



Guracha & 3 others v Guyo & 5 others; Jubilee Party of Kenya & another (Interested Parties) (Constitutional Petition E195 of 2023) [2024] KEHC 3161 (KLR) (Constitutional and Human Rights) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E195 OF 2023
J NGAAH, JM CHIGITI & LN MUGAMBI, JJ**

APRIL 4, 2024

BETWEEN

**GUYO ALI GURACHA 1ST PETITIONER
MOHAMED WARIO JATTANI 2ND PETITIONER
TEDDY M. MUTURI 3RD PETITIONER
STEVEN KIHONGE NDUNG’U 4TH PETITIONER**

AND

**ABDI GUYO 1ST RESPONDENT
HON. JOHN LOWASA 2ND RESPONDENT
UNITED DEMOCRATIC ALLIANCE 3RD RESPONDENT
REGISTRAR OF POLITICAL PARTIES 4TH RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 5TH RESPONDENT
THE HON. ATTORNEY GENERAL 6TH RESPONDENT**

AND

**JUBILEE PARTY OF KENYA INTERESTED PARTY
AZIMIO LA UMOJA ONE-KENYA COALITION INTERESTED PARTY**



RULING

1. This ruling is in respect of a preliminary objection filed by the 1st and 2nd respondents against the petitioners' petition dated 13 June 2023.
2. The petitioners describe themselves in the petition as “citizens of Kenya and registered voters” and that they are “members and/or supporters of Jubilee Party and the Azimio la Umoja Kenya One coalition”.
3. It is the petitioners' case that, Kenya, being a sovereign and a multi party democratic State founded on particular national values and principles of governance, election of an official to a public office establishes a sacred socio political contract that binds the elected official to serve the electors during a fixed term of office. To be precise, under Article 1 of *the Constitution*, the elected official serves in his office and exercises power as a delegate of his electors. If he is sponsored into office by a political party or coalition of parties, he is constitutionally obligated to remain a member of that party or the coalition of parties throughout his term of office. Further, he is constitutionally obligated to observe, promote and uphold the party's agenda, objectives, mission and vision during his term in office.
4. The petitioners aver that in light of the foregoing understanding, the 1st and 2nd respondents were respectively candidates for the County Governor and Deputy Governor of Isiolo County during the General Elections held on 9 August, 2022. They contested for these seats as members of Jubilee Party of Kenya. The objectives of this political party are set out in Article 4 of its Constitution as follows:
 - “ 1) To be a national party that promotes the unity of all the people of the Republic of Kenya.
 - 2) To form national and county governments that will at all times act in the best interests of the people of Kenya at national and county levels.
 - 3) To support, promote and facilitate devolution as a system of governance in Kenya.
 - 4) To promote vigilance in safeguarding the national interests of Kenya.
 - 5) To serve as a vigorous and conscious political vanguard for eradicating tribal, racial and social bigotry, economic discrimination, and exploitation and elimination of all forms of oppression.
 - 6) To implement political, economic, social and cultural policies, including Vision 2030 and future national visions and strategies for a modern, prosperous Kenya which will raise the standards of living for all Kenyans.
 - 7) To promote a national value system and national social transformation policies that will build a cohesive, stable and productive society.
 - 8) To conserve and protect the natural resources, environment and wildlife of Kenya for the benefit of present and future generations.
 - 9) To strive for East and Central African unity and also African unity and integration in every sphere of economic, social and political life based on economic prosperity, social justice, human dignity, and the sovereignty of all African states.



