

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E037 OF 2025

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 13 AND 40 OF THE ELECTIONS ACT

AND

IN THE MATTER OF REGULATION 52 OF THE ELECTIONS (GENERAL)
REGULATIONS, 2012

AND

IN THE MATTER OF THE DECISION OF THE IEBC DISPUTE RESOLUTION
COMMITTEE IN IEBC/DRC-BE/08/2025: EDWARD KIPLIMO MENGICH vs. SELLAH
MALAMBA CHRISTINE & THE EQUITABLE PARTY

BETWEEN

THE EQUITABLE PARTY (TEP).....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

EDWRD KIPLIMO MENGICH.....2ND RESPONDENT

JUDGMENT

1. It is not disputed that the Petitioner is a duly registered Political Party under the **Political Parties Act**, and as is the case with all other registered political parties, possesses the mandate to nominate and sponsor candidates for elective positions within the Republic of Kenya. On its part, the 1st Respondent is established under **Article 88** of the **Constitution**, and is the body charged with the exclusive mandate of conducting or supervising elections to elective offices established by law.

2. This Petition basically faults the decision of the 1st Respondent’s Dispute Resolution Committee (**DRC**) rendered on 21/10/2025 (hereinafter “the Decision”). The Committee panel comprised 3 Commissioners of the 1st Respondent, and was chaired by **Commissioner Maryakaren Sorobit**, sitting with **Commissioners Hassan Noor Hassan Hassan** and **Commissioner Anne Nderitu** as Members.

3. The background of the dispute is captured in the Decision, and is basically that the 2nd Respondent is (or was) a registered candidate, nominated by the Petitioner, for the position of Member of County Assembly (MCA), Metkei Ward, Keiyo South Constituency, Elgeyo Marakwet County. He presented himself before the Returning Officer on 8/10/2025 and was duly registered as a candidate. Apparently, there were only two candidates registered, namely, the 2nd Respondent, and one **Philip Kipkosgei Kiprutto** of the **United Democratic Party (UDA)**. However, on 11/10/2025, the 2nd Respondent forwarded a Notice of Withdrawal of Candidature to the Returning Officer via Whatsapp App, and receipt whereof the Returning Officer acknowledged, but who advised the 2nd Respondent to present a completed Withdrawal Form at the 1st Respondent's office in Keiyo South Constituency, which the 2nd Respondent then did on 14/10/2025. However, the Returning Officer rejected the 2nd Respondent's document on the ground that it did not conform to the prescribed format stipulated under **Regulation 52(1)** of the **Elections (General) Regulations, 2012**. On the same date, the 2nd Respondent quickly managed to return and present the correct prescribed Form. However, the Returning Officer again rejected the document, this time on the ground that the withdrawal was time-barred pursuant to the same **Regulation 52(1)**.
4. It is upon dissatisfaction with the above rejection of his withdrawal of candidature documents that the 2nd Respondent moved to the 1st Respondent's Dispute Resolution Committee (**DRC**) and filed a Complaint seeking nullification of the Returning Officer's rejection of the documents. In the Decision, the DRC overruled the Returning Officer, finding that the Notice of Withdrawal, as submitted to the Returning Officer on 11/10/2025, was valid and within the legally provided timelines, and thus allowed the Complaint. The DRC thus directed the Returning Officer to recall and/or cancel the Certificate of Nomination issued to the 2nd Respondent on 8/10/2025.
5. The Petitioner has now come to this Court with the Constitutional Petition dated 27/10/2025. The same is filed through **Messrs S & S Advocates LLP**, and seeks orders as follows:

 - i) A declaration that the purported resignation of the 2nd Respondent was invalid, unlawful, and of no legal effect.
 - ii) A declaration that the decision of the 1st Respondent validating the said resignation is null and void.

- iii) A declaration that the 1st Respondent's conduct violated the Petitioner's and its members' political rights under **Article 38** of the **Constitution**.
 - iv) An order directing the 1st Respondent to reinstate the name of the Petitioner's candidate, **Edward Kiplimo Mengich**, on the ballot for the Metkei Ward by-election.
 - v) Damages for violation of political rights.
 - vi) Costs of the Petition.
 - vii) Any other orders that the Court may deem fit or just to secure the ends of justice and constitutional integrity.
6. The 1st Respondent has since, by a notice published in the Kenya Gazette edition of 29/10/2025, scheduled Parliamentary and Ward by-elections for various areas across the country, for 27/11/2025. By a notice in the same Gazette edition, however, the 1st Respondent has made a declaration of "**no contest**" for Metkei Ward, the said **Philip Kipkosgei Kiprutto** of the **United Democratic Party (UDA)** being the only, one remaining candidate, the DRC having ruled that the 2nd Respondent validly "**withdrew**" his candidature. Accordingly, the notice declared the said **Philip Kipkosgei Kiprutto** duly elected as the MCA for Metkei Ward.
7. Together with the Petition, the Petitioner also filed the Notice of Motion dated 27/10/2025 seeking conservatory orders to maintain the status quo obtaining prior to the impugned Decision, pending determination of the Petition. The Petitioner also filed the second Notice of Motion dated 3/11/2025 seeking orders restraining the Speaker and Clerk of County Assembly of Elgeyo Marakwet County from conducting, facilitating or participating in the swearing-in of the MCA for Metkei Ward. By the ex parte orders granted by **Lady Justice E. Ominde** on 5/11/2025, such interim restraining orders were issued, pending hearing of the Application.
8. The 1st Respondent then, through **Messrs Samba, Odeck & Mulama Co. Advocates**, filed the Preliminary Objection, and also Notice of Motion, both dated 5/11/2025 challenging the jurisdiction of this Court to determine this matter. **Ms. Soreh** appears for the Petitioner while **Ms. Odeck** appears for the 1st Respondent. Regarding the 2nd Respondent, although there was a Return of Service indicating that he was served, he never, at that stage, appeared either in person or by Counsel.

