



**Mohamed & 2 others v Ibrahim & 4 others (Petition 1BB of 2023)
[2024] KEHC 10683 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION 1BB OF 2023
JN ONYIEGO, J
SEPTEMBER 16, 2024**

BETWEEN

**AHMED DAIB MOHAMED 1ST PETITIONER
ADEN MOHAMED OLOW 2ND PETITIONER
ABDIRIZAK ZIYAD 3RD PETITIONER**

AND

**SAYTUN ABDULQANI IBRAHIM 1ST RESPONDENT
ETHICS AND ANTI CORRUPTION COMMISSION 2ND RESPONDENT
THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT
DIRECTOR IMMIGRATION SERVICES MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT 4TH RESPONDENT
REGISTRAR OF PERSONS 5TH RESPONDENT**

JUDGMENT

1. Pursuant to Articles 22, 165 and 258 of *the constitution*, the petitioners through the firm of Gichina Macharia, Matose & Co. Advocates instituted this suit by way of a petition dated 31-01-23 and later amended on 02-10-2023 seeking the following orders
 - i. An order directed to the 5th respondent to produce all registration records of the 1st respondent on the acquisition of his Kenyan Citizenship.
 - ii. A declaration be and is hereby issued that the 1st respondent is barred from holding any state office as prescribed under article 78(1) of *the constitution*.



- iii. A declaration be and is hereby issued that the 1st respondent was disqualified from being elected as a member of parliament under article 99(2) (c) of *the constitution*.
 - iv. An order of permanent injunction restraining the 2nd and 3rd respondents by themselves, agent, servants and/or any person whatsoever from clearing the 1st respondent as qualified to run for any elective seat.
 - v. A declaration be and is hereby issued that the 1st respondent is not eligible and qualified to vie as a candidate of any elective position to the office of a state officer.
 - vi. An order of certiorari to remove to this Honourable court to quash the registration of the 1st respondent as a Kenyan citizen by birth.
 - vii. Costs of this application be provided for.
2. The petition is anchored on grounds set out on the face of it and further amplified by the content contained in the annexed affidavit of Ahmed Daib Mohamed sworn on 31.01.2023 on his own behalf and that of Aden Mohamed Olow Abdirizak Ziyad and Mohamud Noor Bubow all claiming to be Kenyan citizens.
 3. It was averred that during the national general elections held on the 09.08.2022, the 1st respondent participated as a candidate by vying for the position of national assembly for Lagdera constituency in Garissa County. That despite being a British national by registration and a Somali national by birth born in Kismayo within Somalia Republic, the 2nd and 3rd respondents cleared him to run in the said general election.
 4. That the 1st respondent could not therefore hold a Kenyan citizenship under whatever reasons and that his participation as a candidate in the said general elections, was in violation of articles 78(1) and 99(2) (c) of *the constitution*. He deposed that the 1st respondent in purporting to hold a Kenyan citizenship while still holding a British citizenship with an origin from the republic of Somalia, is itself a threat to the establishment of *the constitution* hence the need for this court to grant the prayers sought.
 5. The 1st respondent who was said to be residing in Britain was served vide substituted service but nevertheless failed to file any response. The matter therefore proceeded ex parte against him.
 6. In response, the 2nd respondent through Mr. Abdirizack Abduba, an investigating officer working under the 2nd respondent filed an affidavit sworn on 05.04.2023 deposing that in the absence of any complaint on the 1st respondent's nationality, the 2nd respondent had no reason to make any adverse report or finding in preventing the 1st respondent from vying for the political seat.
 7. That the 2nd respondent did not violate the provisions of article 78(1) and (2) of *the constitution* regarding the suitability of the 1st respondent in vying for a political seat. It was urged that the prayer for a permanent injunction cannot issue for the reason that the 2nd respondent does not clear candidates but rather issues integrity verification reports to the 3rd respondent who has the sole mandate to register candidates for an election.
 8. The 3rd respondent on the other hand filed a notice of preliminary objection dated 18.09.2023 citing the following grounds:
 - i. This Honourable Court lacks the requisite jurisdiction to take cognizance, hear and determine the application and the petition in view of the provisions of article 88(4) (d) and (e) of *the constitution*, section 74(1) of the *elections Act* and sections 39 and 40 of the *Political Parties Act* which vests jurisdiction on the Independent Electoral & Boundaries Dispute Resolution



Committee and Political Parties Dispute Tribunal to hear and determine pre-election disputes regarding qualification of candidates, including citizenship.

