



**Onchoko v Nyamira County Assembly & another; Nyabaro & another (Interested Parties) (Petition E001 of 2025) [2025] KEHC 2262 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2262 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
PETITION E001 OF 2025  
WA OKWANY, J  
FEBRUARY 6, 2025**

**BETWEEN**

**EDWIN ONCHOKO ..... PETITIONER**

**AND**

**NYAMIRA COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**DUKE ONYARI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THADDEUS NYABARO ..... INTERESTED PARTY**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. The Petitioner filed the Petition dated 20<sup>th</sup> January 2025 seeking the following reliefs: -
  - a. A declaration that the Respondents in purporting to elect the 1<sup>st</sup> Interested Party to office of the County Assembly Speaker in the manner pleaded herein acted in contravention of Articles: 1(1); 3; 10; 178(1), 193 (2) (a) and 194 of *the Constitution* of Kenya, 2010; Standing Orders No.4 of the Nyamira County Assembly Standing Orders.
  - b. A declaration that actions by the 1<sup>st</sup> Respondent made on 19<sup>th</sup> December 2024 purporting to elect and, ipso facto, swear in the 1<sup>st</sup> Interested Party to the office of County Assembly Speaker is unconstitutional, unlawful, null and void and thus of no consequence and the same be and is hereby quashed.



- c. A Declaration that the purported election of the 1st Interested Party as Speaker of the 1<sup>st</sup> Respondent is unconstitutional, unlawful, null and void as there was no vacancy in that office.
  - d. An order that Respondents be condemned to pay costs of this petition.
  - e. Such other further, appropriate and consequential orders and reliefs as this Honourable court may lawfully make.
2. Concurrently with the Petition, the Petitioner filed an Application seeking, inter alia, conservatory orders to stay the effect and implementation of the purported election of the 1<sup>st</sup> Interested Party as the Speaker of the 1<sup>st</sup> Respondent.
  3. The Respondents and the 1st Interested Party opposed the Application and Petition through a Notice of Preliminary Objection (PO) dated 22nd January 2025 wherein they listed the following grounds of Opposition: -
    - i. The position of a Speaker of any County Assembly is an elective position provided for under Section 21(1) of the [Elections Act](#).
    - ii. A Speaker of any County Assembly is an ex officio Member of the County Assembly as provided for under Article 177(1)(d) of [the Constitution](#).
    - iii. The proper forum to adjudicate issues relating to election of any Member of a County Assembly is a Resident Magistrate's Court designated by the Chief Justice in accordance with Section 75 (1A) of the [Elections Act](#).
    - iv. An Election Petition challenging the election of a Speaker of the County Assembly ought to have been filed within 28 days from the declaration of the results as provided for under Section 76(1)(a) of the [Elections Act](#).
    - v. The 1<sup>st</sup> Interested Party having been declared Speaker of Nyamira County Assembly on 19<sup>th</sup> December 2024, a Petition challenging his election ought to have been filed on or before 16<sup>th</sup> January 2025. The instant Petition having been filed on 21<sup>st</sup> January 2025, the same was filed on the 33<sup>rd</sup> day, that is, out of mandatory statutory timeframe provided for in Section 76(1) (a) of the [Elections Act](#).
    - vi. The timeframes provided for under the [Elections Act](#) cannot be extended. Election Petitions under the [Elections Act](#) are strictly governed by the [Elections Act](#) and the Election Petition Rules 2017. The [Civil Procedure Act](#) and Rules are inapplicable with regards to Election Petitions under the [Elections Act](#).
    - vii. The Petitioner has not furnished security for costs as required by the mandatory provisions of Section 78(2) of the [Elections Act](#).
  4. The PO was canvassed by way of written submissions. This ruling is therefore in respect to the PO dated 22<sup>nd</sup> January 2025.

### **The Respondents' and 1<sup>st</sup> Interested Party's Submissions**

5. Mr. Mokuu, learned counsel for the Respondents and 1<sup>st</sup> Interested Party submitted that this court lacks the jurisdiction to hear and determine the Petition as it is an Election Petition that has been disguised/camouflaged as a Constitutional and Human Rights Petition.