9. Upon consultations between the Court and Counsels for the two parties when the matter came up on 10/11/2025, it was agreed by consent, that considering the strict timelines involved, the Court do proceed to directly determine the Petition which would then subsume the pending Applications by determining all issues arising in this matter and render a Judgment. I therefore now proceed as agreed.

10. The Petitioner's Affidavit in support of the Petition is sworn by one **Emmanuel Soreh** who described himself as its Secretary General. He faulted the DRC for validating the resignation of the 2nd Respondent despite it being made outside the statutory window by its Decision rendered on 21/10/2025 but only forwarded to the Petitioner on 27/10/2025. He urged that the DRC correctly acknowledged that a valid resignation must occur at least 72 hours after "***nomination***", yet paradoxically proceeded to uphold the purported resignation effected 72 hours after "***registration***". He then deponed that under the **Elections Act, 2011**, "***nomination***" refers to the "***formal submission of a candidate's name to the Commission***", whereas "***registration***" is the subsequent act of "***presentation of nomination papers***", and that **Section 13** of the **Elections Act** clearly demarcates the stages of "***nomination***" and "***presentation of nomination papers***". He urged that "***nomination***" is the act of submitting the name of the candidate by the Political Party while "***presentation of nomination papers***" constitutes a separate and subsequent electoral activity. He deponed further that exclusion of the Petitioner's candidate was without any written, reasoned, or lawful decision, contrary to **Article 47** of the **Constitution** and the **Fair Administrative Act**.

11. On the part of the 1st Respondent, as aforesaid, filed the Preliminary Objection, Grounds of Opposition and also Application, all dated 5/11/2025, advancing the view that this Court lacks the jurisdiction to entertain this matter.

12. In the Preliminary Objection and the Grounds of Opposition, it is basically urged that this Court lacks the substantive jurisdiction to hear and determine the Petition, which is a dispute over an election, and that whether the election is through universal suffrage or by way of nomination through the Party list, the same must be determined by an Election Court as prescribed under **Article 87** of the **Constitution** as read with the relevant provisions of the **Elections Act** and the **Elections (Parliamentary Election) Rules, 2017**. It was further stated that the Petition is filed after the completion of the electoral process following the gazettelement and declaration of an unopposed candidate for the position of MCA for the Ward on 29/10/2025 vide Gazette Vol.

CXXVII –No. 222, pursuant to **Regulation 53** of the **Elections (General) Regulations, 2012**. It was further urged that the Petition violates the mandatory provisions of **Section 75(1A)** of the **Elections Act, 2011**, which provides that questions regarding the validity of the election of an MCA shall be heard and determined only by a Resident Magistrate’s Court designated as an Election Court by the Chief Justice, that under **Rule 6** of the **Elections (Parliamentary Elections) Petition Rules, 2017**, the Chief Justice must gazette by name, the Magistrate to hear an election Petition such as the instant one, that therefore by virtue of **Article 165(5)** of the **Constitution**, this Court has no jurisdiction over matters reserved for Courts established under **Article 87** of the **Constitution**, namely the Election Courts, which are the only competent fora to hear and determine disputes arising after the declaration of election results. It was also argued that the Petition offends the doctrine of constitutional avoidance, in that the **Elections Act** and the **Elections (Parliamentary and County Elections) Petition Rules, 2017** provide a complete and adequate statutory mechanism for challenging election results, which the Petitioner has failed to exhaust, that the Petition equally violates the doctrine of exhaustion of statutory remedies, as the Petitioner improperly invokes the constitutional jurisdiction of this Court instead of filing an Election Petition before the competent Election Court. It was consequently urged that the Court must down its tools and decline to give any directions in the matter of this nature, instead, the Court should direct that the Deputy Registrar to transmit the file to the Honourable the Chief Justice for purposes of gazetting the Election Court as was decreed in a Ruling of a similar matter in **Nairobi High Court Election Petition No. E001 OF 2025; Mary Ariviza Mwami Vs National Assembly and Harold Kimuge Kipchumba and 2 Others**.

13. In respect to the 1st Respondent’s said Application, the Supporting Affidavit thereto is sworn by one **Ruth Kavuo Makuthu**, who described herself as the Secretary to the 1st Respondents Dispute Resolution Committee (DRC). She basically reiterated the matters set out in the Preliminary Objection and added that the DRC having rendered its decision following the withdrawal of the 2nd Respondent, the only person who remained as the registered candidate for the election was the said **Philip Kipkosgei Kiprutto**, and the 1st Respondent thus declared him as the duly elected MCA for the Ward. She deponed further that the election process for the position of the MCA was thereby completed pursuant to the provisions of **Regulation 53 (supra)** and the subsequent declaration published in the Kenya Gazette. She urged that the Petitioner filed this Constitutional Petition seeking to reopen and suspend the gazetted result, and obtained the said ex parte orders directing the Speaker and Clerk of the County Assembly from conducting, facilitating or participating in the swearing in of the MCA, and which orders

purport to stay a concluded electoral process, an action over which this Court lacks jurisdiction. She urged that this Court can only exercise jurisdiction over pre-electoral matters prior to gazettelement of the election result as is expressly provided for under **Article 88(4)(e)** and **Section 74** of the **Elections Act, 2011**, that upon Gazettelement of the election result, jurisdiction over any dispute concerning the validity of such election shifts exclusively to the Election Court under **Section 75(1A)** of the **Elections Act, 2011**, and that therefore the Petitioner's grievances, if any, lie only through an Election Petition, not a constitutional process.

14. The Petitioner, in response, filed the Grounds of Opposition dated 7/11/2025 in which it stated that the Petitioner is proceeding on a false and legally unsustainable premise that the Petition is an Election Petition, as the Petition expressly invokes **Articles 22, 23** and **165** of the **Constitution**, and challenges violations of the Petitioner's political rights and legitimate expectations. It was stated that the Petition does not seek to question or nullify an election result but to vindicate constitutional rights arising from the 1st Respondent's unlawful and illegal validation of the 2nd Respondent's purported withdrawal as a candidate outside electoral timelines which are cast in stone. It was contended that the 1st Respondent's actions undermined the Petitioner's rights under **Articles 38, 47** and **81(e)** of the **Constitution**, as well as the principles of legality and predictability in electoral administration, and the attempt to oust this jurisdiction is thus contrary to the **Constitution**. It was averred that the Petition cites its statutory and constitutional basis with precision, that it demonstrates that once a party submits a candidate's name to the Commission, the 3-day withdrawal window under **Regulation 52(1)** closes, and any subsequent "**resignation**" is void. It was contended that the 1st Respondent's contrary action was *ultra vires* and violated the principle of legality under **Article 10** of the **Constitution**. It was restated that the Petition was filed on 28/10/2025, the Gazette Notice purporting to declare the 2nd Respondent's elected unopposed is dated 29/10/2025, and it is therefore factually and legally impossible to contend that the Petition was triggered by that "**no contest**" declaration as the cause of action arose from the antecedent decision of 21/10/2025, when the 1st Respondent unlawfully validated a purported resignation that had already lapsed in law. According to the Petitioner, the 2nd Respondent's reliance on the Gazette Notice of **29/10/2025** as proof of a "**concluded election**" is misconceived, as the Gazette cannot operate retroactively to validate an illegality, or to extinguish a constitutional grievance that had already crystallized prior to its publication, and that the Petition impugns the antecedent

decision of 21/10/2025, which was *ultra vires* and unlawful as a declaration of results cannot cleanse an act done without jurisdiction.

15. It was urged further that an Election Petition, by its very definition, can only be instituted after the declaration of election results, that no such declaration existed as at the date of filing this Petition, and to therefore label it an Election Petition is not merely a mischaracterisation. It was also contended that **Article 165(5)** does not insulate the 1st Respondent from constitutional scrutiny, the exclusion applies only to disputes that properly fall within the jurisdiction of Election Courts after an election has been held and results declared, and that where, as herein, the impugned conduct concerns unlawful pre-election actions of the 1st Respondent, this Court retains full constitutional jurisdiction. In conclusion, it was urged that the 1st Respondent's impugned conduct, namely, validating an out-of-time resignation and thereby excluding a duly nominated candidate, violated both the **Elections Act** and the **Constitution**, and that finality cannot precede legality as justice is not served by allowing an unconstitutional act to stand merely because it was swiftly gazetted.

16. The 1st Respondent further filed the Response to Petition dated 10/11/2025, in which it denied that the nomination was "**complete**" upon mere submission of the party list to the Commission. It averred that the correct legal position is that nomination is a multi-stage process, culminating in presentation and clearance of nomination papers by the Returning Officer, and that the DRC properly found that the initial notice of withdrawal by the 2nd Respondent was lodged within the statutory 3-day window. It was stated that the Returning officer's refusal to accept the notice "**was based solely on the form, and not substance**", that the 2nd Respondent thereafter submitted a corrected form on 14/10/2025 "**only because he had been instructed to do so**", and that the DRC concluded that procedural lapses not affecting "**substance**" cannot defeat substantive justice. It was also urged that during the DRC hearing, when directly questioned by the committee, the 2nd Respondent unequivocally confirmed her withdrawal from the elections. It was thus stated that this affirmation was central to the DRC's conclusion following binding authorities from the Supreme Court guidance that a candidate cannot be forced to participate in an election once he loses interest. The case of **Mwau & 2 others -v- IEBC & 2 others** was cited. The Petitioner's claim that the decision was transmitted late was also denied and it was averred that transmission of a Ruling is a post-decision administrative act that does not affect validity of the decision. It also urged that **Section 13** does not extinguish the candidate's right to withdraw under **Regulation 52**, which is a separate and enabling provision, and that **Section 13** regulates a party's submission of names but it does not bar a candidate from retracting consent

to contest. It was further denied that **Regulation 52** must be construed strictly from the date of party submission, and it was urged that for purposes of candidate withdrawal, the operative event is the candidate's own nomination, which is completed upon clearance by the Returning Officer, not upon party submission.

17. According to the 1st Respondent, the Petition seeks to impose an artificial interpretation tying timelines to party submission of names rather than the candidate's own registration. It was also stated that the 1st Respondent did not violate any political right of the Petitioner under **Article 38**, in that a political party has no right to compel a candidate to run, that a Returning Officer cannot lock-in a candidate where the candidate unequivocally expresses unwillingness to contest, as doing so would amount to forced candidacy, which is unconstitutional under **Article 38(3)(c)**. The 1st Respondent stated that the DRC decision merely validated the 2nd Respondent's personal right not to stand for election, which is equally protected under **Article 38**, that the Petitioner's alleged injury is speculative, political, and incapable of constitutional protection, that political parties have no "**vested right**" to compel an unwilling person to run on its ticket, and that the DRC acted before ballot printing and in strict adherence to **Article 81(e)** principle of fairness, transparency and accountability. It was thus urged that the Petition is fatally defective and incompetent for reasons that under **Article 88(4)(e)** of the **Constitution** and **Section 74** of the **Elections Act**, nomination disputes must be resolved by the DRC in the first instance, and that the High Court sitting as a Judicial Review Court, only exercises supervisory jurisdiction under **Article 165 (3) and (6)** of the **Constitution**, where illegality is shown, and that in this case, none has been demonstrated and instead, a Constitutional Petition has been filed instead of a Judicial Review, and that the Petition challenges the merits of the DRC decision and invites this Court to sit as an appellate body, contrary to binding jurisprudence.

18. While going through the Judiciary Case Tracking System (CTS), I also came across the Notice of Preliminary Objection dated 12/11/2025 filed by the 2nd Respondent. The same is filed through **Messrs Sabulei & Kibiwott Advocates LLP**, and was definitely filed long after directions had already been given and even a Judgment date fixed. The Objection is premised on the argument that this Court lacks the jurisdiction to hear this matter because the Petition has not been drafted with reasonable precision in pleading specifically to constitutional violations contrary to the principles in **Anarita Karimi Njeru vs Attorney General [1979] KLR 154**, which was reiterated in the Court of Appeal case of **Mumo Matemu Vs Registered Society of Human Rights Alliances & 5 Others [2013] eKLR**. It was further contended that this Court also lacks the mandate to determine this matter because its jurisdiction under **Article 165(3)** of **Eldoret High Court Constitutional Petition No. E037 of 2025**

the **Constitution** has not been properly invoked, and that the Petition offends the mandatory provisions of **Rule 10(1) and (2) of the Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice Procedure and Rules, 2013**. Like the 1st Respondent, the 2nd Respondent, too, averred that this Court lacks the jurisdiction to hear any matter relating to, or touching upon the validity, conduct, or outcome of the election of an MCA as such jurisdiction is conferred exclusively upon a Resident Magistrate's Court designated as an Election Court pursuant to **Article 87(2) of the Constitution, and Section 75(1A) of the Elections Act, 2011**, to the exclusion of the High Court. In conclusion, it was urged that the Petition, in so far as it seeks to suspend or interfere with the gazettelement and declaration of the duly elected MCA, is misconceived and incompetent.

19. The Petition was then canvassed by way of written Submissions. The Petitioner's Submissions is dated 11/11/2025, while the 1st Respondent's is dated 12/11/2025. There is also the Submissions dated 12/11/2025 in the CTS, filed by the 2nd Respondent after directions had already been taken.

Petitioner's Submissions

20. The Petitioner's Counsel basically expounded on the matters already set out above. He observed that this Petition was filed on 28/10/2025 even before the so-called declaration of elections results which is dated 29/10/2025. He also observed that nothing in the Petition challenges that declaration of results to make it an Election Petition, and that the so-called winner is not even a party to these proceedings. Regarding the submission that this Court lacks jurisdiction upon gazettelement and declaration of the unopposed candidate as duly elected, and that jurisdiction now lies with the Elections Court, he submitted that this Petition "***is not subsequent***" to the purported gazettelement, that, in fact, the Gazette Notice is dated 29/10/2025 but was published on 31/10/2025. He termed the 1st Respondent's interpretation as suggesting that a Court's jurisdiction can be ousted by a Gazette Notice by a party. Counsel urged that there are pre-election disputes that have been determined on merit even after the elections, and that in this case, the election date is admittedly 27/11/2025. He cited the Court of Appeal case of **Talib v Wiper Democratic Movement-Kenya & 4 others (Civil Appeal E605 of 2022) [2022] KEHC 12873 (KLR) (Civ) (9 September 2022) (Judgment)**, which, he submitted, challenged the decision of the **Political Parties Dispute Tribunal (PPDR)**, which, just like this Petition, challenged the decision of the DRC, and in which the Judgment was rendered on 9/09/2022, way after the elections of August 2022. He submitted that the Court of Appeal stayed swearing-
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in pending the appeal, yet it was not an Election Petition, and that in other words, the fact that gazettment had taken place did not oust any jurisdiction of a pre-election dispute. He also cited the case of **Wiper Democratic Movement Secretary General & 3 others v Talib & another; Speaker, National Assembly & another (Interested Parties) (Civil Appeal E325, E329 & E330 of 2022 (Consolidated)) [2022] KECA 1077 (KLR) (7 October 2022) (Ruling)**.

21. According to Counsel therefore, pre-elections disputes can go beyond elections as long as the subject matter is preserved. Regarding **Section 13** of the **Elections Act**, Counsel reiterated that elections in Kenya are highly regulated, that the legislator knew even the definition of “**nomination**” can bring conflict and so went ahead to define it, and that at the centre of this Petition is this definition. He submitted that the Court has two options only; to take the meaning of nomination as suggested by the 1st Respondent or as defined by the **Elections Act**. In his view, “**nomination**” means “*the submission to the Commission of the name of a candidate*”, and thus faulted the 1st Respondent’s interpretation that “*mere submission*” to the Commission is not complete “**nomination**”. He then observed that in this case, the 1st Respondent acknowledges “**presentation**” of papers to the Returning Officer on 8/10/2025 yet the alleged “**resignation**” is on 10/10/2025, way after nomination, after the “**presentation**” of papers, a time when the Petitioner cannot substitute, and that is the mischief the law is curing by giving timelines for resignation of candidates and substitution of candidates by a party. He cited **Section 13** of the **Elections Act** and submitted that between “**nomination**” and “**presentation of papers**”, a political party may change its candidate but after “**presentation of nomination papers**”, nothing can be done, that even in the case of death after nomination and clearance, the election has to be cancelled and fresh nominations carried out. He also cited **Regulation 44, 49** and **53**.

22. He then pointed out that on the requirement of “**before close of nominations**”, it is admitted that the 2nd Respondent had presented nomination papers and had been cleared by the Returning officer, meaning, in the words of the 1st Respondent, that nomination had culminated. Regarding the requirement of “**by notice in writing**” and “**signed by him before the Returning Officer**”, he pointed out that the communication was via a whatsapp message to the Returning Officer, and thus it was not done “**in writing**” or “**signed before the Returning Officer**”. About the mischief sought to be cured, he urged that a resignation must be actual and real, and that is why it has to be done before the Returning officer. He submitted that the

requirements under **Regulation 44** seek to cure situations such as this, where a political party invests in an election and then opponents come in to “*steal*” its candidate out of the race. He submitted that election planning is done on the basis of candidates, and that there are persons who wanted to vie but did not because the Petitioner already had a candidate. According to him, these are not procedural lapses, but substantive law, and that requiring a withdrawal to be in writing and done before the Returning Officer within a timeline is not procedural, but substance. He urged further that other candidates of the Petitioner who emerged 2nd and 3rd have been denied an opportunity.

23. He reminded the Court that the 1st Respondent retained the late **Raila Odinga’s** name on the ballot in 2017 even after he expressly pulled out, as the 1st Respondent insisted that he had resigned outside time. *“And it was right. The Supreme Court upheld it. In Malava constituency in Kakamega County, one Edgar Busiega is on the ballot despite purporting to resign and rightly so. Metkei Ward cannot be different.”* Counsel then prayed that after finding that the 1st Respondent violated the law, the Court should order that the by-election in the Ward be extended to take into account the days between 31st (or 29th as the case maybe) October 2025 and the date of Judgment/11/2025. According to him, this will not be the first time, and urged the Court to take judicial notice that something as intense as a General election has been extended in this Country and the Supreme Court has acknowledged it, that elections for Governor Kakamega and Mombasa were postponed, and thus, a by-election in Metkei Ward can be postponed due to circumstances. He submitted that a General Election is in the **Constitution** and the 1st Respondent and the Supreme Court taught us that elections date is not cast in stone, things can happen, they do happen, and have happened. He contended that the appropriate relief would be extending the election date to allow for “*nomination*” and “*presentation of nomination papers*” for the Petitioner, which would mean that the Petitioner be allowed to present another candidate, and present the papers with necessary extensions to create a level playing field. In conclusion, he urged that damages for violation of rights are also payable.

1st Respondent’s Submissions

24. Counsel for the 1st Respondent, after reciting the background to the matter, basically repeated matters already stated in its various earlier pleadings. On the argument that after gazettelement, jurisdiction shifts, she submitted that such declaration has the force of law and constitutes a return of election results under **Article 88(4)(e)** of the **Constitution**, and from that moment, any challenge thereto must be brought before an Election Court. He cited the Supreme Court case of

Moses Mwicigi & 14 others –v- IEBC & 5 others (2016) eKLR, the case of **Sammy Ndungu Waity –v- Independent Electoral & Boundaries Commission and 3 others (2019) eKLR**, and also several others. She then introduced a new argument, namely, that the Petition is fatally defective for non-joinder of the declared winner as a necessary party. She submitted that the declared MCA-elect is an indispensable party as the Petition seeks to invalidate his election, to suspend his Gazette Notice and to stop his swearing-in. She cited the case of **Isaac Aluoch Polo Aluochier v Uhuru Muigai Kenyatta & Another [2013] eKLR**.

25. Counsel then opposed the Petitioner’s plea that the elections be postponed. She cited the **Supreme Court** case of **Raila Odinga & 7 Others v William Ruto & 10 Others (Presidential Election Petition No. E005 of 2022)**; in which, she submitted, the Court upheld the 1st Respondent’s decision to postpone elections in Mombasa and Kakamega but only because of logistical challenges, and described such mandate as “*a narrow, exceptional power*”. She quoted the holding that “*postponement of elections under Section 55B must be a measure of last resort, triggered by impossibility, and exercised with transparency and fairness*”. She also cited the Court of Appeal case of **IEBC v NASA & 6 Others [2017] eKLR**. Regarding the doctrine of exhaustion, she cited the case of **Speaker of National Assembly v Karume [1992] KLR 21**, and reiterated that “**where the law provides a procedure, that procedure must be followed**”, and also submitted that in electoral disputes, adherence to gazetted timelines is part of that procedure.

