



**Gikenyi B & 9 others v Attorney General & 5 others; Koskei & 5 others (Interested Parties) (Petition E007 of 2024) [2024] KEHC 9508 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
PETITION E007 OF 2024**

**TA ODERA, J**

**JULY 9, 2024**

**IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF SECTIONS 8(3), 8(5), 8(6)(A), 8(8), 12A (1), 12A (4), 12A (6), 12A (7) AND 12A (8), NATIONAL GOVERNMENT COORDINATION ACT [CAP.127, LAWS OF KENYA, AS AMENDED BY NATIONAL GOVERNMENT ADMINISTRATION [AMENDMENT] ACT, 2024]**

**IN THE MATTER OF: ARTICLES 1,2,3(1), 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 47, 50(1), 52, 53, 54, 55, 56, 57, 73, 74, 75(1), 93, 94, 95, 129, 130, 131, 132, 135, 152 (1), 153, 155, 156, 159, 162(1), 165(1), (3) (A, B AND (D) (I –III), 230, 232(1 AND 2), 233(1), 234(1 AND 2), 236, 248, 249(1 AND 2), 253 258(1 AND 2 (C), 259(1) AND 260.**

**IN THE MATTER OF: ALLEGED VIOLATION OF OR THREATS OF VIOLATIONS OF RIGHTS OR FUNDAMENTAL FREEDOMS IN THE BILL OF RIGHTS UNDER ARTICLES 19,20,21, 24,25, 27, 28, 47,48, 52, 53,54,55, 56 AND 57 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: ALLEGED VIOLATIONS OF OR THREATS OF VIOLATIONS OF ARTICLES 1, 2[1,2,4 AND 6], 3,6, 10,73,74, 75[1], 93, 94,95,129,130,131, 132, 152(1), 153, 155, 156, 159, 230, 232, 234, 236, 248, 249, 259 AND 260 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: IN THE MATTER OF RULE 4, 10, 11, 13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL FREEDOMS) –HIGH COURT PRACTICE AND PROCEDURE RULES 2013)**

**IN THE MATTER OF: DOCTRINES OF BILL OF RIGHTS,  
CONSTITUTIONALISM, RULE OF LAW AND LEGITIMATE EXPECTATIONS**

**BETWEEN**

**DR. MAGARE GIKENYI B ..... 1<sup>ST</sup> PETITIONER  
ELIUD KARANJA MATINDI ..... 2<sup>ND</sup> PETITIONER  
BLAIR ANGIMA OIGORO ..... 3<sup>RD</sup> PETITIONER  
OKIYA OMTATAH OKOITI ..... 4<sup>TH</sup> PETITIONER  
PAULINE NDUATA KINYANJUI ..... 5<sup>TH</sup> PETITIONER**



PHILEMON ABUGA NYAKUNDI ..... 6<sup>TH</sup> PETITIONER  
SHALLUM KAKA NYAUNDI ..... 7<sup>TH</sup> PETITIONER  
JAMLICK OTONDI ORINA ..... 8<sup>TH</sup> PETITIONER  
LINAH NYABATE KINGSLEY ..... 9<sup>TH</sup> PETITIONER  
AGNES WAMBUA WANZUU ..... 10<sup>TH</sup> PETITIONER

**AND**

HON. ATTORNEY-GENERAL ..... 1<sup>ST</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
SALARIES AND REMUNARATION COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT  
SENATE ..... 5<sup>TH</sup> RESPONDENT  
CONTROLLER OF BUDGET ..... 6<sup>TH</sup> RESPONDENT

**AND**

FELIX K. KOSKEI ..... INTERESTED PARTY  
KATIBA INSTITUTE ..... INTERESTED PARTY  
LAW SOCIETY OF KENYA ..... INTERESTED PARTY  
KITUO CHA SHERIA ..... INTERESTED PARTY  
OPERATION LINDA JAMII ..... INTERESTED PARTY  
CONSUMER FEDERATION OF KENYA ..... INTERESTED PARTY

**RULING**

1. The petitioners herein filed the petition dated 30.5.24 in this court seeking that:
  - (i) That Sections 8(3), 8(5), 8(6), 8(8), 12A (1), 12A (2), 12A (4), 12A(6) 12A(7) and 12A (8), National Government Coordination Act [CAP. 127, LAWS of Kenya], are unconstitutional, null and void.
  - (ii) That upon making declarations as above, this Honourable Court be pleased to issue an order:
    - a. Voiding Sections 8(3), 8(5), 8(6)(a), 8(8), 12A (1), 12A (2), 12A(4), 12A(6), 12A (7) and 12A (8), National Government Coordination Act [CAP. 127, Laws of Kenya]. (b) THAT The court is pleased to issue an order of judicial review by way of Certiorari, quashing the purported appointment of the 1<sup>st</sup> interested party Mr. Felix K. Koskei or any other person as chief of staff and head of Civil Service.
    - b. (c) That The court is pleased to issue an order of judicial review by way of Prohibition, prohibiting respondents from appointing and/or purporting to make any appointments in regard to the positions of chief administrative secretary (CAS) and/or as chief of staff and head of civil service (d) that pursuant to order (c) above, the



court is pleased to issue an order of judicial review by way of Certiorari, quashing any appointments to the position of chief administrative secretary (CAS) which may occur during the hearing and determination of the petition (e) that any other order or/and modification of petitioners' prayer (s) which this honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole. (f) THAT This being a public interest Petition filed in defence of the rights of the people of Kenya each party to bear its own costs of Kenya.

2. The 1<sup>st</sup> respondent through the firm of triple O K LAW LLP advocates filed a notice of preliminary objection dated 5.6.24 under Article 159 (2)(a) &(c) of *the Constitution* of Kenya. Rules 3(2), (4) (5) (6) of *the constitution* protection and fundamental freedoms (2013) on the following grounds:
  1. The petitioners instituted Nakuru High Court Petition No. E14 of 2024 Dr. Magare Gikenyi Benjamin, Eliuid Karanja Matindi, Blair Angima Oigoro, Okiya Omutatah Okoit versus Hon Attorney General, Public Service Commission & 3 interested parties.
  2. The Nakuru petition was not certified as urgent by the duty court but fixed for mention on 24.6.24 before the High court.
  3. That the petitioners have now filed this petition on the same grounds as Nakuru petition E14 of 2024 which is scheduled for further directions on 24.6.24.
  4. That Pursuant to Rules 3(2),4 & 6 of *The Constitution* of Kenya (Protection of Rights & Fundamental, Freedoms) Practice & Procedure Rules 2013 otherwise known as Mutunga Rules, the petitioners and their advocates (if any) are enjoined to assist the Court to achieve the overriding objective including the obligation not to institute parallel proceedings in two different stations of the High Court.
  5. That pursuant to Article 159(2) (a) and (e) of *the Constitution* of Kenya 2010 as read together with Rules 3(2), (4), (5) & 8 of the said Mutunga Rules, the High Court has a duty to facilitate an expeditious, just and proportionate resolution of disputes brought before the Court including the duty to take steps to prevent abuse of the court process.
  6. That the said Nakuru petition has not been withdrawn under Rule 27 (1), (2) and (3) of the said Mutunga Rules.
  7. That the petitioner cannot institute parallel proceedings in two different High court stations raising the same cause of action court and that Sections 6 and 8 of the *Civil Procedure Act* bars such actions.
  8. That petitioners are guilty of forum shopping and the petition should be struck out in limine
  9. The Petition as presented offends the provisions of Rules 3(2), (4), (5) & 8 of *the Constitution* of Kenya (Protection of Rights & Fundamental, Freedoms) Practice & Procedure Rules 2013 otherwise known as Mutunga Rules and Section 6 & 8 of the *Civil Procedure Act*.
  10. That the petition is bad in law, frivolous, vexatious and an abuse of the process of the Court and is for striking out in limine.
3. Mr. Ochieng Oduol for the 1<sup>st</sup> respondent appeared herein alongside Miss Merisilla Oduor and Kelvin Odhiambo for the 1<sup>st</sup> interested party. Mr. Oduol submitted that there is a similar petition that is petition no. E014 of 2024 which is pending in Nakuru High court and that the same is yet to be withdrawn as required by the law. He submitted that this has been admitted. Further that the petitioners filed a notice of withdrawal of the same but have not exhibited a withdrawal order. It was



further submitted that the petitioners had informed the court of their intention to amend the petition only to come and file the instant petition in this court. Also that the all the respondents have their headquarters in Nairobi and so the choice of Kisii High Court is an abuse of the process of the court and forum shopping. Counsel urged this court to exercise its inherent powers in the interest of the public and administration of justice and strike out this parallel petition.

4. Mr. Sore for the National Assembly supported the Submissions by Mr. Oduol and added that if a party who fails to get conservatory orders in one court moves to another court or the said orders it amounts to forum shopping which would taint the face of Judiciary in the eye of the public and that a Constitutional petition is a public interest litigation and filing a notice to withdraw it is not enough.
5. Mr. Ogozo for the 2<sup>nd</sup> respondent i.e Public Service Commission supported the submissions by Mr. Oduol, Mr. Rana and Mr. Sore. He added that the petition offends the sub judice rule and that the petitioners have admitted pendency of the Nakuru petition. He said this may embarrass the judiciary as there is a possibility of two different decisions by the two courts. He seeks that the petition be struck out and the parties be referred back to Nakuru.
6. Mr. Rana for the Attorney general submitted that he supported the submissions of Mr. Oduol and Sore and stated that they have filed their application dated 6.6.24 herein to have the entire petition struck out as it offends the principle of sub judice as the Nakuru petition was for mention on 24.6.24. This court lacks jurisdiction to entertain this petition. The petitioner filed a reply. We submit that the withdrawal was never endorsed by the court. May the petition and the application be struck out. The same offends the fundamental rights and freedoms rules 2013.
7. Mr. Odanga submitted that a party is entitled to withdraw a matter from court. A notice to withdraw is a valid pleading and once filed the matter stands withdrawn. He sought that the petition herein be heard on its own merit.
8. Dr. Magare Gikenyi, the 1<sup>st</sup> petitioner herein submitted that he had read the application filed by the 1<sup>st</sup> respondent i.e Attorney General and he denied the truthfulness of the contents of the same together with the preliminary objection. He explained that they filed the petition in Nakuru and later realized that they needed to amend the same to add more parties and insert more legal provisions. He submitted that a petition can be withdrawn and filed a fresh and that under rule 8 of the Mutunga rules a matter is to be filed in a court where a violation is likely to have occurred. He said that the petition is already withdrawn and wondered why the respondents wanted to resuscitate it. The 1<sup>st</sup> petitioner emphasized that there is no specific place where the violation is likely to have occurred. Further that Nairobi and Kisii High courts are of equal status. Also that a petition is to be filed where the petitioner lives and that he is a resident of Kisii and hence he filed the petition in this court.
9. On the issue of similarity of the Nakuru petition and the instant one he told this court that the petitions are not the same. Also that the Parties and the legal provisions challenged are not the same. May the application be dismissed and we move to the main petition. The petition is within the law. He argued that the petition is within the law and that Article 159 (2) (d) provides that technicalities should not be dwelt upon.
10. Mr. Oduol in reply submitted that Rules 27(1) to (3) are clear that the process should not be abused and that withdrawal must be endorsed by the court to take effect. Also that formal order of Withdrawal has not been annexed and the Rules require that notice of withdrawal is filed and acted upon. Counsel submitted that the petitioners presented to the court a notice to amend the petition which is not a licence to transfer the petition in the manner that they have done. The respondent ought to have a fair access to the Court. Further the 1<sup>st</sup> petitioner argued that a petitioner in Turkana can file a petition



against respondents who are based in Nairobi in Turkana. Also that it is not denied that they filed the petition in Nakuru and they did not obtain conservatory orders and upon being ordered to serve they decided to file a similar petition in Kisii. He submitted that the petitioners deceived the court disguised form of deceiving that this was a new petition and applied for conservatory orders. Counsel submitted that the issue herein is not that of technicality and that litigation must be practiced by the rules. Also that a court of law is not an avenue for playing hide and seek. They need to take the court of law seriously. He prayed for dismissal of the petition with costs.