6. It was submitted that the Petitioner had not singled out any Constitutional provision that grants this Court the jurisdiction to hear and determine this matter and that instead, the Petitioner had cited Article 162(2) of *the Constitution* as a basis of this Court’s jurisdiction yet the said Article provides for the establishment of courts with the status of the High Court. According to the Respondents, based on the invocation, by the Petitioner, of Article 162(2) of *the Constitution* as the basis of this Court’s jurisdiction, this court should strike out the Petition in limine.
7. It was further submitted that going by the reliefs sought in the petition, which challenges to the nomination and election of the 1<sup>st</sup> Interested Party as the Speaker of the Nyamira County Assembly, the election to the office of the Speaker of any County Assembly can only be challenged by way of an Election Petition. Reference was made to Section 21(1) of the *Elections Act*. The said provision provides :
  21. Election of county assembly speaker
    - (1) The speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.
8. It was submitted that the Speaker of the County Assembly is an ex officio Member of the County Assembly as provided for under Article 177(1)(d) of *the Constitution* and therefore a Member of the County Assembly (MCA) the same way the Speaker of the National Assembly or the Senate are Members of Parliament (MPs). It was therefore submitted that the proper forum to adjudicate issues relating to election of any Member of a County Assembly (its Speaker included) is a Resident Magistrate’s Court designated by the Chief Justice in accordance with Section 75 (1A) of the *Elections Act*.
9. It was submitted that the instant Petition was filed outside the set mandatory timelines having been filed on 21<sup>st</sup> January 2025. For this argument, reference was made to Section 76(1)(a) of the *Elections Act* which provides for the presentation of a petition challenging the validity of an election within 28 days after the date of declaration of the results of the election. It was the Respondents’ case that the timeframes provided for under the *Elections Act* are not negotiable and cannot be extended. Reference was made to the decision in Ferdinand Waititu vs. Independent Electoral and Boundaries Commission & 8 Others Civil Appeal No. 137 of 2013 where it was held that the timelines set by *the Constitution* and the *Elections Act* are neither negotiable nor extendable by any Court.
10. It was submitted that Election Petitions under the *Elections Act* are sui generis and are strictly governed by the *Elections Act* and the Election Petition Rules 2017. Counsel reiterated that this matter should have been filed at the Magistrate’s Court and not the High Court.
11. It was submitted that the Petition is fatally defective as the Petitioner has not furnished security for costs as required by the mandatory provisions of Section 78(2) of the *Elections Act*. Reference was made to the decision in *Milton Kimani Waitinga vs. IEBC & 2 Others Kiambu HC Election Petition No.2 of 2017* where it was held that: -
  - “ 17. In the circumstances, given the clear stipulation of Section 78(2)(b), Rule 13 and our decisional law, it follows that the notice of motion dated 21/09/2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a petitioner is required to deposit security for costs within ten days of filing their petition. This did not happen here. Indeed more than thirty-seven



(37) days later (at the time of arguing the application), the petitioner had not paid the security deposit. The petitioner had, also, not made any effort to get the leave of the court to deposit security for costs out of time.”

12. The Respondents cited the following authorities for the argument that the election of a County Assembly Speaker should be challenged at the Magistrate’s Courts: -
- a. Kipkemoi Terer vs. John Langat & 3 others [2013] eKLR which was an election petition challenging the election of Bomet County Assembly Speaker that was filed, heard and determined at the Chief Magistrate’s Court in Kericho.
  - b. Justus Nyaribo vs. Clerk to Nyamira County Assembly [2013] eKLR, which was an election petition challenging the election of Nyamira County Assembly Speaker was filed, heard and determined at the Chief Magistrate’s Court in Nyamira.
  - c. Mutabi Thiriku & 4 others (Petition E008 of 2022) [2022] KEHC 13678 (KLR) (12 October 2022) (Ruling), where the High Court struck out a Petition challenging the election of Embu County Assembly Speaker on the basis that the issue of non-resignation of the elected County Assembly Speaker (as is the case herein) was a pre-election dispute which ought to have been handled by IEBC’s Dispute Resolution Committee.
  - d. Frank Mulisa Makola vs. Felix G. Mbiuki & 4 others[2013]eKLR, where an election Petition was filed before the Magistrate’s Court challenging the election of Machakos County Assembly Speaker. The matter was initially gazetted to be heard before the Magistrates’ Court at Mavoko sitting as an election court before it was referred to the High Court which held that the High Court had jurisdiction to interrogate the issues raised in the petition in so far as they allege violation of fundamental rights and freedoms guaranteed under the Bill of Rights.
13. The Respondents further argued that the Petitioner did not allege that any of his fundamental rights and freedoms were denied, violated, infringed or threatened so as to bring this Petition under the ambit of Article 165(3)(b) of *the Constitution*.

