

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION No. 1 OF 2021

- BETWEEN -

NATIONAL RAINBOW COALITION KENYA

(NARC KENYA)PETITIONER

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....RESPONDENT

AND

THARAKA NITHI COUNTY ASSEMBLY.....1ST INTERESTED PARTY

MANDERA COUