



**Okoti v Independent Electoral and Boundaries Commission & another; Kenyatta & 7 others
(Interested Parties) (Petition 18 of 2016) [2020] KESC 68 (KLR) (7 February 2020) (Judgment)**

*Okiya Omtatah Okoti v Independent Electoral and Boundaries Commission &
another; Uhuru Muigai Kenyatta & 7 others (Interested Parties) [2020] eKLR*

Neutral citation: [2020] KESC 68 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 18 OF 2016
DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG,
SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
FEBRUARY 7, 2020**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**THE CHAIRMAN, INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION 2ND RESPONDENT**

AND

H.E. UHURU MUIGAI KENYATTA INTERESTED PARTY

RT. HON. RAILA AMOLO ODINGA INTERESTED PARTY

DR. EKURU AUKOT JOHN INTERESTED PARTY

DIDA MOHAMED ABDUBA INTERESTED PARTY

MWAURA MICHAEL WAINAINA INTERESTED PARTY

NYAGAH JOSEPH WILLIAM NTHIGA INTERESTED PARTY

KALUYU JAPHETH KAVINGA INTERESTED PARTY

SHAKHALAGA KWA JIRONGO INTERESTED PARTY



Jurisdiction of the Supreme Court to hear and determine disputes relating to the elections to the office of the President, including interpretation of all the articles relating to the election of a President

Reported by Robai Nasike Sivikhe

Jurisdiction - *jurisdiction of the Supreme Court - exclusive original jurisdiction of the Supreme Court to hear and determine disputes relating to the elections to the office of President arising under article 140 - the scope of the exclusive original jurisdiction of the Supreme Court to hear and determine disputes relating to the elections to the office of President arising under article 140 - at what point would the jurisdiction of the Supreme Court be invoked when determining validity of a presidential election - whether the Supreme Court had the exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President, including interpretation of all the articles relating to the election of a President - Constitution of Kenya article 140(1).*

Civil Practice and Procedure - *costs - award of costs- principles to be followed when awarding costs - whether a petition on the election of the President could be considered a public interest initiative when determining costs.*

Brief facts

The petitioner sought the interpretation of article 140 as read with articles 138 and 139 of the Constitution. In particular, the petitioner sought a determination of the question as to what threshold had to be met in order to trigger a fresh presidential election within the meaning of article 140 (3) of the Constitution. The petitioner also sought a determination of the effect of the withdrawal from the October 26, 2017 fresh presidential election by the 2nd interested party.

Issues

- i. At what point would the jurisdiction of the Supreme Court be invoked when determining validity of a presidential election?
- ii. Whether the Supreme Court had the exclusive original jurisdiction to hear and determine disputes relating to the elections to the Office of the President, including interpretation of all the articles relating to the election of a president.
- iii. Whether the petition could be considered a public interest initiative when determining costs.

Held

1. The Constitution conferred upon the Supreme Court exclusive original jurisdiction to determine disputes relating to the election of the President arising under article 140 only. Though exclusive and original, that jurisdiction was limited to the circumstances contemplated in article 140 (1). It was not a blanket jurisdiction that empowered the Supreme Court to flex its judicial authority over any and all interpretational questions, touching upon the election of the President. Article 163 (3) of the Constitution had not ousted the High Court's original jurisdiction to interpret the Constitution under article 165 (3) (d). The Supreme Court's exclusive and original jurisdiction to determine the validity of a presidential election only kicked in after the declaration of results, following a petition challenging the election.
2. The petitioner had wrongly invoked the Supreme Court's jurisdiction. If the intention was to seek the interpretation of articles 138, 139 and 140 of the Constitution, the petitioner could not leapfrog the High Court and go directly to the Supreme Court. Conversely, if the intention of the petitioner was to challenge the validity of the fresh presidential election of October 26, 2017, then the petition had been filed in breach of article 140 (1) of the Constitution.
3. The Supreme Court could not determine the validity or otherwise of a presidential election, before the same was held and the results thereof declared. It was one thing for the court to pronounce itself on a constitutional or legal question, but it was another thing to determine the validity of an election. In other words, the Supreme Court could not anticipate the validity of a presidential election, within



the meaning of article 140 (1) of the Constitution. As such, the court lacked jurisdiction to hear and determine the petition.

4. Costs followed the event. However, in exceptional circumstances, each party bore its own costs. Although election petitions were almost invariably filed by private individuals (losing candidates), they, by their very nature, bore a certain element of public interest. However, not every election petition could be classified as public interest litigation, unless it exhibited a distinct focus on furthering the public interest. Each case had to be determined on its own merits.
5. The instant petition was not filed for the distinct objective of furthering the public interest. It could not be perceived how the petitioner, having actively participated in and supported the election agenda of the 2nd interested party, suddenly experienced an epiphany that propelled him into the just cause of public interest litigation, in the wake of the fresh presidential election of October 26, 2017. In the circumstances, as costs followed the event, having failed in the petition, the petitioner had to bear the costs of the petition being struck out.

