



**Njiru & 11 others v Kenya Kwanza Coalition & 18 others; Azimio La Umoja
One - Kenya Coalition & 11 others (Interested Parties) (Petition E202 of 2023)
[2024] KEHC 350 (KLR) (Constitutional and Human Rights) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E202 OF 2023
J NGAAH, JM CHIGITI & LN MUGAMBI, JJ
JANUARY 26, 2024**

BETWEEN

- KENNETH NJAGI NJIRU 1ST PETITIONER**
- MESHACK SUBA CHURCHILL 2ND PETITIONER**
- LEMPAA SUYINKA 3RD PETITIONER**
- TEDDY M. MUTURI 4TH PETITIONER**
- AMOS WANJALA 5TH PETITIONER**
- STEVEN KIHONGE NDUNG’U 6TH PETITIONER**
- SOPHIE DOLA 7TH PETITIONER**
- WINNIE THUO 8TH PETITIONER**
- ENG. VICTOR NG’ANG’A 9TH PETITIONER**
- SIMON LOKOMA 10TH PETITIONER**
- CAROLINE MOGAKA 11TH PETITIONER**
- FRANCIS KENYA MWANGI 12TH PETITIONER**

AND

- KENYA KWANZA COALITION 1ST RESPONDENT**
- THE NATIONAL ASSEMBLY OF KENYA 2ND RESPONDENT**
- SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT**
- HON. MOSES M. WETANG’ULA 4TH RESPONDENT**



REGISTRAR OF POLITICAL PARTIES	5 TH RESPONDENT
HON. KIMANI ICHUNG'WA	6 TH RESPONDENT
HON. OWEN BAYA	7 TH RESPONDENT
HON. SYLVANUS OSORO	8 TH RESPONDENT
HON. NAOMI JILLO WAKO	9 TH RESPONDENT
HON. SABINA CHEGE	10 TH RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)	11 TH RESPONDENT
THE HON. ATTORNEY GENERAL	12 TH RESPONDENT
HON. KANINI KEGA	13 TH RESPONDENT
ANNE NDERITU	14 TH RESPONDENT
KENYA REVENUE AUTHORITY	15 TH RESPONDENT
CABINET SECRETARY THE NATIONAL TREASURY AND ECONOMIC PLANNING	16 TH RESPONDENT
UNITED DEMOCRATIC ALLIANCE	17 TH RESPONDENT
AMANI NATIONAL CONGRESS	18 TH RESPONDENT
FORD KENYA	19 TH RESPONDENT

AND

AZIMIO LA UMOJA ONE - KENYA COALITION	INTERESTED PARTY
JUBILEE PARTY OF KENYA	INTERESTED PARTY
LAW SOCIETY OF KENYA	INTERESTED PARTY
HON. OPIYO WANDAYI	INTERESTED PARTY
HON. ROBERT MBUI	INTERESTED PARTY
HON. JUNET MOHAMED	INTERESTED PARTY
KATIBA INSTITUTE	INTERESTED PARTY
MAENDELEO CHAP CHAP PARTY	INTERESTED PARTY
UNITED DEMOCRATIC MOVEMENT	INTERESTED PARTY
MOVEMENT FOR DEMOCRACY & GROWTH	INTERESTED PARTY
USAWA KWA WOTE PARTY	INTERESTED PARTY
ROOTS PARTY	INTERESTED PARTY



RULING

Introduction

1. Before court is the petitioners' amended petition dated 16 June 2023 but amended on 23 June 2023. It is pleaded in the petition that it has been filed pursuant to Article 3 of *the Constitution* under which the petitioners believe they have a joint obligation to protect and defend *the Constitution* of Kenya, 2010.
2. The petitioners describe themselves as "citizens of Kenya and registered voters" and that they are also members or supporters of the Jubilee Party and Azimio la Umoja One Kenya Coalition (hereinafter "Azimio coalition"). These two entities have been described in the petition as political parties duly registered under the *Political Parties Act*, 2011.

The Petitioner's Case

3. The petitioners contend that during the 9 August 2022 General elections, the main contestants for various elective political positions were candidates from parties that formed the Azimio coalition and Kenya Kwanza Alliance Coalition (hereinafter "Kenya Kwanza coalition"). The coalitions are said to have been forged by various individual political parties through coalition agreements. The Kenya Kwanza coalition agreement was signed on 8 May 2022. The signatories to this agreement were His Excellency President William Ruto, who was then the leader of the United Democratic Alliance party, Honourable Musalia Mudavadi of Amani National Congress party and Honourable Moses Wetangula, the leader of Ford-Kenya party.
4. Amongst the highlights of the Kenya Kwanza coalition agreement were the distribution of various posts and duties among the coalition parties' leaders or members. For instance, under Article 11 of the agreement, the coalition partners agreed on creation of a coalition parliamentary group and prescribed, inter alia, the group's membership and leadership. It also prescribed how particular positions would be shared between or amongst the coalition's parties. This provision of the agreement has been captured in the petition as follows:
 - a) There shall be a coalition parliamentary group consisting of elected and nominated members of the National Assembly, the Senate and the East African Legislative Assembly who are elected or nominated by or through any of the founding member parties.
 - b) The coalition parliamentary group shall be chaired by the coalition presidential candidate and in his absence by the coalition deputy presidential candidate.
 - c) Members of the party leaders Forum shall be ex officio members of the coalition parliamentary group.
 - d) The chairperson of the coalition parliamentary group shall convene the first meeting of the parliamentary group within thirty (30) days following the swearing in of the members of the parliamentary group.
 - e) The coalition parliamentary group shall elect a coalition parliamentary group secretary, a coalition parliamentary group whip and such other coordinating



officials as may be deemed necessary for ease of the coalition's agenda in the National Assembly, the Senate at the East African Legislative Assembly.

- f) ANC and Ford-Kenya shall nominate for election, the secretary and the whip of the coalition parliamentary group as may be agreed among the two member parties.
- g) After its first meeting, the coalition parliamentary group shall be convened once every three (3) months or otherwise as frequently as may be deemed necessary.
- h) The role of the coalition parliamentary group shall be to assist the party leaders forum to plan, review and track the implementation of the coalition's legislative and representational agenda in the National Assembly, the Senate and the East African Legislative Assembly including the agreed policies, programmes and legislative proposals of the coalition in the National Assembly, the Senate and the East African Legislative Assembly."

5. Article 14 of the coalition agreement is on the functions and operations of the party leaders' forum. The petitioners contend that under that article, Honourable Moses Wetangula plays what the petitioners have described as a "political role" in the affairs of the party leaders' forum. Hon. Wetangula was nominated for election as the Speaker of the National Assembly under Article 21(l) of the Agreement.

6. Article 21(n), on the other hand, provides for sharing of positions in the National Government between Amani National Congress and Ford-Kenya. This article reads as follows:

- "n) ANC and FORD-Kenya shall have 30% share of the positions in the national secretaries, principal government including ambassadors/high commissioners/heads of diplomatic missions, chairpersons of state corporations, directors of state corporations and chairpersons and commissioners of constitution commissions provided that the aforesaid 30% share positions in the national government shall be shared equally between ANC and Ford Kenya."

7. After the August 9, 2022 elections, the Independent Electoral Boundaries Commission (hereinafter "IEBC") published the results of the members elected and nominated to the National Assembly in Gazette notices nos. 105055 of 5 September 2022; 10537 of 7 September 2022 and 10710 of 9 September 2022.

8. The petitioners contend that according to the published election results, 171 members of the National Assembly were elected on the tickets of political parties that formed the Azimio coalition while 165 members of the National Assembly were elected on Kenya Kwanza coalition parties' tickets. It followed that, going by these results, the Azimio coalition became the majority party in the National Assembly after the August 9, 2022 General Elections.

9. Besides election of members of National Assembly, President William Ruto was declared the duly elected President of the Republic of Kenya while Honourable Moses Wetangula was elected Senator of Bungoma County. Honourable Wetangula later resigned as the senator and subsequently, successfully contested for election as the Speaker of the National Assembly at the first sitting of the 13th Parliament on 8 September 2022.