### **Petitioner’s Submissions**

14. The Petitioner submitted that the issue of the election of a Speaker of the National Assembly, whose position is equivalent to that of the Speaker of the County Assembly, was resolved by the High Court in Peter O. Ngoge vs. Francis Ole Kaparo & 4 Others [2007] KEHC 1433 (KLR) where it was held that: -

“The invitation to the Court to intervene in the matter of the election of a Speaker which is clearly regulated by the Standing Orders and which is required to be the first item of the agenda of a new session would in itself be a clear breach of *the Constitution* in that it is not the function of this court to interfere with the internal arrangements of Parliament unless they violate *the Constitution*. The doctrine of separation of powers as regards the internal arrangements of parliament demands that we do not interfere with and such internal arrangement. The internal arrangements are those normally regulated by the Standing Orders of the House. There cannot therefore be a valid cause of action based on what would clearly be a violation of *the Constitution* by the court if it was to intervene. The declarations and order sought in this regard would be plainly in contravention of *the Constitution*. Moreover, it would result in the court interfering with the immunity granted to Parliament on such internal matters which have nothing to do with any violation of *the Constitution*. The powers, privileges and immunities of Parliament are provided for by the



National assembly (Powers and *Privileges and Immunities Act* Cap 16 Laws of Kenya). Our view is that the court would only be entitled to intervene to uphold the provisions of *the Constitution*. An application which in substance invites the court to violate a constitutional provision or doctrine of separation of powers is itself an abuse of the court process, and is also incompetent and ought to be dealt with summarily.”

15. It was the Petitioner’s case that Article 165(3) of the 2010 Constitution vests the High Court with jurisdiction to hear any question respecting the interpretation of *the Constitution*.
16. Reference was also made to the case of Frank Mulisa Makola vs. Felix G. Mbiuki, Transition Authority, County Assembly Speaker B.N. Mungata, County Governor Dr. Alfred Mutua & Machakos County Assembly [2013] KEHC 967 (KLR) where the court dealt with a question of the election of a County Assembly Speaker and restated its role in such an election as follows: -

“The petitioner’s rights under Article 38 must be adjudicated in the context of the doctrine of separation of powers and the constitutional and legislative provisions that govern the organisation of the county assembly which I have set out above. In this respect I agree with Mr. Kilukumi that the election of a Speaker is an election sui generis. A plain reading of Article 38 as read with Articles 178 and 196, the County Government Act, the *Elections Act*, 2011 and the Standing Orders do not envisage the election of the Speaker as one based on universal suffrage; it is an internal election for Speaker governed by special rules contained in the First Schedule to the *Elections Act*, 2011 and the Standing Orders which are all underpinned by statutory and constitutional provisions I have cited. The County Assembly, as a legislative assembly, is entitled to regulate its own proceedings including the election of the Speaker”

17. The Petitioner maintained that unlike ordinary elections presided over by the 2<sup>nd</sup> Interested Party (IEBC), the election of a Speaker of County Assembly is purely an internal process governed by special rules, presided over by a Clerk of the Assembly and does not follow the rigorous process of universal suffrage.
18. The Petitioner noted that the High Court comprehensively made a distinction between the election of the Speaker of a County Assembly in David Kerario Marwa vs. Boaz Awiti Okoth & Another [2017] eKLR wherein all the issues raised in the instant PO were addressed as follows: -

“According to *the Constitution* the Speaker of any County Assembly is an ex officio member of that Assembly. Since *the Constitution* clearly used the word ‘ex officio’ before the Speaker, that connotes a significant meaning and it is the reason why I will endeavor to ascertain whether the Speaker, as an ex officio member of the Assembly, stands on the same footing as the other Members of the Assembly to regard any challenge into the election of the Speaker as an election petition contemplated under Section 75(1A) of the Act...”