- 10) To encourage and subscribe to the need for the creation of space for groups and individuals in the enjoyment of their human rights, freedoms and liberties.
 - 11) To establish partnerships and I or associations with local, foreign and international organisations whose objectives are similar to those of Jubilee Party.”
5. Vide a Gazette Notice no. 7995, dated 1 July 2022, the 5th respondent published the names of the candidates for the County Governor seat for Isiolo County. Following the elections held on 9 August, 2022, the County Returning Officer, Isiolo County announced that the 1st and 2nd respondents had respectively been elected as the Governor and Deputy Governor of Isiolo County. These election results were subsequently published in Kenya gazette notice no. 9948 dated 23 August, 2022.
 6. The Petitioners aver that the Jubilee Party which nominated the 1st respondent to contest for the gubernatorial seat of Isiolo County is one of the corporate members of the Azimio la Umoja One Kenya Coalition under whose banner and manifesto all the Jubilee Party candidates campaigned. It is under the same platform that the 1st and 2nd respondents campaigned and were elected.
 7. It is their case that according to Articles 1, 38, 92, 103 of *the Constitution*, the election of the 1st and 2nd respondents as respectively the Governor and Deputy Governor of Isiolo County established a socio-political contract between themselves and the people of Isiolo County. Consequently, their election to these offices was on the understanding that:
 - “ a) The 1st and 2nd respondents would serve for five years as Governor and Deputy Governor of Isiolo County elected on the ticket of Jubilee Party and advance its policies, visions and interests.
 - b) In discharging their respective functions and powers as the Governor and Deputy Governor of Isiolo County, the 1st and 2nd respondents would implement the policies and priorities of manifesto of the Azimio la Umoja One Kenya Coalition.
 - c) As a member of the Council of Governors representing Isiolo County, the 1st respondent would promote the values, objectives, interest and policies of Jubilee Party and Azimio Coalition.”
 8. Accordingly, the election of the 1st and 2nd respondents as Governor and Deputy Governor of Isiolo County enjoined them to subscribe to Jubilee Party and Azimio Coalition and, in the same breath, prohibited them from supporting any other political party or political coalition including the United Democratic Alliance and the Kenya Kwanza Coalition during their five years’ tenure as the Governor and Deputy Governor of Isiolo County.
 9. That notwithstanding, the petitioners contend that on 2 June, 2023, the 1st and 2nd respondents defected from Jubilee Party and joined the United Democratic Alliance, the 3rd respondent in these proceedings. The defection, according to the petitioners, is a violation of the law on grounds that:
 - “ i. It constitutes a breach of public trust and the socio-political contract between the 1st and 2nd respondents, on the one hand, and their electors, residents of Isiolo County and Jubilee Party members, on the other hand, to serve and exercise power as delegates elected to uphold observe and promote the



governance agenda objectives, mission and vision of the Jubilee Party and Azimio Coalition.

- ii. The principles and sanctity of multi-party democracy enjoins all state organs and officials to desist from compromising, undermining or usurping the electoral positions garnered by political parties during elections.
- iii. The defection of the 1st and 2nd respondents constitute a blatant breach of the national values and principles of governance set out in Article 10 of *the Constitution* particularly the rule of law, democracy and participation of the people, inclusiveness, good governance, integrity, transparency and accountability.”

10. The Petitioners further contend that in defecting to the 3rd respondent, the 1st and 2nd respondents have violated Chapter Six of *the Constitution* on Leadership and Integrity in the following ways: -

- i. They have violated the public trust as elected officials by undermining the essence and sanctifying of multi-party democracy in Isiolo County.
- ii. The defection constitutes a gross demonstration of disrespect for the people particularly the members and/or supporters of Jubilee and Azimio Coalition who voted them into office.
- iii. The said defection has undermined public confidence in the integrity of the office of Governor and Deputy Governor of Isiolo County.
- iv. The said defection constitutes a conflict of interest between the individual right of the 1st and 2nd respondents to change their political allegiance and their public duty to observe the socio-political contract to serve and exercise power as elected delegates of the people sponsored into office by Jubilee Party and members and supporters of Azimio Coalition.

11. And by inducing, soliciting, aiding and abetting the defection of the 1st and 2nd respondents to the 3rd respondent, the latter has violated Articles 1, 3, 4, 10, 38, 73 and 91 of *the Constitution* in the following ways: -

- “i. The habit of poaching elected leaders to join the ruling Party amounts to blatant violation of the people’s sovereignty in the multi-party democratic State established by Kenya’s 2010 Constitution.
- ii. The 3rd respondent and its leaders have contravened their individual and collective obligation to respect, uphold collective obligation to respect, uphold and defend Kenya’s 2010 Constitution.
- iii. The 3rd respondent’s policy and schemes to “poach” elected leaders, coax, coerce and brainwash them to undermine their political parties amount to subversion of multi-party democracy in Kenya in violation of Article 4 of *the Constitution*.
- iv. The 3rd respondent and its leaders have violated the national values and principles of governance set out in Article 10(2) of *the Constitution* by undermining the people’s sovereignty to be served by elected officials who



are not its members and subverted multi-party democracy through systematic weakening of Jubilee Party and other political parties.”