Petition dismissed, petitioner to bear costs of the petition.

Citations

Cases

Kenya

1. *Aluochier v Independent Electoral and Boundaries Commission (IEBC) & 19 others* Petition 2 of 2013; [2013] KESC 18 (KLR); [2013] eKLR - (Explained)
2. *Aramat, & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR); [2014] eKLR - (Explained)
3. *Aukot, Ekuru v Independent Electoral & Boundaries Commission, Wafula Chebukati, Jubilee Party & Orange Democratic Movement* Petition 471 of 2017; [2017] KEHC 9390 (KLR); [2017] eKLR - (Explained)
4. *In the matter of the principle of gender representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] eKLR; [2012] 3 KLR 718 - (Explained)
5. *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* Petition Nos 552, 554, 573 & 579 of 2012 (Consolidated); [2013] eKLR - (Explained)
6. *Katiba Institute, Africa Center for Open Governance, Okiya Omtatah Okiiti & David Ouma Ochieng v Attorney General, Government Printer & National Assembly* Constitutional Petition 548 of 2017; [2018] KEHC 7560 (KLR); [2018] eKLR - (Explained)
7. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR); [2014] eKLR - (Explained)
8. *Lisamula v Independent Electoral & Boundaries Commission & 2 others* Petition 9 of 2014; [2014] KESC 40 (KLR); [2014] eKLR; [2014] 4 KLR 316 - (Explained)
9. *Mugendi, Daniel v Kenyatta University, Benson I Wairegi, Eliud Mathiu & Olive M Mugenda* Civil Appeal 6 of 2012; [2013] KECA 41 (KLR); [2013] eKLR - (Explained)
10. *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties)* Election Petition 2 & 4 of 2017; [2017] KESC 54 (KLR); [2017] eKLR - (Explained)
11. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR); [2013] eKLR; [2013] 1 KLR 63 - (Explained)
12. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR); [2017] eKLR - (Explained)
13. *Okiya Omtatah Okiiti v Attorney General* Constitutional Petition No 543 of 2017 - (Explained)



14. *Okiya Omtatah Okoiti v Independent Electoral & Boundaries Commission, Chairperson, Independent Electoral & Boundaries Commission, Attorney General, Uhuru Muigai Kenyatta, Ekuru Aukot, Jubilee Party & Orange Democratic Movement* Petition 504 of 2017; [2017] KEHC 9448 (KLR); [2017] eKLR - (Explained)
15. *Orange Democratic Movement v Ekuru Aukot & 4 others* Civil Appeal No 359 of 2017 - (Explained)
16. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR); [2017] eKLR - (Explained)
17. *Rai & 3 others v Rai, Estate of & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Explained)
18. *United States International University (USIU) v the Attorney General & 2 Others* Petition No 170 of 2012; [2012] eKLR; [2012] 2 KLR 357 - (Explained)
19. *Wanjohi v Kariuki & 2 others* Petition 2A of 2014; [2014] KESC 26 (KLR); [2014] eKLR - (Explained)

India

1. *People's Union for Democratic Rights v Union of India & Others* 1982 AIR 1473, 1983 SCR (1) 456, AIR 1982 SC 1473, 1982 (14) Lawyer 57 1982 SCC (L&S) 262, 1982 SCC (L&S) 262, AIRONLINE 1982 SC 75 - (Mentioned)
2. *Thakur Bahadur Singh and Another v Government of Andhra Pradesh And Others* 1998(6)ALD101, 1998(5)ALT567 - (Mentioned)

United States

Cohens v Virginia 19 US 264 (1821) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya - (Interpreted) articles 1; 2; 3; 38; 81; 86; 138; 138(8)(b); 139; 138(9); 140; 140(3); 163(2); 165(3)(d)(i); 249(2)
2. Election Laws (Amendments) Bill (No 37 of 2017) - (Cited) In general
3. Elections (General) Regulations, 2012 (cap 7 Sub Leg) - (Interpreted) regulation 52
4. Elections Act (cap 7) - (Interpreted) section 83
5. Evidence Act (cap 80) - (Interpreted) section 109
6. Supreme Court (Election Petition) Rules (cap 9B) - (Cited) In general

Advocates

None mentioned

JUDGMENT

A. Introduction

1. The Petition before the court is dated October 27, 2017, and lodged on even date. The petitioner seeks the interpretation of article 140 as read with articles 138 and 139 of the [Constitution](#). In particular, the petitioner seeks a determination of the question as to what threshold must be met, in order to trigger a fresh presidential election within the meaning of article 140(3) of the [Constitution](#). The petitioner also seeks a determination of the effect of the withdrawal from the 26th October fresh presidential election by the 2nd Interested Party herein.