2nd Respondent’s Submissions

26. Counsel for the 2nd Respondent, on his part, basically reiterated the matters urged in his Notice of Preliminary Objection. In support of the submission that the Court lacks jurisdiction to hear this matter because gazettelement of the sole candidate as duly elected marked the conclusion of the election process, he, too, cited the Supreme Court case of **Moses Mwicigi & 14 Others (supra)**. He also cited the case of **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others [2014] eKLR**, in which he submitted, the Supreme Court held that the process of declaring and gazetting election results marks the formal conclusion of the election, and any challenge thereafter must strictly follow the petition procedure laid out in the **Elections Act**.

Determination

27. The main issues that arise for determination herein can be summarized as follows:

- i) **Whether this Court possesses the jurisdiction to entertain this matter.**
- ii) **Whether the Petition is drafted to the required standard of particularity and/or precision as set out in the *Anarita Karimi* decision.**
- iii) **Whether the 2nd Respondent’s act of withdrawal of his candidature from the Ward MCA bye-elections was valid.**

28. Before I interrogate the merits of the Preliminary Objection, I will first address the question whether the challenge raised meets the threshold for what should constitute a “***Preliminary Objection***”.

29. In that respect, the Supreme Court, in the case of **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others**, while following the oft-cited decision of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, restated the following:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”. [Emphasis mine]

30. The Supreme Court, further in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR**, guided as follows:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

31. The issue raised by the Respondents being one that touches on this Court's jurisdiction, there is no doubt that it, indeed, fits well within the circumstances contemplated as constituting a "Preliminary Objection". The Respondents thus easily surmount this first hurdle.

32. On the issue of jurisdiction, in the celebrated case of **The Owners of the Motor Vessel "Lillian's" -V- Caltex Oil Kenya Ltd [1989] KLR 1**, Nyarangi J.A. held as follows:

"..... a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

33. Similarly, in the case of **Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011**, the Supreme Court held that:

"[68]. 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 itself jurisdiction exceeding that which is conferred upon it by law."

34. The Preliminary Objection revolves around interpretation of **Section 75(1)(A)** of the **Elections Act**. For purposes of context, I quote the entire **Section 75**, which is premised as follows:

75. County election petitions.

(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.

(1A) A question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—

(a) filed within thirty days of the decision of the Magistrate's Court; and

(b) heard and determined within six months from the date of filing of the appeal.

35. The other relevant provisions are **Section 13(1A)** and **(2)** of the **Elections Act**, which are premised as follows:

13. Nomination of candidates by a political party.

(1) A political party shall nominate its candidates for an election under this Act at least ninety days before a general election under this Act in accordance with its constitution and nomination rules

(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission:

Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may, after notifying the candidate that the party seeks to substitute, where applicable substitute its candidate before the date of presentation of nomination papers to the Commission.

36. There are also **Regulations 44, 52(1)** and **53** of the **Elections (General) Regulations, 2012**, which provides as follows, respectively:

44. Withdrawal of candidature before nomination

A candidate whose nomination papers have been delivered to the returning officer may, before the close of nominations, by notice in writing signed by him or her before the returning officer and presented to the returning officer, withdraw his or her candidature.

52. Withdrawal of candidature after nomination

- (1) A candidate who has been nominated may withdraw his or her candidature by delivering to the respective returning officer a notice to that effect in Form 24A not later than three days after nomination.**
- (2) Where there are only two nominated candidates and one candidate withdraws, the remaining candidate shall be declared duly elected in accordance with regulation 53**

53. Declaration of no contest: Other elective posts

If at the close of nominations for any elective post only one candidate is validly nominated in respect of that elective post in an electoral area, the Commission shall declare the candidate duly elected and publish a notice in the *Gazette* to that effect.

37. The issue whether a Constitutional Petition or Judicial Review proceedings can be invoked before the High Court to vitiate an election related or party nomination dispute subsequent to gazettelement of nominated candidates was extensively dealt with by the Supreme Court in the case of **Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others** [2016] eKLR. The Supreme Court pronounced itself as follows:

“[106] The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.

[107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly. (Emphasis supplied)

.....

“(115) The *Elections Act* confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the Act provides that:

“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

“(117) It is clear to us that *the Constitution* provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a

conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.

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

38. The Court of Appeal, in the case of **Rose Wairimu Kamau and 3 Others -vs- IEBC, C.A. No. 169 of 2013** stated as follows:

“... In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 97(1C) and 177(2) respectively have been gazetted ... they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Article 105 of the Constitution or Part VIII of the Elections Act as the case may be.”

39. The Court of Appeal, again, in **Jaldesa Tuke Dabelo vs Independent Electoral & Boundaries Commission & Another [2015] eKLR** held that:

“The appellant in his application for judicial review sought to invoke the supervisory jurisdiction of the High Court in election matters. We are of the considered view that the jurisdiction of the High Court in electoral matters is a special jurisdiction governed by the *Constitution* and the *Elections Act*. The supervisory jurisdiction of the High Court is inapplicable to electoral matters for the reason that the procedure to follow is set out ... In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on *Article 159 of the Constitution*. *Article 159* was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the ... Assembly is by way of petition ... A judicial review application cannot be allowed to circumvent the statutory procedure of instituting

an election petition to determine the question of membership to a County Assembly; this strategy, we observe, constitutes a mischief that this Court should forestall to prevent a party from using an institutional detour to litigate an issue by seeking a remedy from the High Court in the first instance (which is a different and improper forum) rather than through the Resident Magistrate's Court which is the designated forum under *Section 75 (1A)* of the *Elections Act*. It is our considered view that the jurisdictional competence of a court and the statutory procedure for commencing a cause of action are aimed at facilitating and enabling a party to be heard. A litigant cannot ignore the jurisdictional competence of a court or the procedure for commencing a cause of action and then aver that he has not been heard. *Article 159* of the *Constitution* or the Overriding Objective principles are not blanket provisions that shelter a party who disregards the proper forum or jurisdictional competence of a court or fails to follow the procedure for commencing a cause of action. In totality, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.”

