



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.371 OF 2019

IN THE MATTER OF ARTICLES 19, 20,22,23,24, 88(4) (e) AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 38, 73, 99(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011

AND

ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS, 2012

AND

IN THE MATTER OF UNCONSTITUTIONAL DECISION OF THE DISPUTE RESOLUTION COMMITTEE OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

BETWEEN

LEINA KONCHELLAH.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

MCDONALD MARIGA WANYAMA.....2ND RESPONDENT

THE RETURNING OFFICER, KIBRA CONSTITUENCY.....3RD RESPONDENT

AND

JUBILEE PARTY OF KENYA.....INTERESTED PARTY

RULING

1. The petitioner through a petition dated 20th September 2019 brought pursuant to Articles 10,35,73,99(1) of the Constitution of Kenya seek several prayers being the following:-

- (a) A declaration do issue that for purposes of nomination of a candidate for an elective post whose criteria is set out in Article 99 (1) of the Constitution, the register of voters is –

i. One document;

ii. Which has been certified and published in the Gazette by the 1st Respondent.

(b) A declaration do issue that where a seat of a Member of the National Assembly is declared vacant under Article 101 (4) of the Constitution and a notice of a by-election is issued by the 1st Respondent, for the purposes of determining eligibility to vie as a candidate in the by-election as provided by Article 99 (1) (a) of the Constitution, the suspension of registration of voters provided for by Section 5 (1) (b) of the Elections Act applies to all registration centres.

(c) A declaration do issue that the 2nd Respondent is not, for the purposes of the by-election to be conducted by the 1st Respondent in Kibra Constituency scheduled for 7th November, 2019, a duly registered voter within the meaning of Article 99(1)(a) of the Constitution.

(d) An Order of *certiorari* be and is hereby issued removing into this Court for purposes of quashing the decision of the 1st Respondent dated 16th September, 2019 declaring the 2nd Respondent as a duly registered voter.

(e) A declaration do issue that in declining to adjudicate the Petitioner's complaint about the authenticity of the 2nd Respondent's nomination documents, the 1st Respondent abdicated its duty under Article 88 (4) (e) of the Constitution.

(f) A declaration do issue that the documents presented by the 2nd Respondent in support of his nomination to vie for the by-election for the member of National Assembly, Kibra Constituency are questionable.

(g) A declaration do issue that the 2nd Respondent is not eligible for election as the member of National Assembly, Kibra Constituency as he has not satisfied the moral and ethical requirements prescribed by Chapter Six of the Constitution as required by Article 99(1)(b) of the Constitution.

(h) An Order of *certiorari* be and is hereby issued removing into this Court for purposes of quashing the decision of the 1st Respondent dated 16th September, 2019 ordering for the processing of the 2nd Respondent's Application for nomination as the Interested Party's candidate for the Kibra Constituency by-election slated for 7th November, 2019.

(i) A declaration do issue that the 2nd Respondent is not eligible to participate in the by-election to be conducted by the 1st Respondent on 7th November, 2019.

(j) The 3rd Respondent be directed to reject the nomination of the 2nd Respondent and amend the list of candidates to contest the by-election for the Member of National Assembly, Kibra Constituency accordingly.

2. The 1st Respondent filed Replying affidavit to the petition by Salome Oyugi sworn on 1st October 2019. The 1st Respondent filed further Replying affidavit sworn by Salome Oyugi dated 18th October following replying affidavit, to preliminary objection dated 4th October 2019 sworn by the petitioner on 9th October 2019.

3. The 2nd Respondent filed Replying affidavit by Macdonald Mariga Wanyama to the petition sworn on 3rd October 2019 and on 4th October 2019 filed a preliminary objection setting out four main grounds of objection on point of law.

4. The 3rd Respondent filed Replying affidavit to the petitioner's petition by Beatrice Saki Muli sworn on 1st October 2019.

5. The Interested party filed a Replying affidavit by Mary Karen Kigen Sorobit sworn on 7th October 2019.

6. The parties in this petition filed their respective submissions on the preliminary objection together with responses on the preliminary objection. The preliminary objection by the 2nd Respondent dated 4th October 2019 and filed on 7th October 2019 raises jurisdictional issues of this court to entertain this petition. I will therefore deal with the preliminary objection first and upon determination of the same, if I find this court has jurisdiction, I shall deal with the petition but should I find otherwise I will have no alternative but to down my tools.

7. The preliminary objection raises four points of law being thus:-

a) The petition is incompetent, fatally defective, misconceived and an abuse of court process as it negates the well down principles and essence of Res Judicata in as far as the Petition invokes the Honourable Court's original, and not appellate jurisdiction in contestations as to the registration of the 2nd Respondent as a registered voter.

b) The Petition is fatally and incurably defective as it seeks to prosecute contestations as to the qualification of the 2nd Respondent as a candidate for the Kibra be-election scheduled for the 7th of November, 2019; contrary to Article 88 Constitution, Section 74(1) Elections Act, 2011, Section 9(3) Fair Administrative Actions Act and Rules 7, 8 and 9(1)(a) & (b), Rules of Procedure on Settlement of Disputes.

c) This Honourable Court lacks jurisdiction to entertain the present Petition as it offends the mandatory provisions of Section 96 of

the Elections Act, 2011 and Rule 6 of the Elections (Parliamentary and County) Petition Rules, 2017.

d) The Petition is therefore incompetent and an abuse of the court process and warrants to be dismissed with costs at the outset.

8. The petitioner in his Replying affidavit sworn on 9th October 2019 and filed on 11th October challenges the preliminary point of objection in its entirety and urges the same is an abuse of the court process clearly meant to delay the hearing and determination of the petition. The petitioner urges the preliminary objection is fatally defective. In reply the 1st Respondent filed a replying affidavit sworn on 18th October 2019 urging the petitioner has deliberately circumvented the laid down provisions of the law by failing to file a complaint before the 1st Respondent's Dispute Resolution Committee jurisdiction through filing a formal complaint. It is the 1st Respondent's contention that this court lacks requisite jurisdiction to entertain this suit as court's jurisdiction has been prematurely invoked. The 1st Respondent supports the preliminary objection.

9. Upon consideration of the preliminary objection and upon considering the parties rival submissions the issues arising for consideration can be summed up as follows:-

a) Whether the 2nd Respondent has properly raised the preliminary objection?

b) Whether the court has jurisdiction to hear and determine the petition herein?

c) Whether this suit is Res judicata?

A) Whether the 2nd Respondent has properly raised the preliminary objection?

10. The petitioner's case from the face of the petition is, that he has called into question the authenticity and propriety of the nomination documents the 2nd Respondent produced before the 1st Respondent in order to run for Kibra Constituency MP seat. The petitioner in response to 2nd Respondent's preliminary objection relies on the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited (1969) E.A 696** where the Court of Appeal defined a preliminary objection as follows:-

"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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

11. It is petitioner's contention, that the 2nd Respondent filing the preliminary objection means, that the 2nd Respondent acknowledges and accepts the fact, that the nomination documents he presented before the 1st Respondent have authenticity and integrity issues and secondly from the petition and responses filed thereto, there are disputed facts as to whether a complaint was filed and responses thereto. It is further the petitioner's position at paragraph 10 of the petitioner's replying affidavit sworn on 18th October 2019, the issue of whether a complaint by the petitioner was filed before the 1st Respondent's dispute resolution committee has been raised and as such the petitioner submits, that this is a matter of fact, that can only be decided at the hearing of the petition and not at this preliminary stage. It is further the petitioner's case that this court has been called upon to determine heavy constitutional question raised in the petition and responses thereto, on who is registered voter for purposes of a by-election, whether the 1st Respondent has power to look to the issues of integrity of the aspirant and interpret the provisions of the Elections Act; thus section 5(2) (b) in relation to the constitution and the forthcoming by-elections. The petitioner therefore urges such weighty issues cannot be and should not be reduced to preliminary objections.