10. In the wake of the General elections and after the election of President Ruto as the President of the Republic of Kenya had been validated by the Supreme Court, several members of the National Assembly who contested as members of parties in the Azimio coalition opted to defect to the Kenya Kwanza coalition. To be precise, these were fourteen members of the National Assembly drawn from United Democratic Movement (UDM), Movement for Democracy and Growth (MDG), Maendeleo Chap Chap (MCCP) and PAA political parties.
11. The petitioners are aggrieved that although Hon. Wetangula was elected the Speaker of the National Assembly, he held and still holds the position of the leader of Ford-Kenya party; that he is a member of the Kenya Kwanza Forum of Party leaders; and, that he is an ex officio member of the coalition parliamentary group of Kenya Kwanza. According to the petitioners, Honourable Wetangula is conflicted to the extent that, going by his political inclination, he would be biased towards driving the Kenya Kwanza coalition political agenda in discharge of his functions as the Speaker of the National Assembly.
12. Apart from conflict of interest, Honourable Wetangula's position as the Speaker of the National Assembly yet he remains a leader of a political party and a member of Kenya Kwanza forum of party leaders and also the coalition's parliamentary group is untenable because it is contrary to *the Constitution* of Kenya which establishes a presidential form of government in which the three arms of the government, that is, the executive, the legislature and the judiciary are independent of each other.
13. The petitioners' other grievance arises from the manner in which Hon. Wetangula handled a dispute or disputes that arose in the National Assembly on which of the two coalitions, Azimio and Kenya Kwanza, formed the majority party and who, in these two coalitions, was to be recognised as the bona fide majority leader in the House.
14. The dispute arose when on 4 October 2022, Hon. Wetangula informed the National Assembly that he had received two letters respectively from the Azimio coalition and Kenya Kwanza coalition, both claiming to be the majority party and in that regard appointing their leaders in the National Assembly. As a matter of fact, by a letter dated 21 September 2022, the secretary-general of Azimio coalition had written to the Speaker of the National Assembly informing him that following the coalition's parliamentary group meeting held on 16 and 17 September 2022, the coalition had elected certain of its members as House leaders in the National Assembly. These members were as follows:
 - i. Hon. James Opiyo Wandayi is the leader of the majority.
 - ii. Hon. Robert Mbui, as the deputy leader of the majority.
 - iii. Hon. Junet Mohammed is the majority whip; and
 - iv. Hon. Sabina Chege, as the deputy majority whip.
15. On the other hand, on 22 September 2022, Hon. Silvanus Osoro Onyigo and Honourable Kimani Ichung'wa, wrote to the Speaker of National Assembly and informed him that at its parliamentary group meeting held on 16 and 17 September 2022, the Kenya Kwanza coalition had elected the following persons as its leaders in the National Assembly:
 - i. Hon. Kimani Ichungwa leader of the majority party
 - ii. Hon. Owen Baya, deputy leader of the majority party
 - iii. Hon. Sivanus Osoro Onyiego, chief whip
 - iv. Hon. Naomi Jillo Waqo, deputy chief whip



16. Following the two letters in which members of the coalitions sought to be recognised as the majority party and laid claim on the leadership position in the National Assembly appurtenant to that status, Hon. Moses Wetangula invited members to a debate on the leader of the majority party and the leader of the minority party in the National Assembly.
17. On 6 October 2022, Honourable Wetangula, read out to the National Assembly his ruling the material part which has been summarised in the petition as follows:
 - “ 1) That consideration of the various allegations of coercion and duress at the time of entering into coalition agreements and any appropriate remedy for the same lies outside the authority of this House.
 - 2) That in my considered opinion, it would be imprudent to treat the 14 members elected to the House under the UDM, PAA, MCCC and MDG as part of a coalition that they have expressly distanced both themselves and the parties from. I am therefore persuaded that the 14 members and their parties are a part of the Kenya Kwanza coalition. These, in my view, would be fair and in accordance with the previous rulings by my predecessors and related matters.
 - 3) That with the 14 members, the membership of Kenya Kwanza Coalition stands at 179 members while the membership of the Azimio la Umoja-One Kenya Coalition Party stands at 157 members. This, by implication, indicates that the Kenya Kwanza Coalition is the majority party and the Azimio la Umoja-One Kenya Coalition Party is the minority party in the House.
 - 4) That the Kenya Kwanza coalition is entitled to appoint the leader of the majority party while the Azimio La Umoja-One Kenya Coalition Party is entitled to appoint the leader of the minority party.
 - 5) That with regards to the majority party;
 - a) The member for Kikuyu Constituency, Hon. Kimani Ichung’wa is the leader of the majority party;
 - b) The member for Kilifi North, Owen Baya, is the deputy leader of the majority party;
 - c) The member for South Mugirango, Hon. Sivanus Osoro is the majority party whip; and
 - d) The member for Marsabit County, Hon. Naomi Jillo Waqo is the deputy majority whip.
 - 6) That with regards to the minority party:
 - a) The member fo Ugunja, Hon. Opiyo Wandayi is the leader of the minority party;
 - b) The member for Kathiani, Hon. Robert Mbui is the deputy leader of the minority party;
 - c) The member for Suna East, Hon. Junet Mohamed is the minority party whip; and



d) Nominated member, Hon. Sabina Chege is the deputy minority whip.”

18. The petitioners are aggrieved that this ruling is unlawful because it is in contravention of *the Constitution*, statutory provisions and the standing orders of the National Assembly. It is their position that this ruling was made without jurisdiction and, therefore, it is unconstitutional, null and void. In particular, the petitioners have pleaded that Hon. Wetangula arrogated to himself the power, mandate or jurisdiction to determine the majority party in the aftermath of the General elections held on 9 August 2022. Given that the results of the elections of the members of National Assembly clearly showed that Azimio coalition was the majority party, the issue of the majority party between the two coalitions could not arise or subject to debate.
19. Considering that there was no dispute in the Azimio coalition concerning the need of the majority in the House, the Speaker of the National Assembly acted mischievously and unconstitutionally in recognizing Kenya Kwanza coalition as the majority party.
- According to Articles 4, 90, 99 and 103 of *the Constitution* as read with section 14 and 34 (F) of the *Political Parties Act*, the Speaker of the National Assembly did not have the legal basis to recognise the purported coalition agreement between the 14 members who had written to him distancing themselves and their parties from the Azimio coalition in order to determine that Kenya Kwanza had become the majority party after the results of the elections of members of the National Assembly were gazetted.
20. The petitioners have also contended that even if the 14 members of the Azimio coalition had lawfully resigned from Azimio coalition, the coalition could not, by that fact alone, cease being the majority party after the General elections of August 2022. The power to determine the majority party, it is contended, is with the people of Kenya and it is duly exercised during the General elections. The Azimio coalition could not lose its status, rights and privileges of the majority party secured through a General election on account of defection and change of political allegiance by some members of the National Assembly elected on the tickets of the coalition’s constituent parties.
21. Considering that Azimio coalition was the majority party in the National Assembly, the subsequent determination by the Speaker of the National Assembly on the respective leadership of the majority party and minority party was illegal, null and void. In any event, the Speaker the National Assembly was not an impartial and independent arbiter within the meaning of Article 50 (1) and 75 (1) (a) of *the Constitution* and he ought to have recused himself, assuming that the dispute was properly before him.
22. The respondents pleaded that the dispute about which coalition is the majority party is justiciable issue and falls within the jurisdiction of this Honourable Court to determine. But the validity of the coalition agreement of Azimio coalition could not be determined by the Speaker of the National Assembly.
- Standing order No. 1 which the Speaker of the National Assembly invoked in making his decision enjoined him to give his decision in accordance with *the Constitution*, the applicable laws and democratic norms and conventions.
23. The petitioners are aggrieved that the immediate effect of the Speaker’s ruling has been to trigger general indiscipline and rebellion in political parties particularly those in Azimio coalition. The National Assembly has also been turned to “a political bazaar” in which disgruntled members of Azimio coalition are said to sell their souls and interests of their electors to the government of the day on the pretext of seeking development for their constituents.



