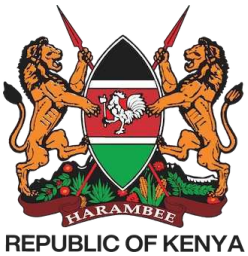

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 197 OF 2020

FORUM FOR THE RESTORATION OF

DEMOCRACY- KENYA….....PETITIONER

VERSUS

OFFICE OF THE REGISTRAR OF

POLITICAL PARTIES….....1ST RESPONDENT

ANN. N. NDERITU,

REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

AND

DAVID ESELI SIMIYU.....1ST INTERESTED PARTY

WAFULA WAMUNYINYI.....2ND INTERSTED PARTY

RULING

1. The Petitioner filed a Petition on 15th June 2020 supported by the Affidavit of Dr Susan Wafula, seeking the following orders:

i. A Declaration that Respondent's Gazette Notice Number 3893 of 8th June, 2020 is unconstitutional, null and void.

ii. A Declaration that the rights of the Petitioner under Articles 27 (1), 27 (3), 36 (1), 38 (1) (b), 38 (3) (c), 47 (1) of the Constitution of Kenya to a fair administrative action have been violated.

iii. A Declaration that the 2nd Respondent's conduct in publishing the Gazette Notice number 3893 of 8th June, 2020 is contrary to Articles 73 (1) and (2) and 75 (1) of the Constitution of Kenya.

iv. A Declaration that the 2nd Respondent's conduct in making offensive pronouncements proceeding and subsequent to the Gazette Notice number 3893 of 8th June 2020 is contrary to Article 73 (1) and (2) and 75 (1) of the Constitution of Kenya.

v. An Order of Certiorari to remove into this Court and quash the Respondent's Gazette Notice 3893 of 8th June, 2020 and all subsequent Respondent's pronouncements in furtherance thereto.

vi. An Order of Certiorari to remove into this Court and quash any and or all publication(s), proceeding(s) and or decision(s) of the Respondents, their agents, employees and or any other persons(s) whosoever or howsoever acting on, with and or under their instructions preceding and or culmination of which is the Respondents' Gazette Notice number 3893 of 8th June, 2020.

vii. An Order of Prohibition forbidding the Respondents by themselves, their agents, employees and or any other person(s) whosoever or howsoever acting on, with and or under their instructions from effecting changes on the officials of the Petitioner as a consequence of the Respondent's Gazette Notice number 3893 of 8th June, 2020.

viii. An Order that the Petitioner is entitled to compensation as shall be assessed by the Court payable by the 2nd Respondent personally for breach and threatened violation of the Petitioner's rights under the Constitution.

ix. An Order that the 2nd Respondent shall personally bear the costs of this petition.

x. Any other relief or orders that this Honourable Court shall deem just, fit and appropriate to grant in favour of the Petitioner.

PETITIONER'S CASE

2. The Petitioner alleges that the Respondents have acted in breach of ***Article 27 (1)*** when they received two sets of filings one from the Interested Parties and the other from the Petitioner, and opted to facilitate the filings by the Interested Parties seeking removal of the Petitioner's duly elected Party Leader and National Organising Secretary while frustrating the other set of filings seeking removal of *inter alia* the Interested parties by allegedly declaring a dispute. Furthermore, the Respondents are accused of hurriedly and prematurely publishing a Gazette Notice Number 3892 of 8th June, 2020 despite the fact that the Interested Parties documents did not meet the requirements to capacitate such a publication. The Gazette Notice was additionally not published under ***Section 20 of the Political Parties Act***; and the Respondents failed to lift, revoke and or invalidate it on grounds that it had been superseded vide their letter dated 11th June, 2020. Moreover, the Gazette Notice still stands in total disregard of the incurable defects in the Interested Parties' submitted documents.

3. It is additionally asserted that there has been a breach of ***Article 27 (3) of the Constitution*** as the Respondents confirmed that the Gazette Notice stands knowing that the Notice would effectively unlawfully facilitate the removal of the Petitioner's duly elected Party Leader and National Organising Secretary ("affected officials") and thereby denying then equal opportunities in the political sphere.

4. The Petitioner further avers that ***Article 36 (1) of the Constitution*** has been infringed by the Respondents in upholding the documents filed by the Interested Parties and issuing a Gazette Notice Number 3893 of 8th June 2020, thereby breaching the Petitioners right to associate with is duly elected National Officials.

5. The Respondents are also alleged to have acted contrary to ***Article 38 (1) (b) of the Constitution*** as they have declined to issue a gazette notice in line with the Petitioner's filings on the suspension of the Interested Parties. Thusly, the Respondents have applied double standards. Furthermore, the Respondents have adopted the purported resolutions arising from the unlawful meeting held by the Interested Parties purporting to be the Petitioner's National Executive Committee Meeting. Additionally, the Petitioner alleges that the Respondents have breached Article 38 (3) (c) by issuing the Gazette Notice 3893 of 8th June 2020 knowing that the Interested Parties will invoke it to deprive the Petitioner's elected affected officials of their national offices.

6. Furthermore, it is contended that ***Article 47 of the Constitution*** has been breached as the Respondents failed to supply reasons to the Petitioner as to why they opted to facilitate the Interested Parties as opposed to the Petitioner. Moreover, the Respondents' Gazette Notice, the letter dated 11th June, 2020 and portions of the clarification issued on 8th June, 2020 and 12th June 2020 to the effect that the impugned Gazette Notice stands are: irrational and unreasonable; manifestly biased and discriminatory; disregard relevant and pertinent facts; disproportionate, procedurally unfair, oppressive and abuse of power; and consideration of irrelevant facts/factors.

7. The Petitioner avers that contrary to Article 73 (1) and (2) the 2nd Respondent has demonstrated open favouritism, partiality and subjectivity in the conducts of the affairs of her statutory office. Furthermore, contrary to Article 75 (1), it is asserted that in upholding the impugned Gazette Notice the 2nd Respondent declined to uphold the interests of the Petitioner in facilitating its affected officials changed premised on illegalities.

8. The Petitioner asserts that it instituted a matter before the Political Parties Tribunal being Cause No. 9 of 2020 which was withdrawn on 12th June 2020.

INTERESTED PARTIES PRELIMINARY OBJECTION

9. The Interested Parties herein filed a Preliminary Objection dated 17th June 2020 claiming that the Court has no jurisdiction to hear this matter on the grounds that:-

a) Section 40 of the Political Parties Act (No 11 of 2011) provides that all disputes between a party and its members or members of a party as between themselves have to be referred to a party's internal dispute resolution mechanism before a dispute is referred to the Political Parties Dispute Tribunal and thereafter the High Court as an appellate court;

b) Section 55 of the Constitution of the Forum for the Restoration of Democracy-Kenya (FORD-Kenya) (hereinafter the Party) provides for the exhaustion of internal dispute resolution mechanisms before institution and any proceedings in court;

c) Section 41 of the Political Parties Act clearly and succinctly provides for statutory procedures to be followed in the event of a dispute within a party. The first port of call is the Political Parties Dispute Tribunal. The High Court has been granted jurisdiction as an appellate court and not a court of first instance as far as party disputes are concerned. By this petition the Petitioner is asking the Court to assume the role and jurisdiction of the Political Parties Dispute Tribunal and at the first instance entertain party disputes;

d) Section 20 of the Political Parties Act clearly and concisely provides for the procedures to be taken if a party wishes to change its membership or officers and the role of the 1st and 2nd Respondents in this process. The change of officers is a party affair and requires resolution through party organs and this petition is premature and improperly before this Honourable Court;

e) Section 34 of the Political Parties Act clearly and concisely provides for the functions of the 1st and 2nd Respondent which include inter alia to investigate complaints lodged under the Act, a function which the 1st and 2nd Respondent has initiated by its letter of 10th June 2020 and by the instant petition the Petitioner is asking the Honourable Court to usurp and assume the functions of the 1st and 2nd Respondent and replace the process of a statutory office with its own process and finding.

10. The Interested Parties accuse the Petitioner of forum shopping for a friendly court. It is asserted that the Petitioner filed a Complaint 9 of 2020 at the Political Parties Dispute Tribunal and the Tribunal refused to issue the interim orders sought, and thereafter the Petitioner opted to withdraw the complaint and file the instant petition seeking the same interim orders.

11. It is further claimed that there is no proper Petitioner before this Court as the FORD-Kenya Party has not given any instructions and there have been no instructions or resolution to institute the instant suit. Furthermore, it is alleged that the orders issued on 15th June 2020 are irregular as they were illegitimately signed by a non-designated officer of the Court (Hon. Mumassaba) who is not a designated Deputy Registrar of the Constitutional and Human Rights Division.

PETITIONER'S RESPONSE

12. The Petitioner filed a Replying Affidavit sworn by Dr Susan Wafula on 24th June 2020 in respect of the 1st and 2nd Respondents' Notice of Motion Application dated 18th June, 2020 and the 1st and 2nd Interested Parties' Preliminary Objection dated 17th June, 2020.

13. The Petitioner avers that the 1st and 2nd Interested Parties have challenged the Court's jurisdiction on mistaken grounds that the issues for determination in the Petition do involve a dispute between a member of the Petitioner and the Petitioner as a Party, or a dispute between the members of the Petitioner as a Political Party.

14. It is asserted that the issues raised in the Petition can be broadly classified as subjecting the impugned Respondents acts to the constitutionality test to determine whether the Petitioner's rights and or fundamental freedoms in the bill of rights and other articles of the Constitution have been infringed. It is contended that only the High Court and Courts of equal status have jurisdiction to determine issues as pertains to the breach and or threatened breach of the Constitution.

15. The other test is the illegality test to determine whether the Respondents exercise of statutory power was in breach of any law of the land. The Petitioner asserts that the acts of the Respondents are subject to the **Fair Administrative Action Act** and the Constitution. Furthermore, it is asserted that the administrative action can only be remedied by the issuance of the prerogative orders which can only be issued by the High Court.

ISSUES FOR DETERMINATION

16. I have very carefully considered the pleadings, the 1st and 2nd Interested Parties Preliminary Objection, parties rival submissions and from the above the issues for consideration are as follows:-

a) Whether this Court has jurisdiction to hear and determine the petition herein?

b) Whether the Petitioner failed to exhaust internal dispute resolution mechanisms so as to divest this court of jurisdiction?

c) Whether the Petitioner seeks the Court to usurp the power of the Respondents?

d) Whether the Petition is an abuse of the court process?

e) Whether the Petitioner is properly before Court?

A) WHETHER THIS COURT HAS JURISDICTION OT HEAR AND DETERMINE THE PETITION HEREIN?

17. The Interested Parties and the Respondents contend that the Petitioner purpose to challenge the decision of the Respondent, to gazette proposed changes of party officials in the impugned Gazette Notice of 8th June 2020, is contended that such challenge ought to be presented first to the political parties as first port of call thereby divesting this court of jurisdiction in the first instance.

18. The Interested Parties aver that it is an undisputed fact that the Gazette Notice was published as a result of proposed changes of party official; which proposed changes of party officials led to a dispute between members of the party. The Interested Parties position is that, that is what is before this Court.

19. The Interested Party urge that it is an undisputed fact that the Gazette Notice was published as a result of proposed changes of party officials, which changes of party officials led to a dispute between members of the party. It is interested parties' case, that the dispute between the members of the party as to the proposed changes is what is before this Honourable Court as per the entire grounds forming basis of this Petition.

20. The Respondents urge the jurisdiction of this Court stems from the known statutory provision or the Constitution. It is their contention that the Political Parties Act establishes the Political Parties Tribunal under ***Section 40 of the Political Parties Act***; which Section confers the Tribunal with the jurisdiction to hear and determine inter alia;

a) Dispute between the members of a political party.

b) Dispute between a member of a political party and a political party

c) Appeals from decisions of the Registrar under the Act.

21. The Interested Parties urge that ***Article 55(g) and (i) of the Party's Constitution (Conciliation and Arbitration)*** provides as follows:=

> ***"No dispute shall go to the Political Parties Disputes Tribunal unless mechanism for internal party arbitration have been exhausted.***
>
> ***It is therefore contended that for avoidance of doubt, no member shall institute any Judicial Proceedings unless the member has first invoked and exhausted the internal arbitration mechanisms."***

22. "A dispute" is defined under ***Black's Law Dictionary Tenth Edition*** at page 572 as follows:-

> ***"A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."***

23. The Party's Constitution clearly provides for resorting to internal Dispute Resolution Mechanisms (IDMR) in the event of any dispute and has also provided that no Judicial proceedings unlesss the member has first invoked and exhausted the Internal Arbitration Mechanisms, in regard of a dispute between the members of a political party or between a member of a political party and a political party. The Interested Parties assert that it has not been shown the present Petition was filed upon exhaustion of party's Internal Dispute Resolution Mechanism or that there was an attempt.

24. In support of the above-mentioned proposition the Interested Parties sought reliance from the case of ***Godfrey Osotsi vs. Amani National Congress Party (2019) eKLR***, where the Court in dismissing the suit for failure to invoke the IDMR stated;-

> **"There is no argument before me nor was it proved that the Respondents Internal Dispute Resolution Mechanism cannot resolve the dispute…There was no argument that the appellate tribunal has developed a rigid policy which renders the requirement for exhaustion futile…It has not been established that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court…My reading of the law is that it is compulsory for he aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application…no such application for exemption was made to this court prior to filing this application…There was no argument before me that the internal remedy is not effective. There was no suggestion that the remedy under the act does not offer prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law…Lastly there was not suggestion, even in the slightest manner that the internal remedy is inadequate and incapable of redressing the complaint. In view of my analysis and the determination of the issue discussed above, it is my conclusion that the ex parte applicant ought to have exhausted the available mechanism before approaching court. In conclusion I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail."**

25. The 1st and 2nd Respondent urge that the instant Petition must fail as the Petitioner has sought to circumvent the provisions of the Party's Constitution, which provides for Internal Dispute Resolution Mechanisms, without alleging or proving that the IDMR will be ineffective remedy.

26. It is further stated that the second avenue for seeking resolution of a dispute between members, after the party's Internal Dispute Resolution Mechanism is not the High Court but the Political Parties Dispute Tribunal (PPDT). ***Section 40 of the Political Party Act*** provides as follows:-

> **"(1) The Tribunal shall determine:**
>
> **a) Disputes between the members of a political party;**
>
> **b) Disputes between a member of a political party and a political party;**
>
> **c) Disputes between political parries;**
>
> **d) Disputes between an independent candidate and a political party;**
>
> **e) Disputes between coalition partners; and**
>
> **f) Appeals form decisions of the Registrar under the Act.**
>
> **(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under**

paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party disputes resolution mechanisms."

27. The Interested Parties aver that even where it is shown and proven that the Internal Dispute Resolution Mechanisms is an ineffective remedy one has to first go to PPDT before approaching the Court. To buttress the point the Interested Parties sought reliance from the case of ***Stephen Asuna Achieng & 2 Others vs. Orange Democratic Movement Party & 2 Others (2011) eKLR***; in which the Court stated:-

> ***"To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative disputes resolution mechanisms…To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanisms has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners' grievance and the parties involved."***

28. Similarly in the case of ***Ephraim Murage Maina vs. Attorney General & 2 others [2013] eKLR*** the court held as follows in dismissing a petition filed before it:-

> ***"The petitioner was under an obligation to exhaust the dispute resolution mechanism in the party constitution. If aggrieved by the decision at the party level, or if the party refused to activate the party mechanism, its option was to seek recourse before the Political Parties Tribunal."*** *(Emphasis added)*

29. The 1st and 2nd Respondents contend, that it was imperative that the complainants herein first seek recourse at the PPDT before approaching this Court, and due to such failure this Court does not have original jurisdiction as far as the dispute now brought before it is concerned.

30. The Respondents on their part contend that petition challenges the decision of the Registrar made in line of programming her statutory duty. The Petitioners it is argued purport that they are impugning the decision of the Respondents to publish or cause to be published the Gazette Notice of 8th June 2020; which was made pursuant to and under the Act, as it was a decision made in compliance with ***Section 20 of the Act***. The Respondents and Interested Parties contend the impugned decision was made under ***Section 40(1)(f) of the Act*** and the right court to hear and determine this matter is the Political Parries Dispute Tribunal, in the first instance, in line with ***Section 40(1)(f) of the Political Parties Act, 2011***. It is contended this is for the reason that the Petitioner has raised fundamental complaints/allegations against the actions and decision of the Registrar under the Act.

31. To buttress the above-mentioned contention the Interested Parties referred to the case of ***Republic v. Registrar of Political Parties & 6 Others Ex-parte Edward Kings Onyancha Maina & 7 Others [2017] eKLR*** *where the Applicant sought an order to quash a Gazette Notice issued under the Political Parties Act, it was held as follows:*

> ***"The law is however clear that the first port of call in respect of disputes pitting members of a political party, the party itself or the Registrar must be handled by the internal political party dispute resolution mechanisms then by the Tribunal where they involve members inter se or members and the party and the Tribunal where they involve the Registrar …in this case the applicants having invoked the jurisdiction of the Tribunal can only challenge that decision before this Court and cannot be permitted to challenge the Registrar's decision in these proceedings as to do so would amount to short circuiting the procedure provided under the statute."*** *(Emphasis added)*

32. The Interested Parties and the Respondents aver that the jurisdiction of the High Court is donated by **Section 41 of the Political Parries Act** which provides:-

> ***"An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court."***

33. It is averred in cases where there are allegations of infringement or violation of rights in an attempt to remove an official from office, it has been held that the Court of first instance is the PPDT. The position herein above was cleary stated in the case of ***Linus Kamunyo Muchina vs.*** **Speaker Embu County Assembly Majority Leader – Embu County Assembly [2016] eKLR** where the Court held:

> ***"Section 40 of the Political Parties Disputes Act empowers that tribunal to hear disputes in the first instance. Thereafter, this court may exercise supervisory jurisdiction over that tribunal in order to enforce the constitutionally guaranteed rights of an aggrieved party such as the current petitioner. It may do so upon its own motion (sua sponte) in terms of Article 165 (7) or upon application by an aggrieved party…It therefore follows that an aggrieved party or person who has a dispute that is contemplated in section 40 of the Political Parties Disputes Act must first file his complaint with that tribunal. By virtue of the mandatory provisions of section 40, such a party or person does not have direct access to the High Court. He has to exhaust the avenues provided for by the provisions of Section 41 of the Political Parties Disputes Act…*** **It therefore follows that the application for transfer to that tribunal is hereby allowed because it has first instance jurisdiction over the subject matter of this petition. The jurisdiction of the High court to enforce these fundamental rights including the threatened removal of the petitioner from office may only come into play after the petitioner has exhausted his avenues/remedies under the provisions of sections 40 and 41 of the Political Parties Disputes Act.** *(Emphasis added)*

34. Similarly, in **Revital Healthcare (EPZ) Limited & Another vs. Ministry of Health & 5 others [2015] eKLR** *it was held that:*

> ***"…Where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."***

35. Further in **Republic vs. National Environment Management Authority [2011] eKLR,** the Court had this to say:

> ***"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERRO LTD case. The Learned Judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statue with respect we agree with the judge."*** *(Emphasis added)*

36. It is further contended that, in addition to the Interested Parties submissions ***Section 9 of the Fair Administrative Actions Act*** provides that:-

> ***"(1) Subject to sub-section (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.***
>
> ***(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are firs exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection(3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person form the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."***

37. The Respondent urge that the Petitioner cannot claim personal liability against the Respondents for performing her mandatory functions and mandate. This is because ***Section 20(3) of the Political Parties Act*** is in mandatory terms; which provides that the Respondent shall without discretion within 14 days cause such a notice to be published in the Gazette.

38. The Petitioner is opposed to the preliminary objection and urges that its trite law that Preliminary Objections proceedings are technical restricted proceedings, whose Rules are well settled. The settled law governing hearing and determination of preliminary objections, which the interested parties must satisfy the court as mandatory prerequisites even before the preliminary objection is consindered on merit are:-

> ***"(i) A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.***
>
> ***ii) A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.***
>
> ***iii) A Preliminary Objection cannot be entertained where;***
>
> ***a. The facts are disputed/contested.***
>
> ***b. The facts are liable to be contested.***
>
> ***c. Facts are to be proved through process of evidence.***
>
> ***d. What is sought is an exercise of judicial discretion."***

39. The first step in this Preliminary Objection is to consider whether the Interested Parties have met the above threshold to enable this court to determine the Preliminary Objection.

40. The Petitioner urge the Preliminary Objection is premised on contested grounds, facts and reasons. It is averred that first, at paragraph 1 of the preliminary objection, the Interested Parties posits that the Court is bereft of jurisdiction. At sub paragraph 1(a) to (e) thereof, the Interested Parties stated what they refer to as reasons for the lack of jurisdiction. The Petitioners admit they did not contend the Interested Parties statements and reasons at sub-paragraph 1(a) and (b) thereof; however they vehemently contest the reasons, statements and facts at

sub-paragraph 1(c) to (e).

41. The petitioner as regards sub-paragraph 1 (c) where the Interested Parties state this case is about a dispute within party and that the first port of call is the Political Parties Tribunal, the Petitioner on the other hand is categorical that the case as laid does not at all seek this Court to determine a dispute within a political party. The petitioner's case is said to be challenging the legality and constitutionality of the Respondents exercise of statutory power in discharge of their statutory administrative functions. The Petitioner further urge her position is that the impugned Gazette Notice Publication, inter alia; is also not an appealable decision before the Political Parties Dispute Tribunal and neither does the Political Parties Dispute Tribunal has jurisdiction to determine the Constitutional issues raised nor can it grant the prerogative orders and constitutional declarations sought as well as the compensation in the nature of damages. In the nutshell it is Petitioner's position that there is absolutely no way she could submit her grievances in the manner raised in this Petition to her (Petitioners') Internal Dispute Resolution Mechanism and before the Political Parties Tribunal.

42. On sub-paragraph 1(d) of the Preliminary Objection, it is the Interested Parties position that the change of officers is a party affairs thereby making the petition herein premature. Whereas the Petitioner's position is of a contrary view, that the change of party officers does not start and end with a political party in exchasive of the Respondents. The Petitioner urge the Respondents have a key role in exercise of their administrative functions to ensure that such change complies with both the party's constitution and applicable law, which review role the Respondents herein did admit to have undertaken as per paragraphs 110 and 210 of the Petition. It is Petitioner's position therefore that any act of commission and omission in the Respondents' review process entails any aggrieved party, as was the Petitioner herein, to invoke the supervisory jurisdiction of this Court seeking appropriate remedies.

43. The Petitioner as regards sub-paragraph 1(e) of the preliminary objection, states, the Interested Parties have stated, that the Respondents have through a letter dated 10/6/2020 initiated investigations in respect of complaints lodged, however it is stated that the Interested Parties have not submitted before this Court the purported letter commencing the investigations dated 10/6/2020. It is contended that the Petitioner is not aware of the investigation letter dated 10/6/2020 and indeed urges that there is no such investigation letter on the court record.

