



**Chamao & 2 others v Ichung’wah & 13 others; Independent Electoral and Boundaries Commission & 2 others (Interested Parties) (Petition E371 of 2023) [2024] KEHC 15727 (KLR) (Constitutional and Human Rights) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E371 OF 2023**

**LN MUGAMBI, J**

**DECEMBER 13, 2024**

**BETWEEN**

**ISSA ELANYI CHAMA O ..... 1<sup>ST</sup> PETITIONER  
PATRICK KARANI EKIRAPA ..... 2<sup>ND</sup> PETITIONER  
PAUL NGWEYWO KIRUI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**HON KIMANI ICHUNG’WAH ..... 1<sup>ST</sup> RESPONDENT  
HON STEPHEN KALONZO ..... 2<sup>ND</sup> RESPONDENT  
HON CECILY MBARIRE ..... 3<sup>RD</sup> RESPONDENT  
HON AARON CHERUIYOT ..... 4<sup>TH</sup> RESPONDENT  
HON OMAR HASSAN OMAR ..... 5<sup>TH</sup> RESPONDENT  
HON CATHERINE WAMBILIANGA ..... 6<sup>TH</sup> RESPONDENT  
HON OPIYO WANDAYI ..... 7<sup>TH</sup> RESPONDENT  
HON EUGENE WAMALWA ..... 8<sup>TH</sup> RESPONDENT  
HON AMINA MNYAZI ..... 9<sup>TH</sup> RESPONDENT  
HON SEN OKONG’O OMOGENI ..... 10<sup>TH</sup> RESPONDENT  
NATIONAL ASSEMBLY ..... 11<sup>TH</sup> RESPONDENT  
THE SENATE ..... 12<sup>TH</sup> RESPONDENT  
NATIONAL DIALOGUE COMMITTEE ..... 13<sup>TH</sup> RESPONDENT**



ATTORNEY GENERAL ..... 14<sup>TH</sup> RESPONDENT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

KATIBA INSTITUTE ..... INTERESTED PARTY

## RULING

### Background

1. The Petition dated 28<sup>th</sup> September 2023 impugns the constitutionality and legality of the 13<sup>th</sup> Respondent's initiative that was published in an advertisement in the Standard Newspaper on the 1<sup>st</sup> September 2023. The advertisement styled 'Public Participation and Submission of Memoranda by the Public to the National Dialogue Committee on issues of concern to the People of Kenya' is the reason for institution of this Petition which contends that the issues the initiative seeks to address will require substantial constitutional amendments.
2. The Petition outlines the legal implications of the alleged unconstitutional conduct by the 13<sup>th</sup> respondent that the Petitioners insist violate several constitutional principles.
3. In response; 7<sup>th</sup> and 9<sup>th</sup> Respondents filed a Notice of Preliminary Objection to the Petition. The 11<sup>th</sup> Respondent filed Notice of Preliminary Objection as well. Both Notices of Preliminary Objection are dated 17<sup>th</sup> October 2023.

### 7<sup>th</sup> and 9<sup>th</sup> Respondents' Preliminary Objection

4. The 7<sup>th</sup> and 9<sup>th</sup> Respondents preliminary objection to the Petition is on the following grounds:
  - i. The Petition and Notice of Motion, both dated 28<sup>th</sup> September, 2023, offend Article 117 of *the Constitution* and the *Parliamentary Powers and Privileges Act*, No. 29 of 2017, which provides for the powers, privileges and immunities of Parliament.
  - ii. The 7<sup>th</sup> and 9<sup>th</sup> Respondents are immune from being subjected to legal proceedings under Section 12 of the *Parliamentary Powers and Privileges Act*, No. 29 of 2017, for acts done in good faith and in their official capacities as Members of Parliament.

### 11<sup>th</sup> Respondent's Preliminary Objection

5. The 11<sup>th</sup> Respondent 'Notice of Preliminary Objection opposes the Petition on the grounds that:
  - i. The Petitioners essentially question *the constitution*, formation and mandate of the 13<sup>th</sup> Respondent by Parliament and seek to interfere with and/or stop its proceedings.
  - ii. The 13<sup>th</sup> Respondent is a Joint Committee of Parliament. Its proceedings are therefore Parliamentary proceedings within the meaning of Section 2 of the Parliamentary Powers & Privileges Act, 2017.
  - iii. Active parliamentary proceedings are currently underway before the 13<sup>th</sup> Respondent on the matters raised in the Petition and the Motion.



- iv. The Petition and the Motion are premature thus are non-justiciable for violating the doctrine of ripeness which requires that factual claims underlying litigation be concretely presented and not based on speculative future contingencies.
- v. Under Article 117 of *the Constitution*, the *Parliamentary Powers and Privileges Act*, 2017, and the doctrine of separation of powers, this Court lacks jurisdiction to regulate and control how Parliament shall conduct its business.

## Parties' Submissions

### 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents' Submissions

6. In support of the Preliminary Objections, the above Respondents through Ochieng Oginga and Company Advocates filed submissions dated 1<sup>st</sup> March 2024 that focused only on the Court's jurisdiction.
7. Mr. Ochieng Oginga submitted that this Court lacks jurisdiction to entertain the Petition on account of the constitutional principle of the doctrine of ripeness which discourage the filing of a suit before a matter crystalizes into a controversy.
8. To expound on this point, he cited the case of Kkb Vs Scm & 5 Others (Constitutional Petition 014 Of 2020) [2022] Kehc 289 (KLR) (22 April 2022) (Ruling) where the Court held:

“The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies, the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system.”

9. Additional dependence was placed in Law Society of Kenya Vs Attorney General & Another; National Commission For Human Rights & Another (Interested Parties), Constitution Petition No. 132 Of 2020 [2020] eKLR. Equally, the discourse in Constitutional Law Doctrines, And Litigation of Fundamental Rights and Freedoms' (Lawafrica, 2023, Kenya), Supreme Court Justice Isaac Lenaola and Arnold Ochieng Oginga on the doctrine of ripeness.
10. It was contended that this Petition is premature as it based on an ongoing legislative process. To buttress the point, the Respondents relied on the case of Hon. Kawira Mwangaza Vs County Assembly of Meru and Another Nyeri Civil Application No. E093 of 2023 where it was held that:

“(20) The Supreme Court further held at Paras 85 – 90 in the case of Justus Kariuki Mate and Another vs Martin Nyaga Wambora and Another [2017] eKLR, that the constitutionally provided timelines within which certain acts must be done were not amenable to intervention by the court process, especially where a constitutional body like the County Assembly is conducting legislative mandate.”



### 13<sup>th</sup> Respondent's Submissions

11. The 13<sup>th</sup> Respondent in support of both Objections filed submissions dated 19<sup>th</sup> April 2024 through Muthoni and Karanja Advocates. The submissions centered on the lack of jurisdiction on account of the doctrine of ripeness. It was submitted that the Petition is premature, speculative and hypothetical because it relates to a matter that was still undergoing Parliamentary process.
12. That the Petitioners had not even approached the 13<sup>th</sup> Respondent to submit any grievances against the process under Article 119 of *the Constitution*.
13. The 13<sup>th</sup> Respondent relied on the case of Civil Appeal No. 11 of 2018: Pevans East Africa Limited and another v Chairman, Betting Control & Licensing Board and 7 others) where the Court of Appeal held that:

“Courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*.”
14. Other cases relied were: High Court (Mombasa) Constitutional Petition No. E065 of 2021: Mohamed Maula Saggaf and 3 others v the Speaker of the National Assembly and 4 others; Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR and KKB v SCM (supra).
15. Finally, the 13<sup>th</sup> Respondent submitted the Petition does not meet the basic threshold set out in Anarita Karimi Njeru v Republic [1979] eKLR as the Petitioners had not demonstrated with reasonable precision the constitutional provisions claimed to have been violated.

### Other Respondents' and Interested Parties Submissions

16. There were no responses or submissions either in the Court file or in the on the online Court Platform (CTS) that were filed by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents' or 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties in respect of the two Preliminary Objections under consideration by this Court.

### Petitioners' Submissions

17. The firm of Manyonge Wanyama and Associates LLP filed submissions dated 5<sup>th</sup> April 2024 in opposition to the two Preliminary Objections by the Respondents.
18. Reiterating the Petitioners' main grievance, Counsel submitted that the Petition raises weighty issues concerning the constitutionality and legality of the National Dialogue Committee initiative (the 13<sup>th</sup> Respondent herein).
19. Counsel urged the Court to take notice that the 13<sup>th</sup> Respondent's Report was tabled before National Assembly on 7<sup>th</sup> December 2023 and adopted on 22<sup>nd</sup> February 2024. Furthermore, that the Kiambu High Court, in Constitutional Petition No. E007 of 2024: Francis Murithi Ndegwa versus The National Dialogue Committee & Others, issued interim orders stopping some of the impugned amendments on 25<sup>th</sup> March 2024.
20. Counsel submitted that the principal issue for determination is whether this Court has jurisdiction to entertain this Petition. Reiterating the prayers in the Petition, the Petitioners argued that the issues raised fundamentally relate to the aspects of governance that includes the amendment process, public participation, and adherence to constitutional principles hence this Court has jurisdiction to entertain the Petition.



21. On the principle of separation of powers, Petitioners maintained that the principle is inapplicable when the issues raised pertain to the actual or threatened violation of *the Constitution* of which this Court has authority to intervene as it has power to step in where rights are being violated or threatened with violation by the Respondents.
22. Reliance was placed on the Speaker of National Assembly v Attorney General and 3 Others [2013] eKLR where it was held 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.”
23. Comparable reliance was placed in the matter of Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011.
24. Counsel stressed that amendment of *the Constitution* is provided for by *the Constitution* which sets the procedure that should be adhered to in the process. He argued that the inclusion of the 13<sup>th</sup> Respondent in the amendment process was contrary to Article 124(2) of *the Constitution*. Moreover, that amendment of *the Constitution* raises fundamental issues that affect the lives of the citizenry. It was argued that these issues necessitate this Court’s intervention.
25. Reliance was placed in Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 9748 (KLR) (20 September 2021)(Judgment) where it was appreciated that:
- “Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court....
- While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under Section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state.”
26. Correspondingly, the Petitioners argued that although Parliament has privileges and immunities as provided under Section 12 of the *Parliamentary Powers and Privileges Act*, 2017, the same should be within the confines of *the Constitution* and the law. They urged the Court as the guardian of *the Constitution* to lift the veil on the doctrine of parliamentary privilege and immunity where *the Constitution* is violated. In support reliance was placed in National Assembly of Kenya v Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment) which cited



Republic v Speaker of the National Assembly & 4 others Ex- parte Edward RO Ouko [2017] eKLR where it was held that:

“Parliament in Kenya cannot enjoy privilege, immunities and powers inconsistent with the fundamental rights guaranteed in [*the Constitution*]. Thus, whereas parliamentary privilege is recognized, it does not extend to violation of *the Constitution* hence Parliament cannot flout *the Constitution* and the law and then plead immunity; where a claim to parliamentary privilege violates constitutional provisions, the court’s jurisdiction would not be defeated by the claim to privilege...”

27. On the issue of ripeness, The Petitioners countered that the Petition raises actual and threatened violations of *the Constitution*, and is thus not hypothetical as alleged. Reliance was placed in *Wambui & 10 others v Speaker of the National Assembly & 6 others (Constitutional Petition 28 of 2021 & Petition E549, E037 & E065 of 2021 & E077 of 2022 (Consolidated))* [2022] KEHC 10275 (KLR) (Constitutional and Human Rights) (13 April 2022) (Judgment) where it was held that:

“Whereas Parliament has the preserve to enact, amend or repeal any legislation, courts must ensure that Parliament inter alia keeps within the constitutional borders while discharging its mandate. That is where the difference lies. As such, the court’s exercise of its jurisdiction in determining whether Parliament acted within *the Constitution* in coming up with the impugned law cannot be seen as an affront to the doctrine of separation of powers. The two are distinct mandates under *the Constitution*.”

### **Analysis and Determination**

28. There is only one issue for determination in this ruling:

#### **i. Whether this Court’s jurisdiction to hear this Petition is barred by the Constitutional principle of Separation of Powers and doctrine of Ripeness.**

29. This Court’s jurisdiction to deal with constitutional matters is provided for in Article 165(3). This Article provides as follows:

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- (3) 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;
  - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - 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;



- ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - iv) a question relating to conflict of laws under Article 191; and
  - e. any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—
- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (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
30. Manifestly, the High Court’s jurisdiction under Article 165(3) of *the Constitution* is quite expansive. Constitutional adjudication is an area that has witnessed immense growth in jurisprudence as various principles have been developed by the Courts to guide in application and interpretation of *the Constitution*.
31. In the instant Petition, the two Preliminary Objections raise three major jurisdictional grounds in challenging this Petition; namely: the Petition contravenes of Article 117(2) of *the Constitution* as read with Section 12 (2) of the Parliamentary (Powers and Privileges) Act, 2011 with reference to the privilege enjoyed by the 7<sup>th</sup> and 9<sup>th</sup> Respondents’ in performance of their duties; the Petition is in violation of the doctrine of separation of powers as the challenged matters revolve around the business of Parliament and the Petition offends the doctrine of ripeness as the Petition is challenging a process that is still ongoing in Parliament.
32. These preliminary objections if successful are capable of disposing the entire Petition hence they are proper points of law.

**Whether the 7<sup>th</sup> and 9<sup>th</sup> Respondents should be discharged from this Petition on the basis of Parliamentary Privilege**

33. The two Respondents argued that they are protected by of Parliamentary privilege from lawsuits for acts done in execution of parliamentary duties. The Petitioners opposed this position insisting that privilege does not apply where there is violation of *the Constitution*.



34. The relevant legal provisions provide as follows:

Article 117 of *the Constitution*:

Powers, privileges and immunities

1. There shall be freedom of speech and debate in Parliament.
2. Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.

Section 12 of the *Parliamentary Powers and Privileges Act*:

Immunity from legal proceedings

- a. No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.
- b. No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.
- c. The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.

35. Discussing the principle of parliamentary privilege; the Court in *Republic v Ethics and Anti-Corruption Commission Ex parte Nairobi City County Assembly & 13 others* [2019] eKLR held:

“The classic definition of parliamentary privilege is found in Erskine May's *Treatise on The Law, Privileges and Usage of Parliament*: -

“Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively...and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to certain extent an exemption from the general law.”[20]

29. May states that:-

“The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights, which are “absolutely necessary for the due execution of its powers.” They are enjoyed by individual Members because the House cannot perform its functions without



unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and dignity.”[21]

30. Privilege essentially belongs to the House as a whole; individual Members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House...”

36. The Court went on to outline the following principles in determining such a case:

“40. The gist of the established principles relating to scope/span/range/extent/reach of parliamentary privileges in common law countries over the centuries are summarised as follows:-[33]

- a. Parliamentary privileges are privileges of the House “as a whole.”
- b. Individual members can make claims of privilege “in so far as any denial of their rights or threats made to them, would impede the functioning of the House”.
- c. The method for ascertaining the scope or range of parliamentary privileges are “to consult the Records of House and relative case laws in which a claim of privilege has been made, and to examine whether it has been admitted or refused.”
- d. A parliamentary privilege cannot be allowed in cases between non-members of parliament or the cases between the members of parliament outside the area of parliamentary proceedings in their individual capacity.
- e. Parliamentary privileges are only such rights and immunities which are “necessarily connected and are reasonably necessary” for the smooth functioning of any legislative body.
- f. Parliamentary privileges include “the statements by members of the legislature in the course of its proceedings, and the right to remove, suspend or even expel a member for disorderly conduct”.
- g. Parliamentary privileges does not include “to suspend or even expel a member for disorderly conduct, for an indefinite period, or to punish by arrest and commitment”.
- h. It is not within the scope of any parliament of the common law “the right to punish contempt which did not obstructers its proceedings”.
- i. The courts cannot intervene “in matters affecting regularity of the parliamentary procedure and the actions of officers in carrying out the procedure of parliament”.
- j. Houses of Parliament cannot extend its privileges.
- k. Houses of Parliament cannot claim for itself claim new privileges.



1. An act of Parliament only can create a new privilege or extend old privilege. Parliament can “apply its rights to new circumstances”.
37. Further in *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR the Court held as follows:
- “ 540. The 6<sup>th</sup> Respondent has attempted to ward off the court’s inquiry into the issues raised by the Petitioners by flashing the separation of powers card and asserting the principle of parliamentary privilege. It has told the court that it should not touch the impugned amendments as that would amount to interference with the National Assembly’s constitutional mandate to legislate. Our response to these arguments is that there is a plethora of authorities which confirm that Parliament can only successfully raise the defence of separation of powers or parliamentary privilege by proving compliance with *the Constitution* and the law. Anything done by Parliament outside the confines of *the Constitution* and the law attracts the attention and action of this court. In conducting an inquiry into the constitutionality of the decisions and actions of the legislature the Court finds constitutional authority in Article 165(3)(d) ...”
38. It is not disputed that the 7<sup>th</sup> and 9<sup>th</sup> Respondent were at the time filing this Petition serving in Parliament as members of joint committee of both Houses of Parliament. The work they were doing in that Committee belonged to Parliament hence official duties of Parliament and not private or personal duties. Under Section 12 of the *Parliamentary Powers and Privileges Act*, a member of parliament cannot be sued for performing duties of the House in a Committee as the Committee’s function constitutes Parliamentary business. Moreover, Parliament cannot be stopped from establishing a committee to carry out tasks that are relevant to its mandate.
39. I uphold the 7<sup>th</sup> and 9<sup>th</sup> Respondents’ Preliminary objection. It is my finding that the 7<sup>th</sup> and 9<sup>th</sup> Respondent enjoy Parliamentary immunity and cannot therefore be sued in their individual capacities on account of their membership in a Parliamentary Committee. I allow the Preliminary Objection that not only removes the two from this Petition but also any other Member of Parliament or Senator sued in this Petition in his/her individual capacity.
40. The next limb of objection against the Petition is based on the principle of separation of powers. The Respondents contended this Petition is an attempt to interfere with Parliamentary function and therefore violates of the doctrine of separation of powers. The Petitioners countered that there is no protection where there is violation of *the Constitution*.
41. In *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2017)eKLR the Supreme Court guided as follows:
- “(55) In *Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others* [2015] eKLR, the High Court examined the extent to which a Court may inquire into the conduct of parliamentary proceedings. The Court held that, as Article 165(3)(d) clothed it with powers to determine the constitutionality of a given act, the doctrine of separation of powers does



not preclude it from examining acts of the Legislature or the Executive. The Court thus observed [paragraph 172]:

“In a jurisdiction such as ours in which *the Constitution* is Supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case” [emphasis supplied].

- (56) The same principle is reflected in the case of *Okiya Omtatah & 3 Others v. Attorney General & 3 Others* [2014] eKLR, in which the High Court thus held [Paragraph 54]:

“Our view is that all organs created by *the Constitution* must live by the edict of *the Constitution*.”

- (57) The Court of Appeal, in the case of *Mumo Matemu v. Trusted Society of Human Rights Alliance & 2 Others, Civil Appeal No 290 of 2012*, [2013] eKLR, adopted the High Court’s dicta, in the following terms:

“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...”

42. The Supreme Court went on to lay down following general principles:

- “(63) From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:
- a. each arm of Government has an obligation to recognize the independence of other arms of Government;
  - b. each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
  - c. the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
  - d. for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;



- e. in the performance of the respective functions, every arm of Government is subject to the law.”

43. Congruently in *Appollo Mboya v. AG & 2 others* (2018) eKLR, the court held thus:

“According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law, including, where applicable, *the constitution*. Ouster clauses prevent courts from carrying out this constitutional function.....The primary duty of the courts is to uphold *the Constitution* and the law “which they must apply impartially and without fear, favour or prejudice.” And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by *the constitution*. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of *the Constitution* and the rule of law including any obligation that parliament is required to fulfill in respect of the passage of laws, on the one hand and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand”.

44. The instant Petition challenges the creation of the 13<sup>th</sup> Respondent by Parliament to undertake the initiative as advertised in the newspaper. It alleges the initiative intends to deal with or address matters that involve substantial amendments of *the Constitution*. In brief, it questions of the Constitutionality and legality of Parliament to form or establish a Joint Committee to seek views that may bring about amendments/changes to *the Constitution*.

45. Article 124 of *the Constitution* confers upon Parliament the power to establish Committees by stating as follows:

124. Power to establish Committees and Standing Orders

- (1) Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.
- (2) Parliament may establish joint committees consisting of members of both Houses and may jointly regulate the procedure of those committees.
- (3) The proceedings of either House are not invalid just because of—
  - a. a vacancy in its membership; or
  - b. the presence or participation of any person not entitled to be present at, or to participate in, the proceedings of the House.
- (4) When a House of Parliament considers any appointment for which its approval is required under this Constitution or an Act of Parliament—
  - a. the appointment shall be considered by a committee of the relevant House;
  - b. the committee’s recommendation shall be tabled in the House for approval; and
  - c. the proceedings of the committee and the House shall be open to the public.



46. From the outset, there is nothing unlawful about Parliament taking steps that may lead into making amendments to *the Constitution*. Parliament's role in that regard is secured under Article 256 of *the Constitution*. Nothing bars Parliament from setting up a committee to explore areas of concern relevant to its work which may include making amendments to *the Constitution* if it considers it necessary subject to meeting all other Constitutional thresholds. The setting up of the 13<sup>th</sup> Respondent to engage with the public and listen to any concerns that the public is likely to raise is not in my view constitutionally objectionable.
47. This Court's jurisdiction under Article 165 (3)(d) cannot be invoked to stop Parliament from establishing its own Committee to assist it execute a constitutional mandate. The establishment of the 13<sup>th</sup> Respondent is an Internal Parliamentary matter. Parliament is empowered under Article 124 (2) and the Standing Orders to establish committees to facilitate Parliament's work in matters relevant to its mandate.
48. The last limb is on the doctrine of ripeness. The Supreme Court in *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated))* [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) guided as follows on the issue of ripeness:
- “61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.
63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystallized.”
49. Citing a number of authorities with approval in *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated))* [2021] KEHC 304 (KLR) (Constitutional and Human Rights) (15 October 2021) (Judgment) the Court noted as follows:
- “171. The Ripeness doctrine is one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a Court from considering a dispute whose resolution has not crystallized enough as to warrant Court's intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than Court process.
172. The operation of the doctrine was discussed by a multi-Judge Bench of the High Court in *Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others* [2020] eKLR in the following manner: -



107. The doctrine focuses on the time when a dispute is presented for adjudication. The Black's Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies....

... In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015* [2016] eKLR, Onguto J stated:

(27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The Court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before Court must be ripe, through a factual matrix for determination.”

50. A perusal of the Petition discloses that the Petitioners are aggrieved inter alia by the fact that Parliament established the 13<sup>th</sup> Respondent to gather views that might bring about substantial amendments of *the Constitution*. They also contend that the Respondents have failed to enact legislation under Article 94 (1) to guide the process of amendment of *the Constitution*.

51. This contention is premature as the process that the Respondents have started is only aimed at gathering views generally, this may not necessarily be confined to the amendment of *the Constitution*. Whether or not the issues raised will touch on the amendment of *the Constitution* is in fact speculative at the moment. Further, even if views touching on the amendment of *the Constitution* are raised before the 13<sup>th</sup> Respondent; it is still within Parliament's mandate to consider them as already observed and there is nothing illegal or unconstitutional about it since amendment of *the Constitution* through Parliamentary initiative is part and parcel of Parliament's mandate.

52. As was held in *Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others* courts should only decide matters that require to be decided. Thus in *Ashwander –v- Tennessee Valley Authority* [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy” ...

... The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination...”

53. In my considered view that this Court's jurisdiction is being invoked to adjudicate a non-existent dispute. The Petitioners want the Court to determine an imaginary controversy. The court has no business engaging in premature adjudication of disputes. The doctrine of ripeness applies in this case.

54. Having regard to the foregoing reasons, this Court upholds the Preliminary objections and strikes out the Petition in its entirety.



55. Each Party to bear its own costs of the Petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER, 2024.**

.....

**L N MUGAMBI**

**JUDGE**

