

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E680 OF 2025

BETWEEN

CALEB AMBULWA BURUDI.....1ST
PETITIONER

MALIRO W. SAMUEL.....2ND
PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION DISPUTE RESOLUTION COMMITTEE
COMPRISING OF COMMISSIONERS
ANN NJERI NDERITU, MARY KAREN SOROBIT, AND
HASSAN NOOR.....

.....1ST RESPONDENT

HASSAN ABDALLAH SALIM WILLIAM,
RETURNING OFFICER MALAVA
CONSTITUENCY.....2ND RESPONDENT

SETH AMBUSINI PANYAKO3RD
RESPONDENT

ATTORNEY GENERAL.....4TH
RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 22nd October 2025 is supported by the Petitioners' affidavits in support of similar date and a further affidavit dated 6th November 2025.
2. The Petition challenges the 1st Respondent's proceedings that culminated to in its decision dated 21st October 2025. This decision dismissed the 1st Petitioner's case against the 3rd Respondent questioning his eligibility to be nominated for election as a Member of Parliament for Malava Constituency.
3. On this basis, the Petitioners seek the following relief against the Respondents:
 - i. A declaration be issued that public officers including Secretary Generals of labour unions sitting as Board Members of Public Bodies/Parastatals shall resign from office before vying for elective office as prescribed by law.*
 - ii. A declaration that Seth Ambusini Panyako violated the Constitution by vying for elective office before resigning from public office.*
 - iii. A declaration that the Independent Electoral and Boundaries Commission violated the Constitution by striking out the complaint and Petition by Caleb Ambulwa Burudi based on a guided Preliminary Objection.*
 - iv. A declaration be issued that Seth Ambusini Panyako shall not be on the ballot for election as Member of Parliament Malava*

Constituency in the by-election scheduled for 27th November, 2025.

- v. A declaration that the nomination of Seth Ambusini Panyako violated the Constitution and the same is null and void.**
- vi. A declaration that Articles 27(1),(2), 37, 47(1),(2), 50(1), 50(2)(e)(j)(k), 84, 88(4)[e] and 159(2) of the Constitution have been infringed by the 1st Respondent.**
- vii. A declaration that the administrative procedure and decision by the 1st Respondent signed on 21st October, 2025 was bad faith and without due regard to procedural fairness.**
- viii. A declaration that the Petitioners legitimate expectation that the 1st Respondent will be procedurally fair in conducting and delivering the administrative impugned decision was violated.**
- ix. An injunctive order issues restraining the gazettelement of Seth Ambusini Panyako as a nominee/candidate for election as Member of Parliament for Malava Constituency or a mandatory injunction issues de-gazetting the said nomination if it has already been so gazetted.**
- x. An order of certiorari to remove into the High Court and quash the decision of the IRBC Dispute Resolution Committee made and signed by the 21st October, 2025.**
- xi. An order of mandamus to remove into the High Court and compel the IEBC to degazette and accordingly cancel the certificate of clearance issued to him.**

xii. Each party shall bear its own costs this being a public interest suit to uphold the Constitution.

Petitioners' Case

4. The Petitioners' aver that the 1st Respondent in its decision dated 21st October 2025 dismissed the 1st Petitioner's complaint and Petition by virtue of a preliminary objection that was raised by the 3rd Respondent on 15th October 2025. The 3rd Respondent in the matter asserted that the 1st Petitioner had failed to lodge his complaint within 24 hours as required in law.
5. On his side, the 1st Petitioner claims that the complaint was lodged on 9th October 2025 after the 3rd Respondent was nominated on 8th October 2025. He depones that in the Petition, he contested the eligibility of the 3rd Respondent to vie for the parliamentary seat, as he did not resign from public office within the set legal timelines. He states that the 3rd Respondent actually resigned 33 days after submitting his name for this seat.
6. Contrary to the allegation that the complaint was lodged late, the 1st Petitioner asserts that the requisite documents were lodged physically and stamped by the Registry Clerk who did not record the time the complaint was lodged.

7. The Petitioners inform that the Petition was slated to be heard on Wednesday 15th October, 2025 at 11:00 am, however the matter was adjourned to 2:30p.m. At 2:30 pm when the matter proceeded, they aver that the 1st Respondent foremost inquired whether there were any objections. It is noted that it is at this point that the cited Preliminary Objection was raised. The 1st Petitioner contested the Preliminary Objection as was factual in nature and thus not a pure point of law.
8. The Petitioners aver that while the 3rd Respondent was granted an opportunity to file a formal Preliminary Objection within an hour, the 1st Respondent did not grant the 1st Petitioner an opportunity to make his response. It is stated that during the adjournment, one of the 1st Petitioner's lawyers received a call from an unidentified person inquiring the time when the Petition was served. In their view, this confirms the fact that the 1st Respondent was on a fishing expedition.
9. Later on, at 4:30 p.m., it is stated that the 1st Respondent conducted a hearing of the matter. It is averred that during the hearing the 3rd Respondent who was called to the stand, purported to adduce evidence of when he was issued with a Clearance Certificate. The Petitioners aver that the document adduced was a mere itinerary schedule and did not in any way confirm the time the certificate was issued.

10. It is claimed that the next person to take the stand was the Registry Clerk who was asked to ascertain the time he received the Petition. The Clerk informed that the same had been received around noon however he had failed to indicate the specific time of receipt. It is underscored that the 3rd Respondent herein and Clerk did not swear any affidavits in the matter. Additionally, it is alleged that the 1st Petitioner was not granted an opportunity to cross examine the two and that the 1st Respondent's in the end sided with the 3rd Respondent.
11. In light of this, the Petitioners assert that it is evident that the preliminary objection was factually disputed thus contrary to the principles of preliminary objections. Second, that the 1st Respondent conducted a trial by ambush as it illegally, improperly and unfairly introduced oral clarifications from registry officials and the Returning Officer during the hearing without prior notice to the Petitioner and without them having sworn any Affidavits. Moreover, the 1st Petitioner was denied a chance to cross-examine them on their evidence. In fact, it is noted that his request to respond to the new material was expressly denied. Additionally, it is claimed that the 1st Respondent also refused to issue a copy of the typed proceedings when the same was requested.
12. In sum, the Petitioners stress that the 1st Respondent's conduct fell short of the procedural fairness guarantees

under Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act. Further to that, they argue that the 1st Respondent's decision principally allowed the 3rd Respondent to circumvent the bar on Public Officers vying for elective office without resigning from public office as it is required under Section 43(5A) of the Elections Act.

13. Likewise, the 2nd Respondent is faulted for clearing the 3rd Respondent in light of these discrepancies yet he had a legal duty to ensure that the 3rd Respondent complied with the set law. The Petitioners assert that the 3rd Respondent is thus set to be gazetted as a candidate for election as Member of Parliament for Malava Constituency in defiance of the law and the Constitution.
14. The Petitioners in light of this urge the Court to interpret the Constitution purposively so as to uphold the constitutional intent in the context of a declaration of a by-election whereby a public servant goes ahead and vies for elective office without resigning from public office. It is as well stated that the issues raised herein affect all public servants and those who hold public office who are or who intend to illegally vie for elective office without resigning from such public offices within the set timelines.
15. The Petitioners contend further that the instant Petition is not an appeal disguised as a constitutional petition. The Petitioners aver that the instant Petition does not challenge

the merits of the 1st Respondent's decision but the procedural unfairness, illegality and violation of constitutional rights by the Respondent. As such, they note that the appropriate remedy is through judicial review or a constitutional petition, such as the present one. For this reason, they maintain that they invoked this Court's jurisdiction properly.

16. In addition to this, the Petitioners aver that various authorities have called upon the 4th Respondent to advise and enable Parliament enact a suitable statutory framework on appeals from the Independent Electoral and Boundaries Commission (IEBC) to the High Court vis-à-vis the Political Parties Dispute Tribunal and the dispute resolution procedure of the IEBC with regards to nominations however so far no such statutory procedures have been enacted. For this reason, they argue that this Petition was the only means to uphold the Constitution and prevent its violation as detailed therein.

1st Respondent's Case

17. In reaction to the Petition, the 1st Respondent filed an Application dated 31st October 2025 and later on a Replying Affidavit dated 5th November 2025.

The Application

18. By way of the cited Notice of Motion Application, the 1st Respondent herein, seeks orders that:

- i. Spent.**
- ii. This Court do find and declare that it lacks jurisdiction to entertain and determine the Petition herein, the Petitioners having improperly invoked the original constitutional jurisdiction of this Court instead of the appellate jurisdiction provided in respect of decisions of quasi-judicial bodies such as the Independent Electoral and Boundaries Commission Dispute Resolution Committee.**
- iii. This Court do find and declare that the Petition is res judicata, the issues raised herein having been conclusively heard and determined by the Independent Electoral and Boundaries Commission Dispute Resolution Committee in its decision delivered on 21st October 2025, and no appeal or review have been preferred against the said decision.**
- iv. This Court do find and declare that the Petition is incompetent and fatally defective for having been instituted against the 1st Respondent, which is not a juridical or legal person capable of being sued in its own name.**
- v. This Court do find and declare that the Petition fails to meet the constitutional threshold of clarity and precision, the Petitioners having failed to plead with specificity the constitutional provisions allegedly violated, the manner of such violation.**

vi. The entire Petition be struck out and dismissed with costs to the 1st Respondent.

19. The Application is supported by the 1st Respondent's Secretary, Ruth Kavuo Makuthu affidavit, sworn on even date and the grounds on the face of the Application.
20. She depones that the 1st Respondent received and heard **Complaint No. 1 of 2025** as lodged by the 1st Petitioner against the 3rd Respondent. She depones that upon considering the complaint, the preliminary objection raised and submissions, the decision dated 21st October 2025 was rendered by the 1st Respondent. She avers that following this determination, no appeal or review was filed against the decision.
21. It is asserted that the Petitioners through this constitutional petition seek to re-open and re-litigate the same issues that have already been determined by the 1st Respondent. That said, she argues that the 1st Respondent is not a legal or juristic person capable of being sued in its name. For this reason, she contends that the Petition is incompetent and fatally defective.
22. Furthermore, she argues that the Petition fails to disclose any specific constitutional violations thus offends the requirement of clarity and precision in constitutional pleadings. In sum, the Petition is adjudged as abuse of the Court process and is frivolous.

23. In support of the Application, the 2nd and 3rd Respondents filed grounds of support. The 2nd Respondent in his undated Grounds of Support echoed that:

- i. The issues raised in the Petition dated 22nd October 2025 were directly and substantially in issue before the 2nd Respondent who made a decision.*
- ii. The 2nd Respondent's decision was then appealed for review to the 1st Respondent where a reasoned determination was delivered.*
- iii. The 2nd Respondent's reasoned decision remains valid and binding as no appeal or review has been preferred.*
- iv. Consequently, the Petitioners have wrongly invoked the original constitutional jurisdiction of this Court to challenge a decision of a quasi-judicial body, contrary to the prescribed appellate framework provided for such determinations.*

24. Correspondingly, the 3rd Respondent in his Grounds of Support dated 5th November 2025, stated that:

- i. The Petitioners lack the requisite locus standi to institute or maintain these proceedings, as they are not registered voters in Malava Constituency and have failed to demonstrate any legitimate, recognizable, or sufficient interest in the election of the Member of National Assembly for the said constituency.*
- ii. The entire substratum of the Petition is res judicata, the self-same issues having been directly and substantially in issue before the 2nd Respondent and subsequently on appeal before the 1 Respondent, which rendered a final, valid,*

and binding decision on the merits on 21st October 2025 which has not been challenged on appeal.

- iii. This Court lacks the requisite jurisdiction to entertain the Petition, as the Petitioners have improperly invoked its original constitutional jurisdiction to mount a collateral attack on a decision of a specialized quasi-judicial body, thereby circumventing the prescribed statutory appellate mechanism under the Elections Act.*
- iv. The Petition is an abuse of the Court process, frivolous, and vexatious, calculated to harass the 3rd Respondent and unjustly impede his candidacy in the Malava Constituency Parliamentary election, despite a conclusive determination on his eligibility by the proper statutory bodies.*

- 25. The Petitioners opposing the Application filed their Replying Affidavit sworn by the 1st Petitioner on 6th November 2025.
- 26. To commence with, the 1st Petitioner avers that he is a registered voter in Malava Constituency thus has the requisite locus standi to file the instant Petition.
- 27. He asserts that the Application which is frivolous and an abuse of the Court process, is geared towards obstructing the cause of justice and shield the 3rd Respondent's flagrant violation of the Constitution, the Elections Act and principles of integrity in public service.
- 28. Furthermore, the 1st Petitioner avers that the Petition is properly before this Court by virtue of Article 22,23 and 165(3)(b) of the Constitution. Further to this, he argues that

Article 88(4) of the Constitution as read with Section 74 of the Elections Act do not clothe this Court with jurisdiction to hear appeals from decisions of the 1st Respondent, as the law is silent on that position.

29. That said, he argues that Article 88(4) of the Constitution and Section 74 of the Elections Act do not oust the supervisory jurisdiction of this Court under Articles 22, 23, 47 and 165(3)(b) of the Constitution to inquire into and remedy violations of fundamental rights and breaches of a fair administrative process as is sought in this matter, not an appeal of the decision.
30. The 1st Petitioner equally argues that the allegation of lacking legal capacity is misleading and untenable as having acted through its own Committee structure, exercising delegated constitutional authority under Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act, it is plainly amenable to judicial review and constitutional scrutiny for its conduct and decisions.
31. The 1st Petitioner as well argues that while Article 88(4)(e) of the Constitution vests the IEBC jurisdiction over nomination disputes, the mandate is not absolute as it must be exercised lawfully, fairly and within the confines of due process. As such, any deviation from these standards invites the supervisory intervention of this Court under Article 165(6) of the Constitution.

32. The 1st Petitioner asserted that in this matter, the 1st Respondent's proceedings were marred by grave procedural irregularities and breaches of the rules of natural justice thus the dispute falls squarely within the remedial purview of this Court under Articles 47, 50, and 165(3)(d) of the Constitution and Section 4(3)(f) of the Fair Administrative Action Act.

The Response

33. The 1st Respondent in its Replying Affidavit also sworn by Ruth Kavuo Makuthu depones that it was appointed vide Gazette Notice No.11161 dated 8th August 2025.

34. She maintains that the Petition is an appeal in disguise with the aim of overturning the 1st Respondent's decision. Further to that, she claims that the Petition fails to meet the threshold set out in **Anarita Karimi Njeru v Republic (1979) eKLR** and re-affirmed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

35. It is emphasized that under Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act, the IEBC, through its Dispute Resolution Committee, has exclusive original jurisdiction to hear and determine all pre- election disputes including disputes relating to or arising from nominations. As such, she argues that once a decision is rendered by the 1st Respondent the only channels available

to an aggrieved party are a review before the IEBC, an appeal or invoke the supervisory or judicial-review jurisdiction of this Court. She notes that the Petitioners herein did not prefer any of these mechanisms before filing this Petition.

