Andabwa & 3 others v Independent Electoral and Boundaries Commission (IEBC) & 3 others (Miscellaneous Petition E005 of 2024) [2026] KEHC 4812 (KLR) (Constitutional and Human Rights) (16 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

MISCELLANEOUS PETITION E005 OF 2024

LN MUGAMBI, J

APRIL 16, 2026

BETWEEN

EUGENE ANDABWA ..... 1ST PETITIONER

LAWI SULTAN NJEREMANI ..... 2ND PETITIONER

EDITH MBEYA NDETTO ..... 3RD PETITIONER

MARTIN MAKAU ..... 4TH PETITIONER

AND

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

THE NATIONAL ASSEMBLY ..... 2ND RESPONDENT

THE SENATE ..... 3RD RESPONDENT

KENYA LAW REFORM COMMISSION ..... 4TH RESPONDENT

RULING

Introduction

1. The Petitioners filed the instant suit dated 5/2/2024 against the Respondents, who comprise a Constitutional Commission, a statutory body and the legislative arms of Government alleging that they failed to undertake public participation during the enactment of Section 45 of the *Elections Act* No. 24 of 2011. The Petition is supported by the affidavit of Eugene Andabwa sworn on 6th February, 2024.

2. The Petitioners thus seek that the said legal provision should be declared unconstitutional.

Petitioners' Case

3. The Petitioners averred that the Kenya Law Reform Commission was ignorant, negligent and overlooked in the process that led to the enactment of Section 45 of the *Elections Act* No. 24 of 2011.

4. The Petitioners contended that the National Assembly, the Senate and the Independent Electoral and Boundaries Commission failed to abide by the principle of public participation during the enactment of Section 45 of the *Elections Act* No. 24 of 2011.

5. They allege that the enactment of the impugned legal provision was hurried, done without any regard to its impact or quality because the sole intent behind it was to shield elected political leaders from accountability by excessively limiting the constitutional right of the citizens to recall them hence is unconstitutional null and void.

RESPONDENTS' CASE

1st Respondent's Preliminary Objection

6. The 1st Respondent opposed the instant suit by filing Grounds of Opposition and a Notice of Preliminary Objection, both dated 15th April, 2024 through the firm of Dr. Mutubwa Law Advocates.

7. The grounds listed in the Preliminary Objection include:

   I. The Petition is inadmissible, incompetent and incurably defective for want of form.

   II. The petition has not met the threshold of specificity and particularity as laid out in the Supreme Court case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR and the Court of Appeal case of Anarita Karimi Njeru v Attorney General [1979] KLR 154.

   III. In furtherance of the above, the petition is defective for want of form as it does not state in specific terms, which Article(s) of *the Constitution* the said Section 45 of the *Elections Act*, 2011 have been allegedly violated by the 1st Respondent.

   IV. While the petition seeks to have Section 45 of the *Elections Act*, 2011 declared unconstitutional for want of public participation in the enactment of the same, the functions of the 1st Respondent as provided for under Article 88 (4) of *the Constitution* of Kenya, 2010 and Section 4 of the *Independent Electoral and Boundaries Commission Act*, No. 9 of 2011; do not include the enactment of statutes nor the conduct of public participation in the legislative process.

   V. Public participation in the legislative process is provided for under Article 118 of *the Constitution* of Kenya, 2010. Section 2 (1) (b) of Schedule 6 of *the Constitution* of Kenya, 2010 suspended the application of chapter 8 of *the Constitution*, including the aforementioned Article 118, until the final announcement of all the results of the first elections for Parliament under *the Constitution* which was held in March, 2013. The *Elections Act*, 2011 was enacted during the suspension period.

   VI. The Petition is bad in law, misconceived and discloses no reasonable cause of action as against the 1st Respondent thus rendering it fatally and incurably defective.

8. The 1st Respondent's Grounds of Opposition, the following grounds were as follows:

I. The petition is defective for want of form as it does not state with particularity the provisions of *the Constitution* of Kenya, 2010 alleged to have been violated by the Respondents herein. On this ground alone, the petition ought to be dismissed.

