



REPUBLIC OF KENYA



**Kenya Human Rights Commission & another v Chebukati & 2 others (Petition E400 of 2022)
[2025] KEHC 8 (KLR) (Constitutional and Human Rights) (9 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 8 (KLR)

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

PETITION E400 OF 2022

LN MUGAMBI, J

JANUARY 9, 2025

BETWEEN

KENYA HUMAN RIGHTS COMMISSION 1ST PETITIONER

INUKA KENYA NI SISI LIMITED 2ND PETITIONER

AND

WAFULA CHEBUKATI 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

IEBC is not required to keep presidential election result forms permanently accessible on a public portal after the conclusion of presidential elections

The petition challenged the Independent Electoral and Boundaries Commission's decision to take down the online portal containing the polling forms of the 2022 presidential election. The court found that the IEBC had complied with section 39(1C)(c) of the Elections Act during the election and was not obligated to maintain the portal indefinitely. The petition was dismissed for lack of merit.

Reported by Kakai Toili

Electoral Law – elections - presidential elections – transmission and publication of results –publishing of the polling result forms on an online public portal maintained by the Independent Electoral and Boundaries Commission (IEBC) – timeline within which the information was to be available of the portal – whether the IEBC was required to ensure that the polling result forms for a presidential election were infinitely available on a publicly accessible portal after conclusion of the elections – Elections Act (cap 7), section 39(1C).

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to access of information - what was the procedure to be followed by a person seeking access to information held by a public body – Constitution of Kenya, article 35.



Brief facts

The petitioners asserted that one of the key amendments to the Elections Act was the publication of election polling results by the 1st respondent as received from the constituencies. Those results were published on the Independent Electoral and Boundaries Commission, the 2nd respondent's online platform as provided under section 39(1C)(c) of the Elections Act. The petitioners took issue with the 1st and 2nd respondents conduct during the previous electioneering period, particularly, the action of closing the portal as soon as the elections were over. The petitioners thus sought for among other orders; a declaration that the 1st and 2nd respondents were duty bound to maintain during the election, at the time of tallying and after announcement of the results a publicly accessible portal holding all the Forms 34A and 34B in relation to the presidential elections.

The 1st and 2nd respondents asserted that the 2nd respondent prior to the 2022 general elections put up a publicly accessible portal for the transmission of presidential elections results. On the portal, one could access all Form 34As, 34Bs and 34C. They further asserted that the portal was up for a period of 90 days to allow adequate time for people to retrieve the information as required and that closure of the portal after that period was informed by the provisions of section 39(1C)(c) that stipulated that the portal was primarily for purposes of a presidential election thus not a perpetual archival portal.

Issues

- i. Whether the Independent Electoral and Boundaries Commission was required to ensure that the polling result forms for a presidential election were infinitely available on a publicly accessible portal after conclusion of the elections.
- ii. What was the procedure to be followed by a person seeking access to information held by a public body?

Relevant provisions of the Law

Elections Act (cap7)

Section 39 - Determination and declaration of results.

(1C) For purposes of a presidential election, the Commission shall —

(a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the constituency tallying centre and the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

Held

1. From constitutional view-point, it was not clear how a dispute that principally revolved around the meaning and scope of a particular statutory provision could become a constitutional controversy. The instant matter was not a dispute that the court ought to entertain as it did not raise a constitutional question. In fact, a closer look at the particulars of the alleged violation did not disclose reasonable precision the manner the alleged violations were in breach of the cited constitutional principles thereby offending the principles set out in *Anarita Karimi Njeru v Republic* (1979) eKLR.
2. The petition as originally drawn and presented was seeking pre-emptive orders, meaning at the point it was filed, there was no real or active controversy. It was futuristic. That was however disproved after the fears of the petitioner were dispelled as the petitioner admitted that indeed the respondents duly complied with section 39(1C)(c) of the Elections Act during the general elections.
3. One could not isolate section 39(1C)(c) of the Elections Act from the rest of the provisions of the Elections Act. It must be read in context and in the light of other provisions in the Act that were intended to achieve the overall objective and the purpose of the Elections Act. The subject matter with which the Act dealt were the general elections and the Act made provisions in broad areas that touched on elections generally including the registration of voters, elections, recall of the member of Parliament,



