



**Njiru & 11 others v Kenya Kwanza Coalition & 18 others; Azimio La Umoja  
One - Kenya Coalition & 11 others (Interested Parties) (Petition E202 of 2023)  
[2025] KEHC 1907 (KLR) (Constitutional and Human Rights) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1907 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E202 OF 2023  
J NGAAH, JM CHIGITI & LN MUGAMBI, JJ  
FEBRUARY 7, 2025**

**BETWEEN**

**KENNETH NJAGI NJIRU ..... 1<sup>ST</sup> PETITIONER  
MESHACK SUBA CHURCHILL ..... 2<sup>ND</sup> PETITIONER  
LEMPAA SUYINKA ..... 3<sup>RD</sup> PETITIONER  
TEDDY M. MUTURI ..... 4<sup>TH</sup> PETITIONER  
AMOS WANJALA ..... 5<sup>TH</sup> PETITIONER  
STEVEN KIHONGE NDUNG’U ..... 6<sup>TH</sup> PETITIONER  
SOPHIE DOLA ..... 7<sup>TH</sup> PETITIONER  
WINNIE THUO ..... 8<sup>TH</sup> PETITIONER  
ENG. VICTOR NG’ANG’A ..... 9<sup>TH</sup> PETITIONER  
SIMON LOKOMA ..... 10<sup>TH</sup> PETITIONER  
CAROLINE MOGAKA ..... 11<sup>TH</sup> PETITIONER  
FRANCIS KENYA MWANGI ..... 12<sup>TH</sup> PETITIONER**

**AND**

**KENYA KWANZA COALITION ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL ASSEMBLY OF KENYA ..... 2<sup>ND</sup> RESPONDENT  
SPEAKER OF THE NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT  
M. WETANG’ULA ..... 4<sup>TH</sup> RESPONDENT**



REGISTRAR OF POLITICAL PARTIES .....	5 <sup>TH</sup> RESPONDENT
KIMANI ICHUNG'WA .....	6 <sup>TH</sup> RESPONDENT
OWEN BAYA .....	7 <sup>TH</sup> RESPONDENT
SYLVANUS OSORO .....	8 <sup>TH</sup> RESPONDENT
NAOMI JILLO WAKO .....	9 <sup>TH</sup> RESPONDENT
HON. SABINA CHEGE .....	10 <sup>TH</sup> RESPONDENT
COMMISSION (IEBC .....	11 <sup>TH</sup> RESPONDENT
ATTORNEY GENERAL .....	12 <sup>TH</sup> RESPONDENT
KANINI KEGA .....	13 <sup>TH</sup> RESPONDENT
ANNE NDERITU .....	14 <sup>TH</sup> RESPONDENT
KENYA REVENUE AUTHORITY .....	15 <sup>TH</sup> RESPONDENT
TREASURY AND ECONOMIC PLANNING .....	16 <sup>TH</sup> RESPONDENT
UNITED DEMOCRATIC ALLIANCE .....	17 <sup>TH</sup> RESPONDENT
AMANI NATIONAL CONGRESS .....	18 <sup>TH</sup> RESPONDENT
FORD KENYA .....	19 <sup>TH</sup> RESPONDENT

**AND**

AZIMIO LA UMOJA ONE - KENYA COALITION .....	INTERESTED PARTY
JUBILEE PARTY OF KENYA .....	INTERESTED PARTY
LAW SOCIETY OF KENYA .....	INTERESTED PARTY
HON. OPIYO WANDAYI .....	INTERESTED PARTY
HON. ROBERT MBUI .....	INTERESTED PARTY
JUNET MOHAMED .....	INTERESTED PARTY
KATIBA INSTITUTE .....	INTERESTED PARTY
MAENDELEO CHAP CHAP PARTY .....	INTERESTED PARTY
UNITED DEMOCRATIC MOVEMENT .....	INTERESTED PARTY
MOVEMENT FOR DEMOCRACY & GROWTH .....	INTERESTED PARTY
USAWA KWA WOTE PARTY .....	INTERESTED PARTY
ROOTS PARTY .....	INTERESTED PARTY

**The party or a coalition of parties with the largest number of members in Parliament s declared by IEBC assumes majority party status while that with the second largest number of members becomes the minority party**

*The petition challenged the Speaker of the National Assembly's ruling declaring the Kenya Kwanza Coalition as the majority party and Azimio Coalition the minority. The petitioners also claimed that the Speaker was not lawfully elected. The court noted that from article 108 of the Constitution, the question of a majority party or*



*minority party was predetermined upon the declaration of the results by the Independent Electoral and Boundaries Commission (IEBC) and that the declaration was conclusive proof. The court found that by assigning to Kenya Kwanza Alliance 14 members of National Assembly elected under Azimio Coalition without any justifiable cause and thus declaring Kenya Kwanza the majority party, the Speaker violated article 108. The court held that the simultaneous holding of the position of Speaker with that of leader of a political party and leadership positions in the ruling political coalition was unconstitutional. The court also held that the fact that the Speaker was a party leader at the time of his election could not invalidate his election.*

Reported by Kakai Toili

**Constitutional Law** – Parliament – offices of Parliament – party leaders - majority and minority parties - how were the majority and minority parties in the National Assembly determined - whether the assignment of members of the National Assembly to a coalition after the elections in the absence of post-election coalition agreements violated article 108 of the Constitution on party leaders - Constitution of Kenya, article 108; Political Parties Act (cap 7D), section 10.

**Constitutional Law** – Parliament – offices of Parliament – Speakers of Parliament – requirements for one to be a Speaker of Parliament – claim that a person vying for the position of Speaker was a party leader - whether the fact that a person vying for the position of Speaker of the National Assembly was a party leader at the time of his election invalidated his election - whether the simultaneous holding of the position of the Speaker of the National Assembly with that of leader of a political party and the ruling political coalition was unconstitutional – Constitution of Kenya, articles 10(2)(a) and 106(1)(a); National Assembly's Standing Orders, standing orders 4 and 6.

**Constitutional Law** – Parliament – parliamentary privilege – scope of parliamentary privilege - whether the immunity granted to proceedings in Parliament by the Parliamentary Powers and Privileges Act could shield an unconstitutional decision – Constitution of Kenya, articles 2(1) and 117; Parliamentary Powers and Privileges Act (cap 6), sections 11 and 12.

**Civil Practice and Procedure** – cross-appeals – parties entitled to file cross-appeals - whether an interested party could file a cross-appeal - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rule 15(3).

### **Brief facts**

The petitioners contended that during the August 9, 2022 general elections, the main contestants for various elective political positions were candidates from parties that formed the Azimio coalition and Kenya Kwanza Alliance Coalition (Kenya Kwanza Coalition). After the elections, the Independent Electoral Boundaries Commission (IEBC) published the results of the members elected and nominated to the National Assembly in the Kenya Gazette. According to the published election results, 171 members of the National Assembly were elected on the tickets of political parties that formed the Azimio coalition while 165 members of the National Assembly were elected on Kenya Kwanza coalition parties' tickets. The petitioners thus contended that, the Azimio coalition became the majority party in the National Assembly.

The petitioners averred that Hon. Moses Wetangula was elected Senator of Bungoma County but later resigned and subsequently elected as the Speaker of the National Assembly. The petitioners were aggrieved that although Hon. Wetangula (the Speaker) was elected as the Speaker; he held the position of the leader of Ford-Kenya party; he was a member of the Kenya Kwanza Forum of party leaders; and, he was an *ex officio* member of the coalition parliamentary group of Kenya Kwanza. According to the petitioners, the Speaker was conflicted to the extent that he would be biased towards the Kenya Kwanza Coalition.

It was further averred that several members of the National Assembly who contested as members of parties in the Azimio coalition opted to defect to the Kenya Kwanza Coalition after the election, they were 14 members of the National Assembly drawn from United Democratic Movement (UDM), Movement for Democracy and Growth (MDG), Maendeleo Chap Chap (MCCP) and PAA political parties. The petitioners contended that on October 6, 2022, the Speaker, issued a ruling stating that the 14 members and their parties were a part of



the Kenya Kwanza Coalition and thus that coalition was the majority party while the Azimio Coalition was the minority party. The petitioners were aggrieved and contended that the ruling was unlawful.

The petitioners sought for among other orders; a declaration that the Azimio Coalition was the majority party and Kenya Kwanza the minority in the National Assembly based on the outcome of the election of members of the National Assembly held on August 9, 2022; and a declaration that the Speaker was not lawfully elected and should not continue serving as the Speaker.

### **Issues**

- i. How were the majority and minority parties in the National Assembly determined?
- ii. Whether the assignment of members of the National Assembly to a coalition after the elections in the absence of post-election coalition agreements violated article 108 of the Constitution on party leaders.
- iii. Whether the simultaneous holding of the position of the Speaker of the National Assembly with that of leader of a political party and the ruling political coalition was unconstitutional.
- iv. Whether the fact that a person vying for the position of Speaker of the National Assembly was a party leader at the time of his election invalidated his election.
- v. Whether the immunity granted to proceedings in Parliament by the Parliamentary Powers and Privileges Act could shield an unconstitutional decision.
- vi. Whether an interested party could file a cross-appeal.

### **Relevant provisions of the Law**

#### **Constitution of Kenya**

##### **Article 108 - Party leaders**

*(1) There shall be a leader of the majority party and a leader of the minority party.*

*(2) The leader of the majority party shall be the person who is the leader in the National Assembly of the largest party or coalition of parties.*

*(3) The leader of the minority party shall be the person who is the leader in the National Assembly of the second largest party or coalition of parties.*

*(4) The following order of precedence shall be observed in the National Assembly—*

*(a) the Speaker of the National Assembly;*

*(b) the leader of the majority party; and*

*(c) the leader of the minority party.*

#### **Leadership and Integrity Act, Cap 185C**

##### **Section 23 – Political neutrality**

*(1) An appointed State officer, other than a Cabinet Secretary or a member of a county executive committee shall not, in the performance of their duties—*

*(a) act as an agent for, or further the interests of a political party or candidate in an election; or*

*(b) manifest support for or opposition to any political party or candidate in an election.*

*(2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.*

*(3) Without prejudice to the generality of subsection (2) a public officer shall not—*

*(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;*

*(b) publicly indicate support for or opposition against any political party or candidate participating in an election.*

### **Held**

1. The court had jurisdiction to determine the issues raised in the petition. Article 259(1) of the Constitution provided the manner in which the Constitution should be interpreted. The purposive



- approach of interpretation mainly focused on ascertaining the intent or the object of the framers in coming up with a particular enactment.
2. The court was not sitting on an appeal against the Speaker's ruling nor was it exercising supervisory jurisdiction over the National Assembly. Article 117 of the Constitution provided for, among other things, the freedom of speech and debate in Parliament and also privileges and immunities of Parliament. Pursuant to article 117, Parliament enacted the Parliamentary Powers and Privileges Act, Cap 6. The Act at sections 11 and 12 made provision for immunity of proceedings of Parliament.
  3. Under the principle of separation of powers, courts were required to accord due deference to other constitutional bodies or organs by allowing them to execute their constitutional mandates. However, that was only possible if such organs did not violate the Constitution. Under article 2(1), the Constitution declared that it was the supreme law of the Republic and bound all persons and all State organs at both levels of Government and further, article 2(2) of the Constitution provided that no person could claim or exercise State authority except as authorized under the Constitution.
  4. The ruling of the Speaker would be beyond questioning by the court only if it could be demonstrated that it was made in conformity with the Constitution. Otherwise, the court had a constitutional duty to intervene if, in making the decision, the Speaker violated the Constitution. The immunity granted by the Parliamentary Powers and Privileges Act could not shield an unconstitutional decision.
  5. Article 108 of the Constitution stated that the party or a coalition of parties with the largest number of members assumed the majority party status while the party or a coalition of parties with the second largest number of members became the minority party. Once the IEBC had declared and gazetted the results for membership in the National Assembly, it should be obvious from those results which party or coalition of parties had the largest number of members of National Assembly and, consequently, the majority party. Similarly, it would also be obvious from those results the second largest party in the House and which, for that reason, would assume the minority party role.
  6. Candidacy for the elective positions and nomination for membership in the National Assembly were based on party membership, except for those candidates participating in the elections as independent candidates, and, therefore, the question of the party ticket on which any particular member was elected or nominated to the House needed not arise in determining the majority or minority party. Likewise, section 10 of the Political Parties Act provided for registration of coalitions prior to elections although they could also be registered after elections.
  7. Vide a Gazette Notice No. 9950 dated August 22, 2022, the Chairman of the IEBC declared persons elected as members of the National Assembly. In the gazette notices, such details as the names of the persons elected and the political parties on which they ran and subsequently got elected were given. Based on that information published by the IEBC and the coalition agreements signed and deposited with the Registrar of Political Parties, it ought to have been possible to tell, offhand, which of the two coalitions was the majority party and whether the other coalition was the minority party.
  8. If the coalition agreements were clear, as they ought to be, by the political parties that comprised their respective coalitions; and, if the number of seats in the National Assembly garnered by each of those parties was also clear from the gazette notices published by the IEBC, the question of which of the two coalitions, or any other coalition or party, for that matter, was the majority party, ought not to be in doubt. It was for that reason that article 108 of the Constitution was couched in such terms that the question of a majority party or minority party was predetermined upon the declaration of the results by the IEBC; the declaration was the conclusive proof of the majority party and the minority party.
  9. The Speaker rejected the evidence provided by the Registrar of Political Parties which, based on the gazette notices by the IEBC declaring the results for membership in the National Assembly, the Azimio coalition was the majority party. The Speaker added to the Kenya Kwanza Coalition the 14 members of Parliament drawn from UDM, MDG, MCCC and PAA political parties. Inevitably, the membership of Azimio coalition was reduced by the same margin with the result that the Azimio coalition had less



- members than Kenya Kwanza Alliance. Nowhere in the Speaker's replying affidavit had he alluded to or provided any evidence of the existence of any post-election coalition agreements involving the UDM, PAA, MCCC and MDG and the Kenya Kwanza Alliance. There was simply no evidence of any post-election coalition signed and deposited with the Registrar of Political Parties.
10. According to section 9(1) of the Political Parties Act, the Constitution or rules of every political party shall provide for all the matters specified in the Second Schedule to the Act. One of the matters specified in the Second Schedule was the requirement that the Constitution or rules of a political party must provide rules for entering into a coalition (rule 21 of the Second Schedule to the Act). It had not been demonstrated, at the very least, that any of the parties alleged to have entered into a post-election coalition agreement with Kenya Kwanza took any step, in compliance with that particular rule, to enter into a coalition agreement with Kenya Kwanza.
  11. In the absence of any proof of post-election coalition agreements entered into between the UDM, PAA, MCCC and MDG and the Kenya Kwanza Alliance, the Speaker could not be heard to fault the Registrar of Political Parties for not producing them. She could not produce what had not been deposited at the Registrar of Political Parties. If it was true the UDM, PAA, MCCC and MDG political parties had signed and deposited the agreements with the Registrar of Political Parties, the court was entitled to assume that they must have had, in their possession, copies of the agreements or evidence of their existence and which they were under obligation to exhibit in the proceedings. At the very least, the Speaker or the 6<sup>th</sup> respondent ought to have exhibited those agreements which the Speaker singled out as having been presented on the floor of the House during the debate.
  12. Without the post-election coalition agreements, the Speaker had no basis to disregard and dismiss the Registrar of Political Parties information on the membership of Azimio coalition and Kenya Kwanza Coalition. For the same reason, the Speaker had neither the legal nor factual basis of declaring UDM, PAA, MCCC and MDG as having migrated from the Azimio Coalition and joined the Kenya Kwanza Alliance.
  13. The fact that there were pending disputes either in the court or before the Political Parties Tribunal on the membership of UDM, PAA, MCCC and MDG in the Azimio Coalition, could not have been a reason for the Speaker to rule that the parties were in Kenya Kwanza Coalition rather than in Azimio coalition. Based on the information provided by the Registrar of Political Parties, the parties were members of the Azimio Coalition notwithstanding the disputes that were pending for determination.
  14. It was never suggested that the coalition agreement or agreements between the constituent parties were suspended or held in abeyance in the event of a dispute on their membership. Neither was there any suggestion or evidence that either the court or the tribunal before which the disputes were pending for determination had stayed or suspended the coalition agreements pending the resolution of the disputes.
  15. By assigning to Kenya Kwanza Alliance, the 14 members of National Assembly elected on UDM, PAA, MCCC and MDG party tickets without any justifiable cause or reason and, in the process declaring Kenya Kwanza the majority party in the National Assembly, the Speaker acted arbitrarily and violated article 108 of the Constitution.
  16. The Office of the Speaker was provided for under article 106 of the Constitution. Apart from article 106 requiring that the Speaker shall be a person qualified to be elected as a Member of Parliament but was not as such a Member of Parliament, there was no other pre-condition that the Constitution prescribed prior to one assuming the role of the Speaker. Once elected, the Constitution further provided the manner in which the Office of Speaker or Deputy Speaker may become vacant.
  17. Article 106(2) did not state that the Speaker's office could become vacant by the Speaker's belonging to or joining a political party. Nevertheless, the constitutional provisions could not be viewed in isolation but must be considered alongside other constitutional provisions that dealt with Parliament as the well-established principles on the role of the Speaker in a constitutional democracy. Article



- 259(1) of the Constitution required, among other things, that in interpreting the Constitution, the same be interpreted in a manner that permitted the development of the law and contributed to good governance.
18. In any well-meaning constitutional democracy, there were three main organs namely; the Executive, the Legislature and the Judiciary which operated under a system of checks and balances working independently within their constitutionally defined spheres but also complementing each other. Parliament (National Assembly and the Senate- per article 93 of the Constitution) was vested with legislative power under article 94 of the Constitution. That power was specifically protected under article 94(5) which provided that no person or body, other than Parliament had the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation.
  19. The Speaker whose role was to preside over Parliament was the figure head of that arm of Government and it was his duty to ensure that Parliament executed the constitutionally mandated roles autonomously under the doctrine of separation of powers. Separation of powers, though not expressly mentioned by the Constitution was a fundamental feature in the rule of law principle which the Constitution obligated State and public officers to observe under the national values and principles of governance in article 10(2)(a) of the Constitution.
  20. Many a time, matters concerning the Executive branch such as those involving oversight, passage of certain laws that the Executive or political or interested groups were clamouring for, budgets, approval of appointments, impeachments would ordinarily find their way into Parliament. The Speaker had to be seen to facilitate those deliberations in Parliament neutrally to preserve the integrity of Parliament as an independent institution. Being associated with a political party or coalition affiliations whose stand on such issues was apparent would obviously evoke perceptions of bias. The cardinal requirement of impartiality was that one must not only be impartial but must be seen to be free from influences that could be perceived to lean towards, or be reasonably thought to be politically inclined in favour of either side, in the instant case, a Speaker who was openly aligned to a political party could not assure and preserve the independence of Parliament.
  21. It was the Speaker's foremost task to protect and propel the independence of Parliament not only in the conduct of debates or motions before the House but also in the broader sense. An arrangement such as the instant one where the Speaker was openly a leader of a political party which was part of the ruling political coalition viewed from the perspective of an objective observer would reasonably and naturally evoke perceptions of bias.
  22. The Constitution at article 99(1)(c) only singled out the Speaker as the ex-officio Member of the National Assembly unlike all other members because of his special status. The argument that the position of the Speaker could thus be viewed as those of other members of National Assembly who sat in the Speaker's panel was thus untenable. The Speaker was the representative face of Parliament as its leader. Through his affiliations or conduct, public confidence in the credibility of Parliament as an independent institution could be gained or lost.
  23. Separation of powers doctrine was a critical component of the rule of law principle and the Speaker occupied the honoured position as the guardian of parliamentary independence that the framers of the Constitution yearned for. Even though the Speaker may be elected while being a member of a political party, the nature of his duties upon assuming office demanded that he severed that relationship upon assuming office so as to remain neutral not only in discharging his duties inside Parliament but also externally to manifest the cohesive face of the democratic independent institution of Parliament. That could not be the case if the Speaker was encumbered with political party affiliations and interests.
  24. In enacting article 106(1) of the Constitution on eligibility of person who could be elected Speaker, the drafters did not require one to be member of a political party or even a Member of Parliament, in



- fact, one was required to resign his or her political party position and that explained why the Speaker resigned as the Senator of Bungoma County.
25. Kenya's position slightly varied with that of South Africa. In South Africa, the Speaker must come from among the Members of Parliament. That was a requirement of law. Unlike South Africa, Kenya had section 12 of the Political Parties Act which barred public officers from being members of a political parties except those that were specifically mentioned as having been exempted from the application of that provision. The Speaker of the National Assembly was not among those that were exempted from the application of section 12 yet by dint of article 260 of the Constitution he was in fact a public officer.
  26. Guided by the canon of interpretation '*expressio unius est exclusio alterius*' "the expression of one was the exclusion of another" the listing of the category of public officers who could be members of political parties while conspicuously excluding the Speaker was not exempted by section 12 of Political Parties Act. That omission was not by accident but deliberate act of Parliament to protect the office of the Speaker from political affiliations and safeguard its neutral role in execution of its constitutional mandate as a guarantee for parliamentary independence.
  27. Section 23(2) of the Leadership and Integrity Act applied to all public officers, and also on appointed State officers subject to any law relating to elections. The only exemption provided for in law was the category of State or public officers enumerated in section 12(2) of the Political Parties Act to which the Speaker did not belong.
  28. The simultaneous holding of the position of Speaker with that of the leader of political party and the leadership positions in the ruling political coalition as was the case with the current National Assembly Speaker who was the leader of Ford Kenya and a holder of key position in Kenya Kwanza Coalition reasonably evoked appearance bias and undermined his neutrality role as the Speaker of the National Assembly and the independence of Parliament as the symbol of democracy negatively impacting on Kenya's democratic standards as envisaged by the rule of law principle under article 10(2)(a) of the Constitution. That dual role was therefore unlawful and unconstitutional.
  29. The Speaker was elected in accordance with article 106(1)(a) of the Constitution and standing orders 4 and 6 of the National Assembly's Standing Orders. The fact that he was a party leader at the time of his election could not invalidate his election. However, his position as the leader of Ford-Kenya Party, or a leader of any other political office or organ, for that matter, became untenable and inconsequential the moment he assumed the Office of the Speaker of the National Assembly. He could not, and he had no capacity to perform any other functions as a leader of a political party or a political organ as long as he was the Speaker of the National Assembly.
  30. Two of the interested parties filed cross-petitions. Under rule 15(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, it was only a respondent in a constitutional petition who had the discretion to file a cross-petition. An interested party did not enjoy that advantage. It was presumed that an interested party had the option of and reserved the right to file his own petition; if the court found that such a subsequent petition raised common issues as in the pre-existing petition, it may exercise its discretion under rule 17 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and consolidate the petitions.

*Petition partly allowed; cross-petitions struck out.*

#### **Orders**

- i. *The court declared that the question as to which party or coalition of parties was the majority in the National Assembly in the 13<sup>th</sup> Parliament was determined by the sovereign will of the Kenyan voters during the August 9, 2022 general elections.*
- ii. *The court declared that the Speaker's ruling or determination contained in his communication from the chair made on October 6, 2022 on the majority and minority in the National Assembly violated article 108 of the Constitution and, therefore, it was null and void.*



- iii. *The court declared that the Speaker's ruling or determination from the chair on October 6, 2022 with respect to leadership of the National Assembly on account of his determination of the majority party and minority party in the National Assembly was contrary to and violated article 108 of the Constitution and, to that extent, it was null and void.*
- iv. *An order of certiorari was issued quashing the Speaker's ruling or determination contained in his communication from the chair made on October 6, 2022 on the majority and minority in the National Assembly.*
- v. *The rest of the prayers in the petition were declined.*
- vi. *Parties to bear their respective costs.*

## Citations

### Cases

#### Kenya

1. *Aluochier, Aluoch Polo v Attorney General* Civil Appeal 66 of 2013; [2018] KECA 583 (KLR) - (Explained)
2. *Ami Development Services Limited & 6 others v Trustees of the Kenya Local Government & 2 others, IZ Engineering Construction Ltd & another* Civil Case 476 of 1999; [2005] KEHC 2315 (KLR) - (Explained)
3. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Mentioned)
4. *Attorney-General & 2 others v Ndi & 79 others; Dixon & 7 others (Amicus Curiae)* Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Explained)
5. *Azimio la Umoja One Kenya Coalition Party v Speaker of the National Assembly & another* Constitutional Petition Number E505 of 2023 - (Mentioned)
6. *Barns, Jared Kaunda Chokwe v Orange Democratic Movement & 2 others* Complaint No 259 of 2017 - (Mentioned)
7. *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties)* Civil Appeal 239 of 2018; [2018] KECA 330 (KLR) - (Explained)
8. *Chapia, Gabriel Bukachi v Orange Democratic Movement* Complaint No 237 of 2017; [2017] KEHC 5409 (KLR) - (Explained)
9. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
10. *County Government of Kiambu & Council of County Governors v Senate & others* Constitutional Petition 229 of 2015; [2017] KEHC 8375 (KLR) - (Explained)
11. *County Government of Turkana v National Land Commission & 34 others* Civil Application 138 of 2019; [2020] KECA 89 (KLR) - (Mentioned)
12. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Explained)
13. *Gogo, Lilian v Joseph Mboya Nyamuthe & 4 others* Civil Appeal 135 of 2017; [2017] KECA 454 (KLR) - (Explained)
14. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR) - (Explained)
15. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Explained)
16. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Explained)
17. *Institute for Social Accountability & another v National Assembly & 5 others* Petition 1 of 2018; [2022] KESC 39 (KLR) - (Explained)
18. *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* Petition 552, 554, 573 & 579 of 2012; [2013] KEHC 5367 (KLR) - (Explained)



19. *Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party)* Petition 518 of 2013; [2014] KEHC 7493 (KLR) - (Explained)
20. *Judicial Service Commission v Speaker of the National Assembly & another* Petition 518 of 2013; [2013] KEHC 1569 (KLR) - (Mentioned)
21. *Kalpana, Rawal & 2 others v Judicial Service Commission & 6 others* Civil Applications 11 & 12 of 2016 & Ad Litem 1 of 2012; [2016] KESC 3 (KLR) (Consolidated) - (Explained)
22. *Kanjogu, Njiiru Mbogo & 7 others v Speaker, Embu County Assembly & another* Constitutional Petition 13 of 2014; [2015] KEHC 5641 (KLR) - (Explained)
23. *Katiba Institute v Attorney General & 9 others* Petition 17 of 2020; [2023] KESC 47 (KLR) - (Explained)
24. *Kenya National Commission on Human Rights vs Attorney General, Independent Electoral & Boundaries Commission & 16 others* Advisory Opinion Reference 1 of 2017; [2020] KESC 54 (KLR) - (Explained)
25. *King'ara, Peter Gichuki v Independent Electoral And Boundaries Commission & 2 others* Civil Appeal 23 of 2013; [2013] KECA 278 (KLR) - (Explained)
26. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* Civil Appeal 46 of 2017; [2018] KECA 381 (KLR) - (Explained)
27. *Lomorukai, Jeremiah Ekaimas v County Government & 2 others* Petition 11 of 2014; [2015] KEHC 4672 (KLR) - (Explained)
28. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Mentioned)
29. *Malala, Cleophas & another v Speaker of the Senate & 2 others; Stewart Madzayo & another (Interested Parties)* Petition E118 of 2021; [2021] KEHC 5781 (KLR) - (Mentioned)
30. *Mangale Chiforomodo v Azimio la Umoja One Kenya Coalition & Others* Constitutional Petition E041 of 2022 - (Mentioned)
31. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)
32. *Matbeka, Francis & 10 others v Director of Public Prosecutions & another* Miscellaneous Application 362 of 2014; [2015] KEHC 7642 (KLR) - (Explained)
33. *Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties)* Petition E080, E084 & E150 of 2023 (Consolidated); [2023] KEHC 19534 (KLR) - (Mentioned)
34. *Mbae v Speaker, County Assembly of Nakuru & another (Interested Party)* Constitutional Petition E004 of 2022; [2022] KEHC 3313 (KLR) - (Explained)
35. *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR) - (Explained)
36. *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition 3 of 2016; [2019] KESC 83 (KLR) - (Explained)
37. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
38. *Munene & another v Kioni & 7 others* Civil Appeal E350 of 2022; [2022] KECA 912 (KLR) - (Mentioned)
39. *Musaliala, Mudavadi & 4 others v Angela Gathoni Wambura & 2 others* Civil Appeal 177 of 2018; [2019] KEHC 8464 (KLR) - (Explained)
40. *Mwangi, Martin Kabubii v County Government of Laikipia* Cause 250 of 2018; [2019] KEELRC 219 (KLR) - (Explained)



41. *Mwau, John Harun v Independent Electoral & Boundaries Commission & another* Civil Appeal 112 of 2014; [2019] KECA 86 (KLR) - (Explained)
42. *Mwengi Mutuse & 4 Others vs Azimio la Umoja One Kenya Coalition & Others* Constitutional Petition E409 of 2022 - (Mentioned)
43. *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* Petition 1 of 2015; [2016] KESC 2 (KLR) - (Explained)
44. *Ng'ang'a v Minister for Justice, National Cohesion & Constitutional Affairs & another* Petition 354 of 2012; [2013] KEHC 6091 (KLR) - (Explained)
45. *Ngoge, Peter O v Francis Ole Kaparo & 4 others* Miscellaneous Application No 22 of 2004; [2007] KEHC 1433 (KLR) - (Explained)
46. *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* Petition E007 of 2023; [2023] KESC 113 (KLR) - (Mentioned)
47. *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 Others* Judicial Review Application 244 of 2018; [2018] KEHC 9501 (KLR) - (Explained)
48. *Njuguna, Peter Muturi v Kenya Wildlife Service* Civil Appeal 260 of 2013; [2017] KECA 42 (KLR) - (Explained)
49. *Okiya Omtatab Okoiti & another v Ministry of Transport & Infrastructure & 4 others* Petition 548 of 2015; [2016] KEHC 7886 (KLR) - (Explained)
50. *Okiya, Omtatab Okoiti & another v Attorney General & 6 others* Civil Appeal 362 of 2014; [2020] KECA 627 (KLR) - (Explained)
51. *Okoiti & 2 others v Cabinet Secretary, National Treasury & 4 others* Petition 303 of 2018; [2022] KEHC 13213 (KLR) - (Explained)
52. *Okoiti, Okiya Omtatab v Cabinet Secretary, National Treasury and Planning & others* Petition E181 of 2023; - (Mentioned)
53. *Omullo v National Land Commission* Petition E089 of 2020; [2021] KEELRC 2414 (KLR) - (Mentioned)
54. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Explained)
55. *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* Civil Appeal 11 of 20 of 2018; [2018] KECA 332 (KLR) - (Mentioned)
56. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated) - (Explained)
57. *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others* Judicial Review 378 of 2017; [2017] KEHC 4663 (KLR) - (Explained)
58. *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* Miscellaneous Application 45 of 2019; [2019] KEHC 11965 (KLR) - (Explained)
59. *Republic v Public Procurement Administrative Review Board & 2 Others Ex-parte Pelt Security Services Limited* Judicial Review Application 74 of 2018; [2018] KEHC 2068 (KLR) - (Explained)
60. *Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrati* Case No 1260 of 2007; [2008] KEHC 3915 (KLR) - (Explained)
61. *Rich Productions Limited v Kenya Pipeline Company & another* Petition 173 of 2014; [2014] KEHC 4539 (KLR) - (Explained)
62. *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* Petition 208,185 and 339 of 2019; [2020] KEHC 10370 (KLR) - (Explained)
63. *Satya, Bhama Gandhi v Director of Public Prosecutions & 3 others* Judicial Review Miscellaneous Application 685 of 2017; [2018] KEHC 6100 (KLR) - (Explained)



64. *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* Civil Appeal 202 of 2015; [2017] KECA 643 (KLR) - (Mentioned)
65. *Sharu, Shadrack Muyesu & 2 others v Justin Muturi & 2 others* Petition 331 of 2018; [2018] KEHC 9759 (KLR) - (Explained)
66. *Speaker of the Senate & another v Attorney-General & 4 Others* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
67. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Mentioned)
68. *Thuranira & 4 others v Attorney General & 2 others; Registrar of Political Parties & 3 others (Interested Parties)* Petition E043, E057 & E109 of 2022; [2022] KEHC 482 (KLR) - (Mentioned)
69. *United Millers Limited v Kenya Bureau of Standards & 5 others* Petition (Application) 4 of 2021; [2021] KESC 72 (KLR) - (Explained)
70. *Yahya, Ahmed Shee v Speaker County Assembly of Lamu; Jubilee Party & 6 others (Interested Parties)* Constitutional Petition E006 of 2020; [2021] KEHC 7956 (KLR) - (Explained)
71. *Yasser, Ali Sheikh v Amani National Congress (ANC) & 5 others* Constitutional Petition 588 of 2017; [2018] KEHC 7481 (KLR) - (Explained)