- v. The 3rd respondent and its leaders have violated the political rights of voters in Isiolo County to be served on the basis of the mandate vested on the 1st and 2nd respondents during the General Election held on 9 August, 2022.
- vi. The 3rd respondent and its leaders have violated the public trust vested in them to exercise their power consistent with the sacred purposes and objects of *the Constitution* to uphold and respect the people's sovereignty and to protect the viability and existence of multi-party democracy in Kenya.
- vii. The 3rd respondents and its leaders have violated and basic requirement, for political parties set out in Article 91 of *the Constitution*, particularly: -
 - a) to promote and uphold national unity;
 - b) to respect the right of all persons to participate in the political process, including minorities and marginalized groups;
 - c) to promote the objects and principles of Kenya's 2010 Constitution and the rule of law.”

12. As far as the petitioners' grievances against the Registrar of Political Parties are concerned, the petitioners contend that by dint of Sections 9, 14, 21 and 34 of the *Political Parties Act*, 2011 as read with Articles 3, 90 and 91 of *the Constitution*, the Registrar of Political Parties is enjoined to ensure: -

- “i. The constitutions of all political parties require them to, inter-alia, uphold the Rule of Law, and recognize the validity of the multi-party constitutional democracy established pursuant to Article 4(1) of Kenya's 2010 Constitution.
- ii. No person shall enjoy the rights privileges and opportunities of membership in two or more political parties.
- iii. Elected persons, like the 1st and 2nd respondents, who resign from their sponsoring political parties, cease to hold the positions to which they were elected.
- iv. Commencement of the process for registration of the 3rd respondent (UDA) for its willful and unapologetic violation of the provisions of Article 91 of *the Constitution*.
- v. Notification to the 5th respondent - the IEBC - about the resignation of the 1st and 2nd Respondents from Jubilee Party.

13. However, contrary to what the petitioners believe are the Registrar of Political Parties' obligations, the petitioners contend that the Registrar of Political Parties has aided and abetted the violation of Articles 1, 4, 38 and 108 of *the Constitution* and the subversion of multiparty democracy in Kenya on grounds that:

- “i. Despite the provisions of Articles 3(1) and 10(1) of *the Constitution*, the Registrar of Political Parties has failed to uphold the will of the people of Kenya expressed during the General Election held on 9 August, 2022.



- ii. The Registrar of Political Parties failure to enforce the *Political Parties Act* has emboldened the 3rd respondent to engage in unprecedented and systematic subversion of multi-party democracy in Kenya over the last eight months, prior to the filing of the instant petition.
 - iii. In failing to ensure that the 3rd respondent adheres to the Code of Conduct for Political Parties set out in the First Schedule of the *Political Parties Act*, 2011, the Registrar of Political Parties has encouraged, aided and abetted the violation of the petitioners' political rights and those of other Jubilee Party members guaranteed by Article 38 of *the Constitution*.
 - iv. In order to promote, aid and abet her conspiracy with the 3rd respondent to subvert multi-party democracy and to displace Kenya's constitutional state, the 4th respondent has provided immunity from legal consequences to the 1st and 2nd respondents and other elected leaders of Jubilee Party who have resigned from their party but continue to hang onto their political seats sponsored by Jubilee Party during the General Election held on 9th August, 2022.”
14. The Petitioners further state that within the meaning of Article 103 of *the Constitution* as read together with Section 14 of the *Political Parties Act*, in defecting to the UDA Party, the 1st and 2nd respondents have ceased to be members of the Jubilee Party and, consequently, they are deemed to have resigned from their positions as Governor and Deputy Governor of Isiolo County.
 15. As a result of her actions and omission, the Registrar of Political Parties is unfit to continue holding the position of Registrar of Political Parties on account of her willful violation of Articles 1, 3, 4, 10, 73 and 75 of *the Constitution*.
 16. In view of the foregoing, the petitioners have petitioned this Honourable Court for the following prayers:
 - “
 - “a) A declaration be issued to declare that the 1st and 2nd Respondents resigned from their positions as governor and deputy governor of Isiolo County upon defecting from Jubilee Party to the United Democratic Alliance Party on 2nd June, 2023.
 - b) A declaration be issued to declare that in defecting from Jubilee Party to United Democratic Alliance the 1st and 2nd Respondents breached and served their socio political contract with the electors of Isiolo and members of the Jubilee party to continue serving as Governor and Deputy Governor of Isiolo County.
 - c) A declaration be issued to declare that within the meaning of Articles 1, 38 and 81 of *the Constitution* all elected officials are delegates and trustees of their electors in discharging their functions and duties in their respective positions during their terms of office.
 - d) An order of permanent injunction be issued to restrain the 1st and 2nd Respondents from discharging any function or duty as Governor and Deputy Governor of Isiolo County.



