



**Legal Advice Centre t/a Kituo Cha Sheria v Independent Electoral and Boundaries Commissions & 4 others; United Democratic Alliance & 5 others (Interested Parties) (Constitutional Petition E009 of 2022) [2025] KEHC 7980 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7980 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CONSTITUTIONAL PETITION E009 OF 2022  
HI ONG'UDI, PN GICHOHI & HM NYAGA, JJ**

**JUNE 9, 2025**

**IN THE MATTER OF: ARTICLES, 1,2,3,10,19,20,21 ,22,23,26,27,29 ,81,232,258  
AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 10, 26(1),  
27(1), 29(C),81(E), 232(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLE 22 OF THE AFRICAN CHARTER ON HUMAN  
AND PEOPLES RIGHTS**

**AND**

**IN THE MATTER OF: SECTION 2 OF THE ELECTIONS ACT, 2011**

**AND**

**IN THE MATTER OF: SECTION 2 OF THE ELECTION (GENERAL)  
REGULATIONS, 2012**

**AND**

**IN THE MATTER OF: SECTION 23 OF THE LEADERSHIP AND INTEGRITY  
ACT, 2012**

**BETWEEN**

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA ..... PETITIONER**

**AND**



INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONS ....	1 <sup>ST</sup> RESPONDENT
DIRECTOR FOR PUBLIC PROSECUTIONS .....	2 <sup>ND</sup> RESPONDENT
REGISTRAR OF POLITICAL PARTIES .....	3 <sup>RD</sup> RESPONDENT
ATTORNEY GENERAL .....	4 <sup>TH</sup> RESPONDENT
INSPECTOR GENERAL OF POLICE .....	5 <sup>TH</sup> RESPONDENT
AND	
UNITED DEMOCRATIC ALLIANCE .....	INTERESTED PARTY
ORANGE DEMOCRATIC MOVEMENT .....	INTERESTED PARTY
JUBILEE PARTY .....	INTERESTED PARTY
AMANI NATIONAL CONGRESS .....	INTERESTED PARTY
WIPER DEMOCRATIC MOVEMENT .....	INTERESTED PARTY
KENYA AFRICA NATIONAL UNION .....	INTERESTED PARTY

**Attorney General directed to take steps, within 12 months, to enact a law governing political campaigns conducted outside the election period**

*The petition concerned potential violations of the law, specifically regarding the premature conduct of political campaigns before the officially designated campaign period begun. The court noted that when it came to alleged violations outside the election period, there was no law upon which the 1st respondent could act. The court held that conducting political campaigns outside the election period violated the right of equality and equal protection of the law, the right to life, freedom from violence, the principle of impartiality, the right to development, the principle of rule of law and free and fair elections. The court directed the Attorney General to take the necessary steps, within 12 months, to enact a law governing political campaigns, in any form, conducted outside the election period.*

Reported by Kakai Toili

**Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – economic and social rights, right to equality and equal protection of the law, freedom from violence, right to life, sustainable development, and free and fair electoral processes – whether campaigns conducted outside the election period compromised the following citizens’ rights; economic and social rights, right to equality and equal protection of the law, freedom from violence, right to life, sustainable development, and free and fair electoral processes – Constitution of Kenya, articles 10(2)(d), 26(1), 27(1), 29(c) and 43.

**Jurisdiction** – jurisdiction of the High Court - jurisdiction to determine disputes relating to early election campaigns conducted prior to the official campaign period - whether the High Court had jurisdiction to determine disputes relating to early election campaigns conducted prior to the official campaign period – Constitution of Kenya, article 165(3).

**Electoral Law** – Independent Electoral and Boundaries Commission (IEBC) – powers of the IEBC – powers of the IEBC to determine disputes relating to early election campaigns conducted prior to the official campaign period – whether the IEBC had jurisdiction to determine disputes relating to early election campaigns conducted prior to the official campaign period.

**Constitutional Law** – national security – National Police Service – Inspector General - role of the Inspector General - what was the role of the Inspector General of Police when citizens exercised their right to peacefully assemble – Constitution of Kenya, article 37.



## Brief facts

According to the petitioner, a campaign period was the period specified in the notice issued by the 1<sup>st</sup> respondent, the Independent Electoral and Boundaries Commissions in relation to an election. On January 20, 2022, the 1<sup>st</sup> respondent issued a gazette notice (the notice) specifying that the campaign period for the August 9, 2022, general elections would commence on May 29, 2022, and conclude on August 6, 2022. However, the petitioner stated that numerous candidates and political parties were promoting themselves for the August 9, 2022, general election prior to the official campaign period. The petitioner noted that the early campaigns had been widely documented and it invited the court to take judicial notice.

The petitioner further stated that the respondents had violated; the right to life by condoning early campaigns, which increased the likelihood of violence and *covid-19* infections, potentially leading to loss of life; the right to equality by failing to act against those campaigning early, thereby elevating them above the law; and the right not to be subjected to any form of violence from public or private sources due to the increased likelihood of violence resulting from early campaigns. The petitioner thus sought for among other orders; a declaration that carrying out early campaigns prior to the legally prescribed campaign period was illegal.

## Issues

- i. Whether campaigns conducted outside the election period compromised the following citizens' rights;
  - a. economic and social rights under article 43 of the Constitution;
  - b. right to equality and equal protection of the law under article 27(1) of the Constitution;
  - c. freedom from violence under article 29(c) of the Constitution;
  - d. right to life under article 26(1) of the Constitution;
  - e. sustainable development under article 10(2)(d) of the Constitution; and free and fair electoral processes under article 81 of the Constitution.
- ii. Whether the High Court had jurisdiction to determine disputes relating to early election campaigns conducted prior to the official campaign period.
- iii. Whether the Independent Electoral and Boundaries Commission had jurisdiction to determine disputes relating to early election campaigns conducted prior to the official campaign period.
- iv. What was the role of the Inspector General of Police when citizens exercised their right to peacefully assemble?

## Relevant provisions of the Law

### Constitution of Kenya

#### Article 88 – Independent Electoral and Boundaries Commission

*(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—*

*(a) the continuous registration of citizens as voters;*

*(b) the regular revision of the voters' roll;*

*(c) the delimitation of constituencies and wards;*

*(d) the regulation of the process by which parties nominate candidates for elections;*

*(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*

*(f) the registration of candidates for election;*

*(g) voter education;*

*(h) the facilitation of the observation, monitoring and evaluation of elections;*

*(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*

*(j) the development of a code of conduct for candidates and parties contesting elections; and*



(k) the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.

## **Elections Act (Cap 7)**

### **Section 2 - Interpretation.**

"campaign period" means the period specified as such in the notice issued by the Commission in relation to an election;

"election period" means the period between the publication of a notice by the Commission for a presidential, parliamentary or county election under sections 14, 16, 17 and 19 and the gazetting of the election results;

## **Elections (General) Regulations (Legal Notice 128 of 2012)**

### **Regulation 2 - Interpretation**

"campaign" means the promotion of a candidate or political party for the purposes of an election during the campaign period;

### **Held**

1. The 1<sup>st</sup> respondent was established under article 88 of the Constitution and its functions set out under article 88(4). Further, Part 3 of the Elections Act granted the 1<sup>st</sup> respondent power to initiate electoral process through publication of a notice for all positions in the general elections. That was expounded by rule 12 of the Elections (General) Regulations by setting out the timelines for nomination of candidates by political parties for each contested position in the general elections.
2. Section 2 of the Elections Act defined election period and campaign period. The election period commenced upon publication of the notice by the 1<sup>st</sup> respondent. During nomination, the aspirants carried out some form of campaign in order to secure their nomination by their respective political parties.
3. According to the notice, the process of nomination was within the election period. In that regard, the 1<sup>st</sup> respondent had powers to act on any alleged violations of the law during the election period. However, when it came to alleged violations outside the election period, there was no law upon which the 1<sup>st</sup> respondent could act.
4. There was no law governing campaigns outside the election period and campaign period, therefore the argument around doctrine of non-justiciability did not hold. It was the court's constitutional duty to address any claims of violation of rights which could not be handled by the 1<sup>st</sup> respondent or any other body. In that regard, the court had jurisdiction to hear and determine the petition by virtue of article 165(3) of the Constitution.
5. According to the pleadings and the prayers sought, the petition raised constitutional issues and the same were pleaded with reasonable precision for consideration by the court.
6. Election campaigns, by their very nature, had the potential to impact negatively on the citizens of Kenya. The election period was characterised by heightened political tensions, suspicions, negative profiling, and general slowdown of the economy. As such, the political season should not be a continuous situation. There was need for Kenya to take a break from political campaigns and concentrate on development of the nation and the wellbeing of its citizens. Incessant campaigns conducted outside the election period interfered with or compromise the citizens' rights as guaranteed by the Constitution, which included;
  - a. Economic and social rights under article 43 of the Constitution. The article granted every person the right to healthcare, accessible and adequate housing, freedom from hunger, adequate food of acceptable quality, education, social security, among others. When people concentrated on political campaigns generally, they tended to forget about their duties and responsibilities. Whatever the political class gave out as tokens for attendance could never replace their normal earnings and that created divisions in families. It also created a culture of political dependency.



- b. The right to equality and equal protection of the law under article 27(1) of the Constitution. When candidates campaigned ahead of the official campaign period, they gained an unfair advantage through access to media or public platforms over candidates who abide by the law. Further, selective enforcement by authorities, where some candidates were allowed to campaign early without consequences, resulted in unequal application of the law. Moreover, in the absence of explicit legal prohibitions, that *de facto* inequality disadvantaged law-abiding candidates and distorted the fairness of the electoral process. Therefore, early campaigns, especially when unregulated or unevenly enforced, could amount to a violation of article 27 of the Constitution by denying equal protection, opportunity, and benefit under the law.
  - c. Freedom from violence under article 29(c) of the Constitution. Generally, political campaigns were conducted amidst a culture of impunity, resulting in for instance, clashes between rival supporters, intimidation of opponents or voters and even the use of hate speech or inflammatory rhetoric that may directly or indirectly incite violence. That resulted in violation of the spirit and intent of article 29(c) thus underscoring the need for proper regulation and enforcement to ensure that political processes remained free from any form of violence. Early campaigns tended to exacerbate that situation to the detriment of the citizens.
  - d. Right to life under article 26(1) of the Constitution. Even though the *covid-19* pandemic was no longer a serious threat as it was at the time of filing the petition, the public health protocols must not be ignored. Incessant political campaigns posed a direct threat to life as those gatherings ignored public health protocols, leading to the potential spread of communicable diseases, thus endangering vulnerable populations. Where the State organs permitted, ignored, or inadequately addressed those risks, they violated their constitutional duty under article 26 to prevent foreseeable harm, thereby undermining the right to life. In addition to those rights, there were national values and principles of governance enshrined in the Constitution that were negatively affected by non-stop campaigns conducted outside the election period.
  - e. Sustainable development under article 10 (2)(d) of the Constitution. The principles were anchored on article 22 of the African Charter on Human and Peoples' Rights. When political campaigns were carried outside the election period, they diverted public resources and disrupted service delivery thus, undermining inclusive and equitable development.
  - f. Free and fair electoral processes under article 81 of the Constitution. Article 81 provided for the following principles; freedom of citizens to exercise their political rights under article 38; free and fair elections, which were free from violence, intimidation, improper influence or corruption. When political campaigns were conducted outside the officially regulated period, they gave an unfair advantage to well-resourced or incumbent candidates, thus eroding transparency, fairness and impartiality. Moreover, the absence of regulation increased the risk of violence, intimidation, and public disorder. As such, early campaigns directly conflicted with the constitutional mandate for free, fair, and accountable elections, and strict enforcement of electoral laws.
7. The Office of the Director of Public Prosecutions, being an independent office, the court could not interfere with its functions save in very exceptional circumstances. Judicial review of prosecutorial decisions was limited to cases of patent arbitrariness, illegality, or abuse of power. The claim against the 2<sup>nd</sup> respondent, the Director of Public Prosecutions failed.
  8. The 3<sup>rd</sup> respondent, the Registrar of Political Parties, had no role to play in the regulation of campaigns, whether during or outside the election period. There was no clarity on what the 4<sup>th</sup> respondent, the Attorney General, failed to do in regard to the petitioner's alleged violations. However, as the legal adviser to the Government, the 4<sup>th</sup> respondent, had a duty to take steps on any gaps in the law.
  9. While recognising the right to peacefully assemble under article 37 of the Constitution, the 5<sup>th</sup> respondent, the Inspector General of Police, had the duty to ensure the safety of all those in attendance.



- He also had the discretion to act on any credible information that pointed to a clear, present or imminent danger of breach of peace or public order and may stop any meeting when it ceased being peaceful as required by the Constitution.
10. The incidents of violence cited by the petitioner occurred during the election period but before the campaign period set out in the notice of January 20, 2022. It had not been shown whether the conveners of the meetings had notified the 5<sup>th</sup> respondent as required by the law. In addition, it was not shown that the persons responsible for the violence were reported so as to be arrested and prosecuted. There was nothing to show that the 5<sup>th</sup> respondent failed in his duty to act on the early campaigns.
  11. The Constitution recognised the need for public officers to keep away from political activities. Article 99(2)(a) of the Constitution provided that a person was disqualified from being elected as a Member of Parliament if the person was a State officer or public officer other than a Member of Parliament. Further, article 137(2)(b) of the Constitution provided that a person was not qualified for nomination as a presidential candidate if the person was a public officer or was acting in any State or other public office. There were also adequate statutory safeguards on the issue in regard to public officers. Public officers ought to keep off the realm of politics and if they did not do so, then they faced the consequences spelt out in the law or code of conduct.
  12. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were independent offices established under the Constitution and relevant statutes, with specific mandates, the court could not direct them on execution of their functions. The court's duty was to provide checks and balances where it was shown that any of them had acted in contravention of the Constitution and the rule of law.

*Petition partly allowed.*

#### **Orders**

- i. *A declaration was made that carrying out of political campaigns outside the election period violated the right of equality and equal protection of the law, the right to life, freedom from violence, principle of impartiality, right to development, principle of rule of law and free and fair elections.*
- ii. *An order was issued directing the Attorney General (4<sup>th</sup> respondent) to take the necessary steps, within 12 months, to enact a law governing political campaigns, in any form, conducted outside the election period.*
- iii. *For avoidance of doubt, all other prayers were declined.*
- iv. *Each party to bear its own costs.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Followed)
2. *Chege v Independent Electoral & Boundaries Commission* Constitutional Petition E073 of 2022; [2022] KEHC 239 (KLR) - (Followed)
3. *China Wuyi & Co Limited v Samson K Metto* Civil Appeal 181 of 2008; [2014] KEHC 2624 (KLR) - (Followed)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition S 14, 14A, 14B & 14C of 2014; [2014] KESC 53 (KLR) (Consolidated) - (Followed)
5. *Katiba Institute v Independent Electoral and Boundaries Commission* Petition 19 of 2017; [2017] KEHC 8555 (KLR) - (Followed)
6. *Khalid, Hussein & 16 others v Attorney General & another* Civil Appeal 1 of 2015; [2017] KECA 326 (KLR) - (Followed)
7. *Kiriro Wa Ngugi & 19 others v Attorney General, Cabinet Secretary, Foreign Affairs & Kenya International Boundaries Office* Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Explained)
8. *Mwangi v Director of Public Prosecutions & another; JNM (Interested Party)* Petition E118 of 2023; [2024] KEHC 7282 (KLR) - (Explained)



9. *Mwau, John Harun v Independent Electoral And Boundaries Commission & another* Petition 26 of 2013; [2013] KEHC 6762 (KLR) - (Explained)
10. *National Assembly of Kenya & another v Institute for Social Accountability & 8 others* Civil Appeal 92 & 97 of 2015; [2017] KECA 170 (KLR) (Consolidated) - (Explained)
11. *Ngunjiri, Wambugu v Inspector General of Police & 2 others* Petition 269 of 2016; [2019] KEHC 5361 (KLR) - (Followed)
12. *Odinga v Independent Electoral and Boundaries Commission & 3 others* Petition 5 of 2013; [2013] KESC 2 (KLR) - (Followed)
13. *Omanga, Charles & another v Independent Electoral & Boundaries Commission & another* Petition 2 of 2012; [2012] KEHC 5457 (KLR) - (Followed)
14. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Explained)
15. *Pallangyo, Jeremiah Ole Dasbiiv Attorney General & 4 others* Petition 57 of 2013; [2021] KEHC 9635 (KLR) - (Explained)
16. *Parsimei, Francis Gitau & 2 others v National Alliance Party & 4 others* Constitutional Reference 356 & 359 of 2012; [2012] KEHC 2603 (KLR) - (Explained)
17. *Public Service Commission & 4 others v Cheruiyot & 20 others* Civil Appeal 119 & 139 of 2017 (Consolidated); [2022] KECA 15 (KLR) - (Explained)
18. *Republic v Director of Public Prosecutions & 2 others Public Prosecutions ;Ex-parte Applicants & 4 others* Civil Miscellaneous Application 68 of 2019; [2019] KEHC 336 (KLR) - (Followed)
19. *Ruwa, Randu Nzau & 2 others v Internal Security Minister & another* Miscellaneous Application 468 of 2010; [2012] KEHC 5466 (KLR) - (Followed)
20. *Shimmers Plaza Limited v National Bank of Kenya Limited* Civil Appeal 33 of 2012; [2013] KEHC 363 (KLR) - (Followed)
21. *Tonui, Emiliano Kipkorir v National Alliance Party* Petition 20 of 2014; [2016] KEHC 5163 (KLR) - (Explained)
22. *Wetangula & another v Kombo & 5 others* Petition 12 of 2014; [2015] KESC 12 (KLR) - (Explained)

### **United Kingdom**

*Mahmut Kaya v Turkey* Application No 22535/93 - (Followed)

### **India**

*Charan Lal Sahu & Others vs Singh* [1985] LRC (Const) - (Explained)

### **Regional Court**

*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/2003 - (Followed)

### **Texts**

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

### **Statutes**

#### **Kenya**

1. Civil Procedure Act (cap 21) section 27 - (Interpreted)
2. Constitution of Kenya articles 1, 2, 3(1);10; 19; 20(1); 21(1); 23(3); 24; 25; 26(1); 27(1); 29(c); 81; 88; 99(2)(a); 156; 137(2)(b); 157; 232(1); 245; rule 9-10 - (Interpreted)
3. Election (General) Regulations, 2012 (cap 7 Sub Leg) regulation 2 - (Interpreted)
4. Election Offences Act (cap 66) section 21 - (Interpreted)
5. Elections Act (cap 7) sections 2, 43(5); 76 - (Interpreted)
6. Ethics And Anti-Corruption Commission Act (cap 7H) In general - (Cited)
7. Evidence Act (cap 80) sections 13, 59, 60, 107, 109 - (Interpreted)
8. Political Parties Act (cap 7D) sections 12(1)(c,d); 33; 34 - (Interpreted)



9. Political Parties Act (cap 7D) sections 12(1)(c,d); 34 - (Interpreted)
10. Public Order Act (cap 56) section 5 - (Interpreted)
11. Independent Electoral And Boundaries Commission Act (cap 7C) section 4 - (Interpreted)
12. Leadership and Integrity Act (cap 185C) section 23 - (Interpreted)
13. Office of the Attorney-General Act (cap 6A) In general - (Cited)
14. Office of The Director of Public Prosecutions Act (cap 6B) In general - (Cited)

#### **Instruments**

1. African Charter on Peoples' and Human Rights (ACPHR) (Banjul Charter) article 22
2. United Nations Declaration on the Right to Development, 1986

#### **Advocates**

*DR Khaminwa* for petitioner

*Ms. Nakore holding brief for Mr. Mwariri* for petitioner

*Mr. Ojong'a* for 1st respondent

## **JUDGMENT**

### **Introduction.**

1. The petitioner is the Legal Advice Centre T/A Kituo Cha Sheria, a Non-Governmental organization focused on protecting and promoting the rights of vulnerable and marginalized individuals and communities in Kenya since 1973.
2. The 1<sup>st</sup> respondent is the Independent Electoral and Boundaries Commission (IEBC) established under article 88 of the [Constitution](#).
3. The 2<sup>nd</sup> respondent is the Director of Public Prosecutions (DPP) designated under article 157 of the [Constitution](#).
4. The 3<sup>rd</sup> respondent is the Registrar of Political Parties established under section 33 of the [Office of the Registrar of Political Parties Act](#), 2011.
5. The 4<sup>th</sup> respondent is the Honourable Attorney General of Kenya established under article 156 of the [Constitution](#).
6. The 5<sup>th</sup> respondent is the Inspector General of Police and the Commander of National Police Service established under article 245 of the [Constitution](#).
7. The 1<sup>st</sup> to 6<sup>th</sup> interested parties are political parties registered in Kenya.