- ii. This Honourable Court lacks the requisite jurisdiction to take cognizance, hear and determine the application and the petition in view of the petitioner's failure to demonstrate that he made a request for information on the 1st respondent's citizenship to the respondents in accordance with article 35 of *the constitution*, thus the petition and the application are both premature before this Honourable Court.
 - iii. This Honourable Court lacks jurisdiction to hear and determine this matter on account of the strict interpretation of article 23(3)(c) to which the petitioner relies on for his prayer for conservatory order yet he does not allege infringement of any right or fundamental freedom in the bill of rights, hence he is not entitled to any orders.
 - iv. This Honourable Court lacks jurisdiction to hear this matter on account of forum. The allegations raised by the petitioner do not involve infringement of rights. The issues ought to have been raised in the correct forum as set out in section 14 of the *Registration of Persons Act*. This is a case where *the constitution* stipulates that a dispute should be in essence resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.
 - v. This Honourable Court lacks jurisdiction to hear and determine this matter as the petition filed is fatally defective and raises no constitutional issues arising for determination as no right or fundamental freedom has been violated. It is therefore not a real constitutional petition since it did not set out precisely the provisions of *the constitution* alleged to have been violated and the manner of violation.
9. The 4th and 5th respondents in opposing both the notice of motion and petition filed joint grounds of opposition dated 07.07.2023 contending that strict interpretation of article 23(3)(c) requires that a relief for conservatory orders must be established through available prima facie evidence that a right or fundamental freedom as provided for in the Bill of Rights has been denied, violated or infringed or is threatened. In buttressing the fact that a petitioner must always demonstrate real danger so imminent and evident, true and actual and not fictitious, the petitioners relied on the case of *Wycliff Indalu Adieno vs Attorney General & 2 others* [2014] eKLR.
 10. That the petitioners have not met the threshold for grant of the sought orders as a prima facie case was not established. That there would be no prejudice or irreparable harm, damage or injury likely to be suffered if the orders sought herein are not granted. It was further argued that no evidentiary proof was shown that the grant of the orders sought would enhance constitutional values and objects specific to the rights and freedoms in the Bill of Rights. To that end, reliance was placed on the case of *Ahmed Isaack Hassan vs Law Society of Kenya Disciplinary Tribunal & 2 others* [2018] eKLR where the court was of the view that an applicant must establish that he will suffer irreparable loss if the proceedings before the tribunal are not stayed.
 11. In the same breadth, it was urged that the petitioners were unable to prove the nature and manner in which the 4th & 5th respondents allegedly violated their rights or any of the provisions of *the constitution* or any other written law. That the petitioners in seeking the court to compel the 5th respondent to produce information pertaining to the registration of the 1st respondent, failed to comply with the requirements provided for under section 8(1) of the *Access to Information Act* which requires any person who is seeking information to do so in writing with sufficient details and particulars to enable the public officer to understand what information is being requested.



12. It was contended that there was no evidence provided before this court to show that the said provision of law was complied with. In the end, it was urged that the petition is a nonstarter and thus deserves to be dismissed against the 4th and 5th respondents.
13. The suit herein was canvassed by way of written submissions.

Petitioners' submissions

14. The petitioners through the firm of GCM advocates LLP, appearing for the petitioner filed their submissions dated 16th day of February 2024 contending that during the 2022 general elections, the 2nd and 3rd respondents irregularly cleared the 1st respondent to vie for the Lagdera constituency parliamentary seat yet he was not qualified by virtue of holding dual citizenship as a Kenyan citizen, Somali and British national. That the 4th respondent is under obligation to clear the air on how the 1st respondent acquired Kenyan citizenship.
15. Counsel contended that the 1st respondent is not qualified to represent the people of Lagdera as he owes allegiance to another country. Learned counsel further contended that a party who is apprehensive that his rights are about to be contravened does not have to wait until the rights are actually infringed. In that regard, reliance was placed in the case of high court petition *no.628 of 2014* coalition for reform and democracy and others v the Attorney general where the court held that a party does not have to wait until a right or fundamental freedom has been violated or for the violation of *the constitution* to occur before approaching the court.
16. On the question whether the petitioners have capacity to sue or file this petition, counsel opined that under Article 22 and 265 of *the constitution* they are empowered to file on their own capacity or represent public interest.
17. To further buttress the position that a state officer should not hold dual citizenship, the court was referred to Article 78(1) & (2) of *the constitution* which provides that a person is not eligible for election or appointment to a state office unless the person is a Kenyan. It was contended that the 1st respondent is a British National by registration as well as a Somali by birth and a Kenyan by registration. To buttress that position, the court was referred to the case of Donald Kisaka Mwawasi v Attorney general & 2 others (2013) e KLR. Similarly, the court was referred to the case of Njau v Gedi & 2 others; United states Embassy as an interested party (2022) e KLR where the court disqualified the 1st respondent from vying for Fafi Constituency parliamentary seat in 2022 on account of being both a Kenyan and British citizen.
18. The court was urged to bar the 1st respondent from vying for any election position in future as he had failed to disclose his dual citizenship in the 2022 general elections.
19. Finally, the court was urged to revoke the 1st respondent's Kenyan citizenship under article 17 of *the constitution* on grounds that the 1st respondent obtained citizenship via fraud, concealment of material information and misrepresentation of facts.

