



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Sonko v Supreme Court of Kenya & another (Petition  
E14 of 2022) [2023] KEHC 17295 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17295 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E14 OF 2022  
OA SEWE, J  
MAY 11, 2023  
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010  
AND  
IN THE MATTER OF ARTICLES 2, 19, 20, 21(1), 22(1) & (2),  
23, 25(C) 28, 48, 50, 165(3)(B) AND 258(1) OF THE  
CONSTITUTION  
AND  
IN THE MATTER OF THE RIGHT TO A FAIR TRIAL/HEARING  
AS PROVIDED FOR UNDER ARTICLE 25(C) & 50(1) OF THE  
CONSTITUTION OF KENYA  
AND  
IN THE MATTER OF AUTHORITY OF THE COURTS TO  
UPHOLD AND ENFORCE THE BILL OF RIGHTS AS PROVIDED  
FOR UNDER ARTICLE 23 OF THE CONSTITUTION  
AND  
IN THE MATTER OF THE APPLICATION AND  
IMPLEMENTATION OF THE RIGHTS AND FUNDAMENTAL  
FREEDOMS AS PROVIDED FOR UNDER ARTICLE 20 & 21 OF  
THE CONSTITUTION  
AND  
IN THE MATTER OF THE SUPREME COURT RULES, 2020  
AND  
IN THE MATTER OF SUPREME COURT PETITION NO. 11 OF**



**2022: HON. MIKE MBUVI GIDEON SONKO AND THE CLERK,  
NAIROBI CITY COUNTY ASSEMBLY AND 11 OTHERS  
PETITION NO. E14 OF 2022 RULING 1**

**AND**

**IN THE MATTER OF PETITION NO. E027 OF 2022: HON.  
MIKE SONKO MBUVI GIDEON KIOKO VERSUS SWALHA  
IBRAHIM YUSUF & 3 OTHERS**

**BETWEEN**

**BETWEEN**

**HON. MIKE MBUVI GIDEON SONKO ..... PETITIONER**

**AND**

**SUPREME COURT OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioner approached the Court vide his Petition dated 22<sup>nd</sup> August 2022 seeking declaratory orders in connection with the manner in which the Supreme Court of Kenya handled Petition No. 11 (E008) of 2022: Hon. Mike Mbuvi Sonko v The Clerk, County Assembly of Nairobi City & Others. In his Amended Petition filed on 8<sup>th</sup> December 2022, the petitioner contended, at paragraph 9 thereof, that:

“On the 11<sup>th</sup> July 2022 the Supreme Court gave arbitrary directions that omitted the filing of submissions by the petitioner and also denied the petitioner the right to a rejoinder.”

2. Thus, the petitioner alleged bias on the part of the Supreme Court contending that the Court deliberately committed procedural irregularities with the sole aim of preventing him from enjoying his socio political rights under Article 38 of *the Constitution*, thereby ultimately violating his right to be heard under Article 50 of *the Constitution*. Accordingly, the petitioner contended, at paragraph 45 of his Amended Petition that the 1<sup>st</sup> respondent, being a state organ, is bound, under Article 21(1) of *the Constitution*, to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and should be held accountable; and therefore that this Court has the jurisdiction to provide the necessary redress. Accordingly, the reliefs prayed for in the Amended Petition are as hereunder:

- (a) A declaration that the petitioner’s rights to fair trial under Article 50(1) of *the Constitution* was infringed in Supreme Court Petition No. 11 of 2022 (E008) Hon. Mike Mbuvi Gideon Sonko and The Clerk, Nairobi City County Assembly & 11 Others.
- (b) A declaration that the Supreme Court judgment dated 15<sup>th</sup> July 2022 in Supreme Court Petition No. 11 of 2022 (E008) Hon. Mike Mbuvi Gideon Sonko and The Clerk, Nairobi



City County Assembly & 11 Others is null and void as the 1<sup>st</sup> respondent contravened Article 50(1) of *the Constitution* of Kenya.

- (c) A declaration that the political rights of the petitioner were violated by the failure by the Supreme Court to accord the petitioner a fair hearing under Article 50(1) of *the Constitution*.
  - (d) A declaration that the Supreme Court Petition No. 11 of 2022 (E008) Hon. Mike Mbuvi Gideon Sonko and The Clerk, Nairobi City County Assembly & 11 Others be heard de novo by the 1<sup>st</sup> respondent.
  - (e) An award of compensation for loss of campaign fund contribution by the petitioner, amounting to Kshs. 35,000,000/=.
  - (f) An award of damages amounting to Kshs. 15,000,000/= for breach of the right to be heard under Article 50(1) as well as breach of the political rights of the petitioner.
  - (g) Any other relief that the Court may deem fit and just to grant in the interest of justice.
3. Concomitantly, the petitioner filed a Notice of Motion dated 22<sup>nd</sup> August 2022, seeking conservatory orders pending the hearing and determination of the Petition. In particular, the petitioner prayed, inter alia, that:
- (a) The Court be pleased to issue conservatory orders staying the judgment of the Supreme Court in Petition No. 11 of 2022 (E008) Hon. Mike Mbuvi Gideon Sonko and The Clerk, Nairobi City County Assembly & 11 Others;
  - (b) Pending the hearing and determination of the Application and Petition the Court do issue urgent conservatory orders stopping the Independent Electoral and Boundaries Commission from conducting the Mombasa Gubernatorial by-election scheduled for 29<sup>th</sup> August 2022;
  - (c) Pending the hearing and determination of the application, the Court do compel the Independent Electoral and Boundaries Commission to comply with the judgment in Petition No. E027 of 2022: Hon. Mike Sonko Mbuvi Gideon v Swalha Ibrahim Yusuf & 3 Others.
4. As was observed by the Court (Hon. Githinji, J.) on 30<sup>th</sup> August 2022, the prayers sought in the application had been overtaken by events, granted that the impugned elections were held as scheduled on 29<sup>th</sup> August 2022. The parties were thereafter granted time to respond to the Petition and obtain directions thereon.
5. In response to the Petition, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objection contending that the petitioner has erroneously invoked the jurisdiction of this Court to hear and determine the Petition dated 22<sup>nd</sup> August 2022 as amended on 8<sup>th</sup> December 2022. The 1<sup>st</sup> respondent raised the following grounds in its Notice of Preliminary Objection:
- (a) That the Petition as drawn and instituted is in substance an abuse of the Court's process and ought to be struck out in limine for the reasons that:
    - (i) An exhaustive review of the Petition reveals that it primarily seeks to nullify the judgment of the Supreme Court delivered on 15<sup>th</sup> July 2022 in Petition No. 11 of 2022 (E008) Hon. Mike Mbuvi Gideon Sonko and The Clerk, Nairobi City County Assembly & 11 Others; which decision was reached by the Supreme Court while exercising its appellate jurisdiction in accordance with Article 163(4)(a) of *the Constitution* as read with Section 15A of the *Supreme Court Act*.



- (ii) Additionally, it is an attempt to revive and re-litigate matters conclusively dealt with and determined by the Supreme Court in the aforementioned case, since it seeks to interrogate the proceedings therein and invites this Court to consider evidence that was before the Supreme Court.
  - (iii) Further, it is an attempt to invite this Court to review the decision of the Supreme Court aforementioned, which attempt is unprocedural and improper.
  - (iv) Furthermore, the underlying issue of the petitioner's impeachment which gave rise to the instant proceedings has been litigated through the hierarchy of courts to finality and as such the petitioner's request to have the matter heard de novo is in contravention of the principle of finality. The petitioner ought to be estopped from bringing it up clothed as a Constitutional Petition.
  - (v) The foregoing attempts by the petitioner contravene Article 165(5)(a) of *the Constitution* which expressly provides that the High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under *the Constitution*.
- (b) That based on the aforesaid reasons, the jurisdiction of this Court has been erroneously invoked.
  - (c) That in the premises, the Petition is not properly before the Court and as such this Court should down its tools.
6. Accordingly, directions were given on 19<sup>th</sup> January 2023 that the Preliminary Objection be given priority and that it disposed of by way of written submissions, granted that it impugned the jurisdiction of the Court to entertain the Petition itself. Thus, learned counsel for the 1<sup>st</sup> respondent, Mr. Kanjama, SC, filed his written submissions on 10<sup>th</sup> February 2023 in which he proposed a single issue for determination, namely, whether the Court is clothed with jurisdiction to hear and determine the Petition. He submitted that from the numerous judicial pronouncements, it is now well settled that jurisdiction is a fundamental matter in the dispensation of justice and must exist before an attempt is made at adjudication. He relied on *Re the Matter of the Interim Independent Electoral Commission [2011] eKLR* and *Civil Appeal No. 656 of 2022: The National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others* for the proposition that jurisdiction is a matter of hard law and that where it is lacking, the Court has no power to make one more step in the matter.
7. It was further the submission of Mr. Kanjama, SC, that the impugned decision was reached by the Supreme Court in the exercise of its appellate jurisdiction in accordance with Article 163(4)(a) of *the Constitution* as read with Section 15A of the *Supreme Court Act*. He pointed out that, in seeking the nullification of the decision, the petitioner alleges, inter alia, impartiality on the part of the Supreme Court judges as well as procedural irregularities. He therefore argued that, under Article 160(5) of *the Constitution*, a member of the Judiciary (of which a Supreme Court Judge is one) is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. In this regard, Mr. Kanjama, SC, relied on *Bellevue Development Company Ltd v Francis Gikonyo & 3 Others [2020] eKLR* and contended that it is improper to join a superior court as a party in litigation seeking to review the decision of that Court.
8. Lastly, counsel urged that, based on the principle of finality, certain disputes must achieve a resolution from which no further appeal may be taken, and from which no collateral proceedings may be permitted to disturb that resolution. He relied on *Justine Masolo Nyakundi v Attorney General &*



