REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR ORIGINATING MOTION APPLICATION NO. E343 OF 2025

LIZ WAKESHO MWASHORI……APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL COMMISSION OF KCA UNIVERISTY (IECK)…….1ST RESPONDENT

ELECTION PETITION PANEL……....2ND RESPONDENT

TERESIA IRURIA……..3RD RESPONDENT

BENSON NGOBIA…….4TH RESPONDENT

EMILY OKOTH…….5TH RESPONDENT

DORA OSOK……...6TH RESPONDENT

MARTIN MAKASA……7TH RESPONDENT

KCA UNIVERSITY……8TH RESPONDENT

CHENUS ODIDA CHERWA……9TH RESPONDENT

JUDGMENT

1. Pursuant to leave of this court granted on 2nd December 2025, the Applicant filed an Amended Originating Motion dated 17th November 2025, after filing the initial Originating Motion dated 3rd November, 2025. The Originating Motion is brought under the Fair Administrative Action Act, 2015 and Fair Administrative Action Rules, 2024 and is supported by the affidavit sworn by

Liz Wakesho, the applicant herein, on 17th November 2025. The Originating Motion seeks the following orders:

i. ***Spent.***

ii. ***Spent.***

iii. ***THAT this Honourable Court be pleased to grant an order of certiorari to remove into this Court for purposes of being quashed the decision of the Election Petition Panel dismissing the Applicant's Election Petition.***

iv. ***THAT this Honourable Court be pleased to grant an order of prohibition restraining the Respondents, their agents, or representatives from recognizing, acting upon, or giving effect to the said decision or any other actions flowing therefrom.***

v. ***THAT this Honourable Court be pleased to grant an order of mandamus compelling the 1st Respondent to conduct fresh elections of the Students Association of KCA University in strict compliance with the Constitution and regulations governing student elections.***

vi. ***THAT the Honourable Court be pleased to issue any further or other orders deemed just and expedient in the circumstances to uphold the Applicant's constitutional and administrative rights.***

vii. ***THAT costs of this Application be provided for.***

2. The Applicant's case as pleaded is that she was a duly nominated candidate for Chairperson of the Students Association of KCA University (SAKU), for the 2025/2026 academic year, having satisfied all nomination requirements under Article 5.2 and 5.9 of the SAKU Constitution and that she took part in the

Election. She claims that on numerous occasions, and in belief of the available systems and structures, she raised various issues pertaining to alleged procedural irregularities in the conduct of the elections, most of which were allegedly either wished away, inadequately addressed or not addressed at all.

3. She laments that the election process was marred by systemic operational failures, including missing names, login failures and absence of a pre-election systems test, the result of which was a poisoned chalice which the Applicant could not drink from and heavily disputed.
4. According to the applicant, following the allegedly flawed election, she lodged a Petition, which was heard by a Panel which was improperly constituted and tainted with conflict of interest and manifest bias, leading to dismissal of her petition, followed by the hurried swearing in of the officials which officials were, in her view, improperly elected.
5. The Applicant claims that her opponent, Mr. Chenus Odida Cherwa, the 9th Respondent herein, together with his proxies, engaged in acts amounting to election offences, including intimidation, threats and bribery of one Angelina Ndida, an aspirant allied to the applicant's team.
6. The applicant states that a formal complaint was lodged with the University administration and the Independent Electoral Commission of KCA University (IECK) on 11th October 2025 and a report recorded at Utalii Police Station

under Police O.B No. 21 of 13/10/2025, however, that no substantive disciplinary or electoral sanctions were imposed against the offenders.

7. It is her further case that the Electoral Commission's failure to enforce electoral integrity and its subsequent clearance of the offending candidate constituted a breach of Article 81(e) of the Constitution, Article 5.8.2 of the SAKU Constitution and her right to fair administrative action under Article 47.
8. Further, that the Electoral Commission curtailed the campaign period to five (5) days, contrary to Article 5.9 (7) of the SAKU Constitution, thereby disadvantaging the Applicant and violating the principle of equality and fairness under Article 27 of the Constitution.
9. According to the Applicant, the conduct of the elections was marred by significant systemic irregularities, including missing candidate names, mismatched symbols and login failures that disenfranchised numerous students, rendering the election neither free nor fair within the meaning of Article 38 of the Constitution.
10. She states that the School of I.T, where she undertakes her studies was the most affected as voting began as late as 12pm after most students had left school and that this deliberately ensured that her preferred delegates and team members were not elected.

11. That being dissatisfied with the Conduct and the results of the election, she lodged an election petition challenging the conduct and outcome of the elections before the **SAKU Election Petition Panel** as per Article 5.12 of the SAKU Constitution, constituted by the 3rd to 7th Respondents.
12. The Applicant states that the SAKU Constitution, under Article 5.11, expressly provides for the composition and membership criteria of the **Election Petition Panel,** designating the University Legal Counsel, the 3rd Respondent herein as both a definitive member and the Chairperson of the Panel, as well as the appointing authority of its other members.
13. That in exercise of this power, the 3rd Respondent appointed Mr. Benson Ngobia-Dean of Students, Ms. Emily Okoth- Manager, Career Planning and Placement, Ms. Dora Osok- Students Relations Manager and Mr. Martin Makasa-Chief Security Officer to constitute the **Election Petition Panel.** However, the applicant contends that Mr. Benson Ngobia and Mr. Martin Makasa were, at the material time, serving members of the **Independent Electoral Commission** under Article 5.4(2) of the SAKU Constitution, while the Independent Election Commission itself was properly listed as a Respondent in the very Petition they were called upon to determine under Article 5.12.

14. The Applicant contends that by sitting as members of the **Election Petition Panel,** both Mr. Ngobia and Mr. Makasa effectively became judges in their own cause, contrary to the cardinal rule of *nemo judex in causa sua*, a fundamental principle of natural justice and fair administrative action.
15. Further, that aggravating this conflict of interest, Mr. Benson Ngobia also serving as the Dean of Students and Mr. Martin Makasa as the Head of Security, had both previously sat on a disciplinary committee concerning the impugned actions of Chenus, Elvis and Alugo prior to the elections.
16. The Applicant contends that the continued participation in the Election Petition Panel by Mr. Ngobia and Mr. Makasa, despite their prior involvement in the dispute and their institutional positions, created a palpable, structural conflict of interest that rendered the proceedings tainted, biased and procedurally unfair.
17. She also contends that the impugned composition violated her right to a fair and impartial hearing guaranteed under Article 50(1) of the Constitution and the right to lawful, reasonable and procedurally fair administrative action under Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act, 2015.
18. The applicant contends that during the hearing, the 3rd Respondent, who chaired the Panel, barred the Applicant's Advocate from participating in the proceedings, claiming that representation required prior leave despite the

governing section stating that a party **"may be represented,"** an interpretation that is said to have unreasonably restricted the Applicant's right to fair hearing.

19. The Applicant further contends that the Election Petition Panel failed to render a **reasoned written decision**, **either to her or on record, contrary to the express requirements of procedural fairness and accountability under Article 47(2) of the Constitution and Section 4(2) and (3) of the Fair Administrative Action Act,** 2015, thereby denying her the opportunity to understand the basis for the determination, to exercise her right of appeal or review, and to meaningfully challenge the outcome in any forum.

20. That the omission to communicate a formal written decision further exemplifies administrative arbitrariness and procedural opacity, demonstrating that the process was neither fair, transparent nor accountable, as required under Article 10 and Article 232(1)(f) of the Constitution.

21. The Applicant also filed a further affidavit sworn on 18th November 2025 in response to the 1st to 8th Respondents' and 9th Respondent's replying affidavits. She deposes that it is ironical that the Respondents claim that a decision is yet to be made, given that the very decision concerning her Petition is annexed to their Replying Affidavit, a decision according to her, which she had frantically requested for but was never formally communicated to her, contrary to the right to written reasons guaranteed by Article 47 of the Constitution.

22. The Applicant contends that the Panel acted with procedural unfairness and bias by striking out her rejoinder, barring Counsel, and wrongly relying on Clause 5.12.1 instead of Clause 5.12(7) of the SAKU Constitution, which permits legal representation. This according to the applicant, violated her constitutional rights under Articles 48 and 50, with the denial of counsel unjustifiably justified on *"data protection"* grounds, despite the non-derogable right to a fair hearing.
23. The Applicant maintained that the Panel's composition was conflicted and biased, as the Dean of Students and Chief of Security, who are key actors in the electoral process as provided for under Article 5.4 of the SAKU Constitution sat on a Panel that reviewed matters arising from the same electoral process, particularly the enforcement of Clause 5.2(11) on candidate disqualification for disciplinary findings or pending cases. That allegations of bribery and intimidation were reported to them, yet no disciplinary action was taken, allowing candidates to run, contrary to their duty to ensure a safe and fair election, despite recorded evidence and an arrest on school premises.
24. The Applicant also highlights alleged contradictions in the Respondents' claim of a pre-election system test, citing Paragraph 22 of the Panel's judgment, where the IECK Chair admitted the system's readiness was not confirmed before election day. The Applicant maintains the ICT Department acted as an

integral part of the Commission, and any internal testing without candidate or agent observation lacked transparency.

25. The Applicant further contends that the 9th Respondent's allegation that her Petition before the Election Petition Panel was dismissed solely on technical grounds underscores, rather than negates, her case that the internal dispute resolution mechanism was applied rigidly, unfairly and in a manner that defeated substantive justice.