- e) A declaration be issued to declare that the United Democratic Alliance - the 3rd Respondent herein- violated Articles 1 and 4 of *the Constitution* in soliciting for, in aiding and abetting the defection of the 1st and 2nd Respondents from Jubilee Party of Kenya and Azimio la Umoja One Kenya Coalition to the United Democratic Alliance.
- f) A declaration be issued to declare that the Registrar of Political Parties - the 4th Respondent herein - has violated Article 3, 38 and 180 of *the Constitution* in condoning, aiding, abetting and accepting the registration of the 1st and 2nd Respondents as members of the United Democratic alliance before they have resigned from their positions as Governor and Deputy Governor of Isiolo County.
- g) A declaration be issued to declare that by dint of Articles 1, 4 and 38 of *the Constitution* an elected official sponsored by a political party cannot join another political party until he or she has resigned from his or her elective position.
- h) A declaration be issued to declare that the 1st and 2nd Respondents cannot lawfully resign from Jubilee Party to join the United Democratic Alliance unless and until they have resigned from their positions as governor and deputy governor of Isiolo County.
 - i) An order of mandamus to compel the 4th Respondent to notify the 5th Respondent about the resignation of the 1st and 2nd Respondent as members of the Jubilee Party.”
- j) An order of mandamus to compel the Independent Electoral and Boundaries Commission - the 5th Respondent herein to degazette the 1st and 2nd Respondent as the governors and deputy governor of Isiolo County.
- k) A declaration be issued to declare that the incumbent Registrar of Political Parties, Madam Anne Nderitu has violated Articles 1, 3, 4, 10, 38, 73 and 75 of *the Constitution* which renders her unfit to continue serving as the registrar of Political Parties.
- l) A declaration be issued to declare that the 3rd Respondent has violated Articles, 1, 3, 4, 38 and 91 of *the Constitution*.
- m) An order of mandamus to compel the 4th Respondent to commence an inquiry into the deregistration of the 3rd Respondent on account of its willful violation of Article of Article 91 of *the Constitution*.
- n) An order of compensation of the Petitioners for violation of their constitutional rights within the meaning of Articles 10, 27, 38 and 50 of *the Constitution*.
- o) Costs of this Petition be borne by the Respondents

17. The grounds of the preliminary objection against the petition have been framed, thus:

- “1. This Honourable Court lacks the requisite jurisdiction to hear and determine the instant petition and application on the basis of Section 40 of the *Political*



Parties Act; and exhaustion of remedies in compliance with Section 40 (2) of the Political Parties Act.