Another [2022] eKLR to buttress his argument in this regard and urged that the 1<sup>st</sup> respondent's Preliminary Objection be upheld.

9. On behalf of the petitioner, written submissions were filed herein on 13<sup>th</sup> March 2023 by Dr. Khaminwa, SC, in which he likewise proposed a single issue for determination, namely, whether the Court has jurisdiction to hear and determine the Petition. Dr. Khaminwa, SC, assisted by Mr. Odhiambo, Advocate, approached the matter from the prism of Articles 22, 23 and 165(3)(b) of *the Constitution*, contending that the object of the Petition is not a reconsideration of the decision reached by the Supreme Court in Supreme Court Petition No. 11 of 2022 (E008): Hon. Mike Mbuvi Gideon Sonko and The Clerk, Nairobi City County Assembly & 11 Others, but the alleged violation of the petitioner's right to fair hearing under Articles 25 and 50 of *the Constitution*. Counsel relied on Andrew Nthiwa Mutuku v Court of Appeal & 3 Others [2021] eKLR and Peter M. Kariuki v Attorney General [2014] eKLR, among other authorities, to urge the viewpoint that the Preliminary Objection is misconceived.
10. What amounts to a preliminary objection was aptly captured in Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors [1969] EA 696 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 the contract giving rise to the suit to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
11. Similarly, in Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others [2015] eKLR the Supreme Court emphasized the point that: -

“...a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”
12. Accordingly, the only issue for determination arising from the grounds set out in the 1<sup>st</sup> respondent's Notice of Preliminary Objection dated 18<sup>th</sup> January 2023 is whether the Court has jurisdiction to entertain the Petition in so far as it seeks to impugn the decision of the Supreme Court dated 15<sup>th</sup> July 2022 on the grounds of procedural irregularities. The 1<sup>st</sup> respondent's arguments in favour of the principle of judicial immunity do not, to my mind, form a proper subject of a preliminary objection, but could be a plausible response to the Petition itself, to the extent that the arguments require further interrogation at the hearing.
13. Hence, in The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR 1, Hon. Nyarangi JA aptly stated: -

“...I think that 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. 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...”

14. And, in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court made it clear 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 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. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

15. As for the jurisdiction of the High Court, Article 165(3)(a) and (b) of *the Constitution* is explicit that:

Subject to clause (5), the High Court shall have-

- a. Unlimited original jurisdiction in criminal and civil matters;
- b. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

16. Sub-Article (5) of Article 165 of *the Constitution*, on the other hand, is categorical that:

“The High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under this Constitution.”

17. To my mind, the matters falling within the exclusive jurisdiction of the Supreme Court under *the Constitution* have been well set out in Article 163(3) thereof; and therefore, it cannot be said that this Petition falls under that category. Indeed, the Petition is explicit that the approach has been made pursuant to the Court’s jurisdiction under Articles 23 and 165(3)(b) of *the Constitution*. A purposive interpretation of those provisions leads to the inevitable conclusion that, where the issue is an alleged violation of a constitutional right or freedom, the High Court is the first port of call. I therefore have no quarrel with the position taken by Hon. Odunga, J. (as he then was) in Andrew Nthiwa Mutuku v Court of Appeal & 3 Others [2021] eKLR that:

“This Court has the original jurisdiction to decide whether a right or fundamental freedom has been infringed or violated and that where any Court including the Court of Appeal and the Supreme Court has violated a provision of *the Constitution*, a party can approach this Court for remedy immediately...I find that this Court has the power and is enjoined to interrogate the constitutionality of actions by state organs and all persons including superior courts.”