40. The Court of Appeal, once more, in the case of **Kennedy Moki vs. Rachel Kaki Nyamai & 2 others** [2018] eKLR, expressed itself as follows:

“56. Notwithstanding the foregoing, we are alive to dicta which state that an election court is the proper forum at which to challenge by way of petition nomination disputes. On our part, having reviewed the case law, we are persuaded that the dicta in Kipkalya Kiprono Kones vs. The Republic & Another Ex-parte Kimani Wanyoike & 4 Others [2006] eKLR is good law where it was held that an election petition was the only valid means of challenging an election. All other proceedings before PPDT or Judicial Review are not proceedings challenging the declared results of an election and such proceedings cannot vitiate or validate the declared results of an election. We are also persuaded with dicta in Mwihia & another vs. Ayah & another [2008] 1 KLR (EP) 450 where it was held that nominations to stand for elections are part of the election process and as such, they could only be challenged after the elections by way of an election petition. We are further convinced that the decision in Wamboko vs. Kibunguchi & another, (2008) 2 KLR 477, is good law where it was held that an election court has jurisdiction to hear and determine a petition where one of the issues is nomination of a candidate - as nomination is a process of election.”

41. The Court of Appeal, yet again, in the case of **Feisal Shaib Khan & another v Independent Electoral And Boundaries Commission (IEBC) & 5 others** [2018] KECA 195 (KLR), held as follows:

“18. We have also considered dicta in Thande vs. Montgomery (1970) EA 341, in which the East African Court of Appeal held that nominations to stand for elections is part of the election process and as such, can only be challenged after the election by way of an election petition. In Mwihia & another vs. Ayah & Another [2008] 1 KLR (EP) 450, 456-458 it was held that nominations to stand for elections are part of the election process and as such, they could only be challenged after the elections by way of an election petition. In Kipkalya Kiprono Kones vs. The Republic & Another Ex-parte Kimani Wanyoike & 4 Others [2006] eKLR it was held that an election petition was the only valid means of challenging an election and the court would only be seized with the Petition once the election results have been declared.

.....

20. In the instant appeal, the issue at hand is whether the trial court had jurisdiction to hear and determine a nomination dispute relating to membership of the Lamu County Assembly. In our considered view, the High Court had no jurisdiction for the following reasons:

(a) Party nomination disputes after gazettelement by the IEBC can only be heard and determined by way of an election petition. Neither a judicial review application nor a constitutional petition can resolve or initiate electoral dispute resolution after gazettelement of nomination or election results.

(b) As regards membership to the County Assembly, jurisdiction to hear an election petition is vested upon the Magistrate’s Court and not the High Court. In the instant case, the petition filed by the appellants at the High Court was not an election petition before an election court presided over by a Magistrate duly gazetted by the Chief Justice.

(c) In addition, the prayers sought by the appellants in the Petition before the High Court was de-gazettelement of the 3rd and 4th respondents who had already been gazetted as Members of the Lamu County Assembly. The jurisdiction to

deal with any such disputes after gazettelement lies with the Magistrate's court which can only be moved by way of an election petition.

21. In arriving at our decision that the trial court had no jurisdiction to hear the petition filed before it, we are cognizant of the decision by this Court in Hamdia Taroi Sheikh Nuri vs. Faith Tumaini Kombe & 2 Others, Election Petition Appeal No. 27 of 2018 where it was held that this Court lacks jurisdiction to hear appeals relating to membership to the County Assembly. In holding that this Court has no jurisdiction, it was expressed that “it would seem that election appeals by members of the County Assembly to this Court were neither contemplated nor permitted”.
 22. In our decision in the instant matter, we are guided and bound by the Supreme Court decision in *Moses Mwicigi & 14 others* (supra) where the Court stated that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’. Guided the judicial authorities cited and bound by the Supreme Court, we find that this appeal has no merit.
 23. For reasons stated above, we are satisfied that the trial court did not err in upholding the Preliminary Objection. In view of the jurisdictional determination we have made in this appeal, we are satisfied that the other numerous grounds of appeal enumerated in the memorandum must *ipso facto* collapse. The appeal has no merit and we hereby dismiss it with costs.”
42. Considering the principle of stare decisis, the ratio decidendi in the above decisions has regularly been followed by the High Court in subsequent cases. For instance, in the case of Suleiman Said Shahbal vs. The Independent Electoral and Boundaries Commission of Kenya and Others Nairobi High Court Constitutional Petition No. 162 of 2013, Mumbi Ngugi, J (as she then was), expressed herself as follows:

“19. Counsel for the petitioner maintains that this is a petition for vindication of the constitutional rights of the petitioner, but it is clear that what is before me is essentially a petition the ultimate goal of which is to nullify the election of the 4th respondent as Governor of Mombasa County. The only order that the petitioner seeks that can be said to be connected with violation of constitutional rights *strictu sensu* is prayer (f) which seeks compensation under Article 23(e) of the Constitution.