II) Furthermore, it is apparent that the petition is misconceived and portrays a misapprehension of the law surrounding the enactment of statutes.

III) The 1st Respondent has neither Constitutional nor statutory mandate in enactment of statutory laws. The role of the 1st Respondent is limited to managing elections and conducting referenda

VII. The organs responsible for making and amending laws in Kenya are the 2nd and 3rd Respondent as provided for under Article 94 (1) and (5) of *the Constitution* of Kenya, 2010.

VIII. In furtherance of the above, any questions regarding the legitimacy or otherwise of the process leading to the *Elections Act*; and any or all the sections therein ought to be directed to the 2nd and 3rd Respondents.

IX. The petitioners have not demonstrated the role of the 1st Respondent in passing the impugned the *Elections Act*, 2011, much less the section whose constitutionality they challenge. Nevertheless, section 2 (1) (b) of Schedule 6 of *the Constitution* of Kenya, 2010 suspended the application of chapter 8 of *the Constitution*, including Article 118 until the final announcement of all the results of the first elections for Parliament under *the Constitution* which was held in March, 2013. The *Elections Act*, 2011 was enacted in 2011, that is during the suspension period. The allegation that the enactment of the *Elections Act*, 2011 ought to have unconstitutional while the entire Act was enacted at the same time and in the same process.

X. In addition, this court ought to take judicial notice of the HCCHRPETMISC/E004/2024 wherein the petitioners herein seek a recall of all Members of Parliament. It is clear that the petitioners herein only seek the orders in the present petition so as to validate their petition in the aforementioned suit. This is a demonstration of abuse of the court process.

XI. Without prejudice to the Court's original jurisdiction, the petitioners have demonstrated no positive steps taken towards petitioning the parliament to amend the section they complain of as per the dictates of Article 119 of *the Constitution* of Kenya, 2010.

XII. Recall of elected leaders is not the only way through which leaders are held accountable. If anything, right of recall can only be pursued as a matter of last resort. Any attempt to seek recall as the point of first call is outrightly malicious and turns such conduct from a legitimate pursuit of accountability to a political witch-hunt.

2nd Respondent Preliminary Objection

9. The 2nd Respondent (National Assembly) filed a Notice of Preliminary Objection to the Petition 5th February 2024 through Advocate Ruth Nyaberi premised on the following grounds:

i. That the present case brought before this Honourable Court bears significant resemblance to a previous matter adjudicated upon by the same court, thereby invoking the doctrine of res judicata. 1 2.

ii. That the present Petition challenges the constitutionality of section 45 of the *Elections Act* No. 24 of 2011. The constitutionality of the entire section 45 of the *Elections Act* was previously contested in the Kisumu High Court Constitutional Petition No. 209 of 2016,

Katiba Institute & another v Attorney General & another [2017] eKLR (the Katiba case). The court addressed the question of constitutionality of section 45 in its entirety.

iii. That the issue raised in this Petition was raised and determined in the Katiba case which was also filed in the public interest. The judgement of the Court in the Katiba case is a judgement in rem, it binds all persons including the Petitioners in this matter. This Petition is hence res judicata. The Petitioners are barred under the doctrine of res judicata from instituting proceedings touching on the same issue of constitutionality of section 45 of the *Elections Act*.

iv. That the principle of res judicata dictates that once a matter has been conclusively adjudicated by a competent court, it cannot be re-litigated. In view of the Judgment of the High Court at Kisumu in Constitutional Petition No. E209 of 2016; Katiba Institute and Another v the Attorney General and Another, this Petition is res judicata.

3rd Respondent Preliminary Objection

10. The 3rd Respondent (the Senate) also filed a Notice of Preliminary Objection dated 24th March, 2025 based on the following grounds:

i. That the Petition herein is inadmissible, incompetent and incurably defective for want of form.

ii. That the Petition herein is res judicata pursuant to Section 7 of the *Civil Procedure Act* and ought to be struck out in the first instance. THAT the Petition herein challenges the constitutionality of Section 45 of the *Elections Act* No. 24 of 2011 which was previously contested in Kisumu High Court Constitutional Petition No. 209 of 2016; Katiba Institute & another v Attorney General & another [2017| KLR where the High Court in the matter addressed the question of constitutionality of Section 45 of the *Elections Act* in its entirety and declared the said section, among others as unconstitutional.

iii. That the impugned section 45 of the *Elections Act*, 2011 having been declared unconstitutional, null and void, the Petitioners are barred under the doctrine of res judicata from instituting proceedings touching on the same issue of constitutionality of Section 45 of the *Elections Act* which has been determined in finality in another court of competent jurisdiction.

iv. That the Petition herein is thus an abuse of the court process and ought to be dismissed.