- referendum, election disputes and other general provisions. Narrowing down to section 39 of the Act, it fell under the broad subject matter ‘elections’ found in Part III of the Act.
4. A statute must be interpreted having regard to the subject-matter with which it addressed; reason or purpose behind its enactment as found in the text and the mischief it was geared to address and the meanings *vis a vis* other relevant parts of the statute. The inclusion of section 39(1)(C) of the Elections Act was meant to secure a transparent and accountable presidential election by streaming the results giving evidence of the supporting documents in real time electronically.
 5. Once the presidential election was concluded and all the results had been verified (up to and including the determination of any electoral dispute with finality), the duty cast on the 2nd respondent in regard to section 39(1C) of the Elections Act for purposes that election was discharged. There was no duty that existed infinitely for purposes of research and audit. That was not provided in section 39(1C). That was extending the meaning of section 39 beyond the contemplation of the Elections Act which confined it to an election.
 6. An election had a time frame and that was what should guide the application of section 39 of the Elections Act. That was the meaning that accorded with the subject-matter, the statutory purpose and related provisions, which all combined, captured the ultimate purpose of the Act which was to deliver transparent and accountable elections, not to create a data base for research based activities and audits which, though important were subsidiary to the main aim.
 7. The period of 90 days that the respondents maintained the data prior to pulling it down from public display in the portal was quite reasonable in the circumstances given that it even went past the time required for settlement of that election dispute and further that anyone who required the information for any use is at liberty to apply for it from the respondents.
 8. If a person was seeking redress from the High Court on a matter which involved a reference to the Constitution, it was important (if only to ensure that justice was done to his case) that he should set out with a reasonable degree of precision that of which he complained, the provisions said to be infringed, and the manner in which they were alleged to be infringed.
 9. The petitioners must demonstrate the manner in which the respondents violated the purported constitutional provisions. The petitioner alleged that there was violation of right of access to information. That, the petitioner claimed arose from the fact that the respondents pulled down from the information on presidential election results from public display. Nevertheless, no claim was made to the effect that the respondents specifically denied or refused to supply either the petitioner or the any member of the public with such information upon request.
 10. There had been no demonstration that the procedure provided for under the Access to the Information Act was complied with. Under section 7 of the Access to Information Act, a party seeking to access information held by the State or private body wrote to the officer having custody of the information seeking access to the information held by the officer. If the request was refused or requester failed to receive the information, section 14 of the Act directed that the requester notify the Commission on Administrative Justice in writing requesting its intervention by reviewing reasons given or outlined in refusing to grant access.
 11. Where there existed other sufficient and adequate avenues to resolve a dispute, a party ought not to trivialize the jurisdiction of the constitutional court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

Petition dismissed.

Citations

Cases

Kenya



1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1976-1980] KLR 1272 - (Explained)
2. *Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & Mercantile Cargo Terminal Operations Limited (Interested Parties)* Constitutional Petition E006 of 2020; [2021] KEHC 9284 (KLR) - (Explained)
3. *Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority* Civil Appeal 67 of 2015; [2016] KECA 411 (KLR) - (Explained)
4. *Gwer & 5 others v Kenya Medical Research Institute & 3 others* Petition 12 of 2019; [2020] KESC 66 (KLR) - (Explained)
5. *Ibrahim Wakhanyanga, Abdalla Wamere & Hussein Munyendo v Chief Magistrate's Court Kakamega, Ann Wesonga Nambiro (As Legal Representative And Administratrix of Estate of Late Peter Nambiro Mubatsi & Ann Wesonga Nambiro; Attorney General for Land Registrar Kakamega (Interested party) ?* E004 of 2021; [2022] KEELC 1072 (KLR) - (Explained)
6. *Independent Electoral & Boundaries Commission v Maina Kiai, Kbelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) - (Mentioned)
7. *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
8. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Mentioned)
9. *Orix Oil (Kenya) Limited v Paul Kabeu, Francis Kiriu & Teresa Waithira Kiriu All Trading as Royal Filling Station* Civil Suit 191 of 2008; [2014] KEHC 5086 (KLR) - (Mentioned)
10. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Mentioned)

Statutes

Kenya

1. Access to Information Act (cap 7M) sections 7, 14, 21, 23 - (Interpreted)
2. Constitution of Kenya articles 10, 20, 35, 38, 39(2); 39(3); 47; 83; 86; 137; 232(e); 232(f); 259 - (Interpreted)
3. Elections Act (cap 7) section 39(1C)(c) - (Interpreted)
4. Evidence Act (cap 80) section 108 - (Interpreted)