24. It is also the petitioners' contention that in inducing, soliciting, aiding and abetting the defection of the members of National Assembly from constituent parties in Azimio coalition, the 1st respondent has violated Articles 1, 3, 4, 10, 38, 73 and 91 of *the Constitution*.
25. As far as the petitioners' grievances against the Registrar of the Political Parties are concerned, the petitioners claim that the Registrar has aided and abetted the violation of Articles 1, 4, 38 and 18 of *the Constitution* and the subversion of multi-party democracy in Kenya because she has failed to uphold the will of the people of Kenya expressed during the General elections held on 9 August 2022.
26. The Registrar of Political Parties is alleged to have failed to enforce the *Political Parties Act*, 2011 and this failure has emboldened Kenya Kwanza coalition to engage in unprecedented and systematic subversion of multi-party democracy in Kenya over the last eight months, prior to the filing of the instant petition. In the same breath, in failing to ensure that Kenya Kwanza coalition complies with the code of conduct for political parties as set out in the 1st schedule to the *Political Parties Act*, the Registrar of Political Parties has encouraged, aided and abetted the violation of the petitioners' political rights and those of other Azimio coalition members guaranteed by Article 38 of *the Constitution*.
27. The Registrar of Political parties is also accused of having promoted, aided and abetted Kenya Kwanza coalition in subverting multi-party democracy. She is said to have provided immunity from legal consequences to the 10th and 13 respondents and other elected leaders of Jubilee party who have defected from the parties in the Azimio coalition but continue to hang on to their political seats sponsored by Azimio coalition during the General elections of August, 2022.
28. The 10th and 13 respondents, according to the petitioners, should be deemed to have ceased to be members of the Jubilee party and having resigned from their positions as members of National Assembly and the East African Legislative Assembly respectively.
29. In view of the decisions, actions and omissions of the Kenya Kwanza coalition and the Speaker of the National Assembly, the Registrar of Political Parties has become unfit to continue holding that position on account of her willful violations of Articles 1, 3, 4, 10, 73 and 75 of *the Constitution*.
30. As for the IEBC, the petitioners contend that the Commission has refused, neglected or otherwise failed to expressly declare the party or coalition that garnered the majority of seats in the National Assembly. Due to this failure, Kenya Kwanza lobbied, induced and manipulated some members of the National Assembly of the Azimio coalition to unlawfully defect to its coalition and assert itself as the majority party.
31. The IEBC is also alleged to have been silent in the wake of public schemes by the Kenya Kwanza and the Speaker of National Assembly to undermine multi-party democracy by fomenting rebellion and indiscipline among Members of National Assembly elected on tickets of constituent parties of the Azimio coalition. The IEBC is alleged to have failed to raise any objection or protest the ruling of the Speaker that Kenya Kwanza is the majority party.
32. Finally, the petitioners contend that the Finance Act, 2023 and the Appropriation Act, 2023 were processed through illegal process for the reason that these statutes were spearheaded by parliamentary committees led by a majority that was unlawfully in office and in a House presided over by a partisan speaker. Accordingly, the statutes are unlawful.



33. Against the foregoing background, the petitioners have petitioned for several orders which we can do no better than reproduce them here as outlined in the petition. They have been captured as follows:

- a) That a declaration be issued to declare that the question as to which party or coalition of parties is the majority in the National Assembly in the 13th Parliament was determined by the sovereign will of the Kenyan voters on 9th August 2022.
- b) That the declaration be issued to declare that the decisions, actions and omission of the 1st respondent with the assistance, complicity, aid and abetment of the 4th and 5th respondents to destabilize the 1st interested party as the popularly determined majority party in the National Assembly constitutes an attempt to overturn the will of the people expressed in the general elections held on 9th August 2022 and establish the leadership of the National Assembly in the 13th Parliament contrary in a manner prohibited by Articles 1, 4, 38 and 103 of *the Constitution*.
- c) That a declaration be issued to declared (sic) that under Articles 1, 12, 27 and 38 of *the Constitution* the 1st, 4th and 5th respondents are jointly and severally prohibited from establishing government that excludes representatives of the members and supporters of Jubilee party in accordance with their voting during the General election (sic) held on 9th August 2022.
- d) That a declaration be issued to declare that the Azimio la Umoja-One Kenya Coalition is the majority party in the National Assembly of Kenya based on the outcome of the election of members of the National Assembly held on 9th August 2022.
- e) That a declaration be issued to declare that the Kenya Kwanza alliance is the minority party in the National Assembly of Kenya based on the outcome of the elections of members of the National Assembly held on 9th August 2022.
- f) That a declaration be issued to declare that the ruling/determination of the 3rd respondent contained in his communication from the chair made on 6th October, 2022 concerning the leadership of the National Assembly in the 13th Parliament is inconsistent with *the Constitution* of Kenya and the outcome of the election of members of the National Assembly held on 9th August, 2022.
- g) That an order of certiorari be issued quashing the ruling of the 3rd respondent on the leadership of the National Assembly in the 13th Parliament contained in his communication from the chair made on 6th October, 2022.
- h) That a declaration be issued to declare that by dint of Article 103 of *the Constitution* read with section 14 of the *Political Parties Act* no member of a party or coalition can become a member of a different coalition merely by writing to the 3rd respondent for recognition of such a change of political allegiance.
- i) That a declaration be issued to declare that the 3rd respondent's ruling on the leadership of the National Assembly in the 13th Parliament is unlawful for amounting to an attempt to establish a government otherwise than in



compliance with [the Constitution](#) of Kenya, 2010 and the results of the election of members of the National Assembly held on 9th August, 2022.

- j) That a declaration be issued to declare that on account of the 4th respondent's position as the leader of the Ford-Kenya party, as a member of the party leaders forum of Kenya Kwanza alliance and an ex officio member of coalition preliminary group of Kenya Kwanza alliance the 4th respondent was not eligible to be elected as the speaker of the National Assembly in the 13th Parliament.
- k) That a declaration be issued to declare that by dint of Articles 50 (1) and 75 (1) of [the Constitution](#) and the doctrine of the separation of powers the 4th respondent was not lawfully elected as or to continue serving as the speaker of the 2nd respondent.
- l) That an order of certiorari be issued to quash the election of the 4th respondent as the speaker of the National Assembly held on 8 September, 2023.
- m) That a declaration be issued to declare the position of the speaker of the National Assembly is applicant.
- n) That a declaration be issued to declare that the 1st respondent has violated Articles 1, 3, 4, 10, 38, 91 and 103 of [the Constitution](#) in inducing, causing, sponsoring and securing political rebellion in Jubilee party and de facto defection of its MPs to the Kenya Kwanza alliance.
- o) That a declaration be issued to declare that the 4th respondent is complicit and guilty of aiding and abetting the de facto defection of Jubilee MPs into Kenya Kwanza alliance in violation of Articles 91 and 103 of [the Constitution](#) read with section 14 of the [Political Parties Act](#), 2011.
- p) That a declaration be issued to declare that by dint of Articles 1, 4, 12 (1) and 38 of [the Constitution](#) read with section 22 and 23 of the Citizenship Act, the 4th-6th and 7th-12th petitioners alongside other members of the Jubilee party have a right to be represented by MPs elected on its ticket during the entire five years term of the 13th Parliament.
- q) That a declaration be issued to declare that by dint of Articles 4, 12 (1), 38 and 90 of [the Constitution](#) the Jubilee party cannot leave the Azimio la Umoja One Kenya Coalition without the approval of its members and/or supporters determined through a referendum envisaged under Articles 1 and 88 of [the Constitution](#).
- r) That a declaration be issued to declare that no official of Jubilee party is mandated to issue a notice to withdraw the Jubilee party from the deed of agreement for Azimio la Umoja One Kenya coalition before such intention is subjected to public participation among members and supporters of Jubilee party as envisaged under Article 10 of [the Constitution](#).
- s) That a declaration be issued to declare that the 13th respondent's notice to withdraw Jubilee party from the deed of agreement for Azimio la Umoja one Kenya coalition dated 13th June, 2023 is unlawful for being inconsistent with Articles 1, 4, 10, 12 (1), 38 (1) and 91 of [the Constitution](#) read with sections 10, 14 and 34 of the [Political Parties Act](#), 2011.



- t) That an order of certiorari be issued to quash the 13th respondent's notice dated 13 June, 2023 to withdraw Jubilee party from the deed of agreement for Azimio la Umoja one Kenya coalition.
- u) That a declaration be issued to declare that the political scheme between the 1st, 4th, 9th, 12th and 13th respondents to destabilize Jubilee party and secure its withdrawal from the deed of agreement for Azimio la Umoja one Kenya coalition amounts to a conspiracy to achieve political and economic exclusion of members and supporters of Jubilee party in central Kenya in violation of Articles 1, 4, 10, 12 (1) and 38 of *the Constitution*.
- v) That a declaration be issued to declare that the Finance Bill, 2023 and the Appropriation Bill, 2023 were prepared and spearheaded by the majority leadership of the National Assembly that is unlawfully in office.
- w) That a declaration be issued to issue an order of certiorari to quash the impending Finance act, 2023 and the Appropriation Act, 2023.
- x) That a declaration be issued to declare that by dint of Articles 1, 3, 4, 10, 12, and 38 of *the Constitution* on the obligation of every Kenyan citizen or section of the citizenry to pay taxes is conditional and subject to his right to be represented in management of state affair (sic) and organs of the state and in particular Parliament.
- y) That a declaration be issued to declare that the member (sic) and/or supporters of Azimio la Umoja one Kenya coalition and its constituent parties have a right to withhold payment of 50% of the direct taxes due to the National Government unless and until the status, rights and privileges of Azimio la Umoja as majority party in the National Assembly are fully restored by this Honourable Court.
- z) That the declaration be issued to declare that by dint of Articles 1, 4 and 38 of *the Constitution* and an elected official sponsored by a political party cannot join another political party until he or she has resigned from his or her elective position.
- aa) That a declaration be issued to declare that within the meaning of Article 103 of *the Constitution* and section 14 of the *Political Parties Act*, the 10th and 13th respondents are deemed to have resigned as members of the Jubilee party.
- bb) A declaration be issued to declare that the incumbent Registrar of Political Parties madam Anne Nderitu has violated Articles 1, 3, 4, 10, 38, 73 and 75 of *the Constitution* which renders her unfit to continue serving as the Registrar of Political Parties.
- cc) A declaration be issued to declare that the 1st respondent has violated Articles, 1, 3, 4, 38 and 91 of *the Constitution*.
- dd) That a declaration be issued to declare that the 16th respondent-the Cabinet Secretary, National Treasury and Economic Planning-violated the rights of the Kenyans to public participation in respect to the budget making cycle for the Finance Bill, 2023 and the Appropriation Bill, 2023.