1st Respondent's Submissions

11. The 1st Respondent identified and submitted only on one issue, that is:

whether the 1st Respondent' Preliminary Objections dated 15th April, 2024 is merited.

12. The 1st Respondent assailed the Petition on two major grounds:

i. That what the Petitioners allege against the 1st Respondent is outside the 1st Respondent's constitutional mandate and;

ii. the Petition does not meet the standard required for pleading a Constitutional petition.

13. The 1st Respondent restated the provisions of Article 88 (4) of *the Constitution* which provides for its mandate and argued that the role of the 1st Respondent does not include to law-making and thus had no role in the enactment of the *Elections Act*, 2011 as the making and amendment of laws is an exclusive preserve of the 2nd and 3rd Respondents in accordance with Article 94 (1) of *the Constitution*.

14. In that regard, the 1st Respondent contended that if public participation was needed in order to pass Section 45 of the *Elections Act*-2011, that was a responsibility that fell on the 2nd and 3rd Respondents and not the 1st Respondent. Relying on the authority of Republic v Independent Electoral and Boundaries Commission & another, Kimathi (Exparte) (Miscellaneous Juridical Review E001 of 2022) [2022] KEHC 11550 (KLR) (5 August 2022) (Ruling) the 1st Respondent argued that as an independent commission, it is charged with the sole responsibility of conducting elections in Kenya as required under Article 88 of *the Constitution* and in accordance with the principles in Article 81 and 86 of *the Constitution* contending that Petitioner's suggestion implies that the 1st Respondent should usurp the role of the 2nd and 3rd Respondents which is untenable as it expressly violates the constitutional principle of separation of powers. To buttress this position, the 1st Respondents relied on the case of Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR the Court observed as follows:

> " ... We start by observing that this court respects the principle of separation of powers that is clearly spelt out in our Constitution as a Constitutional Commission has no role in legislation..."

15. In the light of the above submission, the 1st Respondent argued that it has wrongly been joined in this suit.

16. Nonetheless, the 1st Respondent contended that public participation in the legislative process is provided for in Chapter 8 of *the Constitution* – in particular, Article 118 of *the constitution*. The 1st Respondent then drew the attention of this Court to Section 2 (1) (b) of Schedule 6 of *the Constitution* where the application of Chapter 8 of *the Constitution*, which includes Article 118 was suspended until the final announcement of all the results of the first general elections for Parliament under *the Constitution*. These elections were held in March, 2013. The *Elections Act*, 2011 having been enacted during the period suspension, the 1st Respondent thus argued the application of principle of public participation was not a condition precedent given this particular constitutional clause was under suspension.

17. The 1st Respondent further contended that the Petition does not meet the threshold required for pleading constitutional petitions as did not disclose Articles of *the Constitution* that were contravened by the said Section 45 of the *Elections Act*,2011 thereby violating the test of specificity and particularity as held in the locus classicus case of Anarita Karimi Njeru-v-Republic (1979) eKLR. The 1st Respondent pointed out that the Petitioners did not even disclose a single Article of *the Constitution* that Section 45 of the Election Act, 2011 violates or the manner in which the impugned section was violated or the effect of violation. The 1st Respondent argued that in determining the constitutionality or otherwise of the impugned section, the court will be constrained as it has to evaluate Section 45 of the Election Act,2011 vis-à-vis the specific Article of *the Constitution* said to have been violated yet none has been cited by the Petitioners despite alleging contravention with *the Constitution*.

