IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, F. SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 431 OF 2019

BETWEEN

HON. CLEMENT KUNG'U WAIBARA.....APPELLANT

AND

HON. ANNE WANJIKU KIBEH.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

(Being an appeal against the judgment and orders of the High Court of Kenya at Nairobi, (Lydia Achode, J) dated 14th *August, 2019* in **Const. Pet. No. 8B of 2019**)

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JUDGMENT OF THE COURT

The appellant **Hon. Clement Kung'u Waibara** is a voter and resident of Kiambu County, Gatundu North Constituency. He contested the 8th August, 2017 elections as a candidate for the seat of member of National Assembly, "MP" Gatundu North Constituency and lost to **Hon. Anne Wanjiku Kibeh** the 1st respondent.

On 18th February, 2019, he filed a Constitutional Petition dated 14th February, 2019 in the High Court seeking a declaration that the 1st respondent, holds office as an MP for Gatundu North Constituency in violation of Article 103(1) (g) as read together with Article 99(2) (d) of the Constitution because she was not qualified to contest for elections as an MP on the date of her election on 8th August, 2017.

Following the filing of the Petition in the High Court at Kiambu, **Lady Justice Meoli** disqualified herself from hearing it and referred the same to the Chief Justice for directions as to its hearing. The Chief Justice gazetted the petition and on 2nd July 2019 appointed **Lady Justice Lydia Achode** to hear and determine the petition. The petition was canvassed and dismissed on 14th August, 2019 for want of merit. The appellant was also ordered to bear the costs of the petition. Aggrieved by the decision of the High Court, the appellant filed this appeal against the whole judgment and decree of the High Court.

The facts leading to this appeal are not in dispute. On 3rd March, 2017, the 1st respondent tendered her application to the Jubilee Party for nomination to contest the 2017 General Election as the party's candidate for election as MP Gatundu Constituency. She was on 27th June, 2017 vide Gazette Notice No. 6253 of 2017 gazetted by the "2nd respondent". The Independent Electoral and Boundaries Commission, an independent commission established under Article 88 of the Constitution with the mandate to conduct or supervise referenda and elections to any elective office or body established by the Constitution and any other election prescribed by the Elections Act, as the duly nominated candidate to contest in the 2017 General Elections as the Jubilee party's candidate for MP Gatundu North Constituency.

Subsequently, following the General Election of 8th August, 2017, the 1st respondent was declared winner by the 2nd respondent. Prior to her election as MP, the 1st respondent served as a nominated Member of County Assembly (MCA) of Kiambu County for a period of five years from 17th July 2013 pursuant to Gazette Notice No. 9794 of 17th July, 2013.

The appellant filed a constitutional Petition claiming that the right to vie for election as a Member of Parliament is subject to clear, elaborate and mandatory qualification criteria set out in the Constitution and in particular Article 99 of the Constitution. That the criteria established under Article 99(2)

> d. of the Constitution overrides the right to vie in an election for MP seat and a person stands disqualified if at the date of the election such a person was an MCA.

It was the appellant's case that as at the date of the 1st respondent's gazettement as the Jubilee Party's validly nominated candidate for election as the Gatundu North Constituency through to the General Election of 8th August, 2017, the 1st respondent was not qualified for election since her term as an MCA of Kiambu County was yet to expire. That at all the material times up to the date of the General Election, the 1st respondent was enjoying all the benefits and responsibilities attendant to the office of MCA – Kiambu County.

The appellant contends that the 2nd respondent was negligent in discharging its mandate to ensure that the 1st respondent was duly qualified under the Constitution and applicable law for election as MP. That the 2nd respondent perpetuated an illegality that persists to date in breach of the Constitution and at the expense of the residents of Gatundu North Constituency.

The respondents' countered the arguments by the appellant by raising the question of jurisdiction and in particular *res judicata*. The petition as already stated was canvassed in the Election Court before ***Achode,* J**. The learned judge set out the central issue for determination as whether the court was barred from hearing and determinating the petition under the doctrine of *res judicata*.

In the judgment delivered on 14th August, 2019, the learned judge found that the matter that was directly and substantially in issue in the petition was directly and substantially in issue in *Election Petition No. 1 of 2017* and between the same parties and hence found that the High Court; invoking the doctrine of *Res judicata* the High Court declared itself functus officio as it could not sit on an appeal against its own decision.

As a result of the aforesaid finding, the learned judge dismissed the petition for lack of merit and ordered the appellant to bear the costs of the petition.

The appellant dissatisfied with the whole judgment of the High Court filed the instant appeal. In the memorandum of appeal dated 28th August, 2019 the appellant set forth the following grounds:

> "1. The learned judge erred in law and in fact in failing to holistically apply the doctrine of res judicata to the fill factual circumstances of the petition and thereby made the wrong decision in dismissing the petition on the basis of res judicata.
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> 2. The learned judge misdirected herself in finding that the subject matter of the petition was heard and determined at the interlocutory stage in Election Petition No. 1 of 2017 between the same parties herein and thereby misapplied the doctrine of res judicata to inaccurate and/or erroneous factual circumstances.
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> 3. The learned judge selectively deduced the judgment of the High Court (Prof. Justice Joel Ngugi) in Election Petition No. 1 of 2017 and thereby disregarded clear and uncontroverted evidence pointing to the fact that the subject matter of the petition before her was undetermined on jurisdictional grounds.
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> 4. The learned judge erred in law in failing to interpret and apply the doctrine of res judicata harmoniously with the express provisions of Article 105(1)(b) of the Constitution and section 76(1) (c) of the Election Act both of which read together grants the High Court enduring and/or residual jurisdiction to hear and determine the issues raised in the petition at any time.
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> 5. The learned judge otherwise elevated the provisions of section 7 of the Civil Procedure Act above mandatory and binding provisions of Article 105(1)(b) of the Constitution and binding precedent of this court and the Supreme Court on the settlement of disputes of the nature before her.
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> 6. The learned judge misapprehended the petition before her and or totally disregarded the appellant's cause of action as pleaded under *Article 165(3) and (6), Article 103(1)(g), Article 105(1)(b) and Article 99(2)(d) of the Constitution. Read together with section 76(1) (c) of the Elections Act and thereby wrongly dismissed the petition.*
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> 7. The learned judge otherwise misapprehended the petition before her and wrongly treated it as an Election Petition challenging the validity of the Election of the Member of the National Assembly Gatundu North Constituency under Article 105(1) (a) of the Constitution and Section 76 *(1)(a) of the Elections Act and thereby erroneously dismissed it as time barred.*
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> 8. The impugned judgement has effectively rendered the post-electoral remedies contemplated under Article 105 (1)(b) of the Constitution and section 76(1) (c) of the Elections Act otiose.
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> 9. The impugned judgment was in the circumstances made for convenience and undermines fundamental principles and values of the constitutionalism, rule of law, accountability, transparency and supremacy of the Constitution that the post electoral remedies enshrined under Article 105 (1) (b) of the Constitution were intended to promote and uphold.

10. The learned judge erred in law in failing to expunge the responses to the petition that were filed over five months (5) late and without any application and/or prayer for extension of time and/or leave for the same.

11. The learned judges erred in law and misdirected herself in failing to attach any weight to the prejudice occasioned on the appellant by the respondent's deliberate and unexplained inordinate delay in responding to the petition barely 10 days to the constitutionally set deadline for the disposal of the petition.

12. The learned judge unjustly and unreasonably condemned the appellant to payment of costs in public interest litigation.

13. The learned judge otherwise failed to take into account relevant circumstances and/or took into account irrelevant circumstances and thereby wrongly exercised her discretion in condemning the appellant to payment of costs of the petition.

14. On the whole the decision of the High Court was made with undue regard to technicalities and was in the circumstances unjust."

He prayed for the following orders:

"(i) The appeal be allowed and the whole of the decision of the High Court (Hon. Justice Lydia Achode) given on 14th *August, 2019 be vacated and or set aside.*

ii. That a declaration be and is hereby issued that the factual matrix of the petition was uncontested and/or admitted by the respondent.

iii. This appeal be heard de novo and that the court be pleased to re-appraise the petition in its entirety, to draw its own inferences of fact and law to make its own decision on the same.

iv. In the alternative, that the Court be pleased to draw its own inferences of law based on the uncontested and/or admitted factual matrix of the petition and to make its own decision on the same.

v. This appeal be allowed and the whole of the decision of the High Court (Hon. Justice Lydia Achode) given on 14th *August, 2019 be substituted with an order allowing petition No. 8B of 2019 with costs to the appellant.*

vi. The appellant be awarded the costs of this appeal and the costs of the petition in the High Court."

The appeal was canvassed by way of written submissions with limited oral highlights. On the issue of jurisdiction of this Court to hear and determine the appeal, **Mr Awele**, learned counsel for the appellant submitted that the Court has unlimited jurisdiction to determine the real issues in controversy given that this is a first appeal from the trial court. He argued that Rule 29(1) of the Court of Appeal Rules grants this court power to re-appraise the factual circumstances of the petition and to draw its independent inferences on the same.

Counsel submitted that in determining the petition, the learned judge of the High Court misdirected herself on a number of factual issues and applied the law of *res judicata* to the wrong set of facts and as a consequence came to a wrong conclusion. In particular, counsel contended that the learned judge erred in law and in fact in her finding that the subject matter of the petition, that is, whether the 1st respondent was qualified to vie for election as MP in the 2017 General Election, was heard and determined at the interlocutory stage in Election Petition No. 1 of 2017 between the same parties herein and thereby misapplied the doctrine of res judicata to erroneous factual circumstances. That the learned judge ignored the weighty constitutional questions posed in the petition thus occasioned a serious miscarriage of justice and prejudice to public interest. He opined that the learned judge made an error of fact by holding that the subject matter of the petition had also been dealt with by this Court in Election Petition Appeal No.20 of 2018.