### **The Petition**

8. By the petition dated 8 April, 2022, the petitioner sought the following reliefs:-
  - a. A declaration that carrying out early campaigns prior to the legally prescribed campaign period is illegal.
  - b. A declaration that carrying out early campaigns prior to the commencement of the legally prescribed campaign period contravenes or violates principles of equality, rule of law, right to life, the right to equality, right not to be subjected to any form of violence, principle of free and fair elections, impartiality, and right to development as enshrined in articles 10, 26, 27,



29, 81, 232 of the *Constitution* of Kenya and article 22 of the *African Charter on Human and Peoples' Rights*.

- c. A declaration that the actions of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in failing, neglecting or refusing to take action against aspirants or political parties carrying out early campaigns prior to the commencement of the legally prescribed campaign period contravenes or violates the principles of equality, rule of law, right to life, right to equality, the right not to be subjected to any form of violence, principle of free and fair elections, principle of impartiality, and right to development as enshrined under article 10, 26, 27, 29, 81 and 232 of the *Constitution*, 2020 and article 22 of the *African Charter on Human and Peoples' Rights*.
- d. An order directing the 1<sup>st</sup> respondent to deregister candidates found culpable of campaigning outside the legally prescribed period.
- e. An order directing the 2<sup>nd</sup> respondent to investigate and prosecute those found culpable of campaigning outside the legally prescribed period.
- f. An order directing the 3<sup>rd</sup> respondent to deregister political parties found culpable of campaigning outside the legally prescribed period.
- g. An order directing the 4<sup>th</sup> respondent to, within such time as this court shall direct, prepare relevant Bill on early campaigns carried out prior to the commencement of the legally prescribed campaign period and the consequences of violating such law for tabling before parliament.
- h. A conservatory order be issued restraining the 5<sup>th</sup> respondent from issuing any licenses and security for campaign rallies outside the legally prescribed campaign period.
- i. A conservatory order be issued restraining aspirants and political parties from campaigning prior to the commencement of the legally prescribed campaign period.
- j. An order of injunction restraining aspirants and political parties from publishing, distributing, and exhibiting fliers, posters, handbills, placards, and other campaign material outside the legally prescribed campaign period.
- k. Any other order that the court may deem fit to grant.
- l. This being a matter of public interest, there be no orders as to costs.

### **Petitioner's Case**

9. The petition is supported by the affidavit sworn on 8 April, 2022 by Dr Annette Mbogoh, the executive director of the petitioner.
10. The petitioner highlighted concerns about potential violations of several provisions of the *Constitution* of Kenya and article 22 of the *African Charter on Human and Peoples' Rights*, specifically regarding the premature conduct of political campaigns in Kenya before the officially designated campaign period begins.
11. The petitioner stated that a campaign period is the period specified in the notice issued by the 1<sup>st</sup> respondent in relation to an election. Consequently, on 20 January, 2022, the 1<sup>st</sup> respondent issued Gazette Notice specifying that the campaign period for the 9 August, 2022, General Elections would commence on 29 May, 2022, and conclude on 6 August, 2022. However, numerous candidates and political parties were promoting themselves for the 9 August, 2022, general election prior to the official campaign period.



12. The petitioner noted that these early campaigns have been widely documented and it invited this court to take judicial notice. As evidence, the petitioner cited a press release by the 1<sup>st</sup> respondent on 19 November, 2021, which acknowledged that some aspirants and political parties had been campaigning outside the legally prescribed period. In addition, that media reports, including the Nairobi Law Monthly, Standard Media, Citizen TV, KTN News, Nation Media, and The Star, were referenced to corroborate claims of early campaigning by various presidential aspirants and political party leaders, dating back to 2019.
13. The petitioner further indicated that candidates and parties have been distributing campaign materials such as flyers, posters, and handbills in both public and private premises. It therefore argued that premature election campaigning causes various negative consequences, including the improper use of public resources for campaign activities, since regulations on campaign financing only apply within the officially designated campaign period.
14. The petitioner further asserted that early campaigns disrupt civil and public service, as some public officers, who are expected to perform their duties diligently, consider entering the political arena and as a result, they are required to resign from their positions at least six months before the election date.
15. It argued that early campaigns allow public officers to campaign while still in office, diverting time from public service and creating conflict of interest where their positions could be used to manipulate policies for political gain.
16. Furthermore, the petitioner claimed that campaigns outside the prescribed period heighten tension, increasing the likelihood of violence leading up to the election and also negatively affecting economic development due to a prolonged electioneering frenzy, which is un conducive for investments and development. As an example, the Petitioner referenced a study by the Institute of Economic Affairs on the "Effect of Elections on Kenya's Economy" which noted that periods preceding elections are characterized by high-intensity campaigns causing anxiety, thus reducing economic progress.
17. According to the petitioner, the reduced economic growth and lack of foreign investment, contribute to increased inflation and a rise in commodity prices such as oil, gas and food and further, that the anxiety created by early campaigns negatively impact on tourism, which is a major foreign exchange earner, thereby weakening the Kenyan shilling.
18. Lastly, the Petitioner stated that early Campaigns increase the risk of Covid-19 infection rates, referencing situations in India where infections surged amidst election campaigns characterised by large crowds with minimal social distancing and mask-wearing.
19. It asserted that the actions of the Respondents, as state offices and officers, have contravened or violated the rights of Kenyan citizens and constitutional provisions. Specifically, the petitioner alleged that by failing to take action against those conducting early campaigns, the Respondents violated national values and principles under article 10 of the Constitution of Kenya, which include; the principles of equality and the rule of law by allowing individuals to act above the law and, the principle of sustainable development by prolonging electioneering frenzy, which affects investments and development.
20. The petitioner further stated that the respondents have violated: -
  - i. The right to life guaranteed under article 26 of the Constitution by condoning early campaigns, which increase the likelihood of violence and Covid-19 infections, potentially leading to loss of life.



- ii. The right to equality under article 27 of the *Constitution* by failing to act against those campaigning early, thereby elevating them above the law.
  - iii. The right not to be subjected to any form of violence from public or private sources, as guaranteed under article 29(c) of the *Constitution*, due to the increased likelihood of violence resulting from early campaigns.
21. The petitioner contended that the respondents' failure to act heightens the risk of political violence, misuse of public office for electoral advantage, and unlawful use of public resources during campaigns. This inaction, the petitioner asserted, undermines the fundamental principles of the electoral system outlined in article 81 of the *Constitution*, which mandates free and fair elections that are devoid of violence, intimidation, improper influence, corruption.
  22. Further, the petitioner asserted that such negligence compromises the impartiality, neutrality, efficiency, accuracy and accountability required in election administration.
  23. Additionally, the petitioner claimed that the respondents' failure to act against early campaigns violates the values and principles of public service under article 232 (1) of the *Constitution*, specifically regarding responsive, prompt, effective, impartial, and equitable provision of services, due to conflict of interest among public officers campaigning while still in office.
  24. Lastly, the petitioner stated that the respondents have violated article 22 of the *African Charter on Human and Peoples' Rights*, which guarantees the right to development, by contributing to a prolonged state of anxiety among Kenyan citizens and economic actors, thus reducing economic development.
  25. In support of the above arguments, the petitioner cited various constitutional provisions including: -
    - i. Article 1 which provides that sovereign power belongs to the people of Kenya and state organs exercise power in accordance with the *Constitution*.
    - ii. Article 2 that declares the *Constitution* as the supreme law, binding all persons and state organs, and incorporates international law and ratified treaties into Kenyan law.
    - iii. Article 3(1) which obliges every person to respect, uphold, and defend the *Constitution*.
    - iv. Article 10 which outlines national values and principles of governance, including rule of law, human dignity, equality, good governance, and sustainable development.
    - v. Article 19 which recognises that protecting human rights and fundamental freedoms preserves dignity.
    - vi. Article 20(1) which states that the Bill of Rights binds all State organs and persons.
    - vii. Article 21(1) which imposes a fundamental duty on the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.
    - viii. Article 22(1) which grants every person the right to institute court proceedings for violations or threats to rights and freedoms.
    - ix. Article 23(3) which empowers the court to grant appropriate reliefs, including declarations of rights and injunctions.
    - x. Article 26(1) on the right to life.



- xi. Article 27(1) which provides for equality before the law and equal protection and benefit of the law.
  - xii. Article 29(c) which guarantees security of the person and freedom from violence.
  - xiii. Article 81 which outlines general principles for the electoral system, including free and fair elections.
  - xiv. Article 232(1) on values and principles of public service.
  - xv. Article 258(1) which entitles any person to institute court proceedings in the public interest when the Constitution has been contravened or threatened.
26. Additionally, the petitioner cited: -
- i. Article 22 of the African Charter on Human and Peoples' Rights which guarantees the right to development.
  - ii. Section 2 of the Elections Act, 2011 on the definition of a campaign period.
  - iii. Section 2 of the Election (General) Regulations, 2012 on definition of campaigns.
  - iv. Section 23 of the Leadership and Integrity Act, 2012, concerning public officers engaging in political activity.
27. The petitioner's supporting affidavit gave detailed examples of pre-election violence, including the attack on Hon Esther Passaris's convoy on 28 March, 2022, and a clash between supporters at an Azimio La Umoja rally on 20 February, 2022. The deponent affirmed the likelihood of violence caused by early campaigns.

### **Response by 1<sup>st</sup> Respondent**

28. The 1<sup>st</sup> respondent filed grounds of opposition dated 16 August, 2022 arguing that: -
- 1. The 1<sup>st</sup> respondent did not in any way, manner or form encourage, sanction nor give legitimacy to carrying out of early campaigns by any of the political aspirants outside the legally prescribed campaign period.
  - 2. The 1<sup>st</sup> respondent's mandate does not extend to acting, sanctioning or penalising electoral offence culprits as this is within the purview of the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.
  - 3. Only the 3<sup>rd</sup> respondent has the authority to deregister political parties who are found guilty of contravening the Election Code of Conduct, that is to say, campaigning outside the legally prescribed campaign period.
  - 4. The 1<sup>st</sup> respondent discharged its statutory mandate of prescribing and ensuring the gazettment of the campaign period and has no control over the actions of political aspirants/ parties who contravene the set timelines.
29. In the premises, the 1<sup>st</sup> respondent stated that this court cannot entertain or grant the prayers sought in the petition as against it. It termed the said prayers a nullity, lacking factual merit and therefore warranting dismissal with costs to it.
30. The rest of the respondents did not file any responses to the Petition.



