REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC PETITION CASE NO. 02 OF 2019

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 22 (1)OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS ENSHRINED IN THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES (1, 2, 3, 10, 11, 23, 27, 28, 35, 44, 47, 48, 159, 165, 174 A, C, D, E & F, 184 (1)A & C, 196 1 A & B, 258) AND 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF INFRINGEMENT OF NON-DEROGABLE RIGHT TO PUBLIC PARTICIPATION ENSHRINED UNDER ARTICLES 1 & 10 OF THE CONSTITUTION

AND IN THE MATTER OF INFRINGEMENT OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION ENSHRINED IN ARTICLES 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES

BETWEEN

CHUKA IGAMBANG'OMBE DEVELOPMENT ASSOCIATION ....PETITIONERS

VERSUS

THE COUNTY GOVERNMENT OF THARAKA NITHI COUNTY............................1ST RESPONDENT

THE COUNTY ASSEMBLY OF THARAKA NITHI COUNTY..................................2ND RESPONDENT

VERSUS

NJURI NCHEKE COUNCIL OF ELDERS – MERU SOUTH....1ST INTENDED INTERESTED PARTY

KATHANGARI PROFESSIONAL ASSOCIATION...................2ND INTENDED INTERESTED PARTY

ATIRIRI BURURI MAGUNDU MA CHUKA.............................3RD INTENDED INTERESTED PARTY

THONA NAa IBAGA CLAN..4TH INTENDED INTERESTED PARTY

RULING

1. This ruling concerns a Notice of Preliminary Objection dated 19th March, 2019 which is in the following format.

Notice of preliminary objection

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that at the hearing of Notice of Motion dated 18th February 2019, the Respondent shall object to the same and urge this honourable court to strike it out together with the petition herein dated 18th February 2019 with costs on the following grounds;

1. THAT this Honourable Court lacks jurisdiction to entertain both the Petition and the application herein.

2. THAT the Petitioner has failed to plead its case with the reasonable precision in framing of issues in constitutional petitions as laid down in ***Anarita Karimi Njeru v Republic*** rule.

3. THAT the said Petition and application do not raise a constitutional matter as defined by the High Court in **Peter Mungai Ngengi v Mama Ngina Kenyatta and Another [2015] eKLR** capable of being heard by any court.

4. THAT the Petitioner herein lacks the capacity to bring the said Petition.

5. THAT the delineation of the boundaries of the Kathwana Municipality is vested in institutions other than the Respondents and consequently the Petitioner has sued the wrong institutions.

6. THAT the Petition is barred by the political doctrine question.

7. THAT the Petition is bad in law as the members of the Petitioner are asking this court to review the political decision of the 2nd Respondent and it lacks jurisdiction to do so because of the political question doctrine.

8. THAT the Petitioner is guilty of approbating and reprobating the issue of public participation.

9. THAT the governance of Tharaka Nithi County is vested in the County Government of Tharaka Nithi as constituted by the Constitution and not in elders of the Chuka Community or Atiriri Bururi Ma Chuka Trustees and therefore, the Petition contravenes Article 2 (3) of the Constitution which bars the challenging of the validity and illegality of the Constitution.

10. THAT the Petition is bad for being based on the doctrine of indigenousness which is antithetical to the Republic of Kenya.

11. THAT the Petition is bad for raising moot issues namely how constituencies, boundaries are to be drawn and how urban areas are likely to grow in future.

DATED at NAIROBI this ....19th ..... day of ....March ,........... 2019

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KAMAU KURIA & COMPANY

ADVOCATES FOR THE 1ST DEFENDANT

2. The Notice of Preliminary Objection (hereinafter referred to as "The PO") was canvassed by way of written submissions. The 1st and 2nd respondents who are the Preliminary Objection's proponents filed the following submissions:-

RESPONDENTS' SUBMISSIONS ON THEIR NOTICE OF PRELIMINARY OBJECTION DATED AND FILED ON 19TH MARCH, 2019.

Part 1 – Introduction

1. Before this Honourable Court is the Petitioner's Petition dated 18th February, 2019, which is supported by the supporting affidavit of Gitari Kea sworn on 18th February, 2019. In it, the Petitioner is seeking the following prayers –

1. A declaration do issue that the acts by the Respondents in hiving Mariani ward, its Locations Kithangari and Karingani and its sub locations (Mariani and Karongoni) from Chuka Township to Kathwana Municipality and Itugururu to Kathwana as unlawful, illegal, unreasonable and null and void.

2. An order of temporary injunction do issue restraining the Respondents from publishing County or a gazette notice of the decision to include the boundaries of Mariani ward, its locations and sublocations and Itugururu as part of the

333km square area or thereabouts as Kathwana Municipality pending the hearing and determination of this Petition.

3. A declaration that the Respondents act of enlarging/delineating new boundaries of Kathwana are unwarranted and inconsistent with statute.

4. A declaration that the Chuka people have a right to their boundaries as they are because they have a historical significance.

2. Together with the Petition, the Petitioner filed an application for conservatory orders dated 18th February, 2019,supported by the affidavit of Gitari Kea sworn on 18th February, 2019. In it, the Petitioner has sought the following prayers –

1. Spent

2. An order of Temporary Injunction do issue restraining the Respondents from publishing County or a Gazette Notice of the decision to include the boundaries of Mariani Ward, its locations and sub-locations and Itugururu as part of the 332km square area or thereabouts as Kathwana Municipality pending the hearing and determination of this Petition.

3. In the alternative and without prejudice to prayer 2 above, the Respondents be ordered to adopt the previous regime and or County Government, County Assembly Resolution of conferring municipality status on Kathwana with an area of 2km squared.

4. The Respondents do pay the costs of this application.

3. The said application was filed under a Certificate of Urgency and on 19th February, 2019, the following orders were made –

1. That application is not certified urgent.

2. That an order of temporary injunction be and is hereby issued restraining the Respondent from publishing County or Gazette Notice of the decision to include the boundaries of Mariani Ward, its locations or sub-locations and Itugururu as part of the 332 km square are or thereabouts as Kathwana municipality, pursuant to provisions of section 63 of the Civil Procedure Act in the interest of justice until the next court date.

3. That application to be heard on 27th March, 2019 at Chuka ELC.

4. That service be effected.

4. The Respondents have filed a Notice of Preliminary Objection seeking to strike out the Petition and application on the following grounds –

12. THAT this Honourable Court lacks jurisdiction to entertain both the Petition and the application herein.

13. THAT the Petitioner has failed to plead its case with the reasonable precision in framing of issues in constitutional petitions as laid down in *AnaritaKarimiNjeru v Republic* rule.

14. THAT the said Petition and application do not raise a constitutional matter as defined by the High Court in Peter MungaiNgengi v Mama Ngina Kenyatta and Another [2015] eKLR capable of being heard by any court.

15. THAT the Petitioner herein lacks the capacity to bring the said Petition.

16. THAT the delineation of the boundaries of the Kathwana Municipality is vested in institutions other than the Respondents and consequently the Petitioner has sued the wrong institutions.

17. THAT the Petition is barred by the political doctrine question.

18. THAT the Petition is bad in law as the members of the Petitioner are asking this court to review the political decision of the 2nd Respondent and it lacks jurisdiction to do so because of the political question doctrine.

19. THAT the Petitioner is guilty of approbating and reprobating the issue of public participation.

20. THAT the governance of Tharaka Nithi County is vested in the County Government of Tharaka Nithi as constituted by the Constitution and not in elders of the Chuka Community or AtiririBururi Ma Chuka Trustees and therefore, the Petition contravenes Article 2 (3) of the Constitution which bars the challenging of the validity and illegality of the Constitution.

21. THAT the Petition is bad for being based on the doctrine of indigenousness which is antithetical to the Republic of Kenya.

22. THAT the Petition is bad for raising moot issues namely how constituencies, boundaries are to be drawn and how urban areas are likely to grow in future.

5. On 27th March, 2019, parties allowed for the joinder of the above mentioned interested parties pursuant to their application dated 26th March, 2019, and directions given to hear the said Petition. The court made the following orders –

a. The Preliminary Objection shall be heard first.

b. The application for persons to be enjoined as interested parties was allowed.

c. The two Respondents are to file their submissions on the objection within 7 days and serve them on the Petitioners and the Interested Parties.

d. The latter are to file their written submissions within 7 days of being served.

e. The highlighting shall take place on 7th May, 2019.

f. Interim orders are extended till then.

6. Pursuant to the directions made in this suit on 27th March, 2019, the Respondents file these submissions in order to dispose of its Notice of Preliminary Objection dated 27th February, 2019.

Part 2 – Notice of Preliminary Objection

7. The Respondents submit that that the leading authority on the nature of a preliminary objection is found in **Mukisa Biscuits v West End [1969] EA 696**. In that case, the East African Court of Appeal held that a preliminary objection raises a pure question of law. Law JA stated the law as follows:-

> **So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.**

Hon Justice Newbold stated as follows,

> **A preliminary objection is in the nature of what used to be a demurr. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.**

A copy of that decision is attached to these submissions.

8. In **John Mundia Njoroge and 9 Others –v- Cecilia Muthoni Njoroge and Another [2016] eKLR**, this Honourable Court outlined the grounds which could form the basis of a preliminary objection,

> **In my view, a preliminary objection can be raised on any of the following grounds:-**
>
> **a. Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;**
>
> **b. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;**
>
> **c. Insufficient specificity in a pleading;**
>
> **d. Legal insufficiency of a pleading (demurrer);**
>
> **e. Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; and**
>
> **f. Pendency of a prior action or agreement for alternative dispute resolution.**

A copy of that authority is attached to these submissions.

9. In the case before the court, the Respondents submit that as they shall demonstrate below, this Honourable Court lacks jurisdiction to hear the Petition herein.

Part 3 – The Law

Jurisdiction of this Honourable Court to hear Petitions

10. The Respondents submit that litigants, like the Petitioner and the Interested Parties herein, who approach this Honourable Court must be clear which jurisdiction, he/she intends to invoke as the court will down its tools as soon as it discovers that it lacks jurisdiction to hear the dispute before it. Please see **Owners of the Motor Vessel Lillian S v Caltex Kenya [1989] KLR 1**.In that case, Hon. Justice Nyarangi said this of jurisdiction and the consequence of a court holding that it lacks jurisdiction:-

> **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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.**

The respondents submit that the petitioner has not brought itself within the provisions of Article 162(2)(b) of the Constitution and consequently, its petition and notice of motion are for striking out with costs. That Article reads as follows:-

> **162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**
>
> (a) employment and labour relations; and
>
> **(b) the environment and the use and occupation of, and title to, land.**

The Respondents further submit that both the petition and the notice of motion do not concern either the environment and use and occupation of or title to land. They concern the delineation of the boundaries of Kathwana Municipality and such disputes are for determination by the High Court exercising its powers under Article 165(3) and (5) of the Constitution. These provide as follows:-

> **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;**
>
> **(c) jurisdiction to hear an appeal from a decision of a tribunalappointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
>
> **(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —**
>
> **(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
>
> **(ii)the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
>
> **(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
>
> **(iv) a question relating to conflict of laws under Article 191; and**
>
> **(e) any other jurisdiction, original or appellate, conferred on it by legislation.**
>
> **...**
>
> **(5) The High Court shall not have jurisdiction in respect of matters—**
>
> **(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
>
> **(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).**

11. In chapter 3 of his well-known book, *American Constitutional Law*, Prof. Lawrence H. Tribe has in the second edition, discussed jurisdiction in American constitutional law. A copy of that chapter is attached to these submissions. At page 67, he refers to the limitation of the court through a description of the subjects which the court has jurisdiction to entertain and also the parties. He also discusses at pages 69-93, the doctrine of justiciability; this doctrine encompasses such principles as the refusal of the court to make declarations to, assume jurisdiction over matters which are allocated to such other branches of the government as the legislature or

the executive, refusal to decide issues which are not ripe or those which are mute. As we show below, these doctrines apply with the result that the petition and the notice of motion are for striking out with costs.

12. In Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, **Application No. 2 of 2011 [2012] eKLR**, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:-

> **"(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of theInterim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law." (Emphasis provided).**

A copy of that decision is attached to these submissions.

13. The Respondents further submit that from the prayers sought in the Petition, the petition itself, the supporting affidavit and the annextures to the latter, show that what is in dispute is one that involves boundaries of Kathwana Municipality whose establishment as a municipality and delienation of boundaries are governed by the Urban Areas and Cities Act, 2011, philosophical questions and political questions which the constitution has allocated to the High Court and the County Assembly among other institutions. Article 162(2)(b) of the Constitution which has been interpreted by the Supreme Court in **Republic -v-KarisaChengo and 2 Others [2017] eKLR,**provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.This court exercises a specialist, narrower jurisdiction than the one exercised by the High Court.

14. The Respondents submit that in **Republic –v-KarisaChengo and 2 Others [2017] eKLR**, the Supreme Court had this to say of the jurisdiction of the High Court against those of the Environment and Land Court and Employment and Labour Relations Court,

> [50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of "equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other". Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words:
>
>> "By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word 'status'. The intentions of the framers of the Constitution in that regard are obvious given the choice of… words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court."

A copy of that decision is attached to these submissions.

It is clear that Article 162 of the Constitution categorizes the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Each court, therefore, has its own jurisdiction and no court can usurp the jurisdiction of the other.

15. It is undisputed that Article 22 of the Constitution grants every person the right to move this Honourable Court to move where it has jurisdiction within the meaning of Article 162(2)(b), to enforce fundamental rights and freedoms contained in the Bill of Rights which have been denied, violated or infringed or, is threatened. Hon. Justice Majanja made this clear in **United States International University (USIU) v Attorney General [2012] eKLR**where he stated as follows:-

> **42. Article 19 provides that the Bill of Rights is an integral part of the framework of Kenya's democratic state and is the framework for social, economic and cultural policies. The necessity of having the Industrial Court deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. The fact that the content of labour rights protected under Article 41 is reiterated in the Employment Act, 2007 and Labour Relations Act, 2007 does not create a separate wall of jurisdiction for the High Court and the Industrial Court as contended by MrObura. The reiteration of these rights is merely a consequence of Article 19 and recognition of their universality and indivisibility in application is all spheres of labour and employment law.**
>
> **43. The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically**

prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).

44. In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gcaba v Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and thejurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011.

A copy of that authority is annexed to these submissions.

16. In that case Hon. Justice Majanja was dealing with a labour dispute, whilst in this case, the Court is dealing with a matter brought to the Environment and Land Court which is established by Article 162(2) of the Constitution. What His Lordship said applies with equal force. If, therefore, a matter falls within the jurisdiction of this court and the issue of contravention of fundamental rights arise, the court will determine them and indeed has done so in many cases. A case in point is **Chuka ELC Petition No. 9 of 2017; KaimbaMangaara vs. Tharaka Nithi County Government**. This court held as follows in that case:-

20. I issue judgment in favour of the Petitioner and against the Respondent in the following terms:

1. It is hereby declared that the Petitioner’s Rights to property, to fair administrative action and to human dignity have been infringed upon by the Respondent.

2. I find that the Petitioner is entitled to prompt compensation for Plot No. 77 Marimanti Market at the current market value and mesne profits for 22 years since 1996.

3. For infringement of his right to own property, the Petitioner is awarded Kshs. 2,500,000/=, for the infringement of his right to fair administrative action, he is awarded Kshs.1,500,000/= and for infringement of his right to human dignity, he is awarded Kshs.1,500,000/= making a total of Kshs.5,500,000/= .

4. The Government or County Valuer, Tharaka Nithi County, whichever name is applicable, is ordered to visit within 3 months of this judgment, Plot No. 77 Marimanti Market with a view to quantifying the market value apposite to the plot and to assess mesne profits that have accrued from the same plot from 1996 to date.