2. This Honourable Court lacks the requisite jurisdiction by dint of Articles 181 and 182 of the Constitution of Kenya, 2010 read together with Section 33 of the County Governments Act, 2012.
 3. The Application is bad in law for seeking to restrain the Governor and Deputy Governor from discharging their constitutional mandate.”
18. In the submissions in support of the preliminary objection, the learned counsel for the 1st and 2nd respondents has urged that the objection is two-fold; first, that the dispute between a political party and its members is a dispute suited for Political Parties Disputes Tribunal, in the first instance, as stipulated in section 40 and Section 40(2) of the Political Parties Act, 2011 and, second, removal of a Governor can only be pursued through the provisions of Articles 181 and 182 of the Constitution of Kenya, 2010 as read with Section 33 of the County Government Act, 2012.
19. Narrowing down to the question whether this Honourable Court has the jurisdiction to hear and determine the petition in light of Sections 40(1) of the Political Parties Act, 2011, it has been submitted on behalf of the 1st and 2nd respondents that the dispute is between a Political Party and its members.
20. To be precise, the issue is whether or not the 1st and 2nd respondents resigned from Jubilee Party and whether, by that fact, they ought to lose their seats as Governor and Deputy Governor of Isiolo County.
21. Jurisdiction by courts, it is submitted, is subject to the Constitution of Kenya, 2010, statutory law and by principles laid out in judicial precedents. On this note, the learned counsel for the 1st and 2nd respondents relied on the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1, in which Justice Nyarangi, JA held that the Court should down its tools immediately it finds it has no jurisdiction. Also cited for the same proposition is the Supreme Court of Kenya decision in Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others [2012] eKLR.
22. According to the 1st and 2nd respondents, under section 40 of the Political Parties Act, 2011, it is the Political Parties Disputes Tribunal that is seized of jurisdiction to determine disputes between the members of a political party; between a member of a political party and a political party; between political parties; between an independent candidate and a political party; between coalition partners arising out of party primaries and appeals from decisions of the Registrar under the Act.
23. It is urged that since the petitioners’ case falls squarely under Sections 40 (1) of the Political Parties Act, 2011, this Honourable Court cannot exercise its jurisdiction pursuant to Articles 23 as read together with Articles 165 of the Constitution of Kenya, 2010. The court, therefore, lacks jurisdiction to hear and determine the present petition in the first instance. The decision in Linus Kamunyo Muchina v Speaker Embu County Assembly Majority Leader – Embu County Assembly [2016] eKLR was also cited in support of the argument by the learned counsel for the 1st and 2nd respondents.
24. It is further urged that section 40(2) of the Political Parties Act provides that the Political Parties Disputes Tribunal shall not exercise its jurisdiction in relation to the said disputes unless the internal political party dispute resolution mechanism has been exhausted in the first instance. It follows that if the court determines this matter, it would infringe the doctrine of exhaustion of remedies and deny the 1st and 2nd respondents the alternative avenue of internal dispute resolution mechanisms.
25. It is also urged that where Constitution or a statute provides for a clear procedure to be followed to resolve a grievance, that procedure ought to be strictly followed. In the instant case, Section 40(1) of



- the *Political Parties Act* has laid down procedure that ought to be followed by the petitioners for redress of their grievances before the Political Parties Disputes Tribunal. This doctrine of exhaustion has been articulated by the Supreme Court of Kenya in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 Others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR.
26. Article 165 (6) of *the Constitution*, it is urged, gives this Honourable Court supervisory jurisdiction over tribunals, among them, the Political Parties Dispute Tribunal. According to section 40 of the *Political Parties Act*, the Tribunal is empowered to hear and determine disputes in the first instance. Thus, this Honourable Court lacks jurisdiction to hear and determine the present petition in the first instance.
 27. On the doctrine of exhaustion, the learned counsel for the 1st and 2nd respondents further relied on *Republic v Speaker, West Pokot County Assembly & 2 others Exparte David Pkeu Kapeliswa & Another; Kenya African National Union (Kanu) (Interested Party)* [2020] eKLR where the court upheld a similar preliminary objection and dismissed the petition for want of jurisdiction. And in the *Speaker of the National Assembly v James Njenga Karume* [1992] Eklr, it was held that that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
 28. It has also been urged that the petitioners have not demonstrated that they are members of the Jubilee Party and, therefore, entitled to present this dispute for determination before this Honourable Court. They cannot purport to bring these proceedings as members of the Jubilee Party before first satisfying the Court that they are bona fide members of the Party.
 29. It is also submitted that this Honourable Court's jurisdiction is ousted by the mandatory provisions of Articles 181 and 182 of *the Constitution* of Kenya, 2010 and Section 33 of the *County Governments Act* No. 17 of 2012. This submission is pegged on the 1st and 2nd respondents' understanding that that removal of a Governor is provided under Articles 181 and 182 of *the Constitution* of Kenya as read with Section 33 of the County Government Act No. 17 of 2012.
 30. Article 181 provides that a County Governor may be removed from office on the grounds of gross violation of *the Constitution* or any other law; where there are serious reasons for believing that the county governor has committed a crime under national or international law; abuse of office or gross misconduct; and/or physical or mental incapacity to perform the functions of the office of county governor. The 1st and 2nd respondents further submit that the petitioners' attempt to remove them as Governor and Deputy Governor of Isiolo County amounts to violation of Article 181 of Constitution and further the said attempts amount to supplanting the provisions of Article 181 and section 33 of the *County Governments Act*, 2012.
 31. The learned counsel for the 1st and 2nd respondents relied on the case of *George Obuya Owuor & 2 others v Zachary Okoth Obado & 3 others* [2017] eKLR where it was held that the resignation of Migori Governor from one party to another was not one of the grounds upon which the office of the Governor could become vacant.
 32. The 1st and 2nd respondents have also submitted that the petition has also failed to set out any constitutional violations that may have been violated or threatened through the alleged defection of the 1st and 2nd respondents from Jubilee Party to UDA. It is submitted that the principles of *Anarita Karimi Njeru v Attorney General* [1979] eKLR as restated in *Mumo Matemo v Trusted Society of*