44. The Petitioner further assert that at paragraph 2 of the preliminary objections, the Interested Parties state that this petition is an abuse of Court process. The Petitioner on her part contest the facts cited in support of the preliminary objection thus:

> **"a) Whereas the Interested Parties allege that the Petitioner forum shopped for a friendly Court, this assertion is scandalous, imaginary, frivolous and based on nothing. The Petitioner simply filed its case before the High Court, Constitutional Division which is the Court presiding over the matter. The issue of forum shopping and friendly court does not arise at all.**
>
> **b) It is not true that in the Tribunal Complaint No. 9 of 2020, the Political Parties Disputes Tribunal declined to issue interim orders. Indeed, the Interested Parties have not provided to this Court any evidence attesting to their false assertions that the Political Parties Disputes Tribunal declined to grant interim orders. The correct position is that the application seeking interim orders was due for hearing on 12th June, 2020 on which date the Petitioner withdrew the Case and therefore the issue of decline to grant interim orders does not arise. The reason for the withdrawal of the complaint are part of the Tribunal's record and one of which was that it was due to the refusal to granted interim orders.**
>
> **c) it is not true as alleged by the Interested Parties that the Petitioner failed to secure interim orders. It is stated that at no point did the Tribunal state that it had declined to issue interim orders.**
>
> **d) It is not true as alleged by the Petitioner that this Petition was filed by the Petitioner upon failure to secure interim orders. This assertion, unsubstantiated as it is, remains in the realm of imagination on the part of the Interested Parties. It is Petitioner's firm position that this case was filed on genuine grounds and the Interested Parties beliefs to the contrary is misguided.**
>
> **e) It is not true that the Petitioner failed to disclose to this Court about the matter at the Political Parties Disputes Tribunal. To the contrary, the Petitioner not only disclosed in the body of its Petition that there existed a matter at the Political Parties Disputes Tribunal but also attached as part of its annextures that withdrawal order (see page 217 of the Petition). The Interested Parties assertion to the contrary is therefore false."**

45. The Petitioner urges at paragraph 3 of the preliminary objection, the Interested Parties state that there is no Petitioner before this court. In furtherance of this limb, the Interested Parties state, falsely so, that FORD-Kenya Party has neither given any instructions nor has there been a resolution to institute this suit. The petitioner contests this assertion as indeed there was not only instructions given to institute this suit but the institution of this suit was done pursuant to a resolution under seal of the Petitioner. Had the Interested Parties keenly, perused the pleadings, they would have avoided making this false assertion by reading the Petitioner's resolution under Seal at Pages 236 to 238 of the Petition and more particularly at page 237 thereof.

46. It is further stated that at paragraph 4 of the Preliminary Objection, the Interested Parties state that this Court's Order of 15th June, 2020 was signed by a non-designated officer of this Court. the Petitioner contests this position, thus;

> **"a) Nowhere is it stated in the extracted and served order that the order was signed by one Hon. Mumassabba. The extracted and served order of 15th June, 2020 only has a signature and it is not within the province of the Interested Parties to assign a signature to a specific court officer. The Interested Parties are not handwriting experts and they have not stated the source of their assertion that the order was signed by Hon. Mumassabba.**
>
> **b) Even if the order was signed by Hon. Mumassabba, the Petitioner does not agree that the said Hon. Mumassabba is non-**

designated officer of the Court. This Petition was filed in the High Court of Kenya. The Order as extracted was to be signed by the Deputy Registrar, High Court of Kenya. The person who signed the order so signed in the capacity as a Deputy Registrar, High Court of Kenya. The signatory therefore is a designated officer of the High Court, in the capacity of a Deputy Registrar, a fact which the Interested Parties do not dispute and neither would they have a basis to dispute. The Interested Parties have not presented any evidence to show that Hon. Mumassabba is not a Deputy Registrar of the High Court of Kenya. The assertion therefore that the signatory of the order of 15th June, 2020 is a non-designated officer falls flat on its face.

c) There is only one High Court of Kenya. The Divisions created such as the Constitutional and Human Rights Divisions are only so created for administrative purposes. The administrative High Court divisions does not in itself divest of any High Court Officers jurisdiction to conduct the business of the High Court falling in either of the divisions. Nothing therefore turns on the question of whether the signatory to the order does serve or does not serve in the Constitutional and Human Rights division of the High Court. Neither does such a question's answer impact on the validity or otherwise of the order as issued by the Court on 15th June, 2020."

47. The Petitioner on Interested Parties written submission urge that they have referred to as brief facts of the case and in the process laid bare how their preliminary objection is premised on what the petitioner refers to as contested facts, thus:

a) The Petitioner submit that at paragraph 2 and 3 of the Interested Parties submissions, the Interested Parties allege that the Petitioner communicated desire to change officials which the Respondents published in the Kenya Gazette. These assertions are not true. The Petitioner is clear in her pleadings, which are presumed to be correct on the basis of the preliminary objection as raised by the Interested Parties, that the Interested Parties communication of the change of officials on the strength of which the Respondents caused the publication of the Gazette Notice were unauthorized, illegal, irregular, false and have no binding effect on the Petitioner. The Interested Parties have therefore sought to introduce their own facts of the case through submission on a preliminary objections proceedings.

b) The Petitioner further contend that at paragraph 4 of the Interested Parties submissions, they submit that there was another alleged proposed change of officials. The Petitioner's position is that what the Interested Parties are hereby referring to as the "alleged proposed change of officials" is indeed the proper and duly authorized change of officials. The Interested Parties reference to the set of documents of change of officials not submitted by themselves as "alleged" to suggest invalidity is therefore disputed and does not find a footing in the pleadings on record.

c) The Petitioner state that on paragraph 5, the Interested Parties submissions, they allege that the Respondent wrote to the Interested Parties vide the letter dated 10th June, 2020. This is not true. The letter dated 10th June, 2020 as appearing at page 137 of the Petition was written to the Petitioner's Party Leader and only copied to the 1st Interested Party herein.

d) It is further averred at paragraph 5 and 6 of the Interested parties submissions, they suggest that the entire dispute exhibited by contradictory documentation was referred by the Respondents to internal Party Process. This was the same initial view of the Petitioner, but it later turned out to be incorrect. The Respondents themselves, in the obvious interests of the Interested Parties, did communicate in writing that the officials change process as initiated, unlawfully though, by the interested and facilitated by the impugned Gazette Notice was not affected at all by the referral of the dispute to Party Internal Dispute Resolution (see Pages 140, 216 and 218 of the Petition). The Interested Parties assertion therefore to the contrary is based on no evidence and imaginary.

48. It is clear, that without any doubts, as attested to the facts that the grounds, and facts on which the Interested Parties preliminary objection is premised are notably contested contrary to the Interested Parties submissions, that the facts are undisputed. That is not correct. A preliminary point of law must be based on pure point of law and on the presumption that the pleadings and/or facts as pleaded by the opposite side are correct or agreed upon. A preliminary objection cannot be entertained where the facts are disputed or contested or where facts are likely to be contested or which are to be proved through process of evidence. I find for this court to make a determination on the Interested Parties Preliminary Objection there need not be an inevitable exercise of the court interrogating the facts and making its own findings therefore. That where court is required to make determination on facts, such an exercise divests of this court jurisdiction to entertain the preliminary objection.

49. The Court in the case ***Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696***, ***defined what a Preliminary Objection is. Equally in the case of Oraro vs. Mbaja(2005) I KLR 141 Ojwang, J*** held as follows:-

"I think the principle is abundantly clear, a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point .....Anything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ....."

13. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

[Emphasis added].

50. I find for a preliminary objection to succeed it must pass the test of being a preliminary objection thus:-

i) The facts raised by one party must be accepted by the other party.

ii) It must be a matter of law capable of disposing off the suit.

iii) It must not raise any factual arguments which require proof by way of evidence.

iv) It must not call upon the court's discretion.

