49 of 2012.... Its holder is protected from personal liability for acts done in good faith...., the Act further emphasizes the intention to vest independence in the office....The question is what happens when the Attorney General

fails, or is perceived from any quarter, as having failed to discharge his constitutional mandate?...

...As a State Officer appointed in accordance with the Constitution by the President with the approval of the National Assembly, the route that the respondents had initially taken—lodging a petition in Parliament and filing a Petition before the court with regard to the alleged mishandling of the case in the Queen’s Bench Division in the United Kingdom, was proper (sic) the respondents to exercise their statutory power.”

They submit that by instituting this suit the petitioner wants to use a back door to initiate a process which is outside this court’s jurisdiction.

(xvi) Counsel have submitted that the petitioner is bound to first exhaust all laid down legal avenues in resolving the issues raised in this petition before invoking this court’s jurisdiction. Reliance was placed on the case of **Brian Asin & 2 others v. Wafula W. Chebukati & 9 others [2017] eKLR** where the court stated:

“It is my view that the existence of Constitutional and statutory provisions purpose-built framework for investigating allegations against the commissioners infers that such processes and forum should take precedence. (emphasis ours)”

(xvii) Counsel have also submitted that the claim that the respondent is incompetent and broke the law and hence responsible to the events leading to the nullification of the presidential election results was dealt with by the Supreme Court. Thus, the claim is res judicata. Reference was made to the case of **Raila Amolo Odinga & another v. Independent and Electoral Commission & 2 others [2017] eKLR** where the Supreme Court stated:

“Regarding prayer (1), we have shown that IEBC did not conduct the 8th August 2017 presidential election in conformity with the Constitution and electoral law. Irregularities and illegalities were also committed in a manner inconsistent with the requirement that the electoral system ought to be inter alia simple, verifiable, efficient, accurate and accountable. Although the petitioners claimed that various electoral offences were committed by the officials of the 1st respondent (IEBC) no evidence was placed before us to prove this allegation. What we saw in evidence, was a systematic institutional problem and we were unable to find specific finger prints of individuals who have played a role in commission of illegalities. We are therefore unable to impute any criminal intent or culpability on either the 1st and 2nd respondent or any other commissioner or member of the 1st respondent. We are similarly unable to find any evidence of misconduct on the part of the 3rd respondent. The prayer is therefore disallowed. (emphasis ours)”

(xviii) The same was upheld in the **Brian Asin & 2 others case (supra)** where the court held:

“Clearly, the Supreme Court did not indict the first to eight respondents as alleged nor did it find either of them criminally culpable. It follows that the Petitioners (sic) allegations that the Supreme Court indicted the first to eighth respondents in its judgment have no basis.”

11. It is submitted that the last review of names and boundaries by IEBC was done in March 2012. Article 89 (1) (2) of the Constitution proves:

89. (1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97 (1) (a).

(2) The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.

12. They argue that logically the next review’s deadline is March, 2024 and it was therefore premature for the petitioner to accuse the respondent of failing to delimit the electoral boundaries. Counsel referred to the case of **Wanjiru Gikonyo and 2 others v. National Assembly of Kenya and 4 others [2016] eKLR** where the court stated thus:

“...The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance....”

13. Both counsel submit that the issue of the commission operating without quorum has been overtaken by events as four new commissioners were sworn in on 1st September, 2021. Further that in any event Article 251 (1) of the Constitution provides that the interested party can conduct business with the minimum number of commissioners which is three (3). Cited were the cases of:

(i) **Isaiah Biwott Kangwony v. IEBC and another [2018] eKLR.**

(ii) **IEBC 4 others v. David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus curiae) [2021] eKLR (BBI case).**

(iii) **Republic v. National Employment Authority & 3 others Exparte Middle East Consultancy Services Ltd. [2018] eKLR.**

14. They further submit that the interested party has filed an appeal against the BBI judgment on the issue of quorum. The matter is pending before the Supreme Court and the issue cannot be argued before this court. They urged the court to dismiss the petition.

15. The petitioner in opposing the P. O. filed written submissions dated 2nd November, 2021 through Seko & Co. Advocates. Counsel submits that this petition is not based on the respondent's competence but his violation of the constitution. In that case this court has the power to hear this petition by virtue of Articles 22, 23, 165 and 258 of the constitution. He relied on **petition No.282 of 2020, David Ndiu and others v. Attorney General and others (consolidated with petition Nos. 397 of 2020, E400 of 2020, E416 of 2020, E426 of 2020 and 2 of 2021)** where the court declared that his Excellency the President of Kenya had contravened chapter six (6) of the constitution. This was however overturned by the Court of Appeal in **IEBC & 4 others v. David Ndiu & 2 others; Kenya Human Rights Commission & 4 others (Amicus curiae) [2021] eKLR**. He therefore contends that the court has the jurisdiction to hear the petition.