18. To buttress this point, the 1st Respondent relied on the case of Isaac Robert Murambi-v-Attorney General & 3 others eKLR where it was held that

> " ... the onus of proving that a law is unconstitutional lies with the person saying so. The duty of the court then is to juxtapose the statute or its impugned provisions with the provisions of *the Constitution* as was held in U.S-v-Butlers 2997 U.S (1936) where the court stated that; 'When an act of congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay

the article of *the constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former...'

19. In light of the above omissions, the 1st Respondent maintained that the Petition has not satisfied the tests of specificity and particularity required in pleading a Constitutional Petition hence should be dismissed.

2nd Respondent's submissions

20. The 2nd Respondent through Advocate Ruth Nyaberi filed written submissions dated 20th February, 2025. The submissions were in support of its Preliminary Objection dated 12/4/2024.

21. Counsel argued that the constitutionality of Section 45 of the Election Act No. 24 of 2011 is res judicata as the same question featured and was conclusively determined in the Kisumu High Court Constitutional Petition No. 209 of 2016, Katiba Institute & another v Attorney General & another [2017] eKLR ("the Katiba case").

22. Counsel cited Section 7 of the *Civil Procedure Act*, CAP 21 and relied on various judicial precedents in which the principle has been expounded and applied. The judicial precedents cited in support of her arguments included the Court of Appeal case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR where the Court held:

> " ...The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

23. Further the case of Pop In (Kenya) Limited & 3 Others v Habib Bank AG Zurich [Civil Appeal No. 80 of 1988], where the Court of Appeal stated:

> " Even if new parties or new issues are added to a suit, if the matter in dispute was directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and has been heard and finally decided by a court of competent jurisdiction, it is res judicata."

24. Reference was also made to the Court of Appeal case of Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR where the Court observed as follows:

> " ...the general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle") and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide

wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal."

25. The 2nd Respondent contended that in the Katiba case, three key reliefs had been sought by the Petitioner, namely; one, a declaration that sections 45, 46, 47 and 48 of the Election Act 2011; and sections 27, 28 and 29 of the *County Governments Act* 2012 are unconstitutional; two, a declaration under Article 261(6)(a) of *the Constitution* that Parliament failed to pass the legislation contemplated by Article 104(2) and the Fifth Schedule of *the Constitution*; thirdly, an order to compel Parliament to pass the legislation within ninety days of the delivery of the judgment.

26. In the ensuing decision, Counsel submitted that the Court declared Sections 45(2)(3)(6), 46(1)(b)(ii)(c), and 48 of the *Elections Act*, as well as Sections 27(2)(3)(6) and 28(1)(b)(ii)(c) of the *County Governments Act*, unconstitutional for being vague, superfluous, or falling short of Article 104 of *the Constitution*; Sections 45(1)(b)(ii) and 45(6) of the *Elections Act*, and Sections 27(6) and 28(1)(b)(ii) of the *County Governments Act*, were found to be discriminatory; It declined to compel Parliament to enact new legislation within ninety days, holding that its role was limited to determining constitutionality, petition was thus partially allowed, with each party bearing its own costs since the case was filed in the public interest.

27. Accordingly, the 2nd Respondent submitted that the issue of the constitutionality of Section 45 of the *Elections Act*, No. 24 of 2011 was fully addressed by the Kisumu High Court- in the Katiba case and the same cannot be re-litigated in the present matter.

28. Counsel thus urged the Court to strike out the Petition.

3rd Respondent's Submissions

29. The 3rd Respondent filed submissions dated 11/4/2025 through its Advocate Edward Libendi in support of its Preliminary Objection dated 24th March, 2025; the 1st Respondent's Preliminary Objection dated 15th April, 2024 and, the 2nd Respondent's Preliminary Objection dated 12th April, 2024.

30. Counsel submitted only one issue, namely- Whether the 3rd Respondent's Preliminary Objection dated 24th March, 2025 is merited on grounds that the Petition is Res Judicata.

31. Counsel argued that the constitutionality of Section 45 of the *Elections Act*, No. 24 of 2011 was contested issue in Kisumu High Court Constitutional Petition No. 209 of 2016; Katiba Institute & another v Attorney General & another [2017] KLR where a 3- Judge Bench of the High Court after considered the question and declared the said section as unconstitutional.

32. Counsel thus submitted that the issue is res-judicata and relied on the holding of the High Court in Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR in support of his position. In the said case, the Court held:

> " A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions...Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court."

33. Further reliance was placed on the Supreme Court case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR where the Court expressed itself as follows on res-judicata:

> " 52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

34. Other cases relied upon by the 3rd Respondent were William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR Onguto, Aggrey Chiteri v Republic |2016] eKLR and Edward Okongo Oyugi & 2 others v Attorney General [2016] eKLR, and the Court of Appeal decision in John Florence Maritime Services Limited & another A Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR where it was held that that res judicata applied in constitutional matters as is a doctrine of general application.

4th Respondent's submissions

35. The 4th Respondent filed submissions dated 16th May, 2025 in support of its Preliminary Objection dated 15th May 2025 through the Deputy Chief State Counsel, Stephen Terrrell. The 4th Respondent isolated and submitted on the following two issues:

i. Whether this Petition is res judicata

ii. Whether the Petition meets the threshold of a constitutional Petition.

36. On the first issue, Counsel underscored the Supreme Court decision of the Communications Commission of Kenya & 5 others - v- Royal Media Services Limited & 5 others [2014] eKLR where the Court stated:

> " The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings..."

37. Regarding conditions that must be met before res judicata is invoked, Counsel relied on the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) where the Supreme Court guided as follows:

> " For res judicata to be invoked in a civil matter the following elements had to be demonstrated:
>
> a. there was a former judgment or order which was final;
>
> b. the judgment or order was on merit;

c. the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. there had to be between the first and the second action identical parties, subject matter and cause of action."

38. The 4th Respondent placed further reliance on Section 7 of the *Civil Procedure Act* Cap. 21.

39. Other cases relied upon included William Kabogo Gitau v Ferdinant Ndung'u Waititu [2016] eKLR and Aggrey Chiteri v Republic [2016] eKLR as well as Edward Okongo Oyugi & 2 others v Attorney General [2016] eKLR, the Court held that the doctrine of res judicata applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh was unjustly locked out from the wheels and seat of justice."

40. The 4th Respondent submitted that the present Petition seeks a declaration that Section 45 of the *Elections Act* No. 24 of 2011 is unconstitutional yet that issue was addressed by the Court in Katiba Institute & another v Attorney General & another [2017] KEHC 4648 (KLR), where the Court, pronounced itself as follows:

a. A declaration is hereby issued declaring sections 45(2)(3)and (6), 46(1)(b)(ii) and (c) and 48 of the *Elections Act* and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the *County Governments Act* are meaningless and superfluous; or, that they fall far short of the constitutional imperative in Article 104 of *the Constitution* and to that extent are unconstitutional;

b. A declaration is hereby issued declaring sections 45(1)(b)(ii) and 45(6) of the *Elections Act* and sections 27(6) and 28(1)(b)(ii) of the County Government Act discriminatory and therefore unconstitutional.

41. The 4th Respondent submitted this decision was not been subjected to an appeal or review and because it is a decision of the High Court on an identical subject matter, this Petition is barred by the principle of res judicata and this Court is now functus officio on that issue having already pronounced itself on the same issue.

42. On whether the Petition meets the threshold of a constitutional Petition, the 4th Respondent argued that it does not meet the test laid down in Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154 as emphasized in the case of Mumo Matemu v Trusted Society of Human Rights alliance [2014] eKLR.

43. Counsel submitted that the Petitioners do not even mention any Articles of *the Constitution* violated by the Respondents or and have not given particulars of contravention that they complain of. Further reliance was placed on rely on the case of Kenya Bus Services Ltd & 2 others v Attorney General & 2 others [2005] eKLR. Also cited in support of this contention was the case of MATIBA v ATTORNEY GENERAL High Court Misc. Appl 666 of 1990 where the Court held as follows:

> " An applicant in an application under Section 84(1) of *the constitution* is obliged to state his complaint the provision of *the Constitution* he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement."