Advocates

KMK Africa Advocates LLP for the petitioners

Douglas Kipruto Bargorett for the 1st and 2nd respondents

JUDGMENT

Introduction

1. The petitioners' undated Petition, is supported by the 1st petitioner's affidavit sworn on August 7, 2022.
2. The key contention in the Petition as supported by the averments in the petitioners' affidavit is that the 1st and 2nd respondent's failed to uphold their mandate as envisaged under section 39(1C) of the



Elections Act, following the conclusion of the 2022 General Elections. Consequently, the petitioners seek the following reliefs:

- a. A declaration that the 1st and 2nd respondents are duty bound to maintain during the election, at the time of tallying and after announcement of the results a publicly accessible portal holding all the Forms 34A & 34B in relation to the Presidential elections.
- b. A declaration that failure to maintain the publicly accessible portal holding all Forms 34A & 34B transmitted by the Constituency Returning Officer during the elections, at the time of tallying and after elections is a violation of articles 10, 20, 35, 38, 47, 86, 137 and 232 of the *Constitution of Kenya, 2010*.
- c. A Mandatory order compelling the 1st and 2nd respondents to make the availability of Forms 34A & 34B on the online public portal for access by the public simultaneous with the transmission of the Results and Forms by the Constituency Returning Officers.
- d. The costs of this petition be borne by the respondents.

Petitioners' Case

3. On the onset, the petitioners relying on the two landmarks cases of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR highlighted the two key principles that were established that should govern general elections.
4. First, the Supreme Court discussing section 83 of the *Elections Act* in the *Raila Amolo Odinga* case, stated that election results and the process leading up to the election should be applied disjunctively. Therefore, proof of fault of either of them in an election can void an election. Secondly the Court of Appeal in the *Maina Kiai* case determined that the election results announced by the constituency returning officers are final not provisional as was provided in the now unconstitutional sections 39(2) and (3) of the *Elections Act*.
5. As a result of these pronouncements, various amendments were made to the elections laws.
6. Against this background, the petitioners assert that one of the key amendments, is the publication of election polling results by the 1st respondent as received from the constituencies. These results are published on the 2nd respondent's online platform as provided under section 39(1C)(c) of the *Elections Act*. This is so as to foster transparency and inform the general public of the polling results with regard to presidential election.
7. The petitioners however take issue with the 1st and 2nd respondents conduct during the previous electioneering period. To be specific, the delay and refusal in certain instances to publish some forms in the portal and the action of closing the portal as soon as the elections were over making it hard for the public to access the information to ascertain credibility of the results. This is more so after the 2nd respondent promised on July 26, 2017 that the election results would be in a publicly accessible portal.
8. The petitioner cited two reports that highlighted the difficulties that were experienced in accessing election results in the 2nd respondent's online portal. First, the Kenya ICT Network (KICTANet) report dubbed, the Technology Deployment in Kenya's General Election (August 8, 2017) and on the Repeat Presidential Election (October 26, 2018) and *Kura Yangu Sauti Yangu* report published on August 22, 2017.



9. On this premise, the petitioners were doubtful that the 1st and 2nd respondent would uphold this requirement in the August 2022 General elections with reference to the presidential results. Due to this, they sought pre-emptory orders in view of section 39(1)(c) of the [Elections Act](#) as read with articles 10, 35 and 232(e) and (f) of the [Constitution](#), in fear that the 1st and 2nd respondent would yet again fail to adhere with this requirement.

1st and 2nd Respondents' Case

10. In rejoinder, the 1st and 2nd respondents filed their replying affidavit by Martin Nyaga Wachira sworn on November 18, 2023.
11. It is asserted that the 2nd respondent prior to the 2022 General Elections put up a publicly accessible portal for the transmission of presidential elections results. On the portal, one could access all Form 34As, 34Bs and 34C. This was pursuant to the cited landmark cases and section 39(1C)(c) of the [Election Act](#). One was also able to download these forms for their own future reference.
12. He further asserts that this portal was up for a period of 90 days to allow adequate time for people to retrieve the information as required. He avers that closure of the portal after this period was informed by the provisions of section 39(1C)(c) that stipulates that the portal is primarily for purposes of a presidential election thus not a perpetual archival portal.
13. It is noted that since the general election was over at the time of filing of this affidavit, the 2nd respondent has since taken down the online portal having served its purpose. Moreover, it is stated that continued maintenance of the portal is not viable as the same requires a lot of resources in form of human resource and finances.

3rd Respondent's Case

14. The 3rd respondent's response and submissions to the Petition are not in the court file or Court Online platform (CTS).

Petitioners' Submissions

15. KMK Africa Advocates LLP on the petitioners' behalf filed submissions dated February 16, 2024. The issues for argument were identified as: whether the 1st and 2nd respondents have a duty to open the elections portal and keep it open during and after the elections and whether the 1st and 2nd respondent's decision to shut down the portal has curtailed the petitioners' right to information and to fair administrative action.
16. First, counsel submitted that the 1st and 2nd respondents have a duty to publish the results of the elections on their online portal for ease of access by the public for research and audit purposes. In essence, this is the public's right to access to information in line with article 35 of the [Constitution](#). Equally that article 10 of the [Constitution](#) calls for transparency and accountability and binds all state organs.
17. It is however acknowledged that the 1st and 2nd respondents published the election results as mandated by the law and the results were easily accessible. Therefore, in that aspect the respondents did not violate the petitioners rights. The issue though is that the 2nd respondent proceeded to close the portal 90 days after the general elections.
18. The 1st and 2nd respondents' interpretation of section 39(1C) was faulted because it principally contravenes the right to access this information post general elections. In their view, the portal should



be accessible to the public at all times. Furthermore, that the lack of prescription of the required timeline in law to have the portal up, should not be an excuse to curtail this right. As such, it was argued that section 39(1C) ought to be interpreted in a manner that aligns with article 259 of the Constitution. For this reason, closure of the 2nd respondent's portal is contended to be in violation of articles 2, 10, 35 and 259 of the Constitution.

19. On the right to a fair administrative action, Counsel submitted that the 1st and 2nd respondent's action violated this right. This is because the public lost its ability to access the information on the portal. In addition, it was argued that no public participation was conducted before this decision was made. Further that the public could only access the information by directly requesting the 2nd respondent for it. Consequently, the 1st and 2nd respondents' actions are adjudged to be an abuse of power and in violation of article 47 of the Constitution.
20. In view of the foregoing, Counsel relying in Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR and Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR, submitted that the petitioners ought to be awarded costs.

1st and 2nd Respondents Submissions

21. On May 20, 2024, counsel, Douglas Kipruto Bargorett filed submissions wherein the issues for discussion were highlighted as: whether the 1st and 2nd respondents followed the law with regards to the setting up of the public portal; whether the 1st and 2nd respondents decision to shut down the portal was justified and whether the same was a violation of article 35 of the Constitution.
22. On the first point counsel submitted that the respondents followed the relevant laws, in particular section 39(1C)(c) and the guidelines issued by the courts as cited above. Additionally, it is argued that the portal was used for the intended purpose since all Forms 34As, 34Bs and 34C were accessible to every person who desired to see them and had the option of downloading the same. It is their argument thus that they fully met their obligations as required by the law.
23. It was reasoned therefore that contrary to the petitioners allegations, the 1st and 2nd respondent had not violated article 35 of the Constitution as alleged. This is because the decision to take down the portal was guided by the wording of section 39 (1C)(c) which clearly states 'for purposes of a presidential election'. Equally, that the portal was taken down after the Presidential Election Petition, 2022 had been concluded.
24. Furthermore, counsel submitted that the petitioners' allegations had not been substantiated. In that, it was not demonstrated that a person had sought the information that had been on the portal and denied access.
25. Counsel highlighting the principles of public finance under article 201 of the Constitution, urged the court to consider that maintaining the portal would be an expensive matter which does not give value for public funds. For this reason, Counsel maintained that it was more prudent and reasonable to access this information directly for the 1st and 2nd respondents and that it is at no cost. To this end Counsel submitted that the parties herein should bear their own costs.

Analysis and Determination

26. The issues that arise for determination in my view are as follows:
 - i. Whether the 1st and 2nd respondents are legally required to maintain, after the general elections, all Forms 34A & 34B and 34C in relation to the Presidential elections.



- ii. Whether the 1st and 2nd respondent's failure to do so is in violation of articles 10, 20, 35, 38, 47, 86, 137 and 232 of the Constitution.
- iii. Whether the petitioners are entitled to the relief sought.