According to **Mr. Awele**, both judgments in Election Petition No.1 of 2017 and Election Petition Appeal No. 20 of 2018 demonstrated that although the issue of the 1st respondent's qualification was raised, the same has never been determined on its merits or at all. That the issue of the 1st respondent's qualification was raised for the first time in the election petition No. 1 of 2017 under Article 105(1)(a) of the Constitution as read with section 76(1)(a0 of the Election Act which challenged the validity of the election of the 1st respondent. That the issue of qualification was not heard and determined on merit following the ruling made at an interlocutory stage and the court had no jurisdiction to hear and determine the issue since it was time barred and ought to have been raised at first instance with the IEBC as a pre-election dispute. That in subsequent appeal to this Court, the court overturned the finding of the High Court that it did not have jurisdiction to determine the question of qualification and owing to the limited jurisdiction of this Court on election petitions, it declined to determine that issue.

It was therefore the appellant's submissions that neither the Court of Appeal nor the High Court delved into the merits of the issue of the 1st respondent's qualifications. Hence, the issue was alive and cannot be said to be res judicata. **Mr. Awele** submitted that under Section 7 of the Civil Procedure Act, an issue becomes *res judicata* when the same has been pleaded, heard and determined on its merits between the same

parties. Indeed, he claimed that such a weighty issue could not have been determined at an interlocutory stage and through an application that sought for leave for admission of additional evidence.

According to **Mr. Awele**, the learned judge elevated the principle of res judicata above the superior provisions of Articles 105(1)(b) and 103(1)(g) of the Constitution. He relied on the case of ***Okiya Omtatah Okoiti & another v Attorney General & 6 others (2014) e KLR and Union of Civil Servants & 2 other v Independent Electoral*** and ***Boundaries Commission (IEBC) & another (2015) e KLR*** where it was held that in constitutional matters, the principle of res judicata should only be invoked sparingly and in very clear circumstances.

It was counsel's position that there is a fundamental difference between a petition filed under section 76(1) (a) of the Constitution and the instant appeal brought under Article 105(1) (b) of the Constitution as read with Section 76(1)(c) of the Elections Act. He claimed that a petition filed under Article 105(1)(b) of the Constitution as read with Section 76(1)(c) of the Elections Act grants the High Court original jurisdiction to inter-alia hear and determine at any time the question whether a seat of the Member of Parliament has become vacant. He argues that this peculiar jurisdiction is not coincidental because it grants the High Court powers to determine the qualification of a Member of Parliament whether immediately or during their term of five years.

While relying on the case of ***Kituo Cha Sheria v John Ndirangu Kariuki (2013) e KLR, Mohammed Abdi Mahumud v Ahmed Adbullahi Mohamed & 3 others (2018) e KLR*** and ***Silverse Lisamula Anami bs Independent Electoral & Boundaries Commission & 2 others SC Petition No. 30 of 2018*** Mr. Awele submitted that courts can intervene at any time on the discovery of any breach of election qualification requirements that have not been previously dealt with, with finality.

On the issue of whether the 1st respondent was qualified for election as an MP, Gatundu North Constituency, **Mr Awele** submitted, firstly, that the 1st respondent was a nominated MCA in Kiambu County following the 2013 General Election. By dint of Article 177(4) of the Constitution, she was to serve as an MCA Kiambu County for a period of five years from 17th July, 2013. Her term was set to expire on 8th August, 2017 following the General Election of that year. The 1st respondent was nominated and gazetted vide gazette notice No. 6253 of 2017 dated 27th June, 2017 as the duly nominated Jubilee Party candidate to contest the 2017 General Elections for the seat of MP, Gatundu North Constituency. As a result, **Mr Awele** argued that as at the date of her nomination, the 1st respondent was still an MCA of Kiambu County.

Secondly, **Mr. Awele** submitted that under Article 99(2) (d) of the Constitution, the 1st respondent stood disqualified from being elected as an MP, Gatundu North Constituency since as at the date of her election she was an MCA Kiambu County, continued to draw salaries, benefits and emoluments from Kiambu County in violation of the Constitution. He submitted that under Article 10 of the Constitution, the 1st respondent was bound by the principles of national values and principles of governance and in particular rule of law, integrity, transparency and accountability.

Thirdly, Mr. Awele submitted that the 1st respondent continued to occupy the seat of MP, Gatundu North Constituency illegally and in violation of the Constitution. Counsel relied on the cases of **Luka lubwayo & Another b Gerald Otieno Kajwang and another, Kennedy Moki v Rachel Kaki Nyamai & 2 others (2018) e KLR, Advisory Opinion No. 2 of 2012** in the matter of **the principle of gender representation in the national assembly and the senate and John Harun Mwau & 2 others v IEBC & 2 others PT No. 2 & 4 of 2017** where it was held that an election is not an event but a process. He contends that nomination is one of the stages of an election process. Subsequently, the 1st respondent ought to have resigned before being nominated to contest for the seat of the member of National Assembly, Gatundu North constituency.

Lastly, **Mr. Awele** submitted that the petition before the court ought to have been determined as an undefended cause. The 1st respondent filed her response to the petition well over 5 months since the filing of the petition while the 2nd respondent filed its response about a month after filing of the petition. Both parties failed to tender any explanations on the delay. That pursuant to the provisions of Article 105(2) of the constitution, the petition ought to have been determined within 6 months. Counsel thus submitted that the delay in responding to the petition caused inordinate delay especially because the respondents did not seek for leave to file their responses out of time or for grant of extension of time to have their responses properly on record.