19. The Petitioner also cited the decision in Aluochier vs. Senate & 2 others [2023] KEHC 1045 (KLR) where the Court addressed the question of the election of the Speaker of the senate rendered itself as follows: -

“The election of the Speaker of the Senate is an election sui generis. Article 106 of *the Constitution* provides that the Speaker shall be elected by the Senate in accordance with the Standing Orders article 124 empowers the Senate to make Standing Orders for the orderly conduct of its proceedings. The procedure for the election is set out in Standing Orders 4-12 of the Senate Standing Orders. Of relevance to the proceedings herein is Standing Order 5



which makes elaborate provisions regarding nomination of candidates from collection and return of the nomination papers, close of nominations, availing to the Senators of the names of duly nominated candidates, to preparation of the ballot papers. *The Constitution* and Standing Orders do not envisage an election based on universal suffrage. It is an election where the electoral college comprises county representatives who exercise their will, to choose their speaker. The election of Speaker is an example of the proceedings of the Senate that are governed by the Standing Orders made under article 124. The election of the Speaker is thus a function of the Senate and an internal affair of the Senate.”

20. The Petitioner urged the court to find that it is duly vested with the Jurisdiction to entertain the instant Petition under Article 165(3)(d) of *the Constitution*. The Petitioner emphasized that questions of timelines for filing the Petition and the deposit of security are not applicable in this case since the election of a Speaker is sui generis and not the same as an election conducted by universal suffrage.
21. On the claim that the Petitioner has not indicated the rights that have been violated, it was submitted that Articles 22 and 258 of *the Constitution* allow every person to defend and uphold the supremacy and Application of *the Constitution* which is the dominant question in this Petition.

### **Analysis and Determination**

22. I have carefully considered the grounds listed in the Preliminary Objection, the law and the parties’ written submissions. I find that the main issue for determination is whether the notice of preliminary objection is merited. The gist of the PO is the challenge, on the court’s jurisdiction, to hear and determine the Petition.
23. Jurisdiction of a court is the authority granted to the court of law to consider matters placed before it for adjudication. Jurisdiction may be general or specific, limited or unlimited. Jurisdiction of a court may be conferred by *the constitution*, statute or both. In all instances, the court as a creature of *the constitution* and the law, must only exercise the jurisdiction conferred on it.
24. In the oft cited case of Owners of the Motor Vessel “Lillian S” Caltex Oil (Kenya) Ltd [1989] eKLR it was held that: -

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. In Samuel Kamau Macharia & Another vs. Kenya Commercial Bank and 2 others – Supreme Court of Kenya Civil Application No. 2 of 2011 (unreported) it was held thus:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can, parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon parliament to set the jurisdiction of the court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law.”



26. What constitutes a preliminary objection was discussed in *Mukisa Biscuits Manufacturing Ltd vs. West End Distributors* (1969) EA 696 where it was held that: -
- “---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.
27. In the same *Mukisa Biscuits Manufacturing* case (*supra*) Sir Charles Newbold, P. stated:
- “ a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
28. Taking a cue from the above decision, I find that that an objection to the court’s jurisdiction is listed as one of the issues that may be raised in a preliminary objection as it is a pure point of law.
29. A perusal of the Petition reveals that the Petitioner’s complaint revolves around the violation of several Articles of *the Constitution*, namely; Article 178 (1) which provides that each County Assembly shall have a Speaker who is elected from among persons who are not members of the County Assembly; Article 193 (2) (a) which provides that a person is disqualified from being elected a Speaker if the person is a state officer or other public officer, other than a member of the County Assembly; Article 194 which provides for the procedure under which the 1st Interested Party should have vacated the seat of an MCA before seeking to contest for the position of the Speaker.
30. The Petitioner contended that he filed the Petition in the public interest as provided under *the Constitution* following the Respondents’ illegal actions that amounted to the violation of the rights of the residents of Nyamira County. The Petitioner also accused the Respondents of gross violation of the constitutional principles on the rule of law as articulated under Articles 1(1), 3, 10, 22, 23, 27, 28, 47, 178(3) and 258.
31. As I have already stated in this ruling, the Respondents and the 1st Interested Party argued that the right forum for the Petitioner to present his case should have been before the magistrates court. According to the Respondents and the 1st Interested Party, the matter before this court is an election petition that ought to be heard before the Magistrates Court.
32. On his part, the Petitioner argued that this is purely a constitutional petition as it alleges violations of constitutional principles.
33. Article 22(1) of *the Constitution* states that “Every person has a right to institute Court proceedings claiming that a right or fundamental freedom in the Bill has been denied, violated or infringed or is threatened.”
34. Article 23(3) of *the Constitution* provides that “in any proceedings brought under Article 22; a Court may grant appropriate relief; including (c) a conservatory Order.”
35. Article 258 (1) of *the Constitution* grants every person the right to institute court proceedings, claiming that *the Constitution* has been contravened, or is threatened with contravention.