5. Interest on all monetary awards, including the current value of plot No.77 Marimanti Market and assessed mesne profits from 1996 to the date of this judgment, is awarded to the petitioner from the date of this judgment until payment in full.

6. Costs shall follow the event and are awarded to the Petitioner.

17. Legal Notice No. 117 of 2013 requires that the enforcement of fundamental rights be done through petitions. Rule 4 provides as follows:-

Contravention of rights or fundamental freedoms.

4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—

(i) a person acting on behalf of another person who cannot act in their own name;

(ii) a person acting as a member of, or in the interest of, a group or class of persons;

(iii) a person acting in the public interest; or

(iv) an association acting in the interest of one or more of its members.

Part 4 - The Facts

18. As stated above, the respondents accept, for the purposes of their objections, that all the facts stated by the petitioner are correct. Paragraphs 5-12 of the petition show clearly that the grievance of the petitioner is that the Urban Areas and Cities Act, 2011, is allegedly not being or has not been applied to Kathwana Municipality correctly. Under the subheading '*particulars of infringement*' the Petitioner refers to sections 87 and 91 of the County Governments Act and section 4 of the Urban Areas and Cities Act.

19. The grievance, according to the second paragraph 5 (**as there are two**), is that the former Government of Tharaka Nithi approved of a two kilometer radius as the area within which Kathwana Municipality should be located and that the present government has now put in motion a plan to annex "*Mariani Ward from Chuka Township and create new boundary delienation, a 332 kilometer square in a bid to create Kathwana Municipality*". The petitioner avers that there is no need for the bigger area because there is no requirement for a population threshold. That averment is based on **two** things. **The first** is the Urban Areas and Cities Act, 2011. The **second** thing is the 2017 Urban Areas and Cities (Amendment)Bill, 2017. Section 9 of the former which has been enacted pursuant to article 184 of the Constitution, establishes the criteria for establishing a municipality. Below we set out the provisions of both Article 184 of the constitution and section 9 of the 2011 Act:-

184. (1) National legislation shall provide for the governance and management of urban areas and cities and shall, in particular—

(a) establish criteria for classifying areas as urban areas and cities,

(b) establish the principles of governance and management of urban areas and cities; and

(c) provide for participation by residents in the governance of urban areas and cities.

(2) National legislation contemplated in clause (1) may include mechanisms for identifying different categories of urban areas and cities, and for their governance.

Section 9:-

9. Conferment of municipal status

(1) The county governor may, on the resolution of the county assembly, confer the status of a municipality on a town that meets the criteria set out in subsection (3), by grant of a charter in the prescribed form.

(2) The procedure set out under section 8(1) to (4) shall apply with necessary modifications to the conferment of municipal status to a town, except that the conferment shall be done by the county governor.

(3) A town is eligible for the conferment of municipal status under this Act if the town satisfies the following criteria—

a. has a population of at least between seventy thousand and two hundred and forty-nine thousand residents according to the final gazetted results of the last population census carried out by an institution authorized under any written law, preceding the grant;

b. has an integrated development plan in accordance with this Act;

c. has demonstrable revenue collection or revenue collection potential;

d. has demonstrable capacity to generate sufficient revenue to sustain its operations;

e. has the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule;

f. has institutionalised active participation by its residents in the management of its affairs;

g. has sufficient space for expansion;

h. has infrastructural facilities, including but not limited to street lighting, markets and fire stations; and

i. has a capacity for functional and effective waste disposal.

(4) Notwithstanding the provisions of subsection (1), the county governor shall confer the status of a special municipality to the headquarters of the county even where it does not meet the threshold specified under subsection (3)(a).

20. In 2017, the Senate passed the Urban Areas and Cities (Amendment) Act and referred it to the National Assembly for debate and passing. That Bill has not been passed and brought into operation. It is significant in that section 9 sought to amend section 9 of the 2011 Act by relaxing the criteria to be applied to a town like Kathwana which does not have the threshold of a population of 250,000 as required by section 9 of the 2011 Act. It required deleting subsection 3 and substituting, therefore, a provision to the effect that despite subsection 3, every headquarters of a county government shall be conferred the status of a municipality, whether or not it meets the criteria for a classification as a municipality. Section 6 of that Bill provides as follows:-

6. Section 9 of the principal Act is amended by -

(a) deleting subsection (3) and substituting therefor with the following-

Subject to subsection (4), an urban area may be classified as a municipality under this Act, if the urban area satisfies the following criteria -

has a resident population of a least fifty thousand residents ;

has an integrated urban area development plan in accordance with this Act and other existing laws;

has the capacity to effectively and efficiently deliver its services to its residents and has in existence, the services provided in the First Schedule;

has demonstrable good system and records of prudent management.

by inserting the following new subsection immediately after subsection (3)-

Despite subsection (3), every the headquarters of a county government shall be conferred the status of a municipality, whether or not it meets the criteria for a classification as a municipality.

21. Section 4 of the Bill made provisions for drawing up of boundaries of municipalities. It provides as follows:-

4. The principal Act is amended by inserting the following new sections immediately after section 4 -

4A. (l) Delineation of the boundaries of urban areas or cities may be initiated by the Cabinet Secretary or by the relevant county government making a written request to the Cabinet Secretary to appoint the ad hoc committee in the manner provided under subsection (2).

(2) The Cabinet Secretary shall, on receipt of the request under subsection (1) or on considering it necessary, appoint by notice in the Kenya Gazette an ad hoc committee to delineated the boundaries of an urban area or a city.

(3) The ad hoc committee appointed by the Cabinet Secretary under subsection (2) shall comprise-

(a) a representative of the Independent Electoral and Boundaries Commission, who shall be the chairperson;

(b) three representatives from the national government drawn from-

(i) the Ministry for the time being responsible for urban development;

(ii) the Ministry for the time being responsible for Environment;

(iii) the Ministry for the time being responsible for Agriculture;

(c) three representatives from the county govemment drawn from-

(i) the Department for the time being responsible for urban development;

(ii) the Department for the being responsible Environment;

(iii) the Department for the being responsible Agriculture; and

(d) two representatives from the following Professional Associations-

(i) Institute of Surveyors of Kenya; and

(ii) Kenya Institute of Planners.

(4) Where an ad hoc committee is to be appointed under sub section (2) -

(a) the governor shall nominate the three representatives referred to under subsection (3(c) for appointment by the Cabinet Secretary; and

(b) each of the relevant Professional Associations shall nominate its representative referted to under subsection (3)(d) for appointment by the Cabinet Secretary.

Attached is a copy of the Bill which has been passed by parliament.

22. Section 60 of the Evidence Act, provides that:-

60. Facts of which court shall take judicial notice

(1) The courts shall take judicial notice of the following facts—

(a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;

(b) the general course of proceedings and privileges of Parliament, but not the transactions in their journals;

23. Section 36 of the 2011 Act provides for the preparation of Urban Areas and City Development Plan. It reads as follows:-

36. Objectives of integrated urban areas and city development planning

(1)Every city and municipality established under this Act shall operate within the framework of integrated development planning which shall—

(a) give effect to the development of urban areas and cities as required by this Act and any other written law;

(b) strive to achieve the objects of devolved government as set out in Article 174 of the Constitution;

(c) contribute to the protection and promotion of the fundamental rights and freedoms contained in Chapter Four of the Constitution and the progressive realization of the socio-economic rights;

(d) be the basis for—

(i) the preparation of environmental management plans;

(ii) the preparation of valuation rolls for property taxation;

(iii) provision of physical and social infrastructure and transportation;

(iv) preparation of annual strategic plans for a city or municipality;

(v) disaster preparedness and response;

(vi) overall delivery of service including provision of water, electricity, health, telecommunications and solid waste management; and

(vii) the preparation of a geographic information system for a city or municipality;

***(e)* nurture and promote development of informal commercial activities in an orderly and sustainable manner;**

(f) provide a framework for regulated urban agriculture; and

(g) be the basis for development control.

(2) In addition to the objectives set out in subsection (1), an integrated urban or city development plan shall bind, guide and inform all planning development and decisions and ensure comprehensive inclusion of all functions.

(3) A county government shall initiate an urban planning process for every settlement with a population of at least two thousand residents.

24. In paragraph 5, the petitioner refers to sections 87 and 91 of the County Governments Act, which provide for citizen participation in County Governments. It has been held that where legislation is passed without public participation, it is null and void. This was in **Robert N. Gakuru& Others -v- Governor Kiambu County & 3 Others [2014] eKLR** and **Dricon Transporters Savings and Credit Co-operative Society Limited -v- County Government of Machakos & Another [2016] eKLR**.

25. In analyzing what connotes facilitation of public participation, Hon. Justice Odunga in **Robert N. Gakuru& Others -vs- Governor Kiambu County & 3 others [2014] eKLR** relied on the judge's sentiments in the Doctors for life case. The issue was dealt with by the Judge as follows:-

> **"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1) (a).This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution**

26. The judgment of Hon. Justice Odunga was upheld by the Court of Appeal upon the same being appealed against. It is, therefore, clear that the law as stated by this Honourable Court is now clear. Hon. Justice Chacha Mwita stated the law as follows:-

> **41. On appeal against the above decision, the court of Appeal affirmed the decision in *Kiambu County Government & 3 others v Robert N. Gakuru& Others* [2017] eKLR stating;**
>
> **[20]"…The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation,.."**

27. Learned **Honourable Justice Odunga** in the **Gakuru Case** also in addressing the issue of who and to what extent the issue of public participation ought to be determined relied on the same **Doctors for Life case** where the issue was dealt with as follows**:-**

> **"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs J observed in his minority judgment in New Clicks:**
>
>> **"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**
>>
>> **The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government's fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that "reasonable measures may be taken" to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if 'it is reasonable and justifiable to do so in an open and democratic society.' Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. "In dealing with the issue of reasonableness," this Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. 'In dealing with the issue of reasonableness,' this Court has explained, 'context is all important.' Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law- making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide**

meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision- making." This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate……."

28. In paragraph 6, the petitioner complains that the respondents to which it presented a memorandum in exercise of its right to participate in the governance failed to uphold its submissions which argued against extending the boundaries of Kathwana Municipality to Chuka. Its memorandum is annextures to the exhibit known as **CGK6**. Also other letters addressed to the 2nd Respondent contain similar comments. These are exhibits CGK2 and CGK3.

29. The petitioner annexes to its supporting affidavit, the report of the lands, housing and physical planning committee of Kathwana Municipality Urban Development Framework published in February, 2019 which shows that the petitioner's memorandum was considered and rejected.

30. The petitioner also annexes to the supporting affidavit, exhibit no. CGK7 which is titled "*Kathwana Municipality Urban Development Policy Framework 2018-2030*" that plan assumes, wrongly, that the 2017 bill had been passed.

31. In paragraph 7 of the petition, the petitioner accuses the respondents of contravening Articles 186 and 184 of the Constitution which, as seen above, deal with establishment of municipalities and public participation.

32. In paragraph 8, the petitioner lays bare its fears and avers as follows:

> **The petitioner contends that the respondents' action is political with the intended aim of anticipating a constituency split of Chuka Igamba ngombe and creation of population.**

33. In paragraph 9, the petitioner contends that the respondents have failed to consider population density and demographic trends, physical infrastructure, costs of administration, the views of communities affected and the object of devolution. In the same paragraph, the petitioner avers that the respondents have misapprehended sections 87-91 which govern public participation and section 9(4) of the Urban Areas and Cities Act. It wrongly assumes that the above quoted bill is law.

34. In paragraph 9 of the petition, the petitioner describes the perceived injury it claims it will suffer. The purported injury is that Chuka Town, which was founded in 1913, will be unable to meet the population criteria under section 9(3) of the Urban Areas and Cities Act, because a part of it will have been included in Kathwana Municipality. In part, the paragraph reads as follows:

> **Hiving off Mariani ward will result in loss of population threshold in the case the Urban Areas and Cities (Amendment) 2017 becomes law and the need is far greater if the act remains as the population threshold is a minimum of 70,000 people pursuant to section 3(a) of the Act aforesaid...**

35. In the supporting affidavit sworn by Mr. Gitari Keah, the deponent depones that he is the chairman of the petitioner which is a society registered under the Societies Act.

36. In paragraph 3, he depones that the 1st Respondent was in the process of conferring municipal status on Kathwana, its government headquarters.

37. In paragraph 5, he depones that the respondents have allegedly violated its constitutional rights under Article 136 and disregarded, among other provisions, section 9(4) of the Urban Areas and Cities Act and the provisions governing public participation.

38. In paragraph 6, Mr. Gitari Keah depones that Tharaka Nithi County is comprised of four sub-tribes namely Chuka, Tharaka, Muthambi and Mwimbi which he claims have cultural and historical differences which are zealously guarded and cherished.

39. In paragraph 7 he depones that because he assumes that the bill is the law, he claims that there is no requirement for a population threshold.

40. To that affidavit, Mr. Gitari Keah annexes the documents referred to above. The contents of these may be summarized as follows:

> a. paragraph 2 of exhibit CGK2 makes it clear that the petitioner's complaint is about deleanation of boundaries for Kathwana Municipality beyond the 5 kilometer square approved by Tharaka Nithi County Assembly;
>
> b. the same exhibit shows that the persons he calls 'elders' of Chuka community know the boundaries better than other institutions and they say that young leaders may not know the consequence of moving boundaries. The same document CGK2, says that an entity calling itself *Atiriri Bururi Ma Chuka Trustees* which allegedly is the representative body of the Chuka community, maintains that the wishes of the members should be sought when any decision is being taken;

c. the document called CGK3 describes the purported boundaries which should not be interfered with.

41. At page 31 of the Kathwana Municipality Urban Development Framework 2018-2030, there is a discussion of land tenure management. This reads as follows:

> **The land within the municipality is largely held under freehold tenure. 80% of the land is held under freehold tenure whilst 20% is held under customary land rights. This typography of land tenure implies an eventual conversion of the prevailing land rights into leasehold tenure system under the municipality framework.**

42. There is no allegation in the petition or the affidavit or annextures, that any individual's land rights, land ownership or occupation or use or title has been encroached upon by the respondents.

43. It is equally clear that the objection of the petitioner is to the delienation of Kathwana Municipality. It is respectfully submitted that the grievance of the petitioner or its members is as regards delienation of the boundaries of Kathwana Municipality Under Article 184 of the Constitution, under the Urban Areas and Cities Act and as proposed by the National government through the bill which was passed by the senate in 2017.

44. It is thus clear that according to the plain meaning of Article 162(b) and the decision of the Court of Appeal in **Republic vs. Karisa Chengo (supra),** if, which is denied, the petitioner has remedy, it can only be in a division other than the Environment and Land Court. This court is obliged to down its tools and require the petitioner to look for the appropriate court. This is because it lacks jurisdiction to hear both the petition and the notice of motion. Below, we consider other grounds on which the petition and the application are for striking out with costs.

Grounds 1 and 5: Lack of Jurisdiction over the Subject Matter of the Action or the person of the Defendant, improper venue or improper form or service of a writ of summons or a complaint

45. The Respondents submit that the Petitioner and the Interested Parties are complaining about both Kathwana municipality boundaries and also possible constituency boundaries involving Chuka Igamba-Ng'ombe Constituency. According to paragraph 8, they are happy with the present boundaries of Chuka Igamba-Ng'ombe constitutency. The Petitioner and Interested Parties do not want the altering of the boundaries involving the constituency such that Mariani ward, its locations Kithangarni and Karingai and its sub-locations will be taken away from Chuka Township to Kathwana Municipality and Itugururu to Kathwana. The task of establishing constituency boundaries is vested in the Independent Electoral and Boundaries Commission vide Article 88 of the constitution.

46. As stated above, this Honourable Court is empowered to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Section 13(2) of the Environment and Land Court Act discusses jurisdiction of this Honourable Court and states as follows,

> (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
>
> > a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
> >
> > b. relating to compulsory acquisition of land;
> >
> > c. relating to land administration and management;
> >
> > d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
> >
> > e. any other dispute relating to environment and land.