On the issue of costs, **Mr. Awele** submitted that the learned judge erred in ordering the appellant who had instituted the petition in public interest to pay costs. Counsel contended that the petition raised weighty constitutional issues thus condemning the appellant to pay costs set a bad precedent for public interest litigation.

The 1st respondent, was represented by **Mr. Nyabuti**, learned counsel. Counsel submitted that to the extent that the petition sought for a declaration that a vacancy of a parliamentary seat had arisen, the proceedings premised under Article 105 of the Constitution of Section 76 of the Elections Act and amounted to an election petition. He submitted that section 85A of the Elections Act restricts election petition appeals to this court on matters of law only. He therefore claims that section 85A bars this Court from delving into matters of fact and therefore

cannot inter alia re-appraise the petition de-novo in its entirety as requested by the appellant.

Mr. Nyabuti argued further that the appeal is limited to one issue – whether the doctrine of *res judicata* was properly invoked by the High Court. He submitted that the learned judge of the High Court applied the principles of *res judicata* set out in ***Uhuru Highway Development v. Central Bank (1996) LLR*** ***CAK 2126 properly***, to the extent that the parties in these proceedings were the same as those in Election Petition Number 1 of 2017 and Election Petition Appeal No. 28 of 2018. And also that the issue of the 1st respondent's qualification to contest in the election was in issue in Election Petition Number 1 of 2017 and Election Petition Appeal no. 28 of 2018.

Further, relying on the case of ***E.T v. Attorney General & Another (2012) eKLR***, **Mr. Nyabuti** submitted that the appellant was seeking the same remedy before the court by introducing new cause of action on an issue that has already been litigated upon by a competent court. He submitted that the omission of the appellant in prosecuting its case in Election Petition No. 1 of 2017 and Election Petition Appeal No. 28 of 2018 cannot be cured by instituting a separate case.

On the issue of costs, **Mr. Nyabuti** submitted that the High Court exercised its jurisdiction properly and within the law and this court ought not to interfere with that discretion because the appellant has not provided sufficient grounds to convince this Court do so.

In response to the issue of respondents filing their responses out of time, counsel submitted that they made an application to the High Court to file responses out of time which application was allowed. **Mr. Nyabuti** urged us therefore to dismiss the appeal with costs to the 1st respondent.

The 2nd respondent, was represented by **Mr. Muchemi**, learned counsel. He submitted that the issue of qualification of the 1st respondent has been litigated upon in Election Petition Number 1 of 2017 and Election Petition appeal No. 28 of 2018 and was the issue in the High Court and in this appeal. He therefore submitted that the learned judge of the High Court applied the doctrine of *res judicata* properly in these proceedings. Relying on the case of ***George W. M. Omondi & Another v. National Bank of Kenya Ltd & 2 Others (2001) eKLR***, counsel submitted that the doctrine of *res judicata* is based on two principles – that there must be an end to litigation and that a party should not be vexed twice over the same cause.

According to **Mr. Muchemi**, the issue of the eligibility of the 1st respondent to contest as a Member of the National Assembly is an issue that had already been dealt with by the same parties and competent courts including the Supreme Court thus cannot be raised again in a different petition.

On the issue whether the 1st respondent was eligible to contest for the seat of the MP for Gatundu North Constituency, counsel relying on the interpretation of the Constitution by Justice Mativo in ***Stephen Wachira Karani & Anther v. Attorney General & 4 Others (2017) eKLR*** submitted that the law does not prohibit a member of County Assembly from being nominated to vie for a parliamentary seat by a political party. That nomination to contest is not an election within the meaning of Article 99 of the Constitution. He submitted that the issue raised by the appellant in this appeal in relation to the qualification of the 1st respondent had been determined by courts of competent jurisdiction. In any event, counsel submitted that the interpretation sought by the appellant in this appeal will arrive at illogical and unworkable results and would be contrary to public interest.

Having considered the record of appeal, and the rival submissions made both written and oral, we are of the view that the following are the issues for determination in this appeal;

a. Whether the High Court invoked the doctrine of *res judicata* properly.

b. The issue of costs

c. What is the appropriate relief?

The doctrine of *res judicata* as set out in section 7 of the Civil Procedure Act is to the effect that:

> **"No court shall try any suit or issue in which the matter directly or 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 courts."**

In the case of ***Uhuru Highway Developers Limited vs. Central Bank of Kenya & Others*** this court stated that the doctrine of *res judicata* applies where there is a previous suit in which the matter was in issue, the parties were the same or litigating under the same title, a competent court heard the matter in issue and the issue has been raised once again in a fresh suit.

The principle of *res judicata* allows a party to litigate the subject matter between the same parties only once. Litigation over the same subject matter must come to an end once it has been finally determined on merits by a court of competent jurisdiction. Essentially, *res judicata* is a principle of law that seeks to ensure that there is conclusiveness in litigation – litigation must come to an end as it is often said.