### **Tanzania**

*Augustine Lyatonga Mrema v Speaker of The National Assembly & another* Civil Application No 36 of 1998 - (Mentioned)

### **Uganda**

*Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997; (UGCC 3) - (Explained)

### **South Africa**

1. *Doctors for Life International v Speaker of the National Assembly & others* CCT12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) - (Explained)
2. *Gauteng Provincial Legislature v Kilian & 29 others* 562/98 2000 ZASCA 75; 2001 (2) SA 68 (SCA); 2001 ALL SA 563 - (Explained)
3. *Hugh Glenister v President of the Republic of South Africa & others* CCT 41/08; [2008] ZACC 19 - (Explained)
4. *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) - (Explained)
5. *Matatiele Municipality and others v President of the Republic of South Africa and Others* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) - (Explained)
6. *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa & others* (CCT 31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 - (Explained)
7. *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5 - (Explained)
8. *Speaker of National Assembly v De Lille MP & another* 297/98 (1999) (ZASCA 50) - (Mentioned)
9. *Tlouamma & others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa & another* (A 3236/15) [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC); [2016] 1 All SA 235 (WCC); 2016 (2) BCLR 242 (WCC) - (Explained)

### **United Kingdom**

1. *Blackburn vs Attorney General* [1971] 1 WLR 1037 - (Explained)
2. *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 - (Explained)

### **United States**

*Marshall Field & Co v Clark* 143 US 649 (1892) - (Explained)

### **Canada**

1. *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876 - (Explained)



2. *R v Big M Drug Mart Ltd* [1985] ISCR 295 - (Explained)

### **Malaysia**

*Teng Chang Khim v Badrul Hisba Bin Abdullah & another* Civil Appeal No 01(F)-26- d08/2016 (B) - (Mentioned)

### **Regional Court**

1. *Nickson Aywa Amutsama v Sir Brook (K) Limited* ACmHPR 147/95-149/96 - (Explained)
2. *Yowana Kahere & others v Lunyo Estates Limited* [1959] EA 319 - (Explained)

### **Texts**

1. Garner, BA., Black, HC., (Eds) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn
2. Hickens, A., (Ed) (), *The Role of Political Parties in Making Democracy Work* University of Michigan & V-Dem Project Manager for Political Parties
3. Kolbe, L., (Ed) (2006), *The Mandate of Political Representatives with Special Reference to Floor Crossing: A Legal Historical Study* Pretoria: University of South Africa: Unpublished Master of Laws Thesis
4. Marc, B., Gagnon, A., (Eds) (2017), *House of Commons Procedure and Practice* Editions Yvon Blais, 3rd Ed
5. Mason, P., (Ed) (1953), *Mason's Manual of Legislative Procedure for Legislative and Other Governmental Bodies* New York: London McGraw - Hill Book Company, Inc p 426-427
6. Scott, W., (Ed) (2006), *Parties for Rent? Ambition, Ideology, and Party Switching in Brazil's Chamber of Deputies* San Diego: University of California Volume 50, Issue 1
7. Venter, F (2017), *Utilizing Values in Constitutional Comparison* Apotchefstroom Electronic Law

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 1, 2, 3, 4, 10, 12, 20, 27, 38, 47, 50(1); 73; 75 (1)(a); 77(2); 88; 90; 91; 95; 97(1)(d); 99; 103; 106 - 109; 114; 117(2); 127; 128; 130(1); 159(1),165(3)(d); 203 (1); 209; 210; 248; 249; 255 - 260 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rules 4, 15(3); 17 - (Interpreted)
3. Constitution of Kenya (Repealed) In general - (Cited)
4. Elections (General) Regulations, 2012 (cap 7 Sub Leg) regulations 22, 70, 79, 83(1) (e) - (Interpreted)
5. Elections Act (cap 66) sections 24, 34(6B )(7) - (Interpreted)
6. Fair Administrative Action Act (cap 7L) sections 7, 9(2) - (Interpreted)
7. Independent Electoral and Boundaries Commission Act (cap 7C) In general - (Cited)
8. Kenya Citizenship and Immigration Act (cap 170) sections 22, 23 - (Interpreted)
9. Leadership and Integrity Act (cap 85C) section 23(2) - (Interpreted)
10. Parliamentary Powers and Privileges Act (cap 6) section 12(2) - (Interpreted)
11. Political Parties Act (cap 7D) sections 4A, 10(1); 11(1); 14, 21; 22; 34(F); 40; 41; Schedule 3 - (Interpreted)
12. Wildlife (Conservation and Management) Act (Repealed) (cap 376 Sub Leg) section 62(r) - (Interpreted)

#### **Tanzania**

Constitution of the Republic of Tanzania (cap 2) section 84(1) - (Interpreted)

#### **Uganda**

Constitution of Uganda section 82(2) - (Interpreted)

#### **South Africa**



Constitution of the Republic of South Africa section 52(1) - (Interpreted)

**Zimbabwe**

Constitution of Zimbabwe article 129 - (Interpreted)

**Canada**

Constitution Act, 1987 In general - (Cited)

**Advocates**

None mentioned

## JUDGMENT

### Introduction

1. The petition before court is dated June 16, 2023 but amended on June 23, 2023. It is expressed to be brought under article 3 of the Constitution according to which the petitioners believe they have a joint obligation to protect and defend the Constitution of Kenya, 2010. They have introduced themselves as “citizens of Kenya and registered voters” and that they are also members or supporters of the Jubilee Party and Azimio la Umoja One Kenya Coalition (hereinafter “Azimio coalition”). These two entities have been described in the petition as political parties duly registered under the Political Parties Act, 2011.

### The Petitioners’ Case

2. We need state at the outset that the facts in this case, at least as far as the petitioners’ case is concerned, were set out in a ruling on preliminary objections against petition rendered on January 26, 2024. To appreciate the petitioners’ case in this judgment, it is necessary that we reproduce them here.
3. The petitioners contend that during the August 9, 2022 General elections, the main contestants for various elective political positions were candidates from parties that formed the Azimio coalition and Kenya Kwanza Alliance Coalition (hereinafter “Kenya Kwanza coalition”). The coalitions are said to have been forged by various individual political parties through coalition agreements. The Kenya Kwanza coalition agreement was signed on May 8, 2022. The signatories to this agreement were His Excellency President William Ruto, who was then the leader of the United Democratic Alliance party, Honourable Musalia Mudavadi of Amani National Congress party and Honourable Moses Wetangula, the leader of Ford-Kenya party.
4. Amongst the highlights of the Kenya Kwanza coalition agreement were the distribution of various posts and duties among the coalition parties’ leaders or members. For instance, under article 11 of the agreement, the coalition partners agreed on creation of a coalition parliamentary group and prescribed, *inter alia*, the group’s membership and leadership. It also prescribed how particular positions would be shared between or amongst the coalition’s parties. This provision of the agreement has been captured in the petition as follows:
  - “ a) There shall be a coalition parliamentary group consisting of elected and nominated members of the National Assembly, the Senate and the East African Legislative Assembly who are elected or nominated by or through any of the founding member parties.



- b) The coalition parliamentary group shall be chaired by the coalition presidential candidate and in his absence by the coalition deputy presidential candidate.
  - c) Members of the party leaders Forum shall be *ex officio* members of the coalition parliamentary group.
  - d) The chairperson of the coalition parliamentary group shall convene the first meeting of the parliamentary group within thirty (30) days following the swearing in of the members of the parliamentary group.
  - e) The coalition parliamentary group shall elect a coalition parliamentary group secretary, a coalition parliamentary group whip and such other coordinating officials as may be deemed necessary for ease of the coalition’s agenda in the National Assembly, the Senate at the East African Legislative Assembly.
  - f) ANC and Ford-Kenya shall nominate for election, the secretary and the whip of the coalition parliamentary group as may be agreed among the two member parties.
  - g) After its first meeting, the coalition parliamentary group shall be convened once every three (3) months or otherwise as frequently as may be deemed necessary.
  - h) The role of the coalition parliamentary group shall be to assist the party leaders forum to plan, review and track the implementation of the coalition’s legislative and representational agenda in the National Assembly, the Senate and the East African Legislative Assembly including the agreed policies, programmes and legislative proposals of the coalition in the National Assembly, the Senate and the East African Legislative Assembly.”
5. Article 14 of the coalition agreement is on the functions and operations of the party leaders’ forum. The petitioners contend that under that article, Honourable Moses Wetang’ula plays what the petitioners have described as a “political role” in the affairs of the party leaders’ forum. Hon Wetangula was nominated for election as the Speaker of the National Assembly under article 21(l) of the Agreement.
6. Article 21(n), on the other hand, provides for sharing of positions in the National Government between Amani National Congress and Ford-Kenya. This article reads as follows:
- “n) ANC and FORD-Kenya shall have 30% share of the positions in the national secretaries, principal government including ambassadors/high commissioners/heads of diplomatic missions, chairpersons of state corporations, directors of state corporations and chairpersons and commissioners of constitution commissions provided that the aforesaid 30% share positions in the national government shall be shared equally between ANC and Ford Kenya.”
7. After the August 9, 2022 elections, the Independent Electoral Boundaries Commission (hereinafter “IEBC”) published the results of the members elected and nominated to the National Assembly in Gazette Notices Nos 105055 of September 5, 2022; 10537 of September 7, 2022 and 10710 of September 9, 2022.



8. The petitioners contend that according to the published election results, 171 members of the National Assembly were elected on the tickets of political parties that formed the Azimio coalition while 165 members of the National Assembly were elected on Kenya Kwanza coalition parties' tickets. It followed that, going by these results, the Azimio coalition became the majority party in the National Assembly after the August 9, 2022 General Elections.
9. Besides election of members of National Assembly, President William Ruto was declared the duly elected President of the Republic of Kenya while Honourable Moses Wetangula was elected Senator of Bungoma County. Honourable Wetangula later resigned as the senator and subsequently, successfully contested for election as the Speaker of the National Assembly at the first sitting of the 13<sup>th</sup> Parliament on September 8, 2022.
10. In the wake of the General elections and after the election of President Ruto as the President of the Republic of Kenya had been validated by the Supreme Court, several members of the National Assembly who contested as members of parties in the Azimio coalition opted to defect to the Kenya Kwanza coalition. To be precise, these were fourteen members of the National Assembly drawn from United Democratic Movement (UDM), Movement for Democracy and Growth (MDG), Maendeleo Chap Chap (MCCP) and PAA political parties.
11. The petitioners are aggrieved that although Hon Wetangula was elected the Speaker of the National Assembly, he held and still holds the position of the leader of Ford-Kenya party; that he is a member of the Kenya Kwanza Forum of Party leaders; and, that he is an ex officio member of the coalition parliamentary group of Kenya Kwanza. According to the petitioners, Honourable Wetangula is conflicted to the extent that, going by his political inclination, he would be biased towards driving the Kenya Kwanza coalition political agenda in discharge of his functions as the Speaker of the National Assembly.
12. Apart from conflict of interest, Honourable Wetangula's position as the Speaker of the National Assembly yet he remains a leader of a political party and a member of Kenya Kwanza forum of party leaders and also the coalition's parliamentary group is untenable because it is contrary to the Constitution of Kenya which establishes a presidential form of government in which the three arms of the government, that is, the executive, the legislature and the judiciary are independent of each other.
13. The petitioners' other grievance arises from the manner in which Hon Wetangula handled a dispute or disputes that arose in the National Assembly on which of the two coalitions, Azimio and Kenya Kwanza, formed the majority party and who, in these two coalitions, was to be recognised as the bona fide majority leader in the House.
14. The dispute arose when on October 4, 2022, Hon Wetangula informed the National Assembly that he had received two letters respectively from the Azimio coalition and Kenya Kwanza coalition, both claiming to be the majority party and in that regard appointing their leaders in the National Assembly. As a matter of fact, by a letter dated September 21, 2022, the secretary-general of Azimio coalition had written to the Speaker of the National Assembly informing him that following the coalition's parliamentary group meeting held on 16 and September 17, 2022, the coalition had elected certain of its members as House leaders in the National Assembly. These members were as follows:
  - i. Hon James Opiyo Wandayi is the leader of the majority.
  - ii. Hon Robert Mbui, as the deputy leader of the majority.
  - iii. Hon Junet Mohammed is the majority whip; and



- iv. Hon Sabina Chege, as the deputy majority whip.
15. On the other hand, on September 22, 2022, Hon Silvanus Osoro Onyigo and Honourable Kimani Ichung’wa, wrote to the Speaker of National Assembly and informed him that at its parliamentary group meeting held on 16 and September 17, 2022, the Kenya Kwanza coalition had elected the following persons as its leaders in the National Assembly:
- i. Hon Kimani Ichungwa leader of the majority party
  - ii. Hon Owen Baya, deputy leader of the majority party
  - iii. Hon Sivanus Osoro Onyiego, chief whip
  - iv. Hon Naomi Jillo Waqo, deputy chief whip
16. Following the two letters in which members of the coalitions sought to be recognised as the majority party and laid claim on the leadership position in the National Assembly appurtenant to that status, Hon Moses Wetangula invited members to a debate on the leader of the majority party and the leader of the minority party in the National Assembly.
17. On October 6, 2022, Honourable Wetangula, read out to the National Assembly his ruling the material part which has been summarised in the petition as follows:
- “ 1) That consideration of the various allegations of coercion and duress at the time of entering into coalition agreements and any appropriate remedy for the same lies outside the authority of this House.
  - 2) That in my considered opinion, it would be imprudent to treat the 14 members elected to the House under the UDM, PAA, MCCC and MDG as part of a coalition that they have expressly distanced both themselves and the parties from. I am therefore persuaded that the 14 members and their parties are a part of the Kenya Kwanza coalition. These, in my view, would be fair and in accordance with the previous rulings by my predecessors and related matters.
  - 3) That with the 14 members, the membership of Kenya Kwanza Coalition stands at 179 members while the membership of the Azimio la Umoja-One Kenya Coalition Party stands at 157 members. This, by implication, indicates that the Kenya Kwanza Coalition is the majority party and the Azimio la Umoja-One Kenya Coalition Party is the minority party in the House.
  - 4) That the Kenya Kwanza coalition is entitled to appoint the leader of the majority party while the Azimio La Umoja-One Kenya Coalition Party is entitled to appoint the leader of the minority party.
  - 5) That with regards to the majority party;
    - a) The member for Kikuyu Constituency, Hon Kimani Ichung’wa is the leader of the majority party;
    - b) The member for Kilifi North, Owen Baya, is the deputy leader of the majority party;
    - c) The member for South Mugirango, Hon Sivanus Osoro is the majority party whip; and



- d) The member for Marsabit County, Hon Naomi Jillo Waqo is the deputy majority whip.
- 6) That with regards to the minority party:
- a) The member fo Ugunja, Hon Opiyo Wandayi is the leader of the minority party;
  - b) The member for Kathiani, Hon Robert Mbui is the deputy leader of the minority party;
  - c) The member for Suna East, Hon Junet Mohamed is the minority party whip; and
  - d) Nominated member, Hon Sabina Chege is the deputy minority whip.”
18. The petitioners are aggrieved that this ruling is unlawful because it is in contravention of the Constitution, statutory provisions and the standing orders of the National Assembly. It is their position that this ruling was made without jurisdiction and, therefore, it is unconstitutional, null and void. In particular, the petitioners have pleaded that Hon. Wetangula arrogated to himself the power, mandate or jurisdiction to determine the majority party in the aftermath of the General elections held on August 9, 2022. Given that the results of the elections of the members of National Assembly clearly showed that Azimio coalition was the majority party, the issue of the majority party between the two coalitions could not arise or subject to debate.
19. Considering that there was no dispute in the Azimio coalition concerning the need of the majority in the House, the Speaker of the National Assembly acted mischievously and unconstitutionally in recognizing Kenya Kwanza coalition as the majority party.
- According to articles 4, 90, 99 and 103 of the Constitution as read with section 14 and 34(F) of the Political Parties Act, the Speaker of the National Assembly did not have the legal basis to recognise the purported coalition agreement between the 14 members who had written to him distancing themselves and their parties from the Azimio coalition in order to determine that Kenya Kwanza had become the majority party after the results of the elections of members of the National Assembly were gazetted.
20. The petitioners have also contended that even if the 14 members of the Azimio coalition had lawfully resigned from Azimio coalition, the coalition could not, by that fact alone, cease being the majority party after the General elections of August 2022. The power to determine the majority party, it is contended, is with the people of Kenya and it is duly exercised during the General elections. The Azimio coalition could not lose its status, rights and privileges of the majority party secured through a General election on account of defection and change of political allegiance by some members of the National Assembly elected on the tickets of the coalition’s constituent parties.
21. Considering that Azimio coalition was the majority party in the National Assembly, the subsequent determination by the Speaker of the National Assembly on the respective leadership of the majority party and minority party was illegal, null and void. In any event, the Speaker the National Assembly was not an impartial and independent arbiter within the meaning of article 50(1) and 75(1)(a) of the Constitution and he ought to have recused himself, assuming that the dispute was properly before him.
22. The petitioners pleaded that the dispute about which coalition is the majority party is justiciable issue and falls within the jurisdiction of this honourable court to determine. But the validity of the coalition agreement of Azimio coalition could not be determined by the Speaker of the National Assembly.



- Standing Order No 1 which the Speaker of the National Assembly invoked in making his decision enjoined him to give his decision in accordance with the Constitution, the applicable laws and democratic norms and conventions.
23. The petitioners are aggrieved that the immediate effect of the Speaker's ruling has been to trigger general indiscipline and rebellion in political parties particularly those in Azimio coalition. The National Assembly has also been turned to "a political bazaar" in which disgruntled members of Azimio coalition are said to sell their souls and interests of their electors to the government of the day on the pretext of seeking development for their constituents.
  24. It is also the petitioners' contention that in inducing, soliciting, aiding and abetting the defection of the members of National Assembly from constituent parties in Azimio coalition, the 1<sup>st</sup> respondent has violated articles 1, 3, 4, 10, 38, 73 and 91 of the Constitution.
  25. As far as the petitioners' grievances against the Registrar of the Political Parties are concerned, the petitioners claim that the Registrar has aided and abetted the violation of articles 1, 4, 38 and 18 of the Constitution and the subversion of multi-party democracy in Kenya because she has failed to uphold the will of the people of Kenya expressed during the General elections held on August 9, 2022.
  26. The Registrar of Political Parties is alleged to have failed to enforce the Political Parties Act, 2011 and this failure has emboldened Kenya Kwanza coalition to engage in unprecedented and systematic subversion of multi-party democracy in Kenya over the last eight months, prior to the filing of the instant petition. In the same breath, in failing to ensure that Kenya Kwanza coalition complies with the code of conduct for political parties as set out in the 1<sup>st</sup> schedule to the Political Parties Act, the Registrar of Political Parties has encouraged, aided and abetted the violation of the petitioners' political rights and those of other Azimio coalition members guaranteed by article 38 of the Constitution.
  27. The Registrar of Political parties is also accused of having promoted, aided and abetted Kenya Kwanza coalition in subverting multi-party democracy. She is said to have provided immunity from legal consequences to the 10<sup>th</sup> and 13 respondents and other elected leaders of Jubilee party who have defected from the parties in the Azimio coalition but continue to hang on to their political seats sponsored by Azimio coalition during the General elections of August, 2022.
  28. The 10<sup>th</sup> and 13 respondents, according to the petitioners, should be deemed to have ceased to be members of the Jubilee party and having resigned from their positions as members of National Assembly and the East African Legislative Assembly respectively.
  29. In view of the decisions, actions and omissions of the Kenya Kwanza coalition and the Speaker of the National Assembly, the Registrar of Political Parties has become unfit to continue holding that position on account of her willful violations of articles 1, 3, 4, 10, 73 and 75 of the Constitution.
  30. As for the IEBC, the petitioners contend that the Commission has refused, neglected or otherwise failed to expressly declare the party or coalition that garnered the majority of seats in the National Assembly. Due to this failure, Kenya Kwanza lobbied, induced and manipulated some members of the National Assembly of the Azimio coalition to unlawfully defect to its coalition and assert itself as the majority party.
  31. The IEBC is also alleged to have been silent in the wake of public schemes by the Kenya Kwanza and the Speaker of National Assembly to undermine multi-party democracy by fomenting rebellion and indiscipline among Members of National Assembly elected on tickets of constituent parties of the Azimio coalition. The IEBC is alleged to have failed to raise any objection or protest the ruling of the Speaker that Kenya Kwanza is the majority party.



32. Finally, the petitioners contend that the Finance Act, 2023 and the Appropriation Act, 2023 were processed through illegal process for the reason that these statutes were spearheaded by parliamentary committees led by a majority that was unlawfully in office and in a House presided over by a partisan speaker. Accordingly, the statutes are unlawful.
33. Against the foregoing background, the petitioners have petitioned for several orders which we can do no better than reproduce them here as outlined in the petition. They have been captured as follows:
- a) That a declaration be issued to declare that the question as to which party or coalition of parties is the majority in the National Assembly in the 13<sup>th</sup> Parliament was determined by the sovereign will of the Kenyan voters on August 9, 2022.
  - b) That the declaration be issued to declare that the decisions, actions and omission of the 1<sup>st</sup> respondent with the assistance, complicity, aid and abetment of the 4<sup>th</sup> and 5<sup>th</sup> respondents to destabilize the 1<sup>st</sup> interested party as the popularly determined majority party in the National Assembly constitutes an attempt to overturn the will of the people expressed in the general elections held on August 9, 2022 and establish the leadership of the National Assembly in the 13<sup>th</sup> Parliament contrary in a manner prohibited by articles 1, 4, 38 and 103 of the Constitution.
  - c) That a declaration be issued to declared (sic) that under articles 1, 12, 27 and 38 of the Constitution the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents are jointly and severally prohibited from establishing government that excludes representatives of the members and supporters of Jubilee party in accordance with their voting during the General election (sic) held on August 9, 2022.
  - d) That a declaration be issued to declare that the Azimio la Umoja-One Kenya Coalition is the majority party in the National Assembly of Kenya based on the outcome of the election of members of the National Assembly held on August 9, 2022.
  - e) That a declaration be issued to declare that the Kenya Kwanza alliance is the minority party in the National Assembly of Kenya based on the outcome of the elections of members of the National Assembly held on August 9, 2022.
  - f) That a declaration be issued to declare that the ruling/determination of the 3<sup>rd</sup> respondent contained in his communication from the chair made on October 6, 2022 concerning the leadership of the National Assembly in the 13<sup>th</sup> Parliament is inconsistent with the Constitution of Kenya and the outcome of the election of members of the National Assembly held on August 9, 2022.
  - g) That an order of certiorari be issued quashing the ruling of the 3<sup>rd</sup> respondent on the leadership of the National Assembly in the 13<sup>th</sup> Parliament contained in his communication from the chair made on October 6, 2022.
  - h) That a declaration be issued to declare that by dint of article 103 of the Constitution read with section 14 of the Political Parties Act no member of a party or coalition can become a member of a different coalition merely by



writing to the 3<sup>rd</sup> respondent for recognition of such a change of political allegiance.

- i) That a declaration be issued to declare that the 3<sup>rd</sup> respondent's ruling on the leadership of the National Assembly in the 13<sup>th</sup> Parliament is unlawful for amounting to an attempt to establish a government otherwise than in compliance with the Constitution of Kenya, 2010 and the results of the election of members of the National Assembly held on August 9, 2022.
- j) That a declaration be issued to declare that on account of the 4<sup>th</sup> respondent's position as the leader of the Ford-Kenya party, as a member of the party leaders forum of Kenya Kwanza alliance and an *ex officio* member of coalition preliminary group of Kenya Kwanza alliance the 4<sup>th</sup> respondent was not eligible to be elected as the speaker of the National Assembly in the 13<sup>th</sup> Parliament.
- k) That a declaration be issued to declare that by dint of articles 50(1) and 75(1) of the Constitution and the doctrine of the separation of powers the 4<sup>th</sup> respondent was not lawfully elected as or to continue serving as the speaker of the 2<sup>nd</sup> respondent.
- l) That an order of *certiorari* be issued to quash the election of the 4<sup>th</sup> respondent as the speaker of the National Assembly held on September 8, 2023.
- m) That a declaration be issued to declare the position of the speaker of the National Assembly is applicant.
- n) That a declaration be issued to declare that the 1<sup>st</sup> respondent has violated articles 1, 3, 4, 10, 38, 91 and 103 of the Constitution in inducing, causing, sponsoring and securing political rebellion in Jubilee party and *de facto* defection of its MPs to the Kenya Kwanza alliance.
- o) That a declaration be issued to declare that the 4<sup>th</sup> respondent is complicit and guilty of aiding and abetting the *de facto* defection of Jubilee MPs into Kenya Kwanza alliance in violation of articles 91 and 103 of the Constitution read with section 14 of the Political Parties Act, 2011.
- p) That a declaration be issued to declare that by dint of articles 1, 4, 12(1) and 38 of the Constitution read with section 22 and 23 of the Citizenship Act, the 4<sup>th</sup>-6<sup>th</sup> and 7<sup>th</sup>-12<sup>th</sup> petitioners alongside other members of the Jubilee party have a right to be represented by MPs elected on its ticket during the entire five years term of the 13<sup>th</sup> Parliament.
- q) That a declaration be issued to declare that by dint of articles 4, 12(1), 38 and 90 of the Constitution the Jubilee party cannot leave the Azimio la Umoja One Kenya Coalition without the approval of its members and/or supporters determined through a referendum envisaged under articles 1 and 88 of the Constitution.
- r) That a declaration be issued to declare that no official of Jubilee party is mandated to issue a notice to withdraw the Jubilee party from the deed of agreement for Azimio la Umoja One Kenya coalition before such intention is



subjected to public participation among members and supporters of Jubilee party as envisaged under article 10 of the Constitution.

- s) That a declaration be issued to declare that the 13<sup>th</sup> respondent's notice to withdraw Jubilee party from the deed of agreement for Azimio la Umoja one Kenya coalition dated June 13, 2023 is unlawful for being inconsistent with articles 1, 4, 10, 12(1), 38(1) and 91 of the Constitution read with sections 10, 14 and 34 of the Political Parties Act, 2011.
- t) That an order of *certiorari* be issued to quash the 13<sup>th</sup> respondent's notice dated June 13, 2023 to withdraw Jubilee party from the deed of agreement for Azimio la Umoja one Kenya coalition.
- u) That a declaration be issued to declare that the political scheme between the 1<sup>st</sup>, 4<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> respondents to destabilize Jubilee party and secure its withdrawal from the deed of agreement for Azimio la Umoja one Kenya coalition amounts to a conspiracy to achieve political and economic exclusion of members and supporters of Jubilee party in central Kenya in violation of articles 1, 4, 10, 12(1) and 38 of the Constitution.
- v) That a declaration be issued to declare that the Finance Bill, 2023 and the Appropriation Bill, 2023 were prepared and spearheaded by the majority leadership of the National Assembly that is unlawfully in office.
- w) That a declaration be issued to issue an order of certiorari to quash the impending Finance act, 2023 and the Appropriation Act, 2023.
- x) That a declaration be issued to declare that by dint of articles 1, 3, 4, 10, 12, and 38 of the Constitution on the obligation of every Kenyan citizen or section of the citizenry to pay taxes is conditional and subject to his right to be represented in management of state affair (sic) and organs of the state and in particular Parliament.
- y) That a declaration be issued to declare that the member (sic) and/or supporters of Azimio la Umoja one Kenya coalition and its constituent parties have a right to withhold payment of 50% of the direct taxes due to the National Government unless and until the status, rights and privileges of Azimio la Umoja as majority party in the National Assembly are fully restored by this honourable court.
- z) That the declaration be issued to declare that by dint of articles 1, 4 and 38 of the Constitution and an elected official sponsored by a political party cannot join another political party until he or she has resigned from his or her elective position.
- aa) That a declaration be issued to declare that within the meaning of article 103 of the Constitution and section 14 of the Political Parties Act, the 10<sup>th</sup> and 13<sup>th</sup> respondents are deemed to have resigned as members of the Jubilee party.
- bb) A declaration be issued to declare that the incumbent Registrar of Political Parties madam Anne Nderitu has violated articles 1, 3, 4, 10, 38, 73 and 75 of the Constitution which renders her unfit to continue serving as the Registrar of Political Parties.



- cc) A declaration be issued to declare that the 1<sup>st</sup> respondent has violated articles, 1, 3, 4, 38 and 91 of the Constitution.
- dd) That a declaration be issued to declare that the 16<sup>th</sup> respondent-the Cabinet Secretary, National Treasury and Economic Planning-violated the rights of the Kenyans to public participation in respect to the budget making cycle for the Finance Bill, 2023 and the Appropriation Bill, 2023.
- ee) That an order of permanent injunction be issued to restrain the 15<sup>th</sup> respondent-Kenya Revenue Authority-from demanding payment of taxes due from citizens aggrieved by the ouster of Azimio la Umoja one Kenya coalition as the majority party *vide* a ruling of the 3<sup>rd</sup> respondent delivered on October 6, 2022.
- ff) An order of *mandamus* to compel the Registrar of Political Parties to commence an inquiry into the deregistration of the 1<sup>st</sup> respondent on account of its willful violation of the principles and values set out in article 91 of the Constitution.
- gg) that an order of compensation of the petitioners for violation of their constitutional rights within the meaning of articles 1, 10, 12 (1), 27, 38 and 50 of the Constitution.
- hh) costs of this petition be borne by the respondents.”

## Respondents’ and Interested Parties’ Response

### (i) 1<sup>st</sup> and 17<sup>th</sup> Respondents’ response

34. In response to the petition, except for the 15<sup>th</sup> respondent, the 1<sup>st</sup> to 19<sup>th</sup> respondents filed replying affidavits opposing the petition. The 8<sup>th</sup> interested party filed a replying affidavit and a cross-petition. The 10<sup>th</sup> interested party also filed a cross-petition. The rest of the interested parties filed submissions either in support of or against the petition. The 3<sup>rd</sup> and 4<sup>th</sup> respondents, 6<sup>th</sup> to 9<sup>th</sup> and 18<sup>th</sup> respondents also preliminary objections. For the reasons given in our ruling handed down on January 26, 2024, we dismissed the preliminary objections.
35. The 1<sup>st</sup> and 17<sup>th</sup> respondents’ replying affidavit was sworn by Mr Cleophas Malalah who introduced himself in the affidavit as the Secretary-General of the United Democratic Alliance Party. Some of the “depositions” made in the affidavit appear to be issues of law and which this honourable court pronounced itself on in the ruling on the preliminary objections. For instance, Mr Malala has “sworn” that the petition raises a multiplicity of unrelated causes of action against different unrelated parties and that the court lacks jurisdiction to entertain some of the causes of action.
36. According to Mr Malala, the alleged amalgamation of the causes of action is crafted by the petitioners to avoid the dispute resolution mechanisms laid down in the Constitution and applicable statutes. The jurisdiction to determine a dispute between or among members of a political party is vested in the Political Parties Disputes Tribunal after exhaustion of the internal party dispute resolution mechanisms in accordance with section 40 and 41 of the Political Parties Act. According to the 1<sup>st</sup> and 17<sup>th</sup> respondents, the amended petition is an appeal against the decision of the Registrar of Political Parties.



37. Mr Malala's remarks on the office of the National Speaker are also legal arguments and he has even gone further and made reference to certain provisions of the Constitution including article 106 and article 99 which he has quoted verbatim in his affidavit. He has also cited the Standing Orders of the National Assembly, in particular, standing orders numbers 4 to 12 on the requirements for and the procedure of electing the speaker of the National Assembly.
38. Nonetheless, Mr Malala has also sworn that at the time of his election on September 8, 2022, the Hon Wetang'ula was the party leader of Ford-Kenya Party and also a leader in the Kenya Kwanza Alliance and that the Members of the National Assembly were aware of this fact when they elected him. As far as the impugned decision is concerned, Mr Malala has sworn that the Speaker of the National Assembly cannot be faulted for discharging his Constitutional duty to lead and guide the House on various issues. According to him, the issue of deciding which party is the majority in the National Assembly falls within the functions of the office of the Speaker of the National Assembly.
39. On the issue of the passage of the Finance Bill 2023 and the Appropriation Bill 2023 Mr Malala has urged that the process of making law is a cumulative and joint responsibility of all the members of the National Assembly independent of any political affiliations. In any event, this honourable court lacks jurisdiction to entertain any dispute on tax waivers and, that the Constitution has empowered the National Assembly to make legislation on tax waivers.