2nd respondent's submissions

20. The 2nd respondent filed submissions dated 11-09-23 contending that article 78 (1) of *the constitution* sets out the eligibility criteria for leadership in respect to citizenship and further provides that a person can only be elected or appointed to a state office, if he is a citizen of Kenya. Further reliance was placed on sections 31(1) of the *Leadership and Integrity Act* which envisages that a holder of dual citizenship



may succeed in vying for an elective office. Counsel submitted that, in such an instance, such a person shall upon election or appointment officially renounce his citizenship before taking office.

21. It was contended that the 1st respondent unsuccessfully vied for the position of member of parliament, Lagdera Constituency, Garissa County in the general elections held on 09.08.2022. That in as much as the 1st respondent submitted his self-declaration form, he did not indicate his passport number nor did he disclose that he held dual citizenship. That in the absence of any complaint on the 1st respondent's nationality, the commission had no reason to make an adverse report against the 1st respondent.
22. That in the circumstances of this case, the 1st respondent did not succeed in the said general election and further, he was neither a state nor public officer at the time of vying for the general election. It was counsel's opinion that the commission cannot be condemned for having violated the provisions of article 78(1) and (2) of *the constitution*. Further reliance was drawn from the case of Bishop Donald Kisaka Mwawasi vs Attorney General, IEBC & C.I.C. [2014] eKLR where the Court of Appeal observed that:

“...article 78(2) of *the constitution* was interpreted by the parliament to mean that a dual citizen is eligible to stand for election but upon election, cannot hold office unless and until he voluntarily and officially renounces citizenship of the other country according to the law...”.
23. In the end, this court was urged that the commission did not violate the provisions of article 78(1) and (2) of *the constitution*. That for the reason that the commission does not clear candidates but only issues an integrity verification reports to the I.E.B.C. and the fact that a holder of dual citizenship is eligible to seek for nomination and vie for an elective post and not to mention that, the 1st respondent was unsuccessful in his bid, the orders sought herein ought not issue.

3rd respondent's submissions

24. The Firm of Garane & Somane Advocates representing the 3rd respondent filed submissions dated 21.04.2024 wherein the following issues were raised for determination:
 - i. Whether this Honourable Court has jurisdiction to entertain this petition?
 - ii. Whether the petitioner has discharged the evidential burden required in a constitutional petition?
 - iii. Whether a holder of a dual citizenship is eligible to seek nomination for election as a member of parliament.
25. On the first issue, it was urged that the court lacks jurisdiction as reference was made to article 88(4) (d) and (e) of *the constitution* and section 74(1) of the *Elections Act* which vests jurisdiction on the 3rd respondent to hear and determine pre-election disputes. That the suit herein is a pre-election dispute disguised as a human rights petition. Reliance was placed on the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR where the Supreme Court held that a court's jurisdiction flows from either *the constitution* or legislation or both.
26. Counsel contended that not all disputes where a party feels that a breach of a statutory right ought to be given audience in a constitutional and human rights court are arguable before a constitutional court. That the avenue prescribed by the law dictates that the petitioner ought to have raised his petition either before the Political Parties Tribunal or before the IEBC Dispute Resolution Committee. To that end, support was drawn from the case of Godfrey Paul Okutoyi & others vs Habil Olaka & another [2018]



eKLR where Chacha J. stated that ...rights conferred by statute are not fundamental rights under the Bill of Rights and therefore, a breach of an ordinary statute is addressed through a court of law in the manner allowed by that particular statute or in ordinary suit as provided by procedure.