This Court has addressed the rationale of the doctrine of *res judicata* in the case of ***John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** thus:

> **"The rationale behind res judicata is based on public interest that there should be an end to litigation coupled with the interest to protect a party facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resource and timely termination of cases. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law...In a nutshell, res judicata being a principle of law, may be raised as a valid defense. It is a doctrine of general application and it matters not whether the proceedings are constitutional in nature. The general consensus therefore remains that res judicata being a general principle of law that relates to jurisdiction of the court, may be raised as a defense to a constitutional claim..."**

We shall now proceed to examine whether the conditions set out in section 7 of the Civil Procedure Act and the above case law were satisfied in the trial court and whether the application of the doctrine of *res judicata* by the trial court was justified.

It is not controverted that there was Election Petition Number 1 of 2017 and Election Petition Appeal No. 28 of 2018 where the issue of qualification of the 1st respondent to contest for election for Gatundu North Constituency was in issue and the parties. What is contested though is whether the qualification of the 1st respondent was determined on merits in the previous petition and election petition appeal and as to whether the issue has been raised afresh once again in the petition leading to this appeal.

Mr. Awele submitted that whereas the issue of the 1st respondent's eligibility was raised in Election Petition No. 1 of 2017 and subsequently in the Election Appeal No. 28 of 2018, the issue was never determined on its merits by any of the courts. According to Mr. Awele, *res judicata* is applicable where the issue has been pleaded, heard and determined on merits with finality. Counsel claimed that the issue of qualification for the 1st respondent is still live and ripe for determination. On other hand the respondents are adamant that the question on eligibility of the 1st respondent to contest as an MP for Gatundu North Constituency had been dealt with by courts of competent jurisdiction from the Election Court in Election Petition Number 1 of 2018 all the way to the Supreme Court of Kenya.

We acknowledge that the principle of *res judicata* is to bring an end to litigation and that a party ought not to be vexed twice over the same issue. Therefore, we must interrogate whether the question of eligibility of the 1st respondent to contest for election as an MP for Gatundu North Constituency has been litigated upon by the parties herein and settled with finality.

A reading of the judgment in Election Petition No. 1 of 2018 reveals at paragraph 4 thereof that the appellant had raised the issue of the appellant continuing to draw salaries and privileges until 8th August 2017 as a nominated MCA of Kiambu County in violation of the Constitution. Further, the appellant had made an interlocutory application seeking for an order for the County Secretary to provide payroll information with the aim of establishing that the 1st respondent had not resigned from her position as an MCA prior to the election date. The learned judge in dismissing the interlocutory application stated as follows:-

> **"The respondents have also urged me to disallow the prayer for the 1*st* respondent's employment and salary information based on the fact that the claim the information seeks to establish is time barred and in the wrong forum anyway. The argument is that any disputes related to nominations ought to have been filed at the 2*nd* *respondent's dispute resolution tribunal established under Article 88(4)(e) of the Constitution.***
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> **I find this argument to be persuasive: it is too late for the petitioner to raise this argument now – long after nominations and elections were held. The court would, as a prudential matter, refuse to take jurisdiction to deal with this question at this time. In any event, I note that any information supplied by the County Secretary on the employment and salary of the 1*st* respondent would not support any specific ground for annulment of the petition. As such, any production and admission of evidence in this regard would impermissibly expand the petition beyond the constitutional timelines."**

In his final judgment dated 1st March 2018, the learned judge while determining the issue on the 1st respondent employment and salary, reiterated his reasoning at the interlocutory stage and declined court's jurisdiction to deal with that question for want of jurisdiction. For clarity, the learned judge held thus:-

> **Where the Constitution or a statute creates an alternative forum for resolving disputes, a party is bound to use it before coming to court. Such a party must demonstrate to the court that he has exhausted the other forum before the court agrees to seize jurisdiction. This is a doctrine of vintage judicial ancestry in Kenya (see Speaker of National Assembly vs. Karume [1992] KLR 21) from which I do not intend to depart. In the Karume Case, the Court held thus:-**
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> > **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 procedures...**
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> **Many cases decided in the post 2010 period have found this reasoning to be sound even in under the 2010 constitutional dispensation. For example, a three-judge bench of the High Court remarked in the Matter of the Mui Coal Basin Local Community [2015] eKLR, the rationale is thus:-**

The reasoning is based on the sound constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating that Supreme Court Justice J. B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fueled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence at certain prudential points intersect with the Judicial system) while some will remain parallel to the judicial system.

For the reason that the petitioner did not fulfill his obligations under the doctrine of exhaustion to utilize the mechanisms accorded to him by the Constitution to raise this issue and because the petitioner did not demonstrate that the case fell within the narrow class of cases where an exception to the exhaustion doctrine applies, this claim also fails.

At this stage we are mindful that this Court is not sitting on an appeal from Election Petition No. 1 of 2017. As such we cannot get into the arena of determining whether or not the learned judge was wrong in declining jurisdiction. Indeed, that issue was the subject of the appeal in Election Petition Appeal No. 28 of 2018 where the court examined the finding made by the learned judge on want of jurisdiction and stated as follows:-

Concerning the question of whether the court had jurisdiction, we are of the view that the election court was wrong in declining jurisdiction in respect of the issue of the appellant's qualification...on whether the application was connected to the petition, we find that the learned judge was wrong in declining to grant for the orders sought for this reason. This is because at paragraph 39 of the petition, the 1*st* *respondent specifically pleaded that;* "The petitioner avers that the 1st respondent violated the law, the constitution, regulations and good practice by continuing to draw salary and privileges as nominated MCA until 8th August 2017." *It was therefore apparent that this was one of the grounds that the 1st respondent sought to canvass and therefore it was a matter that was concerned with the petition.*

***The third reason given by the judge for declining to grant the orders was that an order for "...*production and admission of evidence in this regard would impermissibly expand the petition beyond the constitutional timelines", in our view this was a relevant factor for consideration when exercising the court's discretion whether to grant the orders sought. This is because it is true that elections petitions are required to be concluded within strict constitutional timelines, which the court was required to adhere to, and there was the possibility that any delay in obtaining the documents could extend determination of the petition beyond the constitutional timelines.**

Accordingly, we consider that, the learned judge took into account matters that he should have taken into consideration, and in so doing arrived at the right conclusion. See Mbogo & Another vs. Shah [1968] EA 93. Notwithstanding our finding that the trial court erred in declining jurisdiction, and by finding that there was no connection between the application and the petition, we are satisfied that the judge properly exercised its discretion in declining to grant the motion filed on 2*nd* *October 2017.*

The court in this appeal considered and determined the issue as to whether the learned judge of the High Court erred in declining jurisdiction and dismissing the application for introduction of additional evidence. We remind ourselves that the question that lies before us for determination is whether the issue of qualification of the 1st respondent has been determined in a previous petition with the resultant consequence that it is barred from being re-litigated once again by the parties herein. On this issue, the High Court found that;

1. From the above, it is not in doubt that the question *of the 1st* respondent's eligibility properly belonged to the subject of litigation in Election Petition No. 1 of 2017. Further, that the Election Court was required to adjudicate on the issue which it did at the interlocutory stage and reiterated in paragraphs 79 to 83 of the judgment of 1*st* *March 2018.*

We have elsewhere above reproduced the findings of the learned judge in Election Petition No. 1 of 2017 in the judgment dated 1st March 2018. When a court declines jurisdiction, can it be argued that the court has determined the issue fully?

To answer that question, it is certain that the issue of the 1st respondent qualification was alive in the Election Court and was equally alive in the appeal before this court. It was pleaded in both petitions, deliberated upon and we do not agree with the learned judge of the High Court appeal that the issue was determined fully on its merit. We say so because this far we have not found in either Election Petition No. 1 of 2017 or Election Petition Appeal No. 20 of 2018 any finding made on the eligibility of the 1st respondent to contest for election as an MP for Gatundu North Constituency. The issue was dismissed on want of jurisdiction. For the doctrine of *res judicata* to apply and as already stated the subject matter must have been conclusively decided in the previous proceedings by a competent court with jurisdiction. To dismiss the issue for want of jurisdiction does not have the effect of making the issue fully determined on merits. It follows therefore that the issue on the qualification of the 1st respondent to contest is yet to be determined.

Mr. Nyabuti urged us to apply the doctrine of *res judicata* in this appeal to the extent that the issue of qualification of the 1st respondent's eligibility ought to have been canvassed in the previous petitions – Election Petition No. 1 of 2017 and Election Petition Appeal No. 20 of 2018. In the case of ***Mburu Kinyua vs. Gachini Tuti***, citation this Court stated as follows on the question of *res judicata*;

> **Where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, in advertence or even accident, omitted part of their case.**
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> **The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to *subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.***

The fundamental importance of the rule that a party must plead and canvass their whole case in one go is to avoid litigation on piece meal basis. A party must bring forward all matters that ought to have been pleaded as part of the case, touching on the issue in question and all matters that belong to the subject of litigation at one go. **Mr. Muchemi** while relying on the case of ***Mburu Kinyua vs. Gachini Tuti*** urged us that a court of law will only allow parties to re-open the same subject matter in special circumstances. We agree, it is only in special circumstances that a court of law can depart from the *res judicata* rule and allow parties to re-open the matter. Do special circumstances exist in this case? We shall now answer this question.

Firstly, it is not in dispute that the issue of qualification and eligibility of the 1st respondent to vie, was raised and was in issue in the previous petition. It therefore cannot be said that the appellant was negligent in not bringing the issue forward at the time of filing Election Petition No. 1 of 2017. We have found that this question was not determined on merits. The appellant is thus not barred from re-litigating the issue in the subsequent petition, and more so this being a constitutional petition; where it has been held that the doctrine should be invoked sparingly. See **Okiya Omtata Okoiti & Another (supra).** To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy, which is not the case in this appeal.

Secondly, the learned judge in the High Court found that the appellant had disguised the issue in this appeal by re-framing it differently and concluded that the appellant was seeking a second bite on the same cherry. On that aspect, the High Court stated as follows:-

> **80. It is therefore inconsequential that the petitioner has framed his grounds for determination differently. The reliefs sought in the current petition and those sought in Election Petition No. 1 of 2017 are identical and with regard to the same issue as stated above. The matter directly and substantially in issue in the current suit was directly and substantially in issue in Election Petition No.1 of 2017, in which it was dismissed by the court. This issue having bene dealt with by the Election Court at Kiambu, this court is functus officio as it cannot sit on an appeal against its own decision.**
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> **81. It is thus evident that this is an attempt by the Petitioner to have a second bite at the cherry and reintroduce a suit which was properly heard and finally determined on merit, by a court of competent jurisdiction. The issue, having been dismissed by the High court at Kiambu, ought to have bene raised on appeal.**

The appellant filed the petition leading to this appeal invoking the powers of the High Court under Article 105(1)(b) and sought an interpretation whether the seat of Member of National Assembly, Gatundu North Constituency had become vacant. This petition is premised on the grounds that the 1st respondent was not qualified to contest for election as Member of Parliament because she was serving as an MCA prior to her election hence stood disqualified under Article 99(2)(d) of the Constitution. On this issue the learned judge of the High Court observed correctly the peculiar jurisdiction of the High Court under Article 105(1)(b) of the Constitution as invoked by the appellant but erred in our view in categorizing the petition as being predicated on the validity of the election. In this regard, the learned judge expressed herself that;

> **1. I observe that although this Petition is brought under section 76(1)(c) of the Elections Act and seeks inter alia an order declaring as vacant the seat of the Member of the National Assembly, Gatundu North Constituency, the Petition is predicated on the validity of the election. In any case, the parties on record are in agreement that this is an Election Petition. The Petition is therefore bound by section 76(1)(a) of the Elections Act which requires a petition to question the validity of an election to be filed within 28 days from the date of declaration of the results of the election and be concluded within six (6) months.**

We are aware of the rule that a court must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the appellant in this second petition is trying to bring before the court in another way and in a different form a new cause of action which had been resolved by a court of competent jurisdiction. We answer in the negative.

The Petition before the learned judge did not in any way question the validity of the election of the 1st respondent under Article 10(1)(a) of

the Constitution as read with section 76(1)(a) of the Elections Act. The issue of validity of the election of the 1st respondent was the subject matter in Election Petition No. 1 of 2017, and parties are in agreement that this question was fully determined upto the Supreme Court of Kenya. It is indeed not the subject of this appeal.

Our understanding is that the appeal before us borders on determining whether the High Court should have invoked its original jurisdiction under Article 105(1)(b) of the Constitution as read with section 76(1)(c) of the Elections Act. To our mind Article 105(1)(b) of the Constitution as read with section 76(1)(c) of the Elections Act is not coincidental at all. It serves a legitimate purpose within a democratic society, to determine whether a seat of the Member of Parliament has become vacant whether immediately upon resumption of office or during the term of five years. The jurisdiction can be invoked at any time during the term of five years. The jurisdiction can be invoked at any time during the life of Parliament and that such a petition must be heard and determined within six months in accordance with the provisions of Article 105(2) of the Constitution.

It therefore follows that the question whether a seat has become vacant falls squarely within the mandate of the High Court and this question with respect to MP for Gatundu North Constituency is yet to be determined by a competent court. It matters not in our view that the appellant relies on the same ground he relied on in Election Petition No. 1 of 2017 that sought to determine the validity of the election of the 1st respondent in seeking an interpretation of Article 105(1)(b) of the Constitution. The only catchy issue and misdoing in this appeal is that it involves the same parties and it obliquely relies on the same ground as in Election Petition No. 1 of 2017. Otherwise, to our mind it is clear that the appellant has raised a new question for interpretation under Article 105(1)(b) of the Constitution that has not been determined by any competent court. We find that the trial court erred in equating the contest herein as being based on the validity of the election of the 1st respondent.

We therefore find that the issue in this Petition of Appeal was not in issue in Election Petition No. 1 of 2017, it has not been determined on its merits conclusively and the High Court had jurisdiction under Article 105(1)(b) as read with section 76(1)(c) of the Elections Act to determine the question whether the seat had become vacant.

Having found so, we shall not in any way determine the issue raised on whether the 1st respondent was qualified to contest for election for MP for Gatundu North Constituency. Further, we shall not determine the question whether the petition ought to have proceeded as undefended for we do not find the value the same would add in this appeal. That's all to say on that ground of appeal. We shall now proceed to determine the second issue we set out to resolve, and that is, costs.

Mr. Awele urged this court to find that the High Court erred in ordering the appellant who had instituted the petition in public interest to pay the costs of the petition.