**(ii) 2<sup>nd</sup> Respondent's response**

40. A replying affidavit sworn on March 19, 2024 by Samuel Njoroge was filed on behalf of the 2<sup>nd</sup> respondent in response to the petition. Mr Njoroge swore the affidavit in his capacity as the Clerk of the National Assembly. He states that the Office of the Clerk of the National Assembly is a constitutional office within the Parliamentary Service and has the responsibility of managing the operations and affairs of the National Assembly and providing technical and procedural advice to the Speaker and Members on parliamentary practices and procedure, as outlined in articles 127 and 128 of the Constitution.
41. Like the 1<sup>st</sup> and 17<sup>th</sup> respondents, Mr Njoroge has deposed on what is largely matters of law relating to his office and the process of election of the Speaker of the National Assembly at the Assembly's first sitting after members have taken oath of office. In this regard, Mr Njoroge has made reference to articles of the Constitution and several standing orders including standing orders numbers 4,5,7, 10 and 12. He has also made reference to articles 106(1)(a) and 99 of the Constitution with respect to qualifications for the office of the Speaker and those of the members of Parliament.
42. As far as the election of the 4<sup>th</sup> respondent as the Speaker of the National Assembly is concerned, Mr Njoroge has sworn that on September 5, 2022, through Gazette Notice No 10529, the Clerk of the National Assembly announced vacancies for the position of Speaker and invited qualified individuals to apply.
43. Subsequently, the 4<sup>th</sup> respondent submitted his application in line with Standing Order 5(3A) after which the Clerk contacted various agencies, including the IEBC, to verify the 4<sup>th</sup> respondent's eligibility. The IEBC is said to have confirmed that the 4<sup>th</sup> respondent met the requirements to contest for Speaker, as per article 99 of the Constitution and section 24 of the Elections Act, 2011. The 4<sup>th</sup> respondent was subsequently elected as Speaker of the National Assembly in the 13<sup>th</sup> Parliament.
44. According to Mr Njoroge, a person running for the office of the Speaker is not prohibited from holding a position in a political party or coalition and to the extent that the petition posits that to be the position, the petitioners are said to introduce new qualifications for the office of the speaker which are not provided for in the Constitution.



45. On the quest to remove the Speaker from office, Mr Njoroge has sworn that this honourable court has no jurisdiction to remove the Speaker. According to him, the Speaker can only be removed in accordance with article 106(2)(c) of the Constitution and Standing Order 12B of the National Assembly's Standing Orders.
46. The Speaker of the National Assembly, it has been sworn, acts as an impartial umpire, guiding proceedings in the House and Standing Order 1(1) grants him the authority to decide any procedural questions that are not specifically addressed by the Standing Orders or other House rules.
47. As far as the leadership of the House is concerned, Mr Njoroge states that the positions of Leader of majority party and minority party are provided for under Article 108 of the Constitution, Standing Order 19A(1) and Standing Order No 20(1). It is urged that upon election of leaders, their names must be communicated to the Speaker in writing, who then informs the House of the majority and minority Party leadership and whips, as per Standing Order 19A.
48. The Clerk of the National Assembly then writes to the Leaders of the Majority and Minority Parties, requesting the names of nine(9) members to serve on the House Business Committee, as outlined in Standing Order 171(1)(f). These names are published in the Order Paper for approval at the House's first sitting.
49. The House Business Committee, it has been sworn, plays a crucial role in determining and prioritizing the legislative agenda of the National Assembly. Further, without this Committee, the House cannot proceed with its functions, and the participation of the Majority and Minority Leaders is essential. It is urged that Standing Order 171(2) mandates the formation of the House Business Committee within seven days from the start of a new House.
50. Mr Njoroge has sworn that with respect to the 13<sup>th</sup> Parliament, a dispute arose regarding the identification of the majority and minority parties, a matter not explicitly covered by the Constitution or Standing Orders. In line with Standing Order 1, the Speaker, guided by constitutional provisions, statutes, parliamentary traditions, and precedents, addressed the issue. In the 2<sup>nd</sup> respondent's view, the Speaker's decision on the dispute was consistent with the Constitution and the relevant laws, and that the petitioners have not demonstrated any violation of rights, fundamental freedoms, or laws in their amended petition.
51. As far as the Finance Bill, 2023, and Appropriation Bill, 2023, are concerned, Mr Njoroge has sworn that at the time of institution of this suit, both Bills were in the process of legislation. The Finance Bill, 2023, was eventually enacted by the National Assembly on June 21, 2023 and assented to by the President on June 26, 2023.

### **(iii) 3<sup>rd</sup> & 4<sup>th</sup> Respondents' response**

52. The 3<sup>rd</sup> and 4<sup>th</sup> respondents refer to one and the same person except that he has been sued both in his official and private capacities. The Honourable Speaker, filed a notice of preliminary objection dated June 30, 2023 and later filed an amended notice of preliminary objection dated October 30, 2024.
53. The Speaker also filed a replying affidavit sworn November 23, 2023. In the preliminary objection, the Speaker objected to the amended petition on grounds that it contravenes article 117(2) of the Constitution as read with section 12(2) of the Parliamentary (Powers and Privileges) Act, 2011. He has also contended that the amended petition seeks to challenge Finance Bill, 2023 and Appropriation Bill, 2023 which have already been enacted and assented to. The said Bills were also a subject of a separate suit.



54. It is the Speaker's position that the petitioners are guilty of laches and that the orders sought, if granted, will cripple the functioning of the National Assembly. Some of the decisions sought to be challenged in this petition were made long before the petition was filed.
55. The petitioners, it is urged, have failed to exhaust the mechanisms contained in the various parties' constitutions and coalition agreements and also those provided under sections 40 and 41 of the [Political Parties Act](#).
56. The amended petition is said to contravene rule 4 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 which requires that petitioners demonstrate, with precision, and specify the violation or threat of violation of rights to them or any other identified person.
57. It is also urged that the amended petition offends the doctrine of sub judice as the issues therein are substantially and materially similar to the subject matters in:
  - a. The High Court of Kenya at Nairobi in Constitutional Petition No E166 of 2023; *Hon Sabina Chege v Rt Hon of the National Assembly & 3 others*.
  - b. The Political Parties Parties' Dispute Tribunal Case No E010 of 2023; *Jeremiah Kioni v Office of the Registrar of Political Parties*
  - c. The High Court of Kenya at Kiambu in Constitutional Petition No E025 of 2023; *Association of Friends of Youth and Women v Speaker of the National Assembly & 3 others*.
58. The Speaker has sworn that he was qualified to run for the office of the Speaker of the National Assembly, as demonstrated by his successful candidacy as the Member of Parliament for Bungoma County in the 2022 General Elections and that following Standing Order 5(4) of the National Assembly Standing Orders, the Clerk confirmed his eligibility to contest and cleared him as a candidate for Speaker alongside other qualified candidates.
59. When elections were eventually held on September 8, 2022, he was elected Speaker of the National Assembly with 215 votes out of 346 votes and at the time of his election, he was the Party Leader of Ford-Kenya and a Leader in the Kenya Kwanza Alliance, a fact known to the Members of the National Assembly.
60. According to the Speaker, the only objection raised during the election was by Hon. TJ Kajwang, who questioned his qualifications on grounds that he was still a Senator. After a thorough debate, the Clerk is said to have ruled that he had resigned as Senator and was thus qualified to be Speaker, with the ruling recorded in the Hansard of September 8, 2022.
61. It is the Speaker's case that the petitioners, or their representatives, had the opportunity to raise any objections to his qualifications during the election process, but none was presented at the time and, therefore, the objections raised in the Amended Petition are irrelevant, as they are both belated and an afterthought.
62. He has invited the court to note, that through the amended petition, the petitioners have, without any lawful authority, sought to formulate, introduce and entrench new qualifications for the office of the Speaker of the National Assembly. The purported qualifications are not anchored in any law in Kenya. In particular, the Speaker has urged that the allegations by the petitioners that a Speaker of the National Assembly shall not hold office in a political party has no constitutional or legal foundation.



63. According to the Speaker, he is aware that article 38(1) of the Constitution of Kenya safeguards the political right to form and participate in forming a political party and to participate in the activities of a political party and, that a speaker of the National Assembly is not precluded from the enjoyment of this right. He has also sworn that the office of the Speaker of the National Assembly is an elective position. According to him, there is no law that bars a Speaker of the National Assembly or any other elected state officer, for that matter, from holding a position in a political party.
64. The Speaker contends that since he is an elected state officer and not appointed one and, he is not subject to article 77(2) of the Constitution. His position is that the Constitution contemplates that a Speaker of Parliament may be a member of a political party by dint of article 106(1)(a) as read together with article 99(1)(c) of the Constitution. The Deputy Speaker is not prohibited from holding a position in a political party yet he or she, as an elected state officer, who exercises the functions of a Speaker in the absence of the Speaker. The Speaker, by necessary implication enjoys the same rights.
65. Similarly, the Speaker's Panel consists of seven Members of the National Assembly, the Deputy Speaker included. All the seven members in the Speaker's Panel are members of political parties, one of whom is a party leader of Movement for Democracy and Growth. Four of the members of the Speaker's Panel are from the majority party while three are from the minority party. None of the Members of the Speaker's Panel is precluded from holding a position in a political party and neither is holding a position in a political party considered a ground for qualification or disqualification of a member from holding the position in the Speaker's Panel.
66. The Speaker has also made reference to article 75(1) of the Constitution on what constitutes conflict of interest and urged that pursuant to the said provision, conflict of interest constitutes conflict strictly between public interest and personal interests of a public officer. In contrast, the involvement of a person in a political party or its leadership is a matter of enhancing public interest under section 4A of the Political Parties Act.
67. The Speaker has reiterated that his position in the political party does not cause any conflict with his role as Speaker of the National Assembly and that, in any event, the petitioners have not adduced any evidence before this honourable court to prove the existence of a conflict of interest, now or in future.
68. He states further that parliamentary proceedings including legislation, is a product of political actors being the members of Parliament including the Speaker who is an *ex-officio* member, and, therefore, the position by the petitioners that only the Speaker ought not be a Member or an official of a political party is not only discriminatory, but also an absurdity and unfounded.
69. The Speaker has compared our jurisdiction to that of the United States of America where the Speaker of the House of Representatives is the political and parliamentary leader of the House and is simultaneously its presiding officer, de facto leader of the body's majority party, and the institution's administrative head. He also states that South Africa has a Parliamentary system where the political parties' elect members of the National Assembly. However, this is not the position in Kenya as ours is a presidential system where members of Parliament are elected directly by the voters.
70. On separation of powers, it's the Speaker's position that the principle of separation of powers concerns the three arms of government; that is, the Executive, the Legislature, and the Judiciary. Under article 130(1) of the Constitution, the executive comprises the President, the Deputy President, and the rest of the Cabinet. It is urged that offices in the executive do not include political parties.
71. The petitioners, according to the Speaker, have not provided evidence to support the claim of bias. Citing the Black's Law Dictionary, the Speaker says that bias is a preconceived opinion that prevents an



- open mind. Contrary to the petitioners’ allegations, the Speaker denies that he has shown any elements of bias in his actions.
72. As far as the dispute on the Majority Party in the House is concerned, the Speaker has sworn that on September 21, 2022, he received a letter from the Secretary General of the Azimio La Umoja One Kenya Coalition Party, the Hon Junet Mohammed, MP conveying information to the effect that the Coalition Party had elected the following as its House leaders in the National Assembly:
- a. Hon James Opiyo Wandayi, MP as the Leader of the Majority;
  - b. Hon Robert Mbui, MP as the Deputy Leader of the Majority;
  - c. Hon Junet Mohammed, MP as the Majority Whip; and
  - d. Hon Sabina Chege, MP as the Deputy Majority Whip.
73. He also received two other letters dated September 22, 2022 from the Member for South Mugirango, the Hon Silvanus Osoro Onyiego, MP and the Member for Kikuyu Constituency, Hon Kimani Ichung’wah, MP. In those letters, it was communicated to him that the Kenya Kwanza Coalition had appointed the following persons as its House Leaders in the National Assembly:
- a. Hon Kimani Ichung’wah, MP, Leader of the Majority Party;
  - b. Hon Owen Baya, MP, Deputy Leader of the Majority Party;
  - c. Hon Silvanus Osoro Onyiego, Chief Whip; and
  - d. Hon Naomi Jillo Waqo, MP, Deputy Chief Whip.
74. Owing to what the Speaker has termed as “the confusion arising from the letters”, there was a dispute over who held key positions in the National Assembly, and, as a result of the dispute, the formation and functioning of the House Business Committee was hampered. Nonetheless, this dispute called for the determination of which parties or coalitions formed the Majority and Minority parties in the House. According to the National Assembly Standing Orders, the Speaker was required to make a reasoned ruling on the issue. The ruling was eventually delivered on October 6, 2022, after a debate among the Members of the National Assembly.
75. According to the Speaker, in delivering the ruling, he was fulfilling his official responsibility to give guidance to the House on the Constitution of the leadership offices of the National Assembly and, for that reason, he is immune against any proceedings for any act done in the discharge of the functions of the Office of the Speaker of the National Assembly. This immunity is found in article 117 of the Constitution and section 12(2) of the Parliamentary Powers and Privileges Act, 2017.
76. In a bid to resolve the dispute, the Clerk of the National Assembly wrote to the Office of the Registrar of Political Parties on September 2, 2022 requesting information and copies of Coalition Agreements and vide the letter dated September 7, 2022, the Registrar of Political Parties is said to have declined to avail the documents as requested but stated that the membership of Azimio La Umoja One Kenya Coalition Party was still contested in court.
77. As a result of the documents laid on the floor of the House on October 4, 2022, it was brought to the Speaker’s attention that some political parties had filed constitutional petitions challenging the constitutionality of the Azimio la Umoja One Kenya Coalition Agreement. The petitions were identified as Nairobi High Court Constitutional Petition E409 of 2022 *Mwengi Mutuse & 4 others v Azimio la Umoja One Kenya Coalition & others* filed by members of the Maendeleo Chap Chap Party, (MCCP) and Pamoja African Alliance (PAA) and Mombasa High Court Constitutional Petition E041



of 2022 *Mangale Chiforomodo v Azimio la Umoja One Kenya Coalition & others*. Also, an objection had been raised by Movement for Democracy and Growth (MDG) Party dissociating itself from Azimio La Umoja One Kenya Coalition Party.

78. In rendering his ruling of October 6, 2022, the Speaker referred to all the documents presented to him, the presentations of members during the debate in the House and applicable laws and precedents and that the reasons for the decision are contained in the decision itself.
79. After the delivery of the decision, the Members of the Kenya Kwanza Coalition and Azimio La Umoja One Kenya Coalition Party have been operating and continue to operate under their respective designations as majority and minority party in the House respectively. According to the Speaker, none of the coalition parties have contested the positions they assumed after the ruling.

#### **(iv) 5<sup>th</sup> & 14<sup>th</sup> Respondents' response**

80. The 5<sup>th</sup> & 14<sup>th</sup> respondent's filed a replying affidavit sworn on November 3, 2023 by Mr Wafula Wakoko who has sworn that he is the Legal and advisory officer of the 5<sup>th</sup> respondent. He has stated the petition should be dismissed because it does not raise any reasonable cause of action against the 5<sup>th</sup> respondent. In any event, as the Registrar of Political Parties, the 5<sup>th</sup> respondent has effectively carried out her duties in accordance with the *Political Parties Act*, including regulating political parties and ensuring their compliance with the law.
81. On the particular question of the Majority Party in the National Assembly, she wrote to the 19<sup>th</sup> respondent requesting the party's position with regards to the Speaker being a Ford Kenya leader. The 19<sup>th</sup> respondent replied stating that the Speaker was not an appointed state officer and, therefore, article 77 was not applicable to him. the 5<sup>th</sup> respondent is said to have been satisfied with this response.
82. As far as the coalitions are concerned, the Registrar of Political Parties has admitted gazetting the Azimio Coalition Party via Gazette Notice No 4442 on April 14, 2022. The coalition, according to this gazette notice, comprised 26 political parties. She availed this information to the National Assembly when it was requested for. She gave the same information to the Secretary General of Azimio when he wrote to her inquiring about the status of the coalition agreement. Her letter to Azimio Coalition was dated September 7, 2022. According to the 5<sup>th</sup> respondent, as at June 2023, the only party that had legally exited the Azimio coalition was the Devolution Empowerment Party. All other parties were as gazetted on April 14, 2022 and they remained constituent parties of the Azimio Coalition.

#### **(v) 6<sup>th</sup> to 9<sup>th</sup> Respondents' response**

83. The 6<sup>th</sup> to 9<sup>th</sup> respondents filed an amended notice of preliminary objection dated November 3, 2023 and a replying affidavit sworn on June 30, 2023 by Hon Anthony Kimani Ichung'wah MP, the 6<sup>th</sup> respondent in these proceedings, in response to the petition.
84. In the preliminary objection, the 6<sup>th</sup>-9<sup>th</sup> respondents urged that the petition contravened article 117(2) of the *Constitution* as read with section 12(2) of *Parliamentary (Powers and Privileges) Act*, 2011; that the petitioners seek to challenge a legislative process; that they are guilty of laches; that they have failed to exhaust the available dispute resolution mechanisms; and, that the amended petition is full of political contests and it does not raise any justiciable issues capable of being determined by this honourable court. They have also contended that the amended petition contravenes rule 4 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013; and, finally that the petitions offend the doctrine of *sub judice*.



85. In his replying affidavit, Hon. Anthony Kimani Ichung'wah has sworn that following the ruling by the Speaker, the Minority Leader in the National Assembly addressed the House and stated that his party will reserve the right to move the speaker to review his ruling. However, the minority party, has not exercised its right to move the speaker to review his ruling dated October 6, 2022.
86. Hon Ichungwa has also deposed that the designated leaders for both majority and minority parties in the National Assembly took office in accordance with the ruling, members from the Kenya Kwanza Coalition assumed the Majority Leadership positions while members of the Azimio Coalition assumed the minority leadership positions. The 6<sup>th</sup> to 9<sup>th</sup> respondents state that the two Coalitions have never raised issues on the Speaker's ruling or the status of Kenya Kwanza position as the majority coalition in the National Assembly.
87. It is the 6<sup>th</sup> to 9<sup>th</sup> respondents' case that the issue of coalition membership is governed by the provisions of the coalition agreements and the *Political Parties Act*. They state that the discernable issue from the petition is the dispute between coalition partners; either as Azimio or Kenya Kwanza partners and, as such, the dispute is wrongly filed before this honourable court.
88. The petitioners' petition is also opposed on the ground that the petitioners have not pleaded with any degree of precision of the majority leaders' unconstitutional actions in the discharge of their official duties. They have, in this regard, invoked article 117 of the *Constitution* as read together with section 12 of the *Parliamentary Powers and Privileges Act* to urge that they have been wrongly sued in their official capacity in this matter and that pursuant to the doctrine of parliamentary privilege they are immune to these proceedings.
89. It is their case that article 38(2) of the *Constitution* of Kenya guarantees the right to form or join a political party and to campaign for a political cause and as such Kenya Kwanza Coalition exercised this right by partnering with other political parties that share similar interests and objectives to form the coalition. According to the 6<sup>th</sup> -9<sup>th</sup> respondents the Kenya Kwanza coalition, consisting of political parties with a majority in the House, holds 179 members, while the Azimio La Umoja One Kenya Alliance has 157 members. They urge that according to article 108 of the *Constitution*, they are lawfully in office, having been validly nominated by the Kenya Kwanza Coalition, the majority party in the National Assembly.
90. They urge that the rights and freedoms under article 38(2) of the *Constitution* protect political parties' ability to join or form coalitions of their choice, and also to leave coalitions without limitations. It is their case that following this constitutional right, political parties such as MCCC, MDG, PAA, and UDM severed their ties with the Azimio La Umoja One Kenya Alliance Party and submitted their cessation documents to the Registrar of Political Parties.
91. Additionally, the 6<sup>th</sup> to 9<sup>th</sup> respondents argue that section 10 of the *Political Parties Act*, 2011, allows two or more political parties to form a coalition before or after an election, and requires them to deposit their coalition agreement with the Registrar within set timelines. It is also urged that section 2 of the Third Schedule to the *Political Parties' Act* stipulates that coalition agreements must be written, executed by authorized national party officials, and certified by a commissioner for oaths.
92. Section 3 of the Third Schedule of the *Political Parties Act*, 2011 is said to outline the contents of a coalition agreement which include the parties which are members of the coalition, the policies and objectives of the coalition, the decision-making structure, rules and procedures, the Code of Conduct of the coalition including the values and the principles guiding the performance of the individuals and the member parties within the coalition, the dispute resolution mechanisms and procedures and



the enforcement and sanction mechanisms and procedures for breach of any of the provisions of the agreement.

93. According to the 6<sup>th</sup> to 9<sup>th</sup> respondents any party claiming to be in a coalition must submit the coalition agreement to the Registrar of Political Parties. Further, the claim that MCCC, UDM, PAA, and MDG are part of the Azimio coalition lacks supporting documentary evidence, which is necessary for the orders sought by the petitioners.
94. It is further urged that the leaders of these four parties have publicly distanced themselves from the Azimio La Umoja One Kenya Alliance Party and that they have expressed their support for the Kenya Kwanza Alliance and their right to pursue their own political path, which should be respected and protected.
95. It is further contended that section 11(1) of the Political Parties Act allows political parties to merge with another party, either forming a new party or merging into an already registered one. Coalition agreements, it is urged, are private contracts between the parties involved and that they should be resolved according to the terms agreed upon by those parties. The 6<sup>th</sup> to 9<sup>th</sup> respondents also urge that the petitioners have not explained why they by-passed the internal dispute resolution mechanisms of the political parties involved before resorting to court.
96. The 6<sup>th</sup> to 9<sup>th</sup> respondents urge that despite the petitioners' claim that UDM, PAA, MDG, and MCCC are part of Azimio La Umoja One Kenya Alliance, they have not provided the necessary documentary evidence to support their claim.
97. They also urge that the political rights guaranteed under article 38 of the Constitution are closely tied to the freedom of association outlined in article 36, which prohibits the compulsion of a person to join any association, advocating instead for voluntary association. The petitioners, according to 6<sup>th</sup> to 9<sup>th</sup> respondents, are attempting to force the four political parties to remain part of the Azimio La Umoja Kenya One Alliance Party, against their will, which is an infringement upon their political rights and freedom of association.
98. The 6<sup>th</sup> to 9<sup>th</sup> respondent urge that Coalition agreements, which are deposited with the Registrar of Political Parties, can be used to determine coalition membership. However, these agreements must adhere to the requirements of the Third Schedule of the Political Parties Act, 2011, to be valid and reliable.  
  
Also, that the issue of which party or coalition holds the majority in the National Assembly is dynamic and can only be definitively settled when the situation arises, or when political allegiances and party coalitions change.
99. It is these respondents' case that the petitioners' claim that the majority in the National Assembly is decided by the ballot is incorrect. They urge that the Kenyan voters elect their representatives, not political parties, meaning that they do not directly decide who holds the majority in the National Assembly. According to them, this assertion overlooks the role of independent members in the Assembly.
100. They have also urged that the question of which party or coalition of parties holds the majority in the National Assembly, as outlined in article 108 of the Constitution, only arises once members are sworn in. It is their case that the same becomes relevant when the House needs to determine who is entitled to nominate individuals for the majority and minority leadership positions. According to the Constitution, the leader of the majority in the National Assembly is the leader of the largest party or coalition of parties.



101. It is the 6<sup>th</sup> to 9<sup>th</sup> respondents' case that the issue of deciding which party is the majority in the National Assembly falls within the functions of the office of the Speaker of the National Assembly. The petition, according to them, has been brought late in the day and the inordinate delay has not been explained. The members of the minority party are alleged to be guilty of acquiescing and have failed to dispute the Speaker's ruling, particularly having benefited from the leadership offices by being the second largest party in the National Assembly.
102. The 6<sup>th</sup> to 9<sup>th</sup> respondents further contend that the legislation passed by the National Assembly is intended to serve all the people of Kenya, not just a specific political faction or party. Therefore, the petitioners' argument that the Finance Bill 2023 and Appropriation Bill 2023 are designed to benefit the Kenya Kwanza Alliance is flawed.
103. They state that the laws are enacted by all members of the National Assembly in fulfillment of their duty to serve the Kenyan public, rather than to promote their own political interests. It is the 6<sup>th</sup> to 9<sup>th</sup> respondents' case that the petitioners' suggestion that only Azimio and Kenya Kwanza have representation in Parliament is inaccurate. The National Assembly is said to also include members from parties unaffiliated with either Azimio or Kenya Kwanza, as well as independent candidates who actively participate in the legislative process.
104. It is also the 6<sup>th</sup> to 9<sup>th</sup> respondents' case that the doctrine of separation of powers dictates that the courts should refrain from intervening in matters that are still under consideration by the National Assembly until its processes are completed. Furthermore, the petitioners are said to have failed to specify the illegality in the National Assembly's handling of the Finance Bill and the Appropriation Bill.
105. The 6<sup>th</sup> to 9<sup>th</sup> respondents state that the petitioners' claim that the bills were passed by the chairperson of the majority party is a misunderstanding of the parliamentary process as the bills are reviewed by the relevant committee, where decisions are made collectively by members from both the majority and minority parties, as well as independents. They further urge that a bill is considered by the relevant committee and the role of the chairperson is to chair the meeting as provided under Standing Order 180 of the National Assembly's Standing Orders. The committee's report undergoes scrutiny by the whole House, where all members can make further recommendations. It is urged that members of the Azimio La Umoja One Kenya Coalition Party are equally responsible for lawmaking in the National Assembly.
106. The 6<sup>th</sup> to 9<sup>th</sup> respondents urge that articles 95 and 109 of the *Constitution* envision legislation being made by all Members of the National Assembly, regardless of party affiliation. The laws made in Parliament represent the collective will of the people, not any particular political party. It is also stated that, under article 122, decisions in Parliament are made by a majority of members present and voting, meaning that bills belong to the House as a whole, not to any one party.
107. The 6<sup>th</sup> to 9<sup>th</sup> respondents urge that Members of Parliament maintain their independence when voting and making decisions based on needs of the electorate, and not under the control of political parties and as such, the petition is flawed in suggesting that Members of Parliament lack political independence. They have referred to articles 209 and 210 of the *Constitution* on the taxation and urged that these articles grants the National Assembly the authority to impose taxes and make tax-related laws. It is further urged that the Finance Bill, at the time of filing their response, was still undergoing the proper legislative process, and could not be deemed unconstitutional at that stage. Further, that this court lacks jurisdiction to grant tax waivers, as only the National Assembly has the constitutional authority to legislate on taxation matters.



108. Finally, the 6<sup>th</sup> to 9<sup>th</sup> respondents urge that the petitioners' claim appears to be an attempt to bring internal political party disputes to court, dragging the National Assembly's leadership into their political issues. They urge that the appropriate forum for such disputes is within the parties' internal dispute resolution mechanisms or the political parties' tribunal, not the court.

**(vi) 10<sup>th</sup> and 13<sup>th</sup> Respondents' response**

109. The 10<sup>th</sup> and 13<sup>th</sup> respondents filed a replying affidavit sworn on February 2, 2024 by Honourable Kanini Kega, named as the 13<sup>th</sup> respondent in this petition. He introduced himself as the National Director of Elections as well as a member of the National Executive Committee of the Jubilee Party. According to the 10<sup>th</sup> and 13<sup>th</sup> respondents, the amended petition, in so far as it relates to Jubilee Party's membership in the Azimio la Umoja One Kenya Coalition, is moot as the Jubilee Party successfully withdrew from the Deed of Agreement with the Azimio la Umoja One Kenya Coalition.

110. It is their case that this court lacks jurisdiction to hear and determine the questions in the petitioner's amended petition as the issue of Jubilee leadership is sub judice as there are multiple suits filed in the High Court with regard to it. They also urge that this court will not be seized of jurisdiction until the matter is determined by the internal dispute resolution mechanism of the Jubilee Party as mandated under section 40(2) of the *Political Parties Act*, 2011.

111. The 10<sup>th</sup> and 13<sup>th</sup> respondents also urge that the question as to the leadership of the National Assembly as it relates to the 10<sup>th</sup> respondent and the Jubilee Party is moot as the Jubilee Party is now recognised as a Parliamentary Party with the 10<sup>th</sup> respondent as its whip. It is further urged that this issue is also sub judice as Milimani Constitutional Petition Number E505 of 2023 *Azimio la Umoja One Kenya Coalition Party v The Speaker of the National Assembly and Jubilee Party*.

112. It is the 10<sup>th</sup> and 13<sup>th</sup> respondent's case that the duties of the National Executive Committee are outlined under article 8.2 of the Jubilee Party Constitution and include, *inter alia*, ensuring that all decisions made by all party organs are duly carried out and all the policies are adhered to and ensuring that proper order, discipline, and strict adherence to the Party's constitution, by-laws, and party policies by all officials, members, and all organs of the Jubilee Party. They further urge that the Jubilee Party Constitution under article 14.1.12 mandates the National Disciplinary Committee to report its findings and decisions to the National Executive Committee for adoption, ratification, variation or substitution.

113. According to the 10<sup>th</sup> and 13<sup>th</sup> respondents, Jeremiah Kioni, David Murathe and Kagwe Gichohi who were the Secretary General, National Vice Chairperson and National Treasurer of the Jubilee Party respectively, ceased participating in the running of the Jubilee Party, on February 10, 2023 when they were suspended by a resolution of the National Executive Committee pending the hearing and determination of complaints made against them within the Jubilee Party internal dispute resolution mechanism.

114. The Jubilee Party National Executive Committee is also said to have resolved to have the 13<sup>th</sup> respondent as the acting Secretary General of the Jubilee Party, Hon Rachel Nyamai as the acting National Treasurer and Hon Adan Keynan as the acting National Vice Chairperson to ensure the smooth running of the affairs of the Jubilee Party. It is urged that the said persons have held these positions until Hon Asenath Onger J gave interim orders dated July 13, 2023 in Nairobi High Court Civil Appeal Number E630 of 2023.

115. The 10<sup>th</sup> and 13<sup>th</sup> respondents urge that, Jeremiah Kioni, David Murathe and Kagwe Gichohi, thereafter, moved to the Political Parties Tribunal in PPDTTC Number E001 of 2023 seeking, *inter alia*,



- orders to annul the resolutions of February 10, 2023 that suspended them from the Jubilee Party. On April 19, 2023, the Political Parties Tribunal is said to have delivered its judgment in PPDTTC Number E001 of 2023 referring the issue of the validity of the meeting and resolutions of February 10, 2023 to the Jubilee Party internal dispute resolution mechanism in line with section 40 of the [Political Parties Act](#).
116. Following the judgment of the Political Parties Tribunal in PPDTTC Number E001 of 2023, Jeremiah Kioni, David Murathe and Kagwe Gichohi were charged before the Jubilee Party National Disciplinary Committee pursuant to the resolutions of the National Executive Committee dated February 10, 2023 and complaints filed by the Chairperson on behalf of the Jubilee Party.
  117. According to the 10<sup>th</sup> and 13<sup>th</sup> respondents, in a bid to intimidate and threaten the operations of the Jubilee Party internal dispute resolution mechanisms, Jeremiah Kioni issued several letters purporting to revoke the appointment of members of the Jubilee Party national disciplinary tribunal and internal dispute resolution committee. It is urged that Jeremiah Kioni, David Murathe and Kagwe Gichohi were given a fair hearing before the Jubilee Party national disciplinary committee and were represented by advocates of their choice.
  118. The national disciplinary committee reached a decision expelling Jeremiah Kioni and David Murathe and suspending Kagwe Gichohi which decision was forwarded to the national executive committee as provided under article 14.1.12 of the Jubilee Constitution. The 10<sup>th</sup> and 13<sup>th</sup> Respondents urge that pursuant to article 8.2.5 of the Jubilee Party Constitution, the national executive committee met and adopted the decision of the national disciplinary committee on May 19, 2023. The Minutes of the National Executive Committee of 19 May 2023 were then forwarded to the Office of the Registrar of Political Parties who, upon review of the submitted documents, updated its records and the register of party members of the Jubilee Party in its letter dated May 19, 2023.
  119. The 10<sup>th</sup> and 13<sup>th</sup> respondents urge that the decision to suspend Jeremiah Kioni, David Murathe and Kagwe Gichohi led them to filing multiple suits through different law firms seeking a raft of similar orders in the Political Parties Dispute Tribunal. These suits included:
    - i. PPDTTC Complaint Number E009 of 2023 *Hon Jeremiah Ngayu Kioni v Jubilee Party and Registrar of Political Parties and Nelson Dzuya and 12 others*;
    - ii. PPDTTC Complaint number E012 of 2023 *David Murathe v Jubilee Party and Registrar of Political Parties and Nelson Dzuya & 13 others*;
    - iii. PPDTTC Complaint number E011 of 2023 *Kagwe Gichohi v Jubilee Party and Registrar of Political Parties & Nelson Dzuya & 13 others* ;
    - iv. PPDTTC E010 of 2023 *Jeremiah Kioni, David Murathe, Kagwe Gichohi & Jubilee Party v The National Disciplinary Committee of the Jubilee Party, Joshua Kutuny and Kanini Kega*
    - v. PPDTA Number E003 of 2023 *Jeremiah Kioni, David Murathe, Kagwe Gichohi and Jubilee Party v The Office of the Registrar of Political Parties, Anne N Nderitu The National Disciplinary Committee of the Jubilee Party, Joshua Kutuny and Kanini Kega*.
  120. According to the 10<sup>th</sup> and 13<sup>th</sup> respondents, the Political Parties Disputes Tribunal delivered its judgments in E009, E010, E011 and E012 on July 10, 2023 dismissing the complaints with costs to the respondents and interested parties in the dispute. The Political Parties Disputes Tribunal delivered its judgment in PPDTA Number E003 of 2023 July 11, 2023 dismissing the appeal with costs to the respondents and interested parties therein.