11. Mr. Wabwire State Counsel representing the Attorney General in response asked this court to take judicial notice that when the petition in Nakuru, was filed the petitioners were issued with directions. They did not withdraw the said petition before filing this one but rushed to file this petition while the other Nakuru one was pending. The notice of withdrawal was served upon the 1<sup>st</sup> interested party upon the petitioner knowing that notice of preliminary objection was filed.
12. Also that Dr. Magare lives and practices in Nakuru while Hon. Omutata is also a resident of Nairobi. These are matters within public knowledge. He Submitted that the petitioners are abusing the court process. Counsel submitted that the subject matter is in Nairobi and the amendments challenged occurred in Nairobi. Administration of justice is guided by procedures and administrative rules. That is why there is jurisdiction to avoid, embarrassment and overreaching. All the annexures indicate that the other cases were filed in Nairobi. May the petition be struck out with costs to the respondents.
13. The 3<sup>rd</sup> and 6<sup>th</sup> respondents, the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties were not represented herein.
14. I have carefully considered the notice of preliminary objection, the submissions by counsel for the respondents and interested parties. The issues for determination are follows:
  - a. Whether the notice dated meets the threshold for a preliminary objection.
  - b. Whether petition no. E014 of 2024 Nakuru High Court and the instant petition are similar.
  - c. Whether the petition no. E014 of 2024 Nakuru and the instant petition are a public interest litigation.
  - d. Whether the instant petition is subjudice the petition no. E014 of 2024 Nakuru High Court.
  - e. Whether the instant petition amounts to forum shopping and if so,
  - f. Whether the instant petition should be struck out.
  - g. Who bears the costs of these preliminary objection?
  - h. Whether this Honourable Court has the jurisdiction to hear and determine the instant petition.
15. On whether the notice of preliminary objection dated 5.6.24 meets the threshold of a preliminary objection. The leading authority on preliminary objections is the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

.....” 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.



The preliminary objection has listed the issue of sub judice as a similar case between the same parties is pending at Nakuru court and that this petition is contrary to section 6 & 8 of the Civil Procedure Act. section 6 and 8 of the Civil Procedure Act provides”

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Section

8. provides that - Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

12. It is thus clear that the said notice raises preliminary points of law which may finally determine the petition herein.

On whether petition no. E014 of 2024 Nakuru High Court and the instant petition are similar. I have stated the prayers in the instant petition herein above and I have also perused the said Nakuru High court Constitutional Petition No. E014 of 2024 annexed in the application dated 6.6.24 filed by the 1<sup>st</sup> respondent. I note that the prayers sought in the Nakuru petition E014 of 2024 are follows: “

- (i) That Sections 8(3), 8(5), 8(6), 8(8), 12A (1), 12A (2), 12A (4), 12A (6) 12A (7) and 12A (8), National Government Coordination Act [CAP. 127, Laws of Kenya], are unconstitutional, null and void.
- (ii) That upon making declarations as above, this Honourable Court be pleased to issue an order:
  - (a) Voiding Sections 8(3), 8(5), 8(6)(a), 8(8), 12A (1), 12A (2), 12A (4), 12A (6), 12A (7) and 12A (8), National Government Coordination Act [CAP. 127, Laws of Kenya].
  - (b) That The court is pleased to issue an order of judicial review by way of Certiorari, quashing the purported appointment of the 1st interested party Mr. Felix K. Koskei or any other person as chief of staff and head of Civil Service .
  - (c) That the court is pleased to issue an order of judicial review by way of Prohibition, prohibiting respondents from appointing and/or purporting to make any appointments in regard to the positions of chief administrative secretary (CAS) and/or as chief of staff and head of Civil Service.