### Response by 1<sup>st</sup> Interested Party

31. The 1<sup>st</sup> interested party filed a replying affidavit sworn by Veronica Maina in her capacity as its Secretary General. She deponed that there was no existing threat to the constitutional fabric and neither was there violation, infringement, real or threatened, of the provisions cited in this petition. She stated that the Petitioner had not established a case of violation, infringement or even threat to any constitutional rights and freedoms as protected under the Constitution.
32. Her position is that the campaign period meant the period designated by the 1<sup>st</sup> respondent during which a candidate may campaign and therefore, the alleged violations of various provisions of the Constitution of Kenya, the Elections Act, the African Charter on Human and People's Rights, the Leadership and Integrity Act had not been substantiated.
33. She stated that the 1<sup>st</sup> interested party or its members had not begun its campaigns at the period alleged by the petitioner and in addition, there existed mechanisms in law for dealing with public officers who carry out campaigns while in office. She specifically cited section 12(1)(c) and (d) of the Political Parties Act which prohibits public officers from engaging in political activities that may compromise the neutrality of the offices they hold.
34. She further stated that the exposition of conflict of interest allegedly arising out of the purported early campaigns and the cited provisions of the Constitution put forth by the Petitioner was incorrect and utterly misleading. Additionally, she argued that the newspaper cuttings and unverified documents relied on by the Petitioner are inadmissible in a court of law.
35. Further, she averred that the alleged adverse impact of early campaigns on the inflation, stability of public service and general economic growth of the country had no basis. That the Petitioner had not established a nexus between the likelihood of post-election violence and the alleged early campaigns.
36. Her position was that if there were any rallies during the pandemic, the same were done after the government had lifted the containment measures under strict adherence to the Covid-19 protocols.
37. Terming this petition as frivolous, devoid merit, argumentative, incompetent and an outright abuse of the process of the court, she sought its dismissal.

### Response by 3<sup>rd</sup> Interested Party

38. The 3<sup>rd</sup> interested party filed a replying affidavit sworn on 1 July 2022 by Wambui Gichuru in her capacity as its Executive Director.
39. She asserted that the petitioner had not presented any direct allegations against the 3<sup>rd</sup> interested party, its candidate, or any of its officials. Further, that the petitioner had not demonstrated any breach or failure on the part of the 3<sup>rd</sup> interested party.
40. She stated that everyone has the right to freedom of opinion and expression without interference, to seek, receive, impart information and ideas through any media regardless of frontiers and therefore, any law or provision barring the same would be unreasonable and unconstitutional.
41. She deponed that the petitioner's allegations of ongoing campaigns way before gazettelement of the campaign period or incitement to violence or intimidation were not supported by any evidence. Thus, she argued, granting the orders sought by the petitioner would be limiting a person's fundamental right under the Constitution hence contravening article 24 thereof.



42. She added that this court has no jurisdiction to grant the said orders and specifically, the order directing the 1<sup>st</sup> respondent to deregister any candidate from being on the ballot in the General Elections for year 2022.
43. She concluded that the petitioner had not demonstrated how the alleged campaigns were unlawful, illegal and how they had or would taint the General Elections in terms of article 81 of the Constitution. She termed the petition as baseless, bad in law, incompetent, misconceived and an abuse of the court process and therefore urged this court to dismiss it.

### **Response by 5<sup>th</sup> Interested Party**

44. The 5<sup>th</sup> interested party filed a replying affidavit sworn on 4<sup>th</sup> August 2022 by Justus Kyambi, its Executive Director. He averred that the 5<sup>th</sup> interested party had not started election campaigns but was conducting internal party deliberations and consultations including nomination of party aspirants.
45. Further, he stated that section 43(5) of the Elections Act expressly provides that a public officer who intends to contest an election should resign from public office at least six months before the date of the election.
46. He averred that the petitioner did not avail any particulars to show how the 5<sup>th</sup> Interested Party's deliberations had abused public resources. He concurred that public officers were precluded from engaging in political activities that may compromise or be seen to comprise political neutrality of their office.
47. He further averred that the 5<sup>th</sup> interested party's deliberations did not negatively impact economic development and that any economic challenges experienced were a result of the COVID-19 pandemic, which is a public health issue.
48. He concluded by asserting that the 5<sup>th</sup> interested party had not violated any rights of Kenyan citizens, breached constitutional provisions or engaged in early election campaigns. He therefore urged the court to dismiss the petition for lack of merit.
49. The other interested parties did not file any response to the Petition.

### **Petitioner's Submissions**

50. They are dated 26<sup>th</sup> June, 2022 and identified seven (7) key issues which are as follows:-
  - i. Whether early campaigns have been carried out in Kenya.
  - ii. Whether the respondents have violated the right not to be subjected to any form of violence from public or private sources.
  - iii. Whether the respondents have violated the right to life.
  - iv. Whether the respondents have violated the right to development.
  - v. Whether the respondents have violated the principles of public service.
  - vi. Whether the respondents have violated the right to equality.
  - vii. Whether the respondents have violated the principles of free and fair elections.



### **Whether early campaigns have been carried out in Kenya**

51. The petitioner submitted that section 2 of the *Election (General) Regulations, 2012* defines "campaigns" as the promotion of a candidate or political party for election purposes during the campaign period. Thus, any campaigns conducted outside this defined period are considered illegal.
52. Further that section 2 of the *Elections Act, 2011*, specifies that a "campaign period" is the period noted in the notice issued by the Independent Electoral and Boundaries Commission (IEBC) for an election and in regard to the 9 August, 2022 General Election, the 1st respondent, through Gazette Notices No 430-435 issued on 20 January, 2022, announced that the campaign period would run from 29 May, 2022, to 6 August, 2022.
53. The petitioner however argued that aspirants and political parties were promoting themselves contrary to this law prior to the official campaign period and in support of this claim, it submitted that evidence of these campaigns are captured in the various news articles and videos annexed to the supporting affidavit.
54. The petitioner therefore called on the court to recognise the widely known and well-documented instances of early campaigning, citing section 59 of the *Evidence Act* cap 80, which stipulates that facts subject to judicial notice do not need to be proven.
55. In addition, the petitioner relied on section 60 of the said *Act* that outlines facts which a court can take judicial notice of, including all matters of general or local notoriety. In support thereof, reliance was placed on the case of *Ngunjiri Wambugu v Inspector General of Police, & 2 others* [2019] eKLR, where J.A. Makau, J took judicial notice of media reports, newspaper printouts, and photographs in the public domain to prove violations of rights.

### **Whether the respondents have violated the right not to be subjected to any form of violence from public or private sources**

56. The petitioner argued that early campaigns escalate tensions, increasing the likelihood of pre-election violence and in support of this argument, it cited an attack on Hon. Esther Passaris's convoy on 28 March, 2022, and a clash between supporters of Mvita MP Abdulswamad Nassir and businessman Suleiman Shahbal at a rally on 20 February, 2022.
57. The petitioner therefore invited the court to take judicial notice of these widely publicized incidents.
58. The petitioner submitted that the state has a duty under article 29(c) to protect Kenyans from such violence, imposing both a negative obligation not to violate rights and a positive obligation to protect against threats of violation. For that argument, reliance was placed on the case of *Jeremiah ole Dabii Pallangyo v Attorney General & 4 others* [2021] eKLR, where GV Odunga, J (as he then was) recognised this dual obligation while citing the African Commission on Human and Peoples' Rights' ruling in *Association of Victims of Post Electoral Violence & Interights / Cameroon, (272/03)* which ruling emphasised that the State's negligence in protecting rights, even if violations are by private individuals, constitutes a violation attributable to the State.
59. On that basis, the petitioner contended that the respondents have failed, neglected or refused to act against aspirants and political parties conducting early campaigns, thus failing in their positive obligation to prevent and punish for the violence. In support, the petitioner cited a Press Release dated 19 November 2021 and submitted that the 1<sup>st</sup> respondent through its Chairman, expressed concern over campaigns conducted outside the legally prescribed period. The petitioner argued that despite these observations, the respondents had failed to take any action to prevent or penalise those engaged



in early campaigning, contending that such inaction constituted a violation of article 29(c) of the Constitution.

### **Whether the Respondents have violated the right to life**

60. The petitioner submitted that under article 26(1) of the Constitution 2010, every person has the right to life, which right, it argued, can be curtailed by early campaigns that increase the likelihood of violence. Additionally, the petitioner contended that early campaigns contributed to an increased Covid-19 infection rate and cited examples from countries like India where infections surged amidst election campaigns characterised by large crowds, minimal social distancing, and little mask-wearing.
61. Similarly, the petitioner invited the court to take judicial notice of the media-documented increase in the said pandemic during elections. It was the Petitioner's submission that increased likelihood of violence and of infection rates during early campaigns are presented as direct threats to the right to life.
62. Referring to Jeremiah ole Dabii Pallangyo case (*supra*) which cited the European Court of Human Rights in Mahmut Kaya v Turkey Application No 22535/93, the Petitioner submitted that the right to life is interpreted as not only enjoining the State from intentional unlawful taking of life but also imposing a positive obligation to safeguard the lives of those within its jurisdiction.

### **Whether the respondents have violated the right to development**

63. While referring to article 10(2)(d) of the Constitution on sustainable development as a national value and principle of governance and also article 22 of the African Charter on Human and Peoples' Rights, which Kenya ratified on 23<sup>rd</sup> January, 1992 pursuant to article 2 of the Constitution, the petitioner submitted that the right to development provided for under the Charter is applicable in Kenya.
64. The petitioner emphasised that the right to development is recognised by the Charter as a distinct justiciable right, as upheld in case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/2003 (commonly known as the Endorois case) where the African Commission on Human and Peoples' Rights ruled that Kenya had violated the Endorois community's right to development by failing to create conditions favourable to their development after their eviction for creation of a game reserve.
65. Reference was also made to article 3 of the Declaration on the Right to Development which emphasises the State's primary responsibility to create conducive conditions for development. The Petitioner argued that the Respondents violated this right by failing to prevent early campaigns or punish those conducting them, thereby creating conditions unfavourable to its realisation.
66. The petitioner argued that early campaigns have adverse effects on economic development due to prolonged electioneering frenzy. In support, it cited reports from 2019 where the Institute of Economic Affairs' study on the "Effect of Elections on Kenya's Economy" published on 2 November, 2017 noted that the period preceding elections in Kenya causes anxiety to citizens and economic actors, significantly reducing economic progress and that this reduced economic growth and lack of foreign investment leading to increased inflation, negatively affecting tourism thus weakening the Kenyan shilling.
67. The petitioner submitted that according to the study, election years often record lower GDP growth rates compared to non-election years, with an average mean GDP growth rate of 4.0% for election years versus 6.6% for mid-election years thus concluding that election politics significantly reduced the country's economic progress, reinforcing the need for campaigns to remain within the legally



prescribed period. That it was also noted that post-election economic recovery was slow which hinders the realization of the right to development.

68. From the above, the petitioner urged the court to find that the respondents have violated the right to development by their inaction against early campaigns.

#### **Whether the respondents have violated the principles of public service**

69. The petitioner cited article 232(1) of the *Constitution* and section 23 of the *Leadership and Integrity Act*, 2012, and submitted that early campaigns lead to the misuse of public resources and financial impropriety, since campaign financing is only regulated during the prescribed campaign period.
70. It was submitted that public officers participating in early campaigns destabilise civil and public service by compromising their political neutrality, requiring some to resign from office to participate in campaigns. The petitioner argued that this behaviour undermines the principles of public service, as it involves political activity that compromises neutrality and impacts on efficient and economic use of resources. The Petitioner therefore concluded that the Respondents' failure to act against public officers engaged in early campaigns violates the principles of public service.

#### **Whether the Respondents have violated the right to equality**

71. The petitioner relied on article 10 of the *Constitution* and argued that it binds all persons to national values and principles, including the rule of law and equality. Further, the petitioner cited article 27(1) of the *Constitution* and submitted that every person has the right to equal protection and equal benefit of the law.
72. Consequently, the petitioner submitted that the respondents' failure to act against these early campaigns elevates certain aspirants and political parties, thereby violating the principles of equality, the rule of law and the right to equal protection and benefit of the law. In support of this of submission, the petitioner cited *Shimmers Plaza Limited v National Bank of Kenya Limited* (Civil Appeal 33 of 2012) [2015] KECA 945 (KLR), where , W Karanja, JW Mwera and PM Mwilu JJA held:-

“No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.”

#### **Whether the respondents have violated the principles of free and fair elections**

73. The petitioner submitted that early campaigns, characterized by increased political gain, misuse of public resources, and public risk of violence, contravene the principles set out under article 81 of the *Constitution* ,thereby undermining the integrity of the electoral system.
74. It was argued that under article 3(3) of the *Declaration on Criteria for Free and Fair Elections* (1994), everyone individually and collectively has the right to campaign on an equal basis with other political parties. Further, the petitioner submitted that ensuring free and fair elections is critical as it secures a peaceful transfer of power, giving the losing party confidence in the election results, making it easy for them to cede power to the new government. In support of that argument, the petitioner cited the case *Emiliano Kipkorir Tonui v National Alliance Party* [2016] eKLR, where K Kimondo , J stated that:-

“An election is a continuum that starts before polling day; spills over into the IEBC; and, ends up in the election courts.”

75. The petitioner therefore argued that early campaigns negatively affect the principle of free and fair elections, and the respondents' failure to take action against the aspirants and political parties



constitutes a contravention of this principle. In conclusion, the Petitioner sought the court's intervention to stop these early campaigns and ensure future campaigns adhere to the legally prescribed period.

76. During highlighting of the petitioner's submissions, Dr Khaminwa submitted that many issues in the 2010 *Constitution* are emerging, and this petition, though targeting the 2022 elections, addresses Constitutional values. He emphasised the importance of the country's economy, regretting that those in authority are constantly engaged in early campaigning, which he believes the court should stop and condemn, as it affects many aspects of life.
77. Dr Khaminwa contended that the current events reflect a lack of proportionality, violation of the principles of equality and rule of law. To reinforce his argument, Counsel brought to the court's attention the documents filed on 8 April 2022, together with the supporting affidavit by Dr Annette Mbogo.
78. He further submitted that early campaigns must be discouraged and urged the court to establish rules to stop such conduct. He further suggested that politicians and the executive should be directed on proper conduct, and the media should be controlled in its reporting on early campaigns. He reiterated his submissions, noting that leaders are busy campaigning, and prayed that if the Judgment is in the petitioner's favour, a copy of same be provided to the President, Deputy President, Inspector general, ODPP and Parliament.

### **1<sup>st</sup> Respondent's Submissions**

79. They are dated 28 December, 2022 and outlined three (3) key issues for determination;
- i. Whether the 1<sup>st</sup> respondent's mandate extends to taking action against electoral culprits.
  - ii. Whether the 1<sup>st</sup> respondent discharged its statutory mandate concerning the 2022 General Elections campaign,
  - iii. Costs of the petition.
- Whether the 1<sup>st</sup> respondent's mandate extends to taking action against electoral culprits.
80. It was submitted that under article 88 of the *Constitution*, which is reiterated in section 4 of the *Independent Electoral and Boundaries Commissions Act* No 9 of 2011}, the 1<sup>st</sup> respondent's mandate is to conduct or supervise referenda and elections, including; voter registration, revision of voter rolls, delimitation of constituencies, regulation of candidate nominations, settlement of electoral disputes (excluding election petitions and post-declaration disputes), candidate registration, voter education, facilitation, observation, monitoring and evaluation of elections, regulation of campaign spending, development of a code of conduct, and monitoring compliance with legislation relating to candidate nomination.
81. According to the 1<sup>st</sup> respondent, its mandate, particularly after publishing an election notice and campaign period, is limited to facilitating, conducting, and supervising elections, rather than taking action against individuals or political parties committing election offences.
82. While conceding that early campaigning is an offence, the 1<sup>st</sup> respondent asserted that it is not within their mandate to take action against such culprits, arguing that the duty of investigating and prosecuting election offences falls upon the Director of Public Prosecutions ( 2<sup>nd</sup> respondent) as per section 21 of the *Elections Offences Act* No 37 of 2016 and article 157 of the *Constitution*.



83. Further, the 1<sup>st</sup> respondent contended that under section 34 of the *Political Parties Act* No 11 of 2011, it is the responsibility of the Registrar of Political Parties (3<sup>rd</sup> respondent) to regulate, monitor, investigate and supervise political parties and can deregister or suspend parties contravening the Electoral Code, such as campaigning outside the legal period, under section 21 of the *Act*.
84. Consequently, it was submitted that the responsibility to investigate, sanction, or penalise early campaigners lies with the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents. The 1<sup>st</sup> respondent cited the case of *Chege v Independence Electoral & Boundaries Commission* (Constitution Petition E073 of 2022) [2022] KEHC 239 (KRL), where AC Mrima J, held that the IEBC's main duty is to conduct or supervise elections and not to actively participate in disputes or summon witnesses for investigations.

### **Whether the 1<sup>st</sup> respondent discharged its statutory mandate concerning the 2022 General Elections campaign.**

85. The 1<sup>st</sup> respondent cited section 2 of the *Elections Act* on the definition of the campaign period and elaborated that the section obliges the 1<sup>st</sup> respondent to publish such a notice in the Kenya Gazette. That in fulfilling this mandate for the 2022 General Elections, the 1<sup>st</sup> respondent issued Gazette Notices 430-435 on 20 January, 2022, stipulating the campaign periods for various electoral offices, primarily commencing between 29 May, 2022 and 4 June, 2022, and ceasing on 6<sup>th</sup> August, 2022.
86. The 1<sup>st</sup> respondent asserted that by publishing these notices, it discharged its statutory mandate regarding the 2022 General Elections campaign. Consequently, it argued that it had no control over actions by political aspirants and parties that contravened these timelines. Rather, such responsibility fell upon the 2<sup>nd</sup> and 5<sup>th</sup> respondents for investigations and action, and the 3<sup>rd</sup> respondent for deregistering or suspending political parties. It concluded that the petitioner's claim against them for failing to take action was misguided and unmerited.

### **Costs**

87. The 1<sup>st</sup> respondent relied on section 27 of the *Civil Procedure Act* and submitted that since the petitioner had not proved its case against the 1<sup>st</sup> respondent, it should bear the costs to compensate the 1<sup>st</sup> respondent for defending the matter. Reliance was placed on the case of *Republic v Rosemary Wairimu Munene (ex parte applicant) v Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No 6 of 2004, J Mativo J (as he then was) held that costs are at the court's discretion and serve to compensate the successful party.
88. In conclusion, the 1<sup>st</sup> respondent urged the court to dismiss the petition with costs.
89. Mr Ojong'a, in highlighting the 1<sup>st</sup> respondent's submissions, argued that the 1<sup>st</sup> respondent lacks the mandate to prevent parties from early campaigning. Referring to 1<sup>st</sup> respondent's submissions and article 88 of the *Constitution*, counsel emphasised that the 1<sup>st</sup> respondent's mandate is limited to preparing and conducting elections. He argued that conducting early campaigns is an offence, and dealing with it falls under the mandate of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents.
90. Counsel further asserted that the 2<sup>nd</sup> respondent should have requested the 5<sup>th</sup> respondent to investigate and report, while the 3<sup>rd</sup> respondent should monitor political parties and politicians during election preparation. He cited the case of *Chege (supra)* in support of the claim that the 1<sup>st</sup> respondent has no mandate to control campaign methods.
91. He concluded that by virtue of section 2 of the *Elections Act*, the 1<sup>st</sup> respondent discharged its mandate for the 2022 elections by issuing Gazette notices defining this period.



#### 4<sup>th</sup> and 5<sup>th</sup> Respondents' Submissions

92. They are dated 6 July 2022 and identified two issues for determination:-
- i. Whether this court has jurisdiction.
  - ii. Whether the petitioner pleaded with specificity.