121. It is urged that the Jubilee Party Internal Dispute Resolution Committee in IDRC Dispute Number E005 of 2023 Hon Jeremiah Kioni v Nelson Dzuya and Hon Joshua Kuttuny held that the Committee meeting held on February 10, 2023 was properly convened and held under the Jubilee Party Constitution. They urge that this decision is yet to be appealed from or set aside.
122. The 10<sup>th</sup> and 13<sup>th</sup> respondents urge that Jeremiah Kioni, David Murathe and Kagwe Gichohi would later file multiple Appeals in different High Courts challenging the decisions of the Political Parties Dispute Tribunal (PPDT) being;
- i. Nairobi High Court Civil Appeal Number E630 of 2023;
  - ii. Nairobi High Court Civil Appeal Number E635 of 2023;
  - iii. Mombasa High Court Civil Appeal Number E159 of 2023 now Milimani HCCA Number 008 of 2023;
  - iv. Nairobi High Court Civil Appeal Number E736 of 2023;
  - v. Nairobi High Court Civil Appeal Number E750 of 2023;
  - vi. Nairobi High Court Civil Appeal Number E764 of 2023.
123. The 10<sup>th</sup> and 13<sup>th</sup> respondents case is that it is not in dispute that the Jubilee Party entered into a deed of agreement dated March 12, 2022 with respect to the Azimio la Umoja One Kenya Coalition with other coalition partners. It is also not in dispute that the Jubilee Party suffered greatly at the hands of its Azimio coalition partners including the unlawful removal of Jubilee Party members from parliamentary committees and parliamentary leadership positions.
124. They urge that pursuant to article 33.1 and 33.2 of the Jubilee Constitution, the National Executive Committee of the Jubilee Party in its meeting of February 10, 2023 resolved that pending the convening of a special National Delegates Convention that the Committee commences the process of exiting the Azimio Coalition; the National Executive Committee engages with the ruling coalition on the possibility of creating a working cooperation arrangement with it and the Committee demands that the Jubilee Party be recognized as a Parliamentary Party with all the rights and benefits accruing thereto taking into account that the Jubilee Party is the third largest party in Parliament.
125. Given the alleged constant mistreatment of the Jubilee Party members in the hands of its coalition partners within the Azimio la Umoja One Kenya Coalition, the Jubilee Party registered a dispute within the Azimio la Umoja One Kenya Coalition Dispute Resolution Panel pursuant to article 16 of the Deed of Agreement for Azimio La Umoja One Kenya Coalition. It is urged that attempts to resolve the dispute were ignored at the expense of the Jubilee Party and the 10<sup>th</sup> respondent.
126. The 10<sup>th</sup> and 13<sup>th</sup> respondents' case is that pursuant to article 33 of the Jubilee Party Constitution, the National Executive Committee of the Jubilee Party on June 6, 2023 resolved to withdraw from the Deed of Agreement for Azimio La Umoja One Kenya Coalition as was provided for under article 22.1 of the Deed of Agreement for Azimio La Umoja One Kenya Coalition.
127. They also state that as was required under article 22.1. of the Azimio Deed of Agreement, the Jubilee Party published a notice to withdraw from the Deed of Agreement for Azimio la Umoja One Kenya Alliance on June 13, 2023.



**(vii) 11<sup>th</sup> Respondent's response**

128. Mr Chrispine O Owiye swore a replying affidavit on behalf of the 11<sup>th</sup> respondent in response to the petition. The affidavit was sworn on July 28, 2023. Mr Owiye has introduced himself as the manager, in charge of the Directorate of Legal and Public Affairs of the IEBC.
129. According to Mr Owiye, the 11<sup>th</sup> respondent's case is that the petition severely falls short of the constitutional threshold as it does not state with specificity the constitutional provisions that have been violated by the requirement of paragraph (f) of the Gazette Notice No 5735 of 12 June, 2017. The gazette notice, according to Mr Owiye, was sanctioned by law and specifically articles 90 and 260 of the Constitution, 2010, section 34 (6B) and (7) of the Elections Act and the Regulations under the Elections Act.
130. It is further sworn that the respondent is mandated by the Constitution of Kenya 2010, the Independent Electoral and Boundaries Commission (IEBC) Act, 2011 and the Election Act, 2011 to conduct or supervise elections to any elective body or office established by the Constitution of Kenya and specifically article 88(4)(d) of the Constitution mandates the IEBC to regulate the process by which parties nominate candidates for elections. The rest of Mr Owiye's depositions relate to qualifications for nomination to the National Assembly for representation of special groups and they appear to be unrelated to the issue at hand.

**(viii) 12<sup>th</sup> and 16<sup>th</sup> Respondent's response**

131. The 12<sup>th</sup> and 16<sup>th</sup> respondents filed a replying affidavit sworn on November 7, 2023 by Njuguna Ndung'u. It is their case that the process of preparation and enactment of the Finance Act, 2023 was an inclusive process and that it begun by issuing a Public Notice on November 15, 2022 on the Government's website requesting proposals from various stakeholders to be considered during the preparation of the Finance Act, 2023.
132. According to them, the public notice required the proposals to be submitted in writing to the Cabinet Secretary, National Treasury and Economic Planning or through the email budgetproposals@treasury.go.ke not later than December 16, 2022. The notice is said to have specified that the proposals ought to have resonated with the Economic Recovery Strategy and the country's economic blueprint Vision 2030, on taxes should have been geared towards promoting the growth of Agriculture, Micro, small and Medium Enterprise (MSMES), Housing and Settlement, Healthcare, Digital Superhighway and Creative Economy. They also ought to have included measures on regulatory reforms, revenue administration reforms, and any other measures that could enhance macroeconomic stability and also that they could include measures to reposition the economy on an inclusive and sustainable growth trajectory.
133. In response to the said public notice, several stakeholders submitted proposals for consideration in the preparations of the Finance Bill, 2023. Some of the stakeholders that submitted proposals included Institute of Certified Public Accountants of Kenya (ICPAK), Price Waterhouse Coopers (PWC), Ernst and Young, Kenya Association of Manufacturers (KAM), Kenya Bankers Association, Petroleum Institute of East Africa, EABX Public Limited Company, KPMG, Kenya Association of Air Operators, American Chambers of Commerce-Kenya, Alcohol Beverages Association of Kenya, Delloite, Association of Chartered Certified Accountants, Old Mutual Holdings and RSM East Africa.
134. It is the 12<sup>th</sup> and 16<sup>th</sup> respondent's position that the Principal Secretary for the National Treasury requested the Commissioner General, Kenya Revenue Authority, to send an officer to National



- Treasury in January 2023 to participate in the review of the tax proposals submitted by stakeholders together with the team from the National, Treasury.
135. They also urge that the Principal Secretary for the National Treasury requested the Solicitor General State Law Office to send an officer to the National Treasury, legislative team in March 2023, to draft the bill. Upon review of the proposals by the team from the National Treasury and Kenya Revenue Authority, the team invited Stakeholders that submitted tax proposal for consideration in the preparation of the Finance Bill, 2023, following the Public Notice for meetings to discuss their respective proposals with the team.
  136. It is their case that the views of the stakeholders were taken into consideration in the finalization of the analysis of the proposals which were subsequently submitted to the Cabinet Secretary for consideration and approval and were thereafter drafted to form the Finance Bill, 2023. The Bill is said to have been subjected to legal drafting by the team from the State Law Office.
  137. The 12<sup>th</sup> and 16<sup>th</sup> respondents also contend that after finalization of the legal drafting, the Finance Bill 2023 was submitted to the Cabinet for approval and submission to the National Assembly and it was thereafter published in the Kenya Gazette Supplement No 56 as National Assembly No 14.
  138. Following the publication of the Finance Bill, 2023, the National Assembly members of the public were to submit views and comments on the Bill through a Public Notice. Indeed, members of the public responded to the Notice by submitting comments and views including proposals to amend the Bill. It is sworn that the National Assembly submitted to the matrix on summary of comments or proposals to the National Treasury for review. The National Treasury provided comments on each proposal in the matrix in accordance with the provisions of article 114 of the Constitution.
  139. The 12<sup>th</sup> and 16<sup>th</sup> respondents also state that the departmental Committee of Finance and National Planning invited the Cabinet Secretary for the National Treasury and Economic Planning to take the committee through the National Treasury comment on the matrix on the summary of the stakeholder's comments or proposal on the Finance Bill in a retreat in Naivasha.
  140. They also urge that the Departmental Committee of Finance and National Planning of the National Assembly reviewed the comments from the stakeholders and considered the comments from the National Treasury and Economic Planning on the stakeholder comments and prepared a report which was tabled in the National Assembly. It is their case that during this stage of the Finance Bill, 2023, the National Assembly made changes to the Bill.
  141. According to the 12<sup>th</sup> and 16<sup>th</sup> respondents, the above process was undertaken to ensure compliance with the Constitutional requirement of public participation in the development of a policy. It is also their case that the National Assembly has the mandate to, change the contents of the Finance Bill or any other Bill, submitted to Parliament for enactment by adding modifying or removing proposals contained in the Bill having conducted public participation on the same or in their own wisdom.
  142. The 12<sup>th</sup> and 16<sup>th</sup> respondents urge that it is clear that there was public participation in the enactment of the Finance Act, both at the preparation stage and after the publication of the Finance Bill, 2023 in the Gazette by the National Assembly.

**(ix) 18<sup>th</sup> Respondent's response**

143. The 18<sup>th</sup> respondent also filed a replying affidavit dated November 12, 2023 sworn by Hon Omboko Milemba. The affidavit is neither signed nor commissioned and, for that reason, it does not carry any probative or evidentiary weight.



**(x) 19<sup>th</sup> Respondent's response**

144. The 19<sup>th</sup> respondent filed a replying affidavit sworn on November 23, 2023 by Stephen Khisa Namusyule who has introduced himself as the Executive Director of Ford Kenya.
145. According to Mr Namusyule, the petitioners' assumption that the voters determined the majority coalition in the National Assembly through their votes is flawed. According to him, the voters did not choose candidates based on coalition affiliation; rather, they voted for individual candidates or political parties. According to the 19<sup>th</sup> respondent, neither Azimio la Umoja One Kenya Coalition Party nor Kenya Kwanza Alliance sponsored candidates for the National Assembly as coalitions and as such, political parties sponsored their own candidates, and voters had the option to vote based on individual party affiliations, not coalition membership.
146. The 19<sup>th</sup> respondent's case is that both Azimio and Kenya Kwanza's constituent parties each fielded individual candidates for National Assembly seats which resulted in intra-party competition, with voters able to choose between candidates from the same coalition, undermining the unity that would have been presented by a single candidate per coalition. Hence, parties cannot be compelled to continue supporting a coalition against their will.
147. The 19<sup>th</sup> respondent has also stated that the determination of which coalition has the majority in the National Assembly is based on the publication of the results; however, this question should consider the situation at the time of the ruling as seen in the Speaker's ruling of October 6, 2022, where he accounted for the fact that 14 members from parties like UDM, PAA, MCCC, and MSG had explicitly distanced themselves from the Azimio coalition.
148. He contends further that the *Political Parties Act* does not limit the rights stipulated under articles 36 and 38 of the *Constitution* but only regulates the procedural exercise of political association, including coalition formation. And members of Parliament elected under different parties within a coalition are not bound to remain aligned with the coalition if they choose to leave.
149. The 19<sup>th</sup> respondent argues that the petitioners lack locus standi to file the petition as they are not officials of the Azimio coalition or its constituent parties and as such they cannot make claims on behalf of the coalition without proper authorization.
150. According to the 19<sup>th</sup> respondent, Standing Order 1 of the National Assembly Standing Orders gives power to the 3<sup>rd</sup> respondent to give decisions on issues not provided for in the Standing Orders. He has also referred to the letter dated January 18, 2023 from the Registrar of Political Parties raising issues on the eligibility of the 4<sup>th</sup> respondent and its response dated January, 18 2023 on the issues raised by Registrar.
151. Articles 106 of the *Constitution* on the election and removal of the Speaker by the National Assembly and Standing Order 12B of the National Assembly Standing Orders have also been referred to. The 19<sup>th</sup> respondent urges that this court lacks jurisdiction to determine the prayer seeking to remove the 4<sup>th</sup> respondent from office of Speaker of the National Assembly.
152. On the issue of the enactment of the Finance Act, 2023 and Appropriation Act, 2023 the 19<sup>th</sup> respondent states that the petitioners have not demonstrated in any manner the alleged constitutional breaches committed by the 2<sup>nd</sup> respondent when passing the Finance Act, 2023 and the Appropriation Act 2023 and that, in any event, there are pending proceedings before the High Court challenging the legality and or constitutionality of the Acts.



153. The 19<sup>th</sup> respondent also urges that the issue of the election of the Speaker is not a constitutional issue that necessitates judicial intervention.

**(xi) 8<sup>th</sup> Interested party's response**

154. The 8<sup>th</sup> interested party filed a replying affidavit sworn by Wilfred Nyamu Mati who has introduced himself as the Secretary General of the 8<sup>th</sup> interested party. The affidavit was on June 20, 2024.

155. According to the 8<sup>th</sup> interested party, on or about April 10, 2022, through a press conference televised nationally, its Party Leader Hon Alfred Mutua announced that the 8 interested party had joined the Azimio La Umoja One Kenya Coalition by signing the Azimio Coalition Agreement and this announcement triggered an objection from the vice chairman who challenged the propriety of the joinder to the Azimio Coalition contrary to internal party processes.

156. Owing to the objection, the Secretary General of the Party proceeded to issue a notice convening the party's National Executive Meeting which was scheduled for April 16, 2022. During the meeting, the party Leader's authority to sign any coalition agreements on behalf of the party was questioned and, as such, it was resolved that a tribunal be constituted to discuss the issues of membership to Azimio la Umoja coalition.

157. The tribunal is said to have conducted its hearings between 20<sup>th</sup> and April 21, 2022 and in its findings, the tribunal presented its report which was adopted and a resolution passed for the 8<sup>th</sup> interested party to commence proceedings to exit the Azimio Coalition.

158. It is the 8<sup>th</sup> interested party's case that the findings were based on the fact that there was no inclusivity of the members required to execute the decision on joining the coalition, the Vice chairman was not included in the decision making and did not participate in the signing of the agreement, Dr Alfred Mutua being the party leader is not gazetted, hence he could not be a signatory for any coalition and that the National Executive Council did not meet to discuss and make a decision to join Azimio Coalition.

159. The party is said to have immediately commenced steps to withdraw for the coalition. However, it emerged that the Azimio Coalition Agreement was never shared with the 8<sup>th</sup> interested party and only the execution page was shared during signing.

160. Further, according to the 8<sup>th</sup> interested party, its attempts to obtain a copy of the Agreement before the elections were frustrated by the laxity of both the Registrar of Political Parties and the Azimio Coalition and this is evidenced by the letters dated April 20, 2022, May 6, 2022 and May 5, 2022 addressed to the Registrar and Azimio Coalition respectively and a Letter dated April 29, 2022 addressed to Maendeleo Chap Chap Party by the Registrar.

161. The 8<sup>th</sup> interested party's right to association, it is contended, cannot be limited by the Registrar of Political Parties' refusal to update the list of political parties forming part of Azimio Coalition. The 8<sup>th</sup> interested party is said to have since joined the Kenya Kwanza coalition and has 2 members in the National Assembly, being Hon. Caleb Mulwe and Hon Eckomas Mwengi Mutuse who already enjoy the parliamentary benefits accruing from the 8<sup>th</sup> interested party's membership to the Kenya Kwanza coalition.

162. The 8<sup>th</sup> interested party urges that pursuant to a further National Governing Council Meeting, the party commenced the withdrawal proceedings afresh through writing to the Secretary General of Azimio Coalition on October 13, 2023 and informing him that all requirements to exit had been met and requesting for the party's withdrawal from the Coalition to be made formal. A letter was



also written to the Registrar of Political Parties notifying her that the Party had complied with the directions.

163. The Registrar of Political Parties is said to have responded on November 2, 2023 acknowledging receipt of the letter and notifying the Party of the commencement of a 90 -day notice period and upon expiry of the 90-day notice period, the Registrar of Political Parties wrote notifying the Party that the Party had satisfied all the requirements of exiting the Azimio Coalition.

**(xii) 10<sup>th</sup> Interested party's response**

164. The 10<sup>th</sup> interested party filed a cross-petition dated April 16, 2024. The petition is supported by the Affidavit of Mary Anconsila Makokha who has sworn that she is the Secretary General and the duly authorized representative of the cross petitioner. The cross petition seeks the following orders:

- a. A declaration that section 10(1) of the *Political Parties Act* is unconstitutional to the extent that it provides for the creation of a coalition political party.
- b. A declaration that the Azimio La Umoja-One Kenya Coalition is neither a political party nor a coalition of parties contemplated under the *Constitution* hence unconstitutional, null and void.
- c. A declaration that the Azimio La Umoja-One Kenya Alliance Coalition Party coalition agreement is illegal and unconstitutional for having violated the freedom of association, freewill and political rights of some of the purported signatories.
- d. A declaration that the Orange Democratic Movement is the Minority Political Party in the National Assembly.
- e. Any other orders the court may deem fit to grant.

165. The 10<sup>th</sup> interested party argues that the coalition agreement was executed under significant coercion, duress, misrepresentation, deception, falsehoods, distortion, misstatement, intimidation, bullying, and threats which are factors, that vitiated the agreement and made it incurably invalid, illegal, and unconstitutional.

166. Additionally, the 10<sup>th</sup> interested party asserts that the *Constitution* of Kenya contemplates either a political party or a coalition of political parties, but not the so-called coalition political party as defined in section 10(1) of the *Political Parties Act*. It is also urged that section 10(1) is unconstitutional because it attempts to create a hybrid entity that is neither a political party nor a coalition of political parties.

167. The 10<sup>th</sup> interested party relies on several provisions of the *Constitution* and these include article 2(1), 2(4), 3(1), 10, 22(1) and (2), 38(1)(c), 108(2) and (3), 159(1), 165(3)(d), 258(1) and 259(1). The cross petitioner urges that section 9 of *Act No 2 of 2022* amended section 10 of the *Political Parties Act*, introducing the creation of a coalition political party, which is described as a "mongrel" not recognized or contemplated by the *Constitution*. Under this amendment, Azimio was formed as such a "mongrel."

168. It is the 10<sup>th</sup> interested party's case that due to the illegality and unconstitutionality of the amendment in question, any entity created as a result of it would be inherently illegal and invalid from its inception. As a result, Azimio lacks legal recognition and validity. It has no standing to claim the status of the majority party within the National Assembly or any other forum because it does not meet the necessary legal foundation for such a designation.

169. According to the 10<sup>th</sup> interested party, any attempt to designate Azimio as the Majority party or Coalition would be legally flawed and baseless. It has also been urged that several political parties,



which are purported signatories to the coalition agreement, have raised concerns about the validity of the agreement, citing factors such as coercion, duress, misrepresentation, deception, intimidation, and threats.

170. These factors, it is agreed upon by the 10<sup>th</sup> interested party, undermine the validity of the agreement, rendering it illegal, unconstitutional, and beyond remedy. Consequently, the legitimacy of the agreement is questioned, and its foundation is deemed insufficient for lawful recognition.

## **Submissions**

### **(i) Petitioners' submissions**

171. The petitioners, in their submissions, identified the following issues for determination:

- “ 1) How and when is the question as to which party or coalition of parties is the majority in the National Assembly determined?
- 2) Whether the 1<sup>st</sup> respondent - Kenya Kwanza Coalition - has undermined multi-party democracy in Kenya.
- 3) Whether the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents have jointly or severally engaged in actions and omissions that exclude participation in government on the part of representatives and supporters of Jubilee Party in accordance with their voting during the General Election held on August 9, 2022.
- 4) Which is the majority party or coalition of parties on one hand and the minority party or coalition of parties based on the outcome of the last General Election?
- 5) Whether the 3<sup>rd</sup> respondent - Speaker of the National Assembly - had jurisdiction to determine which party or coalition of parties is the majority. And if so, whether he determined the said question correctly in his ruling/determination contained in the Communication from the Chair made on October 6, 2022.
- 6) Whether the Members of Parliament elected on the tickets of one party or coalition can become members of a different party or coalition merely by writing to the Speaker of the National Assembly for recognition of such change of political allegiance.
- 7) Whether the 4<sup>th</sup> respondent - Hon Moses Wetangula - was lawfully elected as Speaker of the National Assembly and eligible to continue serving as such whilst simultaneously remaining one of the Principals in Kenya Kwanza Government.
- 8) Whether the 4<sup>th</sup> - 6<sup>th</sup> and 8<sup>th</sup> - 12<sup>th</sup> petitioners have a right to be represented by MPs elected on its ticket during the entire five years' term of the 13<sup>th</sup> Parliament.
- 9) Whether during the term of the 13<sup>th</sup> Parliament Jubilee Party can withdraw from Azimio La Umoja One Coalition without the concurrence or approval of its members and supporters.
- 10) Whether the political scheme between the 1<sup>st</sup>, 4<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> respondents to destabilize Jubilee Party and secure its withdrawal from the Deed of



Agreement for Azimio La Umoja One Kenya Coalition amount to a conspiracy to achieve political and economic exclusion of members and supporters of Jubilee Party in Central Kenya.

- 11) Whether a section of citizenry excluded from political participation and representation in the management of State affairs and organs of the State are enjoined to pay taxes.
- 12) Whether the 10<sup>th</sup> and 13<sup>th</sup> respondents - Hon Kanini Kega and Hon Sabina Chege - should be deemed as having resigned as members of the Jubilee Party on account of their allegiance to the UDA Party and support for policies of Kenya Kwanza government.
- 13) Whether Madam Anne Nderitu, the Registrar of Political Parties - the 14<sup>th</sup> respondent herein is fit to continue serving as the Registrar of Political Parties.
- 14) Whether the 5<sup>th</sup> respondent - the Registrar of Political Parties - should commence an inquiry into deregistration of the 1<sup>st</sup> respondent - the Kenya Kwanza Coalition - on account of its willful violation of the principles and values set out in articles 91 of the Constitution.
- 15) Whether the rights of the petitioners enshrined in articles 1, 10, 12(1), 27, 28 and 50 of the Constitution have been violated.
- 16) Whether the reliefs sought in the amended petition dated June 23, 2023 should be granted.
- 17) Who should bear the costs of this petition?"

172. Prior to submitting on these issues, the petitioners outlined the historical background of multi-party democracy in this country and, in particular, several amendments to the 1963 Constitution with regard to the country's multi-party-political infrastructure. The petitioners have also submitted on the background of the current Constitution and urged that the petition finds its roots in article 3 thereof which states as follows:

- (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.

173. We must mention that, to a greater degree, the submissions mirror the pleadings in the amended petition and the depositions in the affidavit in support of the petition. As far as the first issue is concerned, it has been submitted that two of the most cherished principles of Kenya's electoral system set out in article 81 are the right to vote in any election or referendum and principle (d) on "universal suffrage based on the aspiration for fair representation and equality of votes".

174. Pursuant to these rights, during the General Election held on August 9, 2022, Kenyans cast their votes to elect, *inter-alia*, their representatives in the National Assembly. In accordance with the published election results, the two contesting coalitions garnered the following seats in the National Assembly:

- a) Azimio Coalition 171 Members.
- b) Kenya Kwanza Alliance 165 Members.



175. Under article 108(2) of the *Constitution*, the majority party is the largest party or coalition of parties. Having garnered 171 members of the National Assembly the Azimio Coalition is the majority and, therefore, entitled to appoint the leader of the majority in the National Assembly.
176. According to the petitioners, the question of which party shall be the majority in the National Assembly was settled by the Kenyan voters on August 9, 2022 and this is a fact that the Speaker himself acknowledged in his ruling of 6 October, 2022.
177. On the second issue, it has been urged that the immediate impact of the alleged scheme by the 1<sup>st</sup> respondent in inducing, soliciting aiding and abetting the defection of Azimio Coalition Members of Parliament to Kenya Kwanza Alliance was to secure the election of one of its three Principals, Hon Moses Wetang'ula, as the Speaker of the National Assembly. In return, Hon. Wetang'ula declared his Kenya Kwanza Coalition as the majority despite acknowledging that, in accordance with the declared results of the National Assembly elections, Azimio Coalition had 171 Members of Parliament against Kenya Kwanza's 164 Members of Parliament. These schemes, the petitioners have urged, have subverted multi-party democracy and violated articles 1, 3, 4, 10, 38, 73 and 91 of the *Constitution*.
178. On the third issue, it has been submitted that the declaration in article 4 of the *Constitution* that the sovereign Republic of Kenya is a multi-party democratic State means and implies the following:-
- i) The right of establishment and existence of many political parties.
  - ii) The right to belong to those political parties and seek elective office through the same.
  - iii) The organization of government using political party representation as the building block and organizing theory of our democracy.
  - iv) The right of Kenyans to participate in public affairs and particularly in parliament through elected representatives sponsored by political parties during the General Election.
  - v) The Democratic idea that in an election the voters give the representatives a mandate to represent them based on the manifesto and ideology of the party that sponsored them.
179. The petitioners urge that as members or supporters of Jubilee or the Azimio La Umoja One Coalition, they gave their successful candidates a five years mandate to represent them in Parliament based on the manifesto and ideology of Jubilee Party and the Azimio Coalition. Since the Kenya Kwanza Coalition and its affiliated parties were the major competitors for power against Jubilee Party and Azimio Coalition, any Member of Parliament elected on the ticket of Jubilee is prohibited from championing the political agenda and manifesto of the 1<sup>st</sup> and 17<sup>th</sup> respondents.
180. However, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents by their actions and omissions have aided, abetted and acquiesced in a political scheme whose objective is to strip the members and supporters of Jubilee Party of representation in the National Assembly in violation of articles 3(2) and 10(1) of the *Constitution*.
181. With respect to the fourth issue, the petitioners have made reference to Gazette Notice No 4442 dated April, 13 2022, published in The Kenya Gazette of April 14, 2022. In this gazette notice, Registrar of Political Parties published particulars of registration of the Azimio La Umoja One Coalition Party which, inter alia, specified the constituent political parties. The said parties include:-
- i. Devolution Empowerment Party (DEP).
  - ii. United Democratic Movement (UDM).
  - iii. Parnoja African Alliance (PAA).



- iv. Movement for Democracy and Growth (MDG).
  - v. Chama Cha Uzalendo (CCU).
  - vi. Maendeleo Chap Chap Party (MCCP).
182. Against this background, it has been submitted that the Speaker had no jurisdiction to make the declaration on the majority party in the House contrary to the available evidence. It is also urged that in view of this evidence of the constituent political parties of Azimio Coalition, there was no legal basis upon which the Speaker could reasonably purport to entertain a dispute as to which party was a member of the Azimio Coalition. And to the extent that he did, the 4<sup>th</sup> respondent was not an impartial and independent arbiter of the purported dispute over which coalition was the majority party and he ought to have recused himself assuming the matter was lawfully available for resolution before him. The 4<sup>th</sup> respondent is said to have violated articles 50(1) and 75(1)(a) of the *Constitution*. Nonetheless, a dispute about which coalition is the majority party is a justiciable issue that falls within the jurisdiction of this honourable court.
183. On the question whether the Members of Parliament elected on the tickets of one party or coalition can become members of a different party or coalition merely by writing to the Speaker of the National Assembly for recognition of such change of political allegiance, it has been urged that under article 103(1)(e) of the *Constitution* read with sections 14 and 34 of the *Political Parties Act*, 2011, a Member of Parliament ceases to be a member of a political party if he resigns or is declared to have resigned from the party. The basic purpose of these provisions is to outlaw defection of members from one party to the other in order to uphold the sanctity and efficacy of multiparty democracy.
184. As to whether the 4<sup>th</sup> respondent was lawfully elected as Speaker of the National Assembly and eligible to continue serving as such whilst simultaneously remaining one of the Principals in Kenya Kwanza Government, the petitioners have submitted that under article 97(1)(d) of the *Constitution*, the Speaker of the National Assembly is an ex-officio member because he is the holder of the office of Speaker by dint of article 106(1) of the *Constitution*.
185. The Speaker is elected by substantive members of the House in accordance with the Standing Orders and his main duty as per article 107 is to preside at any sitting of the House of Parliament. According to articles 94, 95, 107 and 127 of the *Constitution*, the Speaker of the National Assembly is the substantive and titular head of Parliament. That notwithstanding, the Speaker remains the leader of Ford-Kenya Party, one of the founding parties of the Kenya Kwanza Coalition; he is also a member of Kenya Kwanza's Forum of Party Leaders; and that he is an *ex-officio* member of the Coalition Parliamentary Group of Kenya Kwanza Alliance.
186. It is submitted that article 77 of the *Constitution* and section 12 of the *Political Parties Act* provide that elected state officials are excluded from the constitutional requirement that state and public officers should not hold positions in political parties. No doubt, the Speaker is elected by Members of Parliament yet there is nothing in the cited laws to suggest that such election is what is envisaged from the standpoint of articles 1, 38, 81 and 88 of the *Constitution* read with *Elections Act*, 2011. Accordingly, it is illogical for the 4<sup>th</sup> respondent to contend that he is an elected State Officer "just like his fellow MPs".
187. The Speaker's position, it is urged, is a sacred position and, under the *Constitution*, the Speaker should not be a Member of Parliament or enjoy a similar constitutional or political status. According to article 106(1) the Speaker is elected "from among persons who are qualified to be elected as members of Parliament but are not such members. Secondly, under article 97(1)(d) the Speaker, is an ex-officio



member of the National Assembly meaning that his membership stems from the fact that he holds the office of Speaker and not on account of having been elected by the people of Kenya in exercise of their sovereign power.

188. It is urged that Speaker Wetang'ula holds a position that requires him to be politically neutral and impartial. Thus, Hon Wetangula cannot be simultaneously Speaker whilst he remains Chairman of Ford-K Party, a Principal of Kenya Kwanza Coalition and a participant in the parliamentary group meetings of Kenya Kwanza and other political activities. Also the doctrine of separation of powers prohibits the 4<sup>th</sup> respondent from simultaneously serving as Speaker and engaging in requisite political activities as the leader of Ford-Kenya, as one of the principals of Kenya Kwanza and as a member of its top political organ.
189. On the question whether the 4<sup>th</sup> to 6<sup>th</sup> and 8<sup>th</sup> to 12<sup>th</sup> petitioners have a right to be represented by Members of Parliament elected on a particular ticket during the entire five years' term of the 13<sup>th</sup> Parliament, it is urged that these petitioners are members or supporters of Jubilee Party who voted for its candidates and those of Azimio Coalition. The said representatives were voted in to serve for a five years' term. It is the case of the petitioners that article 103(1)(e) of the *Constitution* prohibits defection of elected representatives and if they do so their seats become automatically vacant.
190. The petitioners have cited *International Centre for Policy and Conflict & 5 Others v Attorney General & 5 others* (2023) eKLR in which the sanctity of the people's sovereignty and political rights of electors under article 38 of the *Constitution* was underscored in the following terms:
- “We have already placed on record the rights of the citizens of this country to make political choices, and indeed the rights of the 3rd and 4th respondents to seek public office. article 1 of the *Constitution* of Kenya places all sovereign power on the people of Kenya which shall be exercised only in accordance with the *Constitution*. It shall not be, and can never be the role of this court to exercise that power on behalf of the people of Kenya. That right must remain their best possession in a democratic society and is inalienable.”
191. Regarding the question whether during the term of the 13<sup>th</sup> Parliament Jubilee Party can withdraw from Azimio Coalition without the concurrence or approval of its members and supporters, the petitioners have submitted that the Jubilee Coalition is one of the constituent parties in the Azimio Coalition on whose manifesto, agenda and ideology its Members of Parliament were elected to Parliament.
192. Under articles 1 and 38 of the *Constitution*, the petitioners have a constitutional right and a legitimate expectation that Jubilee Party will remain a constituent party of Azimio Coalition which implies that it cannot leave the said coalition without their permission. Under article 103(f) of the *Constitution* the departure of Jubilee Party from Azimio Coalition constitutes a defection of its Members of Parliament to Kenya Kwanza. The speaker is said to have acknowledged this fact in his ruling when he stated that upon the four parties namely UDM, MDG, MCCC and PAA leaving Azimio Coalition their 14 members were deemed to have shifted their allegiance to Kenya Kwanza.
193. On the question whether a section of citizenry excluded from political participation and representation in the management of State affairs and organs of the State are enjoined to pay taxes, it has been submitted that there is a direct and necessary connection between the rights of citizens to political representation and the obligation to pay taxes. Under article 12(1) of the *Constitution*, every citizen is entitled to:-



- (a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and
  - (b) a Kenyan passport and any document of registration or identification issued by the State to citizens.
194. It is urged that States and governments operate on tax payers' money and invariably citizens have a legal obligation to pay taxes. In return, citizens have a right to participate in the public affairs and governance of the State either directly or indirectly. It is submitted that the court should recognize and declare the right of citizens who are not represented not to pay taxes to the Government established by Kenya Kwanza Coalition.
195. As to whether the 10<sup>th</sup> and 13<sup>th</sup> respondents should be deemed as having resigned as members of the Jubilee Party on account of their allegiance to the UDA Party and support for policies of Kenya Kwanza government, it is urged that the petitioners do not, and cannot, begrudge the fundamental freedom of the 9<sup>th</sup> and 13<sup>th</sup> respondents guaranteed under articles 36 and 38 of the *Constitution*. However, these freedoms are not absolute because they are subject to article 103(1) of the *Constitution* to the extent that in order to lawfully change political fidelity to Kenya Kwanza, they must give back the seats conferred upon them by Jubilee, its members and supporters during the August, 2022 General Election.
196. On the question whether Ms Anne Nderitu, the Registrar of Political Parties, is fit to continue serving as the Registrar of Political Parties, the petitioners have submitted that state officers have a personal obligation to be accountable under the law and their offices cannot do so on their behalf. The 14<sup>th</sup> respondent, it is urged, has failed to respond to the allegations made against her in the petition and, therefore, the orders sought against her ought to be granted.
197. Regarding the question whether the 5<sup>th</sup> respondent should commence an inquiry into deregistration of the 1<sup>st</sup> respondent on account of its wilful violation of the principles and values set out in articles 91 of the *Constitution*, it is urged that the petitions have demonstrated how the 1<sup>st</sup> respondent has violated articles 1, 3, 4, 10, 38, 73 and 91 of the *Constitution*. It has been submitted further that a political party that does not comply with the *Constitution* may be deregistered in accordance with the process set out in sections 21 and 22 of the *Political Parties Act*.
198. Finally, except for prayer (gg) in the petition, which has been abandoned, the petitioners urge that they are entitled to the rest of the prayers in the petition and that they should be awarded costs of the petition as well.