The trial court exercised discretion in awarding costs under section 84 of the Elections act. This provision mandates court to award costs in an election petition and such costs ought to follow the cause. However as we have already stated, this appeal is not founded on electoral laws concerning the question on validity or otherwise of the 1st respondent's election as an MP for Gatundu North Constituency but seeks to interpret the question whether the aforesaid seat has become vacant. The Petition is premised on Article 22(2) and Article 258 of the Constitution that allows every person the right to institute court proceedings in public interest where a claim or contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution is alleged. The Supreme Court in ***Jasbir Singh & 3 Others vs. Tarlochan Singh Rai Estate of & 4 Others [2013]eKLR*** had this to say on the question of costs where public interest litigation was concerned;

> **"In the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs..."**

It is therefore clear that in suits involving genuine public interests litigation, courts are slow to award costs. In this case the subject matter of the suit was in the nature of a public interest where the concern was more particularly whether the seat has become vacant under Article 105(1)(b) of the Constitution. Had the trial court not misapprehended the case before it, the court would have been satisfied that the Petition was in the nature of public interest litigation and would not have exercised its discretion to award costs.

In the case of ***Kenya Human Rights Commission & Another vs. Attorney General & 6 Others [2019]eKLR*** this Court stated thus;

> **Public interest litigation, in most cases, is for the benefit of the public and not the persons or entities that institute the proceedings. Condemning an unsuccessful party to pay costs in genuine public interest litigation can become a deterrent. More likely than not, many a party would hesitate to institute suits in defence of the Bill of Rights and the Constitution for fear of being condemned to pay costs.**

We do not agree with the trial court's reasoning that the appellant ought to pay the costs of the Petition on account of *"in my view, this is a suit that would have bene avoided altogether in light of my finding that the petition is res judicata."* Ordering the appellant to pay costs for that reason without due consideration of the public interest nature of the appellant's petition, was in our view a misdirection, and it is therefore necessary that we interfere with the court's exercise of discretion on costs. This court in ***Supermarine Handling Services Ltd vs.***

Kenya Revenue Authority, Civil Appeal No. 85 of 2006, explained the circumstances that would lead an appellate court to interfere with the trial court's exercise of discretion thus;

> **Costs of any action or other matter or issue shall follow the events unless the court or judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.... Thus,** ***where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reasons" within the meaning of the rule...***

Mr. Awele submits that the Petition raised weighty constitutional issues thus condemning the appellant to pay costs set a bad precedent for public interest litigation. In ***John Harun Mwau & Others vs. The Attorney General and Others [2012]eKLR*** it was held that courts should yield to unhindered access to justice and support legitimate efforts to protect public interest litigation which played an important role in providing a proper understanding of the law. Further in ***Feisal Hassan vs. Public Service Board of Marsabit County and Another [2016] eKLR*** it was held that, "...in constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the Constitution, override the general *principle that costs follow the event, unless it can be shown that the petition was wholly frivolous..."*

As a result, we set aside the order of costs of the appellant and substitute it therefore with an order that each party do bear their own costs in the High Court as well as in this Court.

We have come to the end of this judgment. We have answered all the questions we sought to answer in the beginning. We have found that the issue raised in this appeal is live and yet to be determined by a competent court – the High Court. The issue at this stage is what is the appropriate relief to grant in the circumstances?

Mr. Awele has prayed that the Petition be heard *de novo* and that this Court be pleased to re-appraise the Petition in its entirety, draw its own inferences of fact and law and to make its own decision on the same.

Article 164(3)(a) of the Constitution limits the mandate of this Court to hearing appeals from decisions of the High Court or other courts or tribunals prescribed by Parliament. This appeal raises a fundamental question as to whether the seat of the Member of National Assembly has become vacant. This issue has not been determined by the High Court that has original jurisdiction under Article 105(1)(b) to hear and determine the question.

There is no valid judgment on the aforesaid issue in this appeal, there is no decision upon which this Court may confirm, vary or reverse. The issue has not been canvassed before us and we have no material that this Court can use to determine the issue. The general powers of this Court are set out in Rule 31 of the Court of Appeal Rules which stipulate that:

> "On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings of the superior court with such directions as is appropriate, or to order a new trial, and to make any incidental or necessary orders, including orders as to costs."

The above rule empowers this Court to remit a suit or petition back to the High Court for a new trial. It is therefore in the interest of justice that we order that this Petition be remitted back to the High Court for retrial, this time, it will be the Constitutional and Human Rights Division of the High Court as the subject matter touches on the interpretation of the Constitution and not on the validity of the 1st respondent's election as an MP for Gatundu North Constituency.

In the result, and having regard to the circumstances of the case, we order that the petition be remitted back to the Constitutional and Human Rights Division of the High Court for a new trial on a priority basis within the six months prescribed period under Article 105(2) of the Constitution.

Having disposed the appeal in the above terms, the final orders we make therefore are as follows:

a. That the appeal herein is allowed.

b. That the orders dismissing the Petition herein made on 14th August 2019 be and is hereby vacated and set aside. The Petition is remitted back to the Constitutional and Human Rights Division of the High Court for a new trial on a priority basis and in any event within 6 months from the date of this judgment as per the requirements of the Constitution.

c. That each party to bear their own costs of this appeal and of the Petition in the High Court.

It is so ordered.

Dated and Delivered at Nairobi this 19th day of June, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

……...……..

JUDGE OF APPEAL

J. MOHAMMED

…….……..……

JUDGE OF APPEAL

I certify that this is a true *copy of the original.*

Signed

DEPUTY REGISTRAR