Petitioners written submissions to the Respondents' Preliminary objections

44. The Petitioners in their written submissions dated 21/4/2024 and 22/4/2024 commenced by clarifying that the instant Petition is about the lack of Public Participation in the process that led to the enactment of Section 45 of *Elections Act* No. 24 of 2011 on the Right of Recall Parliamentarians.

45. The Petitioners, relying on the Supreme Court decision of the Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR argued that Parliament must operate under *the Constitution* as it is the supreme law of the land and therefore where *the Constitution* decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure and if Parliament violates the procedural requirements of the supreme law, it is for the courts of law to assert the authority and supremacy of *the Constitution*.

46. The Petitioners argued that the 1st Respondent is a key stakeholder in the electoral process, a mandate that is directly given by *the Constitution* and the failure to acknowledge this fact in its Preliminary Objections and absolving itself of any responsibility in the legitimacy of the process leading to the enactment of the *Elections Act* raises material questions about the 1st Respondent's involvement by the 2nd & 3rd Respondents on the constitutional requirement for Public Participation in the legislative process.

47. The Petitioners argued that the Preliminary Objections are not founded on good faith or in law. The Petitioners referred this Court to an annexure from the Final Report of *the Constitution* of Kenya Review Commission 2005 (page 166-168) and argued that the Right of Recall and Public Participation have always been a demand and a requirement by the People of Kenya which no Institution should be blind to, selectively apply, set aside, exercise chicanery or choose to ignore.

48. The Petitioners argued that 1st Respondent admission that the *Elections Act* 2011 was enacted during the suspension period with reference to Schedule 6 of *the Constitution* of Kenya 2010 confirms the genuineness of the grievance upon which this Petition is founded.

49. The Petitioners cited the Constitutional Petition no. 16 of 2018 in which the High Court reaffirmed the decision in Kenya Human Rights Commission vs. Attorney General &Another [2018] eKLR holding that:

> "Once a petitioner attacks the legislative process on grounds that the law-making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation..." and contended that the 1st Respondent's Preliminary Objection has failed to address the underlying foundation of the petition, that- the process of enactment of Section 45 of *Elections Act* No. 24 of 2011 without subjecting it to Public Participation was unconstitutional.

50. Regarding the applicability of the principle of res judicata, the Petitioners argued that it does not apply in this matter as prayers sought by the petitioner are distinct from what was adjudicated upon by the Court in the Constitutional Petition No. E209 of 2016; Katiba Institute and Another v the Attorney General and Another. The pronouncement of the court in the matter is specific on what was canvassed which is not the subject that is addressed by the petitioner(s) in the present Petition.

Analysis and Determination

51. Upon thorough review of the pleadings and submissions by the Parties, this Honourable Court considers the following to be the issues for determination:

    1. Whether the Petition offends the doctrine of res judicata.

    2. Whether the Petition meets the threshold required for pleading Constitutional Petitions.

    3) Whether the 1st Respondent was improperly joined in instant Petition.

52. To begin with the Petitioners attacked the Preliminary Objections raised by the 1st, 2nd, 3rd and 4th Respondents contending that they are not made in good faith. This therefore begs the question, do the Preliminary Objections meet the legal threshold for raising a Preliminary Objection?

53. The threshold of a preliminary objection was laid out in the cerebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 69 and thereafter the Supreme Court in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR adopted these principles as follows:

> "(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:
>
> "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

54. Regarding the import or utility of preliminary objections, the Supreme Court in Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling) explained:

> "21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement..."

55. By way of a summary therefore, a proper preliminary objection has the essential elements or characteristics:

    a. If argued successfully, a preliminary objection must lead to disposal of the suit without a trial on merits- meaning that if it is upheld, the case ends and the Court does not have to interrogate the substance of the factual dispute between the contending parties.

b. It is argued on the assumption that all the facts pleaded by the other side are correct- this means that the parties on the face value accepting opponent's pleaded facts for purposes of the objection and arguing that even if those facts remain uncontroverted, the suit cannot validly stand in law.

c. It cannot be raised if any fact has to be ascertained by evidence- a preliminary objection would be unavailable if the Court would require to inquire into and ascertain a contested fact either by referring to an affidavit or any other form of evidence, it must be based on the pleading and the law only.

d. It cannot be raised if what is being sought is the exercise of judicial discretion – if the matter would require the Court to weigh competing interests in order to arrive at a decision, that cannot be a pure Preliminary Objection.