**(ii) 1<sup>st</sup> to 17<sup>th</sup> Respondents submissions.**

199. The 1<sup>st</sup> and 17<sup>th</sup> respondents filed written submissions dated March 1, 2024. Their case against the petition is that it is bad for misjoinder of causes of action and among the cases they have cited in support of their position is that of *Yowana Kabere & others v Lunyo Estates Limited* [1959] EA 319 on misjoinder of causes and where the court held that the cause of action in the plaint was not based on the same act or transaction or series of incidents, but rather on separate and independent acts of dispossession or possession. The court is said to have observed that there was no shared legal or factual issue among the plaintiffs, leading to a misjoinder of plaintiffs and a misjoinder of causes of action.
200. This position was also reiterated by the court in the case of *Matindi & 3 others v National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties)* (Petition E080, E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgement) (with dissent-HI Ong'udi J).



201. On the exhaustion principle, the 1<sup>st</sup> and 17<sup>th</sup> respondents have submitted that as was held by the Court of Appeal in *Lillian Gogo v Joseph Mboya Nyamuthe & 4 others* [2017] eKLR, disputes between members of political parties ought to be heard by a party's internal dispute resolution mechanism after which they resort to the Political Parties Disputes Tribunal. The court also held that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament the procedure ought to be strictly followed.
202. The 1<sup>st</sup> and 17<sup>th</sup> respondents also submit that the petitioners have sued the persons who occupy the offices of the Speaker, the leader of majority party, the leader of minority party, chair persons of committees and members in their personal capacity and to this extent that the amended petition violates section 12(2) of *Political Parties Act*.
203. They rely on the case of *John Harun Mwau v Dr Andrew Mullei & another* Civil Appeal No 157 of 2007 where the court held that as the primary function of Parliament is to debate and pass resolutions freely on subjects of their own choosing, they have the freedom of speech and freedom of debate. These freedoms according to the court are the single most important parliamentary privilege and are the cornerstone to section 4 and 12 of the National Assembly(powers and privileges) Act.

### (iii) 2<sup>nd</sup> Respondent's submissions

204. The 2<sup>nd</sup> respondent filed written submissions dated April 4, 2024. According to the 2<sup>nd</sup> respondent, the immunity provided under section 12 of the *Parliamentary Powers and Privileges Act* No 29 of 2017, operates as a safeguard of the separation of powers and the sovereignty of Parliament and extends to those acts of Parliament that are necessary for its existence as well as for the performance of its functions.
205. In support of this position, the 2<sup>nd</sup> respondent relied on *Justus Kariuki Mate & another v Martin Wambora & another* (2017) eKLR where the court is said to have recognized protection conferred upon the Speaker and the officers of the Assembly under section 12 of the *Parliamentary Powers and Privileges Act* No 29 of 2017. This position was also reiterated in the case of *Teng Chang Khim v. Badrul Hisyam Bin Abdullah & Another*; Malaysia Civil Appeal No 01(F)-26- d08/2016 (B). Also cited for the same position is Erskine May Treatise on the Law, Privileges Proceedings and Usage of Parliament, 24<sup>th</sup> Edition, page 203 where the author explains Parliamentary privilege.
206. The 2<sup>nd</sup> respondent also relied on the case of *Peter O Ngoge v Francis Ole Kaparo & 4 others* (2007) eKLR where the court observed that the applicant's contentions challenged Parliament's internal arrangements, including the Speaker's election, and were not related to their personal rights. These challenges, according to the court, were protected by Parliamentary Privileges and required deference from the court.
207. The 2<sup>nd</sup> respondent has submitted further that the petitioners have failed to exhaust internal and alternative dispute resolution mechanisms prior to approaching this honourable court and that it is trite that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. It has relied on Court of Appeal case of *Lilian Gogo v Joseph Mboya Nyamuthe & 4 others* [2017] eKLR in support of this position.
208. It is submitted that the amended petition contains several unrelated causes of action and that the misjoinder of causes of action is an issue that impacts the fundamental right to a fair trial. The 2<sup>nd</sup> respondent submits that as was held by the court in the case of *Matindi & 3 others v National Assembly of Kenya & 4 Others; Controller of Budget & 50 others* (2023) KEHC (KLR) each cause of action ought to be litigated independently to ensure the proper application of law and presentation of evidence.



209. The 2<sup>nd</sup> respondent submits that this court ought to adopt the finding in the case of *Tlouamma & others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another* (A 3236/15) [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC); [2016] 1 All SA 235 (WCC); 2016 (2) BCLR 242 (WCC) (7 October 2015), that there is no constitutional or statutory barrier preventing the Speaker from holding any leadership position within his political party or engaging in the party's activities.
210. It is the 2<sup>nd</sup> respondent's submission that the *Constitution* vests the Speaker with broad powers and duties, including the authority to regulate and oversee the conduct of parliamentary business. This includes the power to interpret the rules of the House, resolve disputes among members, and make procedural rulings to ensure the orderly functioning of Parliament.
211. The 2<sup>nd</sup> respondent relies on the Supreme Court case of *Speaker of the Senate & another v Attorney General & 4 others* [2013] eKLR where the court observed that workings of Parliament cannot be supervised by the court. Further, unwarranted interference in one arm of government's operations by another must not jeopardize the institutional comity among the three arms.
212. It is submitted that this court lacks jurisdiction as it is not convened as an election petition to delve into the issue of whether or not the results were unconstitutional as there was no declaration of the majority party. According to the 2<sup>nd</sup> respondent, it is only the procedures outlined under the *Constitution* that can be used to remove the Speaker. In support of this argument, the 2<sup>nd</sup> respondent relied on the cases of *Tlouamma & others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another (supra)* and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) where the courts observed that where the *Constitution* provides for the procedure to remove the speaker, then it is impermissible for any other person or institution to assume that function.
213. It is submitted that the petition is sub judice and an abuse of the court process. Further, that having the same issues tried in three different petitions will lead to duplication and a high likelihood of conflicting decisions given by the same court. The 2<sup>nd</sup> respondent refers to the rule 3(8) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013, which are said to allow the court to strike out a petition in the interest of having good order in litigation and to save on judicial time and resources.
214. The 2<sup>nd</sup> respondent submits that the doctrine of separation of powers, as articulated by Montesquieu in his work "The Spirit of the Laws," advocates for the division of political authority within a state into three branches: executive, judicial, and legislative. Further, this division aims to prevent the concentration of power by providing checks and balances among the branches of government. It is also submitted that this ensures that no branch of government oversteps its constitutional authority by encroaching on the powers of the others.
215. On the doctrine of constitutional avoidance, the 2<sup>nd</sup> respondent relies on the Supreme Court case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14,14 A, 14 B & 14 C of 2014 (Consolidated) Judgment of the Supreme Court (2014) eKLR where the court held that a court will not determine a constitutional issue, when a matter may properly be decided on another basis.



**(iv) 3<sup>rd</sup> and 4<sup>th</sup> Respondents' submissions**

216. As noted earlier, the 3<sup>rd</sup> and 4<sup>th</sup> respondents refer to one at the same person except that he is sued in two different capacities. The Speaker filed written submissions dated June 25, 2024. In the submissions, the 4<sup>th</sup> respondent set out what, in his opinion, were pertinent parts of the ruling of October 6, 2022.
217. It is also submitted that this court ought not to exercise its jurisdiction to preside over and determine the matter before it as what has been presented before it is a dispute between members of a political party and a coalition. It is also urged that there has been no contestation that the Jubilee Party and Azimio Coalition instruments did not provide a forum for internal dispute resolution mechanisms.
218. The Speaker has submitted that, assuming that the Azimio Coalition agreement exhibited on the Registrar of Political Parties affidavit is genuine and the one submitted to the Speaker was inadmissible, then an internal dispute resolution mechanism was expressly provided for under article 24(3) of the Deed of Agreement and which ought to have been employed to resolve the dispute. It is argued that the Jubilee Party constitution, no doubt, has a dispute resolution clause.
219. The Speaker also submits that even if the court were to hold that the petitioners were not bound to pursue the party or coalition internal dispute resolution mechanisms, the next available statutory forum of dispute resolution, would have been the Political Parties Disputes Tribunal which is provided for under section 40 of the *Political Parties Act*. The petitioners have not demonstrated why they avoided and overlooked this clear statutory procedure on resolution of political party disputes. It is urged that this court can only exercise appellate jurisdiction in resolving disputes between members of a political party as provided for under section 41(2) of the *Political Parties Act*.
220. The Speaker's submission is that even if the petitioners were not able to pursue any of the legal dispute resolution mechanisms, then they still had a legal opportunity of seeking the expulsion of the alleged perpetrators of their grievances from their political parties as provided under section 14A of *Political Parties Act*.
221. It is submitted that if the petitioners were not willing to pursue the three available avenues, then there existed an opportunity for them to engage in resolution of the alleged grievance with their members of Parliament by exercising the right of recall as envisaged under article 104 of the *Constitution* as read together with sections 45 *Elections Act*.
222. The Speaker urges the court to apply the doctrine of constitutional avoidance and decline to exercise jurisdiction as the petition is composed of political party disputes. The case of *Lilian Gogo v Joseph Mboya Nyamuthe & 4 others* [2017] eKLR has been cited in this regard. On the doctrine of exhaustion, the respondents rely on the case of *Cleophas Malala & another v Speaker of the Senate & 2 others; Stewart Madzayo & another (Interested Parties)* [2021] eKLR.
223. The Speaker's submission is that there are various disputes pending before the High Court and the Political Parties Disputes Tribunal and that these disputes touch on questions of association of Jubilee Party, MCCC, PAA, UDM and MDG as well as their respective members with the Azimio Coalition and validity of the Azimio Coalition Agreement and as the petitioners in this case are members or supporters of Jubilee and Azimio, and they are already represented in the pending cases. It is urged that they could easily join those ongoing proceedings to address their concerns. According to the 4<sup>th</sup> respondent, given that the issues raised in this petition are identical to those in the pending cases, the court doesn't have the jurisdiction to hear this petition.
224. The Speaker has relied on the Supreme Court case of *Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others* [2020] eKLR, where



- the court held that when two or more cases are filed between the same parties on the same subject matter before courts of equal jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.
225. It is submitted that the petitioners claim to be upset that their elected members were not appointed as majority leaders in the National Assembly yet these positions are not open to them because they are not current members of Parliament. The Speaker's submission is that only sitting MPs or their political parties have the right to hold these positions. They also submit that neither the serving Members of Parliament of the Jubilee Party or Azimio Coalition, nor the parties themselves, have raised this issue. Further, that the petitioners do not have a valid cause of action and it is only the Azimio Coalition, its constituent parties, or the sitting Members of Parliament who could pursue such a grievance.
226. The Speaker also relied on the case of *Yasser Ali Sheikh v Amani National Congress (ANC), Forum for Restoration of Democracy-Kenya, (Ford-K), Orange Democratic Movement (ODM)-Kenya & Wiper Democratic Movement-Kenya (WDM-K) Jointly as the National Supper Alliance (NASA) Coalition & 2 others* [2018] eKLR where the petitioner, a FORD-Kenya member, relying on the NASA Coalition Agreement, filed a petition challenging the slots allotted to FORD-Kenya by NASA in the EALA elections. The NASA Coalition Agreement gave NASA affiliated parties the right to invoke the dispute resolution process but not individual members of those parties.
227. The court, in its finding, observed that the petitioner at his personal or individual level, could not be a member of the NASA coalition which is a coalition of Political Parties and he could also not be entitled to the nomination slot, at a personal level.
228. On whether the Speaker and Leaders of the House can be sued in their personal capacities on matters relating to discharge of the functions of their offices it is submitted that article 117 of the *Constitution* and section 12(2) of the Parliamentary Powers and Privilege Act provides that no civil suit shall be commenced against the Speaker, the Leader of the Majority Party, the Leader of Minority party, Chairpersons of Committees and Members for any act done or ordered by them in the discharge of the functions of their office.
229. The Speaker cited the case *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR where the court held that the suit against the 3<sup>rd</sup> to 12<sup>th</sup> respondent's in that case was unsustainable owing to the provisions of article 250(9) of the *Constitution* on immunity.
230. He also cited *Attorney-General & 2 others v Ndi & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) where the court also observed that the President is immune from civil action for anything done in the performance of his official duties. The case of *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties)* (Civil Appeal 239 of 2018) [2018] KECA 330 (KLR) (21 September 2018) (Judgment) is also relied on immunity of judicial officers.
231. On parliamentary privilege, the Speaker cited the Canadian case of *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876, where the court observed that Parliament and provincial legislatures have the constitutional right to regulate their own procedures, as outlined in the *Constitution Act*, 1867. This privilege is immune from the Charter, and section 3 of the Charter is achieved by interpreting the democratic guarantees in a purposive way. Courts may only review whether a matter falls within this privilege, and if it does, they must leave the issue for the legislature to resolve, without judicial interference.



232. It is reiterated that the election of the Speaker is an internal arrangement of the National Assembly and the court ought to refrain from interfering with such processes that are exclusively reserved to the National Assembly itself. In support of this position the case of *Peter O Ngoge v Francis ole Kaparo & 4 others* [2007] eKLR is cited. In that case, the court observed that the applicant, who sought the office of Speaker, could not validly claim that the failure to be elected constitutes a violation of fundamental rights under section 84 or any provisions of Chapter 5 of the repealed Constitution of Kenya. Further, that there was no clear connection between the two. The court also found that simply alleging a breach of Chapter 5 without providing specific details of the violation or how it occurred was insufficient to justify judicial intervention.
233. On the doctrine of separation of powers, the Speaker relied on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the court held that the doctrine of separation of powers is a core principle of the constitutional framework, but it does not only prevent one branch of government from interfering with the others but also grants each branch certain powers that act as checks and balances on actions by organs of government. However, these powers are not a license for one branch to take over the functions of another; there must be respect and deference between the judicial, legislative, and executive branches regarding their respective roles.
234. It is the Speaker's submissions that the Supreme Court in the case of *Speaker of the Senate & another v Attorney General & 4 others* [2013] eKLR, recognized the power or mandate of Houses of Parliament to establish and regulate their internal procedures without undue interference from courts.
235. According to the Speaker, the petitioners have not provided any legal provisions to support that he was unqualified to be elected on the ground that he held a political office and based on based on this premise the amended petition ought to collapse.
236. On the jurisdiction of this honourable court to remove the speaker from office, the Speaker cited *Tlouamma and others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another (supra)*, *Peter O Ngoge v Francis ole Kaparo & 4 others* and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)*.
237. It is the Speaker's submission that the petitioners' argument that the Speaker should not hold a political office after being elected does not hold water for the reasons that article 77(2) of the *Constitution* only prevents appointed State Officers from holding political party offices; the Speaker, is an elected State Officer.
238. The Speaker contends that the he is considered a member of Parliament under article 97(1) of the *Constitution* and is not restricted from holding a political office, as per section 12(2) of the *Political Parties Act*. Article 106(1)(a) of the *Constitution* only disqualifies a serving member of Parliament from vying for the position of the Speaker, so much so that, the requirement only applies on qualification prior to election of the Speaker. However, once the candidate is cleared by the relevant organs, including the IEBC and the Clerk of the National Assembly and is elected as the Speaker, then such a person is expressly included as a member of the National Assembly under article 97(1)(d) of the *Constitution*.
239. Regarding the claim that the Speaker's political office compromises impartiality and neutrality, it is contended that the petitioners have not provided any evidence of actual partiality on the Speaker's part, and their allegations are speculative. the *Constitution*, it is urged, defines the national executive as the President, Deputy President, and Cabinet and does not include the Speaker or coalition co-principals.
240. The Speaker has also submitted that holding a political office does not inherently make the Speaker partial in their role as presiding officer and this is evidenced by parliamentary practices in other



- democracies, such as Uganda where section 82(2) of the Ugandan Constitution allows the Speaker to serve as a representative of a constituency while also fulfilling the Speaker's duties. Similarly, section 84(1) of the Constitution of Tanzania permits the Speaker to remain a member of Parliament while serving in their role, section 52(1) of the South African Constitution provides for election of a Speaker of the National Assembly from amongst the Members of the National Assembly. Other countries with similar practices, according to the Speaker, are South Africa, the United Kingdom, the United States of America, Canada, and even India.
241. According to the 4<sup>th</sup> respondent, the petitioners' claim that the Speaker's political office causes partiality is unfounded. It is urged that allegations of impartiality should be raised through a substantive motion in the House, as per the Standing Orders Standing Order 87(1) and parliamentary practice.
242. It is submitted that the Speaker's decisions are guided by the Constitution, the laws and the rules as provided for in the Standing Orders and in instances where the rules do not expressly provide guidance, the Speaker is still obligated to answer any questions arising in Parliament taking into consideration statute law, and the usages, forms, precedents, customs, procedures, traditions and the practices of the Parliament of Kenya and other jurisdictions to the extent that these are applicable to Kenya.
243. The Speaker's position is that his role is not influenced by political leadership positions, which are not recognized in the National Assembly Standing Orders except for the positions listed under article 108 of the Constitution, such as the Leader of Majority and Minority Parties, Whips, and their deputies. The Speaker has no casting vote, and his role does not affect the outcome of decisions in the House. He also does not participate in debates, meaning that his political affiliations do not influence the House's decisions.
244. It is submitted that the petitioners wrongly argue that the Speaker had no jurisdiction to make the communication regarding the majority leadership dispute yet both the Azimio and Kenya Kwanza Coalitions had requested the Speaker's intervention on the matter. The Speaker then acted within his jurisdiction to resolve the issue, in accordance with article 107 of the Constitution and Standing Order 18, which designate the Speaker as the Presiding Officer of the House. It is urged that the Speaker's duty to "preside over" the House, as defined in legal dictionaries, includes guiding, directing, or controlling the House. Thus, the Speaker's actions were within his authority and cannot be faulted.
245. The Speaker relied on Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party)(Petition 518 of 2013) [2014] KEHC 7493 (KLR) (Constitutional and Human Rights) (15 April 2014) Judgment) where the court held that the Speaker is responsible for issuing orders concerning procedures and debates in the House. The Speaker serves as the Presiding and Principal Officer of the National Assembly, bearing the responsibility for ensuring the proper constitutional conduct of proceedings and decisions within the Assembly.
246. The Speaker submits that other than being the presiding officer, he has explicit powers to make decisions on questions arising during parliamentary proceedings under Standing Orders 1 and 47(3) of the National Assembly's Standing Orders. This, according to the Speaker, ensures the smooth conduct of House business and prevents disruptions.
247. The Speaker has given instances when the his predecessor gave rulings on various issues which included the constitutionality and aspect of public participation during consideration of the Health Laws (Amendment) Bill; admissibility of recommendations of the report of the Public Accounts Committee on its examination of the report of the Auditor General on the financial statements of the Independent Electoral and Boundaries Commission; consideration of Mediated versions of the County Governments (Amendment) Bill (Senate Bill No 11 of 2017); the County governments



- (Amendment) (No 2) Bill (Senate Bill No 7 of 2017); and, the constitutionality and aspect of public participation during consideration of the Health Laws (Amendment) Bill.
248. It is submitted that in other comparable jurisdictions, a Speaker of Parliament has at all times possessed both express, inherent and residual powers to render guidance to the House in form of a Communication. In this regard, the Speaker cited Canadian Parliamentary practice and procedure *House of Commons Procedure and Practice* -Third Edition 2017, Marc Bosc and Andre Gagnon and in the United States of America, *Mason's Manual of Legislative Procedure*, 2020 Edition at pages 426-427.
249. It is also submitted that the High Court has no jurisdiction to interrogate the correctness or wrongness of a decision of a Speaker. In other words, the court has no jurisdiction to engage in a merit-based view of a decision of a Speaker. Further, that it cannot sit as an appellate body to the decisions of a House of Parliament. The South African case of *Tlouamma and others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another (supra)* has been cited in support of this position.
250. The Speaker submits that our courts and those of other jurisdictions in cases such as *Speaker of the Senate & another v Attorney-General & 4 Others* [2013] eKLR and *Marshall Field & Co v Clark* 143 US 649 [1892] have repeatedly held that they have no jurisdiction to interfere in the internal processes of Houses of Parliament or to make rules or prescribe procedures for Houses of Parliament.
251. The Supreme Court in the case of *Katiba Institute v Attorney General & 9 others* (Petition 17 of 2020) [2023] KESC 47 (KLR) (16 June 2023) (Judgment) (with dissent-NS Ndungu, SCJ) is said to have propounded the test that courts should employ while reviewing the exercise of administrative functions reposed in other state organs. This was also the position in the Court of Appeal decision of *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR.
252. According to the Speaker, the main aim of this litigation is to influence "the outcome of political decisions" which conduct was deprecated by Salmon LJ more than 48 years ago in *Blackburn v Attorney General* (1971] 1 WLR 1037 when held that; "whilst I recognise the undoubted sincerity of Mr Blackburn's views I deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the courts".

**(v) 5<sup>th</sup> and 14<sup>th</sup> Respondents' submissions.**

- 259 Like the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the 5<sup>th</sup> & 14<sup>th</sup> respondents also refer to one at the same person who, in this instance, is the Registrar of Political Parties. It is Registrar's submissions that her office is established under section 33(1) of the *Political Parties Act* and that the office is capable of suing and being sued in its own name and, as such, enjoining the holder of the office in her personal capacity when the petition pertains to actions within her official duties is improper.
260. She further submits that, pursuant to section 5(d) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, the court may direct that a party improperly joined to a petition may be struck out. She has made reference to section 34 of the *Political Parties Act* on the functions of the Registrar of Political Parties.
261. The petition, according to the Registrar, does not disclose any violation of the *Constitution* by the Registrar to warrant the intervention of the court. In this regard, she has cited *Anarita Karimi Njeru v Attorney General* [1979]KLR. She has also submitted that this honourable court lacks jurisdiction to grant the relief sought for the removal of the Registrar as the procedure is set out under *Political Parties*



Act. On this argument, she has relied on International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC).

**(v) 6<sup>th</sup> to 9<sup>th</sup> Respondents' submissions**

262. In their written submissions, the 6<sup>th</sup> to 9<sup>th</sup> respondents have urged that the question of the legality of the Finance Act is subject to proceedings before this honourable court in CCHRPET/E181/2023: Okiya Omtatab Okoiti v Cabinet Secretary, National Treasury and Planning & Others. They have cited the Supreme Court case of Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others [2020] eKLR to urge that this question is *sub judice*.
263. The 6<sup>th</sup> to 9<sup>th</sup> respondents' submission is that the jurisdiction to determine the present case is vested in the Political Parties Disputes Tribunal under section 40(1)(f) of the Political Parties Act. They have cited the cases of Lilian Gogo v Joseph Mboya Nyamuthe & 4 others (supra), County Government of Turkana v National Land Commission, Attorney General & Jackson Ekaru Nakusa & 32 others [2020] eKLR and Cleophas Malala & another v Speaker of the Senate & 2 others; Stewart Madzayo & another (Interested Parties) [2021] eKLR where the courts reiterated that where there is a clear procedure for redress of any particular grievances prescribed by the law, the same ought to be strictly followed.
264. According to the 6<sup>th</sup> to 9<sup>th</sup> respondents, the petitioners can only deviate from alternative remedies where there are exceptional circumstances. This was the position in the Supreme Court case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment).
265. It is submitted that the question of whether the four political parties coalition pact is legal should be dealt with in accordance with the two-tier mechanism under section 40 of the Political Parties Act, to wit; first through internal dispute resolution mechanism and second, through Political Parties Dispute Tribunal as was held by the Court of Appeal in Munene & another v Muturi & 7 others (Civil Appeal E350 of 2022) [2022] KECA 912 (KLR) (22 July 2022) (Reasons).
266. According to the 6<sup>th</sup> to 9<sup>th</sup> respondents, the provisions of article 108(2) Constitution are couched in present terms and nothing in it can be read to mean that the status of a party or a coalition as the majority party or coalition is fixed for five years. They have relied on the Court of Appeal case in Okiya Omtatab Okoiti & another v Attorney General & 6 others [2020] eKLR where the court held that the Constitution should be given purpose interpretation to give effect of the purpose of the Constitution.
267. It is their case that the decision mentioned above implies that the creators of the Constitution foresaw a scenario where the majority status of a party or coalition in the National Assembly could change during the parliamentary term. They also urge that section 10 of the Political Parties Act allows for the formation of post-election coalitions, new political parties, or the merging of existing parties.
268. The 6<sup>th</sup> to 9<sup>th</sup> respondents also urge that the majority party in the National Assembly can change due to various circumstances, including, two or more political parties merging to form a coalition with a majority (section 10(1) of the Political Parties Act); two or more political parties merging to form a new political party with a majority (section 11(1)(a)); a political party merging into an existing party, resulting in a majority (section 11(1)(a)); expulsion of members from the majority party, affecting its status; loss of members through death, election nullification, imprisonment, or bankruptcy; or even disintegration of the majority coalition into individual parties.
269. The 6<sup>th</sup> to 9<sup>th</sup> respondents submit that the scenarios affecting the majority party in the National Assembly must be interpreted with a specific purpose, as per article 108 of the Constitution. While



general elections determine the National Assembly's membership, they do not prevent these changes from occurring before the parliamentary term ends and if any situation arises that impacts which party or coalition holds the majority, it must be addressed immediately and cannot be postponed until the next general election.

270. It is urged that the purposive interpretation of article 108 of the *Constitution* asserts that the determination of which party or coalition holds the majority in the National Assembly should be made on a case-by-case basis when circumstances change. If a political party leaves a coalition, joins another, or merges to form a new or coalition, it does not result in the loss of seats held by its members. However, such changes can alter the majority party status. It is also submitted that if these changes lead to the formation of a party or coalition with a majority, a new majority status is established and must be addressed accordingly.
271. It has also been submitted on behalf of the 6<sup>th</sup> to 9<sup>th</sup> respondents that the shifting of four political parties from the Azimio La Umoja coalition to Kenya Kwanza shifted the numbers, making Kenya Kwanza the majority party after the general election. They also submit that the *Constitution* allows individuals running for the position of Speaker to be either nominated by a political party or run as independent candidates. There is no requirement for a Speaker, once elected, to resign from their political party or cease engaging in political activities if they were nominated by a political party. the *Constitution* is said to permit candidates to leverage the support of a political party during their campaign for Speaker.
272. The 6<sup>th</sup> to 9<sup>th</sup> respondents rely on the case of *Tlouamma and others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another (supra)* where the court observed that where the *Constitution*, legislation or rules do not require the Speaker to sever their ties with political parties, this does not impede the Speaker from occupying any leadership position within the political party or participating in the activities of the political party. The Speaker's membership to a political party does not point to him lacking impartiality while discharging his official duties.
273. They also rely on the case of *in Matter of Kenya National Commission on Human Rights* [2014] eKLR: Reference 1 of 2012, where the court held that a holistic interpretation of the *Constitution* must mean interpreting the *Constitution* in context. The 6<sup>th</sup> to 9<sup>th</sup> respondents reiterate this court lacks the requisite jurisdiction to remove the Speaker of the National Assembly from office.
274. On the question of immunity, the 6<sup>th</sup> to 9<sup>th</sup> respondents rely on the Supreme Court case of *Bellevue Development Company Ltd v Gikonyo & 3 others* (Petition 42 of 2018) [2020] KESC 43 (KLR) (15 May 2020) (Judgment) where the court observed that the objective of judicial immunity is to allow judicial officers to make decisions independent of personal consideration including fear of personal liability. According to these respondents, the above rationale applies to the parliamentary immunity granted to the Speaker and Leaders in the National Assembly under section 12 of *Political Parties Act*.
275. It is submitted that article 203 (1) of the *Constitution* states that tax exemptions can only be made through legislation. Further that the court in the case of *Okoiti & 2 others v Cabinet Secretary, National Treasury & 4 others* (Petition 303 of 2018) [2022] KEHC 13213 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment) held that policy issues are better left to the legislature and can only be questioned if they violate the *Constitution*.

#### (vi) 10<sup>th</sup> and 13<sup>th</sup> Submissions

276. The 10 and 3<sup>th</sup> respondents filed written submissions dated March 29, 2024 in response to the petitioners' submissions. It is their submission that this court cannot adjudicate on the issues before it because they are sub judice in light of Milimani Constitutional Petition Number E505 of 2023 *Azimio la Umoja One Kenya Coalition Party v The Speaker of the National Assembly and Jubilee Party*.



277. In support of this position, they rely on the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR where the court observed that the purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter.
278. The 10<sup>th</sup> and 13<sup>th</sup> respondents also rely on the case of *Okiya Omtatah Okoiti & another v Ministry of Transport & Infrastructure & 4 others* [2016] eKLR where the court observed that the doctrine of sub-judice is equally applicable to petitions under the *Constitution*. A similar position was also held in the case of *Leonard Omullo v National Land Commission* [2021] eKLR.
279. It is their case that the assertion that the Jubilee Party cannot leave the Azimio Coalition without a referendum is moot in light of the fact that the Jubilee Party already left the Azimio Coalition. According to them, a referendum can only be held when amending the *Constitution* of Kenya under articles 255, 256 and 257 of the *Constitution* of Kenya, 2010 and the ratification of the *Constitution* under article 263 of the *Constitution* of Kenya, 2010.
280. On the issue of jurisdiction, the 10<sup>th</sup> and 13<sup>th</sup> respondents rely on the case of *The Owners of Motor vessel Lillian 'S' v Caltex Kenya Limited* [1989] KLR 1 for the argument that this court does not have jurisdiction to dispose of the dispute and thus should down its tools. These respondents also rely on *Rich Productions Limited v Kenya Pipeline Company & Another* [2014] where the court held that the reason why the *Constitution* and the law establish different sectors is to ensure that such disputes are resolved by those with technical expertise.
281. The 10<sup>th</sup> and 13<sup>th</sup> respondents also relied on the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where the court outlined the situations where an abuse of the court process would arise.

**(vii) 11<sup>th</sup> Respondent's submissions**

282. The 11<sup>th</sup> respondent filed written submissions dated April 9, 2024. At the onset, the 11<sup>th</sup> respondent begun by submitting that it has been unnecessarily dragged into this petition. It also states that no relief has been sought against it.
283. It is its submission that it is only mandated by the *Constitution* of Kenya 2010, the *IEBC Act* and the *Election Act* 2011 to conduct or supervise elections to any elective body or office established by the *Constitution* of Kenya and in keeping with that mandate, the IEBC delivered free, fair, credible and verifiable elections in the General Elections held on August 29, 2022.
284. The 11<sup>th</sup> respondent relies on article 82 of the *Constitution* on the Legislation on elections where some of the functions of the IEBC are laid out. Article 88(4) and section 4 of the *IEBC Act* are also referred to on more functions of the IEBC. Article 89 on IEBC's delimitation of constituencies and wards and article 90 on IEBC's responsibility to conduct and supervise party nomination of candidates are also referred to in the submissions. It is submitted that the obligations and function of IEBC at article 248 and 249 of the *Constitution* are replicated and attained in the execution of its functions under articles 82, 88, 89 and 90 of the *Constitution*.
285. The 11<sup>th</sup> respondent also urges that there is an express and clear legal regime that regulates political parties in Kenya. The Commission refers to article 92 of the *Constitution* on Political Parties and submits that from the reading of the *Political Parties Act*, the IEBC has absolutely no role to play in the regulation of political parties outside the election period.