16. Counsel further submits that the petition does not raise the issue of the doctrine of exhaustion and neither does it behoove the court to look at the exceptions to the doctrine as was elaborated in the case of **Vincent Mwanthi Kioko v. Edward Sigei & 4 others [2021] eKLR**. He distinguished this case from the **Brian Asin case** where the petition sought the removal of the respondents and the other commissioners of the 1st interested party. He argues that the issues in Presidential **Petition No.1 of 2017 (supra)** differ from those in this case. That what the petitioner seeks has never been determined by any court of law, let alone the **Supreme Court in petition No.1/2017**.

17. Still on violation of the constitution counsel submits that the respondents and interested party have violated Article 89 of the constitution. Failure to review boundaries is a serious issue which cannot be taken lightly. The argument of ripeness cannot therefore stand, he argues.

18. On the issue of quorum he agreed with the respondents and interested party that the issue was moot as four (4) commissioners had been appointed. Counsel urged the court to dismiss the P.O.

Analysis and determination

19. I have considered the P.O. raised plus the arguments in support and against. The issue is whether this court has the jurisdiction to hear this matter. In the case of **Owners of Motor vessel "Lillians" vs Caltex Oil (Kenya) Ltd [1989] eKLR** the court stated thus:

"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 its tools in respect of the matter before it the moment it is without jurisdiction..... Where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing, jurisdiction must be acquired before judgment is given."

20. The constitution bestows on this court the mandate to hear and determine issues of violation of rights or fundamental freedoms in the bill of rights. Article 165(3) of the constitution provides:

"165 (3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;"

21. Further Article 23 of the Constitution provides:

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

Article 258(1) of the Constitution provides:

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”

22. From the above provisions it is clear that every person has a right to file a suit claiming violation of the Constitution. At the same time this court has the power to hear and determine such claims of violation and or threatened violation of the Constitution.

23. The respondent has been sued in his capacity as the chairperson of the Independent Electoral Boundaries Commission. All the commissions and omissions complained of by the petitioner against the respondent are alleged to have been committed in his capacity as the chair of the 1st interested party and not in his personal capacity.

24. Chapter 15 of the Constitution deals with commissions and independent officers. Article 248(2) outlines the commissions falling under this chapter. Article 248 (2) (c) names the interested party of whom the respondent is the chair as one of the identified commissions. Article 251 of the Constitution sets out the circumstances and procedure for removal of a member of the commission. It provides as follows:

251. (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—

- (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;**
- (b) gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;**
- (c) physical or mental incapacity to perform the functions of office;**
- (d) incompetence; or**
- (e) bankruptcy.**

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.

(4) On receiving a petition under clause (3), the President—

- (a) may suspend the member or office holder pending the outcome of the complaint; and**
- (b) shall appoint a tribunal in accordance with clause (5).**

(5) The tribunal shall consist of—

- (a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;**
- (b) at least two persons who are qualified to be appointed as High Court judges; and**
- (c) one other member who is qualified to assess the facts in respect of the particular ground for removal.**

(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.

(7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.

25. From the petition filed the respondent is accused of the following:

§ He no longer provides leadership and direction to the 1st interested party.

§ Being the major contributor to the failed August 2017 Presidential elections.

§ Failure to comply with procurement of KShs.4 billion kiems kits.

§ Poor leadership which led to resignation of four (4) commissioners and sacking of the Chief Executive Officer (CEO) who has not been replaced to date.

§ Contributing to the fact that the 1st interested party has a shortage of 296 staff members yet elections are just around the corner.

§ His indefensible complacency has made Kenyans lose confidence in his ability to guide the 1st interested party to conduct free, fair, transparent, credible and verifiable elections in the upcoming August 2022 general elections.

§ The respondent is incompetent and in all aspects and has failed to lead the 1st interested party as expected. That as a result the 1st interested party has failed to carry out a review and delimitation of constituency and ward boundaries under Article 89 of the Constitution in time for the upcoming general elections

§ The Respondent has confessed to being unprepared for the August, 2022 general elections. No systems have been put in place for this important event.

§ He has failed to conduct voter education, update the voters roll, and conduct continuous voter registration as mandated under Article 88(4) of the constitution.

§ He has failed to guide the 1st interested party in facilitating public participation in conducting an independent review of the 2017 General Elections.

26. A summary of all the above allegations shows that the petitioner is accusing the respondent of:

(a) violation of the constitution.

(b) Failure to adhere to procurement regulations which amounts to violation of chapter 6 of the Constitution on integrity.

(c) Gross misconduct in running the affairs of the 1st interested party.

(d) Total incompetence on the part of the respondent.

27. The petitioner wants this court to find the respondent guilty of all the above and make declarations. What next after the declaration? The Constitution has provided for a clear forum where such complaints should be directed under Article 251. Complaints on the violation of the Constitution and the Law is part of what forms the terms of reference to the National Assembly, as outlined under Article 251.

30. This court will not usurp that power of the National Assembly by restricting itself to violations of the Constitution when a reading of the petition clearly shows that the petitioner is accusing the respondent of incompetence, lack of leadership and integrity issues. Let him place all his complaints before the National Assembly which will then act under the provisions of Article 251 of the Constitution.

31. The upshot is that the preliminary objection raised has merit. I find that this court is not seized with the jurisdiction to handle this matter. The same is struck out with costs to the respondent and interested party.

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT