Ouma & another v County Government of Siaya & 11 others (Constitutional Petition E007 of 2022) [2023] KEHC 3163 (KLR) (12 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3163 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CONSTITUTIONAL PETITION E007 OF 2022

RE ABURILI, J

APRIL 12, 2023

BETWEEN

EVERLINE AOKO OUMA ..... 1ST PETITIONER

EUGENE TOBBY OTIENO ..... 2ND PETITIONER

AND

COUNTY GOVERNMENT OF SIAYA ..... 1ST RESPONDENT

COUNTY ASSEMBLY OF SIAYA ..... 2ND RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF SIAYA ..... 3RD RESPONDENT

BENEDICT ABONYO OMOLLO ..... 4TH RESPONDENT

AKINYI ONYANGO ..... 5TH RESPONDENT

GEORGE ODHIAMBO NYING'IRO ..... 6TH RESPONDENT

SYLVESTER ODHIAMBO K'OKOTH ..... 7TH RESPONDENT

DR EDGAR OUKO OTUMBA ..... 8TH RESPONDENT

GRACE AGOLA ..... 9TH RESPONDENT

ANJELINE ATIENO ODUOR ..... 10TH RESPONDENT

MAURICE ATIENO MCOREGE ..... 11TH RESPONDENT

CS AGUNDA ACHANDA ..... 12TH RESPONDENT

RULING

1. This Ruling determines the Notice of Preliminary Objection dated January 23, 2023 raised on behalf of the 1st and 4th-12th respondents. The two petitioners herein vide their petition dated December 15, 2022

seek to have the 4th to the 12th respondents, who were nominated by the 1st respondent Governor of Siaya County, vetted by the 2nd respondent, the County Assembly of Siaya and subsequently appointed by the said Governor, declared unsuitable to hold Office of County Executive Committee Member.

2. In response to the aforementioned petition, the 1st and 4th to the 12th respondents filed a Notice of Preliminary Objection dated January 23, 2023 based on the following grounds:

   i. That the Honourable Court lacks the jurisdiction to entertain the petition since it's a matter that is within the exclusive jurisdiction of the County Assembly.

   ii. That the petition has been prematurely filed by the petitioners as they have not exhausted all remedies available in law for the resolution of the dispute before invoking the jurisdiction of this court hence violating the exhaustion doctrine.

3. The Preliminary Objection was canvassed by way of written submissions. The 2nd and 3rd Respondents did not file any submissions.

The 1st and 4th to 12th Respondents' Submissions in Support of the Preliminary Objection

4. It was submitted that this court lacks jurisdiction to make a declaration that the 4th to 12th respondents are unsuitable to occupy the respective positions that they were appointed to, as there is no evidence or proof of particulars presented before this court by the petitioners.

5. The respondents submitted that if the court were to entertain the petition, the same would amount to abrogation of the *Constitution* as the matter was within the remit of the County Assembly where such proceedings or decisions were undertaken as was held in the case of *Simon Wachira Kagiri v County Assembly of Nyeri & 2 Others* [2013] eKLR.

6. The respondents relied on the cases of *Faith Syokau Wathome Kithu (MBS) & others v Machakos County Assembly & 3 others* [2018] eKLR and that of *Francis Maliti v County Assembly of Machakos & 2 Others; Governor Machakos County (Interested Party)* [2019] eKLR where it was held that a court cannot make a declaration that the respondents were unsuitable to occupy their respective offices as County Executive Committee Members unless it has undertaken an exercise that would lead to such a determination.

7. The respondents further submitted that interference by the Court on the proceedings and decisions of the County Assembly are only legally and constitutionally tenable in instances where the Court has been expressly moved by way of pleadings on the specific nature and character of such legal and constitutional violations as parties are bound by their pleadings as was held in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR.

8. It was submitted that in the absence of the petitioners demonstrating to the satisfaction of the Court that they had attempted to petition the County Assembly for the removal of the respondents pursuant to their right as enshrined in Section 15 of the *County Governments Act*, and that the County Assembly has failed to entertain the said petition or fully entertained it to their dissatisfaction, then this Court lacks jurisdiction to entertain the petition as the petitioners have not exhausted the remedies open to them. Reliance was placed on the cases of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR where the court emphasized the centrality of the exhaustion doctrine and in the case of *Charles Obare & Anor v Clerk, County Assembly of Siaya & Anor* [2020] eKLR as was further reinforced by the Court of Appeal in the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR.