26. She also impugns the Election Petition Panel's proceedings and outcome for illegality, procedural unfairness and violation of constitutional standards, which are matters squarely within the supervisory jurisdiction of this Court.

27. It is her further rejoinder that in the case of intimidation by the 9th Respondent, the same was inadvertently admitted by the 1st to 8th Respondents in their collective affidavit, a claim they casually stated happened out of the school to justify their inaction. These allegations, it is urged, are captured at paragraph 61 of the said decision.

28. That the same record bears the confirmation of the IECK receiving the complaint from the Applicant, and that therefore, the absence of an affidavit by Ms. Angelina Ndinda does not negate the duty of the Respondents to investigate, prevent and address electoral misconduct once brought to their attention.

29. The Applicant contends that other than the acts of intimidation, she denies any personal wrongdoing, even though, the Application challenges not only individual conduct but also institutional actions, omissions and decisions.

Replying Affidavit by the 1st,2nd, 3rd, 4th,5th ,5th ,6th,7th,8th Respondents

30. The 1st,2nd, 3rd, 4th,5th, 6th, 7th and 8th Respondents filed a replying affidavit sworn on 11th November 2025 by the 3rd Respondent, Ms Teresia Irura. The Respondents contend that the application before this Court is incompetent and an abuse of court process. They deny any coercion, intimidation, or harassment of the Applicant, stating that the alleged acts same occurred outside the University, and that the concerned parties reported the matter to the police, and as such the same was beyond their control.

31. They assert in contention that there was no evidence of formal complaints allegedly lodged with the Dean of Students and the Manager Security and Safety on any threats.

32. The Respondents explain that the Applicant was advised to ensure that her supporters complied with campaign rules, as it was only her team that was not compliant.

33. On the alleged dysfunctional voting system, the Respondents assert that a secure pre-election system test was conducted by the University ICT

Department, and that a temporary technical glitch was promptly fixed without external interference, the voting exercise extended and that as such, no student was disenfranchised.

34. They state that the Dean of Students and the Manager Security & Safety were ex officio members of the IECK and were only present to monitor the meeting that had been called by the IECK official. That these two did not have decision making power and did not influence IECK decisions. They justify striking out the Applicant's rejoinder pursuant to Article 5.12.1 which is said to limit petitions to candidates or SAKU members.

35. They maintain that the purported rejoinder was a demand letter disguised as a rejoinder, and that the Applicant's counsel had a pre-determined expectation. Further, that counsel could only guide the Applicant and not file documents. It is their case that the elections and petition process were free, fair, unbiased and lawful and as such the Court ought to dismiss the Motion with costs.

The 9th Respondent's Replying Affidavit

36. The 9th Respondent Chenus Odida Cherwa filed a replying affidavit sworn on 15th December 2025. He deposes that the Applicant's Amended Originating Summons is premature, incompetent and an abuse of process, arguing that it

seeks to stay an order not yet made. He adopts the depositions of the 3rd Respondent on behalf of the 1st to 8th Respondents and contends that the Applicant approached the Court with unclean hands by failing to disclose that her petition was dismissed for lack of evidence and for non-compliance with SAKU filing timelines.

37. He maintains that the Election Panel handled the matter fairly and that the Applicant is improperly attempting to overturn its decision through the Court. He denies the allegations of intimidation, police reports and any personal involvement in misconduct, putting the Applicant to strict proof. It is also his contention that the application lacks specificity and fails to meet the threshold of a constitutional pleading and asks the Court to dismiss it with costs.

Submissions

38. The application was canvassed by way of written submissions.

The Applicant's written submissions

39. The Applicant filed written submissions dated 27th November 2025 and further written submissions dated 18th December 2025. She submits through her counsel maintaining that appointing the 4th and 7th Respondents as members of the Election Petition Panel tainted the proceedings with structural bias hence the conflict of interest alluded to is not merely speculative but is recorded,

admitted and fatal to the jurisdiction of the panel, the merits of their decision notwithstanding.

40. The Applicant relies on the case of **Ridge v Baldwin 1964 A.C 40** where the court is said to have identified the principles of natural justice as being the right to be heard by an un-biased Tribunal, the right to have notice of the charge of misconduct and the right to be heard in answer to these charges.

41. It is argued that the principle with regards to bias prohibits a person from deciding any case in which he or she may be, or may fairly be suspected to be, biased. The Applicant relies on the case of **Barmao v G4S Kenya Limited (Cause E184 of 2021) [2024] KEELRC 1141 (KLR),** on the issue of biasness in internal decision making organs.

42. The Applicant submits that although administrative bodies may impose reasonable procedural rules they cannot deploy them so as to nullify fundamental rights including representation or to deny parties a meaningful hearing.

43. She relies on the case of **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR** where the court is said to have referred to the case of **The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, in which according to the Applicant the Ugandan

Supreme Court stated that no person ought to be condemned without being given a fair and just opportunity to be heard, and any law that violates this principle is invalid.

44. On the issue of legal representation, the Applicant relies on the case of **Republic v Technology (Judicial Review E002 of 2021) [2022] KEHC 494 KLR** where the court is said to have observed that prohibiting legal representation in disciplinary proceedings violates section 4(5) of the Fair Administrative Action Act, and therefore that the applicant's fundamental right to a fair hearing had been breached, regardless of whether the applicant had given the name of a lawyer or he turned up without one.

45. The Applicant also relies on the case of **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** where the court is said to have observed that if a decision is reached in violation of the principles of natural justice, it is irrelevant that the same outcome might have been reached had those principles been observed, such a decision must be declared as no decision.

46. It is reiterated that Article 47(2) and Section 4(2)-(3) of the Fair Administrative Action Act requires that administrative decisions be accompanied by reasons in writing upon request, and that the right to reasons is a constitutional and statutory safeguard enabling accountability, review and

appeal.

47. The Supreme Court **In the Matter of the removal from office of Justice Martin Muya** is said to have underscored the importance of the duty to give reasons and issue written judgment, by observing that it is only by giving reasons for their decisions that those aggrieved may appeal those decisions, and that it is transparency that builds public confidence in the judicial process and that the same will be achieved through reasoned decisions.

48. The Applicant argues that the Panel's failure to issue a written, reasoned decision demonstrates procedural irregularity and a lack of accountability, and that this omission cannot be cured retrospectively because it prevents meaningful judicial review and denies her the ability to challenge the outcome. The Applicant contends that administrative bodies conducting elections must comply with Articles 81(e), 10, and 38 of the Constitution and the Fair Administrative Action Act, and must exercise their statutory and constitutional duties reasonably, transparently, and with due regard to equality. That a failure to investigate or enforce electoral rules in the face of credible allegations renders administrative action arbitrary, in bad faith, and unlawful.

49. It is submitted that the IECK breached its positive duties by failing to investigate and prosecute allegations of intimidation and bribery, clearing candidates despite pending police and disciplinary matters, and failing to

conduct a transparent, open, and verifiable pre-election system test, thereby undermining a fair electoral environment.

50. Relying on **Judicial Service Commission v Mbalu Mutava**, the Applicant emphasizes that administrative and decision-making bodies are constitutionally obliged under Article 47 and common law principles to act in a procedurally fair manner. The Court is urged to evaluate not only the process but also the substantive conduct of the IECK and the Panel.

51. The Applicant invites the Court to adopt a merit-based approach to judicial review, citing **Dande & 3 Others v Inspector General, National Police Service & 5 Others [2023] KESC 40**, where the Supreme Court is said to have held that judicial review may extend to an inquiry into the merits of administrative action.

52. On electoral integrity, the Applicant relies on **Raila Odinga v IEBC [2017] e KLR** and **Maina Kiai & 5 Others v IEBC & 2 Others [2017] eKLR**, where the Court it is urged established the “poisoned chalice” principle which is said to state that once an electoral process is compromised at any stage, the legitimacy of the outcome collapses. It is argued that the curtailed campaign period and ICT failures had predictable disenfranchising effects, and that the IECK’s inability to produce verifiable logs or audit evidence or to permit

candidate observation breached the duty of verifiability, and justifying annulment of the election.

53. The Applicant further submits that she is litigating against fundamental breaches of fair administrative action and the right to a fair hearing, and seeks conventional costs and, that where the court finds egregious rights violations, she seeks damages.

54. In response to the 9th Respondent's objection that the Originating Motion fails the threshold of a constitutional pleading, the Applicant argues that judicial review is now a substantive constitutional right grounded in Articles 22, 23, and 47 of the Constitution, implemented through the Fair Administrative Action Act, 2015 and the Fair Administrative Action Rules, 2017. Further, that Article 47 guarantees lawful, reasonable, expeditious, efficient, and procedurally fair administrative action, while Article 23(3) empowers the High Court to grant judicial review reliefs for rights violations.

55. The Applicant contends that the Constitution does not require a leave stage for proceedings under Articles 22, 23, or 47, and that Rule 4 of the 2017 Rules permits judicial review applications by notice of motion, petition, or any form directed by the Court, departing from the rigidity of Order 53. Citing **Masai Mara (SOPA) Ltd v Narok County Government [2016] eKLR**, the Applicant argues that judicial review is now substantive and constitutional, and

that Order 53 of the Civil procedure Rules does not govern constitutional petitions seeking judicial review remedies.