- ee) That an order of permanent injunction be issued to restrain the 15th respondent-Kenya Revenue Authority-from demanding payment of taxes due from citizens aggrieved by the ouster of Azimio la Umoja one Kenya coalition as the majority party vide a ruling of the 3rd respondent delivered on 6th October 2022.
- ff) An order of mandamus to compel the Registrar of Political Parties to commence an inquiry into the deregistration of the 1st respondent on account of its willful violation of the principles and values set out in Article 91 of *the Constitution*.
- gg) That an order of compensation of the petitioners for violation of their constitutional rights within the meaning of articles 1, 10, 12 (1), 27, 38 and 50 of *the Constitution*.
- hh) costs of this petition be borne by the respondents.”

Respondent's And Intrested Partie's Response

- 34. In response to the petition, the 3rd, 4th, 18th and 19th respondents filed replying affidavits opposing the application. Besides the replying affidavits, the 3rd, 4th and 18th respondents also filed preliminary objections. The 6th, 7th, 8th and 9th respondents filed grounds of objection and a preliminary objection. However, the 1st, 10th, 11th, 12th, 13th and 16th respondents did not file any response. The 1st, 4th, 5th and 6th interested parties filed grounds of objection.
- 35. The 3rd and 4th respondents’ preliminary objection to the hearing of the petition is on grounds that both the petition and the motion for conservatory orders contravene Article 117(2) of *the Constitution* as read with section 12 (2) of the *Parliamentary Powers and Privileges Act*, 2017, according to which the Speaker of the National Assembly, the 6th, 7th, 8th, 9th and 10th respondents are immune to civil suits for any act done or ordered by any of them in the discharge of the functions of their respective offices.
- 36. In the same breath, the immunity from legal proceedings arising from section 12 (2) of the *Parliamentary Powers and Privileges Act*, 2017, insulate the clerk, the leader of the majority party, the leader of minority party, chairpersons of committees and members against civil or criminal proceedings for any act done or ordered by them in the discharge of the functions of their office or relating to proceedings of either House or committee of Parliament.
- 37. The 3rd and 4th respondents’ preliminary objection to the petition is also on the ground that both the petition and the notice of motion are speculative and deal with prospective anticipatory circumstances rather than the current or probable event in as far as they seek to quash the ‘Finance Act, 2023’ and the ‘Appropriation Act, 2023’ which, at the time of filing the petition, were non-existent.
- 38. In so far as the petition and the motion seeks to challenge an ongoing legislative process, this court should avoid the temptation to interfere with the functions of another arm of government. According to the 3rd and 4th respondents, the doctrine of avoidance dictates that this Honourable Court should exercise restraint until such a time the legislative process is concluded.
- 39. The petitioners are accused of being guilty of latches and that the orders sought if granted, would cripple the functioning of the National Assembly. It is urged that some of the decisions the petitioners seek to challenge were made in the year 2022 and that the House is settled and running its business properly. The petitioners’ suit, it is alleged, is aimed at disrupting the functions of the National Assembly and it is an affront to its independence.



40. The 3rd and 4th respondents also contend that in so far as the petition seeks to determine a dispute between political parties and coalitions, this Honourable Court lacks jurisdiction to entertain the dispute for the reason that the petitioners have not exhausted all the available mechanisms contained in the various parties' constitutions and coalition agreements. The petitioners have also not exhausted the available dispute resolution mechanisms available in sections 40 and 41 of the [Political Parties Act](#).
41. Again, the petition is said to be replete with political undertones and does not raise any justiciable issues capable of being determined by this Honourable Court. The nature of the issues and dispute in the petition being political are better left to the relevant political organs. In the circumstances, the court ought to exercise maximum caution and avoid being unnecessarily dragged into what the 3rd and 4th respondents think are political contests.
42. The 3rd and 4th respondents also contend that in so far as the issues raised by the petitioners touch on the Finance Bill, 2023 and the Appropriation Bill, 2023, they are not ripe for determination by this Honourable Court for the reason that the legislative process has not been concluded.
43. Finally, it is the 3rd and 4th respondents' position that that the petition and the motion are incompetent, omnibus, inept and ambiguous and contravene Rule 4 of [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which requires petitioners to demonstrate with precision and specificity the violation or threat of violation of their rights or any other identified person's rights.
44. The petition and motion are said to offend the doctrine of sub judice as the issues raised are directly and substantially in issue before this Honourable Court in constitutional petition no. E166 of 2023, Hon. Sabina Chege Vs the Rt. Hon. Speaker of the National Assembly & 3 Others and in constitutional petition no. E025 of 2023, Association of Friends of Youth and Women Vs the Rt. Hon. Speaker of the National Assembly & 3 Others (Kiambu). The dispute is also said to be before the Political Parties Dispute Tribunal in political parties dispute tribunal case no. E010 of 2023, Jeremiah Kioni Vs Office of the Registrar of Political Parties.
45. The 6th, 7th, 8th and 9th respondents' preliminary objection is based on the same grounds as the objection by the 3rd and 4th respondents. As a matter of fact, the 6th, 7th, 8th and 9th respondents have reproduced, word for word, the grounds raised in the 3rd and 4th respondents' preliminary objection.
46. The 18th respondent's preliminary objection is no different. The grounds upon which it is based is in the same terms as the other two objections.
47. The 3rd and 4th respondents filed additional grounds of their preliminary objection dated 24 November 2023. The two additional grounds have been framed as follows:
 - a. On account of misjoinder of parties and misjoinder of causes of action, the 3rd and 4th respondents (sic) rights under article 25 (c) are likely to be violated;
 - b. The amended petition as framed impleads separate and distinct respondents as relates to separate and distinct causes of action with absolutely no question of law and fact that is common to the distinct causes of action."

Submissions

48. For the reason that the jurisdiction of this Honourable Court to hear and determine the petition before it has been questioned in the preliminary objections, the court directed that the objections be disposed of first before a decision is made and directions taken on the hearing of the petition. It is for this reason



that the court invited parties or their respective counsel to address it on the preliminary objections. It is these objections that are the subject of this ruling.

49. The court directed that the objections be disposed of by way of written submissions. Parties or their representatives were also accorded opportunity to highlight their submissions before the Court retreated to write this ruling.
50. As far as we can gather from the judiciary's case tracking system portal, parties on whose behalf submissions were filed are the petitioners, the 1st, 2nd, 3rd, 4th, 6th to 16th and 18th respondents. The 1st, 4th, 5th and 6th interested parties also filed written submissions.

3rd And 4th Respondent's Submissions

51. In the submissions filed M/s. J.A. Guserwa & Company Advocates for the 3rd and 4th respondents, it has been urged that the petition is made up of unrelated causes of action. For instance, the dispute on which of the two coalitions, is the majority party in the National Assembly has nothing to do with the IEBC or the office of the Registrar of Political Parties. The dispute should concern the National Assembly and the Speaker of the National Assembly only.
52. It is also urged that the allegation that the Registrar of Political Parties subverted multi-party democracy by purporting to sever Jubilee party from Azimio la Umoja and allowing persons who resigned from the party to continue deriving benefit from the party they have resigned from is a separate cause of action.
53. The other causes of action that are alleged not to be interlinked in any way are IEBC's failure to declare which party is the majority and minority in the National Assembly; the passing of the Finance Bill, 2023 and Appropriation Bill, 2023; and, the dispute amongst members in the Jubilee party.
54. In support of her submissions, the learned counsel for the 3rd and 4th respondents cited *Matindi & 3 Others versus National Assembly of Kenya & 4 Others; Controller of Budget & 50 Others (2023) KEHC (KLR)* where the court noted that in order to ensure efficient administration of justice, each cause of action ought to be litigated independently to ensure the proper application of law and presentation of evidence in resolution of disputes. The court is said to have declined to entertain an issue in the petition for the reason that it was found to be a cause of action that was unrelated to the petition before court.

Causes of action, it was urged, need to be litigated independently and separately and the petitioners ought to be barred from blending causes of action and purporting to proffer jurisdiction by craft.
55. On exhaustion of statutory mechanisms for resolution of disputes, the learned counsel relied on section 40 of the *Political Parties Act* which vests the jurisdiction to determine disputes between members of a political party in the Political Parties Tribunal. The same tribunal is seized of the jurisdiction to hear appeals from the decisions of the Registrar Political Parties.
56. It has been urged that the petition against the 10th and 13th respondents is a dispute between members of Jubilee party which is a political party under section 40(1) of the *Political Parties Act*. Under the same provision of the law, the Political Parties Dispute Tribunal is vested with the jurisdiction to determine disputes against the Registrar of Political Parties. It follows that the petitioners' grievances ought to have been addressed at the Political Parties Disputes Tribunal.
57. Amongst the disputes presented before this court, it has been urged, is the question of which coalition between Kenya Kwanza and Azimio ought to be the majority or minority party in the National Assembly. Counsel has urged that this court does not have jurisdiction to entertain this question.



She cited the case of Lillian Gogo versus Joseph Mboya Nyamuthe & 4 Others (2017) eKLR where the Court of Appeal noted that the dispute between parties before the court was a dispute between members of the same political party and that although it was a dispute arising from the party primaries it was, nonetheless, a dispute that fell under paragraphs a, b, c and e of section 40 (1) of the *Political Parties Act* according to which the dispute was to be heard by the party's internal dispute resolution mechanisms before the Political Parties Disputes Tribunal could take up the matter. In that case, the Court of Appeal cited its own decision in Speaker of National Assembly versus Hon. James Njenga Karume (2008) 1KLR where it was held that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

58. The learned counsel for the 3rd and 4th respondents also invoked section 12 (2) of the *Parliamentary Powers and Privileges Act*, 2017 which provides that no civil suit should be commenced against the Speaker, the leader of the majority party, the leader of the minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their respective offices. It is urged that the petition violates this provision of the law to the extent that the petitioners have sued the Speaker of the National Assembly and the leader of the majority in their personal capacity.
59. In support of this submission, counsel relied on the decision in Civil Appeal No. 157 of 2007 John Harun Mwau versus Dr. Andrew Mullei & Another where it was held, inter alia, that one of the primary functions of Parliament is to debate and pass resolutions freely on subjects of its own choosing and that this is one of the cornerstones for parliamentary democracy. The members of Parliament have the right to say whatever they want to say and discuss it freely. This right of freedom of expression by members of the National Assembly is a privilege protected by the *Parliamentary Powers and Privileges Act*, 2017 and it embodies the concept of parliamentary immunity. It follows that the freedom of speech and debates in parliament ought not to be impeached or questioned in any court of law or any other place outside Parliament.
60. Finally, the learned counsel for the 3rd and 4th respondents urged that the petition cannot be severed as that would be untidy and to the prejudice of the respondents and that the only alternative available to court is to strike it out altogether.

6th, 7th, 8th And 9th Responent's Submissions

61. Like the 3rd and 4th respondents, the 6th, 7th, 8th and 9th respondents urged that in light of section 40 of the *Political Parties Act*, the internal political party dispute resolution mechanisms and the Political Party Disputes Tribunal are the ideal fora for resolution of the issues raised by the petitioners and not this Honourable Court. Their learned counsel has urged that this Court only has appellate jurisdiction from the decisions of the Political Parties Disputes Tribunal. To buttress their argument, the 6th to 9th respondents cited the case of Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others [2015] eKLR and Lilian Gogo v Joseph Mboya Nyamuthe & 4 others [2017] eKLR (supra). In the former case it was held, inter alia, that where a dispute resolution mechanism exists outside the courts, the same should be exhausted before the jurisdiction of the courts is invoked. Also cited for the same argument is the case of Eliud Wafula Maelo versus Ministry of Agriculture & 3 Others (2016) eKLR.
62. The 6th to 9th respondents have urged that the dispute is prematurely before this Honourable Court and that the court lacks jurisdiction to entertain it. For this submission they cited the Court of Appeal decision in Owners of the Motor Vessel 'Lillian S' versus Caltex Oil (Kenya) Ltd (1989) KLR 1 where it was held that without jurisdiction a court cannot move a step further in hearing the dispute before it.



63. On Parliamentary immunity, counsel invoked Article 117 (2) of *the Constitution* and Section 12 of the *Parliamentary Powers and Privileges Act* that protect leaders in the National Assembly and members of parliament from judicial proceedings for actions done in good faith in their official capacity. Amongst these leaders are party leaders in the National Assembly whose positions are provided for in Article 108 of *the Constitution* to assist the National Assembly in fulfilling its mandate.
64. Counsel relied on the case of Appollo Mboya versus Attorney General & 2 Others (2018) eKLR where it was held that parliamentary immunity ensures that Parliament can fulfil its tasks and function without obstruction from any quarter and that Parliament can only work when its members are free to carry out their mandate. It follows that immunity is a prerequisite for ensuring that Parliament can function as an independent institution, asserting its own authority and dignity.
65. As far as the Finance and Appropriation Bills, 2023 are concerned, it was submitted that the National Assembly fulfilled its mandate under Article 95 of *the Constitution* by preparing and passing the Finance and Appropriation Bills for the year 2023. The petitioners have failed to provide any evidence to suggest that the 6th to 9th respondents acted unlawfully by participating in the consideration of the Bills.
66. In any event, the 6th to 9th respondents urged that the question of the legality of the Finance Act is subject to proceedings before this Honourable Court in petition no. E181 of 2023; Okiya Omtatah Okoiti versus Cabinet Secretary, National Treasury and Planning & Others and, therefore, based on the doctrine of sub judice, this court should be hesitant to entertain the same issue.
67. Finally, it was submitted that the petition does not disclose any cause of action against the 6th to 9th respondents. The learned counsel for the 6th to 9th interested parties relied on Anarita Karimi vs Republic (No.1) (1979) 1 KLR 154 and urged that legal proceedings should be drafted with a degree of specificity to clearly state the allegations and reliefs sought against a party. The petitioners in this petition are alleged to have failed to specify the constitutional provisions and provide details of the alleged contravention by the 6th to 9th respondents, which is necessary to establish a cause of action against them. Again, it is submitted that the petitioners are not seeking any order against the 6th to 9th respondents. The case of Boniface Omondi v Mathare Youth Sports Association & Another (2021) eKLR was cited in support of the argument that the petition against the 6th to 9th respondents should be struck out because neither has any allegation been made against these respondents nor does the petition reveal a right to some relief against them.

18th Respondent's Submissions

68. As earlier noted, the 18th respondent's preliminary objection is in the same terms as the objections by the 3rd and 4th respondents and 6th to 9th respondents. Inevitably, Dr. Mukhwana, the learned counsel for the 18th respondent has, in his written submissions, more or less, adopted the same stance posited by the learned counsel for the 3rd and 4th respondents and the 6th to 9th respondents in support of their preliminary objections.
69. On the question of the jurisdiction of this Honourable Court to determine the petitioners' dispute, the learned counsel introduced the angle of Article 159 of *the Constitution* for the submission that the petitioners ought to have embraced alternative forms of dispute resolution by submitting themselves to the political parties' internal dispute resolution mechanisms and the Political Parties Disputes Tribunal. This prerequisite is not only sanctioned by *the Constitution* but also by the provisions of the *Political Parties Act* and the *Fair Administrative Action Act*, 2015. This Honourable Court would only



intervene under Order 53 rule 3(1) of the Civil Procedure Rules once the alternative dispute resolution mechanisms have been exhausted.

70. Citing court decisions in Peter Gichuki King'ara versus the Independent Electoral and Boundaries Commission and 2 Others (Civil Appeal 23 of 2013) EKLR; Owners of the motor vessel "Lillian" – VS- Caltex Oil (Kenya) Limited Civil Appeal no. 50 of 1989; and, Samuel Kamau Macharia & Another -VS- Kenya Commercial Bank Limited & 2 Others (2012) Eklr, in which it has been consistently held that without jurisdiction the court is bereft of authority to determine a dispute before it, the learned counsel for the 18th respondent urged that this Honourable Court has no jurisdiction to determine the petitioners' dispute.
71. Like the rest of the respondents who raised preliminary objections against the petitioners' petition, the 18th respondent urged that Article 117(1) of *the Constitution* as read with section 12(2) of the *Parliamentary Powers and Privileges Act*, 2017 clothe the Speaker of the National Assembly and the members of the National Assembly with immunity from liability for utterances made or acts done in performance of their duties.
72. With the respect to the Finance Bill, 2023 and Appropriations Act, 2023, the 18th respondent's submission on this is that the petition has been overtaken by events because the bills have since been enacted into law. In any event, if the petitioners were aggrieved by the ensuing Acts of parliament, all they needed to do was to invoke Article 119 of *the Constitution* and petition parliament to amend or repeal the legislation.