The Petitioners' Opposing Submissions

9. It was submitted on behalf of the petitioners that this Court has jurisdiction to hear and determine the petition as the petitioners had pleaded the specific nature and character of the legal and constitutional violations occasioned by the decisions/actions of the respondents and further that they relied on the report by the Select Committee that contained all the evidentiary documents regarding the vetting of the 4th to the 12th respondents. The petitioners relied on the case of *John Kipng'eno Koech & 2 Others v Nakuru County Assembly & 5 Others* [2013] eKLR.

10. As to whether the petition had been filed prematurely and thus violated the doctrine of exhaustion, the petitioners submitted that there were exceptions to the doctrine of exhaustion as laid out in the case of *Jeremiah Memba Ocharo v Evangeline Njoka & 3 Others* [2022] eKLR specifically that where the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and secondly, the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests that the party wishes to advance.

11. The petitioners submitted that contrary to the submission by the respondents, that the petitioners should follow the laid out procedure for removal of a CEC member by approaching the County Assembly, the County Assembly was a political body that was partisan and as such, it was not capable of balancing its interest vis avis those of the petitioners and thus the exhaustion doctrine would not serve the values enshrined in the *Constitution* or the law.

12. The petitioners further submitted that the matter was of great public importance and the forum alleged to have jurisdiction to deal with it had no ability to balance them as it had unanimously approved the report disregarding the recommendations that the 4th – 12th respondents were not qualified for the advertised positions.

Analysis and Determination

13. The applicable law on preliminary objections is well captured by both the parties herein. In the *locus classicus* case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Court of Appeal for Eastern Africa, stated (Law JA) in part that:

> "So far as I'm aware, 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."

14. Sir Charles Newbold President of the Court in the *Mukisa* (*supra*) case went on to state that a preliminary objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. (see page 710) of the decision.

15. The Respondents are questioning the jurisdiction of this Court to hear and determine the Petition herein. I therefore find that the objections raised by the Respondents fall within the definition of a preliminary objection as stated in the *Mukisa* Case.

16. The issue for determination therefore is whether the preliminary objection raised by the Respondents has merit. In other words, does this court have the requisite jurisdiction to hear and determine the petition herein or it is devoid of such jurisdiction on both limbs?

17. On the issue of this Court's jurisdiction to handle the petition, it is important that this issue is resolved in limine. This was the position adopted by Nyarangi JA in The *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* (1989) KLR 1where he stated that:

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

18. Similarly, in *Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 the same Court expressed itself as follows:

> "The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and 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. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

19. Lastly, on the same issue of jurisdiction, the Supreme Court in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others*, Civil Appl. No 2 of 2011 observed that:

> "A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

20. The 1st, 4th -12th respondents assert that if this Court were to entertain the petition, the same would amount to abrogation of the *Constitution* as the matter was within the remit of the County Assembly. Further, that the doctrine of separation of powers applies to the national government as well as

devolved governments as was appreciated in the case of *Simon Wachira Kagiri v County Assembly of Nyeri & 2 others* (2013) eKLR at page 13 thereof where it was held that:

> "County governments are miniature national governments structures and ordered in line with traditions and principles that govern the national Government. To this extent the doctrine of separation of powers apply with equal measure."

21. Article 1(3) of the *Constitution* provides that sovereign power which, pursuant to Article 1(1) of the *Constitution* "belongs to the people of Kenya and shall be exercised only in accordance with this Constitution." The said sovereign power "...is delegated to the following State organs, which shall perform their functions in accordance with this Constitution––

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

22. This position was appreciated by the High Court in *Trusted Society of Human Rights v The Attorney-General and Others*, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it was stated that:

> "Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the *Constitution*, regarding the necessity of separating the Governmental functions. the *Constitution* consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."

23. Thus, while the *Constitution* provides for several State organs, including Commissions and Independent Offices, the people's sovereign power is vested in the Executive, Legislature and Judiciary.

24. The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. In the *Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate & 2 others* [2013] eKLR Njoki, SCJ opined that:

> "The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra vires the *Constitution*. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."