B. Background

2. Following the August 8, 2017 General Elections, the 1st respondent declared the 1st Interested Party, Uhuru Muigai Kenyatta, the winner of the elections and the 2nd Interested Party, Raila Amolo Odinga, the runner up, on 18th August 2017, filed a presidential election petition, [Raila Amolo Odinga &](#)



Another v Independent Electoral and Boundaries Commission & 2 others, No 1 of 2017 (hereinafter, Raila Odinga 2017) challenging the validity of the election.

3. On 1st September 2017, this court annulled the 8th August 2017 presidential election on grounds that the same was not conducted in accordance with the Constitution and applicable election laws. the court consequently ordered the 1st respondent, to organize and conduct a fresh presidential election, under article 140(3) of the Constitution, within 60 days of the determination. Following several developments, the fresh election was fixed to take place on 26th October 2017, by the 1st respondent.
4. On October 10, 2017, the 2nd Interested Party withdrew from the fresh election claiming that, the 1st respondent had failed to undertake basic reforms that could ensure a credible, fair and accountable election.
5. On 11th October 2017, the petitioner filed Constitutional Petition No 504 of 2017, *Okiya Omtatah Okiiti v The Independent Electoral and Boundaries Commission & 3 others*, seeking *inter alia*, the determination of the question as to the effect of the withdrawal from fresh election by the 2nd Interested Party. On October 24, 2017, the High Court (Mativo J) dismissed the petition on the basis that the subject matter jurisdiction was reserved exclusively to the Supreme Court. the court's reasoning was guided by this court's decision *in the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Advisory Opinion No 2 of 2010.
6. Following the High Court decision, the petitioner has filed this appeal seeking the following reliefs:
 - (i) A declaration that the Supreme Court decision in *Raila Odinga 2013* was part of the elections laws in force when the NASA presidential and deputy candidates abandoned the repeat election scheduled for 26th October, 2017;
 - (ii) A declaration that the decision by NASA presidential and deputy candidates to withdraw from the election was fatal to the said election and effectively and irreversibly cancelled the said election; exiting article 140(3) and kicking into operation article 138(8)(b) of the Constitution;
 - (iii) A declaration that the elections held pursuant to article 140(3) of the Constitution were invalid, null and void;
 - (iv) A declaration that IEBC ought to have held the election within sixty days from 10th October, 2017, being on or before the 10th December, 2017, preceded by fresh nominations;
 - (v) A declaration that the law in force during the 8th August, 2017 presidential elections was the law applicable in the election;
 - (vi) A declaration that section 83 of the *Elections Act* 2012 is unconstitutional, null and void;
 - (vii) An order compelling the 1st and 2nd respondents to hold fresh presidential elections preceded by fresh nominations, pursuant to articles 138(8)(b) and 138(9) of the Constitution and under the election laws in force during the annulled 8th August 2017 presidential elections;
 - (viii) Cost of the suit; and
 - (ix) Any other relief the court may deem just to grant .
7. The petitioner's case in a nutshell is that the fresh election of October 26, 2017, was conducted in violation of the Constitution and electoral laws.



C. Notices of Preliminary Objection

8. Three Notices of Preliminary Objection, challenging this court's jurisdiction to hear and determine the Petition, were filed on 7th November 2017, by the 1st and 2nd respondents and the 3rd Interested Party.

D. The Parties' Respective Cases

(i) petitioner's Case

9. In his written submissions, dated November 2, 2017, and grounds of Opposition to the Preliminary Objections, the petitioner identifies the following issues for determination:

Whether this Petition qualifies as public interest litigation;

- (i) Whether the Supreme Court has jurisdiction to hear and determine this Petition;
- (ii) Whether the findings and directions of this court at paragraphs 286 -294 of [Raila 2013](#) on the conduct of fresh presidential elections are binding on lower courts, the State and the public;
- (iii) Whether the 2nd Interested Party in law and in fact effectively abandoned/ vacated/ withdrew from the October 26, 2017 fresh presidential elections on October 10, 2017;
- (iv) What was the legal effect of the 2nd Interested party's October 10, 2017 withdrawal from the fresh presidential race;
- (v) Whether the High Court decision in [Ekuru Aukot v. IEBC & others](#), High Court Petition No 471 of 2017 (hereinafter Ekuru Aukot Case) delivered a day after the withdrawal by the 2nd Interested Party's withdrawal reverse the trigger of article 138(8)(b) of the [Constitution](#);
- (vi) Whether the postponement of the elections held on October 26, 2017 violate the provisions of articles 1,2,10, 38, 81 and 86 of the [Constitution](#);
- (vii) Whether the 1st respondent implemented the judgment of this court in remedying the irregularities and illegalities that resulted in the nullification of the August 8, 2017 presidential election and if not whether the 1st respondent as presently constituted was at all material times capable of conducting free, fair and credible fresh presidential elections;
- (viii) Whether IEBC conducted the 26th October, 2017 fresh election in strict compliance with the [Constitution](#) and applicable election laws as ordered by the Supreme Court;
- (ix) Whether the 1st respondent can be deemed to have conducted the fresh presidential election on October 26, 2017 in strict compliance with the Constitution and applicable election laws as ordered by the Supreme Court without considering and taking into account the decision of this court in [Raila Odinga 2013](#);
- (x) Whether IEBC put in place mechanism, staff and instruments necessary to conduct free, fair and credible fresh presidential elections;