1st, 10th, 11th, 12th, 13th, 16th, 17th and 19th Respondents' Submissions

73. Except for the 5th, 11th, 14th and 16th respondents, the rest of the respondents who did not file preliminary objections filed written submissions supporting the preliminary objections. For instance, Mr. Murugara, the learned counsel for the 1st and 17th respondents adopted the submissions for the 3rd and 4th respondents in their entirety. In addition to those submissions, the learned counsel cited the case of Yowana Kahere & Others versus Lunyo Estates Limited (1959) EA 319 where it was held that the right to relief alleged to exist must be in respect of or arise out of the same transaction and also that there should be a common question of fact or law.
74. In his submissions, Mr. Manyara, the learned counsel for the 10th to 13th supported the preliminary objections along the same lines as the 3rd, 4th, 6th to 9th and 18th respondents. So was Ms Wanjiru Wanja, the learned counsel for the 12th and 16th respondents. The learned counsel, however, added that according to the doctrine of judicial restraint, judges are required to limit the exercise of their own power and ought to be hesitant in striking down laws or interfere with actions of other arms of government unless they are obviously unconstitutional. Counsel submitted further that the function of the court is to examine the action that has been challenged, in accordance with law, and to determine whether the legislature has acted within the powers and functions assigned to it under *the Constitution*, and if not, to strike down the action. However, as it does so, the court must remain within self-imposed limits.
75. The 19th respondent's submissions are no different from those of the authors of the preliminary objections. It has been urged on its behalf that the petitioners' petition is an attempt to defeat the provisions of the *Political Parties Act* and an attempt to undermine the institutions created under Act. In support of the petitioners' submission, the learned counsel for the 19th respondent cited the case of Moses Mwigigi & 4 others v Independent Electoral and Boundaries Commission & 5 others (2016) eKLR where the Supreme Court held, inter alia, that an electoral dispute cannot be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of *the Constitution*.



76. The 19th respondent also urged that the 4th, 6th to 9th respondents are insulated from court proceedings under Article 117 of *the Constitution* and section 12 of the *Parliamentary Powers and Privileges Act*. The respondent relied on *Shadrack Muyesu Sharu & 2 others versus Justin Muturi & 2 Others* (2008) eKLR where section 12 of the *Parliamentary Powers and Privileges Act*, 2017 is said to have been applied and a preliminary objection to a suit against the Speaker of the National Assembly upheld.
77. The 19th respondent also submitted that the petition is defective to the extent that it is sub judice and a misjoinder of causes of action for the same reasons that were proffered by the 3rd, 4th, 6th to 9th respondents.

8th to 10th Interested Parties' Submissions

78. Also supporting the preliminary objections is the 8th and 10th interested parties which, like the proponents of the preliminary objections before them, they urged that this Court has no jurisdiction to determine the instant dispute for the reason that being a dispute between political parties, it should be resolved within the alternative dispute resolution mechanisms stipulated under the *Political Parties Act* and that the petition is bad under the doctrine exhaustion.

Petitioners' Submissions

79. In response to the submissions in support of the preliminary objections, Mr. Kibe, the learned counsel for the petitioners submitted that the issues raised in the petition can only be determined by this Honourable Court pursuant to its jurisdiction under Article 165 of *the Constitution*.
80. On this particular question of jurisdiction, it has been submitted on behalf of the petitioners that the respondents have conceded that some of the issues raised in the petition fall within the jurisdiction of this Honourable Court. In any case, the petitioners have not sued as members of the Jubilee party and, therefore, they are not subject to the jurisdiction of the Political Party Disputes Tribunal.
81. The learned counsel for the petitioners has also submitted that the dispute about which of the two coalitions between Kenya Kwanza and Azimio ought to be the majority party in the National Assembly is beyond the two coalitions. According to the learned counsel, this is a fundamental question that concerns every Kenyan and that under Article 3 of *the Constitution*, the petitioners have a constitutional duty to defend *the Constitution* and one way of doing it is filing the instant petition to ensure the majority coalition of the National Assembly is in accordance with the result of the General elections of 9 August 2022.
82. As far as the question of immunity is concerned, it has been submitted that section 12 (2) of the *Parliamentary Powers and Privileges Act* is subject to *the Constitution*. It does not override the rights of the petitioners under Articles 3, 22 and 258 of *the Constitution* to file the instant petition. Again, the issues raised in this petition are not prohibited by section 12 (2) of the *Parliamentary Powers and Privileges Act*, 2017. In any case, according to Articles 2 (1), 10 (1) and 20 (1) of *the Constitution*, the 3rd and 4th respondents have an obligation to act in conformity with *the Constitution* in discharging their functions and in conducting themselves as state officers.
83. The learned counsel for the petitioners distinguished the case of *John Harun Mwau versus Dr. Andrew Mulei & Another* (supra) from this case and urged that the John Harun Mwau case was about freedom of speech and debates in Parliament. The instant petition does not seek to curtail any of the freedoms of the 3rd and 4th respondents. Rather, the petition is about the legality of the speaker's ruling of 6 October 2022 declaring the Kenya Kwanza coalition as the majority party in the National Assembly. It is for this reason that the 6th to 9th respondents have been sued in this petition.



84. The petition is also about the validity of the election of Hon. Moses Wetangula as the Speaker given the fact that he is a founding partner of the Kenya Kwanza coalition agreement; and, finally it is about the partisan conduct of the Speaker of the National Assembly which, according to the petitioners, violates the political neutrality of the Speaker of the House.
85. Citing the Supreme Court decision in Justus Kariuki Mate & Another versus Martin Nyaga Wambora & Another (2017) eKLR, the learned counsel for the petitioners submitted that this Honourable court has the jurisdiction to question the constitutionality of the standing orders of the House or anything purported to be done under those standing orders.
86. On the question of sub judice, the learned counsel for the petitioners added that there is no way of confirming the contention that the issues in this petition are directly and substantially in issue in the cases to which the respondents have made reference without going through a detailed perusal and analysis of the said cases including the facts and evidence. It follows that the question of sub judice cannot be determined as a preliminary objection because it is based on disputed facts.
87. While the petitioners agree that under section 40 (2) and (3) of the *Political Parties Act* disputes in political parties, coalition members and parties should be first handled through internal political party or coalition dispute resolution mechanisms before being referred to the tribunal under section 40 (1) of the Act, the petitioners' grievances cannot be ventilated under any of the party constitution or coalition internal dispute resolution mechanisms.

1st, 2nd, 4th, 5th, 6th and 10th Interested Parties' Submissions

88. The 1st, 2nd, 4th, 5th, 6th and 10th interested parties filed submissions opposing the preliminary objections. In particular, the 1st, 4th, 5th and 6th interested parties have urged that this Honourable Court is vested with the jurisdiction to determine the validity of the actions by the Speaker of the National Assembly pursuant to Article 165 (3) (D) of *the Constitution*. They cited the case of Institute for Social Accountability and Another versus National Assembly and 3 others (2022) KESC 39 (KLR) where it was held that this Honourable Court has the power to interrogate a question regarding the nature of legislation in respect of Article 110 (1) of *the Constitution* despite the concurrence of the speakers of the Senate and the National Assembly under Article 110 (3) of *the Constitution*.
89. They have also urged that contrary to assertions by the respondents, the petitioners' disputes cannot be resolved in the fora suggested by the respondents. This is because neither the Political Parties Disputes Tribunal nor the Registrar of Political Parties has jurisdiction over decisions or actions of the Speaker of the National Assembly. The decisions or actions of the Speaker of the National Assembly, the Cabinet Secretary National Treasury and the Kenya Revenue Authority cannot be subjected to internal dispute resolution mechanisms of a political party.
90. It has also been urged that political parties internal dispute resolution mechanisms do not cover persons who are not members of the political party concerned and neither do such mechanisms exist over the overall business of the National Assembly, the cabinet secretary or the Kenya Revenue Authority
91. The Registrar of Political Parties also does not have power or jurisdiction to determine issues of violation of fundamental rights and freedoms. The Political Parties Disputes Tribunal or the Registrar of Political Parties does not have jurisdiction over actions or decisions of the IEBC. And finally, the orders sought by the petitioners cannot be issued by either the Political Parties Tribunal or the Registrar of Political Parties.
92. It has been urged that the issues raised by the petitioners fall within the exceptions to the exhaustion doctrine and in this regard the learned counsel for the 1st, 4th, 5th and 6th interested parties relied



on the case of Republic versus Independent Electoral and Boundaries Commission (IEBC), ex parte, National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR where it was held that this Honourable Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* and proceed with the suit before it. For the same argument, the interested parties relied on the decision of African Commission of Human Rights in Sir Dawda K. Jawara versus Gambia, ACmHPR 147/95-149/96. In this case, it was held that a remedy is considered available if the petitioner can pursue it without impediment and that it is deemed effective if it offers the prospect of success and that it is sufficient if it is capable of redressing the complaint in its totality.

93. The 1st, 4th, 5th and 6th interested parties also opposed the preliminary objections on the ground that they are based on disputed facts that call for this court's interrogation and determination. This is contrary to the what a preliminary objection entails as held in Mukisa Biscuit Manufacturing Company Limited versus West End Distributors Limited (1969) E.A. 696 that a preliminary objection ought to be founded purely on a point of law.
94. On the question of parliamentary privilege, it was urged the immunity is not absolute and that this Honourable Court retains the power to interrogate whether any act purportedly undertaken under the authority of *the Constitution* is, in fact, inconsistent with *the Constitution*. To this end, the interested parties cited the case of Judicial Service Commission versus Speaker of National Assembly & 8 Others (2014) eKLR and Hon. Augustine Lyatonga Mrema versus Speaker of the National Assembly & Another (Misc. Civil Application No. 36 of 1998 (Unreported)).

The 2nd interested party also opposed the preliminary objections based on the same arguments.

Analysis and Determination

95. As has been well articulated by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR jurisdiction is conferred by *the Constitution* and by statute. As far as this Honourable Court is concerned, its jurisdiction is anchored in Article 165 (3) of *the Constitution*. This Article reads as follows:

165

- (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.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
96. Under clause 6 of Article 165, this Court also has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, though not over a superior court.
97. Flowing from these provisions of *the Constitution*, and for purposes of determination of the preliminary objections before us, is the overarching question whether the petition provokes any question on interpretation of *the Constitution*. Secondary to this question, is the question whether there is any contention in the petition against the respondents, jointly or severally, that they did anything, ostensibly under the authority of *the Constitution*, but which turns out to be inconsistent with or in contravention of *the Constitution*. If answers to these questions are in the affirmative, the petition is properly before court and there should be no debate whether this Honourable Court is seized of jurisdiction or not.
98. Of course, there are questions such as whether the petitioners ought to have engaged internal interparty or intraparty dispute resolution mechanisms and alternative procedure for redress of grievances as prescribed by the *Political Parties Act* but, in our humble view, these are questions which, on the one hand will warrant some degree of examination of evidence in order to come to the conclusion that the dispute is as characterized by the respondents. We say so because the description of the petitioners as members of any particular party is a question that is contested.
99. On the other hand, it may well be that that the dispute is between members of a party or between parties or between party coalitions but this is a question that would not found a preliminary objection. It is not purely a question of law; it is, instead, a question of fact whose answer can only be defined once the petition has been heard on merits.
100. It follows that the petition cannot be struck out in limine on the ground that the petitioners ought to have embraced internal dispute resolution mechanisms within their parties or subjected their dispute to other alternative dispute resolution mechanisms under the *Political Parties Act* if the nature of the dispute or the status of the petitioners are questions that are yet to be determined.
101. Turning back to what, in our humble view, is the overarching question in this petition, we gather that this petition was provoked by the ruling of the Speaker of the National Assembly on what appears to have been a debate he invited on which coalition, between Azimio coalition and Kenya Kwanza coalition is the majority party in the National Assembly.
102. The petitioners' concern, as we understand it, is whether the Speaker's ruling is consistent with Article 108 of *the Constitution* which provides for, among other things, the positions of the leader of the majority party and the leader of the minority party. It is necessary we reproduce the entire Article here; it reads as follows:

108



- (1). There shall be a leader of the majority party and a leader of the minority party.
- (2) The leader of the majority party shall be the person who is the leader in the National Assembly of the largest party or coalition of parties.
- (3) The leader of the minority party shall be the person who is the leader in the National Assembly of the second largest party or coalition of parties.
- (4) The following order of precedence shall be observed in the National Assembly--
 - (a) the Speaker of the National Assembly;
 - (b) the leader of the majority party; and
 - (c) the leader of the minority party.

103. On the face of it, this provision of *the Constitution* is couched in such clear and unambiguous terms that one would not expect any debate on its interpretation. But where a dispute arises as to its import and, in particular, whether anything done or, as the petitioners would say, purportedly done, to give effect to this part of *the Constitution* is consistent with this Article, the jurisdiction of this Honourable Court under Article 165 of *the Constitution* is called into action. The court is thereby called to discharge its solemn responsibility to interpret what *the Constitution* means and in so doing, to weigh the Speaker's ruling against the interpretation that, in our view, would be the correct interpretation of Article 108 of *the Constitution*.

104. The respondents have urged that the Speaker's ruling ought not to be questioned in this court and in support of this position they have invoked Article 117 of *the Constitution* and section 12 of the *Parliamentary Powers and Privileges Act*, 2017. Article 117 of *the Constitution* reads as follows:

117.

- (1) There shall be freedom of speech and debate in Parliament.
- (2) Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.

105. Section 12 of *Parliamentary Powers and Privileges Act*, 2017 which has been enacted to give effect to clause (2) of Article 117 states as follows:

12. Immunity from legal proceedings

- (1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.
- (2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.
- (3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.



106. The preceding provision, section 11, is even more direct on this question; it states as follows:11.
11. Proceedings not to be questioned in courts
- No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.
107. The very argument by the respondents and the interested parties supporting the preliminary objections that the Speaker’s ruling is beyond question in light of these provisions of the law does, by itself, invite this Honourable Court to interpret these provisions vis-à-vis Articles 165(3) (d) of *the Constitution* on this Honourable Court’s jurisdiction to hear any question respecting the interpretation of *the Constitution*; Article 165(3) (d) (iii) on 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; and, Article 3 (1) on the obligation on every person, including the Speaker of the National Assembly, to respect, uphold and defend *the Constitution*, among other provisions of *the Constitution*. The court is also invited to interpret the consistency with these provisions of *the Constitution* or lack thereof of section 12 of *Parliamentary Powers and Privileges Act*, 2017.
108. We need not belabour the point that we cannot skirt around our obligation to interpret and give effect to *the Constitution*. It does not matter that in discharging this responsibility, we may, in the process question anything done by the Speaker or the National Assembly in exercise of their constitutional mandate. Our Constitution is supreme and our onerous task is to rise to the occasion and affirm this supremacy, whenever we are called upon to, and whenever this supremacy is threatened by acts of organs of the state or individuals in those organs ostensibly in exercise of their constitutional or statutory roles. To this end, we find the words of the Supreme Court in Supreme Court Advisory Opinion No. 2 of 2013; In the Matter of the Speaker of the Senate & Another versus the Attorney General befitting.
109. While quoting Karle Klare in his article, “Legal Culture and Transformative Constitutionalism” published in South African Journal of Human Rights, Vol. 14 (1998). The court noted as follows:
- “(53) The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country’s achievements in constitutional precedent. We in this Court, conceive of today’s constitutional principles as incorporating the transformative ideals of *the Constitution* of 2010: we bear the responsibility for casting the devolution concept, and its instruments in the shape of county government, in the legitimate course intended by the people. It devolves upon this Court to signal directions of compliance by State organs, with the principles, values and prescriptions of *the Constitution*; and as regards the functional machinery of governance which expresses those values, such as devolution and its scheme of financing, this Court bears the legitimate charge of showing the proper course.
- (54) The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court’s jurisdiction



includes resolving any question touching on the mode of discharge of the legislative mandate.”

110. And to the specific questions raised in the preliminary objections on the court’s mandate vis-à-vis that of the legislature, the Court said at paragraphs 61 and 62 of its opinion thus:

“(61) It emerges that Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of *the Constitution*, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that *the Constitution* vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect *the Constitution* and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with *the Constitution*. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of *the Constitution*. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of *the Constitution*. It cannot operate besides or outside the four corners of *the Constitution*. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

(62) However, where a question arises as to the interpretation of *the Constitution*, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under *the Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where *the Constitution* decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of *the Constitution*. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach *the Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated *the Constitution*, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way.”

111. We cannot put it any better save to say that the reasons that the proponents of the preliminary objections proffer against the hearing of the petition are the very reasons that call for the exercise of this



Honourable Court's jurisdiction to interpret *the Constitution* and determine whether, among other things, the Speaker's actions can stand up to the test of constitutionality.