56. Further reliance is placed on **Esuron v Turkana County Public Service Board & Another [2025] eKLR**, where the Court is said to have affirmed that Article 159 requires courts to minimize procedural formalities in matters enforcing the Bill of Rights and on Article 159(2)(d), which mandates justice without undue regard to technicalities. Even if leave were required, the Applicant argues that failure to seek it is a curable procedural defect that cannot override the constitutional right to be heard absent demonstrated prejudice.

57. The Applicant also relies on the case of **Communications Commission of Kenya v Royal Media Services Ltd [2014] eKLR**, where the Supreme Court is said to have held that the 2010 Constitution has elevated judicial review beyond common-law technicalities, grounding it directly in constitutional provisions.

The 1st to 8th Respondents' written submissions

58. The 1st to 8th Respondents filed written submissions dated 26th November 2025 and further submissions dated 8th December 2025. They submit that it is trite law in Kenya that the remedy of judicial review is concerned with the decision-making process and not necessarily with the merits of the decision itself. That

the wider jurisprudence holds that an applicant seeking judicial review must demonstrate grounds of illegality, irrationality and/or procedural impropriety and in support of this position they rely on the case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300.**

59. The 8 Respondents submit that no constitutional right of the Applicant was violated and that all actions undertaken by the IECK and the Election Petition Panel were procedurally fair, non-discriminatory, lawful, transparent and within their mandate.

60. They further submit that the obligation to demonstrate that their actions were unreasonable, unfair and unlawful rest with the Applicant and to support this argument they refer to Section 107 of the Evidence Act on Burden of proof.

61. The 8 Respondents argue that the Applicant has not shown any evidence of unequal or discriminatory treatment under Article 27, and that communications regarding campaign materials were purely advisory to ensure compliance with the rules. They contend that Articles 38 and 81 were fully observed, and that temporary technical issues were promptly resolved. It is also their submission that the Applicant was afforded a full, fair, and impartial hearing before the Panel, including the opportunity to file a rejoinder albeit late and consult counsel under Article 5.12.1 of the SAKU Constitution.

62. Further, that the Panel considered all material and issued a reasoned decision on 29th October 2025. It is also their submission that the allegations of intimidation were unsubstantiated and unsupported by evidence and that the electoral process, petition hearing and decision were conducted transparently, fairly, and lawfully, and that the Applicant's rights under Articles 27, 38, 47, 50, and 81 were not violated.

63. The 8 Respondents rely on the case of **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, where the court is said to have held that a statutory or disciplinary body can only act within the powers expressly or impliedly granted to it by law, must not exceed its terms of reference, and any exercise of its discretion must be lawful, reasonable, and free from arbitrariness or bad faith.

64. The 8 Respondents further submit that they dealt with the election process and the election in accordance with the University's laid down procedures, policies, statutes and charter, and they pray that this Honourable Court does find so.

65. On whether the Applicant is entitled to the reliefs sought, it is submitted that the judicial review remedies sought are entirely unwarranted because the Applicant has not established any of the grounds recognized for intervention by a judicial review court. That the Applicant's Motion rests on broad, unsubstantiated

assertions, and seeks to invite the Court to reconsider the merits of the Panel's findings, which is beyond the scope of judicial review.

66. The Respondent's rely on **Odhiambo & 2 others v Kisii University & 3 others (Constitutional Petition E004 of 2023) [2023] KEHC 24648 (KLR) (30 October 2023)** where the court is said to have, while quashing an application for Judicial Review relied on the applicable principles for the grant or refusal of conservatory orders enunciated in **Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR**.

67. According to the Respondents, the Applicant has not demonstrated the need for conservatory orders and that no substantive evidence has been received to warrant conservatory orders to the Applicant with regard to a decision she implies is yet to be rendered. It is also urged that the Applicant also seeks to prohibit the swearing in ceremony of the elected officials, however, that it is noted from the material presented herein that the elected officials were sworn in on 30th October 2025, and in the circumstances, there is nothing to prohibit as the prayer has been overtaken by events.

68. The 8 Respondents submit that the Applicant is not entitled to the judicial review remedies sought. They urge that the prayer for certiorari is unsupported, as the Panel's decision dismissing the election petition was lawful and

procedurally fair. Further, that the request for mandamus directing fresh elections is equally untenable, since mandamus cannot compel a public body to undo a lawfully completed process, nor require performance of an act not legally due and to support this position they rely on the case of **Republic v Medical Practitioners & Dentists Council ex parte Njeru [2023] KEHC 712**.

69. It is their further submission that attempting to use certiorari and mandamus simultaneously to quash and then compel action is a misconception of remedies, as mandamus only commands performance of a duty not yet executed.

70. The 8 Respondents further challenge the Applicant's claims of IECK failures which include alleged intimidation, bribery, ICT testing, and clearance of candidates despite pending matters, emphasizing that such allegations are unsupported and require strict proof. They rely on the principle that any alleged breach of fundamental rights must identify the specific right infringed and how it was violated. They support this position by relying on the case of **Anarita K Njeru v Republic [1979] KLR 154** and **John Kimani Mwangi v Town Clerk Kangema Petition 1039 of 2007(Unreported)**.

71. On the Applicant's prayer for damages, the 8 Respondents argue that it is inapplicable in judicial review, which is a public law remedy focused on legality and supervision of administrative action, not compensation. Further,

that courts cannot grant relief not specifically pleaded. They rely on the cases of **Caltex Oil Kenya Ltd v Rono Ltd [2016] eKLR and Ayiera v Kimwomi & 3 Others [2023] KECA 1021** where the court is said to have upheld the principle that for a court to determine or grant a prayer it must be specifically pleaded and proved.

72. In conclusion, the 8 Respondents pray for costs citing the principle that costs follow the event and relying on the case of **Kay Construction Limited v Eco Bank Kenya Ltd & 6 Others [2015] eKLR**.

The 9th Respondent's submissions

73. The 9th Respondent filed written submissions dated 15th December 2025. He argues that from the Applicant's affidavit and the evidence attached, the applicant has not adduced any evidence to support the allegations made against him on intimidation of delegates, disciplinary proceedings and police arrest/report.

74. It is also submitted that the applicant has not specifically stated how he, the 9th Respondent has violated and/or infringed on her constitutional rights warranting this court to review and possibly overturn the decision of the Election Panel.

75. He relies on the cases of **Anarita Karimi** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)**, to support the position that one needs not to identify with mathematical precision but point out the issues in reasonable precision to allow the other party to respond.

76. The 9th Respondent further relies on the case of **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another (Presidential Petition No. 1 of 2017**) where the court is said to have observed that litigants must properly plead and prove their claims, discharging the burden of proof, and constitutional petitions should only be invoked when no effective statutory remedy exists. The 9th Respondent also relies on the case of **Kamau v Karanja & another (Petition E005 of 2024) [2024] KESC 64 (KLR) (8 November 2024) (Judgment)** where the court is said to have struck out the petition for failure to set out the constitutional provisions threatened or violated by the respondents, the specific constitutional provisions violated, and the reliefs sought.

Analysis and Determination

77. I have considered the application and affidavit in support, the responses, further affidavit, annextures, written submissions by the parties, constitutional, statutory and case law cited and the following issues emerge for determination:

a. ***Whether the Applicant's Amended Originating Motion is competent and properly before the Court, or is it premature, an abuse of process and/or an attempt to appeal the Election Petition Panel's decision under the guise of judicial review.***
b. ***Whether the composition and conduct of the Election Petition Panel violated the Applicant's constitutional and statutory rights to a fair, impartial, lawful, and procedurally fair hearing***
c. ***Whether limiting Legal representation to the applicant denied her the right to a fair hearing***
d. ***Whether the conduct of the elections and the Respondents' actions or omissions breached the Constitution and the SAKU Constitution so as to warrant the grant of the judicial review remedies of certiorari, prohibition, and mandamus.***
e. ***Are damages available for the applicant***
f. ***What orders should this court make, including an order for costs if any***

78. There are other important questions that this Court has endeavored to answer in resolving the above issues.

Whether the Applicant's Amended Originating Motion is competent and properly before the Court, or is premature, an abuse of process, and/or an attempt to appeal the Election Petition Panel's decision under the guise of judicial review

79. The 1st to 8th Respondents content that the Motion is incompetent and an abuse of court process. Further, that the Applicant's grievances relate to the substance and outcome of the election and the petition, matters which fall

within the mandate of the SAKU Election Petition Panel, not the Court's supervisory jurisdiction.

80. They also contend that the application is premature as from the face of it, it seeks to stay a decision that is yet to be made. They also urge that the Applicant's counsel improperly attempted to participate and file documents contrary to the SAKU Constitution, justifying the striking out of the rejoinder. It is also their case that the elections and the petition process were free, fair, lawful, and unbiased, and the Court should therefore decline jurisdiction and dismiss the Motion with costs.

81. The 9th Respondent similarly contends that the Motion is premature, incompetent, and an abuse of process, asserting that the Applicant's petition before the Panel was dismissed on technical and evidentiary grounds, including non-compliance with timelines and lack of proof. That the Applicant seeks to overturn the Panel's dismissal through the Court, ultimately inviting the Court to sit on appeal rather than exercise judicial review. He also states that the pleadings lack the specificity required in constitutional litigation, and the Applicant approached the Court with unclean hands by failing to disclose the true basis upon which her petition was dismissed.

82. Rejecting the respondents' contentions that the Originating motion is incompetent, premature and abuse of process as well as an appeal disguised as

judicial review, the Applicant maintains that the Originating Motion is properly before the Court and that it squarely invokes the Court's supervisory jurisdiction. She asserts that **there is a decision** of the **Election Petition Panel**, as it is annexed to the Respondents' replying affidavit, even though it was never formally communicated to her in writing.

83. It is also her submission that the failure to formally issue a written decision and reasons itself constitutes a violation of Article 47(2) of the Constitution and Section 4 of the Fair Administrative Action Act, justifying immediate court intervention. The Applicant argues that the internal dispute resolution mechanism was compromised by illegality, bias and procedural unfairness, particularly due to the conflicted composition of the Panel and the denial of legal representation.

84. The distinction between an appeal and judicial review is central to this issue. Judicial review is concerned not with the correctness of the decision**,** but with the lawfulness, reasonableness, and procedural fairness of the decision-making process**.**

85. In this case, the Applicant impugns the non-existence and communication of a lawful decision**,** alleging the absence of formal written reasons, the lack of impartiality in the composition of the Panel and procedural impropriety including denial of legal representation and striking out of pleadings allegedly

perpetrated by the Election Petition Panel. These matters fall within the traditional and constitutional scope of judicial review and the supervisory jurisdiction of this court**,** rather than appellate re-evaluation of facts or evidence.

86. The Respondents' objection on prematurity is grounded in the assertion that, on the face of the Motion, the Applicant seeks to stay an order that has not yet been made. However, the Applicant's claim that a decision is annexed to the Respondents' affidavit both undermines the contention that no decision existed and supports her position that the decision was never formally communicated, which in itself constitutes a procedural defect under Article 47 (2) of the Constitution which provides that ***if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

87. On the other hand, Section 4 (2) of the Fair Administrative Action Act provides that ***every person has the right to be given written reasons for any administrative action that is taken against him***.

88. On balance, this issue supports the conclusion that the Originating Motion is not an appeal in disguise, but rather raises questions concerning the constitutionality, legality, and procedural fairness of the Election Panel's decision-making process.

89. Although a decision is annexed to the respondents' replying affidavit, there is no evidence that such decision was reduced into writing and formally communicated to the Applicant prior to her filing of these proceedings in November, yet the decision is said to have been rendered in October, 2025. When considered together with the Applicant's contention that no formal communication or written reasons were provided for the decision dismissing her Election Petition, the circumstances point to the existence of a reviewable administrative action.

90. Accordingly, the amended Originating Motion cannot be struck out at the threshold as being premature, incompetent or abuse of process and this Court is therefore properly seized of jurisdiction to examine whether the SAKU Election Petition Panel acted lawfully, fairly and in compliance with constitutional and statutory requirements.

Whether the composition and conduct of the Election Petition Panel violated the Applicant's constitutional and statutory rights to a fair, impartial, lawful, and procedurally fair hearing

91. The Applicant asserts that the Panel's composition and conduct were fundamentally flawed and unconstitutional, arguing that there was conflict of interest and bias as two panel members namely, Mr. Benson Ngobia who is the

Dean of Students and Mr. Martin Makasa the Chief Security Officer, were at the material time members of the Independent Electoral Commission of KCA University, which was itself a Respondent in the Petition that they were called upon to determine.

92. According to the Applicant, the participation of these two individuals meant that they were judges in their own cause, contrary to the principle of *nemo judex in causa sua*. She contends that both individuals had previously sat on a disciplinary committee concerning the impugned actions of Chenus, Elvis and Alugo prior to the elections thereby creating a structural and actual conflict of interest.

93. The Applicant also contends that the 3rd Respondent, as Chair, barred the Applicant's advocate from participating, notwithstanding that Clause 5.12(7) of the SAKU Constitution provides that a party may be represented. The Applicant argues that reliance on Clause 5.12.1 to exclude counsel was a misinterpretation that unjustifiably curtailed her rights under Articles 48 and 50 of the Constitution. It is also her case that the striking out of her rejoinder was arbitrary and procedurally unfair, denying her a fair opportunity to respond to the Respondents' case.

94. She also urges that the Panel allegedly failed to issue a formal, reasoned written decision, contrary to Article 47(2) of the Constitution and Section 4 of the Fair

Administrative Action Act, 2015, thereby denying her the ability to understand, challenge, or appeal the decision.

95. In response, the 1st to 8th Respondents deny any impropriety and maintain that the process was lawful, fair, and unbiased, contending that the Dean of Students and the Manager Security & Safety were merely ex officio members of the Independent Electoral Commission and that they attended the Panel's meetings only to monitor proceedings, without decision-making power or influence over outcomes. That their appointment to the Panel was therefore not incompatible with fairness or impartiality.

96. The 8 respondents also argue that the striking out of the rejoinder and the restriction on counsel's participation were justified under Article 5.12.1 of the SAKU Constitution, which they interpret as limiting participation in petitions to candidates or SAKU members, thereby precluding formal filings by advocates.

97. They assert that the Panel acted within its mandate, conducted the hearing fairly, and that the Applicant's counsel approached the proceedings with a pre-determined agenda, effectively converting a rejoinder into a demand letter.

98. The 9th Respondent supports the position that the Panel was properly constituted and that it acted fairly. He also states that the Applicant's allegations of bias and denial of a fair hearing are a disguised attempt to overturn the dismissal of her petition, rather than genuine complaints about procedural irregularity.

99. In resolving this issue which is multifaceted, covering the question of bias, legal representation and striking out of the applicant's rejoinder, it is important to note that the right to a fair and impartial hearing is guaranteed under Article 50(1) of the Constitution, as reinforced in administrative proceedings by Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015.

100. Under Article 50 (1) on the right to a fair hearing, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

101. On the other hand, Article 47 of the Constitution guarantees every person (1) the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub Article (2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Sub Article (3) empowers Parliament to enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

102. These constitutional and statutory provisions require that any person affected by an administrative decision be heard by an independent and impartial decision-maker, be allowed a fair opportunity to present their case, and be furnished with written reasons for any adverse decision. In addition, Section 4(3) (e) of the Fair Administrative Action Act provides legal representation in administrative or quasi-judicial proceedings as follows:

> ***4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision***
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
> ***(b) an opportunity to be heard and to make representations in that regard;***
> ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> ***(d) a statement of reasons pursuant to section 6;***
> ***(e) notice of the right to legal representation, where applicable***

103. The importance of fair administrative action as a constitutional right was appreciated by the Supreme Court in **Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR)** as follows:

> ***"66...Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 165(6) grants the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a***

superior court. In 2015, Parliament in adherence to article 47 of the Constitution enacted the Fair Administrative Action Act, No 4 of 2014, Laws of Kenya (FAA Act)."

67.Also instructive to the application of judicial review, is that article 10 of the Constitution sets out the national values and principles of governance, key among them being the rule of law. These values and principles bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions."

104. The Supreme Court further opined that:

"74.It is our considered opinion that the framers of the Constitution when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi- judicial functions. We further take the view, that this approach is consistent with realizing the right of access to justice because justice can be obtained in other places besides a courtroom.

75.In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the

evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge."

105. The Supreme Court further in the case of **Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR)** observed as follows on the right to a fair hearing, due process and to fair trial:

"[60] Accordingly, Article 50(2) of the Constitution on the right to a fair trial imposes a duty on the court to guarantee the parties to contempt proceedings procedural justice by evaluating the evidence brought forth by all parties. We note that, while there exists no fixed content to the duty to afford procedural fairness, the fairness of procedure depends on the nature of the matters in issue and that would constitute a reasonable opportunity for parties to present their cases in any given circumstance. Procedural fairness in the administration of justice involves the fair hearing rule and the rule against bias. The fair hearing rules require a decision maker to inter alia afford a [61] Likewise, procedural fairness in decision-making requires courts not to deprive any person of their right without due process of the law, a fundamental precept that implies that the right of a person affected by any adverse decision or action is present

before a tribunal that pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

[62] Accordingly, the doctrine of due process encompasses the right to be treated fairly, efficiently, and effectively in the administration of justice. This Court acknowledged that due process is a fundamental pillar of the rule of law under the Constitution that should be observed by all courts in the administration of Justice in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others SC Petition No. 23 of 2014 [2015] eKLR where we stated:

"[97] All Courts must consider the principles and values of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency, and accountability. This is because the four corners of due process of the law, specifically the right to be heard and the right to a fair hearing require that both parties be heard if an issue is raised before the court in order to accord the court the opportunity to pronounce itself on the issue." (emphasis added).

[63] Similarly, the United States Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 267 (1970) emphasized that the fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. [64] From the foregoing, courts are required to adhere to the principles of procedural fairness and due process in the administration of justice."

106. Applying the foregoing principles, and in resolving the question of alleged bias, the issue for determination is whether, on the material placed before the Court, a fair-minded and informed observer would reasonably apprehend a real possibility of bias arising from the presence of Mr. Benson Ngobia and Mr. Martin Makasa in the Election Petition Panel, and whether the impugned procedural steps namely, the striking out of the Applicant's rejoinder, the restriction on counsel's participation, and the alleged failure to issue a reasoned written decision denied the Applicant a reasonable opportunity to present her case.

107. On the Election Petition's Panel's composition or conduct and whether the Panel in that situation described by the applicant departed from the requirements of independence, impartiality and due process under Articles 47 and 50 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015, or whether the Respondents' actions were a lawful and consistent with the SAKU Constitution and the Panel's mandate, on composition and bias, the test is not only whether actual bias is proved, but whether a reasonable and informed observer would apprehend a real likelihood of bias. It is not in doubt that where decision-makers have previously participated in the events under challenge or belong to a body whose conduct is directly in issue, the risk of institutional or structural bias arises.

108. In this case, the Applicant contends that Mr. Benson Ngobia who is the Dean of Students and Mr. Martin Makasa the Chief Security Officer, were at the material time members of the Electoral Commission, which was itself a Respondent in the Petition that they were called upon to determine, and further that they had previously sat on a disciplinary committee concerning the impugned actions of Chenus, Elvis and Alugo prior to the elections thereby creating a structural and actual conflict of interest.

109. Under Article 5.11, of the SAKU Constitution, the Election Petition Panel shall consist of three and a maximum of five members. The Chair shall be the University Legal Counsel.

110. On the other hand, the Independent Electoral Commission's membership comprises 3 to 7 Commissioners appointed under Article 5.3 and two of the members are ex-officio namely, the Dean of Students or their representative and the University Chief Security Officer or their representative.

111. From the above composition of the two bodies, the Dean of Students and the Chief Security officer are ex-officio members of the IECK and not members of the Election Petition Panel.

112. To meet the threshold of bias, the Applicant would need to show that Mr. Ngobia and Mr. Makasa who were indeed ex officio members of the IECK at the material time, participated in the decision or conduct now under challenge,

that their role was sufficiently connected to the impugned acts such that they would, in effect, be sitting in judgment over their own institutional actions.

113. Their presence in the Commission is not denied by the Respondents, however the respondents claim that the two were ex officio members of the IECK and were only present to monitor the meeting that had been called by the IECK official.

114. I have read paragraphs 9 and 10 of the Verdict annexed to the 1 to 8 respondents' replying affidavit. The Panel as composed and constituted by the University's Legal Counsel and stated so in the verdict, at the hearing on 29th October, 2025 at 2pm had the following members among them, Ben Ngobia as the Dean of students and Martin Makasa as Chief Security Officer. There is nowhere in the verdict to show that the two members were only present as ex officio members of IECK or that they were observers. The two comprised full membership of the Panel of 3 and not more than 7 which therefore means that as ex-officio members of the IECK, they also actively participated in the hearing and consideration of the Petition challenging the outcome of the elections conducted by the Independent Electoral Commission, although the Constitution of SAKU does not provide for their membership to the Elections Panel.

115. It is important to note that there are exceptions to the nemo judex rule. This what the Court of Appeal stated in **Capital Markets Authority v Okumu (Civil Appeal 302 of 2018) [2023] KECA 1212 (KLR) (6 October 2023) (Judgment)**.

> ***"43. Counsel for the appellant submitted that there is no overlap of the appellant's functions as held in the impugned judgment. In other words, does the overlap foul the nemo judex in causa sua esse "(no one should be a judge in their own cause)" principle as argued by the respondent? We do not think that the overlap per se denies parties the right to a fair hearing. The rights to fair administrative action and fair hearing are universal. The natural justice of nemo judex in causa sua esse principle is one of the fundamental principles in many common law jurisdictions.***
>
> ***Lord Hewart, CJ's famous maxim in the case of R v. Sussex Justices, ex parte McCarthy [1924] 1 KB 256, [1923] All ER Rep 233 that justice should not only be done but also be seen to be done is worth reminding ourselves. Our view is that this principle is blurred when one presides in the adjudication of one's cause or in a process one has an interest in. See the US Supreme Court in the case of Re Murchison, 349 U.S. 133, 136 (1955), where the court stated that no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome.***
>
> ***Interest here includes a situation where one desires or is keen on obtaining a given result. A prosecutor, for example, has an interest in the conviction of a suspect he hauls to court.***
>
> ***44. Having so stated, we agree with counsel for the appellant's submissions that there are exceptions to most principles. An important***

exception to the nemo judex in causa sua esse principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. This exception has been captured in the Canadian case of Re WD Latimer Co and Attorney-General for Ontario (1973), 2 OR (2d) 391, affirmed Re WD Latimer Co and Bray (1974), 6 OR (2d) 129, where Dubin, JA stated:

Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task."

45. The Canadian Supreme Court later stated in the case of Georges R. Brosseau v. Alberta Securities Commission, [1989] 1 SCR 301, "Administrative tribunals are created for a variety of reasons and to respond to a variety of needs."

In the case of Georges R Brosseau v Alberta Securities Commission (supra), the Canadian Supreme Court added:-

By their nature, such commissions [read tribunals] undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act."

46. Such bodies will therefore have repeated dealings, in both administrative or adjudicative capacities, with the same parties. It is for this reason and to achieve the efficiency required in the operations of the securities markets, that the legislature more often than not, allow for an

overlap of functions which in normal judicial proceedings would be kept separate."

116. Thus, for the exceptions to the rule to apply, allowing appearances of the same persons at different levels of decision making over the same subject matter, a statute must prescribe. In this case, neither statute nor the SAKU Constitution permits such appearance.

117. And as stated above, courts apply the objective test of whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. This test is settled and consistently applied in many decisions. In the case of **Patrick Abuya v Institute of Certified Public Accountants of Kenya & Another [2015] eKLR,** the Court of Appeal held that an employee must be afforded a proper opportunity to respond to specific allegations, and that ***a hearing devoid of impartiality violates principles of natural justice, particularly the rule against bias (nemo judex in causa sua).***

118. In **Mumba & 7 others (Sued on their own Behalf and on Behalf of Predecessors and or Successors in Title in their Capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own Behalf and on Behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pension Scheme) (Civil Appeal 38 of 2014) [2016] KECA 160 (KLR) (26 February**

2016) (Judgment), the Court of Appeal stated as follows concerning the doctrine of ***nemo judex in sua causa:***

> ***"A significant issue is whether a dispute relating to amendment of the definition of pensionable emoluments could be referred to the CEO of RBA for review when it was the same RBA that approved implementation of the new definition.***
>
> ***59. Natural justice dictates that a person cannot be a judge in his or her own case***
>
> ***–nemo judex in re causa sua. RBA having given approval to the implementation of the Remedial Plan, natural justice would debar the CEO of RBA to hear a review relating to RBA's own approval and decisions. RBA played an active role in approval of the Remedial Plan and any review by the CEO of RBA would be a violation of the rules of natural justice. On the specific facts of this case and guided by the principles of natural justice and noting the role played by RBA in approving implementation of the Remedial Plan, it is our view that the CEO of RBA could not validly review, consider or determine the dispute between the parties. The provisions of Section 46 (1) of the RBA Act are to be invoked when there is no conflict of interest and any active or perceived role by RBA in relation to the decision that is subject to review."***

119. In **Premji Patel Company Limited v Director General Kenya National Highways Authority (KENHA) & 3 others (Civil Appeal 67 of 2019) [2022] KECA 738 (KLR) (27 May 2022) (Judgment)**, the Court of Appeal had this to say on the same doctrine ***of nemo judex in sua causa:***

"32. In the same vein, Odunga J. in a judgment delivered on 31st October 2016 in a judicial review application seeking orders of prohibition and certiorari prohibiting and quashing decision to remove number plates of vehicle, Republic vs. Kenya National Highways Authority Ex parte John Mwaniki Kiarie [2016] eKLR, had this to say:

"In my view Regulation 15 above effectively makes the Respondent the complainant, witness, the investigator, prosecutor and judge in the same cause or proceedings and that would be improper. This is the principle of nemo judex in sua causa. As was held by the Court of Appeal in Galaxy Paints Company Ltd. vs. Falcon Guards Ltd. Civil Appeal No. 219 of 1998 [1999] 2 EA 83, the fundamental principle is that a man may not be a Judge in his own cause."

120. **Republic v. Chuka University ex parte Kennedy Omondi Waringa & 16 Others [2018] eKLR,** this Court held that a person cannot be a judge in their own cause.

121. In my humble view, the fact that the two University officials were ex officio members of Independent Electoral Commission, (IECK), and not being members or ex officio members of the Elections Petition Panel, they could not sit as members of the latter body as constituted by the Legal Counsel to deliberate on the petition which they themselves were respondents having been part of the Commission that conducted elections which were being contested before the Elections Panel. More so, it is also not controverted that the said members participated in earlier stages of the impugned process involving

disciplinary proceedings against some of the candidates including the 9th respondent which, in my view, is sufficient to ground a reasonable apprehension of bias.

122. Thus, where members of the Independent Electoral Commission also sit on the Election Petition Panel, the problem is structural, not merely personal. This is because, such members are effectively required to review, defend or sit in judgment over their own conduct or that of a body of which they were part, which in effect violates the principle of *nemo judex in sua causa*

123. However, even if no actual bias is proved or that members acted in good faith, the strong appearance of bias which is apparent, is sufficient. I reiterate that the composition of the Elections Panel to include ex officio members of the Electoral Commission, when the Constitution did not even make them automatic members of the Panel, created a reasonable apprehension of bias and violated the rules of natural justice.

124. Administrative and quasi-judicial bodies must be independent and impartial and structural bias is sufficient to vitiate proceedings. Bias of this nature is regarded as jurisdictional, because, impartiality is a precondition to the lawful exercise of quasi-judicial power and therefore a biased tribunal lacks the constitutional competence to adjudicate over a dispute placed before it. Such proceedings are accordingly, constitutionally infirm *ab initio.*

125. In **Wanjigi v Chebukati [2022]eKLR** the Court of Appeal dealing with the doctrine of bias and citing other decisions had this to say on the test of bias:

> ***"Earlier on, expounding further on the above test, the Supreme Court of Canada explained as follows in R. v S (R.D.) [1977] 3 SCR 484: The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that areal likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."***
>
> ***(Emphasis added).***

126. In **Evans Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR** it was stated that:

> ***"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail fi no evidence at all were given as either side."***

127. In the present case, the Applicant has raised serious allegations of structural and institutional bias arising from the prior and concurrent roles of Mr. Benson Ngobia and Mr. Martin Makasa.

128. The Respondents' explanation that the two served merely as ex officio members without decision-making authority or substantive involvement in the matters under challenge is unacceptable in view of the fact that as ex officio members of IECK, they actively from the verdict, at paragraphs 9 and 10, participated as members of the Election Petitions Panel, having been constituted by the Legal Counsel. The two were not merely observers and if that were so, the verdict would have said so in the paragraph on composition by the Legal Counsel.

129. I therefore find that the test of bias was established to the required standard by the applicant.

130. The next issue that is pertinent to these proceedings is on legal representation and its effect on the right to a fair hearing. It is trite that where the governing instrument provides that a party may be represented, a restrictive interpretation that bars counsel entirely must meet the threshold of reasonableness and proportionality under Article 24 of the Constitution. Absent clear, express statutory limitation, the outright exclusion of counsel in a contested and rights-based process risks infringing the right of access to justice under Article 48 and the right to a fair hearing under Article 50.

131. In this case, central to the issue of legal representation is Article 5.12 of the SAKU Constitution reproduced herein below:

"5.12. Election Petitions

1) A Petition may be lodged with the Panel by a candidate or any member of SAKU on any of the following grounds:

a) Whenever such a candidate or member has evidence that there has been a contravention of any election procedure or rule during the election period.

b) Whenever there are substantiated allegations of bribing of voters, intimidation and/or harassment of voters and/or candidates.

c) Whenever there is allegation that a candidate has otherwise breached this Constitution.

2) ***A Petitioner may bring a petition regarding nominations, campaigns and/or elections.***
3) ***A Petition must be lodged not later than two Business Days after the elections and must be signed by at least 20 eligible voters under this constitution and other enabling laws.***
4) ***The Chairperson of the Panel shall notify the parties concerned and constituency members of a petition within forty eight (48) hours of such lodging.***
5) ***The Panel shall sit at such places as it may determine from time to time.***
6) ***The Panel shall determine petitions expeditiously, but not more than five (5) Business Days.***
7) ***<u>The petitioner or the respondent may be allowed to have legal representation.</u>***
8) ***The hearing of the petition shall be inter partes (all parties present) save where a party fails to attend without any reasonable excuse, in which case an ex parte (one party present) hearing may be held.***
9) ***The decision of the Panel shall be final and binding and shall be submitted to the Electoral Commission for execution.***

132. A reading of Article 5.12.7 shows that the right to have legal counsel under the SAKU Constitution may be limited which happened as the Elections Petition Panel that barred the Applicant's counsel from participating in the proceedings before it. According to the Respondents, counsel could only guide the Applicant but not actively participate in proceedings or file any documents before it.

133. The panel in its Verdict annexed to the replying affidavit at paragraph 14 in answering the issue that it had framed on ***"whether counsel for the petitioner can have an audience"*** stated as follows:

> ***"The lead petitioner introduced her counsel as Mr. Mokua Manyara and Fidel Castro Owino. In reliance on article 5.12(7) the panel proceeded to issue directions on what the permissible legal representation the lead petitioner could enjoy. The panel allowed the Petitioner to prosecute the matter herself, but with the necessary consultation with her counsel to guarantee fair treatment of the parties, retain the nature of the proceedings as being an internal process and generally protect of data of any students involved. The petitioner did not object."***

134. This Court observes that the proceedings before the Election Petition Panel are internal, administrative and quasi-judicial in nature, designed to resolve disputes arising from student elections expeditiously and within the framework of the SAKU Constitution. Those proceedings are intended to**,** among others, promoting participation and timely resolution. The Panel, therefore, operates under a hybrid framework. However, it must respect fundamental rights and freedoms guaranteed under the Constitution, such as the right to a fair hearing and to access to justice.

135. Under the 2010 Constitution, a body exercising quasi-judicial authority may regulate its procedures, but it cannot impose a blanket prohibition on legal

representation during internal proceedings. Any limitation of the right to be represented by an advocate must meet the constitutional threshold of fairness, reasonableness, and proportionality under Articles 47, 50(1), and 24, and must be justified by the nature and complexity of the proceedings and the gravity of the consequences involved.

136. It is important to note that fair hearing principles apply to all decision-makers exercising public power and where proceedings are adversarial or rights-affecting, representation by counsel may be a necessity, such that procedural rules that undermine fairness are constitutionally suspect and therefore, a rule barring advocates, without justification, would fail this standard.

137. In this case, although the respondents claim that they allowed counsel to guide the applicant but not to argue her case, or file documents, first, is that documents filed by an advocate on behalf of a client cannot be said to be filed by an advocate in his own interest, the advocate not being party to those proceedings, but in the interest and behalf of the client. The affected proceedings were right affecting and involved exercise of the right to a fair hearing, access to justice and fair administrative action such that a constitution of the University granting discretion and restricting legal representation in adversarial proceedings in the name of safeguarding privacy of students' data cannot be allowed to override the Constitutional guarantees. Pursuant to Article

3, the Constitution of Kenya, 2010 is the Supreme Law of the land and binds all persons and all State organs at both levels of government. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

138. Article 24 of the Constitution only ***allows limitation of rights by an Act of Parliament.*** The Article provides:

> ***"24. Limitation of rights and fundamental freedoms***
>
> ***(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,***
>
> ***including—***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied."

139. That limitation notwithstanding, any person or body exercising judicial or quasi-judicial authority or function must look up the statutes to identify the statutory limitations or under what circumstances the right to legal representation may be limited and whether that limitation meets the threshold in Article 24.

140. In **Republic v Chuka University; Waringa & 15 others (Ex parte) (Judicial Review 113 of 2017) [2018] KEHC 8078 (KLR) (Judicial Review) (19 February 2018) (Judgment)** this Court in answering the question of whether the right to legal representation in disciplinary proceedings was negotiable where the Rules excluded such legal representation, stated as follows, which decision has been cited in many other cases including **Omare v Machakos University (Petition 11 of 2019) [2019] KEHC 5596 (KLR) (22 July 2019) (Judgment)**

> ***"89. It follows that the right to legal representation cannot be limited and is not limited by statute as it complements the right to a fair hearing. And it is the duty of the administrative or quasi- judicial body or tribunal to notify the person accused or against whom administrative proceedings are being conducted, of that right to legal representation, and not to wait and see whether the person shall request for such legal representation.***
>
> ***91. In the instant case, it is clear that the respondent's Rules and Regulations applicable to student disciplinary matters bar any legal representations or agent in disciplinary proceedings. Therefore, the argument by the respondent that it was incumbent upon the applicants to request for legal representation before the committee does not hold any water. This is so because it is the Rules and Regulations themselves that limit the right to legal representation by a student facing the disciplinary committee.***

92. It is trite law that Rules and Regulations of an administrative body exercising either administrative or quasi-judicial authority cannot be permitted to limit fundamental rights guaranteed by the Constitution, as they are not substantive legislation contemplated in Article 24 of the Constitution…

96. For the above reasons, I find and hold that the respondent violated the applicant's right to legal representation in the disciplinary proceedings by failing to give him notice of."

141. In **Omare v Machakos University,** Odunga J, (as he then was) agreeing with the holding in the **Kenendy Waringa** case stated as follows:

"146. I agree with the position in Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others (supra) where it was held as follows, (quoting the holding in the Kennedy Waringa case): -

147. I have considered the charges which were levelled against the Petitioner, and I respectfully agree with the Petitioner that some of them were unreasonable. A charge such as rallying suspended students to book for a lawyer cannot be sustained under the current constitutional dispensation. Similarly using social media to rally support for a cause cannot by any stretch of imagination amount to a wrong doing unless by doing so a person is said to have fallen foul of Article 34(2) of the Constitution. <u>However, a blanket rule that takes away ones constitutionally guaranteed rights is unacceptable</u>. Apart from that some of the charges alleged that the Petitioner's actions were directed against third party students. The Petitioner contends that these students were

never called to testify against him so that he could cross-examine them on their contention. This position is not controverted by the Respondent.

148. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Similarly, section 4(1) of the Fair Administrative Action Act, No. 4 of 2015 provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4(3) of the said Act on the other hand provides:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable; (0 notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

149. Section 4(4)(c) thereof on its part provides that the administrator shall accord the person against whom administrative action is taken an opportunity to cross-examine persons who give adverse evidence against him. However, section 4(6) of the Act provides that where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

142. Article 5.12(7) of the SAKU Constitution provides that a petitioner or respondent *may be allowed* legal representation. That provision vests the Panel with discretion to access counsel. Nonetheless, such discretion must be exercised lawfully, reasonably, and proportionately, consistent with Articles 24, 47, 48, and 50 of the Constitution. Thus, limitation of rights is only permissible to a reasonable and justifiable extent, ensuring access to justice and the right to a fair hearing.

143. Legal representation is so fundamental a right that Parliament enactedteh Legal Aid Act, 2016, being- An Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes. The right to legal representation promotes other rights including access to justice, fair hearing and fair trial. In criminal cases, for example, every accused person is

guaranteed the right under Article 50(2) (g) of the Constitution, to choose, and be represented by, an advocate, and to be informed of this right promptly; and at 50(2) (h), (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

144. Although the proceedings before the Panel were not criminal in nature, the principles informing the right to a fair hearing are closely related to those governing the right to a fair trial. The right to a fair hearing, as was stated by the Court of Appeal in **Judicial Service Commission & another v Mutava & another (Civil Appeal 52 of 2014) [2015] KECA 741 (KLR) (8 May 2015) (Judgment)Supreme Court Petition No. 5 of 2014),** cannot be limited. The Court of Appeal stated:

> ***"Fair hearing" in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise."***

145. In the context of this case, the Election Panel had no discretion to confer or withhold the Applicant's entitlement to legal representation. This is because a constitutional right cannot be conferred through discretion of courts or tribunals, while the denial of representation by an advocate of the Applicant's choice was inconsistent with the Applicant's constitutional rights to access justice and to a fair hearing.

146. The other issue raised by the Applicant is that her rejoinder was struck out because, one, it was filed by her advocate and not her. Secondly, that it was a veiled demand notice with the advocate having expectations from the Election Panel and that it was filed out of time. My restatement on this issue is that the Panel had no discretion to decline pleadings filed by an advocate on behalf of his client the applicant herein. Similarly, the fact that the rejoinder pleadings were in the nature of demand notice with expected outcome is nothing but form and no suit should be defeated for want of form, as espoused in Article 159 (2) (d) of the Constitution which mandates that justice shall be administered without undue regard to procedural technicalities thus warning the practice of elevating form over substantive justice.

147. However, the Election Panel also struck out the rejoinder for reasons that it was filed out of time without leave of the Election Panel and perhaps, that is the only valid ground which was nonetheless overshadowed by the Panel's total

rejection of the advocates representing the applicant at the hearing of the Petition. A body cannot condition a party to bring an advocate to only sit in proceedings as an observer for his client and for consultations in a such a serious matter where serious procedural flaws were evident. It may as well be that the applicant could not seek leave of the Panel to admit the rejoinder out of time because of the restrictions placed on her on legal representation, which was a violation of her right to access justice and to a fair hearing.

148. With respect to the Applicant's contention that the Panel's decision and/or written reasons were not provided, a matter addressed in part under Issue No. 1 above, it bears reiteration for emphasis that Article 47(2) of the Constitution and section 4(2) of the Fair Administrative Action Act impose a mandatory obligation on an administrative body to give written reasons for any administrative action that adversely affects a person's rights.

149. The record discloses no evidence that the respondents communicated the decision to the Applicant. The applicable legal framework as repeatedly state din this Judgment requires that an administrative decision be reduced into writing and formally communicated to the affected party.

150. In the present case, there is no contrary evidence that the impugned decision only surfaced in response to the Originating Motion, and the document titled "Verdict" as uploaded on the Case Tracking System is largely illegible, further

compounding the procedural shortcomings. The burden shifts onto the respondent to show that the decision was delivered on a specific date, in what form and supplied to the applicant on which date and in what mode.

151. I however note that the Applicant in the Amended Originating Motion refers to a decision of the Election Panel dated 29th November 2025 which according to her was never served upon her but must have existed as the same is annexed to the Respondents' replying affidavit. The date on the very faint verdict attached to the Respondents' replying affidavit reads October 2025 and not November 2025. However, as the Applicant acknowledges the same as the Panel's decision, the court will infer it to be the decision that is the subject of the challenge but which was never supplied to her in writing to enable her mount an effective challenge.

152. In my view, the applicant has demonstrated that she had no access to the decision and if that were not the case, the respondents could have shown even by email that they had send it to her after the hearing.

153. Accordingly, I am satisfied that the applicant was not supplied with the decision in writing, and the failure to formally communicate a reasoned decision undermines the principles of transparency and accountability and impairs an affected party's ability to seek review or appeal, thereby rendering

the process procedurally deficient, which deficit deprived the applicant of the opportunity to challenge the said decision adequately.

154. I find that the applicant has established that her right to fair administrative action and to be suppled with a reasoned decision, in writing was inconsistent with her right to be furnished with the decision and written reasons for the decision.

The other question is w**hether **the conduct of the elections and the Respondents' actions or omissions breached the Constitution and the SAKU Constitution so as to warrant the grant of the judicial review remedies of certiorari, prohibition, and mandamus

155. As a threshold to this issue, the Applicant has urged this Court to adopt a merit-based approach to judicial review, relying on the decision of the Supreme Court in **Dande & 3 Others v Inspector General, National Police Service & 5 Others [2023] KESC 40**. This Court has been invited to interrogate not only the procedural regularity of the Election Petition Panel and the IECK, but also the substantive correctness of their determinations.

156. In response, the 1st to 8th Respondents state that the Applicant's Motion rests on broad, unsubstantiated assertions, and seeks to invite the Court to reconsider the merits of the Panel's findings, which is beyond the scope of judicial review. Further that any alleged breach of fundamental rights must identify the specific right infringed and how it was violated.

157. The 9th Respondent reiterates the 1st to 8th Respondents' position and states that the Applicant has also not specifically stated how he has violated and/or infringed on her constitutional rights warranting this court to review and possibly overturn the decision of the Election Panel. Further, that constitutional violations must be pleaded with reasonable precision to allow the other party to respond. It is also the 9th Respondent's case that litigants must properly plead and prove their claims, Further, that discharging the burden of proof, and constitutional petitions should only be invoked when no effective statutory remedy exists.

158. This Court accepts that, in appropriate cases, where constitutional rights and obligations are implicated, judicial review may extend beyond a purely formal inquiry and encompass an assessment of whether an administrative decision is reasonable, proportionate, and constitutionally justified and that this is one of those cases where such inquiry into the merit of the decision can be ventured into, in view of my findings above.

159. However, the Court reiterates the settled distinction between judicial review and appellate jurisdiction and that since an appeal is an established mechanism for resolving disputes at a higher level, it is not the function of this Court in its exercise of judicial review jurisdiction to re-hear the election dispute, re-evaluate contested evidence, or substitute its own conclusions for those of the

bodies entrusted by the SAKU Constitution with the conduct and resolution of electoral disputes. This Court's task is to determine whether the Respondents acted within the law and the Constitution and discharged their positive constitutional and statutory duties in a rational and fair manner, a finding that I have already made in the analysis above, that the 1-8 respondents' conduct was inconsistent with the constitutionally guaranteed rights to a fair hearing, access to justice and legal representation as well as the right to be fair administrative action.

160. Briefly, the Applicant contends that the elections were neither free, fair, nor lawful**,** and that the Respondents' omissions and actions justify the grant of all three remedies. She argues that the allegations of intimidation, threats, and bribery were formally reported to the University administration, the Electoral Commission, and the police, yet no effective disciplinary or electoral sanctions were imposed.

161. According to her, this failure is a breach of Article 81(e) of the Constitution and Article 5.8.2 of the SAKU Constitution**,** which require integrity and fairness in elections. She also contends that the reduction of the campaign period to five days, contrary to Article 5.9(7) of the SAKU Constitution**,** disadvantaged her and violated the equality and fairness guarantees under Article 27 of the Constitution**.**

162. The Applicant further avers that missing candidate names, mismatched symbols, login failures, and delayed commencement of voting, particularly in the School of I.T, disenfranchised students and undermined the political rights under Article 38 of the Constitution**.**

163. The Applicant challenges the credibility of the pre-election system test, citing admissions in the Panel's decision that system readiness was not confirmed before election day, asserting that internal ICT testing without candidate or agent observation lacked transparency. She also argues that the Panel's reliance on technicalities to dismiss her petition reflects a defeat of substantive justice, further justifying judicial intervention.

164. The Respondents in their response maintain that the elections were lawful, fair, and credible**,** asserting that any alleged threats or misconduct occurred outside the University and were referred to the police, placing them beyond the Respondents' control. They deny receiving formal complaints requiring institutional action.

165. They also urge that a secure pre-election test was conducted by the ICT Department, a temporary technical glitch was promptly resolved, voting was extended, and no student was disenfranchised. Further, that the Applicant's team was cautioned for non-compliance with campaign rules, and the campaign period adjustments were within the Commission's administrative discretion.

They contend that there is no legal basis to nullify the elections or compel fresh ones, and that the Court should defer to the internal electoral mechanisms.

166. The 9th Respondent contends that the Applicant's petition was dismissed due to lack of evidence and non-compliance with timelines**,** not due to any institutional wrongdoing. It is also his case that the Applicant is seeking to use the Court to overturn an unfavourable outcome**,** rather than to remedy genuine constitutional or legal breaches.

167. For this court to delve into the merits of the decision complained of, there must be proceedings and a clear decision capable of being analysed. There are no proceedings and the decision as annexed is so faint that only portions of it are legible thereby making it impossible to know what the Election Panel said concerning what.