51. In the instant Preliminary Objection as raised by the Interested Parties, it raises factual allegations in the preliminary objection to the effect that no proper Petitioner is before this court as the FORD-Kenya party has not given any instructions and there has been no instructions or resolution to institute the instant suit. Furthermore the Interested Parties allege that the orders issued on 15th June 2020 are irregular as they were illegitimately signed by a non-designed officer of the Court (Hon. Mumassaba) who is not a designed Deputy Registrar of the Constitutional and Human Rights Division, among other several arguments as alleged to in the Interested Parties submissions. It is clear such arguments are denied by the Petitioner, these are facts and not matters of law capable of disposing off the suit and as such, require proof by way of evidence. Such arguments require the provision of evidence to prove their truth, which such process goes beyond the realm of a preliminary objection. The Preliminary objection as such do not pass the test of what a preliminary objection is supposed to be limited to.

B. WHETHER THE PETITIONER FAILED TO EXHAUST INTERNAL DISPUTE RESOLUTION MECHANISMS SO AS TO DIVEST THIS COURT OF JURISDICTION?

52. The Respondents on their part submit that the Petition challenges the decision of the Registrar and that such challenge ought to be presented first to the Political Parties Disputes Tribunal under ***Section 40(1) (f) of the Political Parties Act*** as first port of call thereof divesting this Court of jurisdiction in the first instance.

53. The Petitioner in response urge a reading of the Respondents' submissions would attest that the Respondents did not identify to the court which is this decision that they believe ought to have been lodged at the Tribunal. The Petitioner contend that the Respondents have not disclosed or mentioned the decision that the Respondents would wish the same be presented to the Tribunal first as opposed to this Court. The Petitioner therefore urge that they can only draw a conclusion that the decision intended to be referred to by Respondents is the publication by the Respondents of the Gazette Notice dated 8th June 2020.

54. The Petitioner urge that the Respondents have difficulty as the Respondents have argued successfully before the Tribunal and the High Court that the publication of the Gazette Notice under the Act by the Respondents is an administrative function which is not an appealable decision to the Tribunal (**See the Tribunal Decision in Tribunal Appeal No. 6 of 2006 as well as High Court Decision in Charles Nyandusi and Three others versus Registrar of Political Parties and another (2017) eKLR all attached to the Petitioner's submissions in response to the Interested Parties preliminary objection.)**

55. The Petitioner urges the said decision have not been appealed against in High Court decision in case of ***Charity Nyandusi & 3 others vs. Registrar of the Political Parties & another (2017) eKLR*** and as such the law as stated therein is binding on them.

56. ***Section 40 (1) (a) of the Political Parties Act***, grants Tribunal power to determine dispute between members of a Political Party. The Petitioner urge that this Petition is not seeking a resolution of a dispute between members of a political party, but the matter as presented before this court is constituted as grievance against the complained acts of omission and commission against the office of Registrar of Political Party and the Registrar of Political Party. That being the position ***Section 40 (1) (a) and the Act*** has no reference to the Petition before this Court.

57. There is no dispute that ***Section 40 (1) (b) of the Act*** grants the Tribunal Jurisdiction to determine disputes between a member of a political party and the Political Party. The Petitioner's petition before this Court does not seek the determination of a dispute between a political party and her member. The Petition as drawn is a case of a political party against the office of the Registrar of Political Party and the Registrar of Political Parties. I find that ***Section 40 (1) (b) of the Act*** to lack relevance to this case and therefore is of no relevance to the Interested Parties case. As regards ***Section 40(1) (f) of the Act*** giving Tribunal jurisdiction to determine Appeals from the decision of the Registrar under the Act, the same is not applicable for the following reasons:-

a) It is clear that the Provision refers to "appeals". The Act does not define the term "Appeal". The Black's Law Dictionary 10th Edition define "Appeal" thus: "A proceedings undertaken to have a decision reconsidered by a higher authority."

58. I find so far for the Tribunal to have jurisdiction, there must be a proceeding challenging the Registrar's decision. This would connote the challenge, on merits or otherwise of the decision. The Respondents and Interested Parties have not demonstrated how the Petitioner is challenging the decision. From reading the Petition and upon considering the submissions, it turns out that the correct position is that the Petition is not challenging, the merits or decision(s) of the Registrar. It challenges the factors that the Registrar took into consideration in exercising her statutory mandate in respect of the issue raised in the Petition. For instance, Respondents having been faced with two sets of fillings on change of officials, it was expected of the Respondents to apply the same mechanisms and equal treatment in either processing or not processing the same, a test which the Respondents failed as they opted to process one filling and disregarded the other. This is not therefore a case about the merits or demerits of the impugned Gazette Notice, but rather a question of propriety of the acts of commission and/or omissions, culmination of which was the publication of Gazette Notice. The case as presented by the Petitioner is clearly about procedural fairness and/or legality of the steps taken by the Registrar in handling the matter as opposed to the merits of the impugned pronouncement of the Respondents. I am in view of the aforesaid not satisfied that this matter is an appeal and as such the tribunal would have no jurisdiction to preside over and or determine this matter under ***Section 40(1)(f) of the Act***.

59. ***Section 34 of the Act*** stipulated the function of the 2nd Respondent and in specific ***Section 34 (a) of the Act*** provides as follows:-

"a) register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act."

60. The 2nd Respondent in exercise of her functions and powers under ***Section 34 (a) of the Act*** considered by way of Review, the subject two (2) sets of filings, that were presented to her office. In so reviewing the subject filings, the Respondents were exercising statutory administrative functions thus administrative actions. The definition of and ***"Administrative Action"*** is to be found in the ***Fair Administrative Action Act, 2015***, thus:-

> ***"i) The Powers, function and duties exercised by authorities or quasi-judicial Tribunals; or***
>
> ***ii) An act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates."***

61. From the reading of the Petitioner's Petition, the above definition fits well with the cause of action as laid down by the Petitioner herein in its Petition; which is that the Petitioner is aggrieved by the Respondents acts of commissions or omissions in exercise of their management function under ***Section 34(a) of the Act Culmination*** which are the impugned pronouncement which are bound to affect the right of the Petitioner.

62. It is specifically provided under ***Section 9(1) of the Fair Administrative Actions Act, 2015***, that an aggrieved person on administrative action is granted the liberty to apply to the High Court for Judicial Review. I find that this right is what the Petitioner has exercised and the Petitioner cannot be faulted for seeking to enforce the rights as duly provided by law.

63. It is noted that Political Parties Act is not an overriding statute. It does not supersede the provisions of the other law; including the ***Fair Administrative Actions Act, 2015***. There is no doubt that parliament was well aware of the ***Political Parties Act, 2011,*** when it passed the ***Fair Administrative Actions Act, 2015***. That notwithstanding, it nevertheless granted High Court jurisdiction to hear, review on administrative Actions. Under the legal doctrine of implied repeal, if there was to be any conflict between two statutes, then it is trite that the latter in time takes precedence, such that in this case, the provisions of the ***Fair Administrative Actions Act*** must take precedence on mattes of Judicial Review Forums, which is the High Court.

64. ***Section 40(1) (f) of the Act*** refers to appeal from decisions of the Registrar. The Act does not extent the jurisdiction of the Tribunal to appeals on decisions of the Registrar on any matter under the Act, as opposed to other statutes which have established Tribunals, for example:-

> ***a) Section 126(2) of the Environmental Management and Coordination Act;***
>
> ***"The Tribunal shall, upon an appeal made to it in writing by any party or a referral made to it by the Authority <u>on any matter relating to the Act…." (Emphasis added)</u>***
>
> ***b) Section 48 of Retirement Benefit Act ;***
>
> ***"I) Any person aggrieved by a decision of the Authority of the Chief Executive Officer under the provisions of this Act or any Regulations made thereunder may appeal to the Tribunal…"***
>
> ***2) where <u>any dispute</u> arises between any person and the Authority <u>as to the exercise of the Powers conferred upon the Authority by this Act,</u> either party may appeal to the Tribunal …(Emphasis added)***

65. Considering the above statutory provisions and from comperative statutory powers on matters of jurisdiction of Tribunals, if parliament is desirous of having all the issues arising under the establishing statute be handled by respective Tribunal, the Parliament will have expressly stated so. That is not however the case impact of this matter as parliament did not insert such wholesome expressions of granting Political Party Dispute Tribunal exclusive jurisdiction to adjudicate on any matter coming under the Act.

66. Under ***Section 40(1)(f) of the Act***, it is clear that not even all decisions of the Registrar are to be subjected to the Tribunal. Only appealable decisions are to be subjected to the Tribunal. In other words the Registrars' decisions which an appeal can be lodged against. The question need to be addressed is whether the acts complained of in the instant Petition are appealable decision(s) contemplated under ***Section 40(1)(f) of the Act***? I would start by pointing out none of the opposing parties addressed this court on this question. I will however proceed to consider the question.

67. The Petitioner in the instant Petition apart from challenging the acts of omission and/or commission which preceded and culminated into the publication of the impugned Gazette Notice, the Petitioner also seeks that the impugned Gazette Notice be quashed. The Respondents published the Gazette Notice in exercise of the powers conferred under ***Section 20(1) of the Act***. This publication of the impugned Gazette Notice was an administrative action on the part of the Respondents, which by itself renders the Gazette Notice publication act not an appealable decision contemplated under ***Section 40 (1)(f) of the Act***.

68. Further the gazette Notice Publication is not a final act in itself but a statutory stage in the process towards change of party officials. Does such a step which is not final qualify to be referred to as an appealable decision, the answer is in the negative. The Black's Law Dictionary defines "appealable decisions" to mean, thus:-

"A decree or order that is sufficiently final to receive appellate review". (Emphasis added)

It follows therefore that the complained of acts of commission and or omission in the Petition against the Respondents which are not final in nature do not fall within the description of an "appealable decision"

69. In addition to the above the political parties Disputes Tribunal has rendered itself on this matter. In the ***Appeal No. 6 of 2016, Charles Nyandusi & 3 others Versus Registrar of Political Parties & another***, the Appellants had, among others, challenged before the Tribunal a Gazette Notice publication by the Registrar. The tribunal, in dismissing the Appeal held that such a Gazette Notice publication is not an appealable decision before it (Tribunal). The Tribunal posed, thus;

"Decision

28. The question is whether or not there was an appealable (sic) decision made by the Respondent by the publication of the Kenya Gazette Notice No. 109 of 9th September, 2016. What is a "decision" in the context of S.40(1)(f) of the Political Parties Act, 2011?

29. The Political Parties Act, 2011 does not define the word "decision". Our foray to the Interpretation and General Provisions Act (CAP 2) is also of no help.

30. According to Black's Law Dictionary (9th Edition) (2009), a decision is "a judicial or agency determination after consideration of the facts and the law."

Further afield, Oxfords Dictionary defines a decision as a conclusion or resolution reached after consideration.

31. The immediate question then becomes whether the publication of the Kenya Gazette Notice No. 109 of 9th September, 2016 was a decision on the part of the Respondent. Did she make a judgment or pass a decree or draw any conclusion by publishing the Notice aforementioned?

32. The Tribunal does not agree with the Appellants' submissions on this issue. The publication of the notice was a single administrative act …….

33. Consequently, we hold that there was no decision made by the Respondent on 9th September, 2016 liable for challenge under S.40(1) of the Political Parties Act, 2011.

34. Accordingly, the Appellants' appeal is hereby dismissed with costs to the Respondent."

70. The above decision by the Tribunal prevails to date. The Respondents participated in those proceedings and are aware of this decision, which in any event was given at their instance and favour. It will be a clear case of intellectual dishonesty for the Respondents to turn around and support the interested parties in their quest for clogging these proceedings in their pretext that an appeal out to have been lodged arising ought of the Respondents decision before the Tribunal. The Tribunals decision binds the Respondents.

71. In the appeal preferred against the above decision of the Tribunal, the High Court in ***Charles Nyandusi & 3 others v. Registrar of Political Parties & another (2017) eKLR,*** the Court upheld the Tribunals jurisprudence that such a publication of Gazette Notice is an administration act which is incapable of being appealed under ***Section 40(1)(f) of the Act*** the High Court posed thus:

"While Section 11 of the Act deals directly with mergers, Section 34 deals generally with the functions of the office of the Registrar. These are administrative duties. Fair administrative action is envisaged under Article 47 of the Constitution. Thus one would pose and ask what transpired before the Registrar. There is no evidence of any complaint before the Registrar that could have triggered on investigation or hearing and a determination made. The issuance of the impugned gazette notice was thus an administrative function and there was therefore no appeal capable of being lodged before the Tribunal.

15. For the above stated reasons, this court cannot fault the judgment of the Tribunal. There was no decision capable of being dealt with by way of an appeal. The upshot is that the appeal is dismissed with costs."

72. I find that the above decision has neither been appealed against or set aside. It therefore remains the law on matters whether or not a Gazette Notice publication by Respondents is an appealable decision under ***Section 40(1)(f) of the Act***. I find the answer in the affirmative as pronounced by the Tribunal itself and affirmed by the High Court. This is in black and white, that such a publication of Gazette Notice is not an appealable decision to the Tribunal. This is clearly an administrative function of the Respondent for which Fair Administrative action is envisaged under ***Article 47 of the Constitution***. There is no doubt in this Petition that the issuance of the impugned gazette notice was issued in exercise of Respondents administrative function and not otherwise. The decision of the Respondents was just a single simple administrative act for which no appeal can be lodged with the Tribunal.

73. The Petitioner herein pleaded matters on grave violation of fundamental rights and freedom as provided in the constitution. The averments thereof are yet to be controverted as responses are yet to be filed pending determination of the preliminary objection. The law is clear that the Tribunal has no jurisdiction to determine matters relating to violation of fundamental rights and freedoms. ***Section 40(1)(f) of the Act*** do not confer on the Tribunal any such jurisdiction. In view of the aforesaid the petitioner could not have referred this matter to the Tribunal as the Tribunal itself has no powers to preside over and determine the issues raised in the Petition.

74. The High Court has on the issues raised in this Petition made a declaration that only itself and counts of concurrent status have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms. In the case of ***Royal Medical Services Limited vs. Attorney General & others (2015) eKLR***, the Court rendered itself thus:

> ***"48. At any rate, in view of my findings above, I am satisfied that the Petition has merit, and I therefore grant the following orders:***
>
> ***(a) I hereby declare that only the High Court and courts of similar status currently have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the Bill of Rights.***
>
> ***(b) I hereby declare that in the absence of legislation enacted by Parliament to give subordinate courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedom in the Bill of Rights, subordinate courts and tribunals, including, the 2nd respondent, do not have jurisdiction to hear and determine matters arising from the Bill of Rights.***
>
> ***(c) I hereby issue an order of prohibition directed against the 2nd Respondent prohibiting it from hearing and determining issues of violation of fundamental rights under Article 28 and 31 raised in Tribunal Case No. HAT 004 of 2013."***

75. In a similar matter where the issue of Court's jurisdiction was raised yet the Petitioner had raised matters of Constitutional rights violations the Court in holding that it had jurisdiction stated, in ***Wilfrida Arnodah Itolondo vs. Board of Trustees of Kenyatta University Staff Retirement Benefits Scheme [2014] eKLR***, thus,

> ***"42. However, the petition has sought to bring herself outside the jurisdiction of the Retirement Benefits Authority by alleging two things. First, it is her contention that the acts of the respondent in denying her the right to vie as a trustee because she had filed a case against the Chancellor and Council of the Sponsor, and the fact that she was an official of a trade union, subjected her to discrimination in violation of Article 27 of the Constitution and her right to join a trade union guaranteed under Article.***
>
> ***43. It is also her contention that the Scheme rules, specifically rules vi and vii of the Nomination Rules, are unconstitutional for violating the said rights.***
>
> ***44. It is my view that the mechanism provided under the Retirement Benefits Act is not intended to deal with questions regarding the constitutionality or otherwise of regulations or rules, or to do determine whether a right or fundamental freedom in the Bill of Rights has been infringed or threatened with infringement. Such jurisdiction, in my view, is vested in the High Court by Article 165(3) set out above, I therefore find in favour of the Petitioner with respect to the question of jurisdiction, and now turn to consider the other two issues raised in this petition."***