286. According to the 11<sup>th</sup> respondent, the election period for the elections of August 9, 2022, commenced on January 20, 2022, on the publication of the Kenya Gazette, Vol.CXXIV-No.14 of January 20, 2022 and ended on August 23, 2022 on the publication of election results *vide* Kenya Gazette Vol.CXXIV-No.169 of August 23, 2022. The Kenya Gazette Vol. CXXIV.No.14 of 20 January 2022 was also publicized by the IEBC Press Release of January 21, 2022.
287. It is the 11<sup>th</sup> respondent's submission that no law obliges it to monitor the elected office holders as to their political affiliations or to which political party or which coalition, as that is the function of the Registrar of Political Parties under section 34 of the *Political Parties Act*.
288. The 11<sup>th</sup> respondent has also submitted that the election is not conducted for a political party as an individual or a constituent but for a human individual person. Regulation 22 of the *Elections (General) Regulations* is said to prescribe the manner of nomination of political party candidates for the National Assembly while regulation is said to provide for the inclusion of a symbol of a candidate in the ballot papers.
289. The 11<sup>th</sup> respondent also refers to regulation 70 on the manner of voting, regulation 39(1) on the determination and declaration of results, regulation 79 on the declaration of results of the voting of the member of the National Assembly. It is the 11<sup>th</sup> respondent's case that Form 35A referred to in regulation 79 does not provide a slot for the number of votes attained by a political party nor coalition nor a merger.
290. Regulation 83 provides for the manner of tallying and announcement of election results and in that process there is no requirement at that the results be tallied or announced per a political party, or coalition or a merger.
291. Similarly, it is the 11<sup>th</sup> respondent's submission that Form 35B referred to under regulation 83(1)(e) of the *Elections Regulation* does not provide a slot for the number of votes attained by a political party nor a coalition nor a merger. In summary, the 11<sup>th</sup> respondent submits that it is not obligated under any law or moral rule, to declare the party or coalition that garnered the majority votes or had majority members, in the National Assembly.
292. In making reference to article 249 and 252 on the objects and authority of commissions and independent offices and the general powers and functions of the commissions, it has been submitted on behalf of the 11<sup>th</sup> respondent that its mandate does not include objecting to, or protesting or reviewing or countermanding the rulings of the Speaker of the National Assembly.
293. The National Assembly or the Senate, it is urged, are not under the control or supervision of another body or authority and that it is only the judiciary that has the mandate to ensure that the decisions of the National Assembly are within the law, through the provided channel but not the IEBC.
294. According to the 11<sup>th</sup> respondent the Chairman of the IEBC has no role in the tallying and declaration of results of election to the National Assembly, that is the role of the Presiding Officer and the Returning Officer as provided in regulations 79(2A) and 83(1) of the *Elections Regulation*.
295. The Chairman's role with regard to the elections to the National Assembly is said to be to tally and verify results received and not announce or declare the results as regulation 84 provides for the establishment of the final tallying centers for the respective elective posts.
296. The Chairman's responsibility it is submitted is only as is provided under regulation 87(3) and that is to announce the results of each presidential candidate and to declare the person elected president. In



Forms 34A, 34B and 34C, there is no provision for declaration of results of persons or political parties elected and affiliated to the elected president or other presidential candidates.

297. In conclusion, the 11<sup>th</sup> respondent submits that it has no role to play when it comes to who occupies the office of the majority or minority leaders in the National Assembly.
298. The 11<sup>th</sup> respondent also submits that although the petitioners have no basis or cause at all against the IEBC, this court can recommend an amendment of the *Elections Act*, to make provision for the declaration by the IEBC of the largest party or coalition or parties, during general elections, to actualize article 108 of the *Constitution*.

**(viii) 12<sup>th</sup> and 16<sup>th</sup> Respondents' Submissions**

299. The 12<sup>th</sup> and 16<sup>th</sup> respondents filed their written submissions dated November 7, 2023 and June 20, 2024.
300. On the question whether the decision by the 16<sup>th</sup> respondent contravened articles 10 and 47 of the *Constitution* for want of public participation, stakeholder consultations and administratively fair procedures, the 12<sup>th</sup> and 16<sup>th</sup> respondents rely on the case of Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odbiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & Two Others (Interested Parties)* (2020) eKLR where the court observed that article 10 outlines the national values and principles of governance that apply to all state organs, officers, public officers, and individuals when interpreting the *Constitution*, enacting laws, or making public policy decisions. Additionally, that section 7(1) of the sixth schedule provides that any law in effect before the *Constitution*'s promulgation remains in force, but must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the *Constitution*.
301. They also rely on the Court of Appeal case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*, Civil Appeal No 224 of 2017 eKLR where the court held that the values espoused in article 10(2) are neither aspirational nor progressive but that they are immediate, enforceable and justiciable. The court also held that the values are not directive principles. It also observed that the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable.
302. On the concept of public participation, the 12<sup>th</sup> and 16<sup>th</sup> respondents rely on the case of *Robert N Gakuru & others v Governor Kiambu County & 3 Others* [2014] eKLR where the court adopted the definition of public participation as had been stated in the South African decision in *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC). The court in *Doctors for Life International (supra)* held that Public involvement or participation refers to the process where the public engages in an activity. Also, that in the context of the legislative process, facilitating public involvement means taking actions to ensure that the public has the opportunity to participate in the process.
303. The 12<sup>th</sup> and 16<sup>th</sup> respondents submit that the process of Public Participation may take different forms and that at times it may include consultations. They refer to the definition of consultations as the act of asking the advice or opinion of someone. It is also submitted that consultation is a more robust and pointed approach towards involving a target group and it is often referred to as stakeholders' engagement.



304. They rely on the Court of Appeal case of *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR where the court quoted with approval Ngcobo J in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) where it was stated that the more discrete and clearly identifiable and potentially affected a specific group of people is, and the greater the potential impact on their interests, the more reasonable it is to expect the legislature to take care in ensuring that this group is given a fair opportunity to voice their concerns.
305. The 12<sup>th</sup> and 16<sup>th</sup> respondents also rely on the case Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR where the court observed that a public participation program must be intentionally inclusive and diverse. Any clear and intentional attempts to exclude genuine stakeholders would render the program ineffective and unlawful.
306. Further, that when designing such a program, government agencies or public officials must consider the subsidiarity principle, meaning that those most affected by a policy, legislation, or action must have a greater say in that policy, and their opinions should be actively sought and considered.
307. They also submit that consultation or stakeholder engagement allows key sector stakeholders to participate in the process of making laws or administrative decisions that significantly impact them and since these stakeholders are most affected by the law, policy, or decision, it is essential for government agencies or public officers to consider incorporating consultation or stakeholder engagement in appropriate cases, as was done by the 16<sup>th</sup> respondent in this case.
308. They have also relied on *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (*supra*) where the court held that the purpose of allowing public participation in the law-making process is to give the public a chance to influence law-makers' decisions. Further, that law-makers must consider the public's input and make informed decisions based on it.
309. The court also went ahead to state that law-makers are required to provide meaningful opportunities for the public to express their concerns, values, and preferences, and to take these into account when shaping decisions and policies. It is the court's position that without this, the duty to facilitate public participation would be meaningless.
310. The 12<sup>th</sup> and 16<sup>th</sup> respondents also rely on the case of *Matatiele Municipality v President of the Republic of South Africa* (2) (CCT73/05A), where the South African Constitutional Court emphasized that the right to public participation in governmental decision-making is not only essential for improving decision accuracy by allowing people to present their side but also crucial for preserving human dignity and self-respect.
311. Similarly, in *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5, the court highlighted the importance of public participation, stating that it is vital for informing the public about what to expect, allowing communities to express concerns and demands. The court also held that in a democratic state, participation is integral to the legitimacy of decisions, and decisions made without consulting the public cannot be considered informed.
312. The 12<sup>th</sup> and 16<sup>th</sup> respondents rely on the case of *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (*supra*) where the Court of Appeal referred to the case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR on the threshold of public participation. In this case, the court observed that the mechanism used to facilitate public participation, which included meetings, press conferences, briefings, structured



- questionnaires, and a department dedicated to receiving concerns, was deemed adequate. The court went ahead to observe that the 1<sup>st</sup> respondent has the discretion to choose the appropriate medium for public participation, as long as it ensures a broad outreach to the public and interested parties. The case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (*supra*) has also been cited on what constitutes a reasonable threshold in public participation.
313. On the doctrine of exhaustion, the 12<sup>th</sup> and 16<sup>th</sup> respondents have relied on the case of *Martin Kabubii Mwangi v County Government of Laikipia* [2019] eKLR where the court observed that the exhaustion principle, as enunciated in the cases like *Secretary, County Public Service & Another v Hulbhai Gedi Abdille* Civil Appeal 202 of 2015, does not allow a litigant to choose which parts of a statute to rely on. According to the 12<sup>th</sup> and 16<sup>th</sup> respondents, the dispute before this court is clearly a dispute between the political party members of the National Assembly and the best avenue to resolve this issue is clearly stipulated under section 40 of the *Political parties Act* 2011 which establishes and gives mandate to the Political Parties Disputes Tribunal.
314. The 12<sup>th</sup> and 16<sup>th</sup> respondents also rely on the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, where the court emphasized the importance of exhausting administrative remedies before seeking judicial intervention. In this case court stated that the exhaustion doctrine ensures that litigants first utilize the available mechanisms within an agency for resolving issues before turning to the courts. It is the 12<sup>th</sup> and 16<sup>th</sup> respondents' case that this approach promotes diligence in protecting one's interests and postpones judicial consideration until the alternative remedies have been pursued.
315. They also rely on the case of *Peter Odour Ngoge v Francis Ole Kaparo & others*; SC Petition No 2 of 2012, [2012] eKLR, where the Supreme Court upheld a preliminary objection due to the failure to exhaust statutory alternative dispute resolution mechanisms. Similarly, they have cited *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, where the Supreme Court reiterated that even in matters of profound legal significance, the relevant persons or bodies specified by the law should be given the first opportunity to resolve disputes. The court also emphasized that when alternative dispute resolution mechanisms are provided by legislation, the courts must exercise restraint and allow these bodies to handle the dispute in the first instance.
316. Another case from the Supreme court which the 12<sup>th</sup> and 16<sup>th</sup> respondents cited is *United Millers Limited v Kenya Bureau of Standards & 5 others* (2021) eKLR which stressed that where alternative dispute resolution methods are legislated, the courts should show restraint in exercising their constitutional jurisdiction and defer to the bodies designated by statute to address such disputes initially.
317. The 12<sup>th</sup> and 16<sup>th</sup> respondents submit that the law does not operate in a vacuum. They rely on the case of *R v Kenya Revenue Authority ex-parte Style Industries Limited* (2019) eKLR where Mativo, J,(as he then was) not only dismissed a suit based on the fact that the applicant failed to exhaust all the mechanisms available before approaching the court, but also strived to define the use of the word "Shall" as used under provisions of the law.
318. According to the 12<sup>th</sup> and 16<sup>th</sup> respondents, section 40(2) of the *Political Parties Act* 2011 imposes a restriction on the tribunal's jurisdiction, stating that it shall not hear or determine disputes under certain conditions unless the disputes have been heard and resolved by the internal political party dispute resolution mechanisms. They have also relied on the case of *Musalisa Mudavadi & 4 others v Angela Gathoni Wambura & 2 others* [2019] eKLR, where the court explained that the tribunal only



- acquires jurisdiction to determine disputes under section 40(1) after they have been addressed and decided by the political parties' internal dispute resolution mechanisms.
319. It is urged that judicial restraint is a principle of judicial interpretation that encourages judges to limit their own power and to avoid striking down laws or interfering with the actions of other arms of government unless the actions are clearly unconstitutional. According to the 12<sup>th</sup> and 16<sup>th</sup> respondents, the role of the court is to examine whether the legislature has acted within its constitutional powers and if not, the court may strike down the action but must do so within self-imposed limits.
320. The 12<sup>th</sup> and 16<sup>th</sup> respondents also cited *Speaker of the Senate and Another v Attorney General and others* [2013] eKLR, where the Supreme Court of Kenya rationalised that if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter-majoritarian judicial review, in a democratic society, by maintaining a duly limited place in government.
321. The 12<sup>th</sup> and 16<sup>th</sup> respondents urge this restraint can be exercised through mechanisms like standing rules, the exhaustion of local remedies, adherence to stare decisis, avoidance of political questions, and the requirement of justiciability.
322. It is the 12<sup>th</sup> and 16<sup>th</sup> respondents' case that the doctrine of separation of powers emphasizes that courts must avoid taking over the functions of other branches. These respondents rely on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] at paragraph 49, where the Court of Appeal underscored the importance of deference among the branches of government. It noted that separation of powers not only prevents interference between branches but also enables each branch to provide checks and balances on the others. The court warned that while each branch has powers to counterbalance others, those powers do not grant one branch the authority to assume the functions of another, thereby fostering institutional restraint and avoiding overreach.
323. The 12<sup>th</sup> and 16<sup>th</sup> respondents urge that legislative bodies around the world enjoy parliamentary privilege, which refers to the special rights granted to each House of Parliament collectively and to individual members, enabling them to perform their duties without interference. These privileges are necessary for the legislature to function effectively and to address challenges to its authority.
324. They further urge that the purpose of parliamentary privilege is to remove any obstacles that could impede the legislature in carrying out its work. It is to ensure that the legislature is independent from control by the executive and the courts, granting it the necessary powers to fulfill its constitutional and legal responsibilities. Members of the legislature and others participating in its proceedings must have certain immunities to allow the legislature to perform its functions properly. These privileges reflect parliamentary autonomy and are essential for an effective legislature that operates in the public interest.
325. According to them, the rights and immunities granted to Members of Parliament individually can be categorized into the freedom of speech, freedom from Arrest in Civil Actions and exemption from being summoned to court. In this submission, they have relied on *Francis Mathbeka & 10 others v Director of Public Prosecutions & another* [2015] eKLR, where the court emphasized that parliamentary privilege belongs to the House as a whole, not to individual members. The case of *Samuel Muigai Nganga v The Minister for Justice, National Cohesion and Constitutional Affairs & another* [2013] eKLR, where the petitioner is said to have sought an advisory opinion from the High Court regarding who qualifies as a full-time state officer under article 77(1) of the *Constitution* has also been relied upon by the 12<sup>th</sup> and 16<sup>th</sup> respondents.
326. The court in this case is said to have ruled that it lacked jurisdiction to address hypothetical or abstract issues. It emphasized that its role in interpreting the *Constitution* could only be exercised in the presence



of a real dispute, thus reinforcing the principle of judicial restraint and its focus on concrete legal questions.

**(ix) 18<sup>th</sup> Respondent's submissions**

327. The 18<sup>th</sup> respondent filed written submissions dated April 11, 2024 in respect to the amended petition. To begin with, the 18<sup>th</sup> respondent has submitted that where, pursuant to a constitutional provision, there exists a statute providing a forum for alternative dispute resolution; this ought to be upheld by the courts.
328. The 18<sup>th</sup> respondent also submits that it is not disputed that the petitioners' nature of complaint herein arises from a political dispute between members of a political coalition, namely members of Azimio coalition who bolted out of Azimio Coalition, thereby occasioning the crisis in the National Assembly concerning which one between the Azimio Coalition and Kenya Kwanza Alliance held a majority status in the house. The petitioners, therefore, ought to have pursued internal disciplinary mechanisms within their respective parties or coalitions in the first instance and if dissatisfied, moved the Political Parties Dispute Tribunal in the second instance and upon exhausting these mechanisms, move to this honourable court.
329. The 18<sup>th</sup> respondent submits that the petitioners also had the option of accessing the court via order 53 of the Civil Procedure Rules, specifically order 53 rule 3(1) which provides that an application for orders of mandamus, prohibition or *certiorari* shall be made by way of notice of motion to the High Court. Section 7 of the [Fair Administrative Actions Act](#) is also referred to on review of administrative decisions.
330. It is also submitted that section 9(2) of the [Fair Administrative Action Act](#), 2015 further affirms that the High Court can only review an administrative action once all internal appeal mechanisms have been exhausted. Section 9(4) is referred to the exemption to comply with doctrine of exhaustion. The 18<sup>th</sup> respondent has relied on the case of [Peter Gichuki King'ara v Independent Electoral and Boundaries Commission](#) (Civil Appeal 23 of 2013), where the court observed that if a court lacks jurisdiction, it must immediately cease its proceedings. For this same argument, the decisions in the [Owners of the Motor Vessel "Lillian" v Caltex Oil \(Kenya\) Ltd](#) (Civil Appeal No 50 of 1989) and the Supreme Court case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others](#) [2012] have been cited.
331. The 18<sup>th</sup> respondent has urged that the challenge to the Finance Bill 2023 and Appropriation Bill 2023 is being raised too late, after both bills have already become law and these laws were foundational to the government's budget for the 2023-2024 financial years, and any intervention by the court at this stage would be harmful to the nation's public good and constitutionalism.
332. It is the 18<sup>th</sup> respondent's submission that the amended petition as framed fly in the face of article 117(2) of the [Constitution](#) as read with the [Parliamentary \(Powers and Privileges\) Act](#), 2011 and section 12(2) 2011, which ring fences the autonomy of debate and the civil liberties of members of the Assembly (including the Speaker) while discharging their respective official duties.
333. It is the 19<sup>th</sup> respondent's case that the petitioners should have raised their grievances earlier, and if they had genuine concerns, they could have petitioned Parliament under article 119 of the [Constitution](#) through the procedure provided for under the [Parliament \(Procedure\) Act](#) No 22 of 2012.



**(x) 19<sup>th</sup> Respondent's submissions**

334. The 19<sup>th</sup> respondent has, in the written submissions, filed in its behalf, urged that the decision that offends the petitioners was a political one made by political parties who prior to their departure, formed the constituent parties of the Azimio la Umoja One Kenya Coalition Party. Any constituent party of the Azimio la Umoja One Kenya Coalition Party or member of any constituent party thereof who felt aggrieved by the decision of the 14 members from UDM, PAA, MCCP and MDG had a clear path of redress as provided for under section 40 of the [Political Parties Act](#).
335. It is submitted that the attempt to defeat the provisions of the [Political Parties Act](#) by filing a constitutional petition is not one promoting the supreme law of the land but attempting to undermine the institutions created thereunder and in support of this position the 18<sup>th</sup> respondent has relied on [Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others](#) [2016] eKLR. In this case, the court observed that to allow an electoral dispute to be transmitted into a petition carries the risk of opening up a parallel electoral dispute-resolution regime.
336. The 19<sup>th</sup> respondent has also cited the case of [Peter Muturi Njuguna v Kenya Wildlife Service](#) [2017] eKLR where the court is said to have considered whether a claimant was under an obligation to comply with the provisions of section 62(r) of the [Wildlife \(Conservation and Management\) Act](#) (repealed), which required a claimant to make an application to a district committee for the award of compensation. The court noted that in the language of the Act, there was no compulsion to follow the procedure in the Act since the word used was "may".
337. The 19<sup>th</sup> respondent has also relied on the case of [Peter Oduor Ngoge v Francis Ole Kaparo & 5 others](#) [2012] eKLR where the court is said to have emphasized the need to trust every institution established under the [Constitution](#) by exhausting the specific procedures prescribed therein.
- The case of [Jeremiah Ekaimas Lomorukai v County Government & 2 others](#) [2015] eKLR has also been cited for the argument that the issue of removal of a majority leader can only be resolved by the second respondent and its coalition parties involving the political party machinery facilitated under the [Political Parties Act](#). Also cited is the case of [Kanjogu Njiiru Mbogo & 7 others v Speaker, Embu County Assembly & another](#) [2015] eKLR, where the court struck out a petition because the dispute should have been resolved through internal party mechanisms.
338. It is also submitted that the petition against the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents cannot be sustained in view of article 117 of the [Constitution](#) and section 12 of the Parliamentary (Powers and Privileges) Act. In this regard, the 19<sup>th</sup> respondent has relied on the case of [Shadrack Muyesu Sharu & 2 others v Justin Muturi & 2 others](#) [2018] eKLR where the court declined to allow the preliminary objection on grounds that the same was not on whether or not the actions of the National Assembly can be interrogated, but rather whether, in doing so the speakers can be held personally liable and hence be sued in his or her individual capacity in the exercise of his or her functions as speaker.
339. The 19<sup>th</sup> respondent states that the petition is fatally defective due to the joinder of unrelated causes of action and to support this position it cites [Ami Development Services Limited & 6 others v The Trustees of the Kenya Local Government & 2 others, IZ Engineering Construction Ltd & another](#) [2005] eKLR where the court held that there must be a joint interest in the main questions raised by the litigation as a condition precedent to the joinder of several causes of action against several defendants.
340. The 19<sup>th</sup> respondent further submits that a political party which has disassociated itself from a coalition party or coalition of parties and proceeded to support the ideology of a rival coalition party or coalition of parties cannot be said to still belong to the coalition party or coalition of parties that it is opposing.



- The term ideology is said to have been considered by the court in the case of *Thuranira & 4 others v Attorney General & 2 others; Registrar of Political Parties & 3 others (Interested Parties)* (Petition Eo43, EO57 & E109 of 2022) [2022] KEHC 482 (KLR) (Constitutional and Human Rights) (20 April 2022).
341. It is the 19<sup>th</sup> respondent's submission that the 4<sup>th</sup> respondent was alive to the realities of the day and as such rightfully considered that 14 members drawn from UDM, PAA, MCCC and MsG had expressly distanced themselves and their parties from Azimio la Umoja One Kenya Coalition.
342. According to the 19<sup>th</sup> respondent, a perusal of the *Political Parties Act* vis-a-vis the requirement of article 24(2) of the *Constitution* shows that the former does not manifest or declare any intent to limit the right of association guaranteed under article 36 of the *Constitution* and the right to political rights under article 38 of the *Constitution*. The *Political Parties Act* does not engage in substantive limitation of rights but only deals with the procedural exercise of those rights and timelines.
343. The 19<sup>th</sup> respondent submits that as was held by the court in the case of *John Harun Mwau v Independent Electoral & Boundaries Commission & another* [2019] eKLR, a political party within a coalition party or coalition parties retains the identity and promotes its values.
344. This particular respondent also relied on the case of *Yahya Ahmed Shee v Speaker county Assembly of Lamu; Jubilee Party & 6 others (Interested Parties)* [2021] eKLR where the court observed that for a petition to be competent before this court, the grounds in the petition must relate to and raise questions of constitutionality or unconstitutionality of the Speaker's decision not to effect changes as demanded in the coalition agreement.
345. It is submitted that the Speaker of the National Assembly is not prohibited from holding an office in a political party and that just like a member of Parliament who is elected under the sponsorship of a Political Party is bound to remain as a member of such Political Party during his term, the Honourable Speaker of National Assembly has no obligation to relinquish his office as the party leader of Ford Kenya. The 19<sup>th</sup> respondent also relies on the case of *Aluoch Polo Aluochier v Attorney General* [2018] eKLR where the court held that article 77(2) of the *Constitution* is limited to "appointed" State Officers.
346. According to the 19<sup>th</sup> respondent, the reason Azimio la Umoja coalition cannot invoke article 106 of the *Constitution* is because the coalition "does not have the numbers".
347. It is submitted that the National Assembly, when passing both the Finance and Appropriation Act was exercising its Constitutional mandate. On the issue of exemption of taxes, the 19<sup>th</sup> respondent urges that the same amounts to favoring certain persons which conflicts with article 27(1) of the *Constitution*. According to the 19<sup>th</sup> respondents the petitioners have failed to prove the 2<sup>nd</sup> respondent contravened the *Constitution* while passing the Act and in support of this position the case of *John Harun Mwau v Independent Electoral & Boundaries Commission & another* [2019] eKLR has been cited.
348. The 19<sup>th</sup> respondent submits that the court cannot supervise the operation of the National Assembly especially where the court is not being asked to annul unconstitutional process but rather being asked to substitute the decision of the National Assembly with its own decision. The respondent relies on the case of *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR on when courts should intervene when it comes to the legislative process of the National Assembly.



### (xi) Interested parties' submissions

349. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties filed written submissions dated November 10, 2023 and March 16, 2024. Their case is that the Constitution of Kenya, 2010, as well as various international legal instruments, emphasize democracy as a core principle, particularly through the right to vote and free and fair elections.
350. They urge that the ruling delivered by the Speaker on October 6, 2022 declaring Kenya Kwanza as the Majority party was unconstitutional, unreasonable, and biased, as it goes against the will of the electorate.
350. They also urge that the Speaker acted beyond his powers and jurisdiction, especially since the validity of the Azimio coalition was not within his authority to determine, as per the legal limits outlined in article 165 of the Constitution of Kenya, 2010. They also urge that the Speaker's actions contradict the constitutional framework, especially article 38 of the Constitution, which safeguards the right of the people to choose their representatives.
351. According to these interested parties, the Speaker's decision, which disregards the gazetted election results, is in violation of article 88 of the Constitution, and is legally invalid and to support this position, they rely on the case of Macfoy v United Africa Co Ltd [1961] 3 All ER 1169, where Lord Denning held that if an act is void, then it is in law a nullity. It is not only bad, but incurably bad.
352. They have urged that the Speaker's decision fails the test of reasonableness under article 47 of the Constitution of Kenya, 2010. They rely on the case of Republic v Public Procurement Administrative Review Board & 2 Others Ex-parte Pelt Security Services Limited [2018] eKLR, where the court held that a decision can be challenged as unreasonable if it fails to give proper weight to relevant factors. The court also observed that the decision must be transparent and defensible in both law and facts.
353. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties urge the court, to interpret the Constitution harmoniously, as was affirmed by the court in the case of Tinyefuza v Attorney General of Uganda Constitutional Petition No 1 of 1997 (UGCC3), where it was held that the Constitution should be read as an integrated whole, with each provision complementing the others. They urge that this principle supports the notion that the Majority and Minority parties must be determined based on the election results as gazetted by the IEBC, as outlined in article 90 of the Constitution of Kenya, 2010. Top of Form Bottom of Form
354. The Supreme Court in the case of Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment) is said to have pointed out that the courts have jurisdiction to interrogate the validity of the decisions of the Speaker.
355. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties also submit that the suggested forum is neither available to the petitioners nor convenient for resolving the issues raised in the petition for various reasons including that the Political Parties Dispute Tribunal and the Registrar of Political Parties lack jurisdiction over decisions or actions involving the Speaker of the National Assembly, the Cabinet Secretary for National Treasury, and the Kenya Revenue Authority.
356. It is further urged that the internal dispute mechanisms of political parties do not apply to individuals outside the party, such as those in positions like the Speaker of the National Assembly or the Cabinet Secretary. It is also their case that the Registrar of Political Parties cannot address allegations of fundamental rights violations or oversee the actions of the Independent Electoral and Boundaries Commission. They also urge that the Political Parties Dispute Tribunal or the Registrar cannot issue the orders the petitioners are seeking in this honourable court.



357. It is urged that the petition falls under the exceptions to the exhaustion doctrine as it entails a polycentric of issues that are best heard and determined on merits by this honourable court pursuant to article 165(3)(d) of the Constitution of Kenya, 2010 as the existing dispute resolution mechanisms have a limited role and they do not have jurisdiction over some parties in the instant dispute. The issues raised in the petition border on constitutional interpretation with the key challenge being the conduct of the Speaker of the National Assembly and his determination of the question of which political party is the Majority and Minority in the National Assembly.
358. They rely on the cases of Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR where the court and Night Rose Cosmetics (1972) Ltd v Nairobi City County Government & 2 others[2018] eKLR where the courts acknowledged the circumstances under which exceptions to the exhaustion doctrine would apply.
359. They also relied on Sir Dawda K Jawara v Gambia, ACmHPR 147/95-149/96- where the court observed that a remedy is considered available only if the applicant can make use of it in the circumstance of his case.
360. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties also submit that the immunity is not absolute and this court retains the power to interrogate whether any act is undertaken in accordance with the Constitution of Kenya, 2010. They also rely on the case of Judicial Service Commission v Speaker of The National Assembly & 8 Others, Petition 518 of 2013, [2014] eKLR and the case of Hon Augustine Lyatonga Mrema v Speaker of The National Assembly & another Misc Civil Application No 36 of 1998 where the court highlighted the place of the Speaker in a constitutional democracy.

**(xii) 2<sup>nd</sup> Interested party's submissions**

361. The 2<sup>nd</sup> interested party filed written submission dated April 16, 2024 in respect of the amended petition. Its position is that this court lacks jurisdiction to hear and determine the Amended Petition in so far as it relates to the withdrawal of the Jubilee Party from the Azimio Coalition and the membership of the 10<sup>th</sup> and 13<sup>th</sup> respondents in the Jubilee Party as they have raised issues that offend the express provisions of sections 40(2) and 41 of the Political Parties Act, 2011.
362. It is also the 2<sup>nd</sup> interested party's case that the respondents and, particularly the National Assembly, the Speaker of the National Assembly, the Independent Electoral and Boundaries Commission (IEBC), the Kenya Revenue Authority (KRA), the Cabinet Secretary, the National Treasury and Economic Planning are individuals who cannot be subjected to the dictates of section 40 of the Political Parties Act and, therefore, the Political Parties Tribunal lacks jurisdiction to entertain any claim or response accruing from the captioned individual.
363. According to the 2<sup>nd</sup> interested party the reliefs being sought by the petitioners herein are not capable of being adjudicated by the Political Parties Tribunal under section 40 of the Act and, in any event, the petition seeks to uphold the sovereignty of the people under article 1 and article 38 of the Constitution of Kenya 2010 as it seeks to determine the question of when the majority is to be determined; is it determined during the election and upon the returning of the election results or is it determined by the Speaker upon the convening of Parliament, noting that the question of either majority of minority can only be determined pursuant to an election.
364. The 2<sup>nd</sup> interested party states that the dispute being presented by the petitioners is a dispute that pits the following determinations; who determines that a particular party in Parliament is either the majority party or the minority party, when is the majority party or the minority party determined? How is the Majority party or the Minority Party determined? Do the results of the election as returned



by the 11<sup>th</sup> respondent play a part in determining the question of the Majority or Minority Party? Did the pronouncement of the Speaker of the National Assembly have the capability of altering the outcome of the August 9, 2022 election? This questions, according to the 2<sup>nd</sup> interested party are fundamental questions that cannot be left to the mercy of a mere subordinate Political Party Tribunal.

365. The 2<sup>nd</sup> interested party relies on the case of *County Government of Kiambu v The Senate & others* [2017] eKLR where the court held that it had jurisdiction to determine a matter on the legality or constitutionality of decision or actions or purported decisions brought before the court. It also observed that the *Constitution* distributes power among various organs, and if any of these organs are accused of not acting in line with the *Constitution*, courts have the authority under article 165(3)(d)(ii) to determine whether actions are inconsistent with the *Constitution*. The courts play a crucial role in reviewing the constitutionality or legality of legislative, executive, and administrative acts, protecting constitutional principles and an aggrieved party can challenge these acts in court, provided they can establish *locus standi* to do so.
366. The court also observed that while parliamentary privilege includes necessary immunity for MPs to perform their roles, constitutional organs must still operate within the limits and roles defined by the *Constitution*.

The 2<sup>nd</sup> interested party also relies on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 2 others*, on the scope of application of the separation of powers doctrine.