27. The petitioner was faulted for having failed to raise the issues herein while the IEBC Dispute Resolution Committee was still sitting but only did so after the deadline had passed for lodging complaints before the IEBC Dispute Resolution Committee. To that end, reliance was placed on the case of Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others; Ahmed Ali Muktar (interested party) [2019] eKLR where the court was of the view that...where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC such dispute shall not form a ground in a petition to the election court. That the High Court can only exercise its supervisory role over the 3rd respondent after it has heard and determined such a matter.
28. On the second issue, counsel submitted that the instant petition is defective and misconceived as the same did not raise any constitutional limb which was allegedly contravened. Additionally, the petitioner did not show how he or other citizens would be prejudiced. As such, the petitioners failed to show the specific rights that stood to be violated as the said grounds which they had relied upon were poorly interpreted and misguided. The 3rd respondent relied on the case of Mustafa Tobiko Ole Tampul vs Hassan Ole Naado & 17 others [2021] eKLR to support the position that it is trite that a party invoking article 22(1) of the constitution has to show how the alleged rights have been infringed.
29. On whether a holder of a dual citizenship is eligible to seek nomination for election as a member of parliament, it was urged that article 78(2) is specific on the electoral rights of a state officer holding dual citizenship. That the proscription was not absolute. That the same was exempted by article 78(3) (b) if the person is made a citizen of another country by operation of that country's law without ability to opt out.
30. It was further contended that, article 99 does not expressly disqualify a dual citizen from vying as a member of parliament. However, by article 99(2) a person is disqualified if he is a state officer or a public officer other than a member of parliament. That the same means that a person who is already a state officer or public officer is ineligible for election. Reliance was placed on the case of Bishop Donald Kisaka Mwawasi vs Attorney General & 2 Others (supra) as it was held that a dual citizen is eligible to seek nomination and also eligible to be elected as a member of parliament.
31. In conclusion, this court was urged to dismiss the suit herein with costs to the respondents as the suit raised pre-election disputes disguised as a human rights petition.

Supplementary submissions by the petitioner.

32. The petitioner filed supplementary submissions dated 21.05.2024 and further submitted in regards to three issues to wit:
 - i. Whether this court has jurisdiction to entertain this matter?
 - ii. Whether the petitioners have discharged the evidential burden required in a constitutional petition?
 - iii. Whether the 1st respondent is eligible to seek nomination for an elective position.
33. On the first issue, it was submitted that this court is clothed with the requisite jurisdiction to hear and determine this matter. Further, that the petition was lodged after the elections were concluded as the same sought a declaration that the 1st respondent be barred from running for a public office as the same



had an effect on infringing upon the petitioners' rights. That the petition raised cogent grounds which demonstrated that the petitioners' rights were violated by the 3rd respondent. Reliance was placed on the case of *Njau vs Gedi & 2 Others and United States of America Embassy in Kenya & 3 Others* (Interested parties) Constitutional Petition *10B of 2022* where the court stated that:

“in as much as the issue of qualification in terms of citizenship of a nominee ought to have been considered at the clearance stage by the 2nd respondent, the same was no less a constitutional question, and if for whatever reason the 2nd respondent or any other organs failed to diligently consider the issue or did not fully consider the issue leading to a violation of *the constitution*, the court had the duty to consider any such violation, uphold and safeguard *the constitution*”.

34. On whether the petitioners discharged the evidential burden required in a constitutional petition, counsel urged that the same was established. Reliance was placed on the case of *Anarita Karimi Njeru vs Republic* [1979] KLR 154 where Trevelyan and AR Hancox JJ stated that the same must set out with a degree of precision that which one complains of and the provisions alleged to have been infringed and the manner the said rights have been infringed. As a response, it was submitted that the petition set out its basis of grievances and facts of the case in a detailed manner and therefore, it would be fallacious to argue that the threshold set in the case of *Anarita Karimi Njeru vs Republic*(supra) was not met.
35. On the second issue, it was submitted that as argued by the respondents, the case of *Bishop Donald Kisaka Mwawasi vs Attorney General & 2 Others* (supra) is distinguishable from the case herein since in the said case, the issue for determination was in relation to dual citizenship whereas the case before this court deals with the fact that the 1st respondent possess three nationalities. That as a consequence of the foregoing, the 3rd respondent ought not to have cleared the 1st respondent to run in the election. In the end, it was urged that the suit is properly before this court and as such, the same be allowed as prayed.

Analysis and determination.

36. The Court has carefully read and considered the petition herein, the preliminary objection by the 3rd respondent, the responses and the written submissions by the parties and finds. Issues that crystalize for determination are as follows:
- i. Whether the petitioners have legal capacity to bring this suit.
 - ii. Whether the petition herein meets the threshold of what constitutes a constitutional petition.
 - iii. Whether the preliminary objection herein is merited.
 - iv. Whether the orders sought in the petition ought to issue.
 - v. Whether the 1st respondent should be stripped of Kenyan citizenship.