36. It is stated that the issues raised herein were heard and lawfully determined by the 1st Respondent following the 1st Petitioner's complaint. She stresses that the 1st Respondent conducted its proceedings in accordance with the due process and granted all parties a fair opportunity to canvas their cases.
37. She claims that the allegation that the 1st Petitioner was not granted an opportunity to cross examine the witnesses is untenable as the Registry Clerk and Returning Officer were summoned suo muto and only for the purpose of clarifying administrative facts on record not introduction of new evidence. In fact, it is stated that the 1st Petitioner did not seek to cross-examine the officers during the proceedings. As such, this matter is deemed to be res judicata.
38. She contends that this Court sitting as a Constitutional Court and exercising its original jurisdiction under Articles 22 and 165(3)(b) of the Constitution, cannot sit on appeal or re-hear the merits of a dispute conclusively determined by a competent tribunal.

39. Furthermore, it is emphasized that the Petition fails to demonstrate with precision the manner in which any constitutional right of the Petitioners were infringed. For these reasons, it is argued that the Petition is incompetent, misconceived, frivolous, devoid of merit and so ought to be dismissed.

2nd Respondent's Case

40. The 2nd Respondent filed his Replying Affidavit sworn on 5th November 2025. He informs that vide Gazette Notice No.11158 dated 8th August 2025, he was appointed as a Returning Officer for purposes of the parliamentary by-elections for member of the National Assembly for Malava Constituency scheduled for 27th November, 2025. He contends that the Petitioners' averments primarily revolve around the 1st Respondent's mandate.

41. He depones that on 6th October 2025, he received a complaint vide a letter dated 5th October 2025 from Okubasu & Munene Advocates. He avers that upon perusal of the contents, it was apparent that the complaint was not supported by any verifiable evidence. This means that he was not able to verify any of the allegations or documentation in support thereof in lieu of any declaration on oath or from a judicial or quasi-judicial authority.

42. He depones that on 8th October 2025, he received Statutory Forms 15 and 19 from the 3rd Respondent. He states that once he received the documents, he subjected them to scrutiny to confirm compliance with the necessary legal provisions including Section 43 (5A) of the Elections Act.
43. He informs that the 3rd Respondent indicated that his only nature of employment was an elective position he held at the Kenya National Union of Nurses and Midwives as the General Secretary. As such, Section 43 (5A) was not applicable in the circumstances. He notes that once he confirmed that the documentation was in order, he cleared the 3rd Respondent and issued the Certificate a few minutes before 10.00 AM. He depones that when the review proceedings were instigated before the 1st Respondent he issued his testimony as captured above.
44. To that end, he reasons that the 1st Respondent's decision was rational as was based on the adduced evidence. He notes that the decision was not appealed against before the original constitutional jurisdiction of this Court was invoked.

3rd Respondent's Case

45. In reaction to the Petition, the 3rd Respondent filed a Notice of Preliminary Objection dated 5th November 2025 on the basis that:

- i. *Lack of Jurisdiction: This Court lacks jurisdiction to entertain, hear, or determine the issues raised in this Petition in view of Article 88(4)(e) of the Constitution, which vests exclusive original jurisdiction for the settlement of nomination disputes in the Independent Electoral and Boundaries Commission (IEBC). The Petitioners, having already invoked and participated in the IEBC's Dispute Resolution Committee process culminating in the decision dated 21st October 2025, are barred from re-litigating the same dispute before this Court contrary to the doctrine of exhaustion under Article 159(2)(c) of the Constitution and Section 9(2) of the Fair Administrative Action Act, 2015.*
- ii. *Failure to exhaust appellate mechanisms: the Petitioners have failed to pursue any grievances through the appellate framework provided under the Elections Act, the Elections (Parliamentary and County Elections) Petition Rules, 2017 Accordingly, this Court's jurisdiction cannot be invoked to supervise or sit on appeal over IEBC's quasi-judicial decisions except in limited circumstances of demonstrated illegality, irrationality, or procedural impropriety, none of which has been pleaded or proved.*
- iii. *The Petition is time-barred and fatally defective: under Section 74(2) of the Elections Act, 2011, nomination disputes must be lodged and determined within the timeframes prescribed by law before the conduct of elections. The Petitioners' action, filed after the conclusion of the IEBC statute prescribed process and well outside those statutory timelines, is therefore time-barred, moot, and incapable of conferring jurisdiction.*
- iv. *The Petition is incurably defective for failing to meet the mandatory threshold of clarity and*

precision required in constitutional litigation. It does not:

- a. Clearly and distinctly identify the specific constitutional rights alleged to have been violated;*
 - b. Set out with sufficient particularity the factual basis upon which each alleged violation rests; and*
 - c. Demonstrate a direct nexus between the Respondents' actions or decisions and the specific constitutional provisions cited.*
- v. Abuse of Court Process: The Petition constitutes a collateral attack on a decision of a competent statutory body (the IEBC Dispute Resolution Committee) rendered within its constitutional mandate which has not been appealed by the Petitioners.*
- vi. The Application and the Petition amounts to res judicata: The Petitioners are improperly seeking to relitigate issues conclusively heard and determined, offending the doctrines of res judicata and finality of administrative processes as set out under Section 7 of the Civil Procedure Act (Cap 21).*
- vii. The Petition is barred by the doctrine of issue estoppel, as it impermissibly seeks to re-litigate issues that were directly, substantially, and conclusively determined by the 1st Respondent's final decision of 21st October 2025.*
- viii. This suit is therefore incurably defective and ought to be struck out with costs to the 3rd Respondent.*

4th Respondent's

46. The 4th Respondent's response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Petitioners' Submissions

47. The Petitioners through Okonu and Company Advocates filed submissions dated 6th November 2025 and highlighted the key issues as: *whether this Court has jurisdiction to entertain and determine the Petition, whether the Petition is res judicata, whether the 1st Respondent is properly joined as a party to these proceedings and whether the actions and omissions of the Respondents violated the Petitioners' constitutional rights.*
48. Counsel in the first issue emphasized that indeed by virtue of Articles 22, 23 and 165(3)(b) of the Constitution, the instant Petition was filed properly before this Court. Counsel submitted that while the Respondents argued that this matter ought to be filed as an appeal, the argument was unsustainable as Article 88(4) of the Constitution and Section 74 of the Elections Act do not clothe this Court with jurisdiction to hear appeals from the 1st Respondent as both are silent on the issue.

49. Dependence was placed in **Fredrick Odhiambo Oyugi v Orange Democratic Movement (ODM) & 2 Others [2017] eKLR** where it was held that:

“These provisions do not vest any jurisdiction to this court to hear appeals from this committee. It is trite law that power and authority of the court is derived from the Constitution or statute. This is in respect of determination of disputes in the first instance or on appeal. The power of appeal cannot be inferred or implied but must be conferred expressly. Article 88 (4) of the Constitution and Section 74 of the Elections Act do not clothe this court with jurisdiction to hear appeals from the IEBC Dispute Committee. They are completely silent on that issue. The only conclusion to be drawn from the silence of the Constitution and the statutes on the matters of appeals to the High Court from this body is that such jurisdiction does not exist. Looking elsewhere in the Constitution to see whether there is some relief in that respect this court has turned to Article 165 of the Constitution. It creates jurisdiction of the High Court to hear and determine matters specified in that Article. Again, that Article is silent on the jurisdiction of this court to hear and determine appeals from the IEBC Dispute Committee. Article 165 (3) (e) of the Constitution confers jurisdiction to this court in the following terms: “any other jurisdiction, original or appellate, conferred on it by legislation..... I am live to the fact that the High Court has powers to exercise supervisory powers over other bodies exercising quasi-judicial function like this Committee but certainly not by way of Appeals. This addresses the issue that no party to a dispute should be left without legal remedy. I wish to state that in my view and going

by the Constitution and the Elections Act no appeals lies to this court from decisions of the IEBC Disputes Committee.”

50. Equal reliance was placed in **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR** and **Republic v IEBC ex parte NASA Kenya [2017] eKLR**.
51. For the stated reason, Counsel stressed that the only lawful avenue for redress against the constitutionally or procedurally flawed decision of the 1st Respondent lies through a constitutional petition or judicial review not an appeal. That said, Counsel submitted that it is evident that Article 88(4) and Section 74(1) do not oust this Court’s supervisory jurisdiction under Articles 22, 23, 47, and 165(3) (b) of the Constitution to review decisions that are unconstitutional, unlawful, unreasonable, or procedurally unfair.
52. Moving on, Counsel submitted that the claim of res judicata is inapplicable in this Petition as is only available where the previous matter was between the same parties, before a competent Court and determined on the same issues. Counsel pointed out that the 1st Respondent is a quasi-judicial body, not a Court of equal jurisdiction to the High Court and further lacks the constitutional mandate to determine violations of fundamental rights.

53. Reliance was placed in **Okiya Omtatah Okiiti v Communications Authority of Kenya & 8 Others [2019] eKLR**, where the Court held that the doctrine of res judicata does not bar constitutional petitions where the previous forum lacked jurisdiction to address alleged constitutional violations. Similar dependence was placed in **John Florence Maritime Services Ltd v Cabinet Secretary for Transport & Infrastructure [2021] eKLR**.
54. On the third issue, Counsel submitted that the 1st Respondent is a constitutionally established organ of the IEBC mandated to perform quasi-judicial functions under Article 88(4)(e) and Section 74(1) of the Elections Act and as such having acted in that capacity and rendered the impugned decision, it is amenable to constitutional scrutiny and judicial review. Counsel noted that this was affirmed by the Court in **Centre for Human Rights and Democracy & Others v Judges and Magistrates Vetting Board & Others [2012] eKLR**.
55. On the final issue, Counsel submitted that the Petitioners' had demonstrated that their rights to equal protection of the law, fair administrative treatment, and access to justice under Articles 27, 47, and 50 of the Constitution were violated by the actions of the Respondents.