Human Rights Alliance and Others [2013] eKLR espoused that a petitioner who seeks redress under *the Constitution* must state his claim with precision by reference to the provisions of constitutional rights violated and how they are violated.

33. If it was to be assumed that the petitioners have raised constitutional issues, the question is whether the due procedure for removal or impeachment of a Governor have been met. According to the 1st and 2nd respondents, this Honorable Court is not the right forum to initiate the removal or impeachment of a Governor and Deputy Governor.

The 4th respondent and 6th respondents supported the preliminary objection.

34. In his response to the submissions on behalf of the 1st and 2nd respondents, the learned counsel for the petitioners urged that the petition is pegged on Articles 1, 2, 3, 19, 20, 23, 103, 180(2), 258 of *the Constitution*. Other provisions of *the Constitution* which this Honourable Court has been called upon to interpret have been cited as Articles 1, 4, 10 27, 38 and 50 of *the Constitution*.

35. It is urged that the issues which the petitioners have raised, to wit, the subversion and compromise of multiparty democracy can only be determined in exercise of this Honourable Court's jurisdiction under Article 165 of *the Constitution*. As far as section 40 of the Political Parties Tribunal is concerned, it is the petitioners' position that the majority of the petitioners are not subject to the Political Parties Dispute Tribunal.

The 1st and 2nd interested parties opposed the preliminary objection.

36. We have considered both the oral submission and the submissions filed in support of and opposition to the preliminary objection. The first ground of preliminary objection is anchored on section 40 of the *Political Parties Act*. This section reads as follows:

40. Jurisdiction of Tribunal

(1) The Tribunal shall determine—

- (a) disputes between the members of a political party;
- (b) disputes between a member of a political party and the political party;
- (c) disputes between political parties;
- (d) disputes between an independent candidate and a political party;
- (e) disputes between coalition partners;
- (f) appeals from decisions of the Registrar under this Act; and
- (fa) disputes arising out of party nominations.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) or (fa) unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.



(3) A coalition agreement shall provide for internal dispute resolution mechanisms

37. The 1st and 2nd respondents' argument is that this provision of the law ousts the jurisdiction of this Honourable Court as the dispute before it is a dispute between members of a political party and hence subject to the Political Parties Disputes Tribunal.

38. A scrutiny of the 1st and 2nd respondents' pleadings leads us to the conclusion that this may not be a proper ground upon which this petition can be determined in time. We say so because, as much as these respondents are proceeding on the assumption that the petitioners are members of the Jubilee Party, they have in their submissions prevaricated or flip-flopped and denied that the petitioners are such members.

39. In particular, in paragraph 1.17 of the submissions filed on behalf of 1st and 2nd respondents, it has been submitted as follows:

“ 1. 17 The Petitioners have also not demonstrated to this Court that they are members of the Jubilee Party hence entitled to present this dispute for determination before this Court. They cannot purport to bring these proceedings as members of the Jubilee Party before first satisfying the Court that they are bona fide members of the Party.”

40. This submission betrays the 1st and 2nd respondents' stance that the petitioners are members of the same political party as the 1st and 2nd respondents. It also undermines the argument that the dispute before court ought to have been subjected to the political parties disputes tribunal on the basis that the petitioners, on the one hand, and the 1st and 2nd respondents, on the other hand, are members of the same party.

41. If we were to take the 1st and 2nd respondents at their own word, and we have no reason not to, the question of whether the 1st and 2nd respondents are members of the same party as the petitioners is a question of evidence which can only be interrogated at the hearing of the petition and not at the preliminary stage of these proceedings. This is because, while the 1st and 2nd respondents deny that the petitioners are members of the Jubilee Party, the petitioners have themselves categorically sworn on oath that they are members of that party.

42. In paragraph 3 of the affidavit of Guyo Ali Guracha sworn on 13 June 2023, in support of the petition, he has stated as follows:

“ 3. That my co-petitioners and I are members of the Jubilee Party of Kenya and Kenyan citizens. We are filing this Constitutional Petition in order to defend the Constitution of Kenya as declared by Article 3(2) of the Constitution.”

43. We need not belabor the point save to state that where there is a dispute as to facts, such facts cannot be a basis for a preliminary objection. The case in point on this proposition is the oft-cited *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA, as he then was, had this to say on what a preliminary objection entails:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation,



or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 paragraph B-C Sir Charles Newbold, P. stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...” (Emphasis added).

44. The first ground of the preliminary objection would fail for the reasons that the 1st and 2nd respondents appear to approbate and reprobate on the question of the petitioners’ membership of the Jubilee Party and, secondly, that fact may need to be ascertained.
45. The second ground of the preliminary objection is that this Honourable Court’s jurisdiction is ousted by the provisions of Articles 181 and 182 of *the Constitution* of and section 33 of the *County Governments Act*.
46. Perhaps, to understand the 1st and 2nd respondents’ objection on this ground, it is necessary that we reproduce these provisions of the law here; Articles 181 of *the Constitution* read as follows:

181.

- (1) A county governor may be removed from office on any of the following grounds—
 - (a) gross violation of this Constitution or any other law;
 - (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;
 - (c) abuse of office or gross misconduct; or
 - (d) physical or mental incapacity to perform the functions of office of county governor.
- (2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).

182.

- (1) The office of the county governor shall become vacant if the holder of the office—
 - (a) dies;
 - (b) resigns, in writing, addressed to the speaker of the county assembly;
 - (c) ceases to be eligible to be elected county governor under Article 180 (2);



- (d) is convicted of an offence punishable by imprisonment for at least twelve months; or
 - (e) is removed from office under this Constitution.
- (2) If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.
 - (3) If a person assumes office as county governor under clause (2), the person shall be deemed for the purposes of Article 180 (7)—
 - (a) to have served a full term as county governor if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under Article 180 (1); or
 - (b) not to have served a term of office as county governor, in any other case.
 - (4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.
 - (5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.
 - (6) A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180 (1).

47. Section 33 of the *County Governments Act*, cap. 265, on the other hand states as follows:

33. Removal of a Governor

- (1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the Governor under Article 181 of *the Constitution*.
- (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—
 - (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and
 - (b) the Governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.



- (3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—
 - (a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the Governor; and
 - (b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.
- (4) A special committee appointed under subsection (3)(b) shall—
 - (a) investigate the matter; and
 - (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the Governor to have been substantiated.
- (5) The Governor shall have the right to appear and be represented before the special committee during its investigations.
- (6) If the special committee reports that the particulars of any allegation against the Governor—
 - (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or
 - (b) have been substantiated, the Senate shall, after according the Governor an opportunity to be heard, vote on the impeachment charges.
- (7) If a majority of all the county delegations of the Senate vote to uphold any impeachment charge, the Governor shall cease to hold office.
- (8) If a vote in the Senate fails to result in the removal of the Governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the Governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.
- (9) The procedure for the removal of the President on grounds of incapacity under Article 144 of *the Constitution* shall apply, with necessary modifications, to the removal of a Governor.
 - (9A) Subsections (1) to (9) shall, with necessary modifications, apply to the removal from office of a deputy Governor.
- (10) A vacancy in the office of the Governor or deputy Governor arising under this section shall be filled in the manner provided for by Article 182 of *the Constitution*.