Whether the petitioners have legal capacity to file this suit

37. In filing this petition, the petitioners described themselves as Kenyan citizens whose interest is to safeguard, protect, uphold, and defend *the constitution* hence the locus standi to sue. It is the petitioners' contention that the 1st respondent was irregularly cleared by the 2nd and 3rd respondents to vie for the parliamentary seat Lagdera constituency contrary to Article 78 of *the constitution* yet he holds three nationality status being a Kenyan, Somali and British.
38. This suit has been brought pursuant to among other provisions article 22 of *the constitution* which provides that;



22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
- (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
39. Article 258(1) further provides that every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. This position was well espoused in the case of Benjamin Munywoki Musau v Daniel Mutua Muoki & 2 others (2013) e KLR
40. From the two provisions above, any person can move the high court seeking a declaration that his constitutional rights have been infringed or are about to be infringed or that *the constitution* has been infringed or contravened or is threatened with contravention. In this case, the petitioners are claiming that *the constitution* has been contravened by the 2nd and 3rd respondents by irregularly clearing the 1st respondent as a parliamentary candidate during the 2022 general elections while he was not eligible under article 78 of *the constitution*.
41. Indeed, *the constitution* is clear that any Kenyan citizen can sue if *the constitution* is contravened or is threatened with contravention. It is my conviction that the petitioners have locus to sue to protect contravention of *the constitution*. Whether they will succeed or not is a matter of evidence.

Whether the petition herein has met the threshold of a constitutional petition.

42. It is trite that for a petition to meet the threshold of what a constitutional petition should be, the petitioner must prove with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they have been infringed. See Anarita Karimsi Njeru v Republic (Supra).
43. In the instant case, the petitioners have specified the specific provision alleged to have been contravened, and the manner in which it was infringed. To that end the petition herein has met the threshold required in filing a constitutional petition.

Whether the preliminary objection herein is merited.

44. The next question is the preliminary objection challenging this court's lack of jurisdiction in entertaining the petition. Among the grounds relied on is the claim that; the cause of action is spent as the 2022 elections are over and the 1st respondent was not elected. Secondly, that if there is any cause of action, then, it ought to go through an internal dispute resolution mechanism within the party and thereafter go through the political parties' disputes tribunal or through the 3rd party (IEBC).
45. This court is being asked to strike out the petition at the preliminary stage on those grounds and a void the stress of determining the entire petition. What is a preliminary objection?



46. The case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:
- “---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.
47. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. Indeed the locus classicus case on the question of jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (LTD(Kenya)(1989)KLR where the Court 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
48. In my humble understanding and from the reading of the petition herein, the petition is hinged on the fact that during the 09.08.2022 general elections, the 1st respondent participated as a candidate by vying for the position of national assembly for Lagdera constituency in Garissa County. That despite being of British national with origin in Kismayo within Somalia Republic, the 2nd and 3rd respondents cleared him to run in the said general election.
49. Thus, the orders sought herein among others were to the effect that the 1st respondent be disqualified from being elected as a member of parliament under article 99(2) (c) of *the constitution* and further, a permanent injunction restraining the 2nd and 3rd respondents by themselves, agents, servants and/ or any person whatsoever from clearing the 1st respondent as qualified to run for any elective seat in the future.
50. In recognition of the orders sought by the petitioners, it is my humble view, that the same questions the nomination and/or qualification of the 1st respondent to vie for the Lagdera parliamentary seat in Garissa County. As such, it is clear that what is being challenged in this petition is an action emanating from a past event or process of the 1st respondent seeking to vie for the position in question. It is also speculative in the sense that it seeks to bar the 1st respondent from contesting in any future elections.
51. The 2nd respondent was of the view that their mandate was merely advisory on whether the 1st respondent had any integrity issues and not to clear him. I agree with the 2nd respondent that there is no law requiring the 2nd respondent to bar an aspiring candidate of an elective position on account of nationality. In any event, there was no proof of any objection having been filed against the 2nd respondent’s clearance of the 1st respondent.
52. In short, I do not find any reasonable cause of action against the 2nd respondent as their role was merely advisory based on the information placed before them. If it later emerges like it is being claimed in this case that the 1st respondent made a false declaration by concealing material information regarding his dual or multiple citizenship, then, the 1st respondent should be prosecuted for making such false declaration.



53. The jurisdiction of the High Court to adjudicate on matters of and concerning *the Constitution* is wide. In relation to the petition before this court, Article 165(3) provides, in part, as follows:
- 165(3) 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;
 - (c) ---
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of (i) the question whether any law is inconsistent with or in contravention of this constitution.
54. A reading of this Article confirms the petitioner’s position that this court has unlimited jurisdiction in both criminal and civil cases. While this court takes cognizance of this fact, the issue before it is whether the court can grant the reliefs sought.
55. It is trite that the jurisdiction of the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution* is not generally lost in election matters simply because an election has taken place. That jurisdiction must always be retained where appropriate in order to uphold and preserve the authority of *the Constitution*, in the event of the occurrence of what the Supreme Court termed as “certain tragedies”. [See Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others Ahmed Ali Mukhtar (Interested Party) (2019) eKLR.
56. It was submitted that the petitioner did not exhaust the existing alternative remedies as the same was based on the fact that despite the above provisions of Article 165(3) (6), the petitioner chose not to utilize the avenue provided in Article 88(4) by moving the 3rd respondent through its Dispute Resolution Committee for resolving any disputes arising from nominations and/or disqualifications thus, failing to exploit the possible avenues to solve the dispute herein before approaching this court.
57. The aforesaid process is underpinned by Article 88(4)(e) and Section 74 of the *Elections Act* which provide as follows:
- 88(4)-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—(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.
58. The aforesaid Article is restated in Section 74(1) of the *Elections Act* as follows:
- 74(1) Pursuant to Article 88(4)(e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to and arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
59. The aforesaid provisions and the primacy of the mandate of the IEBC to resolve pre-election disputes has been the subject of consideration by the Supreme Court. In Hon. Mohamed Abdi Mohamud vs Ahmed Abdullahi and others SCK Pet. No 7 of 2018 [2019] eKLR, the Supreme Court affirmed the jurisdiction of IEBC under Article 88(4)(e) as follows:



