



**Owiso & 2 others v Attorney-General & another; Law Society of Kenya & 8 others (Interested Parties) (Petition (Application) E020 of 2025) [2025] KESC 52 (KLR) (Civ) (15 August 2025) (Ruling)**

Neutral citation: [2025] KESC 52 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
CIVIL**

**PETITION (APPLICATION) E020 OF 2025**

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,  
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**AUGUST 15, 2025**

**BETWEEN**

**DR OWISO OWISO ..... 1<sup>ST</sup> PETITIONER  
KHELEF KHALIFA ..... 2<sup>ND</sup> PETITIONER  
ASHIOYA BIKO ..... 3<sup>RD</sup> PETITIONER**

**AND**

**HON ATTORNEY-GENERAL ..... 1<sup>ST</sup> RESPONDENT  
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY  
KATIBA INSTITUTE ..... INTERESTED PARTY  
KALONZO MUSYOKA ..... INTERESTED PARTY  
RAILA ODINGA ..... INTERESTED PARTY  
UNITED DEMOCRATIC ALLIANCE PARTY ..... INTERESTED PARTY  
OKOITI OKIYA OMTATAH ..... INTERESTED PARTY  
JIMI RICHARD WANJIGI ..... INTERESTED PARTY  
FRED MATIANG'I ..... INTERESTED PARTY  
KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY**



***(Being an Application for Leave of the Court to Admit the Petition pursuant to Articles 20, 22, 23, 50(1), 163 (3)(a), 258 and 259(1) of the Constitution of Kenya, 2010; Sections 3A, 12(1), 21(2), and 24 of the Supreme Court Act, Cap 9B; rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017; and rules 31 and 32 of the Supreme Court Rules, 2020)***

## RULING

Representation:

Dr. Owiso Owiso, Advocate

(1st Applicant acting in person and on behalf of the 2nd and 3rd Applicants)

Mr. Emmanuel Bitta, Chief State Counsel

(Office of the Attorney General)

A. Garane, Advocate for the 2nd Respondent Garane and Somane Advocates

(Advocates for the 2nd Respondent)

Mr. Paul Mwangi, Advocate for the 4th Interested Party

(Paul Mwangi & Company Advocates)

Mr. Nelson W. Osiemo, Advocate for the 8th Interested Party

(Osiemo Wanyonyi & Company Advocates)

1. Bearing in mind that the 1st to 3rd applicants herein have described themselves as spirited Kenyan citizens who have moved the court vide a Notice of Motion dated 23rd April 2025 and filed on 24th April 2025 invoking the Court’s jurisdiction under Articles 20, 22, 23, 50(1), 163 (3)(a), 258 and 259 (1) of the Constitution, Sections 3A, 12(1), 21(2), and 24 of the Supreme Court Act, Cap 9B, Rule 4 (2) of the Supreme Court (Presidential Election Petition) Rules, 2017 and Rules 31 and 32 of the Supreme Court Rules, 2020; and seeking the following orders;
  - i. Spent.....
  - ii. That the Honourable Court grant leave to admit the Petition for hearing before the Honourable Court since it raises a dispute relating to presidential elections.
  - iii. That the Application and Petition be heard and determined expeditiously, but in any case, within fourteen days of the filing of the Petition.
  - iv. That the Honourable Court be and is hereby pleased to issue any other order or direction that it may deem just and expedient to grant.
  - v. That there be no orders as to costs.; and
2. Upon Perusing the grounds in support of the application and noting that, on the face of it, the applicants are seeking this Court’s “leave to admit the Petition for hearing”. The petition sought to be admitted is dated 23rd April 2025 and was filed on 24th April 2025 simultaneously with the present application, wherein the applicants are seeking inter alia: “a declaration that Article 136 (2)(a) of the Constitution mandates that presidential elections are to be held on the second Tuesday of August of every fifth year”; and