1st Respondent's Submissions

56. Lilian and Koech Associates LLP for the 1st Respondent filed submissions dated 10th November 2025 and set out the issues for discussion as: *whether the 1st Respondent is a proper party capable of being sued, whether the Petition meets the constitutional threshold, whether the Petition is barred by the doctrine of res judicata and whether this Court has jurisdiction to entertain and determine the Petition.*
57. Counsel in the first issue submitted that the 1st Respondent a Committee of the IEBC is not a body corporate nor legal person capable of being sued or suing in its own name. Counsel emphasized that the law only allows the IEBC to be sued, not its committees, secretariat, or members acting within their statutory capacity. Reliance was placed in **Geoffrey Chege Kirundi v Dispute Resolution Committee of Kenya Tea Development Agency Holdings Ltd & another [2017] eKLR** where it was held that:

“The Dispute Resolution Committee is a creature of those rules, and all the appointments to the committee are made by the Managing Director KTDA Holdings. The life of that committee and the rules governing its functions are determined by the Election Procedure Rules. It goes without saying that the Dispute Resolution Committee is not a legal entity, it is a committee made up of individuals to perform a specific function.”

58. Counsel relying in **Football Kenya Federation v Kenyan Premier League Limited & 4 Others [2015] eKLR** stressed that the presence of a proper party before the Court is a sine qua non to the lawful exercise of judicial authority. Meaning the same strikes at the root of jurisdiction as without a proper Respondent before it, this Court cannot competently exercise jurisdiction over the Petition. Equal dependence was placed in **Appex International Ltd & Anglo Leasing & Finance International Ltd v Kenya Anti-Corruption Commission [2012] eKLR**.
59. On the second issue, Counsel submitted that the Petitioner had failed to set out and show how the Respondents violated the cited provisions of the Constitution thus failed to meet the constitutional threshold. Counsel noted that the Petition only refers to Articles 27, 37, 47, 50, 84, and 88 of the Constitution, but fails to particularize the acts or omissions of the 1st Respondent that allegedly constitute the violations and more so being that the 1st Respondent was exercising its lawful jurisdiction.
60. On the following issue, Counsel submitted that the Petition is barred by the doctrine of res judicata since the issues raised herein were heard and determined by a competent quasi-judicial body in exercise of its mandate under Article 88(4)(e)

of the Constitution as read with Section 74 of the Elections Act. Reliance was placed in **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another; [2016] eKLR** where it was held that:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights... It applies in respect of matters of all categories, including issues of constitutional rights... The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry... It prevents multiplicity of suits, ensures finality in litigation, and promotes order and efficacy in the adjudication process.”

61. Comparable dependence was placed in **John Florence Maritime Services Limited & Another** (supra) and **E.T. v Attorney General & Another [2012] eKLR**.
62. Counsel stressed that being that the Petitioners had exhausted their opportunity before the 1st Respondent, they cannot now seek to invoke the constitutional jurisdiction of this Court as a backdoor appeal. It was emphasized that to do so would offend the principle of finality in litigation, erode the authority of statutory tribunals and undermine the efficient administration of electoral justice.
63. On the final issue, Counsel submitted that this Court lacks original constitutional jurisdiction to entertain the Petition, as the issues raised herein were previously heard and

determined by the 1st Respondent as constitutionally mandated under Article 88(4)(e) of the Constitution. Counsel stated that the Petitioners had failed to challenge the impugned decision through the appropriate judicial review or appellate process. Considering this, Counsel submitted that the Petitioners cannot now seek to invite this Court to sit on appeal by re-litigating the issues. To buttress this point reliance was placed in **Speaker of the National Assembly v Karume [1992] KLR 21** where it was held that:

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

2nd Respondent’s Case

64. On 6th November 2025, Diro Advocates LLP filed submissions on the 2nd Respondent’s behalf. Counsel underscored the key issues as: *whether the Petition is premature and whether the 2nd Respondent correctly exercised his duties.*
65. Counsel submitted on the onset that the Petitioners had improperly invoked the Court’s original jurisdiction instead of exploring the other appellate mechanisms available to them. Counsel noted that the doctrine of exhaustion a constitutional imperative, requires that a party cannot overstep the provided statutory procedures before filing a suit. Reliance was also placed in **Speaker of the National**

Assembly (supra) and Section 9(2) and (3) of the Fair Administrative Act.

66. Counsel as well noted that Article 88 of the Constitution which establishes the IEBC mandates it to settle all pre-electoral disputes. In this regard, Counsel submitted that the IEBC drafted the Rules of Procedure on Settlement of Disputes, No. 139 of 2012 which were adhered to by the 2nd Respondent and the 1st Respondent.
67. Counsel postulated that being a quasi-judicial Tribunal, the Court should take judicial notice that the 1st Respondent is not bound by the rules of evidence and procedure. Equally, Rule 16 of the Rules of Procedure on Settlement of Disputes allows it to regulate its own procedure. Counsel stressed that it is on this basis that the 1st Respondent summoned both the 2nd Respondent and the Registry Clerk to testify before it.
68. Turning to the second issue, Counsel reiterating the contents of the 2nd Respondent's affidavit, submitted that the 2nd Respondent had dutifully carried out his mandate as per the Constitution and the nominations rules which he is enjoined to do under Rule 6 the Rules of Procedure on Settlement of Disputes.