- (68) “So as to ensure that Article 88(4)(e) of *the Constitution* is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election court under article 105 of *the Constitution*, the court developed the following principles.
- i. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
 - ii. Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, such dispute shall not be a ground in a petition to the election court;
 - iii. Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;
 - iv. Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court;
 - v. The action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution*, even after the determination of an election petition;
 - vi. In determining the validity of an election under article 105 of *the Constitution*, or Section 75(1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election”.
60. In the case herein, it is my humble consideration that the petitioners ought to have properly moved the 3rd respondent in order to interrogate their case at the opportune moment which in this case was the 2022 general elections. That for the petitioners to have a reprieve before the court herein, the 3rd respondent ought to have pronounced itself prior and the decision reached thereby would be the subject for this court’s interrogation and/or determination by way of appeal or Judicial Review.
61. In reference to the above, this court adopts the determination reached by the court in the case of *Okoiti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Parties) (Constitutional Petition E090,E168,E221,E230,E234,E249, E017,E109 & E010 of 2022 (Consolidated)) [2022] KEHC 3209 (KLR) (Constitutional and Human Rights)* in which Majanja, Mwita and Thande JJ extensively explored; disputes related to or arising from nominations; the body with jurisdiction to address such issues; the doctrine of exhaustion of administrative remedies; whether filing a petition before the High Court revolving around electoral disputes relating to or arising from nominations before the dispute had been determined by IEBC’s Dispute Resolution Committee was an infringement of the doctrine of exhaustion of administrative remedies in relation to the – *Constitution of Kenya, 2010* Article 88(4)(e) and *Elections Act*, No. 24 of 2011.



62. That going by the above reasoning, pre-election disputes such as those regarding suitability and eligibility for nomination of candidates, must be resolved by the IEBC in the first instance. It is trite that the High Court's jurisdiction can only be triggered once the IEBC makes a decision on the issue. [Also see *Silverse Lisamula Anami & Another v Independent electoral and Boundaries Commission Petition 30 of 2018* and *George Mike Wanjohi v Steven Kariuki & 2 others* SC Petition No. 2 A of 2014. eKLR].
63. In applying the above principles to the case at hand, it is my finding and holding that the 3rd respondent's internal dispute resolution mechanism ought to have been followed and allowed to run its full course. The jurisdiction of this court ought not be invoked until that process is exhausted. In my view, the suit herein is addressing a past event which is spent and this court cannot reopen it.
64. On the other hand, this court cannot issue prospective or speculative orders to stop an imaginary future event. Nobody knows whether the 1st respondent is going to vie in the next general election so as to issue an injunction. If by any chance he does, the suit would have crystalized to call for litigation against such intention or clearance if any or even election. Had the 1st respondent been elected while holding dual citizen or multiple and failed to renounce the same, this court would have definitely and without hesitation moved to issue a declaration over a contravention of *the constitution*.

Whether the reliefs sought can issue.

65. The crux of the matter is the question whether the 1st respondent was properly cleared by the 3rd respondent to run for the Lagdera parliamentary seat on account of being a holder of Kenyan, Somalia and British citizenship contrary to section 78 of *the constitution*. For avoidance of doubt, Article 78 does provide as follows;
- (1) A person is not eligible for election or appointment to a State office unless the person is a citizen of Kenya.
 - (2) A State officer or a member of the defence forces shall not hold dual citizenship.
 - (3) Clauses (1) and (2) do not apply to—
 - (a) judges and members of commissions; or
 - (b) any person who has been made a citizen of another country by operation of that country's law, without ability to opt out.
66. The above quoted provision provides that for one to be eligible for election, he must be a Kenyan citizen. There is no dispute that the 1st respondent was a Kenyan citizen as at the time he vied for the parliamentary seat. The above provision also prohibits a state officer from vying for an elective office. In this case, the 1st respondent was not a state officer nor a public officer hence not barred to contest. To that extent, article 78 of *the constitution* is not applicable as only non-citizens of Kenya are barred.
67. Equally, Article 99 of *the constitution* does provide qualifications for one to be elected as a member of parliament as follows;
99. (1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—
- (a) is registered as a voter;
 - (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and