47. Article 89(5) and (6) of the Constitution provides as follows,

> (5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner mention in clause (6) to take account of –
>
> > a. geographical features and urban centres;
> >
> > b. community of interest, historical, economic and cultural ties; and
> >
> > c. means of communication.
>
> (6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more that –

a. forty percent for cities and sparely populated areas; and

b. thirty per cent for the other areas.

48. Article 89(10) of the Constitution provides that a person may apply to the High Court for review of a decision of the Commission made under this Article.

49. The Respondents submit that in **Law Society of Kenya Nairobi Branch v Malindi Law Society and 6 Others [2017] eKLR**, in following the Karisa Chengo decision held that, 'a judge appointed to serve in the specialized courts cannot administratively be transferred to serve in the High Court and vice versa. The High Court was, therefore, right in our view in holding that the Chief Justice has no mandate to transfer judges from the High Court to the specialized courts and vice versa.' A copy of that decision is attached to these submissions. Similarly, this Honourable Court cannot arrogate itself jurisdiction to hear this dispute having been appointed to serve in the specialized Environment and Land Court.

Ground 2: Insufficient specificity in a pleading: the Petitioner has failed to plead its case with the reasonable precision in framing of issues in constitutional petitions as laid down in *AnaritaKarimiNjeru v Republic* rule.

50. The Respondents submit that the rule in **Anarita Karimi Njeru v the Republic (1976 – 1980) 1 KLR 1272**, the Court of Appeal held that a person seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.

51. The Respondents further submit that in **Trusted Society of Human Rights Alliance v Attorney General and 2 Others [2012] eKLR**, this Honourable Court stated as follows as to the insufficient specificity of pleadings in Constitutional Petition,

> We do not purport to overrule **Anarita Karimi Njeru** as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.

A copy of that decision is attached to these submissions.

52. The Respondents submit that the Petitioner's petition does not identify the specific constitutional provisions which are alleged to have been violated by the Respondents. It is clear that the Respondents did not have sufficient notice of the violations due to the pleadings of the Petitioner and therefore, could not adequately prepare for this Petition and further, that the court is being invited to adjudicate on issues that are not appropriately phrased as justiciable controversies.

53. The Respondents further submit that it is settled law that a party is bound by its pleadings. As demonstrated in by t**he Court of Appeal in Independent Electoral and Boundaries Commission & Another –v- Stephen Mutinda Mule & 3 Others [2014] eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-**

> **"… the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998]MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The present Importance of Pleadings." The same was published in [1960] Current Legal Problems, at P174 whereof the author had stated-**
>
>> **'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings … for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….**
>
> **In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'**

A copy of that authority is attached to these submissions.

54. The Respondents further submit that the court itself is as bound by the pleadings of the parties as they are themselves and it is not the

duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. The Petitioners were required to set the agenda for the trial by its Petition and its failure to do so makes it difficult for the Respondents to respond to the same. This will then breach their right to a fair hearing under Article 50(1) of the Constitution.

55. The Respondents urge this Honourable Court to dismiss this Petition on this ground.

Ground 3: the said Petition and application do not raise a constitutional matter as defined by the High Court in Peter MungaiNgengi v Mama Ngina Kenyatta and Another [2015] eKLR capable of being heard by any court.

56. The Respondents submit that this Honourable Court in **Peter MungaiNgengi v Mama Ngina Kenyatta and Another [2015] eKLR** observed that there had been an increase in litigation in the constitutional arena but not all suits falls under constitutional litigation and held as follows,

> With such increased litigation space in the constitutional arena, the courts have also seen a plethora of ordinary litigation suits where the reliefs and remedies which would lie in ordinary common law remedies are being filed as constitutional matters. In this regard, courts have been vigilant to literally act as a colander and filter out those cases which do not truly fall into the realm of constitutional litigation but are simply so disguised and camouflaged. Thus in the case of **Hon. Uhuru Kenyatta –v- The Star Ltd [2013] eKLR** it was correctly pointed out by the court that not all disputes should attract a constitutional adjudication. Likewise civil matters which have been filed or ought to be filed in the ordinary civil or commercial courts ought not be adjudicated upon as issues of enforcement of fundamental rights and freedoms: see **Booth Irrigation –v- Mombasa Water Products (booth Irrigation No. 1) Nairobi Misc. 1052 of 2004** and also **Edwin Thuo –v- Attorney General & another Nairobi Petition No. 212 of 2011** (unreported). Where therefore exists an appropriate forum to address a party's grievance, the party should be appropriately directed.
>
> The result too of the foregoing is that parties coming to court on the basis of the Constitution and alleged violations of their fundamental rights must be able to succinctly lay out their case to enable the court sitting *qua* a constitutional court to assess whether the matter is genuinely a constitutional one: see **Anarita Karimi Njeru –v- The Republic [1980]KLR 1272** and **Trusted Society of Human Rights Alliance –v- Attorney General & 2 others [2012] eKLR**. With detailed and complete pleadings it is the court' duty to determine whether there is a constitutional matter: see the South African case of **NM & others –v- Smith & others [2000] 5 S. A 250**.
>
> I ascribe to the foregoing views and will only add that the court must be vigilant and not entertain every single Petition, notwithstanding the rather liberal and wide wording of Article 23 of the Constitution, when it is evidently apparent that the Petitioner's claim has recourse in ordinary common law remedies rather than constitutional remedies. Busy bodies should be shut out whilst parties with genuine constitutional grievances and concerns welcomed: see **Attorney General of Gambia –v- Njie [1961] AC 617**.

A copy of that decision is attached to these submissions.

57. As the Respondents demonstrate above and below, the dispute herein is not constitutional in nature and with the lack of specificity in the Petition, it is not clear in what manner the rights of the Petitioner shall be contravened or is being contravened.

58. For this reason, the Respondents urge this Honourable Court to strike out the Petition with costs.

Ground 4:*Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action*: The Petitioner herein lacks the capacity to bring the said Petition.

59. The Respondents submit that the Constitution limits the persons who may enforce the Bill of Rights at Article 22 as follows,

> 1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
>
> 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> > a. a person acting on behalf of another person who cannot act in their own name;
> >
> > b. a person acting as a member of, or in the interest of, a group or class of persons;
> >
> > c. a person acting in the public interest; or
> >
> > d. an association acting in the interest of one or more of its members

60. Further, Article 258 of the Constitution provides as follows,

> (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
>
> (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

61. The Respondents further submit that in **Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 Others [2018] eKLR**, this Honourable Court held as follows as regards locus standi of the Petitioners in that case,

> **Thus a person who wishes to enforce the Constitution must fit into one of the categories set out in the two Articles and must specify the capacity in which they have come to court under either of the two constitutional provisions.**

A copy of that authority is attached to these submissions.

62. The Respondent submit that the Petitioner and Interested Parties were required to prove either their interest or in whose interests it is representing. Further, as seen above, due to lack of specificity of pleadings, it is not clear what, if any, rights or fundamental freedoms of its or those it represents have been contravened or threatened to be contravened.

63. The Respondents further submit that in **Omondi v National Bank of Kenya Ltd and Others [2001] 1 EA 177**, the High Court held as follows,

> **Bearing that definition in mind, I agree with counsels for the Defendants that both the objection as to the legal competence of the Plaintiffs to sue and pleas of *res judicata* are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections. … And I hasten to add that in determining both points, the court is perfectly at liberty to look at the pleadings and other relevant matter in its records. It is not necessary to file affidavit evidence in those matters as contended by counsel for the Plaintiff.**

A copy of that decision is attached to these submissions.

64. As the Petitioner and Interested Parties demonstrated, they have not demonstrated in what way their rights have been infringed or shall be infringed by the conferment of municipality status where the headquarter of the County is situated. Further, they have not demonstrated what persons have appointed them to speak on their behalf.

65. The Respondents submit that the Petitioner and Interested Parties herein lack locus standi to institute this Petition and the same should be dismissed.

Ground 5 of the Notice of Preliminary Objection: The delineation of the boundaries of the Kathwana Municipality is vested in institutions other than the Respondents and consequently the Petitioner has sued the wrong institutions.

66. Further, Article 184 of the Constitution provides as follows,

(1) National legislation shall provide for the governance and management of urban areas and cities and shall, in particular—

a. establish criteria for classifying areas as urban areas and cities,

b. establish the principles of governance and management of urban areas and cities; and

c. provide for participation by residents in the governance of urban areas and cities.

(2) National legislation contemplated in clause (1) may include mechanisms for identifying different categories of urban areas and cities, and for their governance.

67. According to section 9(1) of the Urban Areas and Cities Act, the county governor may, on the resolution of the county assembly, confer the status of a municipality on a town that meets the criteria set out in subsection (3), by grant of a charter in the prescribed form. Section 9(4) provides that notwithstanding the provisions of subsection (1), the county governor shall confer the status of a special municipality to the headquarters of the county even where it does not meet the threshold specified under subsection (3)(a).

68. Section 12(1) of the Urban Areas and Cities Act provides that the management of a city and municipality shall be vested in the county government and administered on its behalf by (a) a board constituted in accordance with section 13 or 14 of this Act; (b) a manager appointed pursuant to section 28; and (c) such other staff or officers as the county public service may determined. Further section 12(2) (a) of the said Act provides that the board of an area granted the status of a city or municipality under this Act shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of suing and being sued.

69. The Respondents submit that the Municipal Board ought to have been sued and not the Respondents herein as the said Board has capacity

to sue and be sued.

Grounds 6 and 7: The Petition is barred by the political doctrine question and also bad in law as the members of the Petitioner are asking this court to review the political decision of the 2nd Respondent and it lacks jurisdiction to do so because of the political question doctrine.

70. The Respondents submit that the decision on conferment of municipal statue and drawing up the boundaries for that reason is a decision taken by the Governor and County Assembly pursuant to section 9 of the Urban Areas and Cities Act.

71. The Respondents further submit that in **Onyango & 12 Others v Attorney Genera & 2 Others (2008) 3 KLR (EP) 84**, discussed the political doctrine principle and stated as follows,

> We find and hold that the exercise of constituent power is a primary right of the people and no group, Parliament, the Executive or the Judiciary has the right to take the peoples right away. Indeed although Courts have the power to adjudicate on all disputes which are brought before them constituent power is one power they cannot fetter.
>
> For the above reasons we find that this Court has no mandate to injunct the right or to declare that it should not be exercised. The Court would have to sit on the Moon or on the Planet Mars to be able to hold otherwise. In addition the process of generating and assembling the proposal and of giving content and substance to them is a political process and our finding on this is that the Court is not equipped to adjudicate on this part of the process under the political doctrine principle since it is also not justiciable and the process having taken place it is moot. What we think is important is the existence of popular consultations which are capable of commanding the existence, loyalty and obedience of the people because the acceptance and legitimacy of the ultimate product that is a new Constitution will depend on the degree or the extent of the consultations.

A copy of that decision is attached to these submissions.

72. The Respondents submit that in **William Odhiambo Ramogi& 2 Others v Attorney General & 6 Others [2018] eKLR**, the High Court discussed the non justiciablility of political question doctrines,

> 69. It was held in **Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374** at 418, that a challenge is referred to as being non-justiciable because its nature and subject matter is such as not to be amenable to the judicial process. The “justiciability” doctrine is rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including a properly limited role of the courts in a democratic society. One justiciability concept is the “political question” doctrine —according to which courts should not adjudicate certain controversies because their resolution is more proper within the political branches. …
>
> 82. It is evident from the case law that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional commitment and mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of majoritarian decision-making rather than by a deliberative constitutional judgment. This will include situations where a Court lacks the capacity to develop clear and coherent principles to govern litigants’ conduct

A copy of that decision is attached to these submissions.

73. As it has been demonstrated, the issue of delineation of boundaries for the conferment of municipality status of Kathwana Municipality is a political decision. It is the decision of the Governor and the County Assembly. In **Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others [2016] eKLR**, the High Court had this to say of political question doctrine,

> The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. 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. It must not decide on what the future holds either. 35. It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.

74. For the foregoing reason, the Petitioner urges this Honourable Court to dismiss the Petition and the application.

Ground 8: The Petitioner is guilty of approbating and reprobating the issue of public participation.

75. The Respondents submit that while the Petitioner have annexed their memorandum on Kathwana Municipality Development Plan and the other objections filed by the Interested Parties and the same were heard and considered and the same is covered in the Report of the Lands, Housing and Physical Planning Committee on the Kathwana Municipality: Urban Development Policy Framework and Minority Report on the Kathwana Municipality: Urban Development Policy Framework.

76. The Respondents further submit that Article 118(1)(b) of the Constitution provides that the Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees. In **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**, the High Court had this to say of public participation,

> Once a petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation. And because it is the constitutional duty of Parliament to ensure that there is public participation, the Attorney General as the respondent, has the legal burden to disprove this contention. This is so because it is a constitutional requirement that the National Assembly conducts its affairs in compliance with the constitution.
>
> The constitutional text in Article 118(1) under the sub title "public Participation" states in plain language that Parliament should conduct its business in an open manner, and its sittings and those of its committees should be open to the public and it should "facilitate public participation and involvement in the legislative and other business of parliament and its committees."
>
> Public participation as a national value was central in the legislative process. The respondent apart from merely stating and orally so, that there was public participation and that the court has to look at the entire legislative process, and that the Act was published on 22nd July 2016, has not done anything or adduced any other material evidence to demonstrate that indeed Article 118(1) (b) of the constitution was complied with during the enactment of the impugned Act. Publication of the Act alone could not and did not amount to Public Participation in terms of Article 118(1) (b).

A copy of that decision is attached to these submissions.

77. The Respondents further submit that the Petitioner and Interested Parties herein are guilty of approbating and reprobating on the issue of public participation. In **Dr Sunny Samuel v Simon M. Mbwika and Another [1998] eKLR**, the Court of Appeal had this to say of approbating and reprobating,

> **In not too dissimilar circumstances, Mustafa J.A. (as he then was) delivering the first judgment of the Court of Appeal for East Africa in the case of INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION VS. KARIUKI GATHECA [1977] KLR 52 was inclined to the view that the applicant had in effect affirmed and approbated the judgment, and had enjoyed and continued to enjoy the full benefit of it and would be precluded from attacking it. Law V-P, agreed in every respect with the judgment prepared by Mustafa, J.A. and so did Musoke J.A.**

A copy of that decision is attached to these submissions.

78. The Respondents submit that the Petitioner and Interested Parties were heard and their views taken into consideration and declined and other recommendations made to accommodate some views. It was found that most of the allegations raised by the Petitioner and Interested Parties were from persons who were not to be directly or indirectly affected by the drawing up boundaries for the municipality status.

79. The Respondents urge this Honourable Court to dismiss the Petition on this ground.

Grounds 9 and 10: The governance of Tharaka Nithi County is vested in the County Government of Tharaka Nithi as constituted by the Constitution and not in elders of the Chuka Community or Atiriri Bururi Ma Chuka Trustees and therefore, the Petition contravenes Article 2 (3) of the Constitution which bars the challenging of the validity and illegality of the Constitution and Also the based on the doctrine of indigenousness which is antithetical to the Republic of Kenya.

80. The Respondents submit that objections of the Petitioner and the Interested Parties are based on the doctrine of indigenousness. The complaint is that the intended conferment of municipal status of Kathwana Municipality will interfere with the Chuka tribe and the Respondents will be cursed if they move the boundaries of Chuka land. It is alleged that some areas are considered sacred places where people meet to make sacrifices to their gods.

81. The Respondents further submit that Article 2(1) and (3) of the Constitution provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and the validity or legality of this Constitution is not subject to challenge by or before any court or any State organ respectively.

82. The Respondents submit that the governance of Tharaka Nithi County is vested in the County Government of Tharaka Nithi as constituted by the Constitution and not in elders of the Petitioner and Interested Parties.

83. Article 3 of the Constitution provides that (1) every person has an obligation to respect, uphold and defend this Constitution; (2) any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.

84. For this reason, the Respondents urge this Honourable Court to uphold this ground of the Notice of Preliminary Objection.

Ground 11 - The Petition is bad for raising moot issues namely how constituencies, boundaries are to be drawn and how urban areas are likely to grow in future.

85. The Respondents submits that the Petition and application is based on an amendment Bill to the Urban Areas and Cities Act. The said Act has not been published and therefore, has not commenced application. The Petitioner shall be given an opportunity to have its concerns dealt with at the appropriate time and before the correct forum. However, it is clear that the Petition before this Honourable Court has been rendered moot by supervening events.

86. The Respondents further submits that in **Zubeda Waziri v Speaker of the National Assembly & 4 Others [2017] eKLR**, the High Court discussed mootness and stated as follows,

> Generally, a case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small.[2] Put differently, the presence of a "collateral" injury is an exception to mootness.[3] As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot.[4] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.
>
> A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.
>
> There is in place a law enacted pursuant to the provisions of the constitution and the said law was in place before the institution of this petition, hence, the petition is premised on pure ignorance of the existence of the said legislation. The petition before me does not challenge the constitutionality or otherwise of the said legislation, hence, there is no real controversy before the court. A case is moot and academic when there is no actual controversy between the parties or useful purpose that can be served in passing upon the merits.[5]
>
> The existence of the said law renders this petition a mere academic exercise and /or of no useful purpose. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it at the time when the suit was instituted. Time and again, it has been expressed that a court should not act in vain.[6]
>
> No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. In the instant case, a consideration of the petition based on an allegation that parliament has failed to enact a legislation which is not true renders the argument academic, cosmetic and of no utilitarian value or benefit as the aim of the petition serves no useful purpose.[7]
>
> A suit is academic or of no useful value where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic and useless if it is not related to practical situations.[8]
>
> A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner would be entitled to, and which would be negated by the dismissal of the petition. Courts generally decline jurisdiction over such cases or dismiss it on the ground of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.[9]
>
> Applying the above time tasted and refined principles of law in cases of this nature to the instant case, it is obvious that there is no unresolved justiciable controversy in the present petition. Courts generally only have subject-matter jurisdiction over live controversies, when a case becomes moot during its pendency, OR it raises no justiciable issue, the appropriate first step is a dismissal of the case.[10]In view of my findings above, and in particular, considering that there exists a law enacted pursuant to the constitutional requirement, I find no justifiable grounds to proceed to determine this petition on the alleged failure to enact the said legislation, hence this petition fails on this ground alone.

A copy of that authority is attached to these submissions.

87. It is clear from the foregoing that the Petition and application herein are moot and therefore, the Respondents' Notice of Preliminary Objection should be upheld.

Part 5 – Costs of the Petition and Application?

88. The Respondents submit that costs of the suit are awarded at the discretion of the Court or Judge and whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially. Please see **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR.** The Supreme Court further held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action. A copy of that decision is attached to these submissions.

89. The Respondents further submit that other principles to be considered in the awarding of costs are as stated by Justice Odunga in **Republic v Communication Authority of Kenya and another ex – parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR** in which he held as follows:

> In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See **Hussein Janmohamed& Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and ***Mulla (12th Edn) P. 150.***

A copy of that decision is attached to these submissions.

90. The Respondents submit that they have been dragged to defend these proceedings instituted against them by the Petitioner and supported by the Interested Parties which are not specified.

Part 6 – Conclusion

91. For the foregoing reasons, the Respondents urge this Honourable Court to uphold the Notice of Preliminary Objection and dismiss the Petition and the application herein.

DATED at Nairobi this …........2nd …. day of …..............April………… 2019

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KAMAU KURIA & COMPANY

ADVOCATES FOR THE RESPONDENTS

3. The petitioner's submissions are reproduced herebelow.

PETITIONER'S SUBMISSIONS

(In respect to the Respondent's Notice of Preliminary Objection dated 19th March 2019)

May it please your Lordship,

1. The subject of these submissions is the Respondent's Notice of Preliminary Objection dated 19thMarch 2019. The Preliminary Objection raises eleven grounds upon which the Respondents are seeking the Petition to be dismissed.

2. The notice of Preliminary Objection is opposed by the Petitioner through its replying affidavit dated 5th April 2019.

1. **Background of the Application**

3. The circumstances that led to the filing of the instant Preliminary Objection is the Petition dated 18th February 2019 and filed by the Petitioner seeking:

a. A declaration does issue that the acts by the Respondents in hiving Mariano Ward, its locations Kithangani and Karingani and its sublocations (Mariani and Karongoni) fromChuka Township to Kathwana Municipality and Itugururu to Kathwana as unlawful, unreasonable and null and void.
b. An order of temporary injunction does issue restraining the respondents from publishing county or on a gazette notice of the decision to include the boundaries of <Mariani Ward, its locations and sublocations and Itugururu as part of the 333km square area or thereabouts as Kathwana Municipality pending the hearing and determination of this petition.
c. A declaration that the respondents act of enlarging/delineating new boundaries of Kathwana are unwarranted and inconsistent with statute.
d. A declaration that the Chuka people have a right to their boundaries as they are because they have historical significance.

2. **Issue for determination**

4. Your Lordship, we believe that the main issue for determination here is:

i. Whether the said Preliminary Objection raises a pure point of law.

3. **The law on Preliminary Objection**

5. The *locus classicus* on preliminary objections is the long standing jurisprudence set in the East Africa Court of Appeal decision in Mukisa **Biscuit Manufacturing Co. Ltd –vs- West End Distributors [1969] E.A 696** where at page 700 Law JA. stated as follows:

> "**…. a preliminary objection consists of a point of law** which has been pleaded, or which arises by clear implication out of pleadings, **and which if argued as a preliminary point may dispose of the suit."**

And at page 701, Sir Charles Newbold P. added as follows;

> "It (a preliminary objection) raises a pure point of law which is the argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion."

In the said Law,J.A. had this to say: " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought the exercise of judicial discretion. **The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop**."(emphasis added)

6. Your Lordship, from the above precedent, the crux of a preliminary objection is that it must be based on a pure point of law for it to be deemed as to have been properly raised. What then is a pure point of law?

7. While endorsing the Mukhisa Biscuits' jurisprudence on preliminary objections, Ombija J in the High Court decision of Oraro **vs Mbaja (2005) 1 KLR 141** enumerated what constitutes a point of law in the following words;

> "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 principle, a true preliminary objection which the Court should allow to proceed. Where 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 deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence….."

8. Therefore, it is trite law that a pure point of law cannot be raised if any fact raised in the pleadings has to be ascertained.

9. The position in Oraro has not been controverted even by the superior Courts of the land. In ***MehubaGelanKelil& 2 Others vs Abdulkadir Shariff Abdirahim& 4 Others (2015) Eklr,*** Gikonyo J while affirming the jurisprudence in Mukhisa Biscuits' Case rendered himself as follows;

> "I need not reinvent the wheel. It is trite law that a Preliminary Objection should be based pure points of law which do not require copious probing of evidence in order to ascertain."

10. The requirement that a pure point of law must be a fact that is not contested and that does not require to be ascertained has also been the clarion call of the apex court of the land. In **Aviation & Allied Workers Union of Kenya vs Kenya Airways Ltd & 3 Others (2015) eklr** the Supreme Court pronounced itself as follows;

> "Thus a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts [and that] the facts are deemed agreed as they are **prima facie** presented in the pleadings on record."

11. Your Lordship, it our humble submissions that the above referred exposition of judicial aphorism lead us to one major conclusion, that; a preliminary objection can only be properly raised where what is involved is a pure point of law. The question then that follows is, does the Respondent's preliminary objection raise a pure point of law? Our answer is an emphatic No! Why? All the grounds upon which the notice of preliminary objection is predicated upon are disputed issues of facts except grounds 1, 4 and 6 which raises issues of law.

12. It is our humble submission that for the Court to conclusively determine on the issue of its jurisdiction as raised in the Preliminary Objection, it must first satisfy itself that a dispute exists over the attempted actions of the respondents and that both the applicant and the respondent have some role in the dispute. Both of these facts, which are the crux of the Preliminary Objection, are heavily contested. In the circumstances, both facts miserably fail the test of 'a pure point of law' and as such should not be treated as preliminary points.

13. From the foregoing, the underlying disputed facts preclude the existence of a pure point of law and ultimately negates the impression that there is a proper preliminary objection before this Honorable Court. The Respondent's intention is to deny the Applicant a hearing before this Court.

A. **Jurisdiction of the Environmental and Land Court**

14. Article 162(2)(b) of the Constitution made provision for the establishment by Parliament of a Court with the status of the High Court to hear and determine disputes relating to the environment, use and occupation of, and title to land. The Environment and Land Court Act No. 19 of 2011 was enacted to give effect to Article 162(2) (b) of the Constitution.

15. The Environment and Land Court Act No. 19 of 2011 under section 13 makes provision for Jurisdiction of the Environment and Land Court established under Section 4 of the Act. Under section 13(2) it states

“……….. the court has power to hear and determine disputes relating to environment and land, including disputes-:

a. relating to environmental planning and protection trade, climate issues, land use

b. planning, title tenure, boundaries, rates, rents valuations, mining, minerals and other natural resources,

c. relating to compulsory acquisition of land,

d. relating to land administration and management,

e. relating to public, private and community land and contracts, chooses in action or other enforcements granting any enforceable interests in land, and any other dispute relating to environment and land.”

16. Section 13(3) confers jurisdiction on the Environment and Land Court to hear and determine matters relating to breach or violation of rights or fundamental freedoms relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

It provides: -

(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of or threat to rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

17. The Court has stated in **Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR** has stated that the ELC Court is vested with powers to handle constitutional violations. The Court held thus,

“Having regard to the Constitutional provision under Article 165(3) (b) and section 13(3) of the Environment and Land Court it is our view that in Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms in as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and in our view a party can bring such matters either before the High court and/or before this court. Thus we find that this court has the jurisdiction to deal with the petition before us and we disallow the ground of objection that this court has no jurisdiction to hear and determine this matter.”

18. Your Lordship, the issue before this honorable court concerns infringement and violations of constitutional rights which has an adverse effect on land boundaries within the concerned county. This is an issue that is well within the jurisdiction of this Honorable Court.
19. In any other case even where the jurisdiction is found to be wanting in a meritorious setting, the practice has been not to dismiss the suits but to transfer them for hearing on merits at the right forum as shown by **Samson Onyango Ngonga vs. Public Service Commission & 5 others (2013) eKLR** and **United States International University vs. Attorney General, Constitutional Petition No. 170 of 2012.**

B. Does the Petitioner have capacity to bring this Petition?

20. Your Lordship, it is our humble submission that the Petition has *locus standi* as a Petitioner.
21. Article 22 of the Constitution provides that: -

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by: -

a. a person acting on behalf of another person who cannot act in their own name;

b. a person acting as a member of, or in the interest of, a group or class of persons;

c. a person acting in the public interest; or

d. an association acting in the interest of one or more of its members.

22. Article 22(2) (b) of the constitution does allow an individual or group of individuals to institute court proceedings claiming breach of a right or fundamental freedom in the Bill of Rights.

C. **Is this Petition a Political Decision barred by the Political Question Doctrine?**

23. Your Lordship, it is the Petitioner's humble submission that this Petition is not barred by the political question doctrine. The Petitioner is not seeking to review a political decision. Instead, the Petitioner is seeking this honorable court to protect the fundamental rights of the Petitioners from the infringements and violations by the respondents in their exercise of political power.

24. The Petitioner submits that the argument by the Respondent that the Petition is barred by the political question doctrine is a non-starter and academic. It is the Petitioner's humble submission that there is indeed an interplay between the doctrine of separation of powers and the political question doctrine, and the right to equal protection of the law and access to justice as fundamental rights and freedoms enshrined under the Constitution.

25. It is the Petitioner humble submission that the courts are vested with authority to intervene in both legislative process making and executive decision making by county executives where circumstances warrant such intervention.

26. In **Beatrice Kedeveresia Elachi v Nairobi City County Assembly Service Board & another [2018] eKLR** the Court held that it makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The court went ahead to state

> "*. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.*"

27. Your Lordship, Article 47 (1) of the Constitution of Kenya, 2010, provides that,

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

It is our humble submission that an administrative action by anyone including a state organ is unlawful and procedurally unfair if it fails to encompass the national values and principles of governance as enumerated under article 10 of the Constitution of Kenya, 2010.

28. Article 10(2) of the Constitution sets out the national values and principles of governance which bind everyone including state organs in their decision making processes while interpreting the Constitution and any other law. The national values and principles of governance include participation of the people, inclusiveness, accountability and transparency. The respondents have failed to apply the national values and principles of governance in their decision making. This is what has led to this suit.

29. The Petitioner submits that the underlying constitutional violations infringement before this court are a complaint of administrative overreach by the Respondents and rightly so opens up the same to this court's intervention.

30. In **Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; (2013) eKLR**, the Court, in that case signaled that it would be reluctant to question parliamentary procedures, as long as they did not breach the Constitution. In reference to Article 109 of the Constitution, which recognizes that Parliament is guided by both the Constitution and the Standing Orders in its legislative process, the Court thus held (paragraph 49 and 55):

> "Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution…."

31. Your Lordship, it is our humble submission that executive prerogatives do not override the Constitutional values. Even in their exercise of executive discretion, politicians must submit to constitutional values.

D. Is the Petition Justiciable?

32. Your Lordship, it is our humble submission that the Petition is justiciable. This is evidenced by the Respondents' submissions which have indeed gone ahead and controverted various facts regarding decision making by the respondents thus making full hearing the right fora for canvassing the issues raised in the Petition.

33. In **Wanjiru Gikonyo& 2 others v National Assembly of Kenya & 4 others [2016] eKLR,** Court held that the citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. This concept has found much favor in most jurisdictions. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness.

34. My Lord, by justiciability it is meant that a matter/issue is "proper to be examined in courts of justice" or "a question as may

properly come before a tribunal for decision" as stated in Black's Law Dictionary 9th Ed, pp 943-944.In other words, courts should only decide matters that require to be decided.

35. In **Wanjiru Gikonyo& 2 others v National Assembly of Kenya & 4 others [2016] eKLR** the Court upheld the United States of America Supreme Court decision in **Ashwander vs Tennessee Valley Authority [1936] 297 U.S 288,** which states that courts should only decide cases which invite *"a real earnest and vital controversy"*.

36. Thus, justiciability prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

37. Your Lordship, the Petitioner humbly submits that this matter is one that fully complies with the tenets of justiciability and is one that has complied with the principle of ripeness hence this Honorable Court must hear and determine.
38. The Petitioner humbly submits that the issue in question in this petition is not delimitation of any political or electoral boundary as alleged by the Respondents under Grounds 5, 10 and 11 of the Respondents notice of preliminary objection but the purported action of the Respondents in conferring municipal status while affecting the environmental, cultural and land boundaries of the Chuka people in clear violation of constitutional rights. Delimitation of boundaries is the exclusive jurisdiction of Independent Electoral Boundaries Commission as provided for under Article 89 of the Constitution. Thus the grounds alleged by the Respondents are moot, unnecessary and an overstretch of their imagination as the Petitioner has not raised any electoral units as alleged by Ground 11.
39. The Respondent has tried to arm twist this court and hoodwink it in introducing matters of costs in the submissions to be awarded to them. This matter is in court due to the actions of the Respondents which infringe on the Petitioner's constitutional rights and those of other members of the public and are in violation of the rule of law, democracy and participation of the people, good governance, integrity, transparency and accountability and values and principles of public service as envisaged in the Constitution hence the costs should be awarded at the court's discretion.
40. Finally, your Lordship it is instructive to note the sentiments in **Attorney General vs Isaiah Muturi Mucee (2018) Eklr** ,Chuka ELC. Petition No. 2 of 2018, where the learned judge his Lordship P.M Njoroge was clear and categorical when he correctly noted in paragraph: 12…. "All the authorities they have proffered are good authorities in their circumstances and facts. However, no one case is congruent to another to a degree of mathematical certitude….."