### (xiii) 3<sup>rd</sup> Interested party submissions

367. The 3<sup>rd</sup> interested party filed written submissions dated June 27, 2024. The 3<sup>rd</sup> interested party's case is that the 3<sup>rd</sup> respondent erred when he reasoned that determination of majority and minority status under article 108 is based on the number of Members of Parliament owing allegiance to any party (or coalition of parties) rather than the number of seats won by any party (or coalition of parties) at the general election.
368. According to the 3<sup>rd</sup> interested party, article 10(a) of the *Constitution* highlights that all state organs, officers, and everyone involved in interpreting the *Constitution* must follow the national values and principles of governance. This sets the foundation for what's known as "value coherent interpretation," where the *Constitution* is interpreted in a way that promotes the values it stands for.
369. The 3<sup>rd</sup> interested party also urges that this kind of interpretation, known as teleological interpretation, focuses on achieving justice by looking beyond just the literal text of the law. It's about understanding the values behind human rights, freedoms, and the broader goals of the *Constitution*. It is urged that since a Constitution is drafted in broad and general terms, it should be interpreted flexibly, with the goal of ensuring fundamental rights are protected. The idea is that the *Constitution* is a living document meant to address important social and political issues, and its interpretation should reflect its commitment to values and political goals, rather than being strictly confined to its specific wording.
370. The 3<sup>rd</sup> interested party has cited Francous Venter, "*Utilizing Values in Constitutional Comparison*" Apotchefstroom Electronic Law where the writer explains that "constitutional values" are not about material worth, but rather represent standards or measures of what is considered good. These values guide how the *Constitution* should be interpreted, applied, and acted upon. If something does not align with these values, it could lead to unconstitutional outcomes.
371. The 3<sup>rd</sup> interested party's case is that anyone interpreting the *Constitution*, whether it's a judge or a speaker in the National Assembly, must ensure their interpretation promotes the values outlined in article 10. It is the Society's case that the two key values from article 10(2)(a) are democracy and the



- participation of the people and thus when interpreting article 108, the goal should be to uphold these values, ensuring that the people's democratic rights are respected both within and between political parties.
372. The 3<sup>rd</sup> interested party has urged that adopting an interpretation of article 108 of the *Constitution* which gives the Members of Parliament a carte blanche to decide which party or coalition of parties, will be the majority or minority party in the National Assembly based solely on an assessment of the dictates of their own self-interests by shifting their allegiances from one party, or coalition of parties to another, violates article 10(1)(a) of the *Constitution*.
373. It is urged further that in his impugned ruling, the 3<sup>rd</sup> respondent ignored the letter which had been written to him by the 5<sup>th</sup> respondent indicating that Azimio Coalition had won 171 seats while Kenya Kwanza Coalition had won 165 seats, and instead relied on the contents of letters that were written to him by the 14 Members of Parliament who were elected on the tickets of UDM, MDG, MCCC and PAA indicating that they had since defected from Azimio Coalition and this was an error on his part. The interpretation adopted by the 3<sup>rd</sup> respondent on the said letters violated articles 91(1),20(4) (a) and 20(4)(b) of the *Constitution*.
374. The 3<sup>rd</sup> interested party submits that as observed by Allen Hickens in “*The Role of Political Parties in Making Democracy Work*” Briefing Paper No 3 University of Michigan & V-DEM Project Manager For Political Parties at page 2 political parties are the workhorses of democracy. The writer observes that Political parties play a crucial role in democracy by acting as a link between voters and their government and that they do this in two main ways: First, parties bring together the interests of many individual voters, giving them a voice in policymaking alongside powerful groups like corporations. Second, parties are the main way voters can hold politicians accountable for their actions. Without strong, effective parties, people are more likely to feel disconnected from the political system and frustrated with democracy.
375. It is urged that the *Constitution* of Kenya seeks to protect, promote and preserve the integrity and purity of decision-making in political parties by ensuring that decisions affecting political parties or their members are made collectively by the members, rather than a few individuals within the party who may occupy privileged positions within the party. This, according to the 3<sup>rd</sup> interested party is the reason why article 91(1)(c) –(g) of the *Constitution* makes it mandatory for political parties to comply with the conditions laid out therein.
376. According to the 3<sup>rd</sup> interested party, the 3<sup>rd</sup> respondent's decision that the four parties, whose MPs defected, were no longer part of the Azimio Coalition violated several constitutional provisions. First, according to article 91(1)(b), political parties can only make decisions through their governing bodies, so the 14 MPs couldn't just decide on their own to remove their parties from the Azimio Coalition by writing letters. Second, article 91(1)(d) requires political parties to follow good governance practices, meaning those four parties couldn't just enter a new coalition with the Kenya Kwanza Coalition without first formally ending their agreement with Azimio, which was still valid. Lastly, article 91(1) (e) stresses that party members have the right to participate in decisions affecting their party so, the Members of Parliament and the four parties could not unilaterally leave the Azimio Coalition without involving other party members or Azimio in the decision.
377. The 3<sup>rd</sup> interested party also urges that the 3<sup>rd</sup> respondent adopted an interpretation of article 108 of the *Constitution* which clearly violated article 38 of the *Constitution*, which is part of the Bill of Rights.
378. Article 20(4)(a) of the *Constitution* requires courts, and any other person who is interpreting a provision of the Bill of Rights, to adopt an interpretation that promotes the values that underlie an



- open and democratic society based on human dignity, equality, equity and freedom. The 3<sup>rd</sup> interested party relied on the article by Andreas, Bengtson, “The Morality of Party Switching 39 Journal of Applied Philosophy (2022) 6/6 at 621-622 where he highlights the negative impact of party-switching on human dignity. The 3<sup>rd</sup> interested party’s case is that as Bengtson argues, the essence of justice is that people should relate with each other as equals, as opposed to inferiors and superiors
379. It is submitted that giving article 108 of the Constitution an interpretation that gives elected MPS the unbridled liberty to determine whether their party or coalition members will enjoy the majority status which they have won at the ballot, also violates the value of freedom to the extent that it denies such party or coalition members the freedom to determine their political, social or economic destiny.
380. The 3<sup>rd</sup> interested party submits that the Constitution of Kenya adopts a very hostile approach to party switching. As article 103(1)(e) provides that where a Member of Parliament elected on a particular party defects to another party after election then he loses his seat. This, according to the 3<sup>rd</sup> interested party, is informed by a deep appreciation of the dangers of party switching as has been written by Martin Goeke & Christoff Hartmann (*supra*).
381. According to the 3<sup>rd</sup> interested party, article 50(1) of the Constitution guarantees everyone the right to have disputes resolved fairly, impartially, and independently, whether in court or before any other body handling such disputes. This includes decisions regarding which party holds majority status in Parliament. It is submitted that the process must meet the constitutional standards of fairness, independence, and impartiality. The “fairness” standard it is urged means that all parties affected by a decision must be given the chance to be heard before any ruling is made. In this case, it is submitted that the members of the Azimio Coalition who voted for the 14 defecting MPs were not given this opportunity, thus violating their right to a fair trial.
382. Article 50(1) requires the tribunal (in this case, the Speaker of the National Assembly) to be independent and impartial and, according to the 3<sup>rd</sup> interested party, independence means being free from any personal or external influences that might affect the decision-making process. It is submitted that at the time of the ruling, the 3<sup>rd</sup> respondent, who was also the Chairman of Ford Kenya (a founding party of the Kenya Kwanza Coalition), had multiple roles within the said coalition and as such this created a clear conflict of interest, making it impossible for him to make an impartial decision, thereby rendering his ruling unconstitutional and invalid.
383. The 3<sup>rd</sup> interested party relies on the case of Kalpana Rawal & 2 others v The Judicial Service Commission & 6 others [2016] eKLR where the court observed that “where a judge is so intimately involved in a decision subject of the challenge then no amount of judicial ingenuity can extricate him from either a real or perceived bias”.
384. It is the 3<sup>rd</sup> interested party’s submission that where a court tribunal or other body renders a judicial or quasi-judicial decision on a matter in which it has an interest, then any decision made by such court, tribunal or body whatever its merits or qualities, fails to meet the constitutional standard of fairness and must therefore be declared null and void *ab initio*.
385. This according to the 3<sup>rd</sup> interested party, is the reason why the Constitution prohibits public and state officers (save for the small excepted categories of elected leaders) from holding positions in political parties. It follows, therefore, that a speaker of the National Assembly cannot make decisions that involves resolving conflicts between political parties if he holds a key position in any of the disputing parties.



**(xiv) 7<sup>th</sup> Interested party's submissions**

386. The 7<sup>th</sup> interested party filed written submissions dated April 15, 2024 in support of the amended petition.
387. It is the 7<sup>th</sup> interested party's submission that the Constitution's interpretation requires a purposive approach that upholds its transformative values, including the rule of law and good governance, as specified in articles 10, 20(3), and 259 and that the Constitution forbids an interpretation of the Constitution that is narrow, artificial, rigid and pedantic and to support this position, the 7<sup>th</sup> interested party has relied on In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No 1 of 2012; [2014] eKLR where the court observed that a holistic interpretation of the Constitution means that the Constitution must be interpreted in context.
388. It is the 7<sup>th</sup> interested party's submission that the Speaker of the National Assembly and members of parliament cannot deploy the privileges roadblock when the constitutionality of their decision is being questioned and that to agree to such an invitation would mean that the speaker of the national assembly and the members of parliament are allowed to operate outside the precincts of the Constitution.
389. In support of this position, the 7<sup>th</sup> respondent has relied on Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrati Nairobi HCMA No 1260 of 2007; [2008] KLR 728 where the court observed that exempting public authorities from the jurisdiction of the courts gives them unchecked power, which is essentially an abuse of constitutional authority.
390. This court, it is urged, has on several occasions as seen in the case of Judicial Service Commission v Speaker of the National Assembly & another (Petition 518 of 2013) [2013] KEHC 1569 (KLR) (Constitutional and Human Rights) (6 November 2013) (Ruling) Petition No 518 of 2013 rejected the argument that article 117 of the Constitution and section 12 of the Parliamentary powers and privileges Act confer parliamentary organs or offices absolute immunity.
391. According to the 7<sup>th</sup> interested party, the arguments for parliamentary supremacy, separation of powers, judicial restraint, and constitutional avoidance are relics of the past, and they suffered their timely death on 27<sup>th</sup> August 2010; to this end, the 7<sup>th</sup> interested party has relied In the Matter of the Speaker of the Senate & another [2013] eKLR.
392. It is also the 7<sup>th</sup> interested party's case that even courts in other jurisdictions have held that no organ is immune from judicial scrutiny due to constitutional supremacy and some of the cases where courts has observed as much include Doctors for Life International v Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11 and Speaker of National Assembly v De Lille MP & Another 297/98 (1999)(ZASCA 50).
393. The Constitution, it is urged, includes two important provisions related to Members of Parliament switching parties. Article 104 is said to give voters the right to recall a Member of Parliament, while article 103(1)(e) is said to provide that a Member of Parliament's seat becomes vacant if they leave the party they were elected from or join a different one. It is the 7<sup>th</sup> interested party's case that, accordingly, the Political Parties Act was created, and section 14A outlines when a Member of Parliament is considered to have resigned from their party and this may include if they join another party or promote its ideology.
394. It is urged that the process for moving from one party to another is clear and it involves the party, the Member of Parliament, and the Registrar of Political Parties, and the member is not officially



- considered to have switched parties until the process is finalized. According to the 7<sup>th</sup> interested party, the National Assembly Speaker, therefore, does not have the authority to decide if Members of Parliament have left the Azimio coalition as that decision rests with the Registrar.
395. The 7<sup>th</sup> interested party has also submitted that article 103(1)(e) of the *Constitution*, often called the anti-hopping clause, stops Members of Parliament from switching parties after elections and if a Member of Parliament does switch parties, they lose their seat. This rule has its roots in Kenya's history, where Members of Parliament would often betray their voters by changing allegiance; the *Constitution* was designed to prevent this. This was discussed by three-judge bench of the High Court in *Mbae v Speaker, County Assembly of Nakuru & another; others (Interested Party)* (Constitutional Petition E004 of 2022) [2022] KEHC 3313 (KLR) (7 July 2022) (Judgment).
396. It is also urged that the Constitutional Review Commission (CKRC) had suggested that Members of Parliament who switch parties should seek a new mandate from voters. This is because, while Kenyans wanted to maintain party discipline, they also understood that Members of Parliament should be free to change parties based on their conscience. The compromise was that if a Member of Parliament switches parties, they lose their seat and must face a by-election, allowing the electorate to decide if they still support the Member of Parliament with their new party and ideology. This protects both the voter and the elected leader, ensuring the leader still reflects the electorate's views
397. According to the 7<sup>th</sup> interested party, Kenya is not alone in entrenching these anti-hopping provisions. In the Zimbabwe *Constitution*, article 129 thereof provides a similar provision. The 7<sup>th</sup> interested party has also cited Desposato, Scott W (2006b) in "*Parties for Rent? Ambition, Ideology, and Party Switching in Brazil's Chamber of Deputies*," American Journal of Political Science, Vol 50, No 1, (January), 62-80) who has stated that political parties serve as the main connection between voters and politicians in modern democracies and meaningful and stable party labels allow voters to identify the best candidates and make informed voting decisions. However, when politicians switch parties, it violates the fundamental electoral agreement and undermines the significance of party labels.
398. The 7<sup>th</sup> interested party has also cited Joubert, Leonardus Kolbe (2006) in "*The Mandate of Political Representatives with Special Reference to Floor Crossing: A Legal Historical Study*." Pretoria: University of South Africa: Unpublished Master of Laws Thesis where he observes that there is a conflict between the principle of accountability to voters and the proportional representation electoral system and that in the current proportional representation system, representatives who switch parties are not held accountable to the voters who elected them, which weakens the democratic value of accountability. Kenneth Janda, in *Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments* <https://www.partylaw.leidenuniv.nl/uploads/> also holds a similar position.
399. The 7<sup>th</sup> interested party's submit that party hopping undermines the already weak party organisations, impedes the institutionalisation of the party system, and complicates policy-making and representation processes. This is why Kenya and other countries constitutionalise an anti-hopping constitutional clause.
400. It is submitted that in a multiparty democracy such as ours, political parties play an essential role and that through the elected parties, parties ensure the interests of the voiceless are championed in parliament. Political parties bring divergent policies in parliament some parties can be pro-left, while others can be pro-right. These parties it is submitted go to the electorate with their inclinations, and the voters elect them to strike a balance in Parliament.
401. Article 4 of the *Constitution* which declares Kenya a multi-democratic state is founded on national values and principles and that this is a reaction to our history in the 1990s when Kenya was transformed



into a de facto and de jure one-party state. The 7<sup>th</sup> respondent cites the case of *Mbae v Speaker County Assembly of Nakuru & another; others (Interested Party)*, (*supra*) where the court observed thus “Kenyans, informed by the painful history of de jure and de facto one party state, were keen to etch a robust role for political parties in Kenya’s governance structure. Kenyans wanted a clear framework for making the country a multi-party democracy. Indeed, so important was this principle to them that they included article 4(2) of the *Constitution*”

### 8<sup>th</sup> Interested party submissions

402. The 8<sup>th</sup> interested party submits that membership to the National Assembly under article 97(1)(a) by the 290 members is not collective, but individual, with each member gaining a foot in the house through election by the registered voters of individual constituencies and, therefore, it is inconceivable that it is argued that the majority party is determined during the general elections. It is also urged that the *Constitution* only envisages that the registered voters’ interest would be electing the representative for their constituency.
403. It is further submitted that upon election, a person elected or nominated as a member of National Assembly only assumes the office once the oath or affirmation has been administered and resultantly, the question of majority party or coalition of parties remains a speculative matter until the House is convened, oaths administered, and the speaker elected.
404. This, according to the 8<sup>th</sup> interested party, when viewed in light of section 10 of the *Political Parties Act* which allows political parties to enter in coalition agreements either before or after the General Elections, demonstrates that the majority status is capable of shifting from one umbrella to another at any moment. This position is said to be further vindicated by Standing Order 2B.
405. The 8<sup>th</sup> interested party’s submission is that the speaker, having been mandated by the *Constitution* to preside over parliament, was granted the authority to make determinations on such matters as would arise in the house, so as to facilitate the discharge by the National Assembly of its functions.
406. According to the 8<sup>th</sup> interested party, given that the Speaker was entrusted with the responsibility of presiding over parliament, it is incorrect for the petitioners to argue that the Speaker lacked the legal authority to decide on the issue of who constituted the legitimate majority coalition. It is urged that had the Speaker failed to address the conflict, his failure to act would have been seen as an abandonment of his constitutional duties, especially considering the dispute that jeopardized the functioning of the House.
407. In support of this position, the 8<sup>th</sup> respondent relied on *Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party)* (Petition 518 of 2013) [2014] KEHC 7493 (KLR) (Constitutional and Human Rights) (15 April 2014) (Judgment) where the court held that the Speaker holds significant responsibilities as the presiding officer of the National Assembly, including maintaining order during debates, resolving points of order, and declaring the decisions of the Assembly.
408. The Speaker is also said to ensure that Members of Parliament can express themselves freely without fear of legal repercussions, as long as parliamentary rules and orders are followed. However, the court states that the Speaker’s authority should not be used to shield actions that violate human rights, acknowledging the importance of balancing parliamentary privileges with accountability.
409. It is the 8<sup>th</sup> interested party’s case that the anti-defection provisions apply particularly to political parties, and in rare cases, to political coalitions for example where the defecting politician vied through



the coalition ticket and that this can be clarified by further reference to the *Mbae v Speaker, County Assembly of Nakuru & another; others (Interested Party)* (*supra*) case.

410. They also urge that a coalition of parties, like Azimio, operates based on the coalition agreement filed with the Registrar and given the dispute over the constitutionality of the agreement and the differences between the version presented by the Registrar and the one tabled by Hon Junet Mohamed, the Speaker correctly concluded that the agreement could not be relied upon to resolve the dispute.

**(xvi) 10<sup>th</sup> Interested party's submissions.**

411. In its submissions, the 10<sup>th</sup> interested party urged that the Political Parties Dispute Tribunal is said to have in the case of *Gabriel Bukachi Chapia v Orange Democratic Movement* & Complaint No 237 of 2017 emphasised the need to exhaust party internal dispute resolution mechanism before engaging its jurisdiction as a necessity for the promotion and protection of the national values and principles of governance including multi-party democracy.
412. It is further urged that under the 2022 Amendments of the *Political Parties Act*, 2011, all a claimant needs to prove is evidence of attempt to apply the respective party's internal dispute resolution mechanism for the Tribunal to have jurisdiction over their case. Evidence of any effort to exhaust party internal dispute resolution mechanism is sufficient to trigger the jurisdiction of Political Parties Disputes Tribunal. In support of this argument, the 8<sup>th</sup> interested party cited the Tribunal's decision in *Jared Kaunda Chokwe Barns v Orange Democratic Movement & 2 others* complaint no: 259 of 2017.
413. On the question of immunity, the 10<sup>th</sup> interested party submitted that as was held by the court in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & another*, [2017] eKLR, members of the legislature and their speakers are protected from judicial proceedings for acts done in the performance of their legislative functions. It is urged that the objections are not on whether or not the actions or ruling of the National Assembly Speaker can be interrogated; rather, whether in so doing, the speaker can be held personally liable and hence be sued in his individual capacity in the exercise of his functions as the speaker.

**Analysis and Determination**

414. The main issue and upon which this petition turns is whether the ruling of the Speaker of the National Assembly rendered on October 6, 2022 is unconstitutional. The rest of the issues are secondary and, in a way, connected to the primary question of the constitutionality of the speaker's ruling. For instance, such an issue as whether there was any basis for rejection by the Speaker of the information given by the Registrar of Political Parties on the status of the Azimio Coalition and Kenya Kwanza Coalition; and, whether, in so rejecting, the Speaker could reach conclusions inconsistent with the evidence provided by the Registrar of Political Parties on the extent of membership of the two coalitions.
415. These are fundamental questions that go to the constitutionality of the speaker's ruling. Again, the question whether, in rejecting the information from the Registrar of Political Parties, which was given at the Speaker's instance, the Speaker could thereby designate members of a particular coalition to another coalition and proceed to declare the coalition to which he designated the members as the Majority Party also goes to the issue of the constitutionality of the Speaker's ruling. This is because article 108 of the *Constitution* on which party or a coalition of parties is the majority or minority in the National Assembly is all about numbers and any action by the Speaker that would, in one way or the other, tamper with the number of members of a political party or a coalition of parties poised to be either a majority party or minority party goes to the question whether the Speaker's action is what the *Constitution* describes in article 165 (3) (d) (ii) as something said to be done under the



authority of the Constitution or of any law but which is, in fact, inconsistent with, or in contravention of, the Constitution; in this particular case, inconsistent with or in contravention of article 108 of the Constitution.

416. A slightly isolated issue; isolated in the sense that it is independent of the question of the constitutionality of the Speaker's ruling, has to do with the office of the Speaker and it is this: once elected the Speaker of the National Assembly could the Speaker continue holding a political office of the leader of his Ford-Kenya party? This is a constitutional question because under article 260 of the Constitution, the Speaker is a public officer and according to this article is a public officer who, by virtue of that position, is restricted from holding a political office under the Political Parties Act and the Leadership and Integrity Act, No 19 of 2012. Thus, the question whether the Speaker can hold a political office is a constitutional question which this honourable court has jurisdiction to interrogate under article 165(3)(d)(ii) of the Constitution.

417. Before delving into these issues, we reiterate here that in our ruling on the preliminary objections delivered on January 26, 2024, we did find that this court has jurisdiction to determine the issues raised in this petition. At paragraph 97 of our ruling aforesaid, we made reference to article 165 of the Constitution which we cited verbatim before concluding as follows:

“...Flowing from these provisions of the Constitution, and for purposes of determination of the preliminary objections before us, is the overarching question whether the petition provokes any question on interpretation of the Constitution. Secondary to this question, is the question whether there is any contention in the petition against the respondents, jointly or severally, that they did anything, ostensibly under the authority of the Constitution, but which turns out to be inconsistent with or in contravention of the Constitution. If answers to these questions are in the affirmative, the petition is properly before court and there should be no debate whether this honourable court is seized of jurisdiction or not...”

418. We then proceeded to consider the issues in contention in the succeeding paragraphs as follows:

“... The petitioners' concern, as we understand it, is whether the Speaker's ruling is consistent with article 108 of the Constitution which provides for, among other things, the positions of the leader of the majority party and the leader of the minority party.... The respondents have urged that the Speaker's ruling ought not to be questioned in this court and in support of this position they have invoked article 117 of the Constitution and section 12 of the Parliamentary Powers and Privileges Act, 2017...”(see Paragraph 102)

419. It was our finding that this court has jurisdiction to determine the issues in this petition under article 165(3)(d)(ii) which finding we expressed at paragraph 107 of our ruling of January 26, 2025 as follows:

“...The very argument by the respondents and the interested parties supporting the preliminary objections that the Speaker's ruling is beyond question in light of these provisions of the law does, by itself, invite this honourable court to interpret these provisions *vis-à-vis* articles 165(3)(d) of the Constitution on this honourable court's jurisdiction to hear any question respecting the interpretation of the Constitution; article 165(3)(d)(ii) on whether any anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; and, article 3(1) on the obligation on every person, including the Speaker of the National Assembly, to respect, uphold and defend the Constitution, among other provisions of the Constitution. The court



is also invited to interpret the consistency with these provisions of the Constitution or lack thereof of section 12 of Parliamentary Powers and Privileges Act, 2017...”

420. With due respect to counsel who have submitted on this issue in support of or in opposition to the petition, we need not belabour this question of jurisdiction since we addressed it with finality in our ruling on the preliminary objections.
421. The second issue that necessarily shapes the course our judgment takes is that of constitutional interpretation. There is no doubt that issues raised call for constitutional interpretation hence it is necessary to consider the principles which guide the court in interpreting the Constitution.
422. The starting point is the Constitution itself. Article 259(1) provides the manner in which the Constitution should be interpreted. This article states as follows:

Article 259- Construing this Constitution

- (1) This Constitution shall be interpreted in a manner that-
- a) promotes its purposes, values and principles;
  - b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights
  - c) permits the development of the law; and
  - d) contributes to good governance

423. The Supreme Court in the Matter of the Interim Independent Electoral & Boundaries Commission [2011] KESC 1 (KLR), while acknowledging the significance of article 259(1) of the Constitution held as follows:

“(86) ...The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). the Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

(87) In article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights....Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people,



human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.”

424. The purposive approach of interpretation mainly focuses on ascertaining the intent or the object of the framers in coming up with a particular enactment. The Supreme Court of Canada in the case of R v Big M Drug Mart Ltd 1985 ISCR 295 explained as follows:

“ .... The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. .... [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts...”

425. The Supreme Court of Kenya considered the principle of holistic interpretation in in the Matter of Kenya National Commission on Human Rights (2014) eKLR and observed thus:

“But what is meant by a ‘holistic interpretation of the Constitution? It must mean interpreting the Constitution in the context. It is the contextual analysis of the constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances. Such a scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result...”

426. With this background in mind, we now turn back to the issues that we have singled out as germane to the determination of this petition. The constitutionality of the Speaker’s ruling on October 6, 2022, as noted, is the primary issue about which this honourable court is concerned; it is whether the ruling violated or contravened the Constitution. To be precise, the question with which the court is confronted is whether the ruling is consistent with article 108 of the Constitution on the majority and minority party in the National Assembly and their respective leaders. This article reads as follows:

108. Party leaders

(1) There shall be a leader of the majority party and a leader of the minority party.



- (2) The leader of the majority party shall be the person who is the leader in the National Assembly of the largest party or coalition of parties.
- (3) The leader of the minority party shall be the person who is the leader in the National Assembly of the second largest party or coalition of parties.
- (4) The following order of precedence shall be observed in the National Assembly—
  - (a) the Speaker of the National Assembly;
  - (b) the leader of the majority party; and
  - (c) the leader of the minority party.

427. Our task is to interpret and apply this provision of the Constitution and, in the process, determine whether or not the speaker's ruling is consistent with the same provision. In doing so we must discount, at the outset, the notion that we are somehow sitting on an appeal against the Speaker's ruling or that we are exercising supervisory jurisdiction over the National Assembly.

428. If we have to say more on this issue, we are mindful that article 117 of the Constitution provides for, among other things, the freedom of speech and debate in Parliament and also privileges and immunities of Parliament. The article reads as follows:

- 1) There shall be freedom of speech and debate in Parliament
- 2) Parliament may, for the purpose of orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the chairpersons of committees and members.

429. Pursuant to article 117 of the Constitution, Parliament enacted the Parliamentary Powers and Privileges Act cap 6. The preamble to the Act provides as follows:

“An Act of Parliament to give effect to article 117 of the Constitution; to provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members; to make provision regulating admittance to and conduct within the precincts of Parliament; and for connected purposes.”

430. The Act at sections 11 and 12 makes provision for immunity of proceedings of Parliament by providing thus:

11. Proceedings not to be questioned in courts  
No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.
12. Immunity from legal proceedings
  - (1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.



- (2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.
- (3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.

431. It is the above provisions that the Speaker of the National Assembly contend that they shield his ruling from the reach of this honourable court.

432. This court takes cognizance of the fact that under the principle of separation of powers, courts are required to accord due deference to other constitutional bodies or organs by allowing them to execute their constitutional mandates. However, this is only possible if such organs do not violate the Constitution. Under article 2(1), the Constitution declares that it is the supreme law of the Republic and binds all persons and all state organs at both levels of government and further, article 2(2) provides that no person may claim or exercise state authority except as authorized under the Constitution.

433. The Constitutional Court of South Africa, while addressing the principle of separation of powers in Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11 stated as follows:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’.. ..”

But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values.”

434. In Kenya, it is the Constitution that is supreme as was affirmed in Speaker of National Assembly v Attorney General & 3 others (2013) eKLR where the Supreme Court held thus:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long



as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the court to make a determination by way of an Advisory Opinion, it would be remiss of the court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the *Supreme Court Act*... Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of solution in plebiscite, is only the courts.”

435. Further, in yet another South African decision of *Hugh Glenister v President of the Republic of South Africa & others* Case CCT 41/08; [2008] ZACC 19 the court affirmed:

“In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.”

436. Similarly, in the South African Court case of *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa & others* (CCT 31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) Chaskalson CJ held:

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary...”

437. Consequently, the ruling of the Speaker in our view would only be immune and beyond the question by the court only if it can be demonstrated that it was made in conformity with the Constitution, otherwise, the court has a constitutional duty to intervene if, in making the decision, the Speaker violated the Constitution. The immunity granted by the *Parliamentary Powers and Privileges Act* cannot shield an unconstitutional decision.

438. That said, it is not in dispute that during the August 9, 2022 general elections, there were two major coalitions of political parties that contested for various elective positions both at the national and county levels of Government. These coalitions were, as noted, the Azimio coalition and the Kenya Kwanza coalition.

439. As far as the contests for the elective positions in National Assembly and nominations for membership in that Assembly is concerned, article 108 of the Constitution states what we think is the obvious and logical position that that the party or a coalition of parties with the largest number of members assumes the majority party status while the party or a coalition of parties with second largest number of members becomes the minority party.

440. Once the IEBC has declared and gazetted the results for membership in the National Assembly, it should be obvious from those results which party or coalition of parties has the largest number of members of National Assembly and, consequently, the Majority party. Similarly, it would also be



obvious from those results the second largest party in the House and which, for that reason, would assume the Minority party role.

441. Except for those candidates participating in the elections as independent candidates, candidacy for the elective positions and nomination for membership in the National Assembly are based on party membership and, therefore, the question of the party ticket on which any particular member was elected or nominated to the House need not arise in determining the Majority or Minority Party. Likewise, section 10 of the *Political Parties Act* provides for registration of coalitions prior to elections although they may also be registered after elections. This section reads as follows:

10. Coalitions

(1) Two or more political parties may form a coalition or a coalition political party before or after an election and shall deposit the coalition agreement with the Registrar.

(2) A coalition agreement entered into before an election shall be deposited with the Registrar at least three months before that election.

Provided that in the case of a coalition political party, the coalition political party shall submit the coalition agreement at least one hundred and twenty days before a general election.

(3) A coalition agreement entered into after an election shall be deposited with the Registrar within twenty-one days of the signing of the coalition agreement.

(4) A coalition agreement shall set out the matters specified in the Third Schedule.

442. The petitioners' case is that Azimio coalition and the Kenya Kwanza coalition agreements were entered into and deposited with the Registrar of Political Parties prior to the General Elections of August 9, 2022 and, therefore, under section 10(2) of the *Political Parties Act*, they must have been deposited with the Registrar of Political Parties, at least, three months to the General Elections. That being the case, upon the declaration by the Independent Electoral and Boundaries Commission of the 9 August 2022 General Election results, it ought to have been obvious which of the two coalitions was the majority party in the National Assembly.

443. Indeed, *vide* a gazette notice no 9950 dated August 22, 2022, the chairman of the IEBC declared persons elected as members of the National Assembly. In the gazette notices, such details as the names of the persons elected and, most importantly for our purposes, the political parties on which they ran and elected were given. Copies of these gazette notices have been exhibited to the affidavit of Chrispine O Owiye who as noted, is an employee of the IEBC.

444. Based on this information published by the IEBC and the coalition agreements signed and deposited with the Registrar of Political Parties, it ought to have been possible to tell, offhand, which of these two coalitions was the majority party and whether the other coalition was the minority party. If the coalition agreements were clear, as they ought to be, on the political parties that comprised their respective coalitions; and, if the number of seats in the National Assembly garnered by each of these parties was also clear from the gazette notices published by the IEBC, the question of which of the two coalitions, or any other coalition or party, for that matter, is the majority party, ought not to be in doubt.

445. It is for this reason that article 108 of the *Constitution* is couched in such terms that the question of a majority party or minority party is predetermined upon the declaration of the results by the IEBC; the declaration is the conclusive proof of the majority party and the minority party. It is against this background that we now consider the Honourable Speaker's ruling.



446. As to what the ruling was all about is not a question that is in dispute; however, for the benefit of an objective reader, it is necessary that we set out the ruling, at least in its material respects. More importantly, it may not be plausible to come to the conclusion that the ruling is either in tandem with or subverts article 108 of the *Constitution* without first laying it bare and without analysing it, at least to such an extent as is necessary to determine the fundamental question of whether it is constitutional or not. In other words, there has to be a basis for the determination that the ruling is consistent or inconsistent with the *Constitution*; that basis can only be laid after the analysis of the ruling.
447. The background of the Honourable Speaker’s ruling can be found in its first few paragraphs. The speaker introduced the ruling as follows:

“Hon Members, you will recall that during the afternoon sitting of Tuesday, October 4, 2022, I informed the House that a question had arisen on the matter of constituting the House Business Committee, especially with regard to the membership reserved for the leaders and whips of the majority party and the minority party, respectively. In guiding the House on the business to be transacted before the establishment of the House Business Committee and the manner in which the business would be moved, I indicated that a question had arisen as to who the bona fide leader of the majority party in the House is. I proceeded to allow the House to address me on this matter and gave priority to the designated party leaders and whips of the Kenya Kwanza Coalition and the Azimio La Umoja-One Kenya Coalition Political Party.

In the debate that ensued, Hon Kimani Ichung’wah tabled various coalition agreements entered into by the constituent parties of Kenya Kwanza Coalition and deposited with the Registrar of Political Parties. Hon Silvanus Osoro also table letters relating to the matter, an excerpt of the minutes of the parliamentary group meeting and a list of attendees of the meeting during which party leaders were elected.

Similarly, Hon Opiyo Wandayi tabled a copy of a letter dated September 7, 2022 from the Registrar of Political Parties (PPP) addressed to the clerk of the National Assembly, conveying what the Registrar termed as constituent parties of the Azimio la Umoja-One Kenya Coalition Party, the Kenya Kwanza Alliance (KKA), the name of one party not affiliated to any coalition and an indication of parties that had filed constitutional petitions and objections to their membership of the Azimio Coalition.”