#### Whether this court has jurisdiction

93. The respondents placed reliance on the case of *The owners of Motor Vessel Lillian 'S' v Caltex Oil Kenya Ltd* 1989 (KLR), and submitted that this court is bereft of jurisdiction. They further submitted that campaigning outside the campaign period does not fall under the precincts of section 76 of the *Elections Act* which provides as follows:-
- (1) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.
  - (2) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.
  - (3) A petition filed in time may, for the purpose of questioning a return or an election court within the time within which the petition questioning the return or the election upon that ground may be presented.
94. The court's attention was drawn to the Supreme Court's decision in *Wetangula & another v Kombo & 5 others* [2015] KESC 12 (KLR) where the nature of the claims, reliefs and prayers to be sought in an election petition was described as follows:-
- “The description of election petitions as causes sui generis, is in every respect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factors. Such petitions rest on private, political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.”
95. The respondents further submitted that the bone of contention in the present petition was on the campaign period and therefore argued that the same were pre-election issues on internal parties' deliberations in order to promote democratic, free and fair nominations.
96. They submitted that the jurisdiction of an election court is invoked on issues touching on the processes during the voting, vote counting, tallying and declaration of the results and not the pre-nomination



and pre-election issues. On this, reliance was placed on the decision in *Francis Parsimei Gitau v National Alliance Party and another* [2012] KEHC 2603 (KLR) where the D.S. Majanja J, held:-

“It is also my view that article 88(4)(e) and section 74(1) of the *elections act*, 2011 provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed”

### **Whether the petitioner pleaded with specificity**

97. The respondents cited two decisions including *Charan Lal Sabu & others v Singh* [1985] LRC (Const) where the Supreme Court of India held: -

“The importance of specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet.”

98. They further submitted that there had to be a nexus between the alleged constitutional violations and the result of the impugned election. In support, they cited *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013 and *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR cases on the burden of proof in election petitions and submitted that the established harmonisation principle of constitutional interpretation is that no constitutional provision is greater or lesser than the another.

99. They concluded by submitting that the petitioner had failed to demonstrate with specificity how the 4<sup>th</sup> and 5<sup>th</sup> respondents contravened the respective articles of the *Constitution* pleaded. They urged the court to dismiss the petition with costs to the respondents.

### **1<sup>st</sup> Interested Party’s Submissions**

100. They are dated 23 June, 2022 and raised four (4) issues for determination.

- i. Whether the issues raised in the petition are justiciable.
- ii. Whether the constitutional jurisdiction of the court has been properly invoked.
- iii. Whether the evidence adduced by the petition had any probative value.
- iv. Who bears the costs.

### **Whether the issues raised in the petition are justiciable**

101. It was submitted that the nature of the issues raised therein were non- justiciable and primarily in the province of the branches of the government and further, that the petitioner had not established a case for violation, infringement or even threat to any of its constitutional rights and freedoms as protected under the *Constitution*.

102. Relying on the decision in *Anarita Karimi Njeru v Attorney General* [1979] KLR 154 (Sir James Wicks CJ, Law JA & Miller Ag JA), it was submitted that a party alleging violation of a constitutional provision must demonstrate with a reasonable degree of precision what provisions of the *Constitution* were violated and the manner in which they have been violated.

103. They further cited the Supreme Court’s decision in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others*, [2014] eKLR and submitted that the court would not determine



a constitutional issue or question even where it was properly before it, if there are other ways upon which the issue can be disposed of.

104. Further reliance was placed on the decision in Nairobi Constitutional Petition No 254 of 2019, *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR where Kimondo, Limo and Mrima JJ stated as follows on the ripeness doctrine: -

“ 107. The doctrine focuses on the time when a dispute is presented for adjudication, The *Black’s Law Dictionary* 10th Edition, [*supra*] at page 1524 defines ripeness as:

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.

109. The Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the constitutional court for adjudicating upon hypothetical matters. The court held:

(72) The broad questions which were raised in the consolidated petitions namely; division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the *Constitution* stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

(74) Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the *Constitution* has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.”

105. It was further submitted that it is the 1<sup>st</sup> respondent’s role and not the petitioner, to deal with cases of early campaigns. Citing section 2 of the *Elections Act* that defines the campaign period as the period specified as such in the notice issued by the Commission in relation to an election and section 12(1) (c) and (d) of the *Political Parties Act* that prohibits public officers from engaging in political activities that may compromise the neutrality of the offices they hold, they urged the court to find that the issues raised in the Petition were moot, academic and non-justiciable.



### **Whether the constitutional jurisdiction of the court has been properly invoked.**

106. It was submitted that there were no valid and holding exceptions to the principle of non-justiciability and the doctrine of exhaustion and therefore, this court is not vested with the requisite jurisdiction to deal with the present petition.
107. Reliance was placed on the case of *John Harun Mwau v The Attorney General* High Court Nairobi Petition No 65 of 2011 [2012] eKLR, where Lenaola J (as he then was), Mumbi J (as she then was) and Majanja J observed that the jurisdiction vested in the High Court to interpret the *Constitution* was not exercised in a vacuum, that there ought to be a real controversy or dispute between parties before the court in order for it to exercise its jurisdiction.

### **Whether the evidence adduced by the petition had any probative value.**

108. It was submitted that the entire petition was anchored on newspaper articles and public utterances by people who were not parties to this petition. Thus, the probative value of the petitioner's evidence was doubtful and proved that the petitioner was on a speculative frolic. It was added that only admissible documents should be the basis of any credible evidence.
109. It was also submitted that the definition of "informal documentation" under rules 9 and 10 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules does not apply to newspaper cuttings.
110. Further, reliance was placed on sections 107 and 109 of the *Evidence Act* and the decisions in *Randu Nzau Ruwa and 2 others v Internal Security Minister and Another* [2012] eKLR and *China Wuyi and Co Limited v Samson K Metto* [2014] eKLR, Civil Appeal No 181 of 2009 to conclude that judicial power is used to determine actual controversies arising between adverse litigants and that power cannot be exercised in instances where the questions for determination are abstract, academic and hypothetical. The court was urged to dismiss the petition with costs.

### **5<sup>th</sup> Interested Party's Submissions**

111. They are dated 5 June, 2022 and identified six (6) issues for determination.
- i. Whether several aspiring candidates and political parties published, distributed and exhibited fliers, posters and handbills, placards and other campaign materials both in public and private premises.
  - ii. Whether early elections campaigns have destabilized civil and public service.
  - iii. Whether early elections campaigns reduced economic growth and lack of foreign investments.
  - iv. Whether early campaigns have created anxiety that negatively affected the tourism sector in Kenya.
  - v. Whether early campaigns have led to increased covid-19 infection rate.
  - vi. Whether the petitioner has established a *prima facie* case to warrant the grant of the orders sought.



**Whether several aspiring candidates and political parties published, distributed and exhibited fliers, posters and handbills, placards and other campaign materials both in public and private premises.**

112. It was submitted that the 5<sup>th</sup> interested party never involved itself in early campaigns as alleged by the petitioner. It was further submitted that prior to the prescribed period of election campaigns, it only conducted deliberations to promote democratic, free and fair, transparent, accountable and inclusive, participatory, non-discriminative, credible and fair elections.
113. Reliance was placed on section 27 of the *Elections Act* 2011 and the decision in *Katiba Institute v Independent Electoral and Boundaries Commission* [2017] eKLR where C Mwita J stated that deliberations on inclusive and non-discriminatory nominations include proposals effected by political parties so as to increase the participation and representation of special interest groups.
114. It was its submission that political parties were under the obligation to ensure their nomination rules comply with the *Constitution* and all other relevant laws.

**Whether early election campaigns have destabilized civil and public service.**

115. It was further submitted that party deliberations alleged by the petitioner to be early election campaigns had not in any way destabilized the civil and the public service. That public officers were precluded from engaging in political activities that may compromise or be seen to comprise political neutrality of the person's office. In support, it placed reliance on section 43(5) of the *Election Act* and the decision in *Charles Omanga & Another v Independent Electoral & Boundaries Commission & Another* NRB Petition No 2 of 2012 [2012] eKLR.

**Whether early election campaigns reduced economic growth and lack of foreign investments (sic).**

116. It was submitted that party deliberations did not impact adverse effects on the economic development, rather, the same was affected by Covid- 19 pandemic which was a public health issue.

**Whether the early campaigns created anxiety that have negatively affected the tourism sector in Kenya.**

117. It was submitted that the petitioner had not tendered any proof to demonstrate how the political campaigns had negatively impacted the tourism industry. On this argument, reliance was placed on the article by National Tourism and Crisis Management Committee on the Impact of Covid-19 on Tourism in Kenya: Measures Taken and Recover Pathways (2020).

**Whether early campaigns have led to increased covid-19 infection rate.**

118. The 5<sup>th</sup> interested party submitted that it adhered to Covid-19 safeguard measures and guidelines and its political deliberation meetings did not lead to spread of the virus.

**Whether the petitioner has established a prima facie case to warrant the grant of the orders sought.**

119. It was its submission that the petitioner had not made out a prima facie case to warrant the grant of the orders sought. That all the assertions and allegations made in the Petition were merely speculative and untrue.
120. The court's attention was drawn to articles 20(2)(3) and (4), 27, 38, 47 48 and 50 of the *Constitution* and several journals including Human Rights Realism, Volume 54, January, 2021, Vanderbilt Journal of Transnational Law by Natalie Davidson, which explores the balance between legal accountability



and political considerations in addressing human rights abuses. This court was urged to dismiss the petition with costs.

### **Analysis and Determination**

121. Having considered the petition, grounds of opposition, affidavits and annexures thereto together with submissions, the issues that arise for determination are as follows: -
1. Whether this court has jurisdiction to hear and determine this petition.
  2. Whether the petition has met the threshold for a constitutional petition.
  3. Whether early campaigns violate constitutional rights as pleaded by the petitioner.
  4. Whether public officers engaging in political activities are in violation of the Constitution and other laws.
  5. Whether the respondents failed in their respective legal and constitutional duties to act on early campaigns.
  6. Whether this court can direct 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent to act as prayed for by the petitioner.
  7. What reliefs this court should grant.
  8. Who bears the costs of this petition.