- (xi) Whether the laws that governed the August 8, 2017 presidential elections can validly be changed midway by Parliament and whether the new law can guide the conduct of the fresh presidential election;
 - (xii) Whether section 83 of the [Election Act](#) 2012 is unconstitutional, null and void; and
 - (xiii) Who should bear the costs of this Petition?
10. On the issue as to whether this court has jurisdiction to hear and determine the Petition, it is the petitioner's case, that indeed, this court has jurisdiction. The said jurisdiction, submits the petitioner, is founded on the provisions of article 3(1) of the [Constitution](#), which obligates everyone to respect and defend the [Constitution](#). It is his contention that this Petition was filed in furtherance of the public interest pursuant to the letter and spirit of article 3 (1). In support of his argument, the petitioner cites two Supreme Court of India decisions, namely, [Thakur Bahadur Singh & Another v. Government of Andhra Pradesh](#) (1998) and [People's Union for Democratic Rights & others v. Union of India & others](#) (1982) 3 SCC 235.
 11. The petitioner further submits that the jurisdiction of this court to determine the Petition is also founded on the provisions of article 163(3)(a) of the [Constitution](#). It is his argument that the exclusive jurisdiction, to hear and determine questions as to the validity of a presidential election under article 140 of the [Constitution](#), subsists not just after the declaration of results but at any stage of the electoral process. It is the petitioner's case that, this position was confirmed by the High Court in [Okiya Omtatah Okoiti v The Independent Electoral and Boundaries Commission & 3 others](#) (*supra*); [International Center for Policy and Conflicts & 5 others v the Attorney General & 4 others](#) [2013] eKLR; and this court [In the Matter of the Principle of Gender Representation in the National Assembly and the Senate](#) (Advisory Opinion Application No 2 of 2012) [2012] eKLR.
 12. The petitioner also submits that pursuant to article 165(5)(a) of the [Constitution](#), where a constitutional issue arises in a dispute whose subject matter is reserved for the original and exclusive jurisdiction of this court, the court has jurisdiction to interpret the [Constitution](#). In support of his arguments, the petitioner cites, as persuasive authority, the High Court decision (Majanja J) in [United States International University \(USIU\) v the Attorney General & 2 others](#) HC Petition No 170 of 2012 [2012] eKLR and the court of Appeal decision in [Daniel N Mugendi v Kenyatta University & 3 others](#) Civil Appeal No 6 of 2012 [2013] eKLR.
 13. He urges the court to assert its judicial authority in order to save the country from the constitutional confusion created by the actions and/or omissions of the respondents. The petitioner relies on the US Supreme Court decision in [Cohens v Virginia](#) 19 US 264(1821), as persuasive authority in that regard.
 14. On the question whether the findings and directions of this court at paragraphs 286-294 in [Raila Odinga 2013](#) are binding, the petitioner urges that article 164(7) of the [Constitution](#) stipulates that all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court as a matter of constitutional imperative. In support of his arguments, the petitioner places reliance upon this court's decision in [Anami Silvester Lisamula v Independent Electoral & Boundaries Commission](#) [2013] eKLR; paragraphs 238 and 239 of [Evans Odhiambo Kidero & 4 others Ferdinand Ndungu Waititu & others](#) [2014] eKLR; as well as paragraph 82 of [George Mike Wanjohi v Steven Kariuki](#) [2014] eKLR. He also revisits the decision in [Jasbir Singh Rai v. Tarlochan Singh Rai](#) [2013] eKLR, to urge, that it is only the Supreme Court that can depart from its own decision and even so, this court can only do so in special circumstances. He adds that the said decision, has not been departed from by a properly constituted Supreme Court in accordance with article 163(2) of the [Constitution](#).



15. It is further submitted that whether obiter or ratio decidendi, the decision of the Supreme Court is binding upon all lower courts. He relies on this court's decision in [Lemanken Aramat v Harun Meitamei Lempaka](#) [2014] eKLR at paragraph 119 and 120. In the same breathe, the petitioner submits that the directions of the court at paragraphs 286 to 294 in [Raila 2013](#) were not *obiter dicta* as they were carefully, adequately and judiciously canvassed, deliberated and ruled on by this court. This, he urges, was done in response to the question raised by the Attorney-General appearing as an amicus in the public interest. He urges that indeed paragraph 290 of [Raila Odinga 2013](#), is the only legal answer to the question,

“What happens if a candidate dies or abandons the fresh presidential election under article 140(3)?”