Whether the 1st and 2nd Respondents are legally required to maintain after the general elections, the results of all Forms 34A & 34B in relation to the Presidential elections

27. Owing to the issues set out by the parties, it is my considered view the heart of this case is the meaning and scope application of section 39 (1C)(c) of the Elections Act. Both parties take a divergent position on its meaning and application. In my view, at stake here is not so much Constitutional Interpretation as apparently, the dispute is about the interpretation of a statutory interpretation because the petitioner does not in any way allege its inconsistency with the Constitution or invalidity. All the petitioner argues is that the statutory provision needs to be interpreted broadly to accord with Constitutional principles.
28. The key provision in contention is section 39(1C) which reads as follows:

Determination and declaration of results

For purposes of a presidential election, the Commission shall

 - a. electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;
 - b. tally and verify the results received at the constituency tallying centre and the national tallying centre; and
 - c. publish the polling result forms on an online public portal maintained by the Commission.
29. The petitioner in its submissions acknowledge that the 1st and 2nd respondents complied with section 39(1)(C)(c) by publishing results of the last election general elections as stipulated by the said provision of the law and that the same were easily accessible. This admission thus appeared to put into doubt the substratum of the petition which was founded on apprehension that the respondent would not fully comply as the prayers sought in the instant Petition were in fact preemptive. However, the petitioner changed tune and argued that there was a lingering issue, and that is, despite having complied fully with the requirements of section 39(1)(C)(c), the respondents contravened this section for pulling down the record of materials used to transmit the results that is forms 34As, 34Bs and 34Cs.
30. The petitioner took issue with the respondents removal of the records of presidential election from public display within 90 days after the conclusion of general elections insisting that the said section should be construed in such a manner that it places a duty on the respondents to maintain the election results and all the documents involved in transmission of the presidential results, forms 34A, 34B, and 34C at all times so that public can access them easily for research and audit purposes and that the lack of legal timelines within the section should not give the respondents the latitude to curtail the right of access to information by the public and should align with interpretation required under article 259 of the Constitution. That the action of the respondents in taking down the information violates article 1, 10, 35 and 259 of the Constitution. That there was also violation of article 47 because no public participation was conducted before the information was pulled down.



31. On their part, the 1st and 2nd respondent differ with the petitioner's contention and insist that the wording of the section restricts its application to 'for purposes of a presidential election' and thus closing the portal 90 days long after the election was concluded was not a violation of the said provision.
32. From Constitutional view-point, I do not see how a dispute that principally revolves around the meaning and scope of a particular statutory provision can become a Constitutional controversy.
33. [*Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega \(Interested party\)*](#) [2022] eKLR

... One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows: ... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the [Constitution](#) without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case(*supra*).

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the [Constitution](#). Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition... A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

34. This is not a dispute that this court ought to be entertained before this court as it does not raise a constitutional question. In fact, a closer look at the particulars of alleged violation does not disclose reasonable precision the manner the alleged violation are in breach of the cited Constitutional principles thereby offending the principles set out in the celebrated case of [Anarita Karimi Njeru v Republic](#) [1979] eKLR.
35. Moreover, the Petition as originally drawn and presented which was so all through even as the petitioner attempted through submissions to breathe life to it was seeking pre-emptive orders, meaning at the point it was filed, there was no real or active controversy. It was futuristic. That was however disproved after the fears of the petitioner were dispelled as the petitioner admits that indeed the respondents duly complied with section 39(1)(C)(c) during the general elections. Why would the court be tasked to determine an issue where there is no live controversy as in the matter is moot. The issue of pulling down the information or results after the 90 days was not specifically raised in the instant Petition but appeared to arise from the subsequent set of circumstances that transpired afterwards.
36. I would have chosen to dismiss the petition at this stage, but for completeness, I found it necessary to consider the implication of section 39(1)(C)(c) nevertheless.



37. It is my view that one cannot isolate section 39(1)(C)(c) from the rest of the provisions of the *Elections Act*. It must be read in context and in the light of other provisions in the *Act* that are intended to achieve the overall objective and the purpose of the *Elections Act*. The objective stated in its preamble is that it is an

“ An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes”

38. Clearly, the subject matter with which the Act deals are the general elections and the Act makes provisions in broad areas that touch on elections generally including the registration of voters, elections, recall of the member of parliament, referendum, election disputes and other general provisions.