- (d) That pursuant to order (c) above, the court is pleased to issue an order of judicial review by way of Certiorari, quashing any appointments to the position of chief administrative secretary (CAS) which may occur during the hearing and determination of the petition.
- (e) That any other order or/and modification of petitioners' prayer (s) which this honourable court may deem fit so as to achieve objectives of justice for majority of Kenyans as a whole.
- (f) That This being a public interest Petition filed in defence of the rights of the people of Kenya each party to bear its own costs. '3

16. It is clear that the prayers sought in both petitions are similar. In the Nakuru petition there were 4 petitioners, 3 respondents and 3 interested parties. The 5<sup>th</sup> to 10<sup>th</sup> petitioners were enjoined in the instant petition. 4<sup>th</sup> to 6<sup>th</sup> respondents and interested parties were also enjoined in the instant petition. It is very clear that the two petitions seek similar orders in form and substance save for the additional parties in the instant petition.

17. On whether the petitions herein are public interest litigation,

In the case of *Luka v Narok Bursaries Management Board & 6 others; Narok County Assembly (Interested Party) (Constitutional Petition E016 of 2023)* [2024] KEHC 2523 (KLR) (13 March 2024) (Ruling)

It was held "The High Court at Mombasa in Petition No. E017 of 2022 Ngoro Kayuga & Another vs. Mike Sonko Mbuvi Gideon Kioko & Others stated as follows: -

- 18. According to Black's Law Dictionary<sup>1</sup> 'Public Interest Litigation' means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.
- 19. In Public Interest Litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights. The proceedings in a Public Interest Litigation are intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory or sizeable segments of the society while owing to poverty, ignorance, social and economically disadvantages cannot themselves assert and quite often not even aware of those rights.
- 20. The jurisprudence coming through is that public interest litigation is not a party's private suit which he may withdraw or discontinue at whims. Any withdrawal or discontinuance of such proceedings as constitutional petitions, must be sanctioned by a Court. The requirement of leave of the court also protects public interest litigation from abuse by parties for ulterior or personal motives. For instance, Odunga JA always states that some parties file public interest litigation with the sole aim of having them dismissed, thereby blocking any other litigation on the subject on the basis of res judicata or the doctrine of functus officio. Others file public litigation cases for personal gain or to settle scores. And, the list could be long."



21. The petitioners pleaded that this is a public interest litigation and the respondents and interested parties admit this. There is no doubt that this is a public interest litigation where the petitioners pleaded infringement of the rights of the citizens of Kenya by enactment of the oppressive statute and creation of unconstitutional offices.
23. Whether the instant petition is subjudice the petition no. E014 of 2024 Nakuru High Court. Mr. Oduol lead counsel for the respondents and interested parties in arguing that the instant petition is sub judice the Nakuru Petition and that the notice of withdrawal of the petition filed by the petitioners is not a withdrawal as no evidence of its endorsement has been filed. Further that rule 27 (1) (2) and (3) of the of *the Constitution* of Kenya (Protection of Rights & Fundamental, Freedoms) Practice & Procedure Rules 2013 has not been complied with. Dr. Magare the 1<sup>st</sup> petitioner and Mr. Odanga for the 2<sup>nd</sup> interested party admitted that the said Nakuru petition existed but has since been withdrawn vide a notice of withdrawal of petition dated 30.6.24 which was filed in Nakuru court. They argued that the said Notice amounts to a withdrawal.

Rule 27 of the said Mutunga rules provides -(1) The petitioner may— (a) on notice to the court and to the respondent, apply to withdraw the petition; or (b) with the leave of the court, discontinue the proceedings. (2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision. (3) Despite sub-rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.

My reading of Rule 27 (1) (2) and (3) of the said rules is that a petitioner wishing to withdraw or continue his petition must apply to withdraw the same and the court may in its discretion allow or disallow the application. This is because Constitutional petitions are public interest litigation filed for the benefit of the public and any member of the public may choose to continue with the same once the petitioner opts to withdraw it. There is no evidence adduced to show that the intended withdrawal was endorsed by the court and 1<sup>st</sup> petitioner in his replying affidavit filed herein said that the matter was fixed for mention on 24.6.24. This is also the position held by the respondents and interested parties (save for 2<sup>nd</sup> interested party). I find that petition no. E014 of 2024 Nakuru High Court was filed before the instant petition and is still pending hearing and determination in that court.

