



REPUBLIC OF KENYA



KENYA LAW
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Likowa v Aluochier & 2 others (Petition E008 of 2024)
[2025] KESC 25 (KLR) (Election Petitions) (16 May 2025) (Judgment)

Neutral citation: [2025] KESC 25 (KLR)

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS
PETITION E008 OF 2024

MK KOOME, CJ & P, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ

MAY 16, 2025

BETWEEN

CHARLES OWINO LIKOWA APPELLANT

AND

ISAAC ALUOCH POLO ALUOCHIER 1ST RESPONDENT

VINCENCIA AWINO KIONGE 2ND RESPONDENT

COUNTY ASSEMBLY OF MIGORI 3RD RESPONDENT

*(Ngugi & M. Ngugi JJ.A) in Civil Appeal No. E037 of 2023 as Consolidated
with Civil Appeal No. E038 of 2023 delivered on 26th May, 2023 with
Reasons dated 23rd February, 2024 and delivered on 27th February, 2024))*

Processes involved in the removal of a speaker of a county assembly

The petition challenged the judgment of the Court of Appeal which affirmed the decision by the High Court quashing the election of the appellant as the Speaker of the County Assembly of Migori. The court noted that there was no legal requirement for the clerk of a county assembly to gazette the name of the speaker-elect before s/he assumed office. The court held that the provisions on electoral malpractices did not apply to a challenge on the election of a speaker. The court highlighted the processes involved in the removal of a speaker and the distinction of the roles of county assemblies and the High Court in the removal of a speaker. The court held that the High Court had jurisdiction to hear and determine a petition challenging the election of a county assembly speaker. The court also highlighted the process leading to the election of a speaker.

Reported by Kakai Toili

Devolution – county assemblies – speakers of county assemblies - assumption of office by a speaker-elect of a county assembly – whether it was mandatory for the clerk of a county assembly to publish the name of the speaker-elect in the county gazette or Kenya Gazette before the speaker-elect assumed office.



Devolution – county assemblies – speakers of county assemblies – removal from office – processes involved in the removal of a speaker - where a petition was filed challenging the election of a speaker - whether a petition challenging the election of a speaker of a county assembly must be filed within 28 days and whether the Independent Electoral and Boundaries Commission ought to be a party in the petition - what was the distinction of the roles of county assemblies and the High Court in the removal of a speaker of the county assembly - whether the provisions of law relating to electoral malpractices applied when an election of a speaker was challenged – Constitution of Kenya, articles 87(2), 165(3) and 177; County Governments Act (cap 265), section 11.

Devolution – county assemblies – speakers of county assemblies – election of speakers of county assemblies - process leading to the election of speakers of county assemblies - whether the actions and conduct of the clerk of the county assembly in the nomination process of a speaker constituted an administrative action - Constitution of Kenya, article 47; Fair Administrative Action Act (cap 7L), section 2.

Jurisdiction – jurisdiction of the High Court – jurisdiction to hear and determine a petition challenging the election of a county assembly speaker - whether the High Court had jurisdiction to hear and determine a petition challenging the election of a county assembly speaker - Constitution of Kenya, articles 23, 47 and 165(3); County Governments Act (cap 265), section 11.

Constitutional Law – constitutional petitions – documents accompanying constitutional petitions – supporting affidavits - Whether it was mandatory for a constitutional petition to be supported by a supporting affidavit - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rules 10 and 11.

Brief facts

At its first sitting convened after the August 9, 2022 general election, the County Assembly of Migori elected the appellant as its speaker. The 1st respondent had offered himself for election but was disqualified for not providing all documents required for the nomination process leading to the election. Aggrieved by the outcome of the election, the 1st respondent, filed a constitutional petition before the High Court alleging contravention of his fundamental rights and freedoms. According to him, he was entitled to be on the ballot and thus sought for among other orders; a declaration that he was the only nominated candidate who had fully complied with all legal requirements for election to the office of the Speaker and was thus speaker- elect upon expiry of the nomination period.

The High Court held that; it had jurisdiction to determine the petition and rejected the argument that the dispute should have been handled by the Employment and Labour Relations Court; the petition met the threshold of a constitutional petition; and that the 1st respondent had failed to prove that he was the only qualified candidate to be nominated as Speaker for Migori County Assembly. Aggrieved, both the 1st and 3rd respondents appealed to the Court of Appeal which dismissed both appeals. Aggrieved, the appellant filed the instant appeal while the 1st respondent filed a cross-appeal.

Issues

- i. What were the processes involved in the removal of a speaker of a county assembly?
- ii. What was the distinction of the roles of county assemblies and the High Court in the removal of a speaker of the county assembly.
- iii. Whether the provisions of law relating to electoral malpractices applied when an election of a speaker was challenged.
- iv. Whether a petition challenging the election of a speaker of a county assembly; must be filed within 28 days and whether the Independent Electoral and Boundaries Commission ought to be a party in the petition.
- v. What was the process leading to the election of a speaker of a county assembly?
- vi. Whether it was mandatory for the clerk of a county assembly to publish the name of the speaker-elect in the county gazette or Kenya Gazette before the speaker-elect assumed office.



- vii. Whether the actions and conduct of the clerk of the county assembly in the nomination process of a speaker constituted an administrative action.
- viii. Whether the High Court had jurisdiction to hear and determine a petition challenging the election of a county assembly speaker.
- ix. Whether it was mandatory for a constitutional petition to be supported by a supporting affidavit.

Held

1. The appeal had been filed as of right under article 163(4)(a) of the Constitution. Article 163(4)(a) provided that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution.
2. Both the appeal and cross-appeal had been filed on the basis that they involved the interpretation and application of articles 22, 23, 35, 38, 47, 50, 94, 178 and 193 of the Constitution. In that context, the appeal and cross-appeal raised various fundamental questions. The status of an election dispute *vis-a-vis* the election of the speaker of a county assembly and the jurisdictional question as to where such a dispute ought to be filed, certainly also presented constitutional questions. There also lay the argument whether it was appropriate for the 1st respondent to initiate the dispute by way of a petition alleging violation of rights and/or the interpretation of the constitutional provisions under article 165(3) of the Constitution. The questions and issues, had been dealt with by the courts below.
3. There were two disjunctive provisions under rule 47(2)(b) of the Supreme Court Rules. Thus, a cross-appeal ought to be filed either 30 days after service of a petition of appeal or 30 days before the hearing of an appeal, whichever was the later. The cross-appeal was filed on April 30, 2024 and the hearing of that matter was on February 20, 2025 which was well over 30 days, in compliance with the latter condition. The cross-appeal was properly before the court, the appeal and cross-appeal raised issues involving the interpretation and application of the Constitution and the court therefore had jurisdiction to hear and determine the appeal and cross-appeal.
4. The reliefs sought by the appellant and the 1st respondent would have a bearing on the position of the Speaker of the County Assembly of Migori. The question whether the 1st respondent was the only candidate validly nominated and therefore ought to have been sworn in as Speaker-elect, and whether he was entitled to monetary compensation, still remained live issues in the proceedings. There were also other issues outlined that required clarity and had a bearing on future elections for the position of the Speaker of the County Assembly of Migori as well as other such assemblies. The appeal was therefore not moot.
5. The appeal was properly before the court. Matters of fact that touched on evidence without any constitutional underpinning were not open for the court's review on appeal in exercise of its article 163(4)(a) jurisdiction. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence did not, as a matter of course, bring an appeal within the ambit of article 163(4)(a) of the Constitution.
6. Article 177(1)(d) of the Constitution provided that a county assembly shall consist of the speaker as an *ex officio* member while article 178 of the Constitution provided that a speaker shall be elected by the county assembly from among persons who were not members of the assembly at the first sitting of the county assembly. The procedure for election of a speaker of a county assembly was provided in section 21 of the Elections Act. Section 11 of the County Governments Act provided for the process of removal of the speaker of the county assembly. The County Assembly Standing Orders provided the rules for the conduct of an election of a speaker.
7. The High Court's jurisdiction was set out in article 165 of the Constitution. Section 75 of the Elections Act elaborately provided for a redress mechanism in county elections and specifically that the question of the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.



8. An election within the set-up of the electoral process should fall within the established electoral institutions. The election of the speaker of the county assembly, was however distinct and did not fall within the same ambit of the electoral processes, comparable to that of an elected or nominated representatives of a county assembly. The election of a speaker of any county assembly and that of a member of the county assembly were dissimilar in that, in the election of a speaker of a county assembly, the clerk merely announced the results immediately after the count, different from a declaration by the Independent Electoral and Boundaries Commission (IEBC) in a general election.
9. There was no legal requirement for the clerk to publish the name of the speaker-elect to the public in the County Gazette or Kenya Gazette before the speaker-elect assumed office. Whereas a speaker could also be removed from office by a resolution of the assembly and that would effectively mark the end of his/her tenure unless legally challenged, that was not the case with the other members of the assembly. Further, the provisions of law relating to electoral malpractices did not apply when an election of a speaker was challenged.
10. There was no requirement that the challenge to the validity of the election of a speaker must be filed within 28 days as provided in article 87(2) of the Constitution. The challenge to the election of the speaker did not similarly bear the requirement that the IEBC ought to be a party in the petition and, there was no requirement for the payment of security of costs which was set at Kshs. 100,000 for members of the county assembly.
11. The distinction of the election of a speaker to that of a member of a county assembly was further elaborated by the position the speaker held in the county assembly. Article 177 of the Constitution was clear that the speaker was an *ex-officio* member of the county assembly. The speaker was therefore a member of the county assembly by the virtue of the office and authority that he/she held only. The speaker of the county assembly did not at any time obtain the same status as that of an elected or nominated member of the county assembly in any way.
12. *Moses Mwicigi & 14 Others v IEBC & 5 Others* [2016] eKLR was distinguishable from the instant case because in that case the courts predominantly delved into the adjudication of disputes related to the nomination of members of a county assembly by political parties under articles 90 and 177 of the Constitution as read with section 34 to 36 of the Elections Act, including the mandate of the IEBC in the process; there was already an established electoral process within the Political Parties Dispute Tribunal to adjudicate nomination disputes, hence the determination by the High Court and adopted by the Supreme Court. In the instance of a Speaker of a county assembly there was no definite role by the IEBC as outlined in article 87 of the Constitution.
13. There were two distinct processes for the removal of a speaker; the first was as outlined under section 11 of the County Governments Act (removal of speaker from office by not less than 75% of all members of the county assembly), mainly occurring upon the assumption of office of the speaker, while the second was through a court process; and in that regard through filing of a judicial review application or a constitutional petition. The processes being distinct there was no conflict as pertained the doctrine of separation of powers and the duties bestowed upon a county assembly were set out under section 11 of that Act and the jurisdiction of the High Court under article 165(3) of the Constitution.
14. The issues raised by the 1st respondent at the High Court predominantly related to the nomination process and the declaration of the election result and not the conduct of the speaker whilst he was in office. The nomination process and the declaration of the result, along with the constitutional issues raised by the 1st respondent therefore fell within the mandate of the High Court under article 165(3) as read with articles 23 and 47 of the Constitution as opposed to the role of the county assembly under section 11 of the County Governments Act. The High Court had jurisdiction to hear and determine the petition filed before it.
15. The common practice under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Mutunga* Rules) was to file an affidavit in support of



every petition. The Rules however, did not make that procedure mandatory. Further, the absence of an affidavit specifically in support of a petition did not go to the jurisdiction of the High Court. Rules 10 and 11 of the *Mutunga* Rules did not also demand that for a petition to be competent it must be supported by an affidavit. The introduction of documents under rule 11 needed not also be through the filing of a supporting affidavit. Rule 11 further presented a scenario where an oral application, a letter or any other informal documentation which disclosed denial, violation, infringement or threat to a right or fundamental freedom may be deemed as a competent petition. A petition may therefore be supported by such documents were attached to the petition.

16. The instant court could not fault the superior courts' consideration of the documents filed by the 1st respondent and the reason was obvious; vindication of constitutional rights needed not be formalistic nor technical under the Constitution. That did not in any way reduce the necessity for or remove the often quoted rule that constitutional petitions should not be vague and must be precise and enable the court to understand the grievance submitted and proof thereof. Only then could any court fashion a remedy under article 23 of the Constitution.
17. Article 47 of the Constitution provided that every person had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Section 2 of the Fair Administrative Action Act stated that an administrative action included; the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affected the legal rights or interests of any person to whom such action related.
18. The process leading to the election to the office of the Speaker of the County Assembly of Migori under the Migori County Assembly Standing Orders involved the declaration of vacancy, the presentation of nomination papers to the Clerk of the County Assembly, the Clerk to ascertain that every candidate qualified for the election of the Speaker, the publication of the names of qualified candidates, preparation of ballot papers and the holding of the election through a secret ballot. The nomination process was the preserve of the Clerk of the Assembly. In the conduct of that function, the Clerk issued decisions that affected the interest of candidates in the nomination process. The action and conduct of the Clerk in that process therefore constituted an administrative action.
19. The Clerk of the County Assembly bore the duty to give reasons for all her actions to the candidates, to ensure transparency in the process. The failure to give reasons, in light of the request by the 1st respondent, left the process as one shrouded in mystery. It was also not clear how the appellant was deemed to be the only one who qualified in the nomination to stand for election for the position of speaker, the election of speaker violated the 1st respondent's rights as claimed and was properly challenged in the High Court.
20. The process leading to the election of the Speaker of Migori County was provided provided for in rules 3-11 of the Migori County Standing Orders. Standing order 5(3) provided that the Clerk of the Assembly must ascertain that each candidate was qualified to be elected under article 193 of the Constitution. Article 193(1) provided that, unless disqualified under clause (2), a person was eligible for election as a member of a county assembly.
21. The 1st respondent did not present the following documents in his nomination papers: a tax compliance certificate from the Kenya Revenue Authority; a clearance certificate from a credit reference bureau and a valid certificate of good conduct from the National Police Service. There was no requirement of a conviction for a person to fail the integrity test. Disciplinary action on the basis of integrity issues was a relevant aspect in testing for integrity. Gross misconduct was also a relevant aspect in testing for integrity.
22. Criminal charges including corruption and economic crimes against a person were relevant considerations in testing for integrity. Conviction of a criminal offence was also a relevant material in testing for integrity. Failure to disclose conflict of interest in a matter relevant to the office one held or to be appointed to was also relevant material in testing for integrity. The list was long; it was not



exhaustive. The national values and principles of governance in article 10 and leadership and integrity provisions in Chapter Six of the Constitution were not mere adornment or embellishments. They were of real value in governance and regulated exercise of public power. Kenya should embark on building national ethos, culture and practices for leadership based on, amongst others, the national values and principles of governance, integrity provisions in the law, principles of justice and invest in integrity.

Petition of appeal and cross-appeal dismissed.

Orders

- i. *The court directed that the sum of Kshs. 6,000 deposited as security for costs therein be refunded to the appellant.*
- ii. *No order as to costs.*

Citations

Cases

1. Aluochier v Senate & 2 others (Constitutional Petition E489 of 2022; [2023] KEHC 1045 (KLR)) — Mentioned
2. Aramat v Lempanka & 2 others (Civil Application 8 of 2014; [2014] KESC 45 (KLR)) — Mentioned
3. Charles Njuru Kihara & 2 Others v Chris Kinyanjui Kamau (Clerk, County Assembly of Muranga) & 2 Others (Constitutional Petition 3 & 2 of 2017; [2018] KEHC 8878 (KLR)) — Mentioned
4. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Explained
5. Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated); [2023] KESC 40 (KLR)) — Explained
6. David Kerario Marwa v Boaz Awiti Okoth & Another (Election Petition 10 of 2017; [2017] KEHC 3102 (KLR)) — Explained
7. Frank Mulisa Makola v Felix G. Mbiuki & 4 others (Election Petition 5 of 2013; [2013] KEHC 967 (KLR)) — Mentioned
8. Gikenyi B v Mwaura & 2 others; Ethics and Anti-Corruption Commission & 2 others (Interested Parties) (Petition E009 of 2023; [2024] KEHC 8456 (KLR)) — Explained
9. Institute for Social Accountability & another v National Assembly & 5 others (Petition 1 of 2018; [2022] KESC 39 (KLR)) — Explained
10. Justus Nyaribo v Clerk to Nyamira County Assembly (Election Petition 2 of 2013; [2013] KEMC 66 (KLR)) — Mentioned
11. Kipkemoi Terer v John Langat & 3 others (Election Petition 1 of 2013; [2013] KEMC 47 (KLR)) — Explained
12. Luka Angaiya Lubwayo & another v Gerald Otieno Kajwang & another (Petition 120 of 2013; [2013] KEHC 6324 (KLR)) — Explained
13. Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others (Civil Appeal 41 of 2013; [2014] KECA 744 (KLR)) — Mentioned
14. Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018; [2021] KESC 34 (KLR))
15. Moses Mwicigi & 14 Others v IEBC & 5 Others (Petition 1 of 2015; [2016] KESC 2 (KLR)) — Mentioned
16. Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Mentioned
17. Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR)) — Mentioned
18. Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (Petition 1 of 2015; [2016] KESC 2 (KLR)) — Explained



19. Nduttu & 6000 others v Kenya Breweries Ltd & another (Petition 3 of 2012; [2012] KESC 9 (KLR)) — Explained
20. Onchoko v Nyamira County Assembly & another; Nyabaro & another (Interested Parties) (Petition E001 of 2025; [2025] KEHC 2262 (KLR)) — Explained
21. Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others (Petition 45 of 2018; [2020] KESC 9 (KLR)) — Followed
22. Rai & 3 others v Rai & 5 others (Petition 4 of 2012; [2013] KESC 21 (KLR)) — Followed
23. Wanja Maina Hannah v Independent Electoral & Boundaries Commission & 2 others (Constitutional Petition 10 of 2017; [2017] KEHC 1602 (KLR)) — Mentioned

Statutes

1. Constitution of Kenya — article 22(1); 23;25(c);27; 38; 38(3)(c);47;47(1); 50(1,3); 81; 87;88(4)(e); 94(5);163(4)(a); 165(3)(a,b,d); 177(1)(d); 178; 178(1,3);193; 193(1);193(3);196; 226(5);236; Chapter 6 — Interpreted
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Sub Leg) — rule 11 — Interpreted
3. County Assemblies Powers And Privileges Act (cap 265C) — section 10, 11,22 — Interpreted
4. County Governments Act (cap 265) — section 9A(1); 11 — Interpreted
5. Elections Act (cap 7) — section 21(1,5); 75(1);75(1A); Schedule 1 — Interpreted
6. Evidence Act (cap 80) — section 107(1);112 — Interpreted
7. Fair Administrative Action Act (cap 7L) — section 2 — Interpreted
8. Supreme Court Act (cap 9B) — section 3, 3A, 15A — Interpreted
9. Supreme Court Rules (cap 9B Sub Leg) — rule 39(1);47(2);47(2)(b);47(3) — Interpreted

Advocates

None mentioned

JUDGMENT

Representation:

Mr Munuang'o for the Appellant (Omondi Abande Advocates)

Mr Isaac Aluoch Polo Aluochier in person for the 1st Respondent

Ms Aron for the 2nd Respondent

Mr Okong'o for the 3rd Respondent (Okongo Wandago & co Advocates)

A. Introduction.

1. The Petition before the Court is dated March 18, 2024 and filed on even date pursuant to article 163(4) (a) of the *Constitution*, sections 3, 3A and 15A of the *Supreme Court Act* as well as rule 39(1) of the *Supreme Court Rules*, 2020. The same is challenging the Judgment of the Court of Appeal delivered without reasons on May 26, 2023 and with reasons on February 27, 2024 which affirmed the decision by the High Court quashing the election of the appellant as the Speaker of the 3rd respondent and ordering for fresh elections to be held for that office.
2. The appeal is predicated on the process leading to the election of the Speaker of the County Assembly of Migori after the 2022 general election and the determination of the question whether a serving County Assembly Speaker, elected by members of that County Assembly at its first sitting after



a general election, can be removed from office contrary to the provisions of article 178(3) of the Constitution and legislation enacted pursuant thereto, in this case the provisions of section 21(5) of the Election Act as well as section 11 of the County Governments Act No 17 of 2012.