### **Whether this court has jurisdiction to hear and determine this Petition.**

122. The 4<sup>th</sup> and 5<sup>th</sup> respondents' argument is that the issues raised by the petitioner are pre-election disputes that fall within the mandate of the 1<sup>st</sup> respondent.
123. On the other hand, and while conceding that there were early campaigns, the 1<sup>st</sup> respondent argued that it is not within its mandate to take any action against the offending parties and candidates. It was its position that this was the mandate of the 2<sup>nd</sup> and 5<sup>th</sup> respondents.
124. On its part, the 1<sup>st</sup> interested party argued that there are no valid and holding exceptions to the principle of non-justiciability and the doctrine of exhaustion, and therefore, this court is not vested with the requisite jurisdiction to deal with the petition.
125. As stated by the 4<sup>th</sup> and 5<sup>th</sup> respondents, the issue of a court's jurisdiction is well settled by the celebrated case of Owners of Motor Vessel "Lillian S" (*supra*) where Nyarangi JA held:-

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

126. As to the source of a court's jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & another* (*supra*) stated as follows: -

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It



cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ... where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

127. To determine this issue, it is important to examine the mandate and/or functions of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent is established under article 88 of the *Constitution* and its functions sets out under article 88(4) as follows:-

- (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
  - (a) the continuous registration of citizens as voters;
  - (b) the regular revision of the voters’ roll;
  - (c) the delimitation of constituencies and wards;
  - (d) the regulation of the process by which parties nominate candidates for elections;
  - (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
  - (f) the registration of candidates for election;
  - (g) voter education;
  - (h) the facilitation of the observation, monitoring and evaluation of elections;
  - (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
  - (j) the development of a code of conduct for candidates and parties contesting elections; and
  - (k) the monitoring of compliance with the legislation required by article 82(1)(b) relating to nomination of candidates by parties.

128. Further, section 4 of the *Independent Electoral and Boundaries Commission Act* ( IEBC Act) provides as follows:-

“As provided for by article 88(4) of the *Constitution*, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established



by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards in accordance with the Constitution;
- (d) the regulation of the process by which parties nominate candidate for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development and enforcement of a code of conduct for candidates and parties contesting elections;
- (k) the monitoring of compliance with the legislation required by article 82(1)(b) of the Constitution relating to nomination of candidates by parties;
- (l) deleted by Act No. 36 of 2016, s 30;
- (m) the use of appropriate technology and approaches in the performance of its functions; and
- (n) such other functions as are provided for by the Constitution or any other written law.”

129. Further still, part 3 of the Elections Act grants the 1<sup>st</sup> respondent power to initiate electoral process through publication of a notice for all positions in the General Elections. This is expounded by rule 12 of the Elections (General) Regulations by setting out the timelines for nomination of candidates by political parties for each contested position in the General Elections.

130. The notice also sets out the election period, the campaign period and other activities to be undertaken in regard to the said elections. These other activities include Party Nominations and dispute resolution during the nominations.

131. Section 2 of the Elections Act defines ‘election period’ as :-

“... the period between the publication of a notice by the Commission as such in the notice issued by the Commission for a presidential, parliamentary or county election under sections 14,16,17 and 19 and the Gazettement of the election results.”



132. As to what a ‘campaign period’ is, section 2 of the *Elections Act* defines it as:-

“...the period specified as such in the notice issued by the Commission in relation to an election.”

133. As to what entails a ‘campaign’, regulation 2 of the *Elections (General) Regulations* defines it as follows:.

“...the promotion of a candidate or political party for the purposes of an election during the campaign period.”

134. This court’s understanding therefore, is that the election period commences upon publication of the said notice by the 1<sup>st</sup> respondent. The court also acknowledges that during nomination, the aspirants obviously carry out some form of campaign in order to secure their nomination by their respective Political Parties.

135. According to the notice, the process of nomination is within the election period. In that regard, the 1<sup>st</sup> respondent has powers to act on any alleged violations of the law during the election period.

136. However, when it comes to alleged violations outside the election period, there is no law upon which the 1<sup>st</sup> respondent can act. Indeed, in the Press Release issued on 19 November 2021 (annexure AM3 to the affidavit sworn on 8 April 2022 by Dr Annette Mbogoh), the 1<sup>st</sup> respondent, through its Chairman, gave an advisory to political parties and aspirants who had engaged in early campaigns for the 2022 General Elections as follows:-

“The Commission has noted with concern sustained campaigns by some political parties and aspirants outside the legally prescribed period. Some of the campaigns have been characterised by blatant acts of violence. The Commission is empowered by the law to regulate campaigns upon commencement of the election period as outlined in the Elections Operations Plan (EOP). The early campaigns are undesirable and may upset the political environment in the lead up to the upcoming General election.

The Commission has developed the General Election timelines that are espoused in the EOP with an outline of dates and days for each election activity. Notably, it is the publication of the of the notice of the General Election that marks the commencement of the election period. Indeed, the *Election Offences Act* 2016 and the Electoral Code of Conduct are enforceable only within the said election period. [Emphasis added]

Consequently, the Commission urges all political parties and aspirants to refrain from engaging in early campaigns prior to the general election. Further the Commission requests all stakeholders in the electoral process to maintain a peaceful political environment conducive for secure and credible elections.

The Commission remains committed to deliver a free, fair and impartial 2022 General Election that meets the democratic aspirations of the people of Kenya.”

137. As regards the principle of non-justiciability, the High Court in *Kiriwa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR held that:-

“...the concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined.”



138. On the Political question doctrine, the court went on to say:- “The political question doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of Government. Such matters mostly deal with foreign relations and national security... According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the courts are doing in such situations is assigning discretion on the issue to another branch of Government...The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion.”
139. On the Constitutional-Avoidance Doctrine, the court stated: -
- “On Constitutional Avoidance Doctrine the principle is that a court will not determine a constitutional issue, when a matter may properly be decided on another basis.”
140. The court made reference to the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* pet 14A, 14B & 14C of 2014 of [2014] eKLR where it was held that the doctrine is at times referred to as the Constitutional-Avoidance Rule and that *Black’s Law Dictionary*, 10<sup>th</sup> Edition at page 377 defines it as: “The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.”
141. Further, on the doctrine of ripeness, the apex court held:-
- “ 107. The doctrine focuses on the time when a dispute is presented for adjudication. The *Black’s Law Dictionary* 10th Edition, [supra] at page 1524 defines ripeness as: The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.
108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.
- The doctrine of exhaustion is to the effect that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures...We find that no material was placed before this court to show that the petitioner failed to follow any other lawful process or engage other lawful bodies before coming to court. As earlier observed the petition raises issues which ought to be addressed by this court. Thus, the said doctrine cannot apply.”
142. Guided by the above decisions and having already found that there is no law governing campaigns outside the election period and campaign period, then the argument around doctrine of non-justiciability does not hold.
143. It is therefore this court’s constitutional duty to address any claims of violation of rights which cannot be handled by the 1<sup>st</sup> respondent or any other body. In that regard, we find that this court has



jurisdiction to hear and determine this petition by virtue of article 165(3) of the Constitution which provides that : -

“... Subject to clause (5), the High Court shall have—

- (a) ...;
- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; [Emphasis added]

#### **Whether the petition has met the threshold for a constitutional petition.**

144. The threshold for a competent constitutional petition was established in Anarita Karimi Njeru (*supra*) where the court stated:-

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

145. The principle in Anarita Karimi case (*supra*), was reaffirmed by the Court of Appeal in Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR when the court stated as follows: -

“It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.” [Emphasis added]

146. In this case , it is clear from the pleadings and the prayers sought that the petition raises constitutional issues and that the same are pleaded with reasonable precision for consideration by this court.

#### **Whether early campaigns violate constitutional rights as pleaded by the petitioner**

147. Election campaigns, by their very nature, have the potential to impact negatively on the citizens of this country. There is no doubt that the election period is characterised by heightened political tensions, suspicions, negative profiling, and general slowdown of the economy.

148. As such, this political season should not be a continuous situation. There is need for the country to take a break from political campaigns and concentrate on development of the nation and the wellbeing of its citizens.

149. It follows that incessant campaigns conducted outside the election period interfere with or compromise the citizens’ rights as guaranteed by the Constitution, which include;

#### **(a) Economic and social rights under article 43 of the Constitution**

150. The article grants every person the right to healthcare, accessible and adequate housing, freedom from hunger, adequate food of acceptable quality, education, social security, among others.



151. When people concentrate on political campaigns generally, they tend to forget about their duties and responsibilities. Whatever the political class gives out as tokens for attendance can never replace their normal earnings and this creates divisions in families. It also creates a culture of political dependency.

**(b) The right to equality and equal protection of the law under article 27(1) of the Constitution.**

152. When candidates campaign ahead of the official campaign period, they gain an unfair advantage through access to media or public platforms over candidates who abide by the law. Further, selective enforcement by authorities, where some candidates are allowed to campaign early without consequences, results in unequal application of the law.

153. Moreover, in the absence of explicit legal prohibitions, this de facto inequality disadvantages law-abiding candidates and distorts the fairness of the electoral process. Therefore, early campaigns, especially when unregulated or unevenly enforced, can amount to a violation of article 27 by denying equal protection, opportunity, and benefit under the law.

**(c) Freedom from violence under article 29(c) of the Constitution.**

154. Generally, political campaigns are conducted amidst a culture of impunity, resulting in for instance, clashes between rival supporters, intimidation of opponents or voters and even the use of hate speech or inflammatory rhetoric that may directly or indirectly incite violence.

155. This, in our view, results in violation of the spirit and intent of article 29(c) thus underscoring the need for proper regulation and enforcement to ensure that political processes remain free from any form of violence. It is our finding that early campaigns tend to exacerbate this situation to the detriment of the citizens.

**(d) Right to life under article 26(1) of the Constitution.**

156. Even though the Covid-19 pandemic is no longer a serious threat as it was at the time of filing this petition, the Public Health Protocols must not be ignored. In our view, incessant political campaigns pose a direct threat to life as these gatherings ignore public health protocols, leading to the potential spread of communicable diseases, thus endangering vulnerable populations.

157. Where the State organs permit, ignore, or inadequately address these risks, they violate their constitutional duty under article 26 to prevent foreseeable harm, thereby undermining the right to life.

158. In addition to these rights, there are national values and principles of governance enshrined in the Constitution that are negatively affected by non-stop campaigns conducted outside the election period. These include;

**(a) Sustainable development under article 10(2)(d) of the Constitution.**

159. These principles are anchored on article 22 of the African Charter on Human and Peoples' Rights which provide that: -

- “1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”



160. When political campaigns are carried outside the election period, they divert public resources and disrupt service delivery thus, undermining inclusive and equitable development.

**(b) Free and fair electoral processes under article 81 of the Constitution.**

161. The Article provides for the following principles—

- (a) freedom of citizens to exercise their political rights under article 38;
- (b) ...
- (c) ...
- (d) ...
- (e) free and fair elections, which are—
  - (i) ...
  - (ii) free from violence, intimidation, improper influence or corruption; ...

162. In our considered view, when political campaigns are conducted outside the officially regulated period, they give an unfair advantage to well-resourced or incumbent candidates, thus eroding transparency, fairness and impartiality.