36. This court is established under Article 165(1) of *the constitution* with jurisdiction donated by Article 165(3) which provides that: -

- “(3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
    - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - (iv) a question relating to conflict of laws under Article 191; and
  - (e) any other jurisdiction, original or appellate, conferred on it by legislation.”[Emphasis added]

37. Guided by the above cited Articles of *the Constitution*, and specifically Article 165 (3) (d) (ii), I find that this court has the jurisdiction to hear and determine the Petition since the dominant issue raised in the Petition is the claim that the Respondents’ actions were inconsistent with or in violation/contravention of *the Constitution*. To my mind, as opposed to an election Petition challenging the conduct of an election and the outcome thereof, the present case is a constitutional Petition alleging violation of various Articles of *the Constitution* and Nyamira County Assembly Standing Orders.

38. My above finding on the jurisdiction of this court would have been sufficient to determine this PO, but I am still minded to consider the other issues raised by the Respondents and the 1<sup>st</sup> Interested Party, namely; the applicability of Article 162 of *the Constitution* that was cited by the Petitioner and whether the election of the County Assembly Speaker can be equated to the elections conducted, by universal suffrage, during the general elections or by-elections.

39. Regarding the provisions of Article 162 of *the Constitution*, the Respondents argued that not only did the Petitioner not specify the Article of *the Constitution* under which the Petition was filed, but



that based on the Petitioner's invocation of the said Article as the basis of this Court's jurisdiction, this court should strike out the Petition in limine as Article 162 deals with the establishment of courts of equal status to the High Court. My finding is that the mere fact that the Petitioner cited Article 162 of *the Constitution* in his pleadings does not in itself confer jurisdiction on the said courts. In any event, by virtue of the fact that the Petitioner filed the instant Petition before this court means that he was cognizant of the fact that this is the proper forum to present his grievances. When faced with a similar scenario where the Petitioner did not state the provision in *the Constitution* under which his petition is brought, Odunga J. (as he then was) held as follows in Peter Muinde & Another vs. Insurance Regulatory Authority & 2 Others Machakos HC Petition No. 20 of 2018: -

“It must similarly be remembered that the High Court is by virtue of the provisions of Article 165 of *the Constitution* a constitutional court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. In my respectful view, even where a party has not expressly stated the provision in *the Constitution* under which his petition is brought, as long as the court can deduce the provisions of *the Constitution* threatened with violation or violated, the court ought not to dismiss the petition merely because the provisions are not cited in the Petition.”

40. I will now turn and consider the issue of whether the election of the Speaker of the County Assembly can be equated to the election of a Member of the County Assembly in terms of the manner of challenging such an election. I note that this is a matter that was settled in the David Kerario Marwa Case [Supra] where the court considered the provisions of Article 251(1) of *the Constitution* on the subject of an ex officio member of a commission not being the same as a member of a commission and held that: -

“It is worth pointing out that the Supreme Court considered *the Constitution* and the law and it was satisfied that the supreme law of the land provides for only two types of elections which can only be challenged by way of election petitions under the Act. The Court remained alive to the provisions of Articles 97, 98 and 177 of *the Constitution* which provides for the Speakers of the National Assembly, the Senate and the County Assemblies as ex-officio Members of those Houses and to the respective Standing Orders of the Houses which provided for the elections of Speakers into office but clearly found the election of such Speakers not to fall within the two categories of elections recognized under *the Constitution* and the law. It therefore means that challenging the election of a Speaker is not the same as challenging an election resulting from a General election, a by-election or through nomination by way of a party list.” [Emphasis added]

41. Guided by the holding in the above cited case, I find that since the Speaker is an ex officio member of the County Assembly, a petition challenging his election cannot be treated in the same manner as a Petition challenging the election of an MCA. This court also draws wisdom from the decision in Frank Mulisa case (supra) where in a Petition challenging the election of Machakos County Assembly Speaker, the High Court held that it had jurisdiction to interrogate the issues raised in the petition in so far as they allege violation of fundamental rights and freedoms guaranteed under the Bill of Rights. In similar fashion, I find that this court has the jurisdiction to interrogate the alleged of violations of *the Constitution* made in the Petition.
42. For the reasons that I have stated in this ruling, I find that the PO is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main Petition.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 6<sup>TH</sup> DAY OF FEBRUARY 2025.**

**W. A. OKWANY**

**JUDGE**