Section 6 of the *Civil Procedure Act* provides that –

24. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
25. Section 8 provides that -
8. Bar to further suit

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR it was held: “23. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral &*



*Boundaries Commission & 16 others (Interested Parties)*<sup>[10]</sup> had occasion to pronounce itself on the subject of *sub judice*. It aptly stated: -

67. The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.
68. In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of *the Constitution*. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of *the Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of *the Constitution* on leadership and integrity.
69. In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of *the Constitution* as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.
70. In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of *the Constitution*. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of *the Constitution*.
71. In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of *the Constitution*, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.



72. We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of *the Constitution*, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of *the Constitution* and that Court has already been moved.
73. Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of *the Constitution*. This Reference is sub-judice and this Court will not usurp the High Court’s jurisdiction under Article 165 (3).”<sup>27</sup>. As the High Court of Uganda held in *Nyanza Garage v Attorney General*:<sup>[12]</sup>

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

“...we do not think that the word ‘matter’...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court...”

26. The High Court at Nakuru is a court of concurrent jurisdiction with this court and the cause action herein is also directly in issue in the Nakuru petition. The parties are also the same save for the 4<sup>th</sup> to 6<sup>th</sup> respondents and 4<sup>th</sup> to 6<sup>th</sup> interested parties in this petition. The danger of filing two petitions seeking the same orders in two courts of equal status is that the two courts may arrive at divergent decisions which cannot be enforced and in the end the Judiciary would be embarrassed as rightly submitted by respondents and interested parties. The petition herein is clearly sub-judice Nakuru High Court Petition No. E014 of 2024 which is still pending hearing and determination.
27. On whether the petitioners are on a mission to shop or a favourable forum, Mr. Oduol, Mr. Wabwire, Mr. Rana, Mr. Ogoso and Mr. Sore vehemently opposed the hearing of the petition in this court and told this court that upon the petitioners being denied conservatory orders in the said Nakuru petition and they sought time to Amend the petition but instead moved this court in this similar petition and that the choice of Kisii was clearly nothing but forum shopping. 1<sup>st</sup> petitioner submitted that it was within their right to file this petition in this court upon “withdrawing” the Nakuru petition and that he resides in Kisii. This was denied by Mr. Wabwire who said that it is common knowledge that the 1<sup>st</sup> and 4<sup>th</sup> petitioners reside and work in Nakuru and Nairobi respectively. The pleadings support this contention by Mr. wabwire. The matters raised in both petitions are matters which would affect all the citizens of Kenya. I agree with Dr. Magare that a petition of national interest can be filed in any High Court in Kenya since all the High Courts have concurrent Jurisdiction.
28. In any event Article 48 of *the Constitution* Provides for access to justice to all and hence the Judiciary has set up of High Courts in almost all the counties in the Country. Nevertheless, I do not see any



plausible reason as to why this petition was filed in this court while the Nakuru petition is still pending. It amounts to forum shopping.

29. The petition dated 30.5.24 is a gross abuse of the process of this court in view of the existence of Constitutional petition no. E014 of 2024 Nakuru and I proceed to strike it out.
30. On the issue of costs, this is a public interest litigation and so I order that each party will bear its own costs.

**T.A ODERA**

**JUDGE**

**9.7.24**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:**

Dr. Magare Gikenyi 1<sup>st</sup> Petitioner in person

Eliud Matindi 2<sup>nd</sup> petitioner in person

Wabwire: I am for 1<sup>st</sup> respondent

Sore: for 4<sup>th</sup> respondent hold brief for Mr. James Ochieng Oduol for 1<sup>st</sup> interested party

Ray Odanga for 2<sup>nd</sup> interested party

Court Assistant- Oigo