20. In my view therefore, two issues arise for consideration in determining the preliminary objections raised by the respondents: *i. Is there a procedure provided by law for lodging of election petitions? ii. If there is, can such procedure be circumvented by way of a petition alleging violation of constitutional rights?*

21. In considering this issue, I am alive to the fact that the Constitution has provided within its Articles not only for protection of fundamental rights, but also for the manner in which various aspects of social and political relations, and the disputes arising therefrom, are to be resolved... Article 87 provides for the manner in which electoral disputes are to be resolved

.....

28. Despite Counsel for the petitioner maintaining strenuously that this is a Petition alleging violation of fundamental rights, what we have before this court is a Petition challenging the election of the County Governor of Mombasa. It has been filed as a constitutional petition alleging violation of the petitioner's rights under the Bill of Rights, rather than as an election petition that complies with all the provisions of the Constitution, the Elections Act and the Elections Rules pertaining to the filing, hearing and determination of election petitions ...

31. I believe that while the law on elections may have changed in keeping with the new constitutional dispensation, the logic of the law has not. There were, and continue to be, cogent reasons for insisting that where there is a specific procedure or remedy provided by law, that procedure must be followed. To hold otherwise would lead to chaos in the administration of justice, for parties would be at liberty to allege violation of constitutional rights even where no such violations exist, and pick and choose which laws and rules to follow and which to disregard. There is great public interest in the expeditious resolution of election disputes, and the Elections Act and the Elections Rules are intended to achieve this.

32. Perhaps, as the 1st respondent submitted, there is an interface between violation of constitutional rights and acts which may form grounds for annulling the results of an election. However, the framers of the Constitution and the people of Kenya, who overwhelmingly voted for the Constitution at the referendum held on August 4th 2010, thought it best that disputes relating to elections should be

resolved as provided under Article 87, through legislation enacted by Parliament
.....

33. Consequently, for a party to be properly before the court while challenging the results of elections under the new constitutional dispensation and the resultant statutory regime, he or she must abide by the provisions of the Constitution, the Elections Act and the Elections Rules as contained in the Elections (Parliamentary and County Elections) Petition Rules 2013 contained in Legal Notice No 54 of 2013 which constitute the constitutionally underpinned code for handling election disputes. A party cannot disregard the clear provisions of the Constitution and legislation enacted pursuant to such constitutional provisions and expect relief from the court by alleging violation of constitutional rights.

.....

38. The Constitution and the Elections Act, as well as the Rules made thereunder, are very clear with regard to how, before which forum, and at what stage, election results can be challenged. It is not by way of a petition alleging violation of constitutional rights but by way of an election petition that complies with all the provisions of the law governing election petitions

43. G.V. Odunga J (as he then was), in the case of *Samatar Mohamed Abdulahi v Independent Electoral and Boundaries Commission & 4 others* [2017] KEHC 9476 (KLR) 25, stated that:

“25. A party ought not to trans-mutate an election petition into a judicial review with a view to avoiding the procedures provided under the legal regime dealing with election petitions for the convenience of the party.

26. It may be argued that since the matter before the Court revolves around the nomination of the Members of Parliament as opposed to an election, this Court has jurisdiction to deal with the matter. The Supreme Court put this issue beyond doubt”

44. *Mrima J* in the case of *Keter & another v Independent Electoral and Boundaries Commission & another* [2023] KEHC 17307 (KLR), also followed the above reasoning in declining jurisdiction in a similar matter.

45. Upon consideration of the above authorities and the principles enunciated therein, it is my finding that in Kenya, the legal framework establishes specific mechanisms for resolving electoral disputes at different stages, and once an election has been gazetted, any dispute challenging the validity of that election must be heard and determined by an **Election Court** duly constituted under the provisions of **Section 76 of the Elections Act**.

46. I am aware of the Court of Appeal decision in the case of **Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission & another [2014] eKLR**, in which the Court held that:

“The second issue is whether indeed, the nomination in question could only be challenged by way of an election petition since the nominated persons have already been gazetted. On this point, we wish to echo the finding of this Court (*Maraga, Mwera & J. Mohammed, JJ.A*) in *Civil Appeal No. 169 of 2013*, in their holding that where the complaint giving rise to the appeal was lodged with the IEBC or any of the other tribunals before the gazettelement of the names, then the court has jurisdiction to determine the matter. In this case, the complaint had been lodged with the IEBC long before the gazettelement. Indeed, the petition before the High court was determined on 12th July 2013 before the gazettelement on 17th July 2013. This matter was therefore properly before the High Court and also before us.

47. I appreciate the above holding but clearly the majority view from the higher Courts, which I am bound by, in general, seems otherwise. The Supreme Court decision in ***Moses Mwigigi & 14 others (supra)*** was, in my understanding, emphatic that **“any contest to an election, whatever its manifestation, is to be by way of ‘election petition’**”. In any event, the Petitioner still retains its right to file an Election Petition.

48. In the end, I thank Counsel for co-operating with the Court, filing pleadings within the short and strict timelines, and the tremendous research obviously carried out by them, thus easing this Court’s task. Counsels’ industry in this matter is commendable and is much appreciated.

Final Orders

49. In the circumstances, I rule and order as follows:

- i) The Notices of Preliminary Objection dated 5/11/2025 and 12/11/2025, respectively, are upheld. Consequently, the Petition herein, dated 27/10/2025 is struck out.
- ii) As the Petition was clearly not a frivolous one, each party shall bear his or its own costs thereof.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF NOVEMBER 2025

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Soreh for the Petitioner

Ms. Odeck for the 1st Respondent

Mr. Kibet for the 2nd Respondent

Court Assistant: Brian Kimathi