76. From clear reading of the Petition, the Petitioner has raised substantial issues on violation of rights and fundamental freedom as protected under the Constitution. The Respondents and Interested Parties have not contested this fact and pointed out that this petition does not raise issues on violation of rights and fundamental freedoms as provided under the Constitution. The Petitioner furher seek prerogative reliefs in the nature of certiorari and prohibition. These reliefs can only be granted by the High Court, which has jurisdiction so to do. In the case of **Jaset Enterprise Limited Vs. Director General National Transport and Safety Authority [2017] eKLR where the Court stated, thus;**

> ***"20. The phrase such other order as the Board considers necessary and fit coming after affirmation or reversal of the decision of the Authority in my view ought to be read ejusdem generis to the two expressly specified reliefs. Further, such other reliefs can only be issued pursuant to section 11 of the Fair Administrative Action Act which provides for remedies which the High Court or a subordinate Court may grant. The orders of certiorari, mandamus and prohibition are <u>NOT</u> some of the orders which the subordinate court is expressly empowered to issue under the said provision. It ought to be noted that such orders have a long history and whereas the effect of grant of the orders under section 11 aforesaid may well be the same as the grant of the said orders, <u>I am not prepared to hold that subordinate Courts have the powers to issue orders of mandamus, prohibition and certiorari. This must necessarily be so since under section 8(2) of the Law Reform Act, it is only the High Court that is expressly empowered to issue orders in the nature of prerogative writs. It ought to be appreciated that such orders are usually in the nature of supervisory reliefs issuable pursuant to Article 165(6) of the Cosntituion which only confers jurisdiction for their issuance on the High Court and Courts of equal status subject to the conferment of such jurisdiction by Parliament.</u>" (emphasis added)***

77. From the aforesaid it has been demonstrated, that the Tribunal has no powers to grant the Constitutional rights envisaged under the Bill of rights nor prerogative reliefs in the nature of certiorari and prohibition which the Petitioner has sought in this Petition. The Constitutional rights and fundamental freedoms as well as prerogative orders sought in this Petition can only be granted by the High Court and courts of concurrent jurisdiction and not the Tribunal.

78. The Interested Parties have relied on a number of authorities which the Petitioner urge are not relevant and sought to distinguish them.

a) In the case of ***Rich Productions Limited vs. Kenya Pipeline Company Limited & Another [2014] eKLR cited by the Interested Parties,*** the Court declined to exercise jurisdiction after the Court had delivered a finding that the Parties had avoided alternative statutory mechanisms and process by converting their issues in dispute into constitutional issues when it is not. However, that is not the case in this Petition as in any event no one has argued that the issues raised in the Petition are not constitutional issues. Neither has this court made or been asked to make a finding that the issues raised are not constitutional issues.

b) In the case of ***Godfrey Muriithi & 4 others vs. Speaker, Tharaka Nithi County Assembly & 2 Others [2020] eKLR cited by the Interested Parties,*** the Court declined to exercise jurisdiction after it had laid no basis as to why the avenues provided under the Political Parties Act would be inappropriate. In the case herein, the Petitioner has laid a clear basis as to why its case would not fit either in the Petitioner's Internal Dispute Resolution mechanisms or the Tribunal.

c) In the case of ***Linus Kamunyo Muchira Vs. Speaker Embu County Assembly Majority Leader – Embu County Assembly [2016] eKLR as cited by the Interested Parties,*** the Court refrained from exercising jurisdiction and referred the matter to the Tribunal on the main ground that the aggrieved party had a dispute contemplated under ***Section 40 of the Political Parties Act.*** However, the Petitioner herein has demonstrated that the grievances laid before this court are not disputes contemplated under ***Section 40 of the Act***, thereby rendering this authority inapplicable to this case. Further, the Petitioner takes great exception to the portion of the Court's finding in the cited case which while appreciating that the Tribunal does not have jurisdiction to preside over fundamental rights, nevertheless the court directed the party to submit his dispute to the Tribunal and that the determination of the fundamental rights issues to be raised only after the Tribunal process has bene concluded. The Court did not cite any law in support of this proposition and neither does any law exist in support thereof. The Constitution, under ***Article 22(1)*** grants any person the right to approach the High Court when there is a denial, threat to breach or a breach of constitutional rights. A crystallized right to sue and have such a question determined by a competent court in my view cannot be suspended or muzzled at the instance of exhausting other avenues of dispute resolution.

d) In the case of ***Republic Vs. National Environment Management Authority [2011] eKLR, cited by the Interested Parties,*** the Court affirmed a refusal on jurisdiction on the ground that there was no exceptional circumstances demonstrated that would render the statutory provided appeal mechanisms suitable. This is not the case here, as has ably been demonstrated how unsuitable the Tribunal is on matters raised in this Petition.

C. WHETHER THE PETITION SEEK THE COURT TO USURP THE POWER OF THE RESPONDENTS?

79. The Interested Parties contend the Petition as framed seeks that this Honourable Court usurps the statutory jurisdiction of the Respondents and replace the Court opinion with the opinion of the Respondents. It is averred that the office of the Registrar of Political parties is established by ***Section 33 of the Political parties Act***, with its functions provided under ***Section 34 of the Act*** which inter alia provides;

> **"Register, regulate monitor, investigate and supervise political parties to ensure compliance with this Act; verify and make publicly available the list of all members of political parties and investigate complaints received under this Act."**

80. The Interested Parties aver that in fulfilling this mandate, the Respondents published the impugned Gazette Notice on 8th June 2020 notifying the public of an intention by the party to change its officials and inviting submission on the proposed changes. Any member of the party, including the aforesaid members, who had filed the instant Petition, had the right to file their papers with the Respondents pursuant to the said Gazette Notice, which they did as per facts pleaded in the Petition.

81. Subsequently the Respondents wrote to the party's secretary General vide a letter of 10/6/2020 directing him to resolve any dispute in regard to the proposed change of party officials in line with the party Constitution and therefore any aggrieved person could involve the dispute resolution mechanisms provided under ***Section 40 of the Act***. It is urged the process undertaken by the Respondents were within the mandate donated to the Respondents by ***Section 20 and 34 of the Political Party Act***.

82. The Interested Parties state that by filing the instant Petition, the complainants want this court to usurp the statutory role and mandate of the Respondents and the process undertaken by the Respondents with intention that this Court undertakes its own process based on its opinion. It is urged that the complainants are seeking this court to substitute its opinions with the statutory and mandate of a statutory body contrary to law.

83. In the case of ***Boundary Commission [1988] 2WLR 458, 475*** it was stated;

> ***"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the decision authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."***

84. In ***Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR*** it was held;

> ***"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and National Legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."***

85. The Interested Parties urge that the Court should decline the invitation by the complainants to replace its own process and opinion with the process commenced by the Respondents and their discretion donated by the Political Parties Act as to do so would otherwise be ultra vires.

86. The Petitioner in response refer at paragraph 1(c) of the preliminary objection by the interested parties, were they allege that there is an investigation commenced under a letter dated 10th June 2020, it is contended that the Interested Parties have not referred the court to purported letter of investigation dated 10th June 2020. It is further stated in the interested parties submissions, they have changed the narrative; amended their preliminary objection and now states that the objection relates to the Gazette Notice and that the letter referred to dated 10th June 2020, was the one that had declared a dispute and referred the matter to internal dispute Resolution. The Petitioner in support of these refers to page 137 of the Petition and paragraph 43 and 44 of the Interested Parties submissions.

87. Parties in any proceedings are bound by their pleadings. It is not open for parties to plead in preliminary objection that the letter of 10th June 2020 was an investigation on complaints by the Respondents then from the same time on submissions argue a different thing altogether; being reference to internal Dispute Resolution. I agree with the petitioner's submissions that any party in proceedings is bound by its own pleadings. A party cannot through submissions purport to charge its pleadings through submissions nor introduce new ground as opposed to what had been pleaded in the preliminary objection. The court is not in such situation obliged to consider such new grounds.