- (c) is nominated by a political party, or is an independent candidate who is supported—
 - (i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or
 - (ii) in the case of election to the Senate, by at least two thousand registered voters in the county.
- (2) A person is disqualified from being elected a member of Parliament if the person—
 - (a) is a State officer or other public officer, other than a member of Parliament;
 - (b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
 - (c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;
 - (d) is a member of a county assembly;
 - (e) is of unsound mind;
 - (f) is an undischarged bankrupt;
 - (g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or
 - (h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.
- (3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.

68. It is clear from the above provision that the 1st respondent was not disqualified as a candidate for the subject parliamentary seat for the 2022 general elections. The only caveat for disqualification of a candidate holding dual citizenship is the *leadership and integrity Act* Section 31(2) which provides that; A person who holds dual citizenship shall, upon election or appointment to a State office, not take office before officially renouncing their other citizenship in accordance with the provisions of the *Kenya Citizenship and Immigration Act* (Cap. 170).

69. From the above provisions, nothing stops a candidate of an elective office from declaring his candidature or being elected in respect of that position simply because he is a holder of dual citizen. The only condition in my view is that such candidate cannot assume that office without renouncing his or her citizenship.

70. In the case of Bishop Donald Kisaka Mwawasi vs. Attorney General & 2 others, [Supra] it was held that;

[13] “Article 99 does not expressly disqualify a dual citizen from vying as a member of Parliament. However, by Article 99(2) a person is disqualified if he is a State officer or a Public officer other than a member of Parliament. That means that a person who is already a State officer or Public officer is ineligible for election as a member of Parliament. By the time the appellant was nominated by his party he was not a State officer and was not therefore disqualified under Article 99(2). Similarly, as the appellant is a Kenyan citizen he is by virtue of Article 78(1) eligible for election. The proscription in Article 78(2) is for a State officer holding dual citizenship. However, the proscription is not absolute. It is exempted by Article 78(3)



(b), if the person is made a citizen of another country by operation of that country's law without ability to opt out. That exception is significant. It implies that if the laws of that other country have no provision for renunciation of citizenship of that country, a State officer can hold dual citizenship. Article 80 authorized Parliament to enact legislation on Leadership, to among other things, provide for the application of the chapter on Leadership with necessary modifications, to public officers. In pursuance of that Article, Parliament enacted the *Leadership and Integrity Act* (Chapter 182) which provides in section 31 thus:

“31 (1) subject to Article 78(3) of *the Constitution*, a State officer who acquires dual citizenship shall lose his or her position as a State officer.

(2) a person who holds dual citizenship shall, upon election or appointment to a State office, not take office before officially renouncing their citizenship in accordance with the provisions of *Kenya Citizenship and Immigration Act*, 2011 (No. 12 of 2011)”.

[14] Thus Parliament interpreted Article 78(2) to mean that a dual citizen is eligible to stand for election but upon election he cannot hold office unless and until he voluntarily and officially renounces citizenship of the other country according to the law. Although the Immigration and Citizenship Act has no specific provision for renunciation of citizenship of another country by a dual citizen, section 20 which applies to voluntary renunciation of citizenship by a foreign national upon application for registration as a citizen of Kenya presumably applies to dual citizenship as the marginal note to the section implies. Such a person is required to avail to the Cabinet Secretary evidence of renunciation of citizenship of the other country.”

71. The court went further and stated as follows;

“(17) [17] From the above analysis, we hold that:

1. While a citizen by birth does not lose citizenship by acquiring the citizenship of another country and while a dual citizen is by virtue of Article 12(1) entitled to rights, privileges and benefits of citizenship by rights to leadership including political participation are limited by Article 78(2).
2. Parliament in enacting section 31 of the *Leadership and Integrity Act* interpreted Article 78(2) correctly. The proscription in Article 78(2) is not against a dual citizen being elected or being appointed as a State officer. The restriction is against leadership by dual citizen in the specified State offices, and it does not all apply unless and until a person is elected and/or appointed to a State office. That is a material fact which must be borne in mind.
3. A dual citizen is eligible to seek nomination for election as a member of Parliament or member of county government and to stand as a Member of Parliament or county government in an election and also eligible to hold any State office.
4. However, a dual citizen is disqualified upon election or appointment to a State office from assuming office before voluntarily and officially renouncing his other citizenship howsoever granted in accordance with *Kenya Citizenship and Immigration Act* unless as Article 78(3) provides, he has no



ability under the laws of the other country to renounce citizenship of the other country.

