



Mohamed v Alio a.k.a. Ahmed Maalim Hassan a.k.a. Ali Barre & 2 others; United Progressive Alliance Party (Interested Party); Ministry of Interior and National Administration State Department for Immigration and Citizen Services Directorate of Immigration Services (Intended Interested Party) (Petition E685 of 2025) [2025] KEHC 16538 (KLR) (Constitutional and Human Rights) (13 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E685 OF 2025
LN MUGAMBI, J
NOVEMBER 13, 2025**

BETWEEN

HON. MOHAMEDIN MOHAMED PETITIONER

AND

AHMED MAALIM HASSAN ALIO A.K.A. AHMED MAALIM HASSAN A.K.A. ALI BARRE 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND RESPONDENT

RETURNING OFFICER BANISA CONSTITUENCY 3RD RESPONDENT

AND

UNITED PROGRESSIVE ALLIANCE PARTY INTERESTED PARTY

AND

**MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION
STATE DEPARTMENT FOR IMMIGRATION AND CITIZEN SERVICES
DIRECTORATE OF IMMIGRATION SERVICES INTENDED INTERESTED PARTY**



RULING

Introduction

1. By way of a Notice of Application dated 4th November 2025, the Applicant Petitioner, seeks orders that:
 - i. Spent.
 - ii. This Court be pleased to enjoin the intended interested party herein for purposes of providing crucial information sought by the Petitioner herein vide a letter dated 3rd November 2025, emanating from Constitution Petition No. E685 of 2025 between the Applicant herein and the 1st, 2nd and 3rd Respondents which matter is coming up for a Mention on 10th November 2025 to confirm filing of submissions.
 - iii. This Court be pleased to execute the Provisions of Article 35(1) of *akn ke act 2010 constitution the Constitution* as against the intended Interested party herein in respect to the information sought by the Petitioners herein vide its letter dated 3rd November 2025.
 - iv. This Court be pleased to order the intended interested Party herein to issue the Applicant herein with the crucial information sought pursuant to its letter dated 3rd November 2025 herein.
 - v. In the alternative to Prayer 2 hereabove, the Court be pleased to grant leave to the Petitioner herein to cross-examine the 1st Respondent on the contents of its Replying Affidavit dated 27th October 2025 particularly on the averments as relates to the 1st Respondent's denial of possessing a British Passport No. 532110112.
 - vi. Cost of the Application be provided for.

Petitioner's Case

2. The Application is supported by the Petitioner's affidavit, sworn on even date and the grounds on the face of the Application.
3. The Petitioner, a registered voter in Kenya contests the nomination of the 1st Respondent to vie in the upcoming Parliamentary By-Elections in Banisa Constituency on the grounds that the 1st Respondent does not meet the eligibility criteria.
4. The Petitioner depones that vide a letter dated 22nd October 2022, he wrote to the British High Commission seeking information with regard to the 1st Respondent's dual citizenship status but did not receive any response to this letter.
5. That similarly, he wrote to the Intended Interested Party herein on 31st October 2025 to be provided with the information about the 1st Respondent travel history, particularly with his British Passport. However, the Intended Interested Party in its letter dated 3rd November 2025 declined this request by virtue of the Data Protection Act. He alleges that the Party however informed that such information can only be availed if ordered by the Court.
6. The Petitioner asserts that while the obligation to prove a matter lies with the party alleging existence of particular facts, there are exceptions to this rule. He states that this is where the facts sought are meant to activate the Petitioner's obligations under Article 1 and 3 of *akn ke act 2010 constitution the*



Constitution. In his view, the information sought in this matter, is vital in aiding this Court determine when or at what stage a party elected in an election, pursuant to Article 1 is presumed to be conferred with the sovereignty of the people. He notes that since the information sought lies with the State, they are bound to release the same.

7. The Petitioner alleges that the 1st Respondent will not suffer any prejudice if this Application is allowed, as the Court will access the probative value of the information sought as it relates to facts in issue and subsequently make a determination.

1st Respondent's Case

8. In opposition to the Application, the 1st Respondent filed his Grounds of Opposition dated 5th November 2025 on the premise that:

- i. The Application is fatally defective, incompetent and wholly unsustainable in limine, because the Supporting Affidavit sworn by the Petitioner on 4th November 2025 is accompanied by unmarked and unsealed annexures. The annexures are therefore of no probative value in law and are incapable of being relied upon as evidence before this Court. The failure to have the annexures stamped and sealed by a Commissioner for Oaths renders them legally worthless.

This was upheld in *Pharmacy and Poisons Board & another; Mwiti & 21 others (Respondent) (Civil Appeal E144 of 2021)[2021] KECA 97 (KLR) (22 October 2021) (Ruling)* where the Court of Appeal stated that the fate of an unmarked and unsealed annexures is similar to that of an unsigned affidavit in that they are of no legal value to the matter before the Court.

- ii. Rule 9 of the Oaths and Statutory Declarations Rules is cast in mandatory terms, and it states that all exhibits to affidavits "shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification." The Petitioner's annexures do not meet the mandatory threshold. There are thus no exhibits in law attached to the impugned Affidavit. The Application is bare of evidence and stands naked before this Court, and should therefore be struck out.
- iii. The Application is defective as the Petitioner has not exhausted the mandatory internal mechanisms provided under Article 35 of *akn ke act 2010 constitution the Constitution* on access to information. Article 35 of *akn ke act 2010 constitution the Constitution* gave birth to the *akn ke act 2016 31 Access to Information Act, 2016* which provides the statutory pathway for access to information from public bodies. That Act expressly provides that where a public entity denies or refuses to provide information, the Applicant's recourse is to escalate the refusal to the Commission on Administrative Justice (CAJ) under Section 14 of the Act. The Petitioner did not follow this statutory mechanism after the refusal, and therefore did not exhaust the mandatory review process. The attempt to bypass CAJ and directly invoke this Court's jurisdiction is therefore premature and incompetent.
- iv. Further, the Application is incompetent and this Court lacks jurisdiction at this stage because the Petitioner ignored the statutory dispute resolution pathway provided under the *akn ke act 2016 31 Access to Information Act, 2016*. The Act provides a clear and structured procedure for requesting information from public entities, which the Applicant has failed to follow.
- v. The Petitioner was required to first apply for review or appeal to the Commission on Administrative Justice (CAJ) under Section 14 of the *akn ke act 2016 31 Access to Information Act*. That step was not taken. This Court's jurisdiction is therefore prematurely and improperly invoked.



This is a mandatory step as was held in Presidential Election Petition No. 4 of 2017, Njonjo Mue & Another -vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR, where the Supreme Court spoke to the balance which Courts must strike while protecting litigants' right of access to information under Article 35 of *akn ke act 2010 constitution the Constitution* against the requirement of adherence to prescribed procedure while seeking such information.

- vi. Further, the Application improperly seeks to invite this Court to delve into merits, interrogate evidence and effectively sit on appeal over the merits of a pre-election dispute already determined by the 2nd Respondent's Dispute Resolution Committee. This Court only exercises supervisory jurisdiction over such pre-election decisions. It does not re-open facts, re-evaluate evidence or sit as a Court of first instance in election qualification disputes. The Supreme Court was categorical in *Mahamud v Mohamed & 3 Others; Muktar (Interested Party) (Petition 7 of 2018) [2019] KESC 70 (KLR)* that once the IEBC Dispute Resolution Committee has rendered a determination on a nomination dispute, the High Court's jurisdiction is narrow and supervisory; not original, appellate nor inquisitorial on merits.
- vii. The Petitioner's Application therefore is a textbook case of abuse of Court process. It is not only jurisdictionally incompetent, but substantively barren, procedurally premature and evidentially unsupported. It must be struck out.

2nd and 3rd Respondents Case

9. These Respondents in like manner filed their Grounds of Opposition dated 6th November 2025 to the Application on the grounds that:
 - i. The Application is fatally defective for failure to disclose under what legal regime or procedural law the joinder of Intended Interested Party is sought and generally the Application.
 - ii. The Intended Interested Party has no identifiable stake in the proceedings which relate to an election dispute and does not therefore meet the threshold for joinder of interested parties in judicial proceedings set in in the Supreme Court case of *Francis Kariuki Muruatetu and Another v Republic & 5 Others [2016] eKLR*.
 - iii. The Application is fatally defective for relying on unmarked and unsealed annexures and the offending paragraphs of the affidavit together with the unmarked and unsealed documents ought to be struck out. Reliance is placed on Rule 9 of the Oaths and Statutory Declaration Rules, and in the cases of *Vee Vee Enterprises Ltd v Kenya Railways Corporation & another; Kenya Commercial Bank & 2 others (Garnishee)(Miscellaneous Civil Application E601 of 2021) [2024] KEHC 11207 (KLR)(Commercial and Tax) (26 September 2024) (Ruling)* and *Darshill Hardware Limited v Kihu & another (Civil Case 376 of 2020) [2025] KEMC 202 (KLR)(3 July 2025) (Ruling)* where the Courts held that any unmarked and unsealed annexures are of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules.
 - iv. The Applicant has not exhausted the statutory mechanisms provided under the *akn ke act 2016 31 Access to Information Act*, No. 31 of 2016. Section 8 of the Act sets out the procedure for realization of the right to access information held by a public entity and where such information has not been provided, a party may apply to the Commissions for review or appeal



of the decision as under Section 14 of the Act within thirty days. Consequently, this Court lacks jurisdiction to entertain the present Application before the Applicant has complied with the statutory process. The Supreme Court in *Waity vs Independent Electoral & Boundaries Commission and Three Others* [2019] KESC 54 (KLR) noted that it is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked

- v. The Applicant seeks orders to fill gaps of evidence and is on a fishing expedition and the grant of the orders not only prejudice the 2nd and 3rd Respondents but also offend the constitutional imperatives of timely resolution of election disputes as enumerated in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR in the Supreme Court and the principle that parties are bound by their pleadings in the same case.

Interested Party's Case

10. In response, the Interested Party through its Secretary General, Jacob Barongo Bagaka, filed its Replying Affidavit sworn on 5th November 2025.
11. In support of the Petition, he avers that since the 1st Respondent has denied having dual citizenship, it is imperative for the Intended Interested Party to be enjoined in this suit so as to resolve the issue in controversy. He notes that its joinder is premised on the fact that they are the custodians of the subject documents.
12. In view of the foregoing, he argues that it is in the interest of justice that the Intended Interested Party be enjoined in this suit so that the Court can order production of his travel history and certify that the passport copy adduced by the Petitioner is a true copy of its records.
13. He asserts that the information sought is public information as relates to public administration and as such is necessary to promote transparency and accountability. To this end, he argues that joinder of the Intended Interested Party will not prejudice any party.

Intended Interested Party's Case

14. This party's response and submissions are not in the Court file or Court Online Platform (CTS).

Petitioner's submissions

15. In support of his Application, the Petitioner through Ndegwa and Ndegwa Advocates filed submissions dated 7th November 2025.
16. Counsel submitted that Order 1 Rule 10(2) of the Civil Procedure Rules provides that the Court can at any stage have a person added to the suit whose presence is necessary to enable the Court conclusively determine the matter. Counsel noted that this is also provided for in Rule 5(b)(ii) of *akn ke act 2010 constitution the Constitution of Kenya* (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.
17. Reliance was placed in *Jason Njuru Mwangi and another v Nyambura Mwangi and 2 others* [2018] KEELC 2535(KLR) where it was held that:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or



whose presence before the Court may be necessary in Order to enable the Court effectually and completely to adjudicate upon and settle all questions and completely to adjudicate upon and settle all questions.”

18. In this matter, Counsel submitted that it is not in doubt that the Intended Interested Party is the State officer charged with Kenyan citizenship, immigration and civil registration under national law and as such holds the exclusive records of nationality.
19. Accordingly, Counsel submitted that the 1st Respondent’s eligibility being in contention in this matter owing to his nationality status, joinder of the Intended Interested Party is necessary to determine this suit. In this regard, Counsel alleges that the Intended Interested Party has a direct, identifiable stake in the outcome of these proceedings. According to Counsel, failure to enjoin the Intended Interested Party will prejudice the administration of justice.

1st Respondent’s Submissions

20. Jamal Bake and Associates Advocates for the 1st Respondent filed submissions dated 7th November 2025 and underscored the key issues as: whether the Petitioner Applicant’s Application dated 4th November 2025 is merited? whether this Court has Jurisdiction to determine the present Application?, whether the Applicant has exhausted the doctrine of exhaustion and whether the Intended Interested Party should be enjoined.
21. On the first issue, Counsel answered in the negative. Counsel stressed that the Application is bad in law, incompetent and fatally defective as the Petitioner’s affidavit is accompanied by unmarked and unsealed annexures contrary to Rule 9 of the Oaths and Statutory Declaration Rules. Counsel equally relied in Pharmacy and Poisons Board & another (supra), Ochieng & another v Oscar Otieno Odongo t a Odongo Investments Auctioneers (Civil Appeal E035 of 2023) (2024] KEHC 17043 (KLR) (30 May 2024) and Raila Odinga(supra) where in all it was emphasized that in the absence of properly sealed annexures there is no admissible evidence.
22. In the second issue, Counsel submitted that this Court lacks jurisdiction to entertain the matter as the Petitioner invites the Court to sit on appeal over the merits of a pre-election dispute which has already been determined by the 2nd Respondent’s Dispute Resolution Committee. Counsel accentuated that this Court only exercises supervisory jurisdiction over such decisions. That is, this Court cannot re-open or re-evaluate evidence or sit as a Court of first instance in election qualification disputes.
23. Reiterating the ration in Mahamud v Mohamed (supra) Counsel submitted that the Supreme Court affirmed that where the 2nd Respondent or Political Parties Disputes Tribunal has determined a pre-election dispute, any aggrieved party may only approach the High Court sitting as a judicial review court in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *akn ke act 2010 constitution the Constitution*.
24. On the third issue, Counsel stressed that the Petitioner had failed to exhaust the mechanisms set out in the law and affirmed by the Supreme Court in Albert Chauremebo Mumba & 7 others v Maurice Munyao & 18 others [2019]eKLR before invoking this Court’s jurisdiction in this matter. Counsel submitted that Rule 8(1) of the Rules of Procedure on Settlement of Disputes provides that nomination disputes are to be lodged with the 2nd Respondent’s Committee within 24 hours of occurrence of the dispute which the Petitioner failed to comply with. Counsel postulated that if the Petitioner had thus been diligent in lodging his complaint, he would have enjoined the Intended Interested party therein so as acquire the sought information.



25. Counsel submitted therefore that a party cannot disregard jurisdictional requirements and prescribed procedures for commencing a cause of action and then seek refuge under Article 159 of *akn ke act 2010 constitution the Constitution* as held by the Court of Appeal in *Jaldesa Tuke Dabelo v IEBC and another* (2015) eKLR.
26. Like dependence was also placed in *Raila Odinga (supra)* and *Njonjo Mue and another (supra)*.
27. Additionally, Counsel submitted that the Petitioner also failed to exhaust the mechanism under the *akn ke act 2016 31 Access to Information Act* in seeking information. Counsel noted that the Petitioner was required to apply for a review with the Commission on Administrative Justice but failed to do so and so this Court's jurisdiction was invoked prematurely.
28. On the final issue, Counsel submitted that the Petitioner had not demonstrated the Intended Interested Party's legal stake in this matter to justify the joinder. According to Counsel, the Petitioner only seeks to have the Intended Interested Party joined as is the custodian of the information he seeks, not based on the threshold outlined in the case of *Muruatetu & another v Republic ;Kenya National Commission on Human Rights & 2 others (Interested Parties) [2016]KESC 12 (KLR)*.
29. Counsel moreover; argued that the Petitioner ought to have brought his case in full at the onset. Considering this, Counsel submitted that the Petitioner's move to have the Intended Interested Party enjoined in this suit is a delaying tactic against the expeditious disposal of this suit and overall administration of justice. On this premise, Counsel maintained that the joinder of the Intended Interested Party has not met the required threshold of joinder of an interested party.

2nd and 3rd Respondents' Submissions

30. On 7th November 2025, these Respondents through Mwititi and Partners Advocates LLP filed submissions and set out the issues for discussion as: whether the application is competent and properly founded in law, whether the Applicant has demonstrated that the Intended Interested Party meets the legal threshold to be joined in the suit and whether the Applicant has exhausted statutory mechanisms under the *akn ke act 2016 31 Access to Information Act*.
31. To commence with, Counsel submitted that the Application is fatally defective for its failure to disclose what legal regime or procedural law the joinder of Intended Interested Party is sought. Equally, Counsel submitted that the Petitioner's supporting affidavit relies on unmarked and unsealed annexures contrary to Rule 9 of the Oaths and Statutory Declarations Rules thus should be struck out. Reliance was placed in *Vee Vee Enterprises LTD (supra)* where it was held that:

“Any unmarked and unsealed annexures such as the draft defence herein are therefore of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules.”
32. Turning to the next issue, Counsel submitted that the Petitioner had not demonstrated that the Intended Interested Party possesses a recognizable stake in the subject matter of this Petition to warrant their inclusion. Equally relying in *Muruatetu & another (supra)*, Counsel submitted that the Petitioner had not demonstrated the Intended Interested Party's personal interest or stake, the prejudice to be suffered in case of non-joinder and submissions it intends to make before the Court and their relevance to the matter at hand.



33. Counsel considering this adjudged the Petitioner’s Application as a fishing expedition intended to fill evidentiary gaps in his case contrary to the principle that parties are bound by their pleadings. Dependence was placed in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017)*[2017] KESC 31 (KLR) where it was held that:

“Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by counsel for the 3rd respondent, a party must be bound by its own pleadings and secondly, any scrutiny of either the forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an extension of the case for the petitioners or which would in effect a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.”

34. For this reason, Counsel argued that grant of the sought orders would not only prejudice the 2nd and 3rd Respondents but would also offend the constitutional imperatives of timely resolution of election disputes as enumerated in *Raila Odinga & 5 Others (supra)*.

35. On the third issue, Counsel submitted that the Petitioner had not shown his compliance with the statutory procedures set out in Section 8 and 14 of the *akn ke act 2016 31 Access to Information Act* and so this Court lacks jurisdiction to entertain it. To buttress this point reliance was placed in *Capital Markets Authority v Ciano & another (Civil Appeal 314 of 2018) [2023] KECA 581 (KLR)* where it was held that:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of *akn ke act 2010 constitution the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

36. Like dependence was placed in *Waity vs Independent Electoral & Boundaries Commission and Three Others [2019] KESC 54 (KLR)*.

Interested Party’s Submissions

37. The Interested Party through Anyoka and Associates Advocates filed submissions dated 6th November 2025 and set out the main issues for discussion as: whether the Petitioner has a constitutional right to access the requested information under Article 35 and whether the party holding the information is a necessary party and ought to be joined to these proceedings.

38. Counsel on the first point submitted that as per Article 35 of *akn ke act 2010 constitution the Constitution*, Government ministries, departments, commissions, parastatals, state agencies and private bodies performing public functions have a duty to disclose information sought. Reliance was placed in *Famy Care Ltd v Public Procurement & Administrative Review Board & Another [2012] eKLR*, where the Court held that:

“Every citizen has a right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom.”

39. Comparable reliance was placed in *Katiba Institute v President’s Delivery Unit & Others [2017] eKLR*.



40. In this matter, Counsel submitted that the Intended Interested Party had refused to issue the sought information and thus this Court should compel disclosure of the information.
41. On the second issue, Counsel submitted that Rule 7 of *akn ke act 2010 constitution the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules allows for joinder of a party necessary for the just and complete adjudication of the issues. In this matter Counsel submitted that the Intended Interested Party is the legal custodian of the documents in the dispute hence a necessary party so as to enable the Court determine the matter fairly. Counsel relied in the principles set out by the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemu* [2014] eKLR.

Analysis and Determination

42. It is my considered view that the issues that arise for determination are:
- i. Whether the Petitioner's Supporting Affidavit is incompetent.
 - ii. Whether granting the order sought in the application will be against the doctrine of exhaustion of remedies.
 - iii. Whether or not the Intended Interested Party should be joined in this suit.

Whether the Petitioner's Supporting Affidavit is incompetent.

43. The Respondents argued that the Petitioner's supporting affidavit is incompetent and incurably defective because the annexures to the affidavit are not marked and sealed as required by Rule 9 of the Oaths and Statutory Declarations Rules. The Petitioner neither responded nor submitted on this issue.
44. Rule 9 of the Oaths and Statutory Declarations Rules provides:
'All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.'
45. In *Jeremiah Nyangwara Matoke v Independent Electoral And Boundaries Commission & 2 others* [2017] KEHC 2217 (KLR), the Court held as follows:

" 23. In the case of *Abraham Mwangivs. S. O. Omboo & Others HCCC No. 1511 of 2002 Hayanga J* (as he then was) quoted Order 41 of the Rules of Supreme Court of England that dealt with forms of affidavits and exhibits. That Order 41 divided exhibits into documents and non-documents and maintained that fly papers are misleading and fraught with uncertainty. He held:

"Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed."

24. Similarly, in the case of *Francis A. Mbalanya vs. Cecilia N. Waema* [2017] eKLR, the annexures had not been marked completely. The judge held that:

"The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with... in the instant case, the law has provided in mandatory terms the



manner in which evidence by way of annexures can be received by court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents. However, considering that the supporting affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the supporting affidavit and the application.”

46. Similarly, in *Chris Munga N. Bichage & 2 others v Independent Electoral & Boundaries Commission & 2 others* [2017] KEHC 1912 (KLR) the Court held:

“40. So what is the legal effect of the failure to seal and serialise the exhibits as provided for in Rule 9?

41. This question arose in the case of *Musikari Nazi Kombo v Moses Masika Wetangula and 2 Others* [2013] eKLR and I think this is a good place to begin as I associate myself fully with the dictum of the Learned Judge.

42. The Court held that:-

“1. The legal requirement relating to securely sealing and marking exhibits in an affidavit entailed a substantive legal act within the context of the production of evidence and the admissibility of evidence, and it was not a legal technicality. The requirement would serve to ensure that only proper documents were placed before the Court and admitted in evidence.

2. Allowing documents brought in an improper and inappropriate manner to form part of the Court's record would prejudice the administration of justice and it would also go against the Law of Evidence as it would defeat the aims of safeguarding the fairness of the trial process...

44. In my considered view, the sealing of the exhibits and their serialization is a fundamental step provided by law. Failure to properly seal the exhibits goes to the root of the evidence envisaged and it would be against all tenets of substantive justice to allow admission of evidence whose propriety is questionable in law.”

47. The affidavit and the annexures constitute critical evidential material which the Court is required to rely on to establish the facts in contention. The Court thus needs to be certain that the documents it is to base its decision on are properly verified and confirmed with the originals and that is why it is necessary for the Commissioner of oaths to carry out the verification to confirm that document referred to in the affidavit are actually genuine. Marking them on the other hand is crucial so avoid possible tampering after such verification such as removing them and introducing others in place of those that were verified. The foundation of this rule is thus to preserve the integrity of the evidence and trial generally and is not just a mere legal technicality. Failure to comply thus undermines the authenticity and evidentiary value of the annexures.

48. The annexures to the Petitioner's supporting affidavit are neither sealed nor marked as required by the law implying that they were never presented for verification and authentication by a Commissioner for



Oaths. That was a fatal omission. It is my finding that these annexures to the Petitioners affidavit are of no evidential value for non-compliance with Rule 9 of the Oaths and Statutory Declarations Rules.

Whether granting the order sought in the application will be against the doctrine of exhaustion of remedies

49. The Respondents faulted the Petitioner for prematurely invoking the jurisdiction of this Court when there is a statutory established mechanism with the primary mandate to address his grievance.
50. The Supreme Court in *Waity vs Independent Electoral & Boundaries Commission and Three Others* (supra) on this principle noted as follows:

“(63) Where *akn ke act 2010 constitution the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

51. Equally, the Supreme Court in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] KESC 83 (KLR) stated as follows:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

(118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.



(119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”

52. Section 7 of the *Access to Information Act* provides that a party seeking to access information held by the state or private body is first required to address the request to the designated information access officer. If no response is received or the request is denied, the Act under Section 14 provides the procedure to be followed to lodge a complaint before the Commission on Administration of Justice (CAJ).
53. Section 23 prescribes the powers of CAJ, which include:
- a. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
 - b. question any person in respect of any subject matter under investigation before the Commission; and
 - c. require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.
2. The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—
- a. the release of any information withheld unlawfully;
 - b. a recommendation for the payment of compensation; or
 - c. any other lawful remedy or redress.
3. A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.
4. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.
5. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.
54. The Petitioner states that he sought for the information relating to the 1st Respondent's from the Intended Interested Party but that request was denied on grounds that it is relates to personal data.



The Petitioner did not take up the matter with CAJ after that refusal as directed in the Act contrary to the doctrine of exhaustion.

55. Pursuant to the provisions of the *akn ke act 2016 31 Access to Information Act*, the Petitioner should approach the High Court to enforce the right of access to information only if presented as an appeal against the decision of the CAJ's under Section 23(3) of the Act. This Court's jurisdiction is thus appellate on matter relating to access to information. The Petitioner has failed to exhaust that alternative mechanism. Under Article 159 of *akn ke act 2010 constitution the Constitution*, this Court is also required to promote alternative methods of dispute resolution. The Application thus offends the doctrine of exhaustion of remedies.

Whether or not the Intended Interested Party should be joined in this suit.

56. The law on joinder of interested parties in constitutional petitions is set forth in *akn ke act 2010 constitution the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. Rule 2 defines an 'interested party' as follows:

'a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'.

57. The addition of an interested party is provided under Rule 5 (d) (ii) which states as follows:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

- (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

58. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR) discussed joinder of an interested party as follows:

“(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

(23) Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;



(iii) joinder to prevent a likely course of proliferated litigation.”

(24) We ask ourselves the following questions: (a) what is the intended interested party’s stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?”

18. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

59. Equally, the applicable principles in an application for joinder of an interested party were set by the Supreme Court in *Muruatetu & another* (supra) where it underscored as follows:

“a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

c. Lastly, a party must, in its application, set out the case and or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

60. Furthermore, at Paragraph 41, the Superior Court noted as follows:

“(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. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.”

61. Guided by the principles of joinder of an interested party, it is reasonable to deduce that joinder of such a party is not a matter of right neither is it automatic. Further, that any joinder to a Court Proceeding is discretionary and each case must be examined on its own merits and circumstances.

62. To qualify for joinder, the Petitioner is required to demonstrate that the Intended Interested Party has a personal interest or stake in the matter, the prejudice that will be suffered if not enjoined and lastly, must set out the case and or submissions it intends to make before the Court and demonstrate the relevance of those submissions.

63. In my considered view, the Petitioner has not satisfied this threshold. I say so because first, the Intended Interested Party in this matter is not a party or aggrieved by the impugned electoral process and as such has no discernible legal interest in the outcome.



- 64. Second, it is evident that the Petitioner solely seeks the Intended Interested Party’s joinder, for the completeness of his case in relation to information sought. That is, the Petitioner seeks the Intended Interested Party to supply the evidence that will support and solidify his main contention in the Petition against the 1st Respondent. It is abuse of process to use a joinder application for purposes of fishing for evidence from a party to prop one’s case. This is against the principles of joinder which permit a party to be joined because he has a stake or personal interest in the matter or is likely to be affected by the outcome. The instant Application for joinder is misplaced and fails to meet the test set by the Supreme Court in *Muruatetu & another* (supra).
- 65. Furthermore, the order of access to information under Article 35 that is sought in the Application against the proposed interested party is not founded on facts that are pleaded in the main Petition. It is sought in the Application only which means the Application will be an end itself as the facts upon which it is based have no foundation in the main suit. An interlocutory application cannot seek a relief that is at variance with a party’s pleadings. The Petitioner is basically using this Application to unilaterally expand his cause of action while avoiding to make an amendment to the Petition, which is legally untenable because a Party is bound by his pleadings.
- 66. The upshot is that this Application is hereby dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2025.

.....

L N MUGAMBI

JUDGE