88. The Petitioner do not deny having submitted documents to the Respondents in response to the impugned Gazette Notice as submitted by the Interested Parties. The Interested Parties have not on their part produced any response as part of the Court record. In the instant Petition, the case is not challenging the Registrar's letter dated 10th June 2020, but it challenges the procedural propriety of the pronouncements made by the Respondents. In the instant Petition there is nowhere were the Petitioner seek that the Court do substitute its opinion with that of the Respondents. The Court has not decided the issue nor has it made any decision as it will be guided by facts of the case and the law nor is the court expected to substitute the alleged opinion (if any) with the role and mandate of a statutory bodies as that is not the role of the court. The ground of the preliminary objection as raised by the Interested Parties is therefore misconceived and without any basis.

D. WHETHER THE PETITION IS AN ABUSE OF THE COURT PROCESS?

89. The Interested Parties aver that before approaching this court, the aggrieved members had filed a complaint before the PPDT seeking similar order as now sought before this Court. It is contended that upon failing to get interim reliefs, the complaints chose to withdraw the complaint and have subsequently filed the instant Petition seeking similar orders.

90. The Interested Parties submit that the complainants are forum shopping and seeking a favourable avenue to have their grievances aired and the dispute resolved and the same amounts to an abuse of Court process.

91. In ***Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR*** it was held:

> ***"In the case of Beinosi v Wiyley [1973] SA 721 SCA the South African Court of Appeal stated with regard to abuse of process that in general terms, abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous to that objective. The Supreme Court of Nigeria observed in the case of African Continental Bank PLC v Damian Ikechukukwu Mwaigwe 82 Others SC 35 of 2001 (14th January 2011) that abuse of court process arises where two or more similar processes are issued by a party against the same party/parties in respect of the exercise of the same right and same subject matter or where the process of the court has not been used bon fide and properly. In Muchangi Industries Limited v Safaris unlimited (Africa) Limited and 2 others the Court of Appeal sated that the person who abuses process is interested only in accomplishing some improper purposes that is collateral to the proper object of the process and that offends justice. And in Governors Balloon Safaris Limited vs Attorney General & 2 others (supra) the Court stated that "It is an abuse of the court process to institute several proceedings in order to challenge the same action and the court has inherent jurisdiction to prevent such abuse. Bearing in mind the above jurisprudence, it is not in doubt that the petitioner filed this petition after he failed in his quest to in HCC No. 433 of 2003 and wanted to try his luck in this Court…This is clearly an abuse of the court process that should never be tolerated."*** *(Emphasis added)*

92. The issue of the abuse of the court process is found at paragraphs 2 of the Interested Parties preliminary objection. The Interested parties contend that the filing of the suit was prompted by the failure to get interim orders before the Tribunal. The Interested Parties, it is noted have not provided any evidence to support this scandalous and malicious assertion. It appears the Interested Parties have created a narrative based on their own beliefs, mistaken through, and placed it before Court as a ground for a preliminary objection. This without admission of any facts by the other party cannot stand as a preliminary point of law. It has no basis at all.

93. The Petitioner controverts the Interested Parties submissions and urge that at no point did the Tribunal decline to grant interim orders. That the application seeking interim orders had been set down for hearing on 12th June 2020. However on 10th June 2020, the Respondents through their letter of 10th June 2020 referred the dispute presented before the Tribunal to Petitioner's Internal Dispute Resolution Mechanisms. That as a result of the action taken by the Respondents, there was nothing for the Petitioner to prosecute before the Tribunal, resulting in the Petitioner's decision to withdraw the case listed for hearing then on 12th June 2020.

94. The Petitioner urge, it is not true as alleged by the Interested Parties that the Petition before this court is forum shopping and an abuse of court process. The Petitioner further contend that these scandalous and frivolous assertions by the Interested Parties are hollow and unsubstantiated, and further avers that the grounds constituting the petition are all genuine and stands unchallenged.

95. I have considered the rival submissions and indeed find the Interested Parties assertions, scandalous, frivolous and unsubstantiated. I find the assertions are intended to intimidate the court but I have to point out that the court shall only be bound by facts and law in determining this matter and would not allow itself to be cowed or influenced through threats and false accusations by any litigant in this Petition.

96. The Interested Parties sought reliance in the case of ***Godfrey Paul Okutoyi v. Wigley (1973) SA 721 SCA***. I have considered the aforesaid authority and the facts of this petition as stated herein above and I am not convinced that the authority herein is relevant, given the facts of the Petition are totally different.

97. From the above, I find that the interested parties have failed to demonstrate that this Petition is an abuse of Court process.

E. *WHETHER THE PETITIONER IS PROPERLY BEFORE COURT?*

98. The Interested Parties contend that the party's constitution provides that the party is a corporate entity capable of suing and being sued in its name. The party being a corporate entity can only institute proceedings, by way of party resolutions. The Interested Parties in support of this proposition relies on the case of ***East Africa Portland Cement Ltd v Capital Market Authority & 4 Others [2014] eKLR*** where the Court held as follows:

> ***"…The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."***

99. The Interested Parties further contend that the Advocates herein equally did not have any authority to file the Petition and the Petition is utterly incompetent and ought to be struck out as held in the case of ***Directline Assurance Company Limited vs. Thomson Ondimu (2015) eKR;***

> ***"Having established so, I come to the same finding as concerns the appointment of the firm of advocates currently on record for the plaintiff. The circumstances as presented to me have led me to the conclusion that the firm of Mohamed Madhani & Co. Advocates had no basis or authority to come on record for the plaintiff in the absence of a company resolution. In fact, the court in East African Portland Cement Ltd (supra) did not shy away from holding that:***
>
> > ***"as an advocate and an officer of the court, the counsel responsible for the filing of this petition was fully aware, or should have been aware, of the requirements of the law with regard to the filing of suits by companies, and had a duty to advice his client (s) not to file proceedings if there was no or no clear authority to do so.."***

100. The Interested Parties further rely on the case of ***Wcfey V United Africa Limited (1961) 3 All 1169*** where it was held:

> ***"If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

101. The Interested Parties therefore urge that it is trite that not only is there no Petitioner before this Honourable Court but also the advocates herein are not properly before this court as there are no resolutions. It is urged that the Petition and the actions allegedly taken on behalf of the party in institution of the Petition are void and should be declared so.

102. The Petitioner in response urges that at paragraph 3 of the Preliminary Objection; it is contended there was no instructions given to file this suit nor was there a resolution to institute the suit. The Petitioner term such allegations as false assertion on the part of the Interested Parties. It is Petitioner's position that the Resolution under seal instructing the Advocates, and commencement of this suit is glaringly part of the Petition, as set out under Pages 236 to 238 thereof. On clear perusal of the Petition at page 237 under Min 32/2020 it is clear this petition was instituted by way of party resolution sanctioning the commencement of this action by the Petitioner and also appointed the law firm of Messers. Milimo, Muthomi & Company Advocates to represent the party in the Court case at the High Court.

103. The Interested Parties Preliminary Objection is therefore not supported by valid grounds. These ground cannot stand but fall. I find the authorities cited by the Interested parties in-applicable and of no legal help.

104. Considering that the Petitioner passed resolution under seal instructing the Advocates on record, and commencement of this suit, which is part of the Petition at pages 236 to 238; I am satisfied that contrary to the Interested Parties assertion, the Petition is properly before this court and that the Petition is competent.

105. The Preliminary Objection raised herein is utterly misconceived and without any basis. The preliminary objection is not well grounded. ***The upshot is that the preliminarily objection has no merit and is accordingly dismissed with costs in favour of the Petitioner against the Interested Parties***.

Dated, Signed and Delivered at Nairobi on this **24th** day of **September, 2020.**

……

J. A. MAKAU

JUDGE