B. Litigation Background.

3. On September 21, 2022, at its first sitting convened after the August 9, 2022 general election, the County Assembly of Migori elected the appellant, Charles Owino Likowa, as its Speaker. The election was presided over by the 2nd respondent, Vincencia Awino Kionge, in the capacity of Acting Clerk of the County Assembly. The 1st respondent, Isaac Aluoch Polo Aluochier, had offered himself for election but was disqualified for not providing all documents required for the nomination process leading to the election.

i. Proceedings before the High Court

4. Aggrieved by the outcome of the election, the 1st respondent, filed a Constitutional Petition before the High Court dated November 8, 2022, being High Court Constitutional Case No E006 of 2022, alleging contravention of his fundamental rights and freedoms under articles 22 (1), 27, 38, 47, 50, (3), 81, 88(4)(e), 165(3), 178(1), (3) and 226 (5) of the Constitution.
5. He specifically challenged the exclusion of his name from the ballot for the position of Speaker of the Migori County Assembly. According to him, he had duly fulfilled all the nomination requirements and was therefore entitled to be on the ballot. He also claimed that, the failure to include him on the ballot by the 2nd respondent and the lack of a formal explanation for the exclusion violated his constitutional right to fair administrative action under article 47 of the Constitution.
6. For the above reasons, he sought a declaration that he was the only nominated candidate who had fully complied with all legal requirements for election to the office of the Speaker and pursuant to Migori County Assembly Standing Orders, was Speaker- elect upon expiry of the nomination period and thus ought to have been sworn in as soon as it was practically possible. He also sought monetary compensation commensurate to what he would have earned as remuneration from the office of the Speaker of the County Assembly commencing from the first sitting of the County Assembly and an order that the 2nd respondent does repay the public all funds expended on account of the unlawful installation into office of the 3rd respondent as Speaker of the County Assembly, including but not limited to any remuneration paid to the latter.
7. In its Judgment delivered on February 21, 2023, the High Court (Wendoh J) delineated three issues for determination. On whether the court had jurisdiction to hear and determine the petition before it, the court held that it had jurisdiction to do so under article 165(3)(b) of the Constitution, which grants it authority to determine questions regarding the denial, violation, or infringement of fundamental rights and freedoms. The court therefore rejected the argument that the dispute should have been handled by the Employment and Labour Relations Court, holding that the election of a County Assembly Speaker is not an employment matter but a constitutional one. It also found that the sub judice rule did not apply because the 1st respondent's other case, Isaac Alouchier v Senate & 2 others Petition No E489 of 2022, challenging the election of the Speaker of the Senate, was different in subject matter.
8. On whether the petition met the threshold of a constitutional petition, the Court found that the petition, though verbose and lacking in precision, met the threshold set out in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, which requires clear identification of alleged constitutional violations.



9. On whether the petition was merited, the court held and found that the 2nd respondent violated article 47 of the Constitution by failing to provide the 1st respondent with reasons for his exclusion from the ballot. Additionally, the 2nd respondent failed to demonstrate that the nomination process was conducted transparently and openly, as is a requirement under article 196 of the Constitution. Consequently, the court held that the election process was flawed and unconstitutional and issued the following declarations and orders:
- i. The 1st respondent had failed to prove that he was the only qualified candidate to be nominated as Speaker for Migori County Assembly.
 - ii. A declaration be and is hereby made that the rights of the 1st respondent under article 47(2) of the Constitution were infringed by the 2nd respondent in that he was denied information.
 - iii. A declaration be and is hereby issued quashing the election of Charles Owino Likowa as the Speaker of the County Assembly of Migori County for the 2nd respondent's failure to comply with Standing Orders 5(2), 5(4), 5(5) of the Migori County Assembly Standing Orders and Article 196 of the Constitution.
 - iv. Within 21 days from the date of the judgment, fresh elections for the Speaker of Migori County Assembly (are) to be conducted starting from the submission of nomination papers of interested persons.
 - v. Each party shall bear its own costs.

ii.Proceedings before the Court of Appeal

10. Aggrieved, both the 1st and 3rd respondents appealed to the Court of Appeal in two separate appeals, that is Civil Appeal No E037 of 2023 by the 1st respondent and Civil Appeal No E038 of 2023 by the 3rd respondent.
11. The gravamen of the 1st respondent's appeal was that the High Court had failed to consider whether all the candidates for the election of Speaker met the eligibility requirements for the said office as provided under Articles 178 and 193 of the Constitution, section 9A (1) of the County Governments Act and the County Assembly of Migori Standing Orders 3 to 13. The 3rd respondent's appeal on the other hand faulted the High Court for treating an electoral dispute as a constitutional rights violation claim, thereby usurping the jurisdiction of a special magistrate appointed by the Chief Justice under section 75(1A) of the Elections Act. Additionally, it urged the point that the court erred in holding that a Speaker of a County Assembly is not a member of the Assembly, contrary to Articles 177(1)(d) and 193 of the Constitution as read with Section 11(1)(b) of the County Governments Act, and that the court misapplied the law and facts by finding that the 2nd and 3rd respondents had violated article 196 of the Constitution as well as standing orders 5(2), 5(4), and 5(5) of the Migori County Assembly.
12. The appeals were consolidated and the appellate court (Kiage, M. Ngugi & J. Ngugi JJ.A) delineated four issues for determination:
- i. Whether the trial court had jurisdiction to hear and determine the 1st respondent's petition;
 - ii. Whether the trial court erred in finding that the 2nd respondent breached the 1st respondent's right to information and fair administrative action;
 - iii. Whether the trial court took into account irrelevant matters in reaching the conclusion that the 2nd respondent had violated the 1st respondent's constitutional rights and in quashing the election of the appellant as Speaker;



- iv. Whether the trial court erred in finding that the 1st respondent had not proved his claim against the 2nd and 3rd respondents with regard to the election of the appellant as Speaker of the Migori County Assembly to the required standard.
13. On whether the High Court had jurisdiction, the appellate court held that the trial court did not err in finding that issues related to alleged constitutional violations, fall within the jurisdiction of the High Court under Article 165(3) of the *Constitution*. The court in that regard found that the issues in contest do not fall within the jurisdiction of the Employment and Labour Relations Court or within the jurisdiction of a special magistrate appointed by the Chief Justice under the *Elections Act*.
14. The court thereafter addressed the other three issues together viz : whether the 2nd respondent breached the 1st respondent's right to information and fair administrative action; whether the trial court took into consideration irrelevant matters in finding that the 2nd respondent had violated the 1st respondent's constitutional rights and in quashing the election of the appellant; and whether the trial court erred in finding that the 1st respondent had failed to prove his claim against the other parties with regard to the election of the appellant as Speaker of the County Assembly of Migori.
15. The Court of Appeal in answering the three questions noted that, from the evidence before the trial court, and which the 1st respondent did not dispute, while he produced some of the documents required of him as part of the nomination process, he had failed to produce a Tax Compliance Certificate from the Kenya Revenue Authority, a clearance certificate from a Credit Reference Bureau, and a valid certificate of good conduct from the National Police Service. The appellate court further noted, that though the 1st respondent had claimed that the requirement to produce those documents was without any basis in law, it was a requirement that had developed as a way for Kenyans aspiring to public office to demonstrate their personal integrity, competence and suitability in line with Chapter 6 of the *Constitution*. Further, such requirements having been communicated to all candidates and with the 1st respondent not claiming to have been unaware of it, the appellate court agreed with the trial court that first, there was no discrimination against the 1st respondent in the requirement that he produce the above documents; and second, the 1st respondent could not claim to have been the only validly nominated candidate having failed to meet the above requirements. Like the trial court, the appellate court also found that the 1st respondent had failed to provide evidence to support his claim that one of his two proposers had been induced to withdraw his proposal in support of the 1st respondent's candidature.
16. Further, the Court of Appeal also found that the nomination and election process undertaken by the 2nd respondent failed to meet the constitutional test of transparency; and was not open to scrutiny by the public or those, such as the 1st respondent, who were interested in the seat of Speaker of the County Assembly. The court further found, like the trial court, that though the documents presented by the 1st respondent failed to meet the requirements in the checklist for nomination, it was unclear why only one candidate was deemed to be qualified for nomination in the election for the position of Speaker. Consequently, the appellate court found no basis for faulting the conclusion reached by the trial court that the actions of the 2nd respondent were shrouded in mystery and were also flawed.
17. The Court of Appeal ultimately found that both appeals, by the appellant and the 1st respondent, had no merit and dismissed them while ordering each party to bear their costs of the appeal.

iii. At the Supreme Court

18. Aggrieved by the decision of the Court of Appeal, the appellant filed the instant Appeal while the 1st respondent filed a cross-appeal.



19. The appellant relies on 15 grounds of appeal which, summarized, make the point that the learned Judges of Appeal, in affirming the decision of the High Court, erred in fact and law in the following ways:
- a. The appellate court affirmed a High Court decision that wrongly assumed jurisdiction over the dispute, misinterpreted Article 177 on the Speaker’s membership of the County Assembly, Article 87 on electoral dispute resolution, and Article 165(3)(d) on determining the validity of an election to a constitutional office. It further violated Article 178(1) by reopening a concluded election process and unlawfully ordering a fresh election.
 - b. The court upheld a decision unsupported by evidence, improperly shifting the burden of proof to the appellant and respondents in contravention of the *Evidence Act*. It also failed to adhere to the standard of proof required in electoral disputes, violating the appellant’s non-derogable right to a fair trial under Article 25(c) and right to a fair hearing under Article 50(1).
 - c. By affirming a decision that was filed outside the prescribed timelines, the court contravened Article 87 and Section 21(1) of the *Elections Act*, which regulate electoral dispute resolution. This rendered the proceedings void as the election of the County Assembly Speaker had been validly conducted on 21st September 2022 under Article 178(1).
 - d. The appellate court ignored the doctrine of stare decisis under Article 163(7) by disregarding Supreme Court jurisprudence on the burden and standard of proof in electoral disputes. It also failed to uphold the principle of separation of powers under Article 196(3) by undermining legislative independence and rendering Sections 10 and 22 of the *County Assemblies Powers and Privileges Act* ineffective.
 - e. The court’s decision to nullify the appellant’s election as Speaker contravened Article 178(3), which regulates the Speaker’s tenure, and failed to apply relevant provisions on removal under Section 21(5) of the *Elections Act* and Sections 11(1), (2)-(8) of the *County Governments Act*. This violated the appellant’s right to hold office under Article 38(3)(c), the right to a fair hearing under Articles 25(c) and 50(1), and due process protections under Article 47(2).
 - f. The appellate court erred in denying the appellant costs of the proceedings and validating a petition that sought relief not contemplated under Article 23(3). It also upheld findings based on unpleaded issues, such as the alleged violation of Article 47(2) concerning a letter dated after the election, thereby rendering its decision procedurally flawed.
20. The appellant, for the above reasons, seeks the following reliefs;
1. The Petition of Appeal be allowed with costs to the appellant.
 2. The Judgment of the Court of Appeal delivered on 26th May, 2023 together with reasons dated 23rd February, 2024 be set aside in its entirety, and in its place an order be issued allowing *Civil Appeal No. E038 of 2023*.
 3. The Judgment of the High Court delivered on 21st February, 2023 be set aside in its entirety and order be issued striking out the 1st respondent’s petition dated 8th November, 022 as the same was unconstitutional, null and void for having violated Article 87(2) of the *Constitution*.
 4. The order requiring the County Assembly of Migori to conduct a fresh election for the office of its Speaker within 21 days, be set aside in its entirety.



5. A declaration that the proceedings before the High Court and the Court of Appeal to the extent that it was an electoral dispute lodged contrary to Article 87 and disguised as a claim for redress for violation of rights, were null and void.
 6. A declaration that allegations made in a constitutional petition anchored on the provisions of Article 22(1), 23(1) and 258(1) of the Constitution which are not backed by any form of evidence at the trial cannot be used to invalidate and or vitiate an election to any public office created by the Constitution.
 7. A declaration that the appellant was lawfully and validly elected by the members of the County Assembly of Migori, on 21st September, 2023 in exercise of a constitutional mandate, pursuant to a valid and concluded constitutional process under Article 178(1) and Section 21(1) of the Elections Act that is prima facie right and regular remains the Speaker of the County Assembly of Migori.
 8. The appellant be paid costs of the Appeal, the Appeal before the Court of Appeal and before the High Court.
 9. Such further orders as may seem just be made.
21. The 2nd and 3rd respondents support the petition of appeal on similar grounds as the appellant. The 2nd respondent relies on her supporting affidavit sworn on 12th April, 2024 while the 3rd respondent relies on an affidavit sworn by Edward Ouma Ooro, the Leader of the Majority Party, Orange Democratic Party, at the County Assembly of Migori.
 22. In opposing the appeal, the 1st respondent filed grounds of objection and reasons for the grounds of objection (in one document) dated 7th April, 2024.

The Cross-Appeal.

23. The 1st respondent in his cross-appeal dated 29th April, 2024 raises six grounds of appeal contending as follows:
 - a. His cross-appeal has been filed on the basis of involving the interpretation and application of Articles 178(3), 193, 22, 23, 38(3)(c), 47(1) and (2), 2(2) and (4), 50, 94(5) and 35(1) of the Constitution (and) therefore falls within the mandate of the Court under Article 163(4)(a) of the Constitution;
 - b. The appellate court erred in finding that the 1st respondent needed to provide affidavit evidence in support of his contentions in the absence of an oral hearing and so contravened Articles 22(3)(b) of the Constitution as read with Rules 11 and 20(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules);
 - c. The appellate court erred in affirming the High Court's ignorance of the gravamen of the Petition, on the question of the candidates, if any, who met the eligibility requirements for the office of Speaker of the Migori County Assembly as provided for in Articles 178 and 193 of the Constitution, Section 9A(1) of the County Governments Act and County Assembly of Migori Standing Orders 3 to 13;
 - d. The appellate court erred in affirming an eligibility criterion outside the applicable law in contravention of the 1st respondent's rights under Article 50(1) of the Constitution on fair hearing and Article 94(5) of the Constitution which provides that no person or body, other



than Parliament, has the power to make provision having the force of law in Kenya, except under the authority of the *Constitution* or legislation;

- e. The appellate court erred in affirming the order for fresh election for the position of Speaker of the County Assembly of Migori when at the end of the nomination process at 9.00 am on 19th September, 2022 there was already a Speaker-elect by virtue of Standing Order No. 11 of the County Assembly of Migori Standing Orders, there being only one candidate who met all the legal nomination requirements, being the 1st respondent, contravening the 1st respondent's right to hold office upon election as provided for under Article 38(3)(c) of the *Constitution*; and
 - f. The appellate court erred by, despite finding that the 2nd respondent had conducted the election of Speaker of the County Assembly of Migori in an unlawful manner, failed to pronounce herself on the mandatory provisions of Article 226(5) of the *Constitution* requiring that, any holder of public office ought to be held liable for any loss arising from him/her directing or approving the use of public funds contrary to the law and requiring that he/she must make good the loss.
24. Consequently, the 1st respondent seeks the following declarations and orders:
- i. A declaration that he was the only duly nominated candidate for the position of Speaker of the County Assembly of Migori, having fully complied with all legal requirements for election to the office.
 - ii. A finding that, in accordance with Standing Order 11 of the Migori County Assembly Standing Orders, he was automatically the Speaker-elect upon the expiry of the nomination period at 9:00 am on 19th September 2022.
 - iii. An order directing that he be sworn in as Speaker of the County Assembly of Migori as soon as practically possible, given that he was the duly elected Speaker following the closure of the nomination period.
 - iv. He be paid monetary compensation equivalent to the remuneration he would have earned as Speaker commencing the first sitting of the County Assembly on 21st September 2022, payable by or on behalf of the County Assembly of Migori.
 - v. A directive requiring the 2nd respondent to reimburse public funds lost due to the unlawful installation of the appellant as Speaker, including but not limited to any remuneration paid to the appellant.
 - vi. An award of costs for the proceedings before both the High Court and the Court of Appeal, to be borne by the appellant, the 2nd, and 3rd respondent.
25. The cross-appeal is opposed by the appellant as well as the 2nd and 3rd respondents. All three have filed grounds of opposition, each dated 16th May, 2024 in doing so.

C. Parties' Submissions

The Appellant's appeal

a. The Appellant's written submissions

26. The appellant relies on his written submissions dated 20th March, 2024 wherein he submits that his appeal is filed under Article 163(4)(a) of the *Constitution* as it involves the application and interpretation of Articles 22, 23, 27, 38(3)(c), 47, 50(1), 87, 88, 94, 165, 177, 178, 193, 196 and



- 226 of the Constitution. He urges that the petition creates a constitutional moment for this Court to pronounce itself on the validity of court orders issued contrary to the express provisions of Article 23(3) of the Constitution as well as the manner of resolving an electoral dispute arising from a County Assembly Speaker's election. The Court is also asked to pronounce itself on the doctrine of separation of powers, immunities and privileges of County Assemblies as legislative bodies at the County level under Article 196 of the Constitution. It is further contended that nullification of an election is not one of the remedies prescribed by Article 23(3) of the Constitution as available to a person alleging violation of constitutional rights and fundamental freedoms.
27. He further submits that his election was erroneously nullified by the High Court and affirmed by the Court of Appeal without any credible evidence being presented or a trial conducted. Furthermore, that the trial court purported to rely on the 1st respondent's petition and supporting affidavit when no such supporting affidavit existed. It is the appellant's contention therefore that, in doing so, the trial court as validated by the Court of Appeal, shifted the burden of proof to the him as well as the 2nd and 3rd respondents contrary to Section 107 (1) of the Evidence Act. Consequently, he was not accorded the opportunity to put forward his case as the 1st respondent never discharged the burden of proof, thereby violating the appellant's rights to fair hearing, access to justice and equal protection of the law.
28. In addition, the appellant contends that the 1st respondent's petition before the High Court was an election petition disguised as a constitutional petition and the same was erroneously sustained. He thus urges that, once he was elected as Speaker of the County Assembly of Migori, Article 177(1) (d) conferred upon him assembly membership status in line with the High Court decision in Charles Njuru Kihara & 2 Others v Chris Kinyanjui Kamau (Clerk, County Assembly of Muranga) & 2 Others [2018] eKLR. Therefore, the trial court erroneously held that the appellant was not a member of the County Assembly and that his election was not subject to the special electoral dispute resolution mechanism provided for by the Constitution and the Elections Act. It is submitted in that regard that, the trial court and Court of Appeal incorrectly interpreted Articles 87(1) and (2) as read with Section 75(1A) of the Elections Act on timely resolution of electoral disputes and the High Court erroneously arrogated itself jurisdiction to preside over an election dispute concerning the election of a Speaker who is a member of the County Assembly, thereby reopening concluded constitutional processes. Further, that in doing so, the court usurped the powers of an election court which ought to have been a subordinate court, presided over, heard and determined by a special magistrate designated as such by the Chief Justice pursuant to Section 75(1) of the Elections Act.
29. It is furthermore urged that the election of a Speaker of any County Assembly is an election sui generis by virtue of Article 178(1) of the Constitution as read with Section 9A(1) of the County Governments Act. Citing the Supreme Court decisions in Moses Mwicigi & 14 Others v IEBC & 5 Others [2016] eKLR and in Leman Ken Aramat v Harun Meitamei Lempaka & 2 Others [2014] eKLR, it is submitted that only an election court can disturb the status quo and any aggrieved party must initiate the process of ventilating grievances by way of an election petition. In addition, that an electoral dispute cannot be transmuted into a petition for the vindication of fundamental rights under Article 165(3) of the Constitution or judicial review proceedings, as this carries the risk of opening up parallel proceedings on the same issue. For that reason, it is argued that both the Court of Appeal and High Court violated the principle of stare decisis under Article 163(7) of the Constitution by failing to follow the two aforesaid decisions.
30. The appellant also argues that the petition filed at the High Court was not supported by an affidavit and was therefore not backed by any credible evidence. That the Mutunga Rules also provide that in cases where a petition is not supported by an affidavit, then the petitioner ought to call oral evidence which was not the case herein.



31. For the above reasons, it is argued that the appellant's political rights pursuant to Article 38(3)(c) and his status as a state and public officer pursuant to Article 236 of the Constitution were violated by the superior courts below. Further, that Article 196(3) of the Constitution as read with Sections 10 and 11 of the County Assembly Powers and Privileges Act provides for the immunity of members of County Assemblies against suits such as the one filed by the 1st respondent and courts should have been slow to interfere with the internal workings of legislative bodies in disputes such as the one entailing the election of a Speaker of a County Assembly. He contends therefore that the Court of Appeal erroneously affirmed the trial court's violation of the doctrine of separation of powers. He furthermore urges that, in any event, nullification of an election is not an appropriate relief contemplated under Article 23(3) of the Constitution to be granted for a violation of a right under Article 47(2) of the Constitution on the basis of non-response to a letter, in the present matter, the 1st respondent's letter dated 26th September, 2022, long after the election had been conducted.
32. The appellant finally submits that he was never accorded a fair trial as guaranteed under Article 50 as read with Article 25(c) of the Constitution since there was no service effected on him by the 1st respondent of the petition or hearing notices or orders of the High Court and as such the proceedings before the High Court were on the basis of a false affidavit of service. He therefore prays that his appeal be allowed and necessary reliefs granted.

b.The 2nd and 3rd Respondents' submissions in support of the Appeal

33. The 2nd and 3rd respondents in their supporting affidavits both sworn on 12th April, 2024 as well as their written submissions dated 15th April, 2024 and 12th April, 2024, respectively, support the appellant's appeal on the same facts and arguments as the appellant.

c.The 1st Respondent's submissions in opposition to the Appeal

34. The 1st respondent relies on his Grounds of Objection dated 7th April, 2024. He submits that this Court lacks jurisdiction to entertain the petition of appeal as the parties entered into a consent on 14th February 2024 taking their dispute out of court and placing it for resolution by an alternative dispute resolution mechanism being court-annexed mediation.
35. He further contends that judicial interrogation of the County Assembly of Migori nomination process neither violated the doctrine of separation of powers, nor Sections 10 and 11 of the County Assemblies Powers and Privileges Act. He argues in that regard that the principle of separation of powers does not exist alone but goes hand in hand with the principle of checks and balances. Consequently, the judicial arm must not be prevented from exercising its judicial authority as provided for in Articles 1(3)(c) and 159(1) of the Constitution where there is good reason to do so. He further argues that Section 11(3) of the County Assemblies Powers and Privileges Act was enacted outside the jurisdiction provided for in Article 196(3) of the Constitution as the Clerk and other members of staff of County Assemblies are not protected in terms of immunity from law suits by that Article.
36. He also adds that no dispute resolution forum has the exclusive jurisdiction for hearing and determining electoral disputes under Article 87 of the Constitution in the manner the Supreme Court has been granted the exclusive jurisdiction to hear and determine disputes arising from a presidential election. Furthermore, that the special magistrates appointed by the Chief Justice to hear and determine disputes arising from the election of members of a County Assembly do not have exclusive original jurisdiction for determining nomination disputes involving the said members.



37. He asserts in the above context that the election for the office of Speaker of the County Assembly of Migori was not carried out by the Independent Electoral and Boundaries Commission (IEBC), nor were the election results declared by IEBC and therefore Article 87(2) does not apply to the said election. Similarly, he argues that Section 75 of the [Elections Act](#) does not also apply to the present dispute as the main issue before this court concerns a nomination and not an election dispute per se. Further, the High Court, unlike IEBC which cannot hear and determine nomination disputes, was better suited to determine the 1st respondent's grievance in all its aspects and facets due to its unlimited jurisdiction in civil matters pursuant to Article 165(3)(a), (b) and (d)(ii) of the [Constitution](#) and that, Parliament has yet to enact legislation for resolving nomination disputes after the declaration of election results pursuant to Article 87(2) of the [Constitution](#), and therefore in such cases, recourse must be had to the unlimited original jurisdiction of the High Court.
38. He furthermore contends that, Articles 22(3)(d) and 159(2)(d) of the [Constitution](#) call for upholding substantive justice rather than procedural technicalities to the detriment of substantive justice. According to him therefore, the High Court had the jurisdiction to hear and determine the 1st respondent's petition filed before it.
39. Regarding the contention that his petition before the High Court did not contain a supporting affidavit, he submits that he filed it in compliance with the provisions of Article 22(3)(b) of the [Constitution](#), and Rule 11 of the [Mutunga Rules](#) as informal documentation which did not require any supporting affidavit and that it was proper for him to annex any document he elected to rely on, which he did. He therefore contends that he discharged his initial burden of proof and points out that Section 112 of the [Evidence Act](#) requires that in civil proceedings, when any fact is within the knowledge of any party to the proceedings, the burden of proving or disproving the fact is upon such a party. Therefore, the 2nd respondent, being the recipient and custodian of all returned nomination papers, and being a party to the proceedings, had the burden of proving that the candidates she cleared for the position of Speaker of the County Assembly of Migori had each demonstrated compliance with Article 193(1)(c). He also contends that in order to protect his Article 38 political rights, he had a right to access the returned nomination papers of all the other candidates, and the 2nd respondent, by electing not to furnish him with this information, breached his right to information pursuant to Article 35(1) of the [Constitution](#).
40. He maintains that the 2nd respondent imposed additional requirements outside those provided for under Article 193, these being the Clearance Certificates from Kenya Revenue Authority, the Police, Higher Education Loans Board and Credit Reference Bureaus and yet all those requirements were devoid of legal force, and his exclusion from the nomination list on that basis was erroneous. He further contends that the appellant's nomination papers, though not forming part of the record at the High Court, demonstrated that the appellant had supplied the 2nd respondent with fake Clearance Certificates, demonstrating that the appellant had failed to comply with Article 193(1)(b) and (c) of the [Constitution](#) and was thus unlawfully cleared to run for office by the 2nd respondent.
41. He, lastly, affirms his position that he stands, to-date, as the only candidate that had fully complied with the requirements under Article 193(1)(b) and (c) of the [Constitution](#) and therefore he remains the Speaker-elect pursuant to Standing Order No. 11 of the County Assembly of Migori. In his view and for the above reasons, the appropriate reliefs are those that he now he seeks in the cross-appeal before us.



The 1st respondent's Cross-Appeal

a. 1st respondent's submissions on his Cross-Appeal

42. On the Court's jurisdiction, he submits that his cross-appeal has been filed on the basis that all issues raised therein involve the interpretation and application of Articles 178(3), 193, 22, 23, 38(3)(c), 47(1) and (2), 2(2) and (4), 50, 94(5) and 35(1) of the Constitution and it therefore falls within the mandate of this Court under Article 163(4)(a) of the Constitution.
43. On the substance thereof, he reiterates his submissions made in opposition to the appellant's appeal. In particular, that the 2nd respondent imposed additional clearance requirements beyond those in Article 193 of the Constitution, including certificates from various agencies, which lacked any legal basis. He also claims that his exclusion from the nomination list was erroneous and asserts that the appellant's nomination papers, though not part of the High Court record, contained fake clearance certificates, making the appellant's clearance unlawful. He maintains therefore that he was the only candidate who fully met the constitutional requirements and should be recognized as the duly elected Speaker of the Migori County Assembly, seeking appropriate relief through his cross-appeal.
44. He further took particular issue with the Court of Appeal's finding that, in the absence of an oral hearing, he had also failed to provide affidavit evidence and therefore all his claims remained devoid of proof. He submits that, on the contrary, he had filed his petition in compliance with Article 22(3) (b) of the Constitution, and Rule 11 of the Mutunga Rules as informal documentation did not require any supporting affidavit and it was sufficient for him to annex any document he elected to rely on, and which he did. He therefore contends that he discharged his initial burden of proof and was entitled to all the orders he had sought.

b. Appellant's submissions in opposition to the Cross-Appeal

45. The appellant argues in his submissions dated 16th May, 2024, that the cross-appeal was filed beyond the permissible time frame and without leave of Court, in violation of Rule 47(2) of the Supreme Court Rules. He asserts instead that this filing occurred long after the pre-trial motions and case management processes had been completed, indicating that the cross-appeal is clearly an afterthought.
46. He further submits that the cross-appeal does not state or specify any provisions of the Constitution said to have been decided wrongly by the Court of Appeal in dismissing *Civil Appeal No. E038 of 2024*. Additionally, he contends that the jurisdiction of this Court to determine the cross-appeal has not been invoked properly and therefore this Court does not have jurisdiction to try and determine the said cross-appeal. Further, that the proceedings as commenced by the 1st respondent in the High Court and escalated to the Court of Appeal are void for having been commenced in violation of Article 87(1), (2) and (3) of the Constitution which provide for a special mechanism for resolution of electoral disputes in the country.
47. It is furthermore contended that the 1st respondent's petition of appeal was an election petition disguised as a constitutional petition seeking the vindication of the 1st respondent's constitutional rights, as the reliefs reflected the true character of the petition as an election petition. In addition, that the High Court's jurisdiction to determine election petitions is not delineated by Article 165(3) (d) of the Constitution but rather Article 87(1) and (2) due to the proceedings not being original and unlimited but rather a special one limited to the timelines that the law sets. And in any case, that the High Court was excluded from hearing and determining the matter by failure of the 1st respondent to comply with the requirements of Article 87(2) of the Constitution as well as the Elections Act.



48. It is also contended by the appellant that the cross-appeal does not challenge the express findings of the High Court to the effect that the 1st respondent's rights under Article 47(1) as read with Article 38(3) (c) of the Constitution had not been violated and, in any event, the reliefs sought in the cross-appeal were never sought in *Civil Appeal No. E038 of 2023*. It is thus urged that this Court does not have jurisdiction to grant the reliefs sought as they are anchored on alleged violation of Standing Orders No. 5(4) and (5) of the County Assembly of Migori which do not raise any issue of constitutional moment worth further input from the Court. In effect, the failure to observe the Standing Orders cited does not amount to a threat, infringement or violation of the 1st respondent's constitutional rights.
49. Finally, it is urged that the reliefs sought have the effect of reopening concluded constitutional processes and would result in the Court exercising power in a manner contrary to the Constitution and electoral legislation.

c.The 2nd and 3rd Respondents' submissions in opposition to the Cross- Appeal

50. The 2nd and 3rd respondents in their Grounds of Opposition both dated 16th May, 2024 together with the 2nd and 3rd respondents' written submissions dated 16th May, 2024 support the appellant's case on the same grounds as the appellant and we do not deem it necessary therefore to reproduce their submissions.

d.The 1st respondent's rejoinder on the Cross- Appeal

51. The 1st respondent, in rejoinder, argues that the other parties have not raised any new issues that have not already been addressed in either his Grounds of Objection dated 7th April, 2024 and in his cross-appeal dated 29th April, 2024. In addition, he contends that the cross-appeal was filed within time under Rule 47(2)(b) of the Supreme Court Rules which requires that a cross appeal ought to be filed either 30 days after service of the petition of appeal or 30 days before the hearing of the appeal, whichever is the later. He thus contends that this requirement was complied with as his notice of cross-appeal, memorandum of cross-appeal and the record of cross-appeal were all served on 30th April, 2024. He further submits that his notice of cross-appeal was sufficient as it complied with Rule 47(3) of the Supreme Court Rules.
52. He further argues that the appeal was consolidated at the Court of Appeal level, and that no de-consolidation occurred after the judgment. Therefore, the requests of the appellant, along with the 2nd and 3rd respondents, to have his cross-appeal dismissed on the ground that it does not pertain to the issues raised in *Civil Appeal No. E038 of 2023* should be rejected. He adds that he raised matters of his rights under Articles 38(3)(c) and 47(1) of the Constitution in *Civil Appeal No. E038 of 2023* filed by the appellant as well as in his own Civil Appeal E037 of 2023 and therefore submits that this Court has jurisdiction under Article 163(4)(a) of the Constitution to hear and determine his cross-appeal as it involves the interpretation and application of specified constitutional provisions.
53. The 1st respondent furthermore contends that this matter concerns a nomination dispute, not an election petition. Additionally, he emphasizes that the nomination and election of the speaker of the County Assembly of Migori were not carried out by the Independent Electoral and Boundaries Commission, but instead by the 2nd respondent. As a result, Article 87(2) of the Constitution and Section 75(1) of the Elections Act do not apply.
54. He also submits that, contrary to the submissions by the appellant and the 2nd and 3rd respondents, this Court is not barred from considering the Migori County Assembly Standing Orders No. 5(4) and 5(5) merely because they are not constitutional provisions. He urges instead that Standing Order No. 5(4)



requires the 2nd respondent to ascertain that all candidates for the election to the office of Speaker were compliant with Article 193 of the *Constitution* while Standing Order 5(5) calls for publicization and making available to all members of the County Assembly a list of the qualified candidates immediately after the close of nomination. All those matters fall under the category of application of expeditious administrative action as required by Article 47(1) of the *Constitution*. Consequently, those Standing Orders incorporate the necessity for constitutional compliance and application of the *Constitution* under Article 163(4)(a) thereof.

