



**Gesicho v Kenyatta & another; Speaker of the National Assembly & 3 others  
(Interested Parties) (Petition 321 of 2018) [2024] KEHC 15354 (KLR)  
(Constitutional and Human Rights) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15354 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 321 OF 2018  
LN MUGAMBI, J  
DECEMBER 6, 2024**

**BETWEEN**

**MORAA GESICHO ..... PETITIONER**

**AND**

**UHURU MUGAI KENYATTA ..... 1<sup>ST</sup> RESPONDENT**

**RAILA AMOLLO ODINGA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SPEAKER OF THE NATIONAL ASSEMBLY ..... INTERESTED PARTY**

**SPEAKER OF THE SENATE ..... INTERESTED PARTY**

**H.E. WILLIAM SAMOEI RUTO ..... INTERESTED PARTY**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... INTERESTED PARTY**

**JUDGMENT**

1. The initial Petition dated 17<sup>th</sup> September 2018 has been amended many times. The further re-amended amended Petition is dated 12<sup>th</sup> July 2022. It is Petition supported by the Petitioner’s verifying affidavit sworn of even date. The Petitioner seeks the following reliefs:
  - i. A declaration be issued that the new definition of a "political party", that is, "coalition political party" is unconstitutional.
  - ii. A declaration be issued that Azimio La Umoja One Kenya Coalition Political Party is unconstitutional.



- iii. A declaration be issued that Kenya Kwanza Coalition Political Party is unconstitutional.
- iv. A declaration be issued that the nomination of the 2<sup>nd</sup> Respondent and other candidates by Azimio La Umoja One Kenya Coalition Political Party to vie for various positions in the August 9, 2022 general election is unconstitutional.
- v. A declaration be issued that nomination of the 3<sup>rd</sup> Interested Party and other candidates by Kenya Kwanza Coalition Political Party to vie for various positions in the August 9, 2022 general election is unconstitutional.
- vi. A declaration be issued that clearance by the 4<sup>th</sup> Interested Party of the 2<sup>nd</sup> Respondent and other candidates to vie for various positions in the August 9, 2022 general election is unconstitutional.
- vii. A declaration be issued that clearance by the 4<sup>th</sup> Interested Party of the 3<sup>rd</sup> Interested Party and other candidates to vie for various positions in the August 9, 2022 general election is unconstitutional.
- viii. A declaration be issued that the 2<sup>nd</sup> Respondent's membership to ODM and Azimio La Umoja One Kenya Coalition Political Party is unlawful.
- ix. A declaration be issued that the 3<sup>rd</sup> Interested Party's membership to UDA and Kenya Kwanza Coalition Political Party is unlawful.
- x. A declaration be issued that it is unlawful for the 2<sup>nd</sup> Respondent to vie for the position of president in the August 9, 2022 general election.
- xi. A declaration be issued that it is unlawful for the 3<sup>rd</sup> Interested Party to vie for the position of president in the August 9, 2022 general election.
- xii. A declaration be issued that it is unlawful for the 4<sup>th</sup> Interested Party to allow the 2<sup>nd</sup> Respondent and other candidates vying for various positions on Azimio La umoja One Kenya Coalition Political Party to take part in the August 9, 2022 general election.
- xiii. A declaration be issued that it is unlawful for the 4<sup>th</sup> Interested Party to allow the 3<sup>rd</sup> Interested Party and other candidates vying for various positions on Kenya Kwanza Coalition Political Party to take part in the August 9, 2022 general election.
- xiv. An order:
  - a. Compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to bear the costs of this suit.
  - b. Any other relief the court may deem just to grant.

#### **Petitioner's case**

2. The Petitioner asserts that following the coming into power of the 1<sup>st</sup> Respondent on 8<sup>th</sup> August 2017, he in alliance with the 2<sup>nd</sup> Respondent embarked on an initiative to amend *the Constitution*. On this premise, a taskforce was established to implement this initiative and issue the government a Report on the same.
3. It is asserted that this initiative was commenced without any legal mandate to do so on the part of the 1<sup>st</sup> Respondent. Instead, the initiative is argued to be a personal project of the Respondents with the aim of initiating changes to *the Constitution*. Additionally, that the same was done without any form of accountability to the public.



4. For these reasons, this initiative is contended to be unconstitutional. Particularly that it is in violation of Articles 1 (1), 28, 73 (1) (2) (c), 75, 129 (1), 131 (2) (a) and 132 (3) (c) of the Constitution.

### **1<sup>st</sup> Respondent's Case**

5. The 1<sup>st</sup> Respondent neither filed a response nor submissions to the Petition as none was in the Court file or in the online Court Platform (CTS).

### **2<sup>nd</sup> Respondent's Case**

6. The 2<sup>nd</sup> Respondent in response to the further re-amended Petition filed its grounds of opposition dated 19<sup>th</sup> July 2022 on the premise that:
- i. The re-amended Petition is an abuse of the Court process and a mere-afterthought aimed at vexing and dragging the 2<sup>nd</sup> Respondent to the Court.
  - ii. The re-amended Petition is an attempt by the Petitioner to have the Court re-open issues heard and determined by the High Court, Court of Appeal and the Supreme Court in regard to the Building Bridges to a United Kenya Taskforce and the Constitution, Constitutional amendment process popularly known as the BBI.
  - iii. The instant re-amended Petition offends the doctrine of res judicata and the Judgments issued by the Courts pertaining to the BBI are judgments in rem and hence binding on all persons and as such the Petitioner cannot use these proceedings to purport to re-open the said issues and have this Court determine the same.
  - iv. The instant re-amended Petition is an attempt by the Petitioner to give her old Petition a cosmetic face-lift by changing the parties and inviting the Court to determine issues that have already been heard and determined on merits.
  - v. This Court lacks the jurisdiction to hear and determine issues pertaining to allegations on qualifications or lack of, of the 2<sup>nd</sup> Respondent as the same constitutes a pre-nomination dispute and this Court's jurisdiction is precluded by dint of Article 88 of the Constitution as read with Section 74 of the Elections Act.
  - vi. The present re-amended Petition is an abuse of the court process as the Court's jurisdiction has been pre-maturely invoked, the Petition is not ripe for determination and the Court's jurisdiction has been wrongly invoked pertaining to pre-election nomination disputes. The Court in the case of Amb. Julius Kiema Kilonzo Vs Independent Electoral and Boundaries Commission and Others, Kitui High Court Petition No. 1 of 2022 (Formerly Milimani High Court Petition No. E304 Of 2022).
  - vii. The Court lacks the jurisdiction to hear and determine pre-nomination electoral disputes pertaining to the nomination of the 2<sup>nd</sup> Respondent and various other candidates as done by their respective political parties such as Azimio La Umoja One Kenya Coalition and Kenya Kwanza Coalition Political Party.
  - viii. The instant Petition is incurably defective as the Petitioner seeks orders and has made allegations against persons not parties to the instant proceedings, such as the Azimio La Umoja Coalition Party; Kenya Kwanza Coalition Party; and all such candidates as nominated and cleared by the Independent Electoral and Boundaries Commission to contest for the various positions under the aforesaid Coalition Political Parties. It is trite law that the Court cannot



issue orders against persons not before it as held in Yasser Ali Sheikh Vs Amani National Congress (Anc), Forum for Restoration of Democracy-Kenya, (Ford-K), Orange Democratic Movement (Odm)-Kenya & Wiper Democratic Movement-Kenya (Wdm-K) Jointly as The National Supper Alliance (Nasa) Coalition & 2 Others [2018] eKLR.

- ix. The re-amended Petition is incurably defective as the Petitioner has sought orders in a vacuum and failed to plead with specificity in line with the principles enshrined in the case of Anarita Karimi Vs Republic, [1979] eKLR.
- x. The above requirement on pleading with precision was reiterated by the Court of Appeal in Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
- xi. The Petitioner has sought orders in a vacuum without pleading with precision on how either *the Constitution* or any such other law has been contravened or infringed. The Petitioner has not made out a case for the grant of the orders sought and neither has she pleaded with precision on how the Orders are merited or the nexus between the orders sought and the grounds and averments in the Petition.
- xii. The instant Petition is bad in law and an abuse of the court process and further offends the doctrine of res judicata for the reason that the question of the constitutionality of the new definition of a “political party” to include a coalition political party has been heard and determined on merits in the case of Salesio Mutuma Thurania & 4 Others V Attorney General & 2 Others; Registrar Of Political Parties & 4 Other (Interested Parties) [2022] eKLR.

#### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties Case**

7. No responses or submissions were filed by the Interested Parties as none is in the Court file or Court online Platform (CTS).

#### **4<sup>th</sup> Interested Party's Case**

8. The 4<sup>th</sup> Interested Party in reply also filed grounds of opposition dated 15<sup>th</sup> July 2022 on the basis that:
  - i. The Petition severely falls short of the constitutional petitions' threshold; it does not state with specificity which constitutional provision has been violated or is threatened with violation and how it has been violated.
  - ii. The Petition does state how the new definition of a political party to include a coalition political party offends *the Constitution*.
  - iii. The Petition does not disclose how Azimio La Umoja One Kenya Coalition is unconstitutional.
  - iv. The Petition does not say how the Kenya Kwanza Coalition Political Party is contrary to *the Constitution*.
  - v. The Petition does not state how the 2<sup>nd</sup> Respondent's membership to the ODM and Azimio La Umoja One Kenya Coalition Political Party is unconstitutional.
  - vi. The Petition does not demonstrate how the 3<sup>rd</sup> Interested Party's membership to UDA and Kenya Kwanza Coalition Political Party is unconstitutional.
  - vii. The Petition is convoluted and does not disclose any violation of any right or freedom and neither does it disclose what the Petitioner really seeks.



- viii. The 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Interested Party were duly qualified and nominated as a presidential candidate and the grounds for qualification and disqualification of a presidential candidate is well established under Article 137 of *the Constitution* and Section 23 of the *Elections Act* and the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Interested Party are yet to be disqualified on any of them.
- ix. All the other candidates in the other seats for the forthcoming elections were duly nominated according to the law and the Petitioner neither raised any objections to their nomination nor filed any complaint with the IEBC.
- x. There is no law that bars the 1<sup>st</sup> Respondent from participating in politics and the political activities of a political party.
- xi. There is an established legal process for raising objections and challenging the nomination of a candidate in the forthcoming general elections that the Petitioner did not follow before coming to this court.
- xii. The Petition is a reference for an advisory opinion disguised as a constitutional petition.
- xiii. The Petition and is entirely unmerited and an abuse of process and should be dismissed with costs.

## Parties Submissions

### Petitioner's Submissions

9. In support of her case, the Petitioner filed submissions dated 13<sup>th</sup> October 2022 where she identified the issues for discussion as: the constitutionality of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's handshake, the memorandum of understanding between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the quest by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to amend *the Constitution*.
10. On the first issue, the Petitioner submitted that this act that culminated to the intended constitution amendment was unconstitutional. This is because the 1<sup>st</sup> Respondent had no constitutional or legal mandate to invite the 2<sup>nd</sup> Respondent to enter into such an agreement. It is argued that this alliance led to the beginning of assistance by the 2<sup>nd</sup> Respondent in governing the Country contrary to Article 131 (1) (b) of *the Constitution* which stipulates this role to the Cabinet Secretaries.
11. As a result of this alliance, it is argued that the BBI initiative was proposed alongside the amendments to the *Political Parties Act*, 2011. The Petitioner challenges the definition of a political party as including a coalition political party terming it as unconstitutional. In this context, the registration of Azimio La Umoja One Kenya Coalition Political Party by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and further Kenya Kwanza Coalition Political Party by the 3<sup>rd</sup> Interested Party are argued to be unconstitutional.
12. The Petitioner further took issue with the nomination of candidates in these parties and clearance of these candidates by the 4<sup>th</sup> Interested Party. According to her, the aspect of belonging to more than one political party is unlawful. For this reason, the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Interested Party's candidature in view of the 9<sup>th</sup> August 2022 general elections, was contended to be unlawful and unconstitutional. As such, the 4<sup>th</sup> Interested Party's clearance of the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Interested Party was submitted to be unconstitutional.



## 2<sup>nd</sup> Respondent's Submissions

13. On 19<sup>th</sup> July 2022, Ochieng Oginga and Company Advocates filed submissions on behalf of the 2<sup>nd</sup> Respondent.

14. Counsel begun by submitting that this Court lacks jurisdiction to entertain the instant matter. First, this is with reference to pre-nomination disputes. It was submitted that *the Constitution* under Article 88 of *the Constitution* as read with Section 74 of the *Elections Act* bestows this mandate on the 4<sup>th</sup> Interested Party. Reliance was placed in Amb. Julius Kiema Kilonzo (supra) where it was held that:

“(86) In my considered view, the question of jurisdiction between Independent Electoral and Boundaries Commission and Political Parties Disputes Tribunal depends on the stage of the process of nominations of candidates in the party primaries. When you look at the definition of ‘Nomination’ going by the above-cited Rule under the *Elections Act*, the jurisdiction of Independent Electoral and Boundaries Commission to deal with disputes arising from nomination exercise of party primaries only kicks in when the submission of the name of the winning candidate is done to the Commission. Only then, depending on grounds raised, the Independent Electoral and Boundaries Commission can exercise jurisdiction to entertain a dispute.”

15. Secondly, that issues touching of the BBI and amendments to Section 2 of the Political Parties (Amendment) Act, 2022 on the definition of coalition political party, have already been determined by the Courts. As a consequence, these issues are adjudged to be res judicata hence a bar to this Court’s jurisdiction.

16. Reliance was placed in Salesio Mutuma Thurania & 4 Others(supra) where it was held that:

“

“(272) We have considered the rival submissions in light of the above constitutional principles and cases cited and we find that Article 260 of *the Constitution* does not give a definition of a political party as such. Instead, it makes reference to Chapter 7 Part 3 of *the Constitution*. Under the said Chapter, Article 91 which deals with political parties only directs on what a political party should be or not be. It does not give a direct definition of what a political party is.

(273) The *Political Parties Act* was enacted to give effect to Article 92 of *the Constitution* as can be seen from the preamble of the Act. The said Act did not provide a definition of a political party and instead it referred to Article 260 of *the Constitution*. Parliament must have noted the lacuna in both *the Constitution* and the *Political Parties Act* 2011, and so it gave the definition in the amended Act.

(274) The definition assigned to the political party in Section 2 of the Political Parties (Amendment) Act, resonates with the ordinary and general meaning of a political party. For instance;

Wikipedia defines it as: ‘a political party is an organization that coordinates candidates to compete in a particular country’s elections. It is common for the members of a party to hold similar ideas about politics and parties may promote specific ideological or policy goals.’



The Black's Law dictionary 9th Edition defines political party as: 'An organization of voters formed to influence the government's conduct policies by nominating and electing candidates to public office. The United States has traditionally maintained a two-party system which today comprises the Democratic and Republican parties-often shortened to party.'

(275) After considering all the above we have not found any inconsistency in the definition of political party as stated in Section 2 of the Political Parties (Amendment) Act and Articles 260 of *the Constitution*."

17. Furthermore, Counsel submitted that the further re-amended Petition is incurably defective as the Petitioner seeks orders against persons not parties to the instant proceedings such as the Azimio La Umoja Coalition Party and all such candidates as nominated and cleared by the 4<sup>th</sup> Interested Party. Reliance was placed in Yasser Ali Sheikh(supra) where it was held that:

“(39) A court of law cannot issue orders which will affect persons who are not parties to the case. Such a scenario amount to granting orders affecting other persons without giving them the benefit of a hearing. It is an established principle that a person becomes a necessary party if he is entitled in law to defend the orders sought. The term “entitled to defend” confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. A person or an authority affected by a court order must have a legal right or right in law to defend or assail.

[40] The Supreme Court of India put it succinctly: [In J.S. Yadav vs State of U.P. & Anr {2011} 6 SCC 570, Paragraph 31] “No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles ... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail...”

18. Additionally, Counsel submitted that the further re-amended Petition is not pleaded with precision as guided by the case of Anarita Karimi(supra) and Mumo Matemu(supra). This is because the Petitioner did not demonstrate how *the Constitution* or any other law had been contravened and how the sought orders are merited. To this end, Counsel urged the Court to dismiss the Petition with costs.

### **Analysis and Determination**

19. Upon perusal of the pleadings and the submissions herein, it is my considered opinion that the following issues arise for determination:

- i. Whether this Court has jurisdiction to entertain this matter.
- ii. Whether the Petition meets the requisite constitutional threshold.
- iii. Whether the Respondents actions were unconstitutional.
- iv. Whether the Petitioner is entitled to the reliefs sought.



### Whether this Court has jurisdiction to entertain this matter.

20. The Respondents objected to the jurisdiction by applying a two-pronged strategy firstly, some of the issues being raised in the Petition are pre-election disputes which should be resolved elsewhere and not before this Court, and secondly that the issues are also res-judicata.

21. Jurisdiction refers to the ability or the capacity of the Court to entertain or resolve a legal dispute. The Supreme Court dealt with jurisdictional question and guided as follows In the Matter of Interim Independent Electoral Commission [2011]eKLR:

“(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent....

[30] ...jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

22. Similarly, in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Superior Court held as follows:

“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 counsels 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 upon 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.”

23. Some of the prayers sought in the further amended petition are various declarations as captured in prayers iv, v, vi and vii as follows:

“A declaration be issued that the nomination of the 2<sup>nd</sup> Respondent and other candidates by Azimio La Umoja One Kenya Coalition Political Party to vie for various positions in the August 9, 2022 general election is unconstitutional; A declaration be issued that nomination of the 3<sup>rd</sup> Interested Party and other candidates by Kenya Kwanza Coalition Political Party to vie for various positions in the August 9, 2022 general election is unconstitutional; A declaration be issued that clearance by the 4<sup>th</sup> Interested Party of the 2<sup>nd</sup> Respondent and other candidates to vie for various positions in the August 9, 2022 general election is unconstitutional and; A declaration be issued that clearance by the 4<sup>th</sup> Interested Party of



the 3<sup>rd</sup> Interested Party and other candidates to vie for various positions in the August 9, 2022 general election is unconstitutional.”

24. It is manifest that these prayers relate to elections which have legally designated procedures that have been enacted to deal with such disputes. Under Article 88 (4) (e); it is the Independent Electoral and Boundaries Commission that is empowered to resolve disputes concerning nominations.

Article 88 (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-

.....

- e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

25. The Petitioner did not approach the 4<sup>th</sup> Respondent to register her grievances on the nomination related complaints yet *the Constitution* gives the primary mandate of resolving disputes arising from nominations to the 4<sup>th</sup> Respondent. She overlooked this primary responsibility bestowed on the 4<sup>th</sup> Respondent and instead sued the 4<sup>th</sup> Respondent yet she did not give it the opportunity to interrogate her nomination related grievances.

26. The Petitioner’s move offends the doctrine of exhaustion of remedies and the Court is bound to decline to exercise jurisdiction matters concerning nomination or make orders affecting the nomination outcomes in the circumstances. I am encouraged to make this finding in view of the Court of Appeal case *Kennedy Moki v Rachel Kaki Nyamai & 2 others* [2018] eKLR where the Court stated:

“

- “ 52. Upfront, we wish to point out that the jurisdiction of the High Court in Electoral Disputes Resolution is a special jurisdiction conferred by *the Constitution* and the *Elections Act*. This special jurisdiction should not be confused with the High Court and unlimited jurisdiction in civil and criminal matters or the High Court’s supervisory jurisdiction over inferior bodies and tribunals. This position was affirmed by the Supreme Court at Paragraphs 82 of its judgment in *Lemanken Aramat -v- Harun Meitamei Lempaka & 2 others* [2014] eKLR where it was stated:

“[82] The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3) (a) of *the Constitution*, is unlimited. In addition, the High Court has a special jurisdiction in electoral matters, conferred by *the Constitution*, and given effect under the *Elections Act*: this is the jurisdiction to determine any question as to whether a person has been validly elected as a Member of Parliament (Article 105(1) (a) of *the Constitution*). This jurisdiction is activated upon a declaration by the authorized electoral body (IEBC) that a particular person has been returned as Member of Parliament, when there is a challenge to that electoral declaration (Article 87(2) of *the Constitution*).

84] The very basis of the High Court’s jurisdiction in respect of Parliamentary-election disputes, lies in Articles 87(2) and 105(1)(a) of *the Constitution*...”

Further, in *Frederick Otieno Outa -v- Jared Odoyo Okello & 4 others* [2014] eKLR, the Supreme Court expressed:



“[63] Similar to Article 87(1) is Article 105 (3), which confers upon Parliament a mandate to enact separate and special legislation giving it full effect. As noted above, Article 105 (1) makes the High Court the first-instance forum for resolving electoral disputes, where any challenge to the election of a Member of Parliament should be directed. Article 105(2) prescribes the timeline within which such a dispute must be resolved. By Article 105(3) *the Constitution*, Parliament was mandated to design and enact a special legislative mechanism, to enable the realization of two objects: the judicial duty of the High Court to hear and determine causes of action in electoral contests, in the first instance, and, where required, provide an avenue of appeal to the Court of Appeal; and secondly, the specification of jurisdiction and timelines.”

Bearing in mind the foregoing, whether or not a candidate has been nominated is a question of fact. Whether the nomination itself and the process leading to the nomination is valid is a question of law. Equally whether a court has jurisdiction in any matter is a matter of law.....To this extent, we affirm the principle that where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.

We bear in mind that an election court is a court with special jurisdiction and availability of alternative remedies and procedures under general law should not be a bar to remedies and procedures under the electoral law. Where *the Constitution* provides for two or three methods of resolving disputes none can exclude the other. In such cases, the decision of the forum that has constitutional finality in resolving the dispute and cause of action prevails. In electoral disputes, it is the electoral law that applies and any electoral dispute must be resolved by way of an election petition and not through judicial review process.”

27. A similar position was upheld by the Court in the case of Kenya Human Rights Commission & 3 others v Independent Electoral & Boundaries Commission & 3 others; National Council for Persons with Disability & another (Interested Parties) [2022] KEHC 16358 (KLR) which held thus:

“ 22. The people of Kenya when enacting *the Constitution* recognised that disputes relating to elections will inevitably arise. Provision was thus made under article 87(1) that Parliament shall enact legislation to establish mechanisms for the timely settlement of electoral disputes. The *Elections Act*, 2011 is the legislation that was enacted to give effect to the said article. In determining the jurisdiction of this court in matters relating to elections, or indeed any other matter, the court must beyond the provisions of *the Constitution* have regard to the provisions of relevant statutes.

23. Under article 88(4)(e) and section 74 of the *Elections Act*, IEBC is vested with the mandate to resolve electoral disputes. However, that mandate does not extend to election petitions and disputes subsequent to the declaration of election results. Article 88(4)(e) provides as follows:

“(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—



- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;"

24. Section 74 of the [Elections Act](#) is couched in similar terms as follows:

"Pursuant to article 88(4)(e) of [the Constitution](#), the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results."

28. This Court would be exceeding its jurisdiction if it is going to entertain election nomination objections raised by the Petitioner when the body [the Constitution](#) has assigned the primary mandate to deal with such concerns has not been invoked and given the opportunity to address the matter.

29. The second limb in the jurisdictional challenge by the Respondents was on the basis that issues raised in the in the re-amended Petition are res judicata having been addressed in the BBI judgments which were judgments in rem and thus binding as they were litigated all the way to the Supreme Court and those matters are now settled. Again, the Petitioner's provide a response that specifically responds to this particular objection.

30. The doctrine of res-judicata is provided for under Section 7 of the [Civil Procedure Act](#), CAP 21 as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

31. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & Bidii Kenya Limited* [2016] KESC 6 (KLR) (Civ) clarified res judicata principle as follows:

"(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights..."

32. Under the doctrine of res-judicata, there has developed what is now referred to as issue-based estoppel which was explained in *Anne Delorie v Aga Khan Health Service Limited* [2009] eKLR as follows:

"... Issue of estoppel and the doctrine of res judicata arise in these appeals. Issue estoppel and res judicata bar the appellant from re-litigating matters already ruled on by the court, since the point at issue in both appeals is the same and based on the same facts between the same parties and arose out of the action which point had been decided with certainty and it matters not whether the first decision was right or wrong." ...

....At page 861 of Halsbury's Laws of England there is some further comment on the issue of estoppel as follows:-



“An estoppel which has come to be known as ‘issue Estoppel’ may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, of one mixed fact and law.”

33. It follows that if an issue was/has been covered in a previous suit even though the case does not involve the same parties but was a public interest litigation, the matter cannot be relitigated as the judgment or order made is in rem. Tinkering with the names of the parties while leaving the substance of the matter intact therefore would be immaterial as such matter cannot escape the res-judicata bar.
34. In the body of the further re-amended Petition, the Petitioner pleads that following the coming into power of the 1<sup>st</sup> Respondent on 8<sup>th</sup> August 2017, he entered into an alliance with the 2<sup>nd</sup> Respondent and embarked on an initiative to amend the Constitution and thus established a taskforce, the Building Bridges To Unity Advisory Task Force to implement this initiative and issue the government a Report on the same. She asserted that this initiative lacked the requisite legal mandate as it was a personal project by the Respondents aimed at initiating changes to the Constitution and was executed without any form of accountability to the public hence unconstitutional.
35. The issues being raised in the body of the Petitioner’s re-amended Petition are not new. These are matters that were dealt with and settled in the Supreme Court Petition 12 of 2021 (Consolidated with 11 & 13 of 2021) The Hon. Attorney General & 2 Others v David Ndii & 78 Others. The Supreme Court judgment conclusively determined the issue of whether the President can initiate changes/amendments to the Constitution in its judgement as well as whether or not there was public participation in respect of the Constitution of Kenya (Amendment) Bill 2020 and those issues cannot therefore be reopened by merely toying with the names of the parties while leaving the body of the Petition intact.

### **Whether this petition meets the threshold of a constitutional Petition**

36. A Petition must meet the constitutional threshold of reasonable degree of precision by identifying the provisions of the constitution that were violated and the manner that the violations occurred or were carried out. The locus classicus case that laid down this test is Anarita Karimi Njeru (supra) which was affirmed by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] KESC 15 (KLR) as follows:

“(349) ... Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement.



Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

37. The essence of this principle was also discussed by Court of Appeal in *Mumo Matemu* (supra) as follows:

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

38. The Court went further to state that:

“We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent...”

39. Similarly, in *Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another* [2017]eKLR the Court opined as follows:

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“33. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court where Vickery J said this of the principles of good pleading:-

“In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning.



The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well-ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.

34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression “material facts” is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.”

40. A reading of the instant Petition shows a lack correlation between facts pleaded in the body of the Petition and the prayers sought. The body and the reliefs are strange bedfellows as there no nexus between the body of the Petition and the reliefs the Petitioner seeks. Declarations are sought with no corresponding effort being made to demonstrate how the alleged matter is unconstitutional or unlawful. A conclusive statement is made from nowhere without any attempt at justifying the alleged position being taken by the Petitioner.

41. This Petition is simply vague, jumbled, imprecise and embarrassing. It is difficult to have a fair trial premised on such a pleading that is manifestly confusing and inconsistent where the reliefs sought and facts relied upon as diverse as heaven and hell. It is my finding that this Petition does not meet the threshold laid down in Anarita Karimi Njeru (supra) which requires a Constitutional Petition to be drawn with reasonable degree of clarity and precision.

42. In view of the foregoing reasons; it is the finding of this Court that the instant Petition incompetent and lacks merit. I hereby dismiss the same.

43. Each Party shall bear its own costs..

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024.**



**L N MUGAMBI**  
**JUDGE**