3. Upon considering the averments contained in the supporting affidavits of Dr. Owiso Owiso, Khelef Khalifa, and Ashioya Biko sworn on 23rd April 2025 wherein they contend that they are concerned that the current confusion, anxiety and uncertainty surrounding the date of the next presidential election threatens to plunge the country into a constitutional crisis and political turmoil thus requiring the guidance of this Court; and
4. Upon considering the applicants' written submissions dated 23rd April 2025 and filed on 25th April 2025, wherein they submit that Kenyans have a constitutional right to regular, free, and fair presidential elections, and that the Government of the Republic of Kenya bears the constitutional obligation to guarantee this right. The applicants further submit that, under Article 136 (2) (a) of the Constitution, presidential elections must be held during the fifth year of a current presidential term—not after the fifth year of the said term; and lastly, that this Court has jurisdiction to admit and hear the petition as it relates to the date of the next presidential election and as such falls within the jurisdiction of this Court under Article 163(3)(a) of the Constitution. The applicants in the above context cite In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Advisory Opinion Application No. 2 of 2012 KESC 5 (KLR) (Two Thirds Gender Rule Matter) to contend that the jurisdiction of this Court under Article 163(3)(a) of the Constitution encompasses all issues and disputes relating to a presidential election, including pre-election disputes such as the present one; and the case of Speaker of the Senate & Another Vs Attorney-General & Another; Law Society of Kenya & 2 Others (Amicus Curie) (Advisory Opinion reference 2 of 2013) KESC 7 (KLR) where the Court affirmed its restorative role in the constitutional transition process through interpretive vigilance; and
5. Noting the 1st respondent's (Office of the Attorney General's) Preliminary Objection and response to the petition dated 26th May 2025 wherein they contend that; firstly, the petition seeks declaratory orders whose import is the pre-emptive usurpation of the legal mandate of the IEBC; secondly, that the petition is an abuse of the court process as the petitioners are essentially seeking this Court's Advisory Opinion without the requisite locus standi; thirdly, that the Supreme Court's original jurisdiction under Article 163(3)(a) of the Constitution is to be read in the context of Article 140 of the Constitution which contemplates a petition being filed after declaration of a president-elect; and lastly, that the joinder of all interested parties by the petitioners without any reference to the Court militates against the provisions of Article 258(2)(c) of the Constitution; and
6. Noting the 2nd respondent's (Independent Electoral and Boundaries Commission's) Preliminary Objection and response to the petition dated 26th June 2025, wherein it seeks to have the petition dated 23rd April 2025 struck out in limine for want of jurisdiction. And further noting that it contends that Articles 163(3)(a) as read with Article 140 of the Constitution confer on this Court exclusive original jurisdiction to determine disputes relating to the election to the office of the President. Furthermore, that the High Court, under Article 165 (2)(d) of the Constitution, is vested with the original jurisdiction on the interpretation and application of the Constitution, and so the applicants ought to commence proceedings regarding the date of the next general election at the said court and not this Court. The 2nd respondent in that regard relies on the case of Owners of the Motor Vessel 'Lillian S' Vs Caltex Oil Kenya Ltd [1989] KECA 48 (KLR) it was determined that a court acting without jurisdiction acts in vain and must down its tools the moment it becomes apparent that jurisdiction is lacking; and
7. Noting the 4th Interested Party's (Raila Odinga's) Grounds of Opposition and written submissions dated 16th May 2025 in opposition to the Notice of Motion wherein he has raised three issues viz: that the said Motion is an abuse of the court process as the applicants have not demonstrated any exceptional circumstances to warrant the invocation of the jurisdiction of this Court at this stage; that the applicants have prematurely invoked the jurisdiction of this Court as the date of a general election in Kenya affects not only an election to the office of the President but all other elective posts; and lastly,



that the issues raised by the applicants are res judicata as the question of the date of the general election and the computation thereof has already been heard and determined on merits by various courts in the past; and

8. Having Perused the 8th Interested Party's (Jimi Richard Wanjigi's) replying affidavit, sworn on 22nd May 2025, wherein he states that he has a deep conviction that the issues raised by the applicants are fundamental to Kenya's constitutional democracy and require urgent and definitive resolution. In addition, that the prevailing uncertainty surrounding the precise date of the next presidential election undermines public confidence in the electoral process, thereby jeopardizing national cohesion and economic stability. And lastly, that this Court must develop jurisprudence that will not only resolve the immediate dispute but also contribute significantly to Kenya's social, economic, and political growth by strengthening democratic institutions and processes; and
9. Noting that the 1st, 2nd, 3rd, 5th, 6th, 7th, 9th, and 10th Interested Parties did not file a response to the application; and
10. Further noting that this Court has had an opportunity in the past to pronounce itself on its jurisdictional contours including in the *Two Thirds Gender Rule Matter* (*supra*) where the Court stated that an advisory opinion as contemplated by Article 163(6) of the *Constitution*, must seek to unravel a legal uncertainty in such a manner as to promote the rule of law and public interest; and in *Nduttu & 6000 others Vs Kenya Breweries Ltd & another* (Petition 3 of 2012) [2012] KESC 9 (KLR) we were categorical that Article 163(4)(a) of the Constitution obligates that an appeal must originate from a Court of Appeal case where issues of contention revolved around the interpretation and application of the Constitution; in *Mwangi Stephen Muriithi Vs Daniel Toroitich Arap Moi & Another* [2014] KESA 273 we addressed the Court's jurisdiction under Article 163(4)(b) of the Constitution on matters of general public importance; and in *Raila Odinga & 16 others Vs William Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008) (Consolidated) [2022] KESC 54 (KLR) we re-affirmed this Court's exclusive original jurisdiction to determine disputes on election to the office of the President under Article 140 as read with Article 163(3)(a) of the *Constitution*; and
11. Turning now to the purported procedure of grant of leave to admit a petition as prayed for by the applicants, we wish to state from the onset that such a procedure is alien to the Rules of this Court. We say so because we do not know how a party can file a petition, then simultaneously seek leave to file the same petition which has already been received and admitted as filed by this Court. The absurdity of such a procedure is obvious to us, and in any event, none of the constitutional and statutory provisions cited by the applicants can properly grant this Court the jurisdiction to grant such leave. It has been reiterated that this Court and indeed any other court operates strictly within constitutional and statutory limits and cannot expand its jurisdiction through judicial craft or constitutional innovation as the applicants are demanding of us in the present application. This position was emphatically affirmed in *Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others*, Application No. 2 of 2011; [2012] KESC 8 (KLR) where the Court stated thus:

“2. Where the Constitution exhaustively provided for the jurisdiction of a court of law, the court must operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution conferred power upon Parliament to set the jurisdiction of a court of law or tribunal, the Legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”; and



12. Noting that the jurisdiction of this Court under Article 163(3)(a) of the Constitution is an exclusive original jurisdiction, only triggered after a petition under Article 140 of the Constitution has been filed and any decision made under Article 140(1) must be limited to the consideration whether a president-elect has been properly elected; and that the said jurisdiction is sacred and cannot be invoked to address pre-election disputes including the determination of the date of the next presidential election as is alleged by the applicants; and noting that, in Okoti Vs Independent Electoral and Boundaries Commission & another; Kenyatta & 7 others (Interested Parties) (Petition 18 of 2016) [2020] KESC 68 (KLR) we stated thus:

“The Supreme Court cannot determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. It is one thing for the court to pronounce itself on a constitutional or legal question, but it is another thing to determine the validity of an election. In other words, the Supreme Court cannot anticipate the validity of a presidential election, within the meaning of Article 140(1) of the Constitution. As such, this court lacks jurisdiction to hear and determine the present Petition”; and

13. Aware that, the question relating to the date of the next general election is in the realm of interpretation and application of the Constitution, in Ekuru Aukot Vs Independent Electoral & Boundaries Commission & 3 others [2017] KEHC 9390 (KLR) the court opined;

“35. Article 140 of the Constitution deals with questions as to the validity of presidential elections which as the learned Chief Justice observed is a matter within the original jurisdiction of the Supreme Court. The issue presented in this petition is not a question as to the validity of presidential elections, but a question on the interpretation of what constitutes a fresh election. Thus, the Hon. the Chief Justice was right in holding that the Supreme Court has no original jurisdiction to interpret the said provision. The jurisdiction lies in this court by dint of article 163 (3) (d). Consequently, this matter is properly before this court”; and

14. Aware that, the High Court in 2011 was faced with a similar question and had to determine the date of the 2013 general election, and it did so in John Harun Mwau & 3 Others Vs Attorney General & 2 Others [2012] KEHC 5438 (KLR) where the said court stated thus:

“As we have stated, the election date for the first elections under the Constitution is provided under the Sixth Schedule and is not affected by the provisions of Article 101 et seq, which deal with subsequent elections. Whatever date the first elections are held on, the next elections must be conducted on the second Tuesday of August of the fifth year from that date, hence the term for the next President, Members of Parliament, Governors and members of the County Assemblies may be shorter than five years as a consequence of the transitional provision”; and

15. Considering all that we have stated above, We now opine and determine as Follows:

- i. We appreciate that the original jurisdiction of this Court under Article 163 (3)(a) as read with Article 140 (1) of the Constitution in presidential election petitions is exclusive; and guided by the foregoing principles, we find that the Notice of Motion before us seeking leave to admit Petition No. E020 of 2025 was filed unprocedurally more so where the petition has already been filed so that any grant of leave would be superfluous;
- ii. Petition No. E020 of 2025 was filed purportedly under Articles 163 (3)(a) as read with Article 140 of the Constitution and if it were a true petition under those Articles, which, are self-



executing, no leave is required to approach this Court for any declaration of the date of the next general election. The applicants indeed filed the said petition as if it was a matter of right and if so, no leave is required from this Court to do so; and

iii. In the absence of jurisdiction, we cannot delve into the merits of the application for grant of leave to admit a petition as sought by the applicants in their Notice of Motion dated 23rd April 2025 and filed on 24th April 2025.

16. Consequently, and for the reasons aforesaid, we make the following orders:

i. The applicants' Notice of Motion dated 23rd April 2025 and filed on 24th April 2025 is hereby struck out for want of jurisdiction; and

iii. Each party shall bear their costs of the Application.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST, 2025.**

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**M.K KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**P.M MWILU**

**DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT**

.....

**M.K IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S.C WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNG'U**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**



**SUPREME COURT OF KENYA**