55. It is his other contention that the doctrine of separation of powers does not bar courts from reviewing the nomination process for the election to the office of Speaker of the County Assembly of Migori because the nomination period ended before the Assembly commenced its official business. Since County Assembly of Migori members were therefore sworn in on 21st September 2022, they had no authority to conduct any duties before that date, meaning the nomination process (which ended on 19th September 2022) was not part of official County Assembly of Migori proceedings and is not protected by legal provisions that shield County Assembly proceedings from judicial scrutiny.
56. The 1st respondent furthermore submits that the *Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others* [2014] eKLR case is not applicable to the current dispute due to key differences between the cases. He argues in that regard that in the Mable Muruli case, the petitioner was excluded from the gubernatorial ballot because the Independent Electoral and Boundaries Commission (IEBC) had declined to accept her academic transcripts as valid qualifications. This exclusion occurred before any election took place, and no candidate had been lawfully declared governor-elect at that time. In contrast, that the present case involves the 1st respondent being the only candidate who met all the County Assembly of Migori Standing Orders nomination requirements, aligning with Article 193 of the *Constitution*. Despite this fact, he claims that he was excluded from the subsequent unlawful County Assembly of Migori election for the office of Speaker, which was deliberately aimed at electing a different individual- the appellant. This exclusion violated the 1st respondent's constitutional rights under Article 38(3)(c) to hold office upon election hence his petition to the High Court.
57. Finally, the 1st respondent contends that, following the appellant's impeachment on 23rd April 2024 and the subsequent announcement of a fresh County Assembly of Migori office of Speaker election held on 15th May 2024 (and installation of a new Speaker on 28th May 2024), the original petition of appeal filed in this Court has been rendered moot as the appellant is no longer the Speaker. He further submits that the appellant as a petitioner in *Kisumu ELRC Petition No. E016 of 2024* is no longer contesting his removal but is instead seeking compensation for alleged unlawful and unprocedural removal from office. Consequently, that there is no longer a dispute between the appellant and the 1st respondent as to who between them is the rightful Speaker and the appellant has already abandoned his claim for the occupation of the Speaker's office. He thus urges that the petition of appeal should be deemed as withdrawn, to leave for consideration only the 1st respondent's cross-appeal. Additionally, the appellant should be removed as a party in the cross-appeal, leaving the 1st respondent as the cross appellant, with the 2nd and 3rd respondents as the only remaining necessary parties.

D. Issues For Determination.

58. From our consideration of the pleadings, the findings of the Court of Appeal, and the submissions by counsel representing the parties, and while many peripheral issues were raised by the parties, we find that only the following five issues fall for our determination:
- i. Whether this Court has jurisdiction to hear and determine the appeal and cross-appeal.
 - ii. Whether the issues raised in the appeal are now moot.



- iii. Whether the High Court had the requisite jurisdiction to hear and determine the petition before it.
- iv. Whether the process leading to election of the Speaker of the County Assembly of Migori constituted an administrative action.
- v. Whether the 1st respondent was entitled to the reliefs sought; and
- vi. Who should bear the costs of the appeal and cross-appeal?

E. Analysis And Determination

i. Whether this Court has jurisdiction to hear and determine the appeal and cross-appeal

59. The appeal herein has been filed as of right under Article 163 (4) (a) of the *Constitution*. Article 163 (4) (a) provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the *Constitution*. In *Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another*, Sup. Ct. Petition No. 3 of 2012, we set out the requirements that any appellant needs to satisfy, in an appeal said to be brought under Article 163(4)(a) of the *Constitution*. We stated as follows in that matter:

“... the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)”.

60. Both the appeal and cross-appeal have been filed on the basis that they involve the interpretation and application of Articles 22, 23, 35, 38, 47, 50, 94, 178 and 193 of the *Constitution*. In that context, we note that the appeal and cross-appeal raise various fundamental questions including but not limited to; the process of nomination, election and declaration of results for the office of the Speaker of a County Assembly; whether the election of a Speaker is an administrative action and whether upon election the Speaker becomes a member of the County Assembly, and, whether, like the elected members, the Speaker is entitled to the same privileges and immunities? The appeal also begs the question, whether the High Court has jurisdiction to hear and determine a dispute involving the election of a Speaker of a County Assembly and if it can issue any remedies under Article 23 of the *Constitution*.
61. The status of an election dispute vis-a-vis the election of the Speaker of a County Assembly and the jurisdictional question as to where such a dispute ought to be filed, certainly also present constitutional questions. There also lies the argument whether it was appropriate for the 1st respondent to initiate the dispute by way of a petition alleging violation of rights and/or the interpretation of the constitutional provisions under Article 165(3) of the *Constitution*. The above questions, and issues, have been dealt with by the courts below and we have above set out in detail how they addressed them.
62. As for the challenge to the timing of the filing of the cross appeal, we note that there are two disjunctive provisions under Rule 47(2)(b) of the *Supreme Court Rules*. Thus, a cross-appeal ought to be filed either 30 days after service of a petition of appeal or 30 days before the hearing of an appeal, whichever is the later. It is common ground that the cross-appeal herein was filed on 30th April 2024 and the hearing



of this matter was on 20th February 2025 which is well over 30 days, in compliance with the latter condition. We therefore find that the cross-appeal is properly before us, the appeal and cross-appeal raise issues involving the interpretation and application of the Constitution and this Court therefore has jurisdiction to hear and determine the appeal and cross-appeal.

ii. Whether the issues raised in the appeal are now moot

63. Related to the competence of the appeal under Article 163 (4) (a) is the question whether the controversy in the appeal herein is moot. The context of the alleged mootness arises from the fact that the appellant was impeached by members of the County Assembly of Migori on 23rd April 2024, and his impeachment was followed by the election of a new Speaker on 28th May 2024. It is also alleged that upon his ouster, the appellant, in the ensuing litigation, abandoned the prayer to be reinstated as Speaker.

64. This Court in the case of Institute for Social Accountability & another v National Assembly & 3 others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment) in addressing the doctrine of mootness stated that:

“A matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot.”

65. Subsequently, in the case of Dande & 3 Others v Inspector General, National Police Service & 5 Others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) we held that:

“The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.”

66. Bearing the foregoing principles in mind, it is our opinion that the reliefs sought by the appellant and the 1st respondent in this case will still have a bearing on the position of the Speaker of the County Assembly of Migori. The question whether the 1st respondent was the only candidate validly nominated and therefore ought to have been sworn in as Speaker-elect, and whether he is entitled to monetary compensation, still remain live issues in these proceedings. There are also other issues we outlined at paragraph 60 above, that require clarity and have a bearing on future elections for the position of the Speaker of the County Assembly of Migori as well as other such Assemblies. The appeal is therefore not moot.

67. Having distilled the preliminary issues, and determined that the appeal is properly before us, we shall now proceed to consider its merits. To do so, we must restate factual dispositions made by the parties and remind ourselves that, in Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others [2020] eKLR we held



that matters of fact that touch on evidence without any constitutional underpinning are not open for this Court's review on appeal in exercise of its Article 163 (4) (a) jurisdiction. In *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR) we further stated that challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence do not, as a matter of course, bring an appeal within the ambit of Article 163(4)(a) of the *Constitution*.

68. In the context of the decisions in *Institute for Social Accountability & another v National Assembly & 3 others* (*supra*) and *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others* (*supra*) we are alive, and careful as to our limits in revisiting factual findings of the superior courts below; the same being only to the extent of our jurisdiction under Article 163 (4) (a) of the *Constitution*.

iii. Whether the High Court had the requisite jurisdiction to hear and determine the petition

69. We understand the appellant's question in relation to the High Court's jurisdiction to be, upon the election of the Speaker of County Assembly, is the duty to remove the Speaker a preserve of the County Assembly under Section 11 of the *County Governments Act* or should the same squarely fall within the preserve of a special magistrate appointed by the Chief Justice?

70. Article 177 (1) (d) of the *Constitution* provides that a County Assembly shall consist of the Speaker as an ex officio member while Article 178 of the *Constitution* provides that a Speaker shall be elected by the County Assembly from among persons who are not members of the assembly at the first sitting of the County Assembly. The procedure for election of a Speaker of a County Assembly is provided in Section 21 of the *Elections Act* which provides that;

- “(1) The Speaker of a county assembly shall be elected by each county assembly in accordance with the standing orders of the county assembly from among persons who are qualified to be elected as members of a county assembly but are not such members.
2. For purposes of the election of the speaker of the county assembly after the first election under the *Constitution*, the procedure set out in the First Schedule shall apply.”

71. Section 11 of the *County Governments Act* No. 17 of 2012 provides for the process of removal of the Speaker of the County Assembly as follows:

- “(1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.
2. A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.
3. A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9(4).
4. Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.”



72. The County Assembly Standing Orders provide the rules for the conduct of an election of a Speaker. In this case, the Migori County Assembly Standing Order 4 states that a speaker shall be elected when the County Assembly first meets after a general election; Standing Order 5 (2) stipulates that the nomination papers for such an election shall be handed to the Clerk of the Assembly at least forty-eight (48) hours before the appointed time at which the County Assembly shall meet to elect a Speaker. Standing Order No. 6 states that the election shall be through secret ballot. Standing Order 7 states that a Speaker shall be elected upon attaining the votes of two-thirds of all members. Standing order 8 provides for the withdrawal of a candidate through written notice. Standing Order 9 provides for a further election if the threshold under Section 7 is not met and that the further election shall be on the equality of votes until one candidate obtains more votes than the other candidate. Under Standing Order 10, the custody of ballot papers shall be with the Clerk of the County Assembly for a period of six months, then they are destroyed. Standing Order 11 provides that if a single person is duly nominated such persons shall be declared forthwith to have been elected Speaker without any ballot of vote being required. Lastly, Standing Order 12 states that immediately following the election of the Speaker, the Clerk shall administer the Oath or Affirmation of office to the Speaker in the presence of the assembled County Assembly.

73. The High Court's jurisdiction is set out in Article 165 of the Constitution which provides as follows:

- “(3) Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation...”



74. The appellant’s submissions, supported by the 2nd and 3rd respondents, outline the magistrate’s court’s jurisdiction in hearing cases related to the election of Members of County Assemblies to equate that in the same context, the magistrate’s court has jurisdiction to hear and determine the validity of the election of the Speaker of the County Assembly. Section 75 of the *Elections Act* elaborately provides for a redress mechanism in county elections and specifically that the question of the validity of the election of a member of a County Assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.
75. The High Court in finding that it has jurisdiction to entertain the petition in this matter distinguished the election of a member of a County Assembly from that of a Speaker of the County Assembly and determined as follows [para. 64 & 65]:
- “Where there is unconstitutional exercise of legislative or executive powers: the National Assemblies (Parliament and Senate) of the County Assemblies cannot be shielded from judicial scrutiny in the name of separation of powers.
- Flowing from the above discourse, this court holds the view that a Speaker of the County Assembly cannot be equated to be a member of the County Assembly. The procedure in which the Speaker and the Member of the County Assembly assume office is distinct and provided for clearly under the law, the Speaker is an ex-officio member who is selected by the Members of the Assembly while the Members of the County Assembly are a direct choice of the electorate...”
76. The Court of Appeal agreeing with the determination of the High Court held as follows [par.57 & 58]:
- “The trial court made a finding, one that, in our view, was sound, that the issues raised related to alleged constitutional violations, falling within the jurisdiction of the High Court under Article 165 (3). They did not fall within the jurisdiction of the Employment and Labour Relations Court, nor did they fall within the jurisdiction of a special magistrate under the *Elections Act*....In our view, there was no error or misdirection on the part of the trial court in reaching the conclusion, and our finding was that this ground of appeal raised by the respondents against the decision of the trial court had to be determined in the negative...”
77. The proper court to determine the question of the validity of the election of the Speaker of the County Assembly has been the subject of various determinations by the courts below. *Kipkemoi Terer v John Langat & 3 others* [2013] eKLR was an election petition challenging the election of the Bomet County Assembly Speaker that was filed, heard and determined at the Chief Magistrate’s Court in Kericho. *Justus Nyaribo v Clerk to Nyamira County Assembly* [2013] eKLR, which was an election petition challenging the election of the Nyamira County Assembly Speaker was filed, heard and determined at the Chief Magistrate’s Court in Nyamira. *Frank Mulisa Makola v Felix G. Mbiuki & 4 others* [2013] eKLR, was an election Petition filed before the Magistrate’s Court challenging the election of the Machakos County Assembly Speaker but was subsequently transferred to the High Court. In *Charles Njuru Kihara & 2 others v Chris Kinyanjui Kamau (Clerk, County Assembly of Murang’a) & 2 others* [2018] KEHC 8878 (KLR) and *Wanja Maina Hannab v Independent Electoral & Boundaries Commission & 2 others* [2017] KEHC 1602 (KLR) the court held that, by dint of Article 177 (1) (d) of the *Constitution*, the Speaker of a County Assembly, once elected, becomes a member of the Assembly and that any dispute regarding the election of such a Speaker must therefore be resolved as provided in the *Elections Act*, the relevant provision being Section 75 (1) (A) of the *Act*.



78. This Court on its part has had the opportunity to consider the types of elections and the resultant election petitions under the *Constitution* and the law. In the case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR, the Court, in addressing the question as to whether a member nominated to a County Assembly through the process of a party list is an equal member to the one elected at a general election and whether such a challenge should be by way of an election petition or otherwise, after a detailed consideration of the matter had the following to say:

“ [117] It is clear to us that the *Constitution* provides for two modes of ‘election’. The first is the election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of election petition.

118. On such a foundation of principle, we hold it to be the case that whereas the Court of Appeal exercised jurisdiction as an appellate electoral court, it had not been moved as such, in accordance with section 85A of the *Elections Act*, and relevant provisions of the *Constitution*. The respondents had moved the appellate court on the basis that they were aggrieved by the High Court’s decision in judicial review proceedings, in which that court had declined jurisdiction. This in our view, would have been a proper case for the appellate court to refer the matter back to the High Court, with appropriate directions.

119. To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165(3) of the *Constitution*, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute- resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute- resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.’

79. The High Court in *David Kerario Marwa v Boaz Awiti Okoth & Another* [2017] eKLR while determining the question whether a Speaker, as an ex-officio member of the Assembly, stands on the same footing as other members of the Assembly with regard to any challenge to his/her election as such Speaker analyzed our decision in *Moses Mwicigi (supra)* and made the following determination:

“It is worth pointing out that the Supreme Court considered the *Constitution* and the law and it was satisfied that the supreme law of the land provides for only two types of elections which can only be challenged by way of election petitions under the Act. The Court remained alive to the provisions of Articles 97, 98 and 177 of the *Constitution* which provides for the Speakers of the National Assembly, the Senate and the County Assemblies as ex-officio Members of those Houses and to the respective Standing Orders of the Houses which provided for the elections of Speakers into office but clearly found the election of such Speakers not to fall within the two categories of elections recognized under the *Constitution* and the law. It therefore means that challenging the election of a Speaker is not the same as challenging an election resulting from a general election, a by-election or through nomination by way of a party list.



65. The foregoing discourse makes it conspicuously clear that a Speaker, as an ex-officio member, of an Assembly does not occupy the same status as the other Members of the Assembly. Whereas the Speaker can be said to be engaged by the Assembly that cannot be said of the other Members of the Assembly who are the direct choice of the people. That is the very reason why even the way the election of a Speaker is challenged must be different from that of any other Member of the Assembly. The election petitions contemplated under the Act and the Rules do not therefore include any legal challenges to an election of a Speaker of a County Assembly. I find it a misconception of the law to treat a petition challenging the election of the Speaker of a County Assembly as an election petition contemplated under the Act and the Rules....” (Emphasis Ours)
80. A similar determination was made in *Onchoko v Nyamira County Assembly & another; Nyabaro & another (Interested Parties)* [2025] KEHC 2262 (KLR) where the Court held that, since the Speaker is an ex-officio member of a County Assembly, a petition challenging his election cannot be treated in the same manner as a petition challenging the election of an MCA and, in *Frank Mulisa Makola v Felix G. Mbiuki, Transition Authority, County Assembly Speaker B.N. Mungata, County Governor Dr. Alfred Mutua & Machakos County Assembly* [2013] KEHC 967 (KLR) the High Court, while dealing with same question of the election of a County Assembly Speaker, restated its role in such an election as follows:
- “The petitioner’s rights under Article 38 must be adjudicated in the context of the doctrine of separation of powers and the constitutional and legislative provisions that govern the organization of the county assembly which I have set out above. In this respect I agree with Mr. Kilukumi that the election of a Speaker is an election sui generis. A plain reading of Article 38 as read with Articles 178 and 196, the County Government Act, the Elections Act, 2011 and the Standing Orders do not envisage the election of the Speaker as one based on universal suffrage; it is an internal election for Speaker governed by special rules contained in the First Schedule to the Elections Act, 2011 and the Standing Orders which are all underpinned by statutory and constitutional provisions I have cited. The County Assembly, as a legislative assembly, is entitled to regulate its own proceedings including the election of the Speaker” (Emphasis Ours)
81. On our part, we are of the view that an election within the set up of the electoral process should fall within the established electoral institutions. The election of the Speaker of the County Assembly, is however distinct and does not fall within the same ambit of the electoral processes, comparable to that of an elected or nominated representatives of a County Assembly. We therefore, respectfully, agree with the determination in *David Kerario (supra)* that the election of a Speaker of any County Assembly and that of a Member of the County Assembly are dissimilar in that; in the election of a Speaker of a County Assembly, the Clerk merely announces the results immediately after the count, different from a declaration by IEBC in a general election. There is also no legal requirement for the Clerk to publish the name of the Speaker-elect to the public in the County Gazette or Kenya Gazette before the Speaker-elect assumes office. Whereas a Speaker can also be removed from office by a resolution of the Assembly and that will effectively mark the end of his/her tenure unless legally challenged, that is not the case with the other members of the Assembly. Further, the provisions of law relating to electoral malpractices do not apply when an election of a Speaker is challenged. There is furthermore no requirement that the challenge to the validity of the election of a Speaker must be filed within 28 days as provided in Article 87 (2) of the *Constitution*. The challenge to the election of the Speaker does not similarly bear



- the requirement that the IEBC ought to be a party in the petition and, there is no requirement for the payment of security of costs which is set at KShs. 100,000/= for members of the County Assembly.
82. The distinction of the election of a Speaker to that of a Member of a County Assembly is further elaborated by the position the Speaker holds in the County Assembly. Article 177 is clear that the Speaker is an ex- officio member of the County Assembly. The Speaker is therefore a member of the County Assembly by the virtue of the office and authority that he/she holds only. The Speaker of the County Assembly does however not at any time obtain the same status as that of an elected or nominated member of the County Assembly in any way.
83. In *Moses Mwicigi (supra)*, this Court, while reversing the determination of the Court of Appeal, found that there are established institutions to determine election disputes and it was not the preserve of the Court of Appeal to take up the matter couched as a constitutional petition. The High Court in the matter had denied jurisdiction, holding that the issue fell within the mandate of the Political Parties Tribunal. While we fully reiterate our decision in *Moses Mwicigi (supra)*, we find that the decision is distinguishable from this case because in that case the courts predominantly delved into the adjudication of disputes related to the nomination of members of a County Assembly by political parties under Articles 90 and 177 of the *Constitution* as read with Section 34 to 36 of the *Elections Act*, including the mandate of the IEBC in the process; there was already an established electoral process within the Political Parties Dispute Tribunal to adjudicate nomination disputes, hence the determination by the High Court and adopted by the Supreme Court. In the instance of a Speaker of a County Assembly there is no definite role by the IEBC as outlined in Section 87 of the *Constitution*.
84. In addition to the above findings, there are two distinct processes for the removal of a Speaker; the first is as outlined under Section 11 of the *County Governments Act* (removal of speaker from office by not less than seventy five percent of all members of the county assembly), mainly occurring upon the assumption of office of the Speaker, while the second is through a court process; and in this regard through filing of a judicial review application or a constitutional petition. The processes being distinct we find no conflict as pertains the doctrine of separation of powers and the duties bestowed upon a County Assembly are set out under Section 11 of that *Act* and the jurisdiction of the High Court under Article 165(3). In this case, the issues raised by the 1st respondent at the High Court predominantly related to the nomination process and the declaration of the election result and not the conduct of the Speaker whilst he was in office. The nomination process and the declaration of the result, along with the constitutional issues raised by the 1st respondent therefore fell within the mandate of the High Court under Article 165(3) as read with Articles 23 and 47 of the *Constitution* as opposed to the role of the County Assembly under Section 11 of the *County Governments Act*.
85. As regards whether the reliefs sought by the 1st respondent were not those set out under Article 23 of the *Constitution*, Article 23 (3) is clear on the reliefs a court can grant and states thus:
- “In any proceedings brought under article 22, a court may grant appropriate relief, including:
- a. a declaration of rights
 - b. an injunction
 - c. a conservatory order
 - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
 - e. an order for compensation



f. an order of judicial review.”

86. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*; Petition No 14, 14A, 14B and 14C of 2014 (Consolidated)[2014] KESC 53 (KLR) this Court found that Article 23(3) is not exhaustive and the High Court has an obligation to fashion a remedy that addresses the violation in question. The impact of this is that the High Court has a wide discretion in granting any appropriate remedy. (See also *Francis Karioko Muruatetu Another v Republic* Petition No 15 & 16 of 2015, [2017] eKLR, and *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment).
87. With the above differences as to the election of a Member of the County Assembly to that of the Speaker of an Assembly and bearing in mind that the petition at the High Court also raised constitutional questions on violations of rights under the Bill of Rights and contraventions of various Articles of the *Constitution* we find, and agree with the Court of Appeal that the High Court had jurisdiction to hear and determine the petition filed before it.
88. Related to the jurisdiction of the High Court, the appellant also urges this Court to find that the petition at the High Court was not supported by a supporting affidavit and therefore no evidence was presented by the 1st respondent in support of his petition. Rule 10 of the *Mutunga Rules* provides the form of a petition as follows:
- “(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
 2. The petition shall disclose the following—
 - a. the petitioner’s name and address;
 - b. the facts relied upon;
 - c. the constitutional provision violated;
 - d. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - e. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - f. the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - g. the relief sought by the petitioner.
 3. Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
 4. An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”



89. Rule 11 on the other hand states as follows:

- “ 11. Documents to be annexed to affidavit or petition
1. The petition filed under these rules may be supported by an affidavit.
 2. If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit” [Emphasis ours]

90. The common practice under the *Mutunga Rules* is to file an affidavit in support of every petition. The Rules however, do not make this procedure mandatory. Further, the absence of an affidavit specifically in support of a petition does not go to the jurisdiction of the High Court. Rules 10 and 11 of the *Mutunga Rules* do not also demand that for a petition to be competent it must be supported by an affidavit. The introduction of documents under Rule 11 of those *Rules* need not also be through the filing of a supporting affidavit. Rule 11 further presents a scenario where an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom may be deemed as a competent petition. A petition may therefore be supported by such documents are attached to the petition. To that extent we cannot fault the superior courts’ consideration of the documents filed by the 1st respondent herein and the reason is obvious; vindication of constitutional rights need not be formalistic nor technical under the *Constitution*. This finding does not in any way reduce the necessity for or remove the oft quoted rule that constitutional petitions should not be vague and must be precise and enable the court to

understand the grievance submitted and proof thereof. Only then can any court fashion a remedy under Article 23 aforesaid.

iv. Whether the process leading to election of the Speaker of the County Assembly of Migori constituted an administrative action

91. Article 47 of the *Constitution* provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47 (2) specifically provides that;
- (2) if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
92. Section 2 of the *Fair Administrative Action Act* states that an “administrative action” includes—
- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
 - ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
93. The process leading to the election to the office of the Speaker of the County Assembly of Migori under the Migori County Assembly Standing Orders involves the declaration of vacancy, the presentation of nomination papers to the Clerk of the County Assembly, the Clerk to ascertain that every candidate qualifies for the election of the Speaker, the publication of the names of qualified candidates, preparation of ballot papers and the holding of the election through a secret ballot.
94. The nomination process is the preserve of the Clerk of the Assembly. In the conduct of this function, the Clerk issues decisions that affect the interest of candidates in the nomination process. The action and conduct of the Clerk in this process therefore constitutes an administrative action.



95. Subjecting the above definition to the facts of the case before us, we note that the High Court, reflecting on the conduct of the Clerk of the County Assembly during the nomination process and in the High Court proceedings noted as follows:

“In her response, the 2nd respondent did not attempt to lead this court and show that she complied with the laid down procedure in the Constitution, the relevant legislation and the Migori County Assembly Standing Orders. The 2nd respondent being the officer responsible for conducting the elections of the office of the Speaker of the County Assembly, filed her response in a rather lackluster manner and did not give this petition, the seriousness it deserves. Even if in her view, this court lacked the requisite jurisdiction to hear and determine the instant petition or her misgivings on the person of the petitioner whom she termed has a litigious tendencies, the onus of proving that the process was lawful lay on her.

It is quite surprising that the 2nd respondent did not try to defend her actions or inactions to demonstrate that she followed the laid procedure before the election of the Speaker of the County Assembly of Migori...”

96. The Court of Appeal also found that the conduct of the Clerk of Migori County Assembly did not meet the constitutional test of transparency as the same was not open to scrutiny by the public or those, such as the 1st respondent, who were interested in the seat of the Speaker of the County Assembly.
97. The Clerk of the County Assembly bore the duty to give reasons for all her actions to the candidates, to ensure transparency in the process. We therefore agree with the Court of Appeal that the failure to give reasons, in light of the request by the 1st respondent, left the process as one shrouded in mystery. It was also not clear how the appellant was deemed to be the only one who qualified in the nomination to stand for election for the position of Speaker and we agree with the superior courts below that the election of Speaker violated the 1st respondent’s rights as claimed and was properly challenged in the High Court

v. Whether the 1st Respondent was Entitled to the Reliefs Sought.

98. We have already made a finding that the election of the Speaker of Migori County was not transparent, which in part determines the appeal and part of the reliefs sought by the 1st respondent in its cross-appeal. The next issue, which significantly forms the basis of his cross-appeal is whether the 1st respondent was the only validly nominated candidate under the Migori County Standing Orders and therefore entitled to be declared Speaker-elect under Rule 11 of the Standing Orders which provides as follows:

“Single duly nominated candidate

11. Despite the provisions of this Part, if there is only one candidate who has been duly nominated for election as Speaker at the expiry of the nomination period, that candidate shall be declared forthwith to have been elected Speaker without any ballot or vote being required.”

99. The process leading to the election of the Speaker of Migori County is provided for in Rules 3-11 of the Migori County Standing Orders which we summarized above. Standing Order 5 (3) provides that the Clerk of the Assembly must ascertain that each candidate is qualified to be elected under Article 193



of the Constitution. Article 193 (1) of the Constitution provides that, unless disqualified under clause (2), a person is eligible for election as a member of a County Assembly if the person—

- “(a) is registered as a voter;
- b. satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and
- c. is either—
 - i. nominated by a political party; or
 - ii. an independent candidate supported by at least five hundred registered voters in the ward concerned.”

100. It is not in dispute that the 1st respondent did not present the following documents in his nomination papers: a tax compliance certificate from KRA; a clearance certificate from a Credit Reference Bureau and a valid certificate of good conduct from the National Police Service. The 1st respondent argues that the said documents were extra- legal and not required of him during the nomination exercise, and that in line with Article 193 (3) he has not been found to be in contravention of Chapter 6 of the Constitution.

101. The Court of Appeal, in finding the 1st respondent not to be compliant with Article 193 of the Constitution as set out above, stated as follows:

“Chapter 6 of the Constitution contains the constitutional principles on leadership and integrity and requires that persons working in the public sector, whether as state or public officers, espouse and exhibit qualities of leadership and integrity. There has thus developed over the years since the promulgation of the Constitution, a requirement that those aspiring for such offices obtain clearances certificates from various institutions to confirm that such applicants exhibit personal integrity, competence and suitability. While not a foolproof or perfect measure, it is not strange or unlawful for the 1st respondent to require of those aspiring to the office of the Speaker that they produce, with their nomination application forms, the clearance from these institutions. The requirement was not applied to Aluochier alone but was required of all those who presented themselves as candidates for the officer of Speaker. The requirements were communicated to all candidates beforehand, and Aluochier does not claim to have been unaware of them. The trial court, in our view, correctly found no discrimination against Aluochier. That being the case, since he had not produced all the documents required of him, he could not properly claim to have been the only validly nominated candidate.”

102. The question of integrity under Chapter 6 of the Constitution has been the subject of various determination by the superior courts below, the recent being by Gikonyo J in Gikenyi B v Mwaura & 2 others; Ethics and Anti-Corruption Commission & 2 others (Interested Parties) (Petition E009 of 2023) [2024] KEHC 8456 (KLR) who, while addressing his understanding of Chapter 6 of the Constitution, stated as follows:

“The power of integrity provisions cannot be underrated.

- 104. Be that as it may, there is no requirement of a conviction for a person to fail the integrity test. Disciplinary action on the basis of integrity issues is relevant aspect in testing for integrity. Gross misconduct is also a relevant



aspect in testing for integrity. Criminal charges including corruption and economic crimes against a person are also relevant considerations in testing for integrity. Conviction of a criminal offence is also a relevant material in testing for integrity. Failure to disclose conflict of interest in a matter relevant to the office you hold or to be appointed to is also relevant material in testing for integrity. And, the list is long; it is not exhaustive..... The national values and principles of governance in article 10 and leadership and integrity provisions in chapter six of the *Constitution* are not mere adornment or embellishments. They are of real value in governance and regulate exercise of public power. The country should now embark on building national ethos, culture and practices for leadership based on, amongst others, the national values and principles of governance, integrity provisions in the law, principles of justice. Invest in integrity....”

103. Lenaola J (as he then was) in *Luka Angaiya Lubwayo & another v Gerald Otieno Kajwang & another* [2013] KEHC 6324 (KLR) made a distinction of the requirement under Chapter 6 of the *Constitution* between appointive positions and elective position when he held as follows:

“the *Constitution* at Article 73 (2)(a) anticipates the two situations as follows;

- i. In appointive position, the criteria is “personal integrity, competence and suitability.”
- ii. In elective positions, the criteria is “election in free and fair elections.”

40. This distinction is important because in elective positions, it is the electors who determine those to elect based on their assessment of the candidates including on their honesty, rectitude, uprightness and scrupulousness. That is why Article 38(2) of the *Constitution* provides that every citizen has “the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors ...”

104. Both Gikonyo J. and Lenaola J. therefore pointed to the need for integrity in all positions - elective and appointive - in line with Chapter 6 and in this case, the 1st respondent was well informed of the requirements before hand and the same applied to all the other candidates who subjected themselves to the election including the appellant. The Clerk of the County Assembly, in an adopted practice that has now gained wide usage in Kenya, sought to ensure compliance by the candidates on Chapter 6 of the *Constitution* and we cannot see how her conduct can be said to be unlawful or irregular when all she did was to invoke and apply Chapter 6 of the *Constitution* in a practical and purposive manner and with notice to all candidates. We therefore agree with the determination by the Court of Appeal that, by failing to present these crucial documents which are expressive of the need to have a person of integrity elected as Speaker of the Assembly, he could not claim to be the only validly elected candidate. We also note that he has not explained why he was unable to procure those documents which are now routinely issued to deserving candidates for positions such as the one he was seeking.

F. Conclusion.

105. Having determined that the election of the appellant herein was not transparent and that the 1st respondent failed to comply with the conditions set out by the Clerk of the County Assembly and Migori County Assembly Standing Orders, we fully agree with the determination of the Court of Appeal and hereby dismiss the petition and cross-appeal.



106. Costs follow the event but are also awarded at the discretion of the Court and guided by the principles on the award of costs enunciated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR and noting the nature of the appeal, we shall make no orders with regard to costs.

G. Final Orders.

107. Accordingly, we make the following final Orders:

- i. The Petition of Appeal dated 18th March 2024 and filed on 18//th March 2024 is hereby dismissed.
- ii. The Cross - Appeal dated 29th April 2024 and filed on 30th April 2024 is hereby dismissed.
- iii. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs herein be refunded to the appellant; and
- iv. There shall be no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2025.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I.LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