The petitioner consequently submits that, even where there is an inconsistency in the interpretation of the [Constitution](#) between a statute and a decision of the Supreme Court, the court's decision prevails.

16. On the issue as to whether the 2nd Interested Party on 10th October, 2017 effectively abandoned or vacated the election, the petitioner rejects the assertion that the vacation of the 2nd Interested Party's candidature was incompetent for noncompliance with Regulation 52 of the [Elections \(General\) Regulations](#) 2017. He submits that this regulation is not applicable to the withdrawal of October 10, 2017, as it provides for withdrawal of candidature three days after 'nomination'. He therefore urges, that the regulation only contemplates a withdrawal in the nomination process during a general election.
17. On the legal effect of the 2nd Interested Party's withdrawal, the petitioner submits that legal predictability is a fundamental ingredient of the principle of the rule of law. In the petitioner's view, the 2nd Interested Party, while abandoning the fresh presidential election, relied on paragraph 290 in [Raila Odinga 2013](#), in the legitimate expectation that fresh nominations would ensue under article 138(8)(b). He urges that vacation of candidature, is a political right under article 38 of the [Constitution](#), which must be protected. He concludes by submitting that upon the withdrawal by the 2nd Interested Party, the elections were vacated by the operation of law, and therefore, the 1st respondent is under an obligation to start the election process afresh, by conducting nominations under article 138(8)(b) of the [Constitution](#).
18. Adverting to the High Court Judgment in the [Ekuru Aukot case](#), delivered a day after the withdrawal of the 2nd interested party from the election, the petitioner submits that the said Judgment, was not capable of reversing the trigger of the application of article 138(8)(b).
19. On the issue as to whether the election was conducted in strict compliance with the [Constitution](#) and applicable electoral laws, the petitioner submits that the election was a sham and violated the provisions of articles 1, 2, 3(2), 10 (2), 24, 27, 38, 47, 81, 86, 201(d) and 259(1)(3) of the [Constitution](#). He submits that the contents of the internal memo dated October 9, 2017, by Dr Roselyne Akombe, the 1st respondent's CEO internal memo dated October 14, 2017, the signed press release by Dr Roselyne Akombe dated October 17, 2017, and the signed press release by the 2nd respondent dated October 18, 2017, affirm ipso facto that the respondents could not guarantee a free and fair elections.
20. The petitioner adds that the election left the country divided in the middle, posing a threat to the entire [Constitution](#). He submits, that the election threatens article 1(1) on sovereignty of the people; article 2(1-4) on supremacy of the [Constitution](#); article 3(2) on establishment of Government in accordance with the [Constitution](#); article 10(2) on national values; article 38 on political rights; articles 81 and 86 on general principles for electoral system; articles 88 and 249 on mandate of the 1st respondent;



article 82(1)(d) and (2) as read with 93(2) on the mandate of Parliament to enact legislation governing elections.

21. On the issue whether the respondents can be deemed to have conducted the election in compliance with the Constitution and applicable laws, without considering the Judgment of this court in Raila Odinga 2013, the petitioner submits that unless set aside, non-conformity with the provisions of paragraphs 286-294 of the decision in Raila Odinga 2013 amounts to failure to hold the election in strict compliance with the Constitution and applicable laws by the 1st respondent.
22. On the issue of nomination of candidates in the election under article 140 of the Constitution, the petitioner submits that the court should interpret “a fresh election” as used in article 140(3) by considering article 138(5) where no fresh nominations are envisaged because of a shorter period of 30 days within which to conduct the fresh presidential election. He urges that the court should also consider the provisions of article 138(8) and (9) where if scheduled presidential elections are cancelled, a new one must be held within 60 days after fresh nominations; article 139(1)(b) which applies if the President elect dies before assuming office and fresh nominations are envisaged for new presidential candidate(s) within the 60 day period; article 139(3)(b) where, if both the President elect and Deputy President elect die, a fresh presidential election preceded by fresh nominations is to be held within 60 days and article 140(3) where if a presidential election has been nullified by the Supreme Court, a new one is held within 60 days. The petitioner contends that the 60-day period given in article 140(3) was to allow for fresh nominations; otherwise, the Constitution would have set a shorter period for the fresh election as provided for under article 138(5).
23. The petitioner urges the court to depart from its decision in John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others; Petitions Nos 2 and 4 of 2017 [2017] eKLR and instead hold that fresh elections under article 140 of the Constitution must begin with fresh nominations.
24. On the issue as to whether laws that governed the 8th August, 2017 presidential elections can validly be changed midway, the petitioner submits that whereas Parliament has the exclusive constitutional authority to enact laws, the laws so enacted cannot have retrospective application.
25. On the constitutionality of section 83 of the Elections Act 2012, the petitioner submits that the same is unconstitutional, as it is worded in a manner that ousts or minimizes the constitutional provisions, especially articles 38, 81 and 86 of the Constitution on free, fair and credible elections.
26. On costs, the petitioner submits that while costs follow the event, the court should not award costs to the respondents in the event of an adverse Judgment. It is his contention in that regard that the Petition herein is a public interest litigation suit by a private citizen against the State and so he should not be penalized with an Order of costs.