168. The Court is therefore only left with the contents of the replying affidavit and the submissions.

169. In this Court's view, it was incumbent upon the Applicant to seek legible copies of the decision upon becoming aware of its existence. Having not been supplied with the decision prior to the institution of these proceedings, the Applicant could, upon obtaining the decision, have sought leave to amend the Originating Motion so as to properly frame any challenge to the merits of that decision. Further, the present proceedings impugn elections in respect of which

office bearers have already assumed office, yet no prayer has been made seeking the nullification of those elections.

170. This observation is made in light of the settled principle that parties are bound by their pleadings and that submissions cannot take the place of pleadings or evidence. In **Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment)**, the Court of Appeal, in an election appeal stated as follows concerning adherence to parties' pleadings, at paragraphs 5 to 11 of the Judgment:

> ***"5. The Appellant submits that by unilaterally framing new issues for determination not pleaded or responded to by the parties, the learned Judge abandoned her role as an independent and impartial adjudicator and descended into the arena of conflict. To support its contention, the Appellant cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd v Nyasulu [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at p 174 whereof the author had stated;***
>
> ***" As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet***

and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves.

It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

6. The Appellants also cited the Ugandan case of Libyan Arab Uganda Bank for Foreign Trade and Development & another v Adam Vassiliadis [1986] UG CA 6 where the Uganda Court of Appeal (judgment of Odoki JA) cited with approval the dictum of Lord Denning in Jones v National Coal Board [1957] 2 QB 55 that;

" In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

7. Lord Denning was of course alluding to the essential difference between an adversarial system of justice such as we have in which the judge is or ought to be more of an impartial umpire and the inquisitorial system where the judge is an active investigator after evidence and truth. The good law Lord had proceeded to quote Lord Green MR who had explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations for, by descending into the arena the judge is liable to have his vision clouded by the dust of conflict. See Yuill v Yuill [1945] All ER 183.

8. The Appellants contention is that the learned Judge overstepped her mandate in crafting a new issue not brought by the parties and basing it to nullify the 1st Respondent's election thereby essentially assisting the Petitioner in an impermissible manner. The 1st Respondent in submissions filed in this Court supported this argument by the Appellant and cited to us two decisions of the Nigerian Supreme Court. In the first, Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc SC 91/2002, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows;

" ..it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

9. Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell JSC rendering himself thus;

" In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on

the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

10. To the above submissions by the Appellant and the 1st Respondent through its learned counsel Mr Kiugu, which are by no means insubstantial, we have been unable to find any answer by the 2nd to 4th Respondents both in their written submissions and in the address before us by Mr Laichena, their learned counsel.

11. As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the Appeal succeeds on that score."

171. In addition, within the context of judicial review, the establishment of wrongdoing does not, of itself, entitle an applicant to the grant of relief. Judicial review is a discretionary and remedial jurisdiction, directed at the lawfulness of decision-making processes rather than the punishment of decision-makers or the compensation of affected parties.

172. Accordingly, whereas a Court may conclude that a public body acted unlawfully, unreasonably, or unfairly, it may decline to grant the judicial review remedies sought. The distinction between a finding of illegality and the grant of relief is foundational. Even where unlawfulness is established, the court must

consider whether the remedies sought are appropriate, lawful, proportionate and capable of practical effect. This is particularly so where the impugned process has been completed and implemented, in which event, orders of certiorari may be ineffective, orders of prohibition may be moot while orders of mandamus may lack a proper legal basis.

173. In line with the foregoing analysis, this Court remains bound by the pleadings and the reliefs sought. It cannot reformulate remedies to accord with the evidence, grant reliefs not expressly prayed for, or set aside outcomes that have not been directly challenged. Accordingly, even where procedural or substantive impropriety is established, such findings cannot, of themselves, remedy deficiencies in the pleadings or expand the scope of the relief sought.

174. The Court will further decline to grant relief where the effect of doing so would be disproportionate or disruptive. This may occur where the orders sought, would, like in the instant case, unsettle the position of office holders who are not parties to the proceedings, noting that the 9th respondent was in a team of candidates for election and who were beneficiaries of the election which is impugned but have not been enjoined to these proceedings. This Court would therefore not grant reliefs not sought and which reliefs would undermine institutional or administrative stability, or occasion consequences that outweigh the impropriety of the process as already established herein above. Thus, the

discretionary nature of judicial review requires the Court to consider the broader public interest and the practical consequences of the relief sought.

175. In addition, even following the Dande case, the function of judicial review remains limited to an examination of the legality, rationality and procedural propriety and now constitutionality of administrative action. It does not entail the substitution of the Court's views for those of the decision-maker, nor does it involve the automatic alteration or rewriting of the outcome reached.

176. Having said as much, the next question is whether the judicial review orders sought are available to the applicant, despite the findings of infractions in the impugned decision of the Election petition panel.

177. On the scope of the orders of certiorari, prohibition and mandamus sought by the Applicant the court in the case of Kenya **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] KECA 58 (KLR)** held as follows on the nature of the order of prohibition:

> "***That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for***

excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law of England, 4th Edition vol.1 at Pg.37 paragraph 128." When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

178. On the order of Mandamus, the same Court above observed as follows:

"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again, we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

> ***"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will***

issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

179. On the order of certiorari, the same Court observed as follows:

"…. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter."

180. Applying the above principles to this case and while the Supreme Court in **Dande & Others v. Inspector General, National Police Service & Others** case affirmed that judicial review in Kenya has been expanded to permit interrogation of the merits of administrative decisions under Article 47 of the Constitution, such expansion does not dispense with the requirement that courts remain bound by the reliefs sought.

181. In the instant case, and as already stated above, even where this Court has found on the limited merits review, owing to illegibility of the verdict of the Election petition panel, that the decision of the University's Election Petition Panel was unreasonable, tainted with illegalities and or was substantively unfair, this Court is unable to invalidate a completed election or compel fresh elections where nullification was not pleaded or sought in the reliefs and where elected office bearers have already taken oath and assumed office.

182. In other words, the expansion of judicial review as articulated in the **Dande** case does not displace other settled principles of adjudication. The Supreme Court did not hold that judicial review empowers courts to grant reliefs not pleaded, nor did it abolish the doctrine that courts are bound by the prayers sought by the parties.

183. It remains trite law that a court cannot grant a remedy that has not been specifically prayed for as affirmed in the **Independent Electoral and**

Boundaries Commission v. Stephen Mutinda Mule & 3 Others, (supra) that that parties are bound by their pleadings and that a court cannot frame or grant reliefs on their behalf.

184. In the present case, the elections have been conducted and the elected office bearers have assumed office. Their taking of oath administered by the Legal Counsel and assumption of office confers upon them vested legal interests which cannot be taken away without due process, including their proper joinder to these proceedings to which only the elected Chairman was enjoined and an express prayer seeking nullification of the election.

185. No such prayer for nullification of the impugned elections was sought. Instead, the Applicant challenges the decision of the Election Petition Panel and seeks, as a consequential relief, an order of mandamus compelling the conduct of fresh elections.

186. This Court is unable to accede to that invitation. Ordering fresh elections in the absence of a pleaded prayer for nullification would amount, in substance, to indirectly assisting the applicant to invalidate the concluded election. Courts have consistently declined to do indirectly what they cannot do directly.

187. With respect to the order of certiorari, this Court finds that, guided by the decision in the Dande case, it may review the merits of the Panel's decision and, if warranted, quash it for illegalities, unreasonableness, disproportionality,

or substantive unfairness. However, the quashing of the Panel's decision does not, without more, nullify the election itself, there being no relief for nullification of the concluded elections.

188. Regarding the order of prohibition, this Court notes that prohibition is a forward-looking remedy. As was held in the case of **Kenya National Examinations Council v. Republic ex parte Geoffrey Gathenji, p**rohibition cannot undo a decision that has already been made. Given that the elections have been concluded and implemented, this prayer has been overtaken by events and rendered moot.

189. As to the prayer for mandamus compelling the conduct of fresh elections, this Court finds that mandamus lies to compel the performance of a clear legal duty. In the absence of an order nullifying the election, no legal duty arises requiring the 1st Respondent to conduct fresh elections. Therefore, granting this order would effectively annul the election through the back door, contrary to the principle that courts are bound by the reliefs sought.

190. Neither were damages pleaded nor a basis laid for grant of an un pleaded relief which only came into the submissions.

191. Finally, the omnibus prayer for "*any other orders deemed just and expedient*" cannot be invoked to grant substantive reliefs that were neither pleaded nor specifically sought, particularly where such reliefs would affect

vested rights of persons already in office and who were not made parties to these proceedings.

192. In light of the foregoing, this Court finds that although judicial review in Kenya has been expanded, as affirmed by the Supreme Court in Dande case, to allow limited interrogation of the merits of administrative action, the identified infractions in the decision of the 2nd Respondent Election Petition Panel do not, in the circumstances of this case, justify the invalidation of a concluded university students' election or the ordering of fresh elections. This is particularly so where nullification was not pleaded and the elected office bearers have already assumed office.

193. To grant the orders sought in these circumstances would exceed the proper limits of judicial review and depart from the settled principle that courts are bound by the pleadings and the reliefs sought.

194. Accordingly, for the reasons set out above, this Court finds that the judicial review remedies sought are not available to the Applicant. The Originating Motion dated 3rd November 2025, as amended on 17th November 2025, is therefore dismissed.

195. I make no orders as to costs.

196. This file is closed.

197. I so order

Dated, Signed and Delivered at Nairobi this 30th Day of January, 2026

R.E. ABURILI
JUDGE