25. The Supreme Court has aptly captured this fact *In Re The Matter of the Interim Independent Electoral Commission* Advisory Opinion No2 of 2011 where it pronounced that:

> "The effect of the *Constitution*'s detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

26. However, Article 2(4) of our *Constitution* provides that:

> "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

27. Under Article 165(3)(d)(i) and (ii), the High Court is vested with the jurisdiction to hear any question respecting the interpretation of the *Constitution* including the determination of the question whether any law is inconsistent with or is in contravention of the *Constitution* and the question whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of, the *Constitution*.

28. Therefore, whereas the legislative authority vests in Parliament and the County legislative assemblies, where a question arises as to whether an enactment is or decision or act done by the legislature is inconsistent with the *Constitution* or is passed in contravention of the *Constitution*, the High Court is the institution constitutionally mandated and empowered to determine such issues subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court.

29. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the *Constitution* since, under Article 2(1) and (2), the *Constitution* is the supreme law of the Republic of Kenya and it binds all persons and all State organs at both levels of government, such that no person or body or state organ may claim or exercise State authority except as authorized under the *Constitution*.

30. Therefore, there is only supremacy of the *Constitution* and given that the *Constitution* is supreme, every organ of State exercising a constitutional function or mandate must perform it in conformity with the *Constitution*. It follows that where any State organ fails to do so, the High Court, as the ultimate guardian of the *Constitution*, will point out the transgression.

31. The jurisdiction of the High Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the *Constitution*, which pronounces its supremacy at Article 2. Similarly, the general provisions of the *Constitution*, which are set out in Article 258 guarantees every person the right to "... institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention."

32. This position is buttressed by the decision in *Coalition for Reform and Democracy (CORD) & another v the Republic of Kenya & another* (2015) eKLR where the Court stated *inter alia* at paragraph 125 that:

> "Under Article 1 of the *Constitution* sovereign power belongs to the people and it is to be exercised in accordance with the *Constitution*. That sovereign power is delegated to

Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the *Constitution*. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the *Constitution*... Article 2 of the *Constitution* provides for the binding effect of the *Constitution* on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid..."

33. Therefore, where an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, and without delving into the merits or demerits of that issue, it falls upon the laps of the Judiciary to determine that issue. As was held in *Jayne Mati & Another v Attorney General and Another* – Nairobi Petition No 108 of 2011 at paragraph 31 that:

> "...separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the *Constitution* and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the *Constitution*."

34. The Supreme Court in *Speaker of National Assembly v Attorney General and 3 Others* (2013)e KLR stated that:

> "Parliament must operate under the *Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the *Constitution* decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the *Constitution*. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the *Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated the *Constitution*, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the *Constitution* and the *Supreme Court Act*."

35. The apex Court went on to state that:

> "Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the *Constitution*, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the *Constitution* itself. It is our perception that all reading of the *Constitution* indicates that

the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."

36. From the above cited judicial pronouncements, it is clear that this Court is vested with the jurisdiction and power to interpret the *Constitution* and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the *Constitution*. In addition, this Court has the Constitutional duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the *Constitution* has either been violated or is threatened with violation.

37. In this case, the petitioners set forth the legal foundation of the petition as being Articles 1 (1), (2), 2 (1), (4), 3, 10, 73 (2) (a), 179, 232, 258 and 259 of the *Constitution*. The petitioners then detailed various alleged violations of the *Constitution*, specifically Articles 10 and 73 as well as Sections 7 (8) and 8 of the *Public Appointments (County Assemblies Approval) Act 2017* and Section 35 of the *County Governments Acts, 2012*. They elaborately claim that the Governor nominated and the County Assembly went ahead and approved for appointment persons who were not qualified or suitable for appointment to the positions that they were nominated. Without delving into the merits and demerits of such assertions, I am satisfied that this Court is fully clothed with jurisdiction to interrogate the legitimacy of the petitioners' claims. accordingly, the first limb of the preliminary objection is overruled and declined.

38. Turning to the second limb of the preliminary objection, the 1st, 4th–12th respondents pleaded and submitted that this court lacked jurisdiction to entertain the instant petition as the petitioners failed to exhaust the available remedies by first petitioning the County Assembly for the removal of the respondents from office pursuant to the right enshrined in Section 15 of the *County Governments Act* and thus the Court lacked jurisdiction to entertain the petition.