12. The 2nd Respondent in response has urged, that the factual province of its preliminary objection is undisputed. It is urged that it is clear from the proceedings before the Dispute Resolution Committee, that it heard and determined the issue of whether the 2nd Respondent is a registered voter. The Disputes Resolution Committee stated, that it was not sitting as an integrity committee and proceeded to expunge paragraphs 12, 13, 14 and 15 of the petitioner's affidavit. The only complaint before the Dispute Resolution Committee of the 1st Respondent, was the one duly filed on 11/9/2019 being complaint by the 2nd Respondent. The petitioner herein had only filed an application dated 12th September 2019 seeking that he be granted leave to be enjoined as an interested party. The application was allowed. He did not file a complaint before the Disputes Resolution Committee or a complaint before the **IEBC** Integrity Committee or any other committee of the 1st Respondent.

13. The petitioner having been enjoined in the proceedings before the Dispute Resolution Committee as an interested party was bound by his pleadings. He had not filed any complaint of his own and I find, that it would be against the interest of justice, if an interested party in a matter, would seek to introduce a new issue and urge to ventilate on the same, when the same is not what he had sought in the application for rejoinder. The attempt of an interested party to attempt to introduce new issues or a complaint should not be entertained as, that would amount to hijacking of the issues for determination in a matter.

14. The Supreme Court in **Francis Kariuki Muruatetu & another vs Republic & 5 others, Supreme Court Petition No. 15 of 2015 as Consolidated with Petition No.16 of 2015 [2016] eKLR**, in addressing the issue of interested parties it stated that:

"[41] Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties."

...[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court. [43] Consequently, the issues of constitutionality of the death penalty and/or its abolition, are not issues presented by the petitioners before this court. Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed."

15. In the instant matter the 2nd Respondent has demonstrated, that there are no pending issues to be ascertained and further what is sought is the exercise of judicial discretion. It has further been demonstrated to the satisfaction of the court, that the petitioner did not file any complaint and there is none pending before the Disputes Resolution Committee or any other. The 2nd Respondent's preliminary objection raises pure points of law which are argued on assumption, that all facts pleaded by the other side are correct and further that on being successful the petition will be fully determined. I find the respondent has properly raised the Preliminary Objection.

B) Whether the court has jurisdiction to hear and determine the petition herein?

16. The 2nd Respondent contention is, that this court lacks jurisdiction on the basis, that the petitioner has sought to invoke original jurisdiction of this court or pre-election dispute. The jurisdiction to hear and determine disputes raising out of nominations is donated to the IEBC by Article 88(4) of the Constitution, section 74 of the Elections Act, and Regulation 99 of the Elections (General) Regulation, 2012 ("*the General Regulations*") as well as the Rules of procedure on settlement of Disputes ("*the settlement of Disputes Rules*").

17. Article 88(4) and (e) of the Constitution of Kenya 2010 provides:-

"(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—

(a).....

(b).....

(c).....

(d).....

(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."

18. The above provision is reflected under section 74 of the Elections Act and section 4 of the Independent Electoral and Boundaries Commission Act 2011 which outlines the function of the IEBC thus:-

"4. Functions of the Commission As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(a) The continuous registration of citizens as voters;

(b) The regular revision of the voters' roll;

(c) The delimitation of constituencies and wards in accordance with the Constitution;

(d) The regulation of the process by which parties nominate candidates for elections;

(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; Independent Electoral and Boundaries Commission No. 9 of 2011;

(f) The registration of candidates for election;

(g) Voter education;

(h) The facilitation of the observation, monitoring and evaluation of elections;

(i) The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) **The development and enforcement of a code of conduct for candidates and parties contesting elections;**

(k) **The monitoring of compliance with the legislation required by Article 82(1) (b) of the Constitution relating to nomination of candidates by parties;**

(l) **Deleted by Act No. 36 of 2016, s. 30;**

(m) **The use of appropriate technology and approaches in the performance of its functions; and**

(n) **Such other functions as are provided for by the Constitution or any other written law"**

19. Further under Rule of the Settlement of the Electoral Disputes Rules, the term "*dispute*" has been defined as a complaint, challenge, claim relating to contest relating to any stage of the electoral process and includes an objection to the acceptance of the nomination papers of a candidate by the Returning Officer."

The purview of complaint under Rule 9 extends to complaints relating to whether "*the candidate (has) all the qualifications required under any law.*"

20. The petition before this court seeks to invite this court to adjudicate on the qualification of the 2nd Respondent to participate as a candidate Kibra in member of Assembly by-election scheduled for 7th November 2019. Such a dispute is a dispute for hearing and determination by IEBC Dispute Resolution Committee. Anyone dissatisfied with the nomination should have filed a complaint with the IEBC Dispute Resolution Committee in the first instance.

21. In in case of **Diana Kethi Kolonzo & another vs Independent & Boundaries Commission & 10 others [2013] e KLR**, the court stated, at paragraph 94 of the judgment, that:-

".....a reading of Article 88(4) (e) of the current Constitution and Section 74 of the act clearly shows that the IEBC now has power to settle disputes, including nomination disputes, other than election petitions and disputes subsequent to the declaration of election results. The mandate to settle disputes therefore runs up to the election date. The Committee hence had jurisdiction to hear the complaints of the interested parties."

22. The petitioner in his petition raises issues touching on the integrity of the 2nd Respondent's documents during nomination including his academic certificates. The IEBC Dispute Resolution Committee pronounced itself very clearly and stated, it was not sitting as an integrity committee.

23. In the case of **Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamad & 3 others, Ahmed Ali Mukta (Interested party) [2019] eKLR** the Supreme Court stated this is a pre-election dispute which falls within the jurisdiction of IEBC. The court set out the principles governing pre-election disputes at paragraph 68 as follows:-

"So as to ensure that Article 88 (4) (e) of the Constitution is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election Court under Article 105 of the Constitution, the Court developed the following principles:

(i) **all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or Political Parties Disputes Tribunal (PPDT), as the case may be, in the first instance;**

(ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court;

(iii) **where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution;** the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;

(iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court;

(v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition;

(vi) in determining the validity of an election under Article 105 of the Constitution, or Section 75(1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.

24. In **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) (supra)** the court further held at paragraph 80 as follows:-

"On the basis of the foregoing reasoning, we find and hold that both the Election Court and the Court of Appeal wrongly assumed jurisdiction, in determining what a pre-election dispute was clearly, regarding the academic qualifications of the petitioner. However, as our principle number (v) (above) stipulates, a petitioner's inaction does not prevent him from presenting the dispute for resolution before the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution."

25. The 2nd Respondent upon being aggrieved by the 3rd Respondent's decision rejecting his registration as a candidate on solitary ground, that the 3rd Respondent could not see registration details of the 2nd Respondent in the **KIEMS KIT**, the 2nd Respondent subjected such decision to appeal in accordance with the provision of the law before the **IEBC** Dispute Resolution Committee and the 1st Respondent legally set aside the decision of the 3rd Respondent and held the 2nd Respondent was duly registered as a voter. The said decision to date has not been subjected to Appeal or Judicial Review.

26. From the above authorities, it appears, that a petitioner may, under some circumstances approach the High Court without first filing a complaint before the 1st Respondent but such approach must be hinged on the supervisory jurisdiction of the court under **Article 165 (6) of the Constitution of Kenya 2010**; which provides:-

"(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."

27. **Article 165(6) of the Constitution of Kenya 2010**, presupposes the existence of a decision on which this Honourable Court can exercise its supervisory jurisdiction, contrary to the position taken by the petitioner. In the present petition there is no decision as alluded to by the petitioner, since the petitioner never filed a formal complaint before the 1st Respondent's Dispute Resolution Committee or before the 1st Respondent Integrity Committee. The petitioner failed to demonstrate, that he had filed any complaint before as committee of the 1st Respondent as laid down by Rules, 7, 8 and 9(1) (a) and (b) of the Rules of Procedure on settlement of Disputes. The petitioner to the contrary seeks to invoke the court's original jurisdiction to adjudicate whether the 2nd Respondent is qualified for the purpose of being registered as a candidate for member of National Assembly. Any dispute, if at all, ought to have been raised with the 1st Respondent.

28. This court was referred to Notice of Motion dated 12th September 2019, filed on 13th September 2019, in which the petitioner was seeking to be enjoined in the complaint before the 1st Respondent's Dispute Resolution Committee which application was specific and sought the follows:-

"i) The Dispute Resolution Committee be pleased to grant leave to Leina Konchella the Applicant thereon and the petitioner herein, to be joined as an interested party.

ii) The costs be in the cause."

The application was allowed limited to the contents of the application as filed by the 2nd Respondent and the only issue, that arose for determination in complaint before the Dispute Resolution Committee was *"whether the Respondent is a registered voter for purpose of being cleared to vie for Kibra by-election scheduled for 7th November 2019."*

29. The petitioner in this matter, failed to demonstrate what complaint he had filed. He was enjoined as interested party without filing a complaint. He cannot therefore be held to purport to raise new issues or purport to have a complaint when he had not filed any complaint. In **Sammy Ndung'u Waity & another vs Independent Electoral Boundaries Commission & 5 others Election Pet. No. 2 of 2017 [2017] eKLR** the court dismissed the Intended interested party's Notice of Motion with costs to the Respondent on the grounds that it introduced new facts and issues. It stated at paragraph 57 and 58 that:

"Such attempt to introduce new issues was considered by the Supreme Court in the case Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 3 others [2017] eKLR viz: "The applicant, in essence is introducing new facts and issues that were not before court. It follows that he is not in a position to advance any submission that will be helpful to the court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application." That quotation is very apt to the matter before me. The intended interested party cannot, at this late stage introduce new facts and issues that are not in the petition. That introduction would be prejudicial to the Respondents."

30. I find the petitioner did not file a complaint before the 1st Respondent Dispute Resolution Committee. The petitioner in this matter, if he was aggrieved, in anyway by the decision of the 1st Respondent's Dispute Resolution Committee he ought to have filed a judicial review application or an appeal to the High Court. I however find that this step would have gone no far in view of the current scenario since there is no decision, particularly over the authenticity or integrity of the 2nd Respondent's nomination papers, as no complaint had been filed over the same before any of the 1st Respondent's Committees. I find there would be no basis for this court to purport to exercise its supervisory jurisdiction in a vacuum. I find therefore supervisory/judicial review jurisdiction as submitted by the petitioner cannot be sustained.

31. Further to the above the Court of Appeal in the case of **Speaker of National Assembly vs James Njenga Karume (1992) eKLR**, the court held:-

"In our views, there is a considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament that procedure should strictly be followed."

32. In view of the above decision, I find the petitioner acted contrary to clear procedure as provided by statute and cannot be allowed to seek this court to exercise its original jurisdiction as opposed to supervisory/judicial review jurisdiction. I find that this court has no jurisdiction to hear and determine the petition seeking the court to exercise its original jurisdiction.

C) Whether this suit is Res judicata?

33. The 2nd Respondent contention is that there is no dispute, that the 2nd Respondent filed a complaint before the 1st Respondent's Dispute Resolution Committee and a decision was made. The issue was whether the 2nd Respondent is a duly registered voter eligible to run for the seat of member of National Assembly in Kibra Constituency. The issue was fully determined by the 1st Respondent's Dispute Resolution Committee in their decision of 16th September 2019.

34. The principle of *Res judicata* are well provided for under **section 7 of the Civil Procedure Act** which provides:-

"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."