163. Moreover, the absence of regulation increases the risk of violence, intimidation, and public disorder. As such, early campaigns directly conflict with the constitutional mandate for free, fair, and accountable elections, and strict enforcement of electoral laws.

**Whether the respondents failed in their respective legal and constitutional duties to act on early campaigns.**

164. It would be appropriate to set out the mandate of each respondent, and determine if any of them has failed in their duty.

165. In regard to the role of the 1<sup>st</sup> respondent, this court has already dealt with its mandate and function and therefore, there is no need to rehash the issue.

166. As for the 2<sup>nd</sup> respondent, this is an independent office established under article 157(1) of the Constitution. Its constitutional mandate is as set out under article 157(6) to (11). Further, article 157(4) grants the 2<sup>nd</sup> respondent the power to direct the Inspector-General of the National Police Service (5<sup>th</sup> respondent) to investigate any information or allegation of criminal conduct. Article 157(11) requires the DPP to have due regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process.

167. Further, the Office of the Director of Public Prosecutions Act, 2013 (No 2 of 2013), operationalises article 157 of the Constitution and further elaborates on the powers and functions of the office. In relation to the matter at hand, there is no material placed herein to show how the 2<sup>nd</sup> respondent failed to exercise its mandate.

168. Furthermore, that office, being an independent office, this court cannot interfere with its functions save in very exceptional circumstances. Indeed, in the case of Republic v Director of Public Prosecutions & 2 others ex parte Francis Ng'ang'a [2018] eKLR, the Court reiterated the DPP's independence and the high threshold required for a court to interfere with the exercise of prosecutorial discretion.



The judgment emphasized that judicial review of prosecutorial decisions is limited to cases of patent arbitrariness, illegality, or abuse of power.

169. Also, in *Mwangi v Director of Public Prosecutions & another; JNM (Interested Party)* (Petition E118 of 2023) [2024] KEHC 7282 (KLR) (14 June 2024) (Judgment), the court held as follows;

“The DPP has constitutional mandate and discretion to initiate, continue and, or terminate criminal prosecutions. (Article 157). In doing so, the DPP does not require consent or permission from any person or authority. The DPP must, however, exercise his powers in a manner that has regard to public interest, interests of administration of justice and the need to prevent and avoid abuse of the legal process.”

170. In view of the above, this court finds that the claim against the DPP fails.

171. As regards the 3<sup>rd</sup> respondent, it is established under section 33 of the *Political Parties Act*, 2011 pursuant to article 92 of the *Constitution*. It is responsible for the registration, regulation, monitoring, and supervision of political parties in Kenya.

172. Section 34 of the *Act* outlines the 3<sup>rd</sup> respondent’s duties and functions which include registering, regulating, monitoring, investigating, and supervising political parties to ensure their compliance with the *Act*. Additionally, the Registrar investigates complaints received under the *Act*, certifies independent candidates, and certifies party lists submitted by political parties for purposes of elections.

173. In regard to elections, section 27 of The *Elections Act*, 2011 requires political parties to submit their nomination rules to the IEBC, which are often first certified by the ORPP for compliance. Section 28 requires political parties to submit their membership lists to the IEBC for verification, a process heavily reliant on the register of members maintained by the Registrar.

174. In our view the 3<sup>rd</sup> respondent has no role to play in the regulation of campaigns, whether during or outside the election period.

175. As for the 4<sup>th</sup> respondent, the office is established under article 156(1) of the *Constitution* while article 156(4) outlines its functions. These include acting as the principal legal adviser to the national government and representing the national government in court or any other legal proceedings where the national government is a party, excluding criminal proceedings.

176. The holder of that office also performs any other functions conferred by an Act of Parliament or by the President. Further, article 156(6) mandates the 4<sup>th</sup> respondent to promote, protect, and uphold the rule of law and defend the public interest.

177. The *Office of the Attorney-General Act*, 2012 (No 49 of 2012), operationalises the constitutional mandate of the of the 4<sup>th</sup> respondent and provides for its administration . From the above provisions, it is our finding that there was no clarity on what the 4<sup>th</sup> respondent failed to do in regard to the petitioner’s alleged violations.

178. However, it is also our finding that as the legal adviser to the Government, the 4<sup>th</sup> respondent, has a duty to take steps on any gaps in the law, as we pointed out when addressing the role of the 1<sup>st</sup> respondent on early campaigns.

179. As regards the 5<sup>th</sup> respondent, the office is established under article 243(1) of the *Constitution* and under article 245(2)(b), exercises independent command over the National Police Service.

180. In regard to the matter at hand, section 105 of the *Elections Act*, 2011 mandates police officers to cooperate with the 1<sup>st</sup> respondent in carrying out its functions. Further, section 5 of the *Public Order*



Act (cap. 56) requires organisers of public meetings or processions to notify the regulating officer on such intent.

181. While recognising the right to peacefully assemble under article 37 of the Constitution, the 5<sup>th</sup> respondent has the duty to ensure the safety of all those in attendance. He also has the discretion to act on any credible information that points to a clear, present or imminent danger of breach of peace or public order and may stop any meeting when it ceases being peaceful as required by the Constitution. See Hussein Khalid & 16 others v Attorney General & 2 others [2017] eKLR.
182. In the present case, the incidents of violence cited by the petitioner occurred during the election period but before the campaign period set out in the notice of 20 January 2022. It has not been shown whether the conveners of the said meetings had notified the 5<sup>th</sup> respondent as required by the law. In addition, it is not shown that the persons responsible for the violence were reported so as to be arrested and prosecuted.
183. Thus, it our finding that there is nothing to show that the 5<sup>th</sup> respondent failed in his duty to act on the early campaigns as alleged by the petitioner.

#### **Whether public officers engaging in political activities are in violation of the Constitution.**

184. the Constitution recognises the need for public officers to keep away from political activities. Article 99(2)(a) thereof provides that a person is disqualified from being elected as a member of Parliament if the person is a State officer or public officer other than a member of Parliament.
185. Further, article 137(2)(b) provides that a person is not qualified for nomination as a presidential candidate if the person is a public officer or is acting in any State or other public office. There are also adequate statutory safeguards on the issue in regards to public officers namely:-
  - a. Section 43 of the Election Act.
  - b. Section 15(1) of the Election Offences Act
  - c. Section 23 of the Leadership and Integrity Act
  - d. Section 16 of the Public Officers Ethics Act
  - e. Section 12(1) of the Political Parties Act No 11 of 2011
  - f. Clause 24 of the Public Service Code of Conduct and Ethics, 2016.
186. This issue was dealt with by the Court of Appeal in Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) which held as follows.

“The importance of political neutrality and impartiality of public officers during the term of employment cannot be overemphasized. We therefore fully agree with the findings of Lenaola, J in the Charles Omanga petition on the necessity for public officers desirous of running for elective posts to resign in good time. The provisions of sections 43(5) and (6) also seek to promote, inter alia, the principle of good governance and the value of the integrity contemplated under articles 10(2)(c) of the Constitution.

It is also not lost on us that a general election has very strict timelines which political parties, the IEBC, aspirants and other stakeholders must adhere to in order to have free and fair election. One of the events that precedes a general election is the nomination of candidates by political parties pursuant to the provisions of section 13 of the Elections Act, 2011. It is



only after the nomination process has taken place that the IEBC can proceed to print the necessary ballot papers which contain information on the candidates vying for a particular seat in a particular electoral area. The resignation of public officers at least six months before the general election therefore ensures that the IEBC has sufficient time to undertake its processes and that the calendar of the general election is not disturbed and/or interrupted unnecessarily.

Our reading of articles 24 and 25 of the *Constitution* yields the interpretation that the political and or the labour rights of the State and/or public officers seeking to join elective politics are not absolute rights that cannot be limited pursuant to the provisions of article 25 of the *Constitution*. These rights can be limited by application of relevant laws provided that the limitation is reasonable and justifiable in an open and democratic society based on, inter alia, human dignity, equality, and freedom. In our view, the limitation of the right to equal treatment as set out in section 43(5) and (6) of the *Elections Act*, 2011 does not discriminate against State and/or public officer seeking to join elective politics and is therefore reasonable and justifiable.”

187. In *Charles Omanga & another v Independent Electoral & Boundaries Commission & another & another* [2012] KEHC 5457 (KLR), Lenaola J (as he was then) held as follows:-

“I am cognizant that this matter is of considerable interest to public officers who may wish to run for elective positions. Let this judgment sound as a preparatory gong to them; they cannot have one leg in public service and another at their elective area. The Law was designed to aid them make up their minds on where they want to maximize their energies. Seven months before the election date is sufficient time for them to prepare themselves to meet their fate at the election box. A longer period would be unreasonable and a shorter period would be more unreasonable.”

188. The law being as we have stated above, it is clear that Public Officers ought to keep off the realm of politics and if they do not do so, then they should face the consequences spelt out in the law or Code of Conduct.

#### **Whether this court can direct the 1<sup>st</sup> to 4<sup>th</sup> respondents to act as sought by the petitioner?**

189. Having established that the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents are independent offices established under the *Constitution* and relevant statutes, with specific mandates, this court cannot direct them on execution of their functions. The court’s duty is to provide checks and balances where it is shown that any of them has acted in contravention of the *Constitution* and the rule of law.

#### **Who bears the costs of this petition?**

190. By virtue of section 27 of the *Civil Procedure Act*, an award of costs is at the discretion of the court.

#### **What reliefs should this court grant?**

191. In conclusion, the following orders/ reliefs issue: -

1. A declaration be and is hereby made that carrying out of political campaigns outside the election period violates the right of equality and equal protection of the law, the right to life, freedom from violence, principle of impartiality, right to development, principle of rule of law and free and fair elections.



2. An order be and is hereby issued directing the Attorney General (4<sup>th</sup> respondent ) to take the necessary steps, within twelve (12) months, to enact a law governing political campaigns, in any form , conducted outside the election period.
3. For avoidance of doubt, all other prayers are declined.
4. This being a public interest matter, each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 9<sup>TH</sup> DAY OF JUNE, 2025.**

**HEDWIG ONG'UDI**

**JUDGE**

**PATRICIA GICHOHI**

**JUDGE**

**HESTON M. NYAGA**

**JUDGE**

In the presence of: -

DR Khaminwa for Petitioner

Ms. Nakore holding brief for Mr. Mwariri also for Petitioner.

Mr. Ojong'a for the 1<sup>st</sup> Respondent.

2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5 Respondents, and 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties- absent.

Court Assistants - Jamlick Lopedes and Shadrack Ruto