3rd Respondent's Submissions

69. The 3rd Respondent through Chimei & Malenya Company Advocates filed submissions dated 7th November 2025 where the key issues for determination were highlighted as: *whether this Court has jurisdiction to entertain this Petition in light of Article 88(4)(e) of the Constitution, whether the Petitioners have exhausted all available remedies under the Elections Act and Fair Administrative Action Act, whether the Petition is time-barred and fatally defective, whether the Petition is barred by the doctrine of issue estoppel and whether the Petition constitutes an abuse of the process of this Court.*
70. On the first issue, Counsel submitted that this Court lacks jurisdiction to entertain and determine this Petition as Article 88(4)(e) of the Constitution as read with Article 74(1) makes it clear that the IEBC having original jurisdiction will be responsible for settlement of electoral disputes, including disputes relating to or arising from nominations. Considering this, Counsel submitted that the Petitioners cannot now circumvent that process by invoking constitutional litigation.
71. To buttress this point reliance was placed in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR** where it was held that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. The Court

emphasized that no court can arrogate itself jurisdiction that is not expressly provided for by law.”

72. Equal dependence was placed in **Speaker of the National Assembly** (supra) and **Moses Mwicigi & 14 Others v IEBC & 5 Others [2016] eKLR**.
73. Moving on, Counsel submitted that the doctrine of exhaustion reaffirms that courts must refrain from entertaining matters where statutory remedies are available and adequate. On this basis, Counsel submitted that the Petitioners having invoked the 1st Respondent’s decision cannot re-approach this Court without demonstrating exceptional circumstances. Reliance was placed in **Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others [2015] eKLR** where it was held that:

“We see this as the crux of the matter in this and similar cases. 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

74. Furthermore, in the next issue, Counsel submitted that Section 74(2) of the Elections Act requires that nomination disputes be determined within the timelines set out by law and before the conduct of elections. Counsel stressed that the law is strict on electoral timelines owing to the public interest in certainty and stability of the electoral process. Counsel asserted thus that once the statutory period lapses, no new proceedings can be validly initiated, as held in **Ferdinand Waititu v IEBC & 8 Others [2014] eKLR**. For this reason, Counsel submitted that the Petition is moot and time-barred.
75. Counsel equally added that Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules mandates that constitutional petitions clearly set out the specific constitutional provisions violated, the manner of violation, and the nature of the injury suffered in line with the **Anarita Karimi Njeru** case (supra). Counsel submitted that the Petitioners had failed to do so in this Petition.
76. Counsel also contended in the fourth issue that doctrine of issue estoppel precludes parties from re-litigating specific issues that were directly and substantially in issue in prior proceedings. Reliance was placed in **Soy Developers**

Limited v Kenagri Products Limited & 4 others (Environment & Land Case 132 of 2015) [2024] KEELC 13452 (KLR) where it was held that:

“Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.”

77. On the final issue, Counsel submitted that the Petition is an abuse of the Court process, as a party cannot improperly use judicial machinery to achieve purposes other than those for which it was established. Reliance was placed in **Beinosi V Wiyley 1973 SA 721 [SCA]** where it was held that:

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

78. Like dependence was placed in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR, Attahiro V Bagudo 1998 3 Nwll** and **Sarak V Kotoye (1992) 9 NWLR 9pt 264) 156.**

Analysis and Determination

79. It is my considered take that the issues that arise for determination in this matter are as follows:

- i. Whether this Court has jurisdiction to entertain this Petition.***
- ii. Whether the 1st Respondent is a proper party in this suit.***
- iii. Whether the Petition meets the constitutional threshold.***
- iv. Whether the Petitioners rights were violated by the 1st Respondent.***
- v. Whether the Petitioners are entitled to the relief sought.***

Whether this Court has jurisdiction to entertain this Petition.

80. Jurisdiction defines the competence of a Court to hear and determine a dispute before it and this scope is circumscribed by the Constitution, the Statute or even judicial precedents (**Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR).**)

81. The Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)** succinctly summarized what jurisdiction involves as follows:

“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 a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

See Words and Phrases Legally defined - Volume 3: I - N Page 113”

82. In considering whether this Court can assume jurisdiction, it is necessary to examine the applicable law on resolution of pre-election disputes alongside the relevant jurisdictional principles. For instance where there are other interests other than the court that has to be considered.

83. In the **County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya ([2021] KEHC 304 (KLR)** the Court underscored thus:

“171. The Ripeness doctrine is one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a Court from considering a dispute whose resolution has not crystallized enough as to warrant Court’s intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than Court process... “

84. **Ndii & 79 others; Prof. Rosalind Dixon & 7 others [2022] KESC 8 (KLR)** stated as follows:

“325. Justiciability was the quality or state of being appropriate or suitable for adjudication by a court. For a matter to be justiciable, it had to be ripe for it to be properly before the court. Ripeness was the state that a dispute had reached, but had not passed, when facts had developed

sufficiently to permit an intelligent and useful decision to be made.”

85. In **Benjamin v Gitiri & 4 others; Chairman Council of Legal Education & 4 others (Interested Parties) [2025] KEHC 17026 (KLR)** this Court observed asserted thus:

“93. In adjudication of constitutional disputes, the court ensures that it does not usurp the powers and responsibilities of other constitutional or public bodies hence under the justiciable principle, the court can examine if the matter properly falls within its scope or is a mandate of another constitutional organ or public body.