448. The Speaker further noted that in order to establish the fact and the status of the coalition agreements, the clerk of the National Assembly wrote to the Registrar of Political Parties seeking particular information. On this particular issue the speaker wrote as follows:

“With regard to the coalition agreements affecting the affairs of the 13th Parliament, the Clerk wrote to the Office of the Registrar of Political Parties on September 2, 2022. In her letter titled, “Requests for Information and Copies of Coalition Agreements Pursuant to the National Assembly Standing Order 2B”, she provided the Registrar with a list of parties with representation in the House at the time. The Clerk sought the following from the Registrar:

- (i) Guidance on which particular political parties (from the list above) are in Coalition arrangements. Please include the date of the registration of the coalition(s);
- (ii) Information on changes made to any of the coalition agreements or partnerships that are in place and the dates of the changes, if any; and,



- (iii) Certified copies of the coalition arrangements entered into by any of the parties listed herein.

Hon Members, in response, the Registrar noted that as at April 21, 2022, Azimio La Umoja-One Kenya Coalition Party comprised 26 political parties namely: Jubilee Party (JP), Orange Democratic Movement (ODM), Wiper Democratic Movement of Kenya (WDM-K), Kenya African National Union (KANU), National Rainbow Coalition (NARC), National Rainbow Coalition-Kenya (NARC-Kenya), Muungano Party (MP), Maendeleo Chap Chap Party (MCCP), Democratic Action Party Kenya (DAP-K), Devolution Empowerment Party (DEP), United Party of Independent Alliance (UPIA); United Democratic Movement (UDM), United Progressive Alliance (UPA), Pamoja African Alliance (PAA), Kenya Union Party (KUP), United Democratic Party (UDP), Movement for Democracy and Growth (MDG), Kenya Reform Party (KRP), Chama Cha Uzalendo (CCU), National Liberal Party (NLP), People's Trust Party (PTP), Ubuntu Peoples' Forum (UPF), Party of National Unity (PNU), Labour Party of Kenya (LPK) and the Party for Growth and Prosperity (PGP).

In the same letter, according to the Registrar, the Kenya Kwanza Alliance comprises 15 political parties which include: United Democratic Alliance (UDA), Amani National Congress (ANC), Forum for Restoration of Democracy in Kenya (FORD-K), Chama Cha Kazi (CCK), Communist Party of Kenya (CPK), The Service Party (TSP), Tujibebe Wakenya Party, Farmers Party, Devolution Party of Kenya, Economic Freedom Party and the Umoja na Maendeleo Party. These are the members of the Coalition as at June 3, 2022.

Hon. Members, the letter further notes that the Democratic Party, the National Agenda Party of Kenya, the Grand Dream Development Party and Chama Cha Mashinani effectively became members of the Coalition on September 5, 2022. The Registrar of Political Parties also observed that the National Ordinary People Empowerment Union (NOPEU) is not a member of any of the coalitions. In the letter, the Registrar of Political Parties also conveys that the Maendeleo Chap Chap Party (MCCM), the Pamoja African Alliance (PAA), the United Democratic Movement (UDM) and the Movement for Democracy and Growth (MDG) have filed constitutional petitions and/or objections with regard to their membership of the Azimio Coalition.

449. In his ruling, the Hon Speaker appeared to harbour some reservations on the information provided by Registrar of Political Parties. He noted, thus:

“It is notable that despite written requests by the Clerk of the National Assembly, the Registrar of Political Parties did not convey certified copies of any pre-election or post-election coalition agreements entered into by the parties with representation in this House in the response to the letter dated September 7, 2022.

May I at this juncture report to the House that surprisingly the Registrar of Political Parties today morning, at 8.30 am submitted to me, through the Office of the Clerk, documents said to be certified copies of the coalition agreements for the Kenya Kwanza Alliance Coalition and the Azimio la Umoja-One Kenya Coalition Party. Curiously, whereas the Registrar's letter to the Clerk of the National Assembly is dated October 3, 2022, the accompanying agreements bear a certification of the following day, which is October 4, 2022. The letter and the documents were delivered to the Office of the Clerk today, October 6, 2022. That is more than six weeks after the request by the Clerk. Seemingly, this may be read by any



reasonable person to be a reaction to the proceedings of the House on Tuesday, October 4, 2022.”

And in what appears to have been a justification for dismissal or ignoring of the Registrar’s communication, the speaker noted as follows:

“Nevertheless, I have had occasion to peruse the documents accompanying the letter as against the documents tabled in the House on Tuesday this week. Despite attempting to advise the House on the status of the coalition agreements affecting the composition of the House as at October 10, 2022, the Registrar has again failed to mention the existence of any post-election coalition agreements. This is a glaring omission when viewed against the post-election coalition agreements tabled by the Member for Kikuyu Constituency during the proceedings. The post-election coalition agreements are critical to the Speaker for purposes of guaranteeing constitutional rights and political freedoms of Members of this House elected under UDM, PAA, MCCP and MDG.”

450. It is apparent that the speaker was of the conviction that the Registrar of the Political Parties suppressed the information that there were post-election coalition agreements involving UDM, PAA, MCCP and MDG political parties which, hitherto, were members of the Azimio Coalition. For the avoidance of doubt that the speaker was of the firm view that there were post-election coalition agreements that were pivotal to his ruling, he held as follows:

“This now brings me to the submissions made by Hon Opiyo Wandayi on the significance to be attached to the response of the Registrar of Political Parties, which he also tabled in the House on Tuesday this week and any subsequent communication from the Registrar. It will be recalled that the distinguished Member for Ugunja submitted that the Speaker has no other role apart from conveying information contained in the letter by the Registrar to the House. You will agree with me that this view is untenable for two main reasons.

Firstly, section 10 of the *Political Parties Act* 2011 is clear that coalitions are not cast in stone. They are evolving arrangements that can occur both prior to and after an election. The Registrar has shied away from making a determination on the post-election status of the existing coalitions in light of the submissions made by part of the membership of this House and letters written to me by a number of Members relating to post-election coalitions.

451. The speaker then dismissed the Registrar of Political Parties’ information and held as follows:

“Hon Members, may I at this point bring to the attention of the House that several Members said to belong to the Azimio la Umoja - One Kenya Coalition Party have formally written to my office to denounce their association with the party. In a letter dated September 9, 2022 and received by my office on September 22, 2022, the Member for Ugenya Constituency, Hon. David Ochieng wrote to convey the decision of his party, the MDG to terminate its membership with the Azimio la Umoja - One Kenya Coalition Party. In the letter, Hon. Ochieng also notes that his party is now a member of the Kenya Kwanza Coalition.

In letters received by my office on 21<sup>st</sup> and September 22, 2022, Hon. Kenneth Charo, Hon Gonzi Rai and Hon Anthony Kenga, who were all elected to Parliament on the PAA Party ticket formally distanced themselves and their party from any association with the Azimio Coalition. The three categorically noted that their party should only be associated with the Kenya Kwanza Coalition with which it has entered into its only existing coalition agreement.



Additionally, in a letter dated September 16, 2022 and received by my office on September 19, 2022, all the seven Members of Parliament elected to the National Assembly under the United Democratic Movement (UDM), namely Hon Maj (Rtd) Bashir Abdullahi, Hon Hassan Kulow, Hon Haro Abdul Ebrahim, Hon Mangale Chiforomodo, Hon Yusuf Adan Haji, Hon Joseph Lekuton, Hon. Umul Kheir Kassim and Hon Sulekha Harun distanced themselves and their party from any alleged coalition agreement with the Azimio Coalition.

Instead, they note in their letter that they are party to a post-election coalition agreement with the Kenya Kwanza Coalition. It is their contention that their affiliation with the Kenya Kwanza Coalition has seemingly been ignored by the Registrar of Political Parties.”

452. Even then, the speaker admitted, as we have posited earlier in this judgment, that coalition agreements coupled with the gazette notice or gazette notices publishing the election results are sufficient to determine the majority and minority party in the National Assembly. As a matter of fact, the Honourable Speaker held that using this basic and rather common-sense formula, the Azimio Coalition would have 171 members while Kenya Kwanza Alliance would have 165 members in the National Assembly. To quote the Honourable Speaker:

Hon Members, let me now turn to the nexus between the letter from the Registrar of Political Parties and the several gazette notices published by the Independent Electoral and Boundaries Commission (IEBC) with respect to your election or nomination as Members of this House. Based on Gazette Notices No 9950 and 9951 of 2022 both dated August 23, 2022; Gazette Notice No 10535 of 2022 dated 5<sup>th</sup> September 2022; Gazette Notice No 10537 of 2022 dated 7<sup>th</sup> September 2022 and Gazette Notice No 10710 of 2022 dated September 9, 2022 the current composition of the National Assembly by individual political parties is as follows: The UDA), 145; ODM, 86; Jubilee Party, 28; WDM, 26; UDM, 8; ANC, 8; FORD K, 6; KANU, 6; DAP-K, 5; PAA, 3; KUP, 3; UPIA 2; MCCC, 2; TSP, 2; UPA, 1; NAP-K, 1; NOPEU, 1; GDDP, 1; DP, 1; MDG); and CCM, 1.

Hon Members, reference to the letter by the Registrar of Political Parties would give the cumulative number of members of the constituent parties of what the Registrar refers to as the Azimio la Umoja-One Kenya Coalition Party as 171 Members against 165 Members of the constituent parties of what the Registrar refers to as the Kenya Kwanza Alliance.”

453. However, and in total disregard of the foregoing, the Speaker rejected the evidence provided by the Registrar of Political Parties which, based on the gazette notices by the IEBC declaring the results for membership in the National Assembly, the Azimio coalition was the majority party. His reason for the departure from this approach was as follows:

“It is however, notable that a total of 14 Members are drawn from four parties which is UDM, MDG, MCCC and PAA who according to the letter of the Registrar have filed constitutional petitions and objections against their membership in Azimio. This implies that the letter from the Registrar may not be used to compute the membership of the Majority and Minority parties by dint of the admission contained in it on the existing constitutional petitions and objections. Hon Members, it will also be recalled that the Members of UDM, MDG, MCCC and PAA have claimed they signed pre-election and post-election coalition agreements with the Kenya Kwanza Alliance Coalition. Cumulatively, the membership of the four parties in this House is 14 Members. If these Members were to be added to the 165 Members of the initial constituent parties of the Kenya Kwanza Coalition,



it would comprise a total of 179 Members. Consequently, the Azimio Coalition would then comprise a total of 157 Members.”

454. Indeed, the Honourable Speaker proceeded accordingly, and added to the Kenya Kwanza Coalition the 14 members of Parliament drawn from UDM, MDG, MCCC and PAA political parties. Inevitably, the membership of Azimio coalition was reduced by the same margin with the result that the Azimio coalition had less members than Kenya Kwanza Alliance. The Honourable Speaker stated:

“Hon Members, I note that the four parties which I mentioned cumulatively, comprise of 14 Members. The Members elected to this House under the four parties have exercised their freedom of association under article 36 of the Constitution. They have already migrated to the Kenya Kwanza Alliance both in writing and in action. The parties are already enjoying benefits accruing from their membership of the Kenya Kwanza Coalition based on the coalition agreements that they signed and deposited with the Registrar.”

455. The Speaker then concluded his ruling and stated, *inter alia*, as follows:

“Hon members in summary therefore, my considered determination on the matter raised is as follows:

1. That, consideration of the various allegations of coercion and duress at the time of entering into coalition agreements and any appropriate remedy for the same lies outside the authority of this House.
2. That, in my considered opinion, it would be imprudent to treat the 14 Members elected to the House under the UDM, PAA, MCCC and MDG as part of a coalition that they have expressly distanced both themselves and their parties from. I am therefore persuaded that the 14 Members and their parties are part of the Kenya Kwanza Coalition. This, in my view, would be fair and in accordance with previous rulings by my predecessors on related matters.
3. That, with the 14 members, the membership of the Kenya Kwanza Coalition stands at 179 Members while the membership of the Azimio la Umoja-One Kenya Coalition Party stands at 157 Members. This, by implication, indicates that the Kenya Kwanza Coalition is the Majority Party and the Azimio la Umoja-One Kenya Coalition Party is the Minority Party in this House.
4. That, the Kenya Kwanza Coalition is entitled to appoint the Leader of the Majority Party while the Azimio la Umoja-One Kenya Coalition Party is entitled to appoint the Leader of the Minority Party.
5. That, with regard to the Majority Party:
  - a) The Member for Kikuyu Constituency, Hon Kimani Ichung'wa is the Leader of the Majority Party;
  - b) The Member for Kilifi North, Hon Owen Baya is the Deputy Leader of the Majority Party;
  - c) The Member for South Mugirango, Hon Silvanus Osoro is the Majority Party Whip; and



d) The Member for Marsabit County, Hon Naomi Jillo Waqo is the Deputy Majority Whip.

6. That, with regard to the Minority Party:

a) The Member for Ugunja, Hon Opiyo Wandayi is the Leader of the Minority Party;

b) The Member for Kathiani, Hon Robert Mbui is the Deputy Leader of the Minority Party;

c) The Member for Suna East, Hon Junet Mohamed is the Minority Party Whip; and

d) Nominated Member, Hon Sabina Chege is the Deputy Minority Whip.”

456. It is clear from the Speaker’s ruling that when the dispute as to which of the two coalitions-Azimio Coalition and Kenya Kwanza Coalition, was the Majority Party he sought to satisfy himself of, among other things, the membership and the status of these coalitions and, to that end, he wrote to the Registrar of Political Parties, through the office of the Clerk to the National Assembly, seeking for this information.

457. It is also clear from the ruling that the Registrar of Political Parties responded to the Clerk’s letter before the speaker rendered his ruling. According to the Honourable Speaker, the Registrar did not provide all the information that he required but it is clear from his ruling that the Registrar provided information to the effect that:

(i) there existed Azimio la Umoja Coalition Party that comprised 26 political parties which included, UDM, PAA, MCCP and MDG political parties.

(ii) there also existed Kenya Kwanza Alliance coalition consisting of 15 political parties.

(iii) Maendeleo Chap Chap Party Movement (MCCM), Pamoja African Alliance (PAA), United Democratic Movement (UDM) and Movement for Democracy and Growth (MDG) had filed constitutional petitions or objections against their membership in the Azimio la umoja Coalition.

458. It is also apparent from the Speaker’s ruling that on October 6, 2022 at 8.30 am, the Hon Speaker also received from the Registrar of Political Parties “certified copies of the coalition agreements for the Kenya Kwanza Alliance Coalition and the Azimio la Umoja-One Kenya Coalition Party.”

459. Armed with this information, together with the election results declared by the IEBC the Speaker could, and indeed did determine, that Azimio Coalition had the largest number of members followed by the Kenya Kwanza Coalition. But the speaker was not prepared to declare the Azimio Coalition as the majority party for the reasons that:

(i) The registrar failed to mention the existence of any post-election coalition agreements which the Speaker found to be “a glaring omission.” According to him, there were “post-election agreements that had been tabled by the Member for Kikuyu Constituency during the proceedings.” Ostensibly, these post-election coalition agreements had been entered into by UDM, PAA, MCCP and MDG political parties.



- (ii) The Registrar had “shied away from making a determination on the post-election status of the existing coalitions in light of the submissions made by part of the membership of this House and letters written to me by a number of Members relating to post-election coalitions.”
  - (iii) Members of National Assembly elected on UDM, PAA, MCCC and MDG party tickets had written to the Speaker dissociating themselves and their parties from the Azimio Coalition and associating themselves with the Kenya Kwanza Alliance Coalition. As a matter of fact, they had declared that they were in a post-election coalition agreement with the Kenya Kwanza Alliance.
  - (iv) Members of National Assembly elected on UDM, PAA, MCCC and MDG party tickets had exercised their right to freedom of association under article 36 of the *Constitution* and “migrated to the Kenya Kwanza Alliance both in writing and in action”. The speaker held that the parties have “signed and deposited with the Registrar” coalition agreements.
  - (v) The UDM, PAA, MCCC and MDG had raised objections or filed petitions in this Honourable Court contesting their membership in the Azimio Coalition.
460. Now, it is worth noting that the Speaker, having been sued in this petition as the 3<sup>rd</sup> and 4<sup>th</sup> respondents, apparently, in his official and private capacities respectively, swore and filed a replying affidavit dated November 23, 2023 in response to the petition. Nowhere in that affidavit has the Speaker alluded to or provided any evidence of the existence of any post-election coalition agreements involving the UDM, PAA, MCCC and MDG and the Kenya Kwanza Alliance. There is simply no evidence of any post-election coalition signed and deposited with the Registrar of Political Parties as alleged by the Hon Speaker or at all. As a matter of fact, none of the rest of the respondents, including the Hon Ichung’wah who is said to have tabled the post-election coalition agreements in parliament during the debate on the issue of the majority and minority party in the House, has exhibited any such agreement.
461. According to section 9(1) of the *Political Parties Act*, the *Constitution* or rules of every political party shall provide for all the matters specified in the Second Schedule to this Act. One of the matters specified in the 2<sup>nd</sup> schedule is the requirement that the *Constitution* or rules of a political party must provide rules for entering into a coalition (see rule 21 of the 2<sup>nd</sup> Schedule to the Act). It has not been demonstrated, at the very least, that any of the parties alleged to have entered into a post-election coalition agreement with Kenya Kwanza took any step, in compliance with this particular rule, to enter into a coalition agreement with Kenya Kwanza.
462. In the absence of any proof of post-election coalition agreements entered into between the UDM, PAA, MCCC and MDG and the Kenya Kwanza Alliance, the Speaker cannot be heard to fault the Registrar of Political Parties for not producing them. She could not produce what had not been deposited at the Registrar of Political Parties. If it is true the UDM, PAA, MCCC and MDG political parties had signed and deposited the agreements with the Registrar of Political Parties, we are entitled to assume that they must have had, in their possession, copies of these agreements or evidence of their existence and which they were under obligation to exhibit in these proceedings. At the very least, the Speaker or Honourable Ichung’wa ought to have exhibited those agreements which the Speaker singled out as having been presented on the floor of the House during the debate.
463. Without these post-election coalition agreements, the Speaker had no basis to disregard and dismiss the Registrar of Political Parties information on the membership of Azimio coalition and Kenya Kwanza Coalition. For the same reason, the Speaker had neither the legal nor factual basis of declaring UDM, PAA, MCCC and MDG as having migrated from the Azimio Coalition and joined the Kenya Kwanza Alliance.



464. Again, the fact that there were pending disputes either in this honourable court or before the Political Parties Tribunal on the membership of UDM, PAA, MCCC and MDG in the Azimio Coalition, could not have been a reason for the Speaker to rule that the parties were in Kenya Kwanza Coalition rather than in Azimio coalition. Based on the information provided by the Registrar of Political Parties, these parties were members of the Azimio Coalition notwithstanding the disputes that were pending for determination. It was never suggested that the coalition agreement or agreements between the constituent parties were suspended or held in abeyance in the event of a dispute on their membership. Neither was there any suggestion or evidence that either this honourable court or the tribunal before which these disputes were pending for determination had stayed or suspended the coalition agreements pending the resolution of the disputes.
465. It follows that, by assigning to Kenya Kwanza Alliance, the 14 members of National Assembly elected on UDM, PAA, MCCC and MDG party tickets without any justifiable cause or reason and, in the process declaring Kenya Kwanza the Majority Party in the National Assembly, the Speaker acted arbitrarily and violated article 108 of the Constitution.

### **Whether the speaker can hold a political office**

466. The petitioners contended that it is not within the Constitutional design that a National Assembly Speaker can also double up as a leader of a political party at the same time as is the case with the current Speaker who not only is the leader of Ford-Kenya party but is also a member of the Kenya Kwanza Party leader's forum; and, an ex officio member of the coalition parliamentary group of Kenya Kwanza. The Petitioners argue that this state of affairs makes him conflicted, politically inclined and makes him unsuitable to serve impartially as the National Assembly Speaker.
467. The Office of the Speaker is provided for under article 106 of the Constitution. This article provides thus:
- 106 - Speakers and Deputy Speakers
- 1) There shall be-
    - a) Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected members of Parliament but are not such members;
  - 2) a Deputy Speaker for each House of Parliament, who shall be elected by that House in accordance with standing orders from among members of the House
468. Apart from the above constitutional provision requiring that the Speaker shall be a person qualified to be elected as a Member of Parliament but is not as such a member of Parliament, there is no other pre-condition that the Constitution prescribes prior to one assuming the role of the Speaker.
469. Once elected, the Constitution further provides the manner in which the Office of Speaker or Deputy Speaker may become vacant. Article 106(2) provides-
- The Office of Speaker or Deputy Speaker shall become vacant:
- a) When a new Parliament first meets after election
  - b) If the office holder, as a member of the relevant House, vacates office under article 103,
  - c) If the relevant House so resolves by resolution supported by votes of at least two-thirds of members; or



- d) If the office holder resigns from office in a letter addressed to the relevant House
470. Again, the above provision does not state that the Speaker's office can become vacant by the Speaker's belonging to or joining a political party.
471. Nevertheless, the foregoing constitutional provisions cannot be viewed in isolation but must be considered alongside other constitutional provisions that deal with Parliament as the well-established principles on the role of the Speaker in a constitutional democracy. Article 259(1) of the Constitution requires, among other things, that in interpreting the Constitution, the same be interpreted in a manner that permits the development of the law and contributes to good governance.
472. In any well-meaning constitutional democracy, there are three main organs namely; the Executive, the Legislature and the Judiciary which operate under a system of checks and balances working independently within their constitutionally defined spheres but also complementing each other.
432. Parliament (meaning National Assembly and the Senate- per article 93) is vested with legislative power under article 94. That power is specifically protected under article 94 (5) which provides that "No person or body, other than Parliament has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation."
473. The Speaker whose role is to preside over Parliament is also the figure head of this arm of Government and it his duty to ensure that Parliament executes the constitutionally mandated roles autonomously under the doctrine of separation of powers. Separation of powers, though not expressly mentioned by the Constitution is a fundamental feature in the rule of law principle which the Constitution obligates State and Public officers to observe under the national values and principles of governance in article 10(2)(a) of the Constitution.
474. The overarching role of the Speaker in a Constitutional democracy was articulated in the South African case of Thlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another (A 3236/15) [2015] ZAWCHC 140; 2016 (1) SA 534 (WCC); [2016] 1 All SA 235 (WCC); 2016 (2) BCLR 242 (WCC) (7 October 2015) as follows:
- “(78) The Speaker represents the National Assembly in its interactions with the President, other organs of State, judiciary, public, media and international bodies or States. While members of Parliament represent their individual constituencies, the Speaker represents the full authority of the House itself. The Speaker therefore speaks for the House as a whole and must make decisions that are in the best interest of the National Assembly as a whole. By common consent the Speaker's judgment is normally unquestioned and the Speaker is looked upon as the guardian of parliamentary democracy.
- (79) The legal system of South Africa has developed a strong set of traditions concerning the Speaker of Parliament which were retained from the Westminster system of government. According to these traditions the Speaker of Parliament must maintain the neutrality of the office, must act with fairness, without favouritism and with impartiality. The 2004 Guide to National Assembly Procedure states explicitly that the role of the Speaker must be executed in a manner that displays fairness, impartiality, protects the rights of all parties and advances the interests of Parliament.”
475. In yet another South African Court decision, the Supreme Court of Appeal of South Africa in Gauteng Provincial Legislature v Kilian & 29 others 562/98 2000 ZASCA 75; 2001 (2) SA 68 (SCA); 2001



ALL SA 563 it was held that notwithstanding the fact that the Speaker may be removed by legislature or his decision may be overridden by it, the Speaker should not submit to political pressures. Zulman JA observed:

“He is required by the duties of his office to exercise, and display, the impartiality of a Judge.”

476. Many a time, matters concerning the Executive Branch such as those involving oversight, passage of certain laws that the executive or political or interested groups are clamouring for, budgets, approval of appointments, impeachments will ordinarily find their way into Parliament. The Speaker has to be seen to facilitate those deliberations in Parliament neutrally to preserve the integrity of Parliament as an independent institution. Being associated with a political party or coalition affiliations whose stand on such issues is apparent will obviously evoke perceptions of bias. The cardinal requirement of impartiality is that one must only be impartial but must be seen to be free from influences that may be perceived to lean towards, or be reasonably thought to be politically inclined in favour of either side, in this case, a Speaker who is openly aligned to a political party cannot assure and preserve the independence of Parliament.
477. It also our view, it is the Speaker’s foremost task is to protect and propel the independence of Parliament not only in the conduct of debates or motions before the House but also in the broader sense. An arrangement such as the present one where the Speaker is openly a leader of a Political Party which is part of the ruling Political Coalition viewed from the perspective of an objective observer will reasonably and naturally evoke perceptions of bias.
478. It will be remembered that our Constitution at article 99(1)(c) only singles out the Speaker as the *ex-officio* Member of the National Assembly unlike all other members because of his special status. The argument that the position of the Speaker can thus be viewed as those of other members of National Assembly who sit in the Speaker’s panel is thus untenable. The Speaker is the representative face of Parliament as its leader. Through his affiliations or conduct, public confidence in the credibility of Parliament as an Independent Institution can be gained or lost.
479. Separation of powers doctrine is a critical component of the rule of law principle and the Speaker occupies the honoured position as the guardian of parliamentary independence that the framers of the Constitution yearned for. Even though the Speaker may be elected while a member of a political Party, the nature of his duties upon assuming office demands that he severs that relationship upon assuming office so as to remain neutral not only in discharging his duties inside Parliament but also externally to manifest the cohesive face of the democratic independent institution of Parliament. That cannot be the case if the Speaker is encumbered with political party affiliations and interests.
480. In enacting article 106(1) of the Constitution on eligibility of person who can be elected Speaker, the drafters did not require one to be member of a political party or even a Member of Parliament, in fact, one is required to resign his or her political party position and that explains why the current Speaker resigned as the Senator of Bungoma County.
481. Our position slightly varies with that of South Africa. In South Africa, the Speaker must come from among the Members of Parliament. This is a requirement of law as explained by the court in Tlouamma and Others v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another (*supra*) where it was held:

“(80) Section 52(1) read with subsection 4 of the Constitution of the Republic of South Africa<sup>[39]</sup> provides that the National Assembly must elect a Speaker from among its members and that the Speaker may be removed from the office by a



resolution of the House, provided a majority of the members of the National Assembly are present. The Speaker holds office for the duration of the term of an Assembly, and ceases to hold office when he or she ceases to be a member of the Assembly...”

482. The court then proceeded to highlight the underlying weakness created in the provision by stating thus:

“(82) The South African Constitution and Rules of Parliament do not give clear guidelines regarding the most appropriate manner to protect the Speaker’s impartiality and do not require the Speaker to resign from a political party. There are no provisions in the *Constitution* which specifically deal with the role and powers of the Speaker. However, as administrative leader of the National Assembly, The Speaker has an Implicit Duty to uphold the dignity and authority of the assembly, thereby enhancing its ability to fulfill its constitutional mandate to pass legislation in a manner that promotes a participatory and representative democracy, and to hold the executive to account.”

483. Unlike the South Africa, Kenya has section 12 of the *Political Parties Act* which bars public officers from being members of a political parties except those that are specifically mentioned as having been exempted from the application of that provision. The Speaker of the National Assembly is not among those that are exempted from the application of section 12 yet by dint of article 260 of the *Constitution* he is in fact a public officer.

484. Article 260 of the *Constitution* defines a “public officer” to mean:

- (a) any State officer; or
- (b) any person, other than a State Officer, who holds a public office; “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.’

485. Section 12 of the *Political Parties Act* provides:

12. Restrictions on public officers in a political party
  - (1) A public officer shall not—
    - (a) be eligible to be a founding member of a political party;
    - (b) be eligible to hold office in a political party;
    - (c) engage in political activity that may compromise or be seen to compromise the political neutrality of that person’s office; or
    - (d) publicly indicate support for or opposition to any political party or candidate in an election.
  - (2) Subsection (1) shall not apply to the President, Deputy President, a Member of Parliament, Governor, Deputy Governor or a member of a county assembly.
  - (3) Until after the first elections under the *Constitution*, subsection (2) shall apply to the Prime Minister.



486. Guided by the canon of Interpretation '*Expressio Unius Est Exclusio Alterius*' "the expression of one is the exclusion of another," It is our finding that the listing of the category of public officers who can be members of political parties while conspicuously excluding the Speaker is not exempted by section 12 of *Political Parties Act*. It is our humble view that this omission is not by accident but deliberate act of Parliament to protect the office of the Speaker from political affiliations and safeguard its neutral role in execution of its constitutional mandate as a guarantee for Parliamentary Independence.

487. To further augment our finding above, we are emboldened by section 23 and 24 of the *Leadership and Integrity Act* which Act was enacted to give effect to Chapter 6 of the *Constitution*. The two sections provide as follows:

23. Political neutrality

- (1) An appointed State officer, other than a Cabinet Secretary or a member of a county executive committee shall not, in the performance of their duties—
  - (a) act as an agent for, or further the interests of a political party or candidate in an election; or
  - (b) manifest support for or opposition to any political party or candidate in an election.
- (2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.
- (3) Without prejudice to the generality of subsection (2) a public officer shall not—
  - (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
  - (b) publicly indicate support for or opposition against any political party or candidate participating in an election.

24. Impartiality

A State officer shall, at all times, carry out the duties of the office with impartiality and objectivity in accordance with articles 10, 27, 73(2)(b) and 232 of the *Constitution* and shall not practise favouritism, nepotism, tribalism, cronyism, religious bias or engage in corrupt or unethical practices.

488. It is instructive to note that section 23(2) of the *Leadership and Integrity Act* applies to all public officers, and also on appointed state officers subject to any law relating to elections. In our view, the only exemption provided for in law is the category of State or Public officers enumerated in section 12 (2) of the *Political Parties Act* to which the Speaker does not belong.

489. We thus hold and find that the simultaneous holding of the position of Speaker with that of the leader of political Party and the leadership positions in the ruling political coalition as is the case with the current National Assembly Speaker, Hon Moses Wetang'ula who is the leader of Ford Kenya and a holder of key position in Kenya Kwanza Coalition reasonably evokes appearance bias and undermines his neutrality role as the Speaker of the National Assembly and the independence of Parliament as the symbol of democracy negatively impacting on our democratic standards as envisaged by the rule of law principle under article 10(2)(a) of the *Constitution*. This dual role is therefore unlawful and unconstitutional.



490. The other aspect of the Speaker's office which the petitioners urged before us is whether the Honourable Moses Wetang'ula was validly elected to this office. We hold that the Speaker was elected in accordance with article 106(1)(a) and Standing Orders 4 and 6 of the National Assembly's Standing Orders. The fact that he was a party leader at the time of his election could not invalidate his election. However, for reasons we have given, his position as the leader of Ford-Kenya Party, or a leader of any other political office or organ, for that matter, became untenable and inconsequential the moment he assumed the Office of the Speaker of the National Assembly. He could not, and he has no capacity to perform any other functions as a leader of a political party or a political organ as long as he is the Speaker of the National Assembly.

491. Before we conclude, we note that two of the interested parties filed cross-petitions. Under rule 15(3) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, it is only a respondent in a constitutional petition who has the discretion to file a cross-petition. That rule reads as follows:

15.(3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).

492. Going by the express provision of this rule, an interested party does not enjoy that advantage. It is presumed that an interested party has the option of and reserves the right to file his own petition; if the court finds that such a subsequent petition raises common issues as in the pre-existing petition, it may exercise its discretion under rule 17 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* and consolidate the petitions. This rule reads as follows:

17. The court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just.

493. For these reasons, we are not inclined to dwell on the cross-petitions any further except to strike them out for the reason that they are misconceived and an abuse of the due process of this honourable court.

In the ultimate, we allow the petition to the following extent:

- (i) It is hereby declared that the question as to which party or coalition of parties is the majority in the National Assembly in the 13<sup>th</sup> Parliament was determined by the sovereign will of the Kenyan voters during the August 9, 2022 General Elections.
- (ii) It is hereby declared that the Honourable Speaker's ruling or determination contained in his communication from the chair made on October 6, 2022 on the Majority and Minority in the National Assembly violated article 108 of the *Constitution* and, therefore, it is null and void.
- (iii) It is hereby declared that the Honourable Speaker's ruling or determination from the chair on October 6, 2022 with respect to leadership of the National Assembly on account of his determination of the Majority Party and Minority Party in the National Assembly is contrary to and violated article 108 of the *Constitution* and, to that extent, it is null and void.
- (iii) An order of *certiorari* is hereby issued quashing the Honourable Speaker's ruling or determination contained in his communication from the chair made on October 6, 2022 on the Majority and Minority in the National Assembly.
- (iv). Subject to the forgoing orders, the rest of the prayers in the petition are declined.
- (v). Parties will bear their respective costs.

Orders accordingly.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI ON 7 FEBRUARY 2025**



**NGAAH, J.**  
**CHIGITI, J.**  
**MUGAMBI, J.**