We humbly Submit, and, Most Obliged, Your Lordship.

DATED AT CHUKA this …5th …day of……April,………..2019

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WAKLAW ADVOCATES

ADVOCATES FOR THE PETITIONER

4. The Interested Parties' are headed "PETITIONERS SUBMISSIONS", which heading may have been inadvertent. The submissions are reproduced herebelow.

<u>PETITIONER'S SUBMISSIONS</u>

(In opposition to the Respondent's Notice of Preliminary Objection dated 19th March 2019)

May it please your Lordship,

A. **INTRODUCTION**

41. The subject of these submissions is the Respondent's Notice of Preliminary Objection dated 19thMarch 2019. The preliminary objection raises eleven grounds upon which the Respondents are seeking the Petition to be dismissed.

42. The notice of preliminary objection is opposed by the Interested Parties' Joint response to the Notice of Preliminary Objection dated 9th April 2019

43. The circumstances that led to the filing of the instant Preliminary Objection is the Petition dated 18th February 2019 and filed by the Petitioner seeking:

e. A declaration does issue that the acts by the Respondents in hiving Mariano Ward, its locations Kithangani and Karingani

and its sublocations (Mariani and Karongoni) from Chuka Township to Kathwana Municipality and Ituguruu to Kathwana as unlawful, unreasonable and null and void.

f. An order of temporary injunction does issue restraining the respondents from publishing county or on a gazette notice of the decision to include the boundaries of <Mariani Ward, its locations and sublocations and Itugururu as part of the 333km square area or thereabouts as Kathwana Municipality pending the hearing and determination of this petition.

g. A declaration that the respondents act of enlarging/delineating new boundaries of Kathwana are unwarranted and inconsistent with statute.

h. A declaration that the Chuka people have a right to their boundaries as they are because they have historical significance.

B. ISSUES FOR DETERMINATION

44. Your Lordship, the interested parties humbly submit that the issues for determination before this honorable court are:

ii. Whether the notice of preliminary objection before this Court raises a pure point of law.

iii. Whether the Petitioner's petition raises a justiciable issue.

iv. Whether the Respondents are entitled to costs.

1. Whether the Notice of Preliminary Objection raises a pure point of Law

45. My Lord, the interested parties humbly submit that the Respondent's preliminary objection does not raise a pure point of law.

46. Your Lordship, the *locus classicus* on preliminary objections is the long standing jurisprudence set in the East Africa Court of Appeal decision in **Mukhisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors [1969] E.A 696** where at page 700 Law JA. stated as follows:

> **"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

And at page 701, Sir Charles Newbold P. added as follows;

> ***"A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".***

47. Your Lordship, according to **Mukhisa Biscuits'** jurisprudence, a Preliminary Objection is based on an issue of law. The facts thereof must be outrightly clear, unchallenged and which do not require the Court to ascertain their authenticity. The jurisprudence of Mukhisa Biscuits has been innumerably endorsed and refined by superior courts of the land.

48. A proper preliminary objection should not be based on disputed facts or facts which need to be ascertained by normal rules of evidence. It must be based on established legal principles. This position was enumerated in **National Rainbow Coalition (NARK Kenya). v Independent Electoral and Boundaries Commission (I.E.B.C.) & 3 others [2017] eKLR** where Justice Mativo, while endorsing the Mukhisa Biscuits' jurisprudence, held that;

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

49. Your Lordship, what then is a pure question of law? To answer this question, Justice Mativo went ahead to pronounce himself thus;

> In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

50. My Lord, having satisfied ourselves as to the requirements of a preliminary objection, the question then is, does the respondents' preliminary objection raise a pure question of law? Our answer is a firm NO! Why?

51. Your Lordship, the Preliminary objection is extensively predicated upon issues of facts that are vehemently disputed. With the exception of grounds 1,2 and 4, all other grounds raised by the respondents are issues of facts which must be ascertained.

Particularly, grounds 5, 6, 7, 8, 9, 10 and 11 are complete factual miscomprehensions of the substance of the Petitioner's Petition and which this honorable court should have no regard to at all.

52. From the foregoing, the underlying disputed facts preclude the existence of a pure point of law and ultimately negates the impression that there is a proper preliminary objection before this Honorable Court. The Respondent's intention is to deny the Applicant a hearing before this Court.

a. Does this Court have jurisdiction to hear and determine this case?

53. My Lord, in opposition to ground 1of the preliminary objection, it is the interested parties' humble submission that this Court is the proper and right forum for hearing and determination of this matter. Article 162(2)(b) of the Constitution made provision for the establishment by Parliament of a Court with the status of the High Court to hear and determine disputes relating to the environment, use and occupation of, and title to land. The Environment and Land Court Act No. 19 of 2011 was enacted to give effect to Article 162(2) (b) of the Constitution.

54. The Environment and Land Court Act No. 19 of 2011 under section 13 makes provision for Jurisdiction of the Environment and Land Court established under Section 4 of the Act. Under section 13(2) it states

> "……… the court has power to hear and determine disputes relating to environment and land, including disputes-:
>
> f. relating to environmental planning and protection trade, climate issues, land use
>
> g. planning, title tenure, <u>boundaries,</u> rates, rents valuations, mining, minerals and other natural resources,
>
> h. relating to compulsory acquisition of land,
>
> i. relating to land administration and management,
>
> j. relating to public, private and community land and contracts, chooses in action or other enforcements granting any enforceable interests in land, and any other dispute relating to environment and land."

55. Section 13(3) confers jurisdiction on the Environment and Land Court to hear and determine matters relating to breach or violation of rights or fundamental freedoms relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

It provides: -

> (3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of or threat to rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

56. In **Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR** the Court stated that the ELC Court is vested with powers to handle constitutional violations. The Court held thus,

> "Having regard to the Constitutional provision under Article 165(3) (b) and section 13(3) of the Environment and Land Court it is our view that in Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms in as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and in our view a party can bring such matters either before the High court and/or before this court. Thus we find that this court has the jurisdiction to deal with the petition before us and we disallow the ground of objection that this court has no jurisdiction to hear and determine this matter."

57. Your Lordship, the issue before this honorable court concerns infringement and violations of constitutional rights which has an adverse effect on land boundaries within the concerned county. This is an issue that is well within the jurisdiction of this Honorable Court.

b. Does the Petitioner have locus standi in this case?

58. My Lord, in opposition to ground 4 of the respondents' preliminary objection, it is the interested parties' humble submission that the Petitioner has *locus standi* as a Petitioner.

59. Article 22 of the Constitution provides that: -

> (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
>
> (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by: -
>
> e. a person acting on behalf of another person who cannot act in their own name;

f. a person acting as a member of, or in the interest of, a group or class of persons;

g. a person acting in the public interest; or

h. an association acting in the interest of one or more of its members.

60. Article 22(2) (b) of the constitution does allow an individual or group of individuals to institute court proceedings claiming breach of a right or fundamental freedom in the Bill of Rights.

c. Is the Petition Justiciable?

61. Your Lordship, it is our humble submission that the Petition is justiciable. This is evidenced by the Respondents' submissions which have indeed gone ahead and controverted various facts regarding decision making by the respondents thus making full hearing the right fora for canvassing the issues raised in the Petition.

62. The doctrine of justifiability is elucidated by the Black's Law Dictionary 9th Ed, pp 943-944 which defines justiciability as "**proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision**"

63. The Interested Parties submits that the alleged constitutional violations that have been brought before court are ones relating to the irregularity occasioned by the Respondents hence this court must come in to right the wrongs as the matter is fully compliant with the doctrine of justiciability.

64. The Interested parties submit that in opposition to the Respondents assertion that the issue is outside the scope of this court as an issue before the court must be ripe, through a factual matrix, for determination.

65. The Interested Parties submit that this matter is one that fully complies with the tenets of justiciability and is one that has complied with the principle of ripeness.

66. The court in **John Harun Mwau& 3 others V Attorney General & 2 others [2012] eKLR** stated as follows:

> "We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."

67. Later in **Martin Nyaga Wambora v Speaker of the County Of Assembly Of Embu & 3 Others [2014] eKLR**, the court observed as follows:

> "It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.'

68. The Interested parties submit that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.

69. In the present circumstances, the crisp question for determination is whether the court is obliged to determine the question as to the constitutional validity of the actions of the Respondents to alter boundaries thus interfering with the social and cultural heritage of the residents without engaging, involving or taking into consideration the views of the governed.

70. In **Jesse Kamau & 25 Others –v- Attorney General Misc. Application 890 of 2004**, the court dedicated a great part of the judgment to the exploration of the doctrine of justiciability and rendered itself as follows:

> "B. THE POLITICAL QUESTION, JUSTICIABILITY, RIPENESS AND MOOTNESS
>
> > On Ripeness pp 80 - 81 Tribe says: "In some cases the constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish a concrete controversy than upon the general development or underlying facts. For example litigants alleging that a government action has effected an unconstitutional "taking" without just compensation" are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe"….Still even in situations where an allegedly injurious event is certain to occur, (a court) may delay resolution of constitutional question until a time closer to the actual occurrence of the disputed event when a better factual record might be available "Essentially, the complaints and the allegations or questions raised by the Applicants in the Originating Summons are anchored in Section 66 of the Constitution. It is this section which is being challenged and impugned. It is the Section to be declared discriminatory, unconstitutional, inconsistent with the Constitution, null and void and of no effect. It is the Section sought to be expunged… In the case of Anarita Karimi Njeru vs the Republic (No 1 [1979] KLR 154 the court's attention was drawn to a text and commentary on the Constitution of India where the author says: - "In the United States, it has been established that constitutional questions must be raised "reasonably" that is at the earliest practicable moment. As a result of this rule, a constitutional right may be forfeited in a criminal as well as civil case by the failure to make timely assertion of the

right before a tribunal having jurisdiction to determine it."
… Mr. Orengo also referred the court to the discussion of the doctrine of the political question and justiciability in American Constitutional Law by Laurence H. Tribe. *The views expressed are both appropriate for consideration and are persuasive. Professor Tyler summarizes the constitutional view of the doctrine of the political question as grounded in the assumption that there are constitutional questions which are inherently non-justiciable and that these practical questions, it is said concern matters as to which departments of government, other than the courts or perhaps, the electorate as a whole must have the final say, that with respect to these matters, the judiciary does not define constitutional limits…*
On the question of Ripeness (of issues for adjudication) and the courts' competence to issue declaratory orders, Hon. Orengo submitted that the issue at hand must not only be ripe for determination but must also not be either academic or hypothetical. He referred us to the excerpts from the case of Blackburn vs Attorney – General and Justice Ringera's remarks in the Njoya case that one of "the most fundamental aspects of the court's jurisdiction is that we are not an academic forum and we do not act in vain does indeed resonate in line with authorities and legal texts." The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. Stamp LJ in Blackburn vs Attorney General (supra) states at p.138 3 h J "It is the duty of this court in proper cases to interpret those laws when made; but it is no part of this court's function or duty to make declarations in general regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are partly hypothetical". In Matalinga and Others vs Attorney General [1972] E.A. 578 Simpson J held: Before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with present interest in supporting it."In the Matalinga case, the Plaintiffs (representatives of an unincorporated association) had sued the Attorney General for a declaration that certain government employees must be treated equally on the grounds that they were being discriminated against, and for an order that the Director of Personnel review and rectify salary structures.
The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable. It was also contended that the jurisdiction to give a declaratory judgment must be exercised "sparingly" with great care and jealously and "with extreme caution." (Emphasis added)

71. The Interested Party submits that the this petition is rightly before court under the justiciability doctrine as held in **Hon. Kanini Kega –v- Okoa Kenya Movement & 6 Others HCCP No. 427 of 2014** the court expressed itself as follows:

> "[82] Therefore whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action. As was held in the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If public officers fail to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review."

72. Your Lordship, the Petitioner humbly submits that this matter is one that fully complies with the tenets of justiciability and is one that has complied with the principle of ripeness hence this Honorable Court must hear and determine.

73. Your Lordship, the Respondents have viciously contested the issue of public participation. The respondents have, at Paragraph 76 of their submissions, confirmed that public participation is indeed key to decision making in governance and is part of the national values as under Article 118 (1)(b). However, the respondents, at paragraph 78 of their submissions, have admitted to discriminatingly allowing views and blatantly disregarding the views of the residents.

74. The Interested Parties humbly submit that they are the most directly affected by the decisions of the Respondents hence they should have been consulted. In **Mui Coal Basin Local Community & 17 Others v Permanent Secretary Ministry of Energy & 15 Others [2015] e KLR** and upheld in **Okiya Omtatah Okoiti v County Government of Kiambu [2018] eKLR** the court observed that,

> "Public participation did not mean that everyone must give their views, which is impracticable. rather that there ought to be evidence of "intentional inclusivity" in the participation program and which, on the face of it, took into account the principle that **"those most affected by a policy, legislation or action must have a bigger say: and their views more deliberately sought and put into account."** That notwithstanding, there is no attendant requirement that each individual's views will be included in the final policy or law: the public authority has no duty to accept any and every view, the opposite of which would effectively neutralize and stall the exercise of the authority's mandate."

75. In **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** the Court enumerated practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case. The Court pronounced itself thus;

> **"First,** it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012).** In relevant portion, the Court stated: "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

Sixthly, *the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."*

76. The Interested Parties submit that the Respondents have controverted the issue of public participation under Paragraph 76. hence Court should hear and determine this question.

77. The Interested party submits that the argument propounded by the Respondent that the Petition is barred by the political question doctrine is a false as the matter is apolitical.

78. Therefore, the question is whether a certain category of persons in this matter who are the interested parties have a right to equal protection of the law (Article 27) and to initiate proceedings where violations are threatened can be limited until after the alleged violation or threatened violation of constitutional rights have been perfected when Article 22 contemplates a party approaching the Court on assertion of threats of violation or infringement of fundamental rights.

79. The Interested Party submits that there is a nexus between the doctrine of separation of powers and the political question doctrine and the right to equal protection of the law and access to justice as enshrined rights and fundamental freedoms.

80. The Interested Party submits that decisions of the Executive and the Legislative arms of government are open to review bin the hallowed courts of justice.

81. On the question of separation of powers and privilege, the Court of Appeal, in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** considered the scope of application of the separation of powers doctrine, and adopted the High Court's standpoint in the following terms: -

"[Separation of powers] must mean that the Courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy, as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions…."

"[I]n a jurisdiction such as ours in which the Constitution is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by [the] Standing Orders which have been given constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case."

82. The Interested Parties submit that the Constitution is supreme and so are the rights enshrined in it. This was affirmed in **Okiya Omtatah and 3 Others v. Attorney-General and 3 Others** where the Court held that

"To agree with the National Assembly that this Court cannot interrogate its work will amount to saying that the National Assembly can fly beyond the reach of the radar of the Constitution. That is a proposition we do not agree with. Our view is that all organs created by the Constitution must live by the edict of the Constitution."

83. The assertion by the Respondents that this matter should not be handled by this court is thus a nonstarter and should be treated with the contempt it deserves.

84. Your Lordship, on the issue of costs, the interested parties humbly submit that the same is left to the discretion of the Court.