(ii) respondents' Case

27. The respondents are categorical that this court lacks jurisdiction to hear and determine the Petition on the following grounds:
 - a) The issues as to what constitutes a fresh election under article 140(3) of the Constitution, and whether paragraph 290 in Raila Odinga 2013 is binding, were the subject of proceedings before the court of Appeal in Orange Democratic Movement v Dr Ekuru Aukot & 4 others, Civil Appeal No 359 of 2017; at the time of filing the petition herein.
 - b) The jurisdiction of this court under article 163(3) of the Constitution, as read with the Supreme Court (Election Petition) Rules 2013, becomes operative only upon the declaration of results



of a presidential election as was held by this court in [Isaac Aluoch Polo Aluochier v IEBC & 19 others](#) SC Petition No 2 of 2013 [2013] eKLR;

- c) This petition is filed as a Constitutional Petition but seeks Orders that can only be granted in a presidential petition contemplated under article 140 of the [Constitution](#);
 - d) The Petition offends mandatory legal compliance requirements relating to filing of presidential petitions;
 - e) The petitioner seeks the interpretation and/or review of the decision of this court's Judgment in [Raila Odinga v IEBC & others](#) Petition No 5 of 2013, yet the court lacks such review jurisdiction on the basis of its Ruling in [Fredrick Otieno Outa v Jared Odoyo Okello & 3 others](#), Supreme Court Petition No 6 of 2014;
 - f) The petitioner seeks the interpretation of article 138(8) of the [Constitution](#) by this court yet such jurisdiction is reserved in the first instance, to the High Court;
 - g) The petitioner is inviting the court to amend the [Constitution](#) to include, 'voluntary withdrawal by way of a letter' as one of the circumstances that can warrant a cancellation of an election and trigger new elections under article 138(8) of the [Constitution](#);
 - h) The issue of the appointment of returning officers for the fresh presidential election was pending before the court of Appeal in Civil Application No 246 of 2017; at the time of filing this Petition.
28. On the issue of fresh nomination of candidates in the election, the respondents submit that in view of the legal framework set out in the [Constitution](#), the [Elections Act](#) 2012, and the [Elections \(General Regulations\)](#) 2012, the full nominations process requires in excess of 60 days and that it is therefore not practicable for fresh nominations to be held in a fresh election contemplated under article 140(3) of the [Constitution](#).
29. They submit further that the respondents' decision not to conduct fresh nominations, was informed by the decision of this court in [Raila Odinga 2013](#) at paragraph 289 and by the High Court decision, in [Ekuru Aukot](#), at paragraph 73. They urge that these two decisions, are authority for the proposition that, there was no basis for fresh nominations in a presidential election under article 140(3) of the [Constitution](#).
30. The respondents further submit that, the issue as to whether fresh nominations must precede fresh presidential elections under article 140(3) of the [Constitution](#) is moot. They urge that the same was dealt with extensively and clearly by this court in [John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others](#) (*supra*). They urge that the petitioner has not given any persuasive grounds to justify this court's departure from its holding.
31. On the issue of the purported withdrawal from the fresh election by the 2nd Interested Party, the respondents submit that the same is untenable and lacks merit. They submit that the purported withdrawal, was made ineffective by the High Court decision in the [Ekuru Aukot Case](#) delivered on October 11, 2017 directing the 1st respondent to include all the candidates in the annulled presidential election on the ballot for the fresh election.
32. Without prejudice to the contention above, the respondents further submit that the 2nd Interested Party failed to adhere to the provisions of Regulations 52 of the [Elections \(General\) Regulations](#) while tendering his withdrawal from the election.