5. The High Court erred in law to the extent that it held that a dual citizen is disqualified from nomination and from standing for election as a member of Parliament.”

72. Similarly, in the case of *Mwende Maluki Mwinzi v The Cabinet Secretary Ministry of Foreign Affairs*(2019)e KLR

“ [66]. Article 78 of *the Constitution* of Kenya bars persons who hold dual citizenship from occupying state offices or being members of defence forces of Kenya. The aim of *the constitution* was to avoid the potential conflict of interest that may arise which would affect the well-being of the country involving the security interest of the state.”

73. It is clear from the above case law that a candidate aspiring for an elective seat while holding dual citizenship can only be allowed to assume office upon renouncing his or her other nationality status. In other words, he cannot hold an elective position or state officer’s office or position unless he renounces his dual citizenship. In a nutshell, the suit is merely anticipatory and or premature as the cause of action has not crystallized.

74. However, the petitioner was of the view that the 1st respondent was not holding dual citizenship but triple in this case; being a Kenyan citizen; Somali and british all of which were not challenged nor denied. According to the petitioners, the Kenyan law only shields dual citizenship holders from contesting elective positions but not triple citizenship holders. In that respect, they relied on the *Njau v Gedi* case(supra) where Aroni J, as she then was, disqualified the 1st respondent in this case then vying for Fafi constituency parliamentary seat on grounds that he held triple citizenship i.e American, Somali and Kenyan.

75. A look at Article 78 of *the constitution* reveals that only non Kenyan citizens are barred from contesting an elective position. Article 16 goes further to state that a citizen by birth does not lose citizenship by acquiring the citizenship of another country. Therefore, there is no law which expressly bars a candidate with triple citizenship from contesting. In my view, Section 31 (2) of the *leadership and integrity Act* shall apply just as it applies to the dual citizenship case.

76. There is obviously a lacuna in the law as a case of triple citizenship and or over and above dual citizenship are not covered in *the constitution* nor the relevant statutes. In that context, the court must interpret *the constitution* under article 259 in a manner that; promotes its purposes, values and principles; advances the rule of law, the human rights and fundamental freedoms in the bill of rights; permits the development of law and contributes to good governance.

77. Why would a person holding dual citizenship be allowed to stand for election and not the one with triple? That in my view will be discriminatory on account of ones’ status in this case, citizenship and also denial of a right to exercise political right by voting or being elected as a Kenyan citizen and thereafter relinquish such other citizenships upon being elected and before assuming office pursuant to Section 31(2) of the *leadership and integrity Act*.

78. I do not see the rationale for treating the holder of triple citizenship differently in similar circumstances as those of a dual citizen. The mischief addressed by Section 31(2) of the *leadership and integrity Act* can objectively apply in respect to triple citizenship. On that ground, I am not sufficiently persuaded by the holding in *Njau v Gedi* (supra) case to which I respectively disagree with.



79. The mere fact that the Kenyan law does not specifically mention the word triple citizenship or more, does not lessen the holders their right to vote or contest for an elective post so long as they are Kenyan citizens and fully complies with Section 31(2) of the *leadership and integrity Act*. In the circumstances I do fully associate myself with Bishop Donald Kisaka Mwawasi case (supra) and the principles thereof shall apply to the triple citizenship.

Whether the 1st respondent should be stripped of Kenyan citizenship by birth.

80. It is the petitioners' case that the 1st respondent falsely acquired Kenyan citizenship through false misrepresentation of facts yet he was a Somali citizen by birth. It is an offence under the Kenyan citizenship and Immigration Act sections 8 and 54(1) for any person to make a false declaration leading to acquisition of Kenyan citizenship by registration hence liable to a fine of not more than 5 million.
81. In fact, if there was false declaration leading to acquisition of Kenyan citizenship, the 1st respondent should be arrested and charged before a court of law. Subsequently, if found guilty or if there is sufficient evidence, due process for revocation of his citizenship shall follow as provided under section 21 of the same Act.
82. Equally, if there is sufficient evidence that the 1st respondent made false declaration to the 2nd respondent by not disclosing that he was a holder of dual citizenship, he can be charged for giving false information to a public officer or for making false declaration. All these actions do not need a constitutional petition to enforce yet there are sufficient statutory provisions taking care of the same. To that extent, I do not find any wrong committed by the registrar of persons in issuing identification documents yet no complaint had been lodged for necessary action to be taken including revocation of such registration.
83. The upshot of the above holding is that, the prayers sought herein cannot issue and the petition is accordingly dismissed. This being a public interest litigation, each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF SEPTEMBER 2024.

J. N. ONYIEGO

JUDGE