85. From the foregoing, it is crystal clear that there are underlying disputed facts which preclude the existence of a pure point of law and ultimately negate the impression that there is a proper preliminary objection before this Honourable Court. The Respondents' intention is to deny the Petitioner a hearing before this Court. The Interested Parties humbly pray that the Court dismissed the Respondents' Notice of Preliminary Objection dated 19th March 2019 and sets down the Petition for hearing and determination.

Most Obliged Your Lordship

DATED AT CHUKA this ……10th ……day of…………April,………..2019

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WANJA & KIRIMI ADVOCATESLLP

ADVOCATES FOR THE INTERETSED PARTIES

5. The Respondents' reply to the petitioner's and Interested Parties' submissions is reproduced herebelow.

RESPONDENTS' SUBMISSIONS IN REPLY TO THE PETITIONER AND INTERESTED PARTIES' SUBMISSIONS ON THEIR NOTICE OF PRELIMINARY OBJECTION

Part 1 – Introduction

1. In reply to the Petitioner's submissions filed herein on 9th April, 2019 and Interested Parties' submissions herein on 11th April, 2019 both relating to the Respondents' Notice of Preliminary Objection, the Respondents reiterate their submissions filed herein on 2nd April, 2019.

2. Hereinafter, the Petitioner's submissions filed herein on 9th April, 2019 are referred to as the Petitioner's submissions, the Interested Parties' submissions filed on 11th April, 2019 are referred to as the Interested Parties' submissions and the Respondents' submissions filed herein on 2nd April, 2019 are referred to as the Respondents' submissions.

3. The further affidavits of Mr. Gitari Kea sworn on 5th April, 2019 on behalf of the Petitioner and Mr. Isaac Mugo Rugani sworn on 10th April, 2019 on behalf of the Interested Parties are misconceived. When a Preliminary Objection is taken on the basis that the facts as stated by the Petitioner are correct, no further facts from the Petitioner or Interested Parties are admissible. Please see paragraph 7 of the Respondents' submissions on ***Mukisa Biscuits v West End***. The Petitioner and Interested Parties are trying to correct defects in the Petition and supporting affidavit through the backdoor. The court has no jurisdiction to entertain such affidavits. The Respondents urge this Honourable Court to expunge it from the record.

Part 2 - The Respondent's Case in Sum

4. The Respondents' case in sum is that –

a. as demonstrated partly by the prayers which the Petitioner has sought and partly by the Petition and supporting affidavit, the Petitioner is aggrieved by the delineation of the boundaries of the proposed Kathwana Municipality and seeks remedies of injunctions and declarations which are consequential to declaring the purportedly delineated boundaries being declared unlawful, illegal, unreasonable, null and void; the Respondents submit that the boundaries of cities, municipalities, towns and market centres established under the Urban Areas and Cities Act as amended by the Urban Areas and Cities (Amendment) Act, 2019 are different from boundaries of parcels of land owned by persons and registered under either the Land Registration Act, 2012 or the former Acts of Parliament governing registration, namely, the Government Lands Act, Registration of Titles Act, the Land Titles Act and Registered Lands Act, all of which were repealed by the Land Registration Act, 2012; the Respondents submit that adjudication of disputes on boundaries under the Urban Areas and Cities Act like those of constituency boundaries and wards established by the Independent Electoral and Boundaries Act under Article 89 of the Constitution can only be adjudicated upon by the High Court in exercise of its jurisdiction under Article 165(3)(d) of the Constitution and not by the Environment and Land Court established under Article 162(2)(b) of the Constitution;

b. as held by the Supreme Court in the **Karisa Chengo** case, this court is a specialist one and handles only disputes concerning environment and the use and occupation of and title to land; it has no jurisdiction to entertain disputes touching delineation of boundaries of cities, municipalities, towns and market centres; we urge this Honourable Court to apply the rule of construction of statutes which requires that words be given their plain meaning and effect; Article 162(2)(b) of the Constitution reads as follows,

> **(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**
>
> **(b the environment and the use and occupation of, and title to, land.**

The Petitioner has not presented before this Honourable Court a dispute between it or its members and the Respondents touching the environment and the use and occupation of, and title to, land; its concern is about inclusion of the locations mentioned in declaration no. 1 into Kathwana Municipality when it is established in future. For the reasons we give below, the Petitioner is engaging in shadow boxing. No Kathwana Municipality has been established as required by the provisions of sections 9 and 10 of the Urban Areas and Cities Act.

c. Even if the Petitioner had filed in the High Court and not in the Environment and Land Court, it was bound to fail or would be struck out for being a purely academic exercise because it is based on the wrong assumptions **first** that the Urban Areas and Cities Amendment Bill 2017 became the law as proposed and further that, the Respondents had implemented it. Section 6 of the said Bill, a copy of which is attached to these submissions, proposed that section 3 of the Urban Areas and Cities Act, 2011 be deleted and be replaced by a provision that required that a municipality be established where a resident population was of at least 50, 000 residents as opposed to 250, 000 residents in the Urban Areas and Cities Act, 2011; it further required that a new subsection 4 (b) introduced to create a unique or special municipality which did not have to comply with the criteria that applied to the other municipalities when the headquarters of a county government were established in it; that provision read as follows,

Despite subsection (3), every headquarters of the County Government shall be conferred the status of a municipality whether or not it meets the criteria for a classification as a municipality.

The Respondents took the actions complained of on the assumption that the Bill was the law. However, it is only on 12th March, 2019 that the Urban Areas and Cities (Amendment) Act was assented and the date of commencement of the said Act was set for 28th March, 2019. Copies of the 2011 Act, the Senate Bill and the 2019 Amendment Act are attached to these submissions.

d. there are significant differences between the Senate Bill and the 2019 Amendment Act; the **main** difference is that the proposed amendments in the Bill to section 9 were rejected with the consequence that all actions based on the Bill are null and void;

e. as amended, the Act requires that the delineation of boundaries of urban areas and cities which include a municipality be done by an ad hoc committee which is established by a new section 4A of the Urban Areas and Cities Act; the significance of that is that no municipality can have boundaries delineated by an institution other than the ad hoc committee which has both national government and county government representatives; the great significance of this fact is that the organ for delineating boundaries which the Petitioner complains about has not been established and therefore, a debate of the boundaries it complains of is of academic nature because the task has not begun;

f. the Constitution requires that the people work with the Governor and the County Assembly when a municipality is being established under section 9 of the Urban Areas and Cities Act; section 87 and 91 of the County Government Act and Article 196 of the Constitution will ensure that there is public participation; the Governor and the County Assembly will take the political decision of establishing a municipality, an ad hoc committee will delineate its boundaries and the people will have the right to participate in that exercise; the Petitioner and its members should hold their horses, the time for establishing Kathwana Municipality is going to come;

g. as indicated in the introduction above, the Petitioner and Interested Parties have misconceived the nature of a preliminary objection; they have filed purported affidavits which are wholly unnecessary and illegal;

h. a suit like the one before the court may become moot or academic if some events occur during its pendency making it unnecessary for it to be prosecuted; the Petition before the court, as seen above, was filed on 18th February, 2019 on the wrong assumption that the Senate Bill was the law and the Petitioner contended that that law had not been applied correctly; it has now emerged that a different act from the Bill was assented on 12th March, 2019 and brought into force on 28th March, 2019; the Petitioner had, at all material times, had fear because of treating a Bill as an Act of Parliament;

i. as stated in the Respondents' submissions, the Petitioner and Interested Parties have rejected the institutions established by the Constitution and the Urban Areas and Cities Act for establishing Kathwana Municipality and want other institutions like elders to be involved; Article 184 of the Constitution envisages the enactment of the Urban Areas and Cities Act, 2011; the Act and the Constitution spell out all the institutions of the cities, municipalities, towns and market centres; the elders and other categories of people have no role to play in governance; the Petitioner and Interested Parties and their respective members are busybodies who have brought a political dispute to court;

j. the decision to establish a municipality or not is a political one and is not one to be canvassed in court; the Petitioners have representatives in the County Assembly;

k. a party cannot purport to provide particulars of its or his claim through submissions because so to do would breach the settled principle of law that cases must be based on pleaded facts and those who wish to rely on points which are not pleaded must first effect the amendment. The authority for this preposition is **Provincial Insurance Company of East Africa v Nandwa (1995 – 1998) 2 EACA 288** in which the following statement of law was accepted,

Cases must be decided on the issues on the record; and if it is desired to take other issues, they must be put on the record by amendment. In this present case, the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion, he was not entitled to take such a course.

A copy of that decision is attached to these submissions

Part 3 – Reply to the Petitioner's Submissions

5. The Respondents submit that as they demonstrate, the Petitioner's submissions filed herein on 9th April, 2019 are based on grave misapprehensions of the law.

6. Below, the Respondents reply to the said submissions using the same headings as the Petitioner in its submissions.

Law of Preliminary Objection

7. The Respondents submit that the contentions of the Petitioner that the Notice of Preliminary Objection does not raise a pure point of law are unfounded because of two reasons. **First,** both the Petitioner and Interested Parties admit that grounds 1, 2 and 4 raise pure question of law which qualify for hearing as preliminary objections. **Second,** they choose to ignore the principle of pleading on which the other grounds are based. That principle is that parties are bound by their own pleadings. The Respondents have accepted as correct the facts as deponed to by the Petitioner and on those basis have raised the objections in grounds 3 – 11, all the grounds are therefore available to be argued as preliminary objections.

8. As the Notice of Preliminary Objection filed and the law on preliminary objections as stated in **John Mundia Njoroge and 9 Others v Cecilia Muthoni Njoroge and Another supra** demonstrates that a preliminary objection can be raised on the issue of, among others,

> i. lack of jurisdiction over the subject matter of the action which is covered in grounds 1, 6, 7, 9 and 10 of the Notice of Preliminary Objection;
>
> ii. improper venue which is covered in grounds 5, 6 and 11 of the Notice of Preliminary Objection;
>
> iii. insufficient specificity in a pleading which is covered in grounds 2, 3 and 8 of the Notice of Preliminary Objection;
>
> iv. lack of capacity to sue, non-joinder or misjoinder of a party of a cause of action – grounds 4 and 5 of the Notice of Preliminary Objection.

As the Respondents' Notice of Preliminary Objection demonstrates the grounds fall among those and therefore, the Notice of Preliminary Objection raises pure points of law. **Please see paragraph 8 of the Respondents' submissions.**

9. The Respondents further submit that as held in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributor*** **supra**, the Notice of Preliminary Objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. The court considers the Notice of Preliminary Objection on the assumption that the facts as set out in Petitioner's supporting affidavit are correct. **Please see paragraph 7 of the Respondent's submissions.**

10. The Respondents submit that in paragraph 11 of its submissions, the Petitioner admits that, according to it, grounds 1, 4 and 6 of the said Notice of Preliminary Objection are pure points of law and therefore, the Notice of Preliminary Objection is properly before the court. The Petitioner is disputing the facts that are contained in its Petition as it is clear the Notice of Preliminary Objection is based on the said Petition and its supporting affidavit.

11. The Respondents further submit that contrary to the contention of paragraph 12 of the Petitioner's submissions, it is the Petitioner that sets out the agenda for determination before the court. It is not for the court to decide whether it has jurisdiction or satisfy itself that a dispute exists over the attempted actions of the Respondent and that both the Applicant and Respondent have some role in the dispute.

12. It is settled law that a party is bound by its pleadings. As demonstrated in by t**he Court of Appeal in INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER –Vs- STEPHEN MUTINDA MULE & 3 OTHERS *supra*, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-**

> **'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings … for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….**
>
> **In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'**

Please see paragraph 53 of the Respondents' submissions.

13. It is clear from that decision that this Honourable Court is as bound by the pleadings of the Petitioner as the other parties are themselves and it is not the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. **At this stage, the assumption is that the facts as stated by the Petitioner are correct and the court is bound to the Petition as drawn and filed by the Petitioner.**

14. In **Omondi v National Bank of Kenya Ltd and Others supra**, the High Court held that the objection as to the legal competence of the Plaintiffs to sue is a pure of law and in determining that point, the court is at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence in those matters as contended by the Petitioner's advocates. **Please see page 63 of the Respondents' submissions filed herein on 2nd April, 2019.**

15. The Respondents submit that the authorities referred to by the Petitioner under this heading state the law correctly but it is not applicable to the Petitioner in this case.

16. It is, therefore, clear that the Notice of Preliminary Objection is correctly before this Honourable Court and it must be decided before the court delves into the dispute.

Jurisdiction of the Environment and Land Court

17. The Respondent submits that the contention that the reference of 'boundaries' in section 13 (2) of the Environment and Land Court Act as set out in paragraph 15 of the Petitioner's submissions is wrong. That section applied to boundaries of parcels of land and not of delineation of boundaries of cities, municipalities, towns and market centres.

18. The Respondent further submits that the boundaries referred into that section are the boundaries of a parcel of land and not to the boundaries relating to the Urban Areas and Cities Act. It bears repeating that the ***Karisa Chengo*** case has spelt out the scope of the jurisdiction of this Honourable Court. The court cannot accept jurisdiction given to it by parties like the Petitioner and the Interested Parties. It can only act on the jurisdiction conferred on it by the Constitution and the Environment and Land Court Act. This Honourable Court has jurisdiction over boundaries over land but lack jurisdiction insofar as boundaries relating to municipalities, towns and cities.

19. Section 18(1) of the Land Registration Act provides that except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. Section 19(3) of the Land Registration Act provides that where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

20. The Respondents submit that prior to the enactment of the Environment and Land Court, disputes involving boundary disputes were heard by the Land Dispute Tribunals. According to section 3(1) of the Land Disputes Tribunal Act, subject to the said Act, all cases of a civil nature involving a dispute as to (a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land, shall be heard by a Tribunal established under section 4 of the said Act.

21. The Respondents further submits that section 31 of the Environment and Land Court repeals the Land Disputes Tribunal Act (No. 18 of 1990).

22. The Respondents submit that while it is undisputed that this Honourable Court is vested with power to handle constitutional violations insofar as the same relate to the environment and land disputes, it is clear that in this case, this Honourable Court lacks jurisdiction to hear disputes pertaining to delineation of boundaries for setting up municipalities which are not registered against any land and therefore, outside the jurisdiction of this Honourable Court. There can, therefore, be no constitutional violations impacted by these boundaries which will not be registered against any property.

23. By way of analogy, the Respondents refer to Article 189 of the Constitution which confers on IEBC the power to review the boundaries of constituencies and wards. The question arises as to whether anyone who is dissatisfied with the decision of the IEBC would bring his dispute to this court. The answer is in the negative.

24. The Respondent urges this Honourable Court to dismiss this Petition with costs.

Does the Petitioner have capacity to bring this Petition?

25. The Respondents submit that the Petitioner has failed to meet the requirements set out in Article 22 of the Constitution. In **Humphrey Makokha Nyongesa and Another v Communications Authority of Kenya and 2 Others** ***supra***, this Honourable Court held that a person who wishes to enforce the Constitution must fit into one of the categories in which they have come to court under either of the two constitutional provisions. The Bill of Rights spells out the fundamental rights in Articles 19 – 57 of the Constitution. The Petitioner which is supported by the Interested Parties has not brought itself within those Articles.

26. The Respondents further submit that the Petitioner and the Interested Parties are claiming that the particulars of infringement are violations of sections 87 and 91 of the County Governments Act and section 4 of the Urban Areas and Cities Act. These statutory provisions do not fall under the Bill of Rights which has been referred to above. They have not suffered any violations or infringements of their rights and fundamental rights to claim *locus standi* under Article 22 of the Constitution. Article 165(5)(3) of the Constitution takes away from the High Court the power to hear disputes which are to be heard by this Honourable Court. The corollary must be true and it is that this Honourable Court cannot adjudicate on disputes which fall outside Article 162(2)(b) of the

Constitution.

27. The Respondents submit that the Petitioner and the Interested Parties have not proved their interests or whose interests it is representing. Further, in view of the lack of specificity of pleadings, it is not clear, what, if any, rights or fundamental freedoms of it or those it represents have been contravened or threatened to be contravened.