39. Narrowing down to section 39 of the *Elections Act* it falls under broad the subject matter- ‘Elections’ found in Part III of this legislation. In fact, section 39 is introduced by the words: ‘Determination and Declaration of results then, at 39(1)(C) the opening phrase reads:

“ For purposes of a Presidential Election, the Commission Shall- “

40. A statute must be interpreted having regard to the subject-matter with which it addresses; reason or purpose behind its enactment as found in the text and the mischief it was geared to address and the meanings vis a vis other relevant parts of the same statute.

41. In my humble view therefore, the inclusion of section 39(1)(C) was meant to secure a transparent and accountable presidential election by streaming the results giving evidence of the supporting documents in real time electronically. once the Presidential Election is concluded and all the results have been verified, (up to and including the determination of any electoral dispute with finality), I would take it that the duty cast on the 2nd respondent in regard to section 39(1)(C) for purposes that election is discharged. There is no duty in my view that exists infinitely as suggested by the petitioner for purposes of research and audit. That is not provided in section 39(1)(c). That is extending the meaning of section 39 beyond the contemplation of the *Act* which confines it to an election. An election has a time frame and that is what should guide the application of section 39 of the *Elections Act*. This is the meaning that in my view accords with the subject-matter, the statutory purpose and related provisions, which all combined, capture the ultimate purpose of the *Act* which is to deliver transparent and accountable elections, not create a data base for research based activities and audits which, though important are subsidiary to the main aim.

42. The period of 90 days that the respondents maintained the data prior to pulling it down from public display in the portal is therefore quite reasonable in the circumstances given that it even went past the time required for settlement of that election dispute and further that anyone who requires the information for any use is at liberty to apply for it from the respondents.

Whether the 1st and 2nd Respondents’ failure to maintain the information violates Article 35 of the *Constitution*

43. For the petitioners’ case to be successful, two principles must be established. First, satisfy the threshold set in *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272 on specifically in placing the violation which was later on reaffirmed by the Supreme Court and the Court of Appeal.



44. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR affirmed that:

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

45. Further, the petitioners must demonstrate the manner in which the respondents violated the purported constitutional provisions. In this respect, the Supreme Court in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) guided as follows:

“(49) section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the *Act* declares 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.”

(50) This Court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden....”

46. In the instant case, the petitioner alleges that there is violation of right of access to information. This the petitioner claims arises from the fact that the respondents pulled down from the information on presidential election results from public display. Nevertheless, no claim is made to the effect that the respondents specifically denied or refused to supply either the petitioner or the any member of the public with such information upon request.

47. Further the procedure there has been no demonstration that the procedure provided for under the Access to the Information Act was complied with.

48. Under section 7 of the *Access to Information Act*, a party seeking to access information held by the state or private body writes to officer having custody of the information seeking access to the held by the officer.

49. If the request is refused or requester fails to receive the information, section 14 of the *Act* directs that the requester notify Commission on Administrative Justice in writing requesting its intervention by reviewing reasons given or outlined in refusing to grant access.

50. In execution of its functions under section 21; the CAJ has powers set out in section 23 of the *Act* as follows:

a. In the performance of its functions under this Act, the Commission shall have the power to—



- i. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
 - ii. question any person in respect of any subject matter under investigation before the Commission; and
 - iii. require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.
- b. The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—
- i. the release of any information withheld unlawfully;
 - ii. a recommendation for the payment of compensation; or
 - iii. any other lawful remedy or redress.
- c. A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.
- d. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.
- e. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.
51. In the court in [*Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another \(interested parties\)*](#) [2021] eKLR discussing the mandate of the CAJ observed as follows:

“29. Under section 23 of the [*Access to Information Act*](#) No 31 of 2016, the High Court has been established to have appellate jurisdiction. In [*Savraj Singh Chana v Diamond Trust Bank \(Kenya\) Limited & another*](#) [2020] eKLR, Korir J observed correctly in my view, as follows:

It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under article 165(3)(b) of the [*Constitution*](#) to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for



avoiding that route. In the case before me, the petitioner has simply pointed to the jurisdiction of this court. The exhaustion principle does not actually take away the constitutional jurisdiction of this court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.”

52. Furthermore, in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR; the Court held:

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

53. In view of the foregoing reasons, this Court finds no merit in this Petition which is hereby dismissed.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 9TH DAY OF JANUARY, 2025.

L N MUGAMBI

JUDGE