33. They also urge that the circumstances envisaged under article 138(8) of the Constitution, were not the basis for the nullification of the election by this court. The respondents therefore submit that the averment by the petitioner, to the effect that the withdrawal by the 2nd Interested Party, kicked into operation the provisions of article 138(8)(b) as read with article 138(9) of the Constitution, are misconceived.
34. On the operational preparedness and independence of the 1st respondent to conduct a fresh election, the respondents urge that the petitioner's claim can only be considered in the context of a challenge to the declared results. They urge that the Petition, having been filed before the declaration of results of the election, is not a presidential petition stricto sensu but a devious attempt to overturn a legitimate election in the guise of a constitutional petition.
35. In the alternative, the respondents submit that the election was conducted in compliance with the Constitution and the law, as extensively demonstrated in the Replying Affidavit at paragraphs 45 to 65. They urge that the 1st respondent is obliged by article 249(2) of the Constitution, to carry out its functions subject only to the Constitution and relevant legislation.
36. On the issue of the retrospective application of elections laws, the respondents submit that the amendments to the election laws vide the Election Laws (Amendments) Bill No 37 of 2017 did not come into force until after the election and therefore did not affect the manner in which the election was conducted. They in addition, urge that the said laws are a subject of challenge in the High Court in Katiba Institute & another v The AG & another Constitutional Petition No 548 of 2017 and in Okiya Omtatah Okoiti v The AG High Court Constitutional Petition No 543 of 2017.
37. As regards the petitioner's invitation to this court to consider the constitutionality of section 83 of the Elections Act, the respondents submit that the prayer is misconceived. They urge that the validity of the said section was considered and determined by the Supreme Court in Raila Odinga 2013 and Raila Odinga 2017.
38. On the issue of postponement of elections in certain areas of the Country, the respondents submit that the postponement was legally acceptable in law. They rely on the provisions of section 55B(1)(a) of the Elections Act, which envisages the need to cancel elections in certain areas if circumstances so warrant.

(iii) Interested Parties' Case

39. The Interested Parties agree with the respondents and submit that this court lacks jurisdiction to hear and determine this Petition, to the extent that the petitioner seeks the interpretation of article 140(3) of the Constitution and a declaration of the constitutionality of section 83 of the Elections Act. They submit that in line with this court's directions in an application by Dr. Ekuru Aukot made in Presidential Petition No 1 of 2017, the jurisdiction to interpret the Constitution, or to determine the inconsistency of any law with the Constitution, is vested in the High Court in the first instance, by virtue of article 165(3)(d)(i) of the Constitution. They urge further, that the Petition relies on an *obiter dicta* of this court in Raila Odinga 2013, which is not binding but persuasive.
40. They submit that the Petition offends the doctrine of ripeness and ought to be struck out. They contend that the validity of the elections, was not a justiciable issue at the time the Petition was filed. The Interested parties further contend that under article 163(3)(a) as read with article 140(1) of the Constitution, the court may only be moved to challenge the election of a President after the declaration of results.



41. On the withdrawal of the 2nd Interested Party from the election, they agree with the respondents and submit that the said withdrawal offends the provisions of Regulation 52 of the [Elections \(General\) Regulations 2012](#).
42. The Interested Parties urge that, the withdrawal of a party from an election would not vacate an election under the provisions of article 138(8) of the [Constitution](#). On the effect of the withdrawal and the interpretation and application of article 138(8) of the [Constitution](#), they rely on this court's decision in [Jasbir Singh Rai & others v Tarlochan Singh Rai Estate & 4 others](#) [2013] eKLR and the High Court decision, in [Ekuru Aukot](#), to the effect that the petitioner's reliance on paragraphs 286 to 294 in [Raila Odinga 2013](#), is misguided as the same is *obiter dicta*.
43. On whether the respondents complied with the Orders of the Supreme Court in [Presidential Petition No 1 of 2017](#), the 1st Interested Party faults the petitioner's reliance on evidence in the form of statements by Dr Roselyn Akombe, to claim that the election was not held in compliance with the court Orders and the [Constitution](#). He submits that the said evidence is hearsay, and does not meet the threshold set out under the provisions of section 109 of the [Evidence Act](#).
44. On the question of costs, the Interested Parties submit that, this is a case where the award of costs against the petitioner is appropriate. They urge that the petitioner contested the Busia Senatorial election on a FORD-Kenya ticket, a member of the National Super Alliance. They add that the petitioner supported the candidature of the 2nd Interested Party; hence the Petition is for the benefit of the 2nd Interested Party, disguised as public interest litigation. They urge the court to protect the vehicle of public interest litigation against illegitimate use by politically partisan individuals.

E. Issues For Determination

45. Upon consideration of the grounds listed in the Petition, the responses to the Petition, the oral and written submissions by the parties, and the authorities cited in support thereof, we have formed the distinct view that, the Preliminary Objection challenging this court's jurisdiction, must be disposed of at the outset before considering the other issues as set out by the petitioner.