112. The other ground against the petition is that of sub judice. It is alleged that the issues in this petition are directly and substantially in issue before this Honourable Court in constitutional petition no. E166 of 2023, Hon. Sabina Chege Vs the Rt. Hon. Speaker of the National Assembly & 3 Others and in constitutional petition no. E025 of 2023, Association of Friends of Youth and Women Vs the Rt. Hon. Speaker of the National Assembly & 3 Others (Kiambu). The dispute is also said to be before the Political Parties Dispute Tribunal in political parties dispute tribunal case no. E010 of 2023, Jeremiah Kioni Vs Office of the Registrar of Political Parties.
113. But this has been disputed and, in any event, there is no evidence of the of the existence of these suits. At this stage of the proceedings, it is impossible to determine whether the issues raised in this petition are directly or substantially in issue in the alleged suits. To reach such conclusion, the court has to interrogate the evidence and, for this very reason, this ground cannot form a ground for preliminary objection which, as noted, can only be taken on a point of law only based on undisputed facts.
114. Lest we forget, in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say on what a preliminary objection entails:
- “ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
115. At page701 paragraph B-C Sir Charles Newbold, P. stated:
- “ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
116. Related to the ground of sub judice is the ground that the Finance Bill, 2023 and Appropriation Bill, 2023 which the petitioners seek to impugn in these proceedings have since been enacted into law and are already in force. All we can say on this is that if this petition was all about the two bills, we would not have proceeded with it any further because it is in the public domain that the two Bills have since progressed into Acts of Parliament. We understand that their constitutionality or lack therefore is a question that is the subject of proceedings in the Court of Appeal.
117. Finally, it was urged on behalf of the parties that filed preliminary objections that the petition ought not to be heard because it alleged to be a mixture of unrelated causes of action which ought to have been filed as separate suits. The learned counsel for the 3rd and 4th respondents in particular relied on *Matindi & 3 Others versus National Assembly of Kenya & 4 Others; Controller of Budget & 50 Others* (2023) KEHC (KLR) where the court is said to have held that each cause of action ought to be litigated independently to ensure the proper application of law and presentation of evidence in resolution of disputes and in so holding, the court is said to have declined to entertain an issue in the petition for the reason that it was found to be a cause of action that was unrelated to the petition before court.



118. We have had opportunity to consider the decision and noted that the argument that unrelated causes of action should not be joined into a single petition was raised by one of the respondents in the petition. In particular, it was urged that the issue of the constitutional validity of section 26(2) of the Salaries Remuneration Commission Act and Salaries Remuneration Commission Regulations, 2013 should have been raised as a separate action. The primary issue in that petition was the constitutionality, or lack thereof, of the creation of the positions of chief administrative secretaries and the appointment of particular individuals to those offices.
119. The court captured the respondent’s arguments with which it agreed as follows:
- “ 292. However, and more importantly, it submitted that while the provisions of order 3 rule 5 of the Civil Procedure Rules and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 do permit the joinder of causes of action, the issue of the creation of the position of CAS and the subsequent appointment of the 2nd to 51st interested parties as CASs; and the issue of the constitutional validity of Section 26(2) of the SRC Act and SRC Regulations, 2013 and SRC’s advice on the remuneration and benefits of CASs are independent and distinct causes of action.
293. Further to the above, the issues do not arise out of the same act or transaction, or series of acts or transactions, and no common question of law or fact would arise should the two issues be considered together. The two causes of action joined in the petition are fundamentally disparate in nature, both legally and factually. Each cause of action carries distinct elements, legal standards, and remedies, necessitating separate and individual consideration.
294. The 4th respondent contended, and we agree, that by joining these unrelated causes of action, this court may not be able to render a fair and efficient resolution of that particular issue given that it derogates from the core issues before this court. This court is of the view that in order to ensure efficient administration of justice, each cause of action ought to be litigated independently to ensure the proper application of law, presentation of evidence, and resolution of disputes. In the present matter, this court has not had sufficient opportunity to carry out the above exercise in relation to that specific issue.
295. Accordingly, based on the reasons set out above, we decline to entertain this issue and find that the same is an unrelated cause of action within the context of the consolidated petition. The petitioner is at liberty to raise the issue as a separate cause of action should it wish to pursue the same.”
120. It is worth noting here that the issue of unrelated causes of action was not raised as a preliminary issue or dealt with as such. The court considered the question at the hearing of the main petition and only came to the conclusion it came to after hearing the parties on the petition. Secondly, and more crucial to determination of the preliminary objections in these proceedings, the court proceeded to dispose of the primary question in the petition and, by majority, allowed the petition.
121. The point is, where in a petition, a petitioner raises a constitutional issue that calls for invocation of this Honourable Court’s jurisdiction under Article 165 of *the Constitution*, the petition will not be



- defeated merely because the petitioner has either wittingly or unwittingly, raised other issues in the petition that could properly form a basis of a separate and distinct suit.
122. A constitutional petition is not necessarily subject to strictures of procedure ordinarily associated with other ordinary suits in the manner of approaching court. It is, in our humble opinion, partly for this reason the court has been given such a wide mandate in nature of reliefs it may grant in a petition instituted for enforcement of Bill of Rights under Article 22 of *the Constitution*. According to Article 23(3) of *the Constitution*, reliefs that may be granted in a petition for enforcement of the Bill of Rights include an injunction, a declaration of rights, an order for compensation and judicial review reliefs. Ordinarily, these reliefs would be anchored on distinct causes of action but the possibility that they may be granted in a single constitutional petition goes to show that a misjoinder of causes of action in a constitutional petition is not fatal to the petition.
123. This liberality in approach to court for enforcement of constitutional rights is resonated in Rule 10 (3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which is to the effect that subject to rules 9 and 10 of those Rules, 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.
124. And to the specific question of misjoinder of parties, the same Rules are clear that a petitioner may join as many parties as are necessary if he is in doubt as to the person or persons from whom redress may be sought. The court may determine whether proper parties have been joined to the petition but certainly, misjoinder cannot be a reason for failure of a petition. This position is captured in Rule 5(a) and (b) of the Rules; it reads as follows:
- 5.
- (a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
 - (b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
125. Rule 5 (c) gives the court the leeway to correct the error of instituting the petition in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner and under Rule 5(d) the court may strike out the name of any party improperly joined to the suit or order that any party who ought to be joined but has not been joined be joined to the petition.
126. We should not be mistaken to be saying that a constitutional court will entertain every suit that would otherwise have been filed as an ordinary suit only because it is christened a "petition" or "constitutional petition". Neither are we saying that a constitutional court will invoke its jurisdiction under Articles 23, 165 (3), (b) and (d) of *the Constitution* for the mere reason that the pleadings before it have been laced with provisions of *the Constitution* with random and unfounded claims that a party's constitutional rights have been violated or are threatened with violation.
127. A constitutional court will guard against abuse of the solemnity of its jurisdiction under Article 165 and avoid disputes whose means of initiation, procedure and determination has been provided elsewhere. If *the constitution* or a statute prescribes the process or procedure by which any particular grievance ought to be addressed, the court will be hesitant to take up the dispute arising out of such a grievance as a constitutional petition. The aggrieved party will be enjoined to not only abide by the



procedure prescribed for seeking relief but also to seek the relief from the appropriate forum disposed to determine or resolve the dispute.

128. The sanctity of constitutional petitions in addressing violations of *the Constitution* and constitutional rights is a subject that was addressed by the Privy Council in *Kemrajh HARRIKISSOON Versus Attorney General of Trinidad & Tobago* (1979) 3WLR 62. In that case the teaching service commission of Trinidad and Tobago, acting under regulation 135(1) of the public service commission regulations 1966 (as adopted and amended by the commission in 1968), made an order transferring the appellant teacher to another school, without giving him the three months' notice that was required unless the exigencies of the teaching service did not so permit. The appellant considered that the transfer was intended as a punishment for allegations he had made of improprieties at the first school and that the exigencies of the teaching service did not justify his transfer on less than three months' notice. Instead of availing himself of the review procedure provided by regulation 135, he applied to the High Court under section 6 of *the Constitution* of 1962 for a declaration that the human rights and fundamental freedoms granted to him by section 1 of *the Constitution* had been violated. The High Court rejected the appellant's claim. He appealed to the Court of Appeal of Trinidad and Tobago, which dismissed his appeal. When the matter went to the Privy Council, it held as follows:

“The notion that wherever there is a failure by an organ of the Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of *the Constitution* is fallacious. The right to apply to the High Court under Section 6 of *the Constitution* for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

129. We must add that in declining to take up a dispute on the ground that it is an ordinary dispute that ought to be disposed of in the usual way, the constitutional court is not thereby saying that it is deprived of jurisdiction; of course, the court has unlimited original jurisdiction in civil and criminal matters under Article 165(3)(a) of *the Constitution*. Declining jurisdiction in these circumstances is out of deference to the institutions which *the constitution* or a statute has established and entrusted with the task of dealing with the dispute in question and the procedure which has been prescribed for determination of such a dispute. Courts acknowledge the simple but vital truth that public decision makers exist for a purpose and have a specific role to play.
130. That said, we are not persuaded that this petition should be struck out in limine on the ground that it is in the category of disputes that either ought to have been brought to court as an ordinary suit or subjected to other public bodies for determination. For reasons that we have already given, we are satisfied that it is not in that category of cases.



131. In the final analysis, and for reasons we have given, we are inclined to overrule the preliminary objections to the hearing of the petition. They are hereby dismissed. The costs will abide the outcome of the petition. We so order.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI ON 26 JANUARY 2024

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NGAAH, J

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CHIGITI, J

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MUGAMBI, J