56. The Respondents Preliminary Objections are premised on the two major grounds, that the Petition is incompetent for being pleaded in a manner that falls short of the threshold of pleading Constitutional Petitions. This does not require calling of evidence or exercise of judicial discretion in order to determine for it merely involves a review of the Pleading itself to determine if it meets the requisite threshold as dictated by judicial precedents or any legal instrument. If the Court were to find the pleading does not meet the threshold and does not for instance raise a reasonable cause of action, it would definitely not proceed with the trial on merits. That in itself constitutes a sufficient ground upon which a Preliminary Objection can be raised.

57. In respect to the Plea of res judicata, the Court will be primarily concerned with is the previous Court decision and the essence will be to ascertain the issues dealt with therein and the parties thereto and then comparing with the present suit so as to and establish if the matters are identical or not. Such an examination is sufficient to inform the Court whether it can proceed and hear the matter or not. A judgment of a Court delivered in this Country needs no proof as that is a matter that this Court can take judicial notice of. If res judicata principles established, becomes a jurisdictional bar and precludes the Court from hearing the matter. A plea of res-judicata can therefore properly found a Preliminary Objection.

58. I thus find that despite the Petitioner's contention that the Respondent's Preliminary Objections are not made in good faith, my assessment is that they validly meet the foundational legal grounds raising proper Preliminary Objections. I will now turn to consider whether the there is any merits in the said Preliminary Objections.

Whether the Petition offends the doctrine of res judicata

59. Res judicata doctrine is statutorily anchored on Section 7 of the *Civil Procedure Act*, CAP 21 which provides as follows:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

60. In the case of Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & another (2016) eKLR the Supreme Court affirmed res judicata is a doctrine of universal application even in constitutional petitions. The Court held thus:

> " (52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights..."

61. This was similarly echoed in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2024] KEHC 6648 (KLR) where the Court, rejecting the contention that res-judicata is mere technicality, reasoned as follows:

> "
>
> " 55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.
>
> 56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):
>
> The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

62. It must further be underscored that res judicata is not just about identical causes of action between the same parties to encompass what is also known as issue-based estoppel, whose implication is that if an issue is determined in the former suit, it cannot be subsequently raised by a party or the representative of that party in the later suit even if that suit be different. The case of Mumira v Attorney General [2022] KEHC 271 (KLR) expounded on what cause of action estoppel and issue-based estoppel entails by holding thus:

> " 18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel... (A distinction is made between "cause of action estoppel" and "issue estoppel". In the first case— "the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter." (Arnold v National Westminster Bank [1991] 2 AC 93 (HL) at 104.) In the second case— "a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the

same issue is relevant one of the parties seeks to re-open that issue." (Arnold at 105.)

63. Res judicata also applies in decisions has been in public interest matters such that if the constitutionality of a particular process or issue has been made, such is a decision is in rem and goes beyond the interest of the particular parties in that dispute. It cannot therefore be raised by a separate or different Party in a subsequent public interest matter.

64. In the instant case, the Petitioners seek a declaration that the enactment of Section 45 of the *Elections Act* No. 24 of 2011 be declared unconstitutional on the basis that it was processed and enacted by the Respondents without complying with the principle of public participation.

65. The Respondents countered that the petitioners are relitigating a matter that was settled long time ago in the case of Katiba Institute & another v Attorney General & another [2017] KEHC 4648 (KLR), where the Court, pronounced itself as follows:

a. A declaration is hereby issued declaring sections 45(2)(3)and (6), 46(1)(b)(ii) and (c) and 48 of the *Elections Act* and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the *County Governments Act* are meaningless and superfluous; or, that they fall far short of the constitutional imperative in Article 104 of *the Constitution* and to that extent are unconstitutional;

b. A declaration is hereby issued declaring sections 45(1)(b)(ii) and 45(6) of the *Elections Act* and sections 27(6) and 28(1)(b)(ii) of the County Government Act discriminatory and therefore unconstitutional.

66. The Petitioners opposed this contention and maintained that the decision in the Katiba case has no implication in this matter as prayers sought by the petitioner are distinct from what was adjudicated upon by the Court in the Constitutional Petition No. E209 of 2016; Katiba Institute and Another v the Attorney General and Another. That the pronouncement of the court in the matter was specific to what was canvassed in that Petition and is not what the present Petition seeks the Court to address.

67. The decision in the Constitutional Petition No. E209 of 2016; Katiba Institute & Anor v AG (2017) KEHC, KLR is available in Kenya Law hence the Court took judicial notice of the same.

68. The introductory paragraph of the judgment signals an early revelation to what as the real nature of the cause of action upon which judgment was ultimately rendered was, in particular, relief number one as expressly captured by the Court in the introduction is itself telling. The introductory paragraph reads as follows:

" Introduction.

1. This petition revolves around Article 104 of *the Constitution* which bestows upon voters the right to recall their representatives. The Article commands Parliament to enact legislation to provide for the grounds and procedures for recall. The Fifth Schedule to *the Constitution* required the legislation to be passed within two years of the promulgation of *the Constitution*.

2. Parliament enacted the *Elections Act* 2011; and, the *County Governments Act* 2012 in an attempt to meet the constitutional requirements. Sections 45, 46, 47 and 48 of the *Elections Act* 2011; and, sections 27, 28 and 29 of the *County Governments Act* 2012 provide for the recall of a Member of Parliament or the County Assembly respectively.

3. In this petition however, it is the petitioners' case that no legislation on recall was effectively passed; and, that the provisions are inimical to the letter and spirit of *the Constitution*.

B. The reliefs sought.

4. The petitioners therefore pray for three key reliefs. Firstly, for a declaration that sections 45, 46, 47 and 48 of the Election Act 2011; and, sections 27, 28 and 29 of the *County Governments Act* 2012 are unconstitutional. Secondly, for a declaration under Article 261(6)(a) of *the Constitution* that Parliament has failed to pass the legislation contemplated by Article 104(2) and the Fifth Schedule of *the Constitution*. Thirdly, the petitioners crave for an order to compel Parliament to pass the legislation within ninety days of the delivery of the judgment in this matter. There is also a prayer for costs."

69. In the final reliefs granted by the Court, the Court inter alia stated at paragraph 127 of the Judgment:

> " 127. The upshot is that the petition is partially allowed in the following terms:
>
> a. A declaration is hereby issued declaring sections 45(2)(3)and (6), 46(1)(b)(ii) and (c) and 48 of the *Elections Act* and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the *County Governments Act* are meaningless and superfluous; or, that they fall far short of the constitutional imperative in Article 104 of *the Constitution* and to that extent are unconstitutional.
>
> b. A declaration is hereby issued declaring sections 45(1)(b)(ii) and 45(6) of the *Elections Act* and Sections 27(6) and 28(1)(b)(ii) of the County Government Act discriminatory and therefore unconstitutional..."

70. The High Court which clothed with jurisdiction under Article 165 (3) (d) thus considered the question of constitutionality of Section 45 of the *Elections Act* and having heard the matter fully made the above determination. The Constitutionality of Section 45 of the *Elections Act* cannot thus be raised in subsequently via this Petition on ground that the issue of public participation was not canvassed hence because it is a different constitutional ground that was not canvassed in the initial matter, this Petition should stand.

Under explanation 4 on res judicata in Section 7 of the *Civil Procedure Act*, it provides:

Explanation 4- Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

71. The fact that the Petitioners are different does not allow them to relitigate a matter that the Court has addressed with finality and on merits. It is my finding that the instant Petition offends the doctrine of res judicata.

72. This finding suffices to dispose of this Petition even without further consideration of the remaining issues as res judicata is a jurisdictional bar. I must therefore down my tools at this juncture.

73. The upshot is that the Respondents Preliminary Objection on the basis that this matter is res judicata are upheld and the instant Petition is hereby struck out.

74. Being a public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF APRIL, 2026.

.....

L N MUGAMBI

JUDGE