REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E402 OF 2022

BETWEEN

RUTH KHANALI OGOLLA.....1ST PETITIONER

CHRISPIN MAYAKA BOSIRE..... 2ND PETITIONER

KELVIN NDOHO MACHARIA..... 3RD PETITIONER

KATIBA INSTITUTE.....4TH PETITIONER

VERSUS

REGISTRAR OF POLITICAL PARTIES..... 1ST RESPONDENT

JUBILEE PARTY..... 2ND RESPONDENT

UNITED DEMOCRATIC ALLIANCE..... 3RD RESPONDENT

FARMERS PARTY.....4TH RESPONDENT

AND

DATA PROTECTION COMMISSION..... 1ST INTERESTED PARTY

COMMISSION ON ADMINISTRATIVE JUSTICE.....2ND INTERESTED PARTY

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 8th August 2022 is supported by the 3rd Petitioner's affidavit in support of similar date.

2. The Petition assails the unlawful and irregular registration of Kenyan citizens, without their consent, to various political parties such as the 2nd, 3rd and 4th Respondents. The Petitioners faults the 1st Respondent's failure to offer an appropriate remedy to resolve the matter which they contend not only constitutes violation of the right to privacy but also amounts to infringement of Articles 10, 35, 36, 38, and 91 of the Constitution.

3. Consequently, the Petitioners seek the following relief against the Respondents:

    i. This Court be pleased to declare that the Respondents have violated Articles 10, 35, 36, 38, and 91 of the Constitution.

    ii. This Court be pleased to make a declaration that the Respondents have violated Section 34(d) of the Political Parties Act 2011 and Section 26 of the Data Protection Act 2019.

    iii. This Court be pleased to issue an order of mandamus compelling the 1st Respondent to operationalize the political parties' management information system as per the law.

iv. This Court be pleased to issue an order of mandamus compelling the 1st Respondent to conduct an audit for confirmation and verification of the accuracy of the 2nd to 4th Respondents' and other political parties' register of members as required under the Data Protection Act 2019 and cause deregistration of members not validly registered.

v. This Court be pleased to issue an order directing the 1st Respondent, the 1st and 2nd Interested Parties, to report to this Court, the progress made in expunging all names of the complainants from the registers of the political parties and the steps taken to ensure compliance with the Political Parties Act 2011, Data Protection Act 2019, within sixty (60) days from the date of the judgment herein.

vi. This Court be pleased to issue an order of mandamus compelling the 2nd to 4th Respondents as data controllers/data processors to be registered with the 2nd Interested Party as per the Data Protection Act.

vii. This Court be pleased to issue an order of mandamus compelling the 1st Respondent to deregister the 2nd to 4th Respondents from its list of validly constituted political parties in Kenya for violating the Petitioners constitutional rights and

contravening the Data Protection Act 2019 until they comply with the relevant provisions of the law.

viii. The Respondents bear the Petitioners' costs or in the alternative each party bears their own costs.

ix. This Court be pleased to issue any other reliefs it many deem just and fair to order.

x. Any other relief that this Court may deem just and fair to order.

Petitioners' Case

4. It is averred that in June 2021, the 1st Respondent introduced a technology software for verification of political party membership status through its *website*, *the e-citizen platform* and *vide an SMS code*. To access this information, one is required to input data in relation to their name, Identity Card number or Passport number, so as to confirm their registration status.

5. He depones that when the Petitioners accessed the 1st Respondent's platform on the e-citizen portal on 22nd June 2021, they were shocked to learn that they were registered irregularly by the 2nd to 4th Respondents. In reaction, they lodged their complaint with the 1st and 2nd Interested Party expressing their concerns over the illegal use of their data by these political parties.

6. He states that in a Statement released on 25th June 2021, the 1st and 2nd Interested Parties confirmed that they had received over 200 complaints concerning their irregular registration in various political parties without their consent. The 1st and 2nd Interested Parties resolved that their names were to be deregistered by the political parties. Further they proposed deliberations to ensure compliance with the Data Protection Act.

7. He alleges that instead of the 1st Respondent taking the necessary action and providing remedies for those irregularly registered, it collapsed its platform effectively denying Kenyans an opportunity to access information on their political registration status. He stresses that the 1st Respondent failed to ensure that complaints and concerns relating to the right to privacy were addressed adequately.

8. He depones that the 1st Respondent restored the system on 10th November 2021 and in an attempt to remedy the situation allowed citizens to check their status. He decries that the system only provided the option of resignation which is specifically reserved for persons who were already voluntarily registered to a political party and now sought to resign.

9. He points out that even if one was to select the option, no clear guidelines were provided as to when one was to be considered to have resigned thus failed to offer an ineffective remedy for violation of constitutional rights.

10. He depones that the 2nd and 4th Petitioners wrote to the 1st Respondent on 8th April and 8th June 2022 seeking access to information on the irregular listing of Kenyans to political parties. He avers that the 1st Respondent did not provide any response to their letter.

11. The Petitioners in light of this, argue that the 1st Respondent's action is in direct violation of Articles 31, 35, 36, 38, 47, and 91 of the Constitution as read alongside Section 18, 25, 26, 28 and 30 of the Data Protection Act, Section 17 and 34(d) of the Political Parties Act and Section 4 of the Fair Administrative Action Act.

1st Respondent's Case

12. Opposing the Petition, the 1st Respondent through its compliance officer, Joy Onyango filed a Replying Affidavit sworn on 5th October 2022.

13. She depones that the 1st Respondent as empowered by the Political Parties Ac, established a Political Parties Management Information System for the purpose of processing the political parties' data records. In view of this, the 1st Respondent developed the ***Integrated Political Parties Management***

System (IPPMS) to enable efficient and effective management of political parties' records.

14. She depones that the IPPMS led to the introduction of the unstructured supplementary service data (USSD) code **509#*, where using any type of mobile phone, a Kenyan can check their party membership status and resign from a political party. This is also accessible through the e-citizen platform and via link *ippms.orpp.or.ke*.

15. She informs that although the operative word in IPPMS is resignation, Kenyans who have been recruited without consent are able to indicate the same as their reason for resignation. Correspondingly, she informs that IPPMS allows the 1st Respondent to prompt Kenyans across mobile networks vide an SMS to either consent to or decline to join a political party.

16. That said, she informs that the 1st and 2nd Petitioners have protection under the Political Parties (Membership) Regulations, 2021 in terms of lodging a complaint. She makes known that the 3rd Petitioner is not a member of any political party.

4th Respondent's Case

17. The 4th Respondent in opposition to the Petition filed a Notice of Preliminary Objection dated 5th October 2022 anchored on the basis that:

i. *The Petition is premature as the Petitioners have not exhausted the statutory mechanisms of lodging a complaint in the prescribed form, under Section 56 of the Data Protection Act and Section 21 of the Political Parties Act to address the issues raised in the petition thus offending the exhaustion doctrine.*

ii. *In the absence of exhaustion of the statutory procedure under the Data Protection Act and the Political Parties Act, this Court lacks jurisdiction to entertain the Petition.*

iii. *As held in* ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR****, where the Petitioners' averments are mere bootstraps this Court cannot assume its enforcement of fundamentals rights jurisdiction.*

18. Additionally, the 4th Respondents through its Secretary General, John Itugi Kahura filed a Replying Affidavit sworn on 5th October 2022

19. In addition to the averments made in the Preliminary Objection, he depones that the Petitioners never raised the issues highlighted in Petition prior to this and thus the 4th Respondent cannot be accused of wrong doing.

20. He asserts that the 4th Respondent has not registered any persons illegally as alleged and that it maintains a high

standard of data protection over its members and prospective members, information. That said, he points out that the Petitioners did not adduce any evidence to demonstrate that the 4th Respondent registered people illegally.

21. That notwithstanding, he maintains that the provisions of the Data Protection Act were not applicable to the 4th Respondent during the registration period being 21st to 25th June 2021, as it was not a designated as data controller or processor under the Act. He informs that this obligation accrued on 14th July 2022.

22. He makes known that the 4th Respondent being a political party does not possess data for all the citizens in Kenya or political parties, thus the Petitioner's allegation in this regard is unfounded. Equally, he stresses that the 4th Respondent does not regulate political parties nor investigations on misuse of data.

23. He argues that the Petition is full of conjecture and fails to provide any evidence against the 4th Respondent. In the same manner, he contends that data survey adduced by the Petitioners is not compliant with the provisions of the Evidence Act, thus should be struck out. In sum, he states that the Petition is ripe for a dismissal.

Other Parties' Case

24. The other parties' submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Parties' Submissions

Petitioners' Submissions

25. In the submissions dated 31st March 2025, the Petitioners' advocate Joshua Malidzo Nyawa underscored the issues for discussion as: *whether the Court has jurisdiction to consider the Petition, whether the actions of the Respondents in registering the 1st, 2nd and 3rd Petitioners as members of political parties without their consent violated their right to privacy, whether the actions of the Respondents to register these Petitioners as members of a political party is a violation of their political rights and the right to association, whether the actions and omissions of the 1st Respondent are a violation of the right to fair administrative action, whether failure by the 1st Respondent to cause the deregistration of the Petitioners from the said parties resulted in unjustifiable and unreasonable limitation to their rights* and *whether the failure to provide information violates the right to fair administrative action under Article 35 of the Constitution*.
26. On the first issue, Counsel relying in Article 165(3) of the Constitution and opposing the 4th Respondent's assertion, submitted that only this Court, not a Tribunal or a body, has jurisdiction to determine the question of whether a right has been infringed or threatened, whether any law is inconsistent

with the Constitution and whether anything said to be done under the authority of the Constitution or any law is inconsistent with the Constitution. Counsel highlighted that the Petition revolves around violation of the rights under Articles 10, 24, 31, 35, 36, 38, 47 and 91 of the Constitution. Counsel stressed thus that these questions cannot be determined by Office of the Data Protection Commissioner.

27. To buttress this point reliance was placed in **William Odhiambo Ramogi** (supra) where it was held that:

> *"**Where a suit primarily seeks to enforce fundamental rights and freedoms, and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."***

28. Further reliance was placed on NGOs **Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)** and **Nicholus Abidha v Attorney-General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR)**.

29. Counsel in addition postulated that the 4th Respondent was proposing that the Petitioners split their case into smaller fractions and have different administrative bodies determine the various fractions which is untenable within the tenets of the Constitution. Equally, Counsel argued that the proposed remedies are not available and that are ineffective. Reliance was placed in **Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) [2024] KEHC 336 (KLR)** where it was held that:

> *"**Furthermore, the issues in the petition cannot be split, so some are dealt with by the Court and others by Parliament. Where there is an allegation of violation or threat to violate the Constitution, it is within the Court's mandate to determine the issue and not any other body."***

30. Turning to the second issue, Counsel submitted that the 2nd to 4th Respondents acquired the Petitioners' personal information without their knowledge and consent, in a manner that is not established. Counsel added that by illegally and arbitrarily registering the Petitioners as members of their parties, the 2nd, 3rd and 4th Respondents breached their right to lead autonomous and independent lives and caused them mental distress. As such, Counsel argued that the 2nd, 3rd and 4th Respondents acted arbitrarily in violation of the Petitioners

right to privacy under Article 31 of the Constitution and in breach of Section 18, 25, 26 and 30 of the Data Protection Act.

31. To buttress this point reliance was placed in **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** where it was held that:

> *"**The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a "private Submissions 12 sphere" with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued."***

32. Additional reliance was placed on **Coalition for Reform and Democracy (CORD) & 2 others –vs- Republic of Kenya & 10 others [2015] eKLR**.

33. Turning to the third issue, Counsel submitted that the Respondents violated the Petitioners right to freedom of association, including the right to form, join, or participate in any association of any kind. Counsel pointed out that Article 36(2) of the Constitution explicitly provides that a person shall not be compelled to join an association of any kind. This is

contrary to the 2nd ,3rd and 4th Respondents' action of deliberately registering the Petitioners as members of their political parties without their consent as observed in **Ndicho v Registrar of Societies & 3 others [2024] KEHC 15298 (KLR)**.

34. Equally, Counsel argued that the 1st Respondent violated the Petitioners rights under Article 47 of the Constitution as their platform was the only place they and Kenyans could verify their registration details thus the 1st Respondent was obliged to offer reasons but failed to.
35. Further to this, Counsel submitted that the 1st Respondent is mandated to uphold the dictates of the Political Parties Act. In this regard, a political party is required to keep a register under Section 17 which is then forwarded to the 1st Respondent. Section 18 of the Act provides that the 1st Respondent can audit this register and under Section 34 is required to verify and make publicly available the list of all members of political parties. Accordingly, Counsel argued that the 1st Respondent violated its statutory obligation by failing to verify the lists of members of the 2nd to 4th Respondents contrary to the rule of law.
36. Further to this, Counsel in the following issue argued that Article 35 (3) of the Constitution requires the state to publish and publicize any important information. Consequently, Counsel argued that the 1st Respondent was constitutionally required to disclose the register of members of political parties,

provide a platform where the Petitioners could access their registration status, remedies available against political parties who irregularly register members, how personal data from the political parties is received and processed by the office before being published on the e-citizen platform and steps undertaken to regularize the register of political parties.

37. Counsel stressed that this was not done by the 1st Respondent effectively violating the Petitioners' rights. In view of the foregoing, Counsel urged the Court to declare that the Respondents actions were unlawful and grant the prayers sought in the Petition.

1st Respondent's Submissions

38. The 1st Respondent's submissions to the Petition are not in the Court file or Court Online Platform (CTS).

4th Respondent's Submissions

39. The 4th Respondent through Chege and Sang Company Advocates filed submissions dated 8th (month omitted) 2025.The issues for discussion were set out as: *whether this Court has jurisdiction to entertain the Petition, whether the 4th Respondent was at the time of alleged violation designated as a data controller and processor thus liable under the Data protection Act, whether the Petition has adduced evidence of violation of the right to privacy by the 4th Respondent and whether the Petitioners are entitled to the reliefs sought*.

40. On the first issue, Counsel relying in Article 159(2)(c) of the Constitution and Section 9(2) (3) and (4) of the Fair Administrative Action Act submitted that a party is obligated to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving the Court for remedies save in exceptional cases. Further reliance was placed in **Speaker of National Assembly v Karume [1992] KLR 21** where it was held that:

> *"**Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure."***

41. Further reliance was placed on **Mohammed Baadi and Others vs The Attorney General and 11 Others [2018] eKLR** and **Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] KEHC 10266 (KLR)**.
42. In this matter, Counsel submitted that Section 56 of the Data Protection Act provides the statutory procedure to be followed by a data subject who feels aggrieved by alleged violation of privacy by a data controller and or data processor. Counsel underscored that the Petitioners filed this Petition prematurely

as they did not exhaust this mechanism. To buttress this point reliance was placed in **Muthoni v Solpia Kenya Limited t/a Sista Kenya [2023] KEHC 22373 (KLR)** where it was held that:

> ***"Parliament donated powers to an entity like the Data Commissioner to determine if one's privacy rights under Article 31(c) and (d) of the Constitution are infringed, then it means as much; that the Commissioner has such power to determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened. However, the Commissioner lacks the jurisdiction to interpret the Constitution***."

43. Turning to the second issue, Counsel submitted that the 4th Respondent as at the time of the impugned registration was not registered as a data controller and data processor under the Data Protection Act as this provision required Regulations in order to give it necessary effect. Counsel submitted that the Data Protection (Registration of Data Controllers and Data Processor) Regulations, 2021 were published in the Kenya Gazette on 14th January 2022 and came into effect on 14th July 2022. On this basis, Counsel emphasized that the 4th Respondent's obligations in that regard had not accrued and thus cannot be held liable under the law.

44. Turning to the third issue, Counsel submitted that the Petitioners filed copies of emails which are classified as electronic evidence. The Petitioners are however did not provide the relevant certificates as required under Section 106A and B of the Evidence Act and affirmed in the case of **Republic Vs Lloyd Stevenson [2016] eKLR** hence are inadmissible as evidence. Further, the documents were also not certified. In light of the submissions made, Counsel argued that the Petitioners are not entitled to the reliefs sought.

Analysis and Determination

45. It is my considered view that the issues that arise for determination in this matter are:
    i. ***Whether this Court has jurisdiction to entertain this matter.***
    ii. ***Whether the Respondents' violated the Petitioners' rights under Articles 31, 35, 36, 38, 47, and 91 of the Constitution.***
    iii. ***Whether the Petitioners are entitled to the relief sought.***

Whether this Court has jurisdiction to entertain this matter.

46. The 4th Respondent relied on Article 159(2)(c) of the Constitution and Section 9(2) (3) and (4) of the Fair Administrative Action Act for the submission that a party is

obligated to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving the Court for remedies. Counsel for the 4th Respondent cited Section 56 of the Data Protection Act and contended that the statutory procedure provided for redress of violation of right to privacy by a data controller and or data processer was not followed hence Petition premature for the failure to exhaust this statutory mechanism. Further, that the 4th Respondent as at the time of the impugned registration was not even a registered as a data controller and data processor under the Data Protection Act as this provision required Regulations in order to give it necessary effect and the Data Protection (Registration of Data Controllers and Data Processor) Regulations, 2021 were published in the Kenya Gazette on 14th January 2022 and came into effect on 14th July 2022 hence the 4th Respondent's obligations in that regard had not accrued and thus cannot be held liable under the law.

47. In opposing the assertion that this Court lacks jurisdiction, the Petitioners relied on Article 165(3) of the Constitution and maintained submitted this Court, not a Tribunal or an administrative body, has jurisdiction to determine the question of whether a right has been infringed or threatened or violated.
48. The Petitioner's Counsel, Joshua Malizo argued that the Petition raises issues of violation of the rights under Articles 10, 24, 31, 35, 36, 38, 47 and 91 of the Constitution which are beyond the Office of the Data Protection Commissioner to

determine pointing out that the 4th Respondent proposal is to have the Petitioners split their case into smaller fractions and have different administrative bodies determine each of those fractions which is untenable as the matters directly impact on the Constitution and further, that the proposed remedies are neither available nor ineffective

49. In my view, the Petition as pleaded clearly delineates the specific rights and fundamental freedoms that were allegedly violated and gives the factual particulars detailing how the violations came about or happened.
50. According to the Petitioner, the actions of the Respondents complained of have cumulatively violated Articles 10, 31, 35, 36, 38, 47 and 91 of the Constitution.
51. The doctrine of exhaustion of remedies requires that where a dispute can be fully and properly resolved either through a procedure provided for in the legislation or Regulations, then that is the primary process that ought to be followed rather than directly invoking Court's jurisdiction. The Supreme Court in **Waity v Independent Electoral & Boundaries Commission & 3 others [2019] KESC 54 (KLR)** guided as follows:

> ***"[63] Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and***

later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

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

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

"…We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the

court below, and for the reasons we have given, that the appellant's petition lacked merit and was for dismissal."

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

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

53. Statutorily, Section 8 (1) (f) gives the Data Commissioner the power to among others '***receive and investigate any complaint by any person on infringements of rights under this Act'.*** The Data Protection Act is however narrow its application because the preambular clause states that the Act was enacted to give effect to Article 31 (c) and (d) of the Constitution. This makes the Act unsuitable in situations involving multiple intertwined constitutional violations from the actions complained as that takes the matter outside the scope of the Data Protection Commissioner. I thus find this Court's jurisdiction under Article 165 (3) (b) & d was properly invoked in the circumstances of this case.

54. This Court therefore finds the 4th Respondent's Preliminary Objection which is solely based on the provisions of the Data Protection Act to be devoid of merit and thus dismiss the same accordingly.

Whether the Respondents' violated the Petitioners' rights under Articles 31, 35, 36, 38, 47, and 91 of the Constitution.

55. Upon a careful review of the present Petition, I would like to reiterate the same satisfies the threshold of specificity and precision required in pleading Constitutional Petitions as spelt

out by the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)** where it observed thus:

> ***"[349] …. Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement…"***

56. Nevertheless, a properly drawn Petition is not an end in itself. The Petitioner must now move ahead and tender proof of the allegations contained in the Petition by adducing cogent and credible evidence that substantiates the allegations put forward on a balance of probabilities.

57. The Evidence Act, Cap 80 hence provides as follows:

> *107. Burden of proof*

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

58. In **Edward Akong'o Oyugi & 2 others v Attorney General [2019] KEHC 10211 (KLR)** the Court held as follows:

"73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[38] :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

74. <u>It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses</u>."

59. The question thus becomes, did the Petitioner prove that the Respondents unlawfully and irregularly allowed and/or registered the Petitioners into political parties such as the 2nd-4th Respondents without their consent. This allegation was denied by the Respondents. It was the responsibility of the Petitioners to provide cogent and credible evidence of this essential fact that forms the bedrock of the Petition. One of the essential fact is the proof of such registration into any of the political parties.

60. The 4th Respondent assailed the evidence relied upon by the Petitioners by pointing out the Petitioners have relied on copies of emails which constitute electronic evidence yet did not provide the relevant certificates as specified under Section 106A and B of the Evidence Act hence the same is inadmissible as proof of the facts asserted. Further, that they had relied on uncertified copies.

61. The Petitioners did not specifically react to this submission.

62. The Evidence Act at 106 B (4) provides:

106B. Admissibility of electronic records.

(1) ***Notwithstanding anything contained in this Act****, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.*

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a)the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any

activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then

all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment,

whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

63. Section 106B is the primary and the overriding provision when it comes to admissibility of the electronic evidence such as emails, CCTV footage, call records, electronic texts or chats, digital photos and so on. It supersedes any other provision in the Act in regard to admissibility of electronic evidence given its introductory and/or opening statement which those states ***'notwithstanding anything contained in the Act.'*** It means despite Section 78A of the Evidence Act appearing to be more broad and permissive, it does not derogate from the provisions of Section 106B of the Evidence Act on the production of a formal certificate of electronic evidence issued under Section 106 B (4) by a responsible person in charge of operating the device used in the generation of the electronic record, which in effect, confirms that specific technical threshold pre-conditions that are prescribed were satisfied in regard to the electronic evidence as a guarantee of its integrity in view of the high risk that exists due to the ease of tampering and the difficult of intangible detection. The certificate by the party relying on such evidence is thus an obligation fixed by law requiring the Party to ascertain on oath, the electronic evidence

he/she tenders has not been interfered with as a guarantee for its integrity before its admission.

64. In the instant case, the Petitioners failed to comply with the requirements of the Section 106 B (4) for they did not file the certificate of electronic evidence. As such, they avoided the legal obligation of ascertaining the genuiness and the integrity of the electronic record they offered before the Court as their evidence.
65. As such, the electronic evidence relied upon in this Petition does not meet the legal threshold of admissibility hence is inadmissible. The Petition essentially relies on electronic evidence without which it stands no chance and must therefore inevitably collapse for want of proof.
66. The upshot is that the Petition is hereby dismissed. Since it is public interest litigation, I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 30th April, 2026.

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L N MUGAMBI

JUDGE