28. It is therefore clear that this ground of the Notice of Preliminary Objection is for allowing.

Is this Petition a Political Decision barred by the Political Question Doctrine?

29. The Respondents submit that as they have demonstrated above, it is undisputed that the Petitioner's Petition is based on an Amendment Bill to the Urban Areas and Cities Act. To the extent that the Petitioner is challenging a political decision which has not been taken under section 9 of the Act, it is raising issues which are moot or academic.

30. The Respondents further submit that the law as stated in **Beatrice Kedeveresia Elachi v National City County Assembly Board and Another [2018] eKLR** as referred to in paragraph 26 of the Petitioner's submissions can be distinguished on fact and law. On fact, that case was dealing with the employment contract of the Petitioner who was the Speaker of the Nairobi City County Assembly which was being threatened with unlawful dismissal. The law applicable was different in that the Employment and Labour Relations Court in that that court is required to protect a contract of employment as if it were property as defined in Article 40 of the Constitution. The dispute herein involves boundaries that will not be registered on land but for the establishment of Kathwana Municipality.

31. The Respondents submit that it is difficult to understand the stand of the Petitioner on the issue of public participation. It is blowing hot and cold. In its Petition, the Petitioner admits that there was public participation albeit prematurely as the creation of Kathwana municipality is a project of the future after the 2019 commencement of the Urban Areas and Cities (Amendment) Act, 2019. It is disgruntled by the fact that its suggestions were denied and further, it was noted that it would not be affected by the delineation of boundaries for the intended Kathwana Municipality status.

32. As the Petitioner has correctly pointed out, the Supreme Court in **Speaker of the Senate and Another v Attorney General and 4 Others, Reference No. 2 of 2013 (2013) eKLR**, held that the courts would be reluctant to question parliamentary procedures as long as they did not breach the Constitution. As stated above on pleadings, the Respondents submit that the Petitioner was under a duty to ensure that it demonstrated any alleged breaches of the Constitution by the Respondents in conducting its parliamentary procedures. Similarly, the court will be reluctant to question the procedures of the County Assembly as long as they do not breach the Constitution. It has failed to discharge that duty as the Petition makes clear.

33. Section 107 of the Evidence Act provides as follows,

> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

34. Further, section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

35. As demonstrated above, section 9 of the Urban Areas and Cities Act vests in the political institutions primarily names the Governor and the County Assembly, the power to establish a municipality. It vests in the ad hoc committee the power to delineate boundaries of the municipality, it vests I the people the obligation to participate in the actions pertaining to establishment of the municipality. The Respondents hasten to add that these are projects of tomorrow because Kathwana Municipality is yet to be established in accordance with the law.

Is the Petition Justiciable?

36. The Respondents submit that as the High Court in **Wanjiru Gikonyo and 2 Others v National Assembly of Kenya and 4 Others supra**, held that it is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise givers and (a) ought not determine issues which are not yet ready for determination or (b) only of academic interest having been taken overtaken by events.

37. The Respondents submit that as stated above, the Petition was filed on 18th February, 2019 which was based on the amendment bill to the Urban Areas and Cities Act but the court will take judicial note of the fact that the President only assented to the said Amendment Act on 11th March, 2019.

38. Section 4A(1) of the Urban Areas and Cities (Amendment) Act, 2019 provides that delineation of the boundaries of urban areas or cities may be initiated by the Cabinet Secretary or by the relevant county government making a written request to the Cabinet Secretary to appoint the *ad hoc* committee in the manner provided under sub section (2). **It is worthy of note that according to section 9(1) of the Urban Areas and Cities Act provides that the County Governor may, on the resolution of the county assembly, confer the status of a municipality on a town that meets the criteria set out in subsection (3) by a grant of a charter in the prescribed form.** It is further worthy of note that according to the said Amendment Act, section 9(3) was deleted and substituted altogether and replaced with new provisions for the establishment of municipalities.

39. It is clear that the amendment bill was to assist the Respondents to implement the provisions of the Urban Areas and Cities Act in the delineation of the boundaries of municipalities, towns and market centres. The said Urban Areas and Cities Amendment Act was assented to on 12th March, 2019 and its date of commencement was 28th March, 2019. It is, therefore, clear that the Petition has now been rendered an academic exercise as the Respondent will be required to follow the procedure set out in the Urban Areas and Cities (Amendment) Act, 2019 and the Petitioner will be given an opportunity to raise its concerns during the undertaking of the process under that procedure.

40. The Respondents submit that the Petitioner herein finds itself in the same position as the Petitioner in **High Court Petition No. 38 of 2017: Dismas Wambola v Cabinet Secretary, Treasury and 5 Others**, where this Honourable Court considered the law of mootness which inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. The High Court stated the law as follows on mootness of the Petition,

> **A case or issue is moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case of a declaration on the issue would be of no practical value or use. In such instances, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally declined jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public or when the case is capable of repetition yet evading judicial review.** This exception could have been satisfied had the Petitioner amended the Petition to plead that the current Parliament was threatening or was intending to do the same mischief complained of against its predecessor. The 11th Parliament cannot execute then plan from home. This is what the Petitioner seems to be inviting this court to find. I decline the invitation.

A copy of that authority is attached to these submissions.

41. It is clear from the foregoing that there have been supervening events i.e. the President assenting to the Urban Areas and Cities (Amendment) Act which sets out the procedure to be followed in establishments of municipalities, towns and market centres. It bears repeating that the actions complained of by the Petitioner are based on a wrong assumption made by it and the Respondents that the Senate Bill stated the law, which it did not. The new procedure must be complied with by the Respondents and it is only where there that procedure is not followed that the Petitioner can challenge either the Act or the actions of the Respondents and other third parties in the appropriate proceedings and appropriate court which not the Environment and Land Court and at the appropriate time as the machinery for establishing Kathwana Municipality under section 9 of the Urban Areas and Cities Act has not been set in motion.

42. For the foregoing reasons, the Respondents urge this Honourable Court to find that the issues raised in the Petition have been filed in the wrong court and they are moot and proceed to strike out the Petition with costs.

Costs

43. The Respondents submit that according to section 13(7)(i) of the Environment and Land Court Act provides that in exercise of its jurisdiction under that Act, the court shall have power to make any order and grant any relief as the court deems fit and just including costs.

44. As stated, costs of the suit are awarded by the discretion of the court or judge whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially.

45. The Respondents further submit that section 27(1) of the Civil Procedure Act provides that subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; **and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:** Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

46. The Respondents urge this Honourable Court to grant them costs as prayed for.

47. For these reason, the Respondents urges this Honourable Court to uphold their Notice of Preliminary Objection and award them the costs for being dragged into these proceedings when the President had not assented to the Urban Areas and Cities (Amendment) Act, 2019.

Part 3 – Reply to the Interested Parties' Submissions

48. In reply to the Interested Parties' submissions, the Respondents reiterate their submissions filed herein on 2nd April, 2019 and their submissions above in reply to the Petitioner's submissions.

49. The Respondents submit that the Interested Parties' submissions are identical to those of the Petitioner and therefore, the Respondents reiterate their submissions above.

50. In sum, the Respondents submit as follows –

a. as stated above, **the Interested Parties, just like the Petitioner, admit that some grounds Notice of Preliminary Objection i.e. grounds 1, 2 and 4 raise pure issues of law** and therefore, the Preliminary Objection before this Honourable Court is proper; further, the remaining grounds are based on the Petition as filed by the Petitioner and all the parties to the Petition and the court are bound to the pleadings as drawn up by the Petitioner; in other words, even grounds 3 and 5 – 11 have been properly taken as preliminary objections;

b. the Interested Parties and the Petitioner, therefore, contradict themselves by claiming in one breath that the notice of Preliminary Objection does not raise pure questions of law and in another breath, they claim that certain grounds in the Preliminary Objection raise issues of pure law and therefore, can be heard;

c. on the question of jurisdiction and the reference of 'boundaries' in section 13(2)(b) of the Environment Land Court Act, the Respondents submit that these are boundaries to land and particularly, boundary disputes which were previously heard by the Land Dispute Tribunal; section 31 of the Environment Land Court Act provides that the Land Disputes Tribunal Act is repealed; as explained above, disputes touching boundaries of cities, municipalities, towns and market centres established under the Urban Areas and Cities Act are to be adjudicated upon by the High Court by virtue of Article 165(5)(3) of the Constitution;

d. it is also undisputed that this Honourable Court has jurisdiction to hear about violations and contraventions of the rights and fundamental freedoms but as seen above, this Honourable Court lacks jurisdiction to hear this dispute as the boundaries sought to be delineated shall not be registered against the property; they are just meant to set out the municipalities, towns and market centres; as the Petition demonstrates, the Petitioner is complaining of violations of sections 87 and 91 of the County Governments and section 4 of the Urban Areas and Cities Act under the subheading of 'particulars of infringement'; it would appear that, through the submissions of the Petitioner and those of the Interested Parties, it is purporting to vary that position; the law is clear that matters must be pleaded in pleadings and not through submissions;

e. on **locus standi of the Petitioner and Interested Parties,** the Respondents reiterate their submissions on the fact that both the Petitioner and the Interested Parties have failed to demonstrate what their interest is in the delineation of boundaries for establishment of municipalities, towns and market centres; as seen above, they are claiming that the particulars of infringement are violations of sections 87 and 91 of the County Governments Act and section 4 of the Urban Areas and Cities Act; they have not suffered any violations or infringements of their rights and fundamental rights to claim locus standi under Article 22 of the Constitution; to the extent that the Petitioner and the Interested Parties are relying on 87 and 91 of the County Governments Act, their claim in misconceived as it is only the Bill of Rights which is enforceable through a Petition and in any event, it would have to be a Petition enforcing fundamental rights Article 42 of the Constitution; the Petition before this Honourable Court is not one where it is complained that the rights of the Petitioner and Interested Parties under Article 42 of the Constitution have been contravened; that Article provides as follows,

f. as to the issue of **whether the Petition is justiciable**, the Respondents submit that the President assented the Urban Areas and Cities (Amendment) Act on 12th March, 2019 and the date of commencement was 28th March, 2019; the Petition herein was filed on 18th February, 2019 and is based on the amendment Bill of the Urban Areas and Cities Act; since the filing of the Petition, there are supervening events thereby defeating the purpose of hearing the said Petition; it has been rendered an academic exercise on one hand and on the other hand, it is premature in view of the enactment of the Urban Areas and Cities (Amendment) Act, the process of conferment of municipality status, town and market centre has been varied and therefore, the Respondents will be required to follow the procedure; it is only at that point that the Petitioner and Interested Parties may make their challenges to the same;

g. on the **issue of approbating and reprobating the issue of public participation**, the Petitioner and Interested Parties admit that they were given a chance to submit memoranda and as the report annexed to the Petitioner demonstrates that the same was considered but the same was declined by the Respondents on the ground that they were not persons who were **not** to be directly or indirectly affected by the delineation of the boundaries for the municipality status; it is also undisputed that the views of other groups were considered, some were declined and others lead to recommendations being made to accommodate those views; **it is clear that through the Interested Parties' submissions, the Interested Parties purports to have been discriminated;** the Petitioner and Interested Parties instituted this suit in view of the fact that their views were heard and rejected;

h. on the **political question doctrine** ground, the Respondents submit that this Honourable Court could only interfere with the political question doctrine if the Petitioner and Interested Parties demonstrates that the Respondents had breached the Constitution in its conduct; as the Petition makes clear, the violations claimed were those set out in section 4 of the Urban Areas and Cities Act and sections 87 and 91 of the County Governments Act; these are not rights and fundamental freedoms; it is undisputed that the delineation of boundaries for conferment of municipality status was done according to section 9(1) of the Urban Areas and Cities Act but the said section 9 has been amended in the Urban Areas and Cities Act; the previous section 9(1) stated that the County Governor may, on resolution of the County Assembly, confer the status of a municipality on a town that meets the criteria out in subsection (3), by grant of a charter in the prescribed form; this is a pure political question; the Petitioner and the Interested Parties were duty bound to demonstrate any breaches of the Constitution by the Respondents as they bore the burden of proof under sections 107, 108 and 109 of the Evidence Act;

i. as to **supremacy of the Constitution**, the Respondents submit that this is undisputed; it is that supremacy that the Petitioner and Interested Parties are questioning through the doctrine of indigenousness; the complaint of the Petitioner and Interested Parties is that the intended conferment of municipal status of Kathwana Municipality will interfere with the Chuka tribe and the Respondents will be cursed if they move the boundaries of the Chuka land; further, the Petitioner and the Interested Parties purport to be the ones governing Tharaka Nithi County or an extension of the governance of the Government; the Constitution is supreme and Article 2(3) of the Constitution bars the challenging of the validity and illegality of the Constitution; it is therefore undisputed that the governance of Tharaka Nithi County is vested in its County

Government which is led by the Governor;

j. as regards **costs**, the Respondent reiterates their submissions above on costs; costs follow the event even where the court is considering whether it has jurisdiction to hear the dispute is no bar to its absolute and unfettered discretion to award or not award costs; the Respondents urge this Honourable Court to award them costs in this Petition.

51. It is therefore clear that the Respondents' Notice of Preliminary Objection is validly before this Honourable Court and is for upholding.

Part 4 – Conclusion

52. The Respondents urge this Honourable Court to uphold their Notice of Preliminary Objection, dismiss the Petition and the application herein, discharge the interim orders and award them the costs of defending the same.

DATED at Nairobi this …........13th …. day of …......................May,.………… 2019

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KAMAU KURIA & COMPANY

ADVOCATES FOR THE RESPONDENTS

6. The parties orally highlighted their submissions on **13th May, 2019**.

7. When highlighting the respondents' submissions on **13th May, 2019,** Dr. Kamau Kuria told the court that he was relying on the bundle of documents filed by the respondents on **1st April, 2019** and on **13th April, 2019**.

8. Dr. Kamau told the court that the petitioner's case was based on two fundamentally wrong assumptions. The first was that there is already in existence a Kathwana Municipality which has purportedly been established under **section 9(4)** of the **Urban Areas and Cities Act of 2011**. He told the court that the petitioner's assumption was based on a Senate **Bill passed in October, 2017.** He averred that section 6 thereof sought to amend section 9 of the Urban Areas and Cities Act. He was laconic that that section was not amended. He referred the court to the Senate Bill and the eventual amendment.

9. Doctor Kamau submitted that the proposed section 9(4) never became law. He asserted that a court of law must take cognizance of the fact that a litigant has not relied on existing law in his/its pleadings. He told the court that in accordance with **section 60 of the Evidence Act**, courts should take Judicial Notice of all written laws which have the force of law in all parts of Kenya.

10. Dr. Kamau submitted that in view of his assertion that Kathwana Municipality had not been established and reliance by the petitioner on non-existent law when the petition was filed, this petition constituted a mere academic exercise.

11. Dr Kamau went on to submit that there were institutions *sine qua non* to the establishment of a Minicipality. These are:-

a. Political – This concerns the governor and the County Assembly in accordance with Section 9 of the Urban Areas and Cities Act. He submitted that the 2 institutions had not exercised their mandate and it was only in future that they could do so. He submitted that the petition was speculative.

b. An *Adhoc* Committee established under section 4A of the Urban Areas and Cities Act, Amendment Act, 2019 - He asserted that it is this committee that delineates or marks the boundaries of a municipality. Dr Kamau told the court that the Act was brought into force on 28th March, 2019 after being assented to on 12th March, 2019. He was categorical that an adhoc committee to delienate the apposite boundaries had not been constituted.

c. People resident in the area proposed to be made a municipality – Dr Kamau asserted that whereas apposite residents had a right to publicly participate in the process leading to the establishment of a municipality, the 2nd respondent's *hansard* shows that there was public participation and some people objected to some aspects of the apposite process. I do opine that this submission is overtaken by events if one accepts Dr. Kamau's assertion that the necessary process would have to be undertaken in accordance with the existing law.