F. Analysis

(i) On Jurisdiction

46. Both the respondents and Interested Parties have vigorously opposed this Petition for want of jurisdiction. It is their argument that, this court lacks jurisdiction to hear and determine the Petition. It is their further argument that, even if this court had jurisdiction to entertain the Petition (which it doesn't), the same is moot, as all the issues raised by the petitioner have either been conclusively determined by this court or are pending at the court of Appeal.
47. The submissions challenging the court's jurisdiction have been comprehensively highlighted in the foregoing paragraphs. The respondents submit that the Petition, is disguised as seeking the interpretation by this court, of various articles of the Constitution while in essence, it is in reality, challenging the validity of the repeat presidential election held on the 26th October of 2017. In the respondents' view, any declarations or Orders emanating from this court, as a result of the Petition herein, would be a pronouncement about the validity or otherwise of the said election. They also argue that, even if the Petition simply seeks the interpretation of various articles of the [Constitution](#), the same is misconceived as the jurisdiction to interpret the [Constitution](#) in the first instance, lies with the High Court.



48. The petitioner on the other hand, is categorical that this court has the requisite jurisdiction to hear and determine the Petition. It is his contention that the Supreme Court has the exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the president. This exclusive original jurisdiction, in the view of the petitioner, also vests the court with original jurisdiction to interpret all the articles relating to the election of a president. He urges the court to seize the moment and clarify a number of questions that he has identified in the Petition.
49. We have carefully considered the reasoned positions of all parties to the Petition regarding the jurisdiction of this court. Towards this end, and as has been the practice of this court in disputes wherein jurisdictional questions have arisen, we have to turn back to article 163(3) of the Constitution. In this regard, we focus upon article 163(3) (a) which, provides that the Supreme Court shall have:
- “exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under article 140...” (Emphasis added).
- article 140 (1) on the other hand provides that:
- “A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.” (Emphasis added).
50. We hasten to restate the position that, the Constitution confers upon the Supreme Court, exclusive original jurisdiction, to determine disputes relating to the election of the President arising under article 140 only. Though exclusive and original, this jurisdiction is limited to the circumstances contemplated in article 140(1). It is not a blanket jurisdiction that empowers the Supreme Court, to flex its judicial authority over any and all interpretational questions, touching upon the election of the President. It must be further emphasized that, article 163(3) of the Constitution does not oust the High Court’s original jurisdiction to interpret the Constitution under article 165(3)(d). The Supreme Court’s exclusive and original jurisdiction to determine the validity of a presidential election, only kicks in after the declaration of results, following a petition challenging the election; (see Aluochier and Ekuru Aukot) (*supra*).
51. Applying these principles to the Petition herein, we have no hesitation in agreeing with the respondents’ submissions (supported by the Interested Parties) to the effect that the petitioner has wrongly invoked this court’s jurisdiction. If his intention is to seek the interpretation of articles 138, 139 and 140 of the Constitution, the petitioner cannot leapfrog the High Court and come directly to the Supreme Court. Conversely, if the intention of the petitioner is to challenge the validity of the fresh presidential election of October 26th 2017, then his Petition has been filed in breach of article 140(1) of the Constitution. It is not denied that the Petition herein, was filed before the declaration of the results of the October 26th election.
52. 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.



(ii) On Costs

- 53. Having determined that the court lacks jurisdiction to entertain this Petition, we see no reason to delve into the other attendant issues. This conclusion then leaves us with the question as to what Orders we should make regarding Costs. The petitioner has urged the court not to visit him with Costs, in the event of an adverse decision to himself. His main argument is that this being a Petition in public interest, the same should not be penalized by way of Costs, as this would go against the spirit of Public Interest Litigation.
- 54. The respondents and Interested Parties, on the other hand, argue that the petitioner should bear their Costs as the same was filed, not in the public interest as claimed by the petitioner, but in furtherance of his own private interests. In this regard, they submit that the petitioner participated in the 2017 general election as a candidate of NASA; a coalition led by the 2nd Interested Party, whom the petitioner actively supported.
- 55. We have considered the Parties’ Submissions regarding the issue of Costs. We have times without number, stated the general principle that costs follow the event. We have at times departed from this Principle, to order that each party should bears its own Costs in exceptional circumstances. As observed in our past decisions, although election petitions are almost invariably filed by private individuals (losing candidates), they, by their very nature, bear a certain element of public interest.
- 56. However, not every election petition can be classified as public interest litigation, unless it exhibits a distinct focus on furthering the Public Interest. Each case has to be determined on its own merits. In the instant case, we are not convinced that this Petition was filed for the distinct objective of furthering the Public Interest. We are not able to perceive how the petitioner, having actively participated in and supported the election agenda of the 2nd Interested Party, suddenly experienced an epiphany that propelled him into the just course of public interest litigation, in the wake of the fresh presidential election of October 26th 2017.
- 57. In the circumstances, as costs follow the event, having failed in his Petition, the petitioner must bear the costs of the Petition being struck out.

G. Orders

The Petition dated October 27, 2017, is hereby struck out for want of Jurisdiction;
The petitioner shall bear the Costs of this Petition.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2020.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT, JUSTICE OF THE SUPREME COURT

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG
JUSTICE OF THE SUPREME COURT



.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