48. Article 181 prescribes instances when a governor may be removed from office while Article 182 provides circumstances under which the office of the Governor may become vacant. Section 33 of the *County Governments Act* prescribes the procedure to be followed in the quest to remove a Governor from office. This section gives effect to Article 181(2) of *the Constitution* which, as noted, tasks the



legislature with the duty of enacting legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1) of Article 181.

49. Of the fifteen prayers the petitioners have sought, there is none that specifically seeks removal of the governor; at least, as contemplated under Article 181(1) of *the Constitution*. The only prayer that comes close to touching the office of the Governor but is nowhere near seeking the removal of the Governor is prayer (d) which is to the effect that:

“d) An order of permanent injunction be issued to restrain the 1st and 2nd respondents from discharging any function or duty as Governor and deputy Governor of Isiolo County”.

50. We are of the humble view that an injunction sought in terms of prayer (d) in the prayers in the petition and a prayer for removal of the Governor on any of the grounds prescribed in Article 181(1) of *the Constitution* are two different things and one cannot be assumed to mean the other.

51. As far as we understand the petitioners, their case is that, by their conduct, the 1st and 2nd respondents have subverted *the Constitution* in various respects including undermining multiparty democracy which *the Constitution* espouses. If, at the close of the hearing of the petition the petitioners are vindicated in this regard or the court finds that the 1st and 2nd respondents have violated *the Constitution* in any way, that may be a ground for their removal, in which event, section 33 of the *County Governments Act* will kick in and the process of their removal may be commenced.

52. We think the 1st and 2nd respondents’ apprehension that the petitioners are seeking their removal from the office in this petition is misplaced. We are also of the humble opinion that the argument that this Honourable Court is deficient of jurisdiction to dispose of this petition on the ground that the petition seeks the removal of a governor and his deputy is premature and, at best, misconceived.

53. In any event, even if it was to be assumed that the petitioners have, in one of their fifteen prayers, sought for removal of the Governor, that alone would not be fatal to petition. The most the 1st and 2nd respondents can derive out of what they think are the petitioners’ misstep is to persuade the court to decline to grant that particular prayer; the entire petition would not fail at the preliminary only because the petitioners have prayed for an order that cannot be granted.

54. As has been noted, there are several other prayers that seek the pronouncement of this Honourable Court on what various provisions of *the Constitution* entail with respect to, inter alia, conduct of political parties and their members, particularly those of whom are elected to office on their respective parties’ tickets. Besides the diverse prayers in the petition, it is also worth noting that this petition is not just against the 1st and 2nd respondent. It is also against other parties and against whom the petitioners have sought specific orders.

For the reasons we have given, we think that the second ground of the preliminary objection is baseless and misconceived. It is hereby dismissed.

55. The third and final ground of the 1st and 2nd respondents’ preliminary objection is that “the application is bad in law for seeking to restrain the Governor and Deputy Governor from discharging their constitutional mandate.” If this ground was informed by the petitioners’ application for conservatory orders, it has been overtaken by events because the record shows that on 30 October 2023, Mr. Kibe, the learned counsel for the petitioners withdrew the application.

56. But even if it was targeted at the petition, it would not be a tenable ground upon which the petition can be struck out in limine. We think that the question whether an injunction can issue against the



1st and 2nd respondents if they are held to have violated *the Constitution* is subject to interpretation of this Honourable Court in exercise of its jurisdiction under Article 165 of *the Constitution*. The burden would be upon the 1st and 2nd respondents to convince the Court, at the hearing of the petition, that contrary to the petitioners' position that an injunction against the 1st and 2nd respondents is a plausible relief, it is, in law, in particular, under *the Constitution*, not a viable remedy to the petitioners' grievances.

57. For the reasons we have given, we dismiss the preliminary objection. The costs, if any, shall abide the outcome of the petition. It is so ordered.

SIGNED, DATED AND DELIVERED ON 4 APRIL 2024

NGAAH JAIRUS

JUDGE

JOHN CHIGITI

JUDGE

LAWRENCE MUGAMBI

JUDGE