18. That said, the question to pose next is what is the exact nature of the petitioner’s complaint. At paragraphs 12 and 13 of the Amended Petition, the petitioner complained of arbitrariness, bias and procedural irregularities. Particulars thereof were detailed at paragraphs 52-63 of the Petition. It is noteworthy too that at paragraph 20 of his written submissions, Dr. Khaminwa, SC, reiterated the assertion that:

“The suit before the court is to challenge the unorthodox procedures invented by Respondents to arbitrarily hear and determine the Appeal No. 11 of 2022 (E008) thus undermining the respected principles of Natural justice.”

19. It is plain therefore that, in effect, the petitioner has invoked the supervisory jurisdiction of the Court as contemplated under Article 165(6) and (7) of *the Constitution*, which state:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

20. Situations abound in which, due to the fact that Judicial Review remedies are now anchored in *the Constitution* as per Article 23, many applications, indeed even other mundane claims that do not pass muster in a constitutional sense, are disguised as constitutional petitions. This fusion of laws was aptly commented on by the supreme Court in *Communications Commission of Kenya v Royal Media Services Ltd* [2014] eKLR thus:

“...we remain keenly aware that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal’s view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of *the Constitution*...”

21. Hence, the Court is under obligation to identify the nature of the dispute and the true character of the petitioner’s case so as to determine the most appropriate relief; and in so doing must be convinced that it has the jurisdiction to not only entertain the suit but also grant the reliefs sought. In this regard, a comparison may be made with the established jurisprudence in the area of electoral law to avoid confusion of any kind. In this regard, the Supreme Court expressed itself in *Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR thus:

To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under article 165(3) of *the Constitution*, or through judicial review proceedings, in our respectful view, carries the risk of opening up a parallel electoral dispute resolution regime. Such an event would serve not only to complicate, but ultimately defeat the sui generis character of electoral dispute resolution mechanisms, and notwithstanding the vital role of electoral dispute settlement in the progressive governance set-up of the current Constitution.



22. Likewise, in the National Rainbow Coalition Kenya (NARC KENYA) v Independent Electoral & Boundaries Commission & Others (Petition 1 of 2021) [2022] KESC 6 (KLR), the Supreme Court reiterated its stance that:

“...We could not agree more with the respondent’s submissions before us and the conclusions reached by the two courts below that the true character of the appellant’s cause, despite being disguised as a constitutional petition, was in fact an election petition, questioning the validity of nomination of elected members of the County Assemblies who had been gazetted; and that such challenge could only be commenced in the election court, in this case, under section 75(1A) of the *Elections Act*.”

23. It is therefore imperative for courts to be vigilant and determine what the predominant issue is and to proceed accordingly, so as to avoid any obfuscation or absurdity; considering that there are instances where *the Constitution* itself limits the jurisdiction of the Court to entertain or grant certain remedies against certain parties. I have in mind Article 165(6) which limits the supervisory jurisdiction of the High Court to subordinate courts as opposed to the superior courts. Indeed, in *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy* [2014] eKLR the Supreme Court held:

“[206] This court has set out construction guidelines, and mainstreamed the interpretation of Kenya’s new Constitution. In particular, we have observed that *the Constitution* should be interpreted in a holistic manner; that the country’s history has to be taken into consideration; and that a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of *the Constitution*.”

24. In the result, I take the view that, since this Petition sounds more in Judicial Review than in violation of the constitutional right to fair hearing, it is a matter that falls outside the mandate of the Court by dint of Article 165(6) of *the Constitution*; noting that one of the reliefs sought is a declaration that the judgment of the Supreme Court in Petition No. 11 of 2022 dated 15<sup>th</sup> July 2022 is null and void. Indeed in *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy* (supra) the Supreme Court further stated:

“(161) When courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable.”

25. It is in the light of the foregoing that I find merit in the 1<sup>st</sup> respondent’s Preliminary Objection. The same is hereby upheld and orders granted as follows:

- (a) That the Petition dated 22<sup>nd</sup> August 2022 as amended on 8<sup>th</sup> December 2022 be and is hereby struck out for lack of jurisdiction.
- (b) That each party shall bear own costs of the Petition.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11<sup>TH</sup> DAY OF MAY 2023**

**OLGA SEWE**



**JUDGE**