35. I find, that it is prudent before proceeding any further to determine, whether the 1st Respondent's Dispute Committee is a court for the purposes of section 7 of the Civil Procedure Act and whether dispute filed before the committee qualify as a suit within the meaning of the obtaining Civil Procedure Laws. **Section 2 of the Civil Procedure Act** defines a "court" as High Court or a subordinate court, acting in the exercise of its civil jurisdiction, and in the same breach, **Article 169 of the Constitution of Kenya 2010** defines subordinate court as follows:-

"(1) The subordinate courts are—

(a) The Magistrates courts;

(b) The Kadhis' courts;

(c) The Courts Martial; and

(d) Any other court or local tribunal as may be established by an Act courts established as required by Article 162(2).

(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1)".

Further to the above **section 2 of Civil Procedure Act** defines a "suit" to mean all civil proceedings commend in any manner prescribed.

36. From the foregoing there is no doubt, that the 1st Respondent's Dispute Resolution Committee (**DRC**) established pursuant to **Article 88(4) (e) of the Constitution of Kenya 2010** as read together with **section 74 of the Elections Act** and **section 4 and 12 of the IEBC Act**, qualified for all purposes and intention of this matter, as a subordinate court within the meaning of **Article 169 of the Constitution of Kenya 2010**. As regards the dispute filed before the **DRC** vide **Macdonald Mariga Wanyama vs The Returning Officer, Kibra Constituency and another, IEBC** Dispute Resolution Committee complaint No.3 of 2019 is a civil suit within the meaning of section 2 Civil Procedure Act.

37. The petitioner submits the system of courts are set under **Article 162 of the Constitution**, however this Article clearly sets superior court; courts of equal status to the High Court and subordinate courts established under Article 169 and urges the 1st Respondent, Dispute Resolution Committee is excluded. A clear perusal of **Article 169(d) of the Constitution 2010** provides:-

The subordinate courts are:-

"a)

b)

c)

d) Any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2)."

From the aforesaid **Article 169(d) of the Constitution**, the 1st Respondent's **DRC** qualified, to be a court, as it is a local tribunal established pursuant to **Article 88(4) (a) of the Constitution** as read with **section 74 of the Elections Act** and **section 4 and 12 of IEBC Act** therefore it falls within the requirements set out under **Article 169(1) (2) of the Constitution**.

38. The courts have in myriads of decisions pronounced themselves on conditions, that must be met when invoking the principle of *Res Judicata*. The Court of Appeal in the case of **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others, (2017) eKLR** rendered itself thus:-

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”

39. From the 1st Respondent’s Dispute Resolution Committee proceedings it is clear, that parties herein appeared before the 1st Respondent’s Dispute Resolution Committee, when the issue as to whether the 2nd Respondent is a duly registered voter was considered and finally settled. The petitioner herein appeared as the 2nd Interested party before **DRC**, and urged the committee to make a finding, that the 2nd Respondent herein is not a duly registered voter. The 1st Respondent’s Dispute Resolution Committee was sitting as a competent tribunal, clothed with necessary jurisdiction and it fully determined the issue as to whether the 2nd Respondent herein is a duly registered voter. I find all the elements required to be satisfied for the bar of **Res Judicata** to be effectively raised and upheld on account of a former suit has been established by the 2nd Respondent in his preliminary objection. I therefore find, that the principle of *Res Judicata* applies herein to bar the petitioner from raising the same issue in this petition. The issue as to whether the 2nd Respondent is a registered voter is *Res Judicata* and cannot be re-litigated in this petition as the petitioner seeks to do. I find further, that this court lacks jurisdiction to determine the issue raised in the petition. The petition is therefore incompetent, and an abuse of the court process.

40. From my findings herein above, the 2nd Respondent’s preliminary objection dated 4th October 2019, is meritorious and is upheld. This court lacks jurisdiction to entertain the petition herein, as the same is incompetent, fatally defective, misconceived as it negates the principles and essence of *Res Judicata*. The petition is accordingly dismissed with costs to the Respondents and interested party.

Dated, signed and delivered at Nairobi this 5th day of November, 2019.

.....

J .A. MAKAU

JUDGE