12. Dr. Kamau told the court that this suit was filed on **18th February, 2019** before the Urban Areas and Cities (Amendment) Act, 2019 was assented to on **12th March, 2019** and operationised on **28th March, 2019**. He asserted that under prayer 3 in the petition, there was no statute allowing delineation of boundaries when the petitioner filed this suit.

13. Dr. Kamau asserted that boundaries must mean boundaries delienated under the Urban Areas and Cities Act and argued that the petitioner assumes that there is no Constitution of Kenya in existence and that the contents of the Urban Areas and Cities Act cannot change. He further said that the petitioner assumed that the apposite boundaries should be those that the Chuka people considered to be their correct boundaries despite the fact that Article 184 of the Constitution gives parliament power to make legislation for governance and management of urban areas. He opined that the petitioner assumes that there is a Chuka Law of Tradition that overrides the constitution of Kenya. According to him, this was tantamount to saying that the Constitution was invalid. He said that the petitioner and the Interested Parties cannot be superior

to the constitution.

14. Dr. Kamau told the court laconically that it had no jurisdiction to entertain this suit as Article 162(2((b) of the constitution and section 13(2) of the Environment and Land Court Act delienated the areas to be handled by the ELC Court to use, occupation and title to land. He was unequivocal that the issues raised in this petition could only be handled by the High Court. He likened the petitioner to a traveller who had lost his way and who should be redirected to the correct jurisdiction.

15. Dr. Kamau made reference to the various authorities he was placing reliance upon and concluded by stating that the petitioner was bound by its pleadings and should not in its submissions go beyond what it had pleaded in its petition. Dr. Kamau also asserted that though the petitioner had referred to Article 47 of the Constitution in the petition, it had not particularized its rights which had been infringed upon. He also opined that the petitioner mistook sections 87 and 91 of the County Government Act for being part of the bill of rights. He was categorical that provisions of Acts of Parliament did not qualify to be rights under the bill of rights as framed in the constitution. He asked the court to strike out the suit altogether.

16. Mr. Kirimi Muturi, the petitioner’s advocate told the court that he was relying on the affidavits and submissions he had filed. He complained that Dr. Kamau, the respondents’ advocate, had gone beyond the remit of a preliminary objection and had highlighted issues as if he was canvassing the main suit.

17. He submitted that through its replying affidavit, the petitioner denied all allegations contained in the Preliminary Objection and termed it as incompetent and highly and grossly misinformed because the essence and the way it had been authored was meant to mislead the court. He told the court that the Preliminary Objection was blurred by embracing factual matters which brought out arguments calling for proof by way of evidence. He said that issues such as whether or not the court had jurisdiction and whether or not the County Government was in the process of establishing Kathwana Municipality to the detriment of the petitioner were matters which could only be canvassed in the main motion. Mr. Kirimi was unequivocal in stating that as long as a Preliminary Objection, even in the simplest form, evinced any issue that attracted disputed facts, it must fall on its own sword.

18. Mr. Kirimi referred to a paragraph in the celebrated case of Mukisa Manufacturing Co. Ltd versus West End Distributors (1969) EA 696 which observes that many cases are brought to court as Preliminary Objections even when they do not raise pure points of law and end up unnecessarily increasing costs. He was of the view that the respondents’ Preliminary Objection fell under this category.

19. Mr. Kirimi told the court that by filing the Preliminary Objection, the respondents wanted to derail the hearing of the petitioner’s legitimate grievances and deny it an ear which would be against the spirit of the Constitution which required that suits be heard on the basis of substance and not on other issues which could amount to mere technicalities.

20. Mr. Kirimi told the court that by filing 11 grounds in the Preliminary Objection, this was indicative that the respondents were on a fishing expedition and showed that they were not sure which of their grounds would succeed. He opined that if the respondents were sure about their Preliminary Objection they would have been precise, concise and to the point.

21. Mr. Kirimi denied that the petition was challenging the validity of the Constitution and was laconic that nowhere in the petition had the validity of the Constitution been challenged. He told the court that that assertion as made by the respondents was an attempt to mislead the court. He asked the court to dismiss the Preliminary Objection.

22. Dr. Kamau Kuria responded to the points raised by the petitioner in its highlights. By and large, the reply was in consonance with his original highlights.

23. Mr. Kirimi told the court that he was holding brief for the advocate representing the interested parties. He told the court that they associated themselves with his highlights and also relied on the submissions they had filed.

24. The respondents proffered the following authorities:

1. Constitution of Kenya, 2010

2. Environment and Land Court Act

3. Urban Areas and Cities Act

4. The Urban Areas and Cities (Amendment) Bill, 2017

5. Mukisa Biscuits v West End Distributors [1969] EA 696

6. United States International University (USIU) v Attorney General [2012] eKLR.

7. Chuka ELC Petition No. 9 of 2017; Kaimba Mangaara vs. Tharaka Nithi County Government

8. Robert N. Gakuru & Others –vs- Governor Kiambu County & 3 Others [2014] eKLR.

9. Dricon Transporters Savings and Credit Co-operative Society Limited -v- County Government of Machakos & Another [2016] eKLR.

10. John Mundia Njoroge and 9 Others v Cecilia Muthoni Njoroge and Another [2016] eKLR.

11. Owners of the Motor Vessel Lillian S v Caltex Kenya [1989] KLR 1.

12. Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR.

13. Republic v Karisa Chengo and 2 Others [2017] eKLR

14. Law Society of Kenya Nairobi Branch v Malindi Law Society and 6 Others [2012] eKLR.

15. Anarita Karimi Njeru v the Republic (1976 – 1980) 1 KLR 1272

16. Trusted Society of Human Rights Alliance v Attorney General and 2 Others [2012] eKLR.

17. Independent Electoral and Boundaries Commission & Another –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR.

18. Peter Mungai Ngengi v Mama Ngina Kenyatta and Another [2015] eKLR.

19. Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 Others [2018] eKLR.

20. Omondi v National Bank of Kenya Ltd and Others [2001] 1 EA 177.

21. Onyango & 12 Others v Attorney General & 2 Others (2008) 3 KLR (EP) 84

22. William Odhiambo Ramogi & 2 Others v Attorney General & 6 Others [2018] eKLR.

23. Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others [2016] eKLR.

24. Kenya Human Rights Commission v Attorney General & Another [2018] eKLR.

25. Dr. Sunny Samuel v Simon M. Mbwika and Another [1998] eKLR.

26. Zubeda Waziri v Speaker of the National Assembly & 4 Others [2017] eKLR.

27. Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR.

28. Republic v Communications Authority of Kenya and another ex-parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR.

29. L.H. Tribe, American Constitutional Law, 2nd Edition, Chapter 3,

25. The petitioner cited or proffered the following authorities:-

1.Mukisa Biscuits Manufacturing Co. Ltd Versus West End Distributors (1969) EA 696.

2.Oraro Versus Mbaji (2005) eKLR

3.Mchuba Gelan Kelil and 2 Others Versus Abdulkadir Shariff Abdirhim and 4 others (2015) eKLR

4.Kenya Airways Limited Versus Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR, CoA Nairobi.

5.Ledida Ole Tauta and Others Versus A.G and 2 Others (2015) eKLR.

6.Samson Onyango Ngonga Versus Public Service Commission and 5 Others (2013) eKLR High Court, Nairobi

7.USIU Versus AG (2012) eKLR,

8.Beatrice Elachi Versus Nairobi City Council Assembly Service Board and Another (2018) eKLR.

9.Speaker of the Senate and Another and A.G and 4 Others (2013) eKLR, Supreme Court of Kenya Advisory opinion.

10.Wanjiru Gikonyo and 2 Others Versus National Assembly of Kenya and 4 others (2016) eKLR.

11.Attorney General Versus Isaiah Muturi Mucee (2018) eKLR, Chuka ELC Petition 2 of 2018.

26. The Interested Parties proffered or cited the following authorities:

1. Mukisa Biscuits Manufacturing Company Ltd Versus West End Distributors (op.cit).

2. NARK Kenya Versus IEBC and 3 others (2017) eKLR.

3. Ledida Ole Tauta and Others versus AG and 2 Others (op.cit).

4. John Harun Mwau and Others Versus AG and 2 Others (2012) eKLR.

5. Martin Nyaga Wambora Versus Speaker of the County Assembly of Embu & 3 Others (2014) eKLR.

6. Jesse Kamau and 25 Others Versus A.G, Misc. 890 of 2004, HC, Nairobi.

7. Hon. Kanini Kega Versus Okoa Kenya Movement and 6 others, Petition 427 of 2014, Nairobi.

8. Mui Coal Basin Local Community and 17 Others versus PS Ministry of Energy and 15 Others (2015) eKLR as quoted in Okiya Omtata Versus County Government of Kiambu (2018) eKLR.

9. Kenya Human Rights Commission Versus Communications Authority of Kenya and 4 others (2018) eKLR.

10. Mumo Matemu Versus Trusted Society of Human Rights Alliance and 5 others (2013) eKLR, CoA, Nairobi.

11. Okiya Omtata Versus A.G and 2 Others (2013) eKLR.

27. I have considered the pleadings, the authorities and the submissions proffered by the parties. The assertions made by the respondents are diametrically opposed to those made by the petitioner and the interested parties.

28. I do not need to regurgitate the legal principles enunciated in the authorities proffered by the parties as these have been sufficiently elaborated upon in their written submissions which have been reproduced in full in the earlier part of this ruling. All these authorities are relevant regarding the principles of law they are supporting and in their proper context based on their facts and circumstances. But no two cases are, to a degree of mathematical exactitude, fully congruent. Facts and circumstances are in many cases different. A court of law has to take cognizance of this reality and move appropriately.

29. The advocates representing the parties herein have been robust in their postipulation of their clients' assertions. That robustiness has evinced the reality that there are many disputed issues in both the petition and the Preliminary Objection. I find that most, and likely all, of the grounds in the Preliminary Objection raise disputed issues which may need to be escalated to a full hearing.

30. On the issue of jurisdiction, I find that this court has jurisdiction to hear this matter. It is clear that this court is seized with jurisdiction to determine planning matters. The delineation of municipal and urban boundaries may spawn planning issues which may affect the rights of the denizens of the affected areas. Concurrently with this view, I opine that should a political decision impinge on the rights of citizens germane to environment and land, the ELC has full and unfettered jurisdiction to hear apposite disputes.

31. For reasons shown later in this ruling, I will not definitively make a finding on many of the issues raised in the Preliminary Objection. Under section 13 of the ELC, the court is granted powers to hear boundary disputes. However, the enabling Act does not expressly state that the ELC cannot entertain disputes concerning boundaries of a county, town or municipality. The establishment of a municipality or any other urban area may touch on the areas of environment and the use and occupation of, and title to land. What immediately comes to mind is the possibility of imposition of rates upon the property of the people living within the area of the established municipality or other urban area. In my view, many of the issues raised in the Preliminary Objection would have been conclusively canvassed in the full hearing of this petition if this court allowed it to escalate to full hearing.

32. In a nutshell, I find that all the 11 grounds in the petition invite arguments which can only be effectively canvassed during full hearing of this petition.

33. I fully agree with Dr. Kamau's assertion that parties must be bound by their pleadings. In their Notice of Motion dated 18th February, 2019, the petitioner has stated:

> **"In total disregard of the law, the respondents have arbitrarily, illegally and unnecessarily enlarged the Boundaries of Kathwana purportedly to Confer Municipality status on it."**

34. The Notice of Motion and this petition were filed on 18th February, 2019. I agree with Dr. Kamau that the claim that the respondents had arbitrarily, illegally and unnecessarily enlarged the boundaries of Kathwana purportedly to confer Municipal Status on it is speculative. This is because the applicable law was assented to on 12th March, 2019 and became effective only on 28th March, 2019. This means that the apposite law became effective almost one and a half months after this Petition was filed. The applicable law is the Urban Areas and Cities (Amendment) Act (No. 3 of 2019). I reproduce section 4 of the Act in full herebelow:

> **4. The principal Act is amended by inserting the following new section immediately after section 4 –**

4A. (1) Delineation of the boundaries of urban areas or cities may be initiated by the Cabinet Secretary or by the relevant county government making a written request to the Cabinet Secretary to appoint the ad hoc committee in the manner provided under subsection (2).

(2) The Cabinet Secretary shall, on receipt of a request under subsection (1) or on considering it necessary, appoint by notice in the Kenya Gazette an ad hoc committee to delineate the boundaries of an urban area or a city.

(3) The ad hoc committee appointed by the Cabinet Secretary under subsection (2) shall comprise –

(a) a representative of the Independent Electoral and Boundaries Commission, who shall be the chairperson.

(b) three representatives from the national government drawn from –

(i) the Ministry for the time being responsible for urban development;

(ii) the Ministry for the time being responsible for environment;

(iii) the Ministry for the time being responsible for lkagriculture;

(c) three representatives from the county government drawn from –

(i)the department for the time being responsible for urban development.

(ii) the department for the time being responsible for environment;

(iii)the department for the time being responsible for agriculture; and

(d)two representatives from the following professional associations.

(i)Institute of Surveyors of Kenya;

And

(ii)Kenya Institute of Planners.

(4)Where an ad hoc committee is to be appointed under sub section (2) –

(a)the governor shall nominate the three representatives referred to under subsection (3) (c) for appointment by the Cabinet Secretary; and

(b)each of the relevant professional associations shall nominate its representative referred to under subsection (3)(d) for appointment by the Cabinet Secretary.

(5)The representative from the national government drawn from the Ministry for the time being responsible for urban development appointed under subsection (3)(b)(i) shall serve as the secretary to the ad hoc committee.

(6)Where the boundaries of an urban area extend to more than one county, membership of the ad hoc committee shall include representatives of the relevant counties and the proposal for delineation of the boundaries shall be handled by the Council of Governors.

35. Clearly as the current applicable law was not in existence at the time this petition was filed, the 4 orders sought in the petition are not tenable. They are:

a. A declaration do issue that the acts by the Respondents in hiving Mariani ward, its Locations Kithangani & Karingani and its sub locations (Mariani and Karongoni) From Chuka Township to Kathwana Municipality and Itugururu to Kathwana as unlawful, illegal, unreasonable and null and void.

b. An order of Temporary injunction do issue restraining the respondents from publishing County or a gazette Notice of the decision to include the boundaries of Mariani ward, its locations and sub locations and Itugururu as part of the 333 km Square Area or thereabouts as Kathwana Municipality pending the hearing and determination of this petition.

c. A declaration that the Respondents act of enlarging/delineating new boundaries of Kathwana are unwarranted and inconsistent with statute.

d. A declaration that the respondents act of enlarging/delineating new boundaries of Kathwana are unwarranted and inconsistent with statute.

36. Having found that the orders sought are not tenable, it would amount to a pyrrhic and a veritably wasteful and unnecessary process to escalate this petition to full hearing. Courts of law cannot act in vain.

37. The following orders are issued:

a. The 11 grounds in the Preliminary Objection are not allowed.

b. For being presumptuous and speculative, having been filed before the applicable law became effective, this Petition is hereby dismissed.

c. Should the respondents, in future, wish to establish a Kathwana Municipality or any other Urban area, they are directed to strictly observe the process prescribed by Section 4A of the Urban Areas and Cities Act (op.cit).

d. As both the Petition and the Preliminary Objection evince strong veneers of public interest, the parties will bear their own costs.

Delivered in open Court at Chuka this 10th day of July, 2019 in the presence of:

CA: Ndegwa

Miss Chege for the Respondents

Kirimi Muturi for the Petitioner

Kirimi Muturi h/b Kinoti Kirera for the Interested Parties

P. M. NJOROGE

JUDGE.