39. On their part, the petitioners pleaded that there were exceptions to the doctrine that applied in this case specifically that the County Assembly was partisan as it had already approved the nominees and thus it was not the appropriate venue for the petitioners to have their claim addressed.

40. There is no doubt that the doctrine of exhaustion of local remedies has a venerated juridical ancestry in Kenya. In *Republic v IEBC Ex Parte NASA-Kenya & 6 Others* [2017] eKLR, the High Court – a three-judge bench described our jurisprudential policy on the doctrine of exhaustion of remedies in the following words:

> " 42. This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:-
>
> > Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
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> 43. While this case was decided before the *Constitution of Kenya, 2010* was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for

the doctrine. This is Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR, where the Court of Appeal stated that:-

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

45. We have read these cases carefully and considered the salutary decisional rule of law they announce..."

41. In the same case, the High Court bench, after reviewing case law, identified two exceptions to the doctrine of exhaustion.

"i. First, where the forum is not suitable for determination of weighty constitutional matters especially if they are previously untested. In this regard, the Court stated:

> [T]he High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it...This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.

Hence, Court of Appeal in R v National Environmental Management Authority [2011] eKLR where the Court explained that:

> The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...

ii. Second, the doctrine of exhaustion does not apply where the alternative forum does not give critical litigant audience before it. As the Court explained:

> The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute."

42. In the instant petition, the County Assembly, the 2nd respondent, had already expressed itself on the suitability of the 1st Respondent's nominees after vetting the said nominees, who are the 4th to 12th respondents and therefore, Iam of the strong view that the petitioners were well within their rights to approach this Court to have their issues ventilated. Furthermore, Article 50(1) of the *Constitution* guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair, and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.

43. In *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR the Court of Appeal further restated this position in stated as thus:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

44. Indeed, Article 159 (2) (c) of the *Constitution of Kenya, 2010* provides that:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

45. The Respondents submit that section 15 of the *County Governments Act* (CGA) provides for alternative mechanisms for dispute resolution and that the said section forms the basis of the ousting

the jurisdiction of this Court in this petition. Section 15 (1) of the *County Governments Act* provides that:

> "A person has a right to petition a County Assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation."

46. My reading of the above section does not reveal any bar to resort to Court but guarantees a person the right to petition a County Assembly to consider any matter within its authority. Therefore, to determine whether the jurisdiction of this Court is ousted, the Court examines the pleadings of the petitioner which contains the legal basis of the claim. The exposition by Mativo J in *Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments* [2019] eKLR, explains this position in the following manner:

> "On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court held in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others[43]had this to say:-
>
> > "Jurisdiction is determined on the basis of the pleadings,[44]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would lack jurisdiction..."

47. In the present petition, it is clear from the orders sought in the Petition that the Petitioners are challenging the constitutionality of the 1st respondent's nomination and the 2nd Respondents' Act of vetting and approving for appointment the 4th to 12th respondents when, according to the petitioners, the persons so nominated, vetted and approved and appointed as CECs were not qualified or suitable for appointment to the respective positions.

48. As earlier stated herein, the determination of the question whether any law is inconsistent with or in contravention of the *Constitution* and the question whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of, the *Constitution* is within the purview and jurisdiction of this Court.

49. To this end, I find and hold that this Court is possessed of jurisdiction to hear and determine the petition and all the issues raised on merit and that the doctrine of exhaustion is not applicable in the instant petition because the body (Siaya County Assembly) that is mandated to vet and which vetted the nominees and approved them cannot be the same body that the petitioners should now be petitioning to determine whether what it did was constitutional. To do so would be asking the County Assembly to be judge in its own cause.

50. Accordingly, I find and hold that all the limbs of the Notice of Preliminary Objection dated January 23, 2023 are devoid of merit and are hereby dismissed.

51. Each party to bear their own costs of the Preliminary objection as this is a public interest litigation. The main petition shall be mentioned before the presiding Judge, Siaya High Court on May 4, 2023 for directions on the hearing and determination of the main petition.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 12TH DAY OF APRIL, 2023

R.E. ABURILI

JUDGE