94. If it is apparent to the Court that the matter deserves to be considered elsewhere rather than before the Court, it will decline the invitation to entertain the matter as the court does not exist in Constitutional vacuum.”

86. To determine if this matter is properly before this Court or not, it necessary lay bare the relevant Constitutional and legal provisions and examine them deeply.
87. Article 87 of the Constitution provides as follows on electoral disputes:

Electoral disputes

Electoral system and process

- i. Parliament shall enact legislation to establish mechanisms **for timely settling of electoral disputes.**
- ii. Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.
- iii. Service of a petition may be direct or by advertisement in a newspaper with national circulation.

88. On the 2nd Respondent's mandate, Article 88 (4) (e) of the Constitution affirms that the 2nd Respondent:

“ the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”

89. Further, Section 74 of the Elections Act provides that ***pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations*** but excluding election petitions and disputes subsequent to the declaration of election results.

90. The Section provides that an electoral dispute *under subsection (1) shall be determined within seven days of the*

lodging of the dispute with the Commission and further notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

91. Furthermore, the Rules of Procedure on Settlement of Disputes provides as follows in this regard:

Rule 8(1):

Initiation of a complaint

A party to a dispute may, within twenty-four hours of the occurrence of a dispute, notify the Commission and any adverse party of the dispute, in writing.

Rule 10:

Declining to accept a dispute.

The returning officer or the Commission acting on appeal may decline to accept a dispute if that dispute—

- (a) does not raise an issue under the constitution or the nomination rules of the party concerned or the Constitution, the Act or the Regulations;*
- (b) does not conform with these rules of procedure;*
- (c) is trivial, frivolous or vexatious.*

92. It is thus crystal clear that pursuant to the Constitution, Article 88 (4) (e), as read with Section 74 of the Elections Act, that settlement of nomination disputes is vested with

the Independent Electoral and Boundaries Commission and not this court. That procedure was adopted by the Petitioner but it appears he is now upset by what transpired, he accuses the Respondent of having dismissed his complaint prematurely without giving him a chance to air his grievances by elevating rules of procedure over substance. He thus filed this Constitutional Petition.

93. The Supreme Court in **Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] KESC 2 (KLR)** had the following to say in regard to converting electoral disputes into constitutional petitions:

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.”

94. Furthermore, the Court of Appeal in **Kennedy Moki v Rachel Kaki Nyamai & 2 others [2018] KEHC 8722 (KLR)** guided as follows:

“52. Upfront, we wish to point out that the jurisdiction of the High Court in Electoral Disputes Resolution is a special jurisdiction conferred by the Constitution and the Elections Act. This special jurisdiction should not be confused with the High Court and unlimited jurisdiction in civil and criminal matters or the High Court’s supervisory jurisdiction over inferior bodies and tribunals. ...

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

95. It thus apparent that jurisdiction to determine nomination disputes lies with the 2nd Respondent but what happens when one disagrees with the decision as is apparent in the instant case. Is it a solution to file a Constitutional Petition

alleging violation of Constitutional rights? The Supreme Court in **Waity (supra)** guided inter alia as follows:

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

96. In the instant case, the dispute was properly presented to the 2nd Respondents Dispute Resolution Committee and a decision was made dismissing the complaint because it was not presented within the prescribed regulatory timelines. The Petitioner seeks to overturn that decision on the basis that it is violated his rights and fundamental freedoms including alleging violations of his rights under Articles 27 (1) & (2), 37, 47 (1), 50 (1) and 50 (2) (e), (j) and (k).
97. A challenge to the decision of the IEBC Dispute Resolution Committee can only be done by specifically invoking this Court’s supervisory power of judicial review under Article 165 (6). This petition, however, is an attempt to reinvent the dispute and relitigate it afresh on merits considering the expansive nature of this Petition and this is improper because a determination of a pre-election dispute is a matter

for the IEBC. It must be appreciated that although the Fair Administrative Actions Act has opened up and permitted to some extent, interpretation of whether a decision maker took into account relevant facts as per **Section 7 (2)** of the Fair Administrative Actions Act, the Court conducting a review of such a decision must be careful not to substitute its own decision for that of the decision maker. By inviting the Court to look into a stream of other multiple fact-based allegations, the Petitioner is attempting to reinvent the factual scenario rather than focus on the decision itself.

98. In my view, the impugned decision was made in accordance with the election regulations. The 1st Respondent neither acted ultra vires nor unreasonably for enforcing strict adherence to the regulatory timelines as this is a fundamental requirement prescribed for an election processes in this country. Article 88 (1) of the Constitution underscores the need for legislation to be enacted by Parliament that provides for mechanisms for ensuring timely settling of electoral disputes hence the provision of strict timelines is justified by the Constitution itself.
99. For reasons aforesaid, this Court finds it cannot assume jurisdiction over this matter.
100. I need not consider any other issue. Petition is dismissed with costs to the Respondent.

Dated, signed and delivered virtually at Nairobi this 20th day of November, 2025.

.....

L N MUGAMBI

JUDGE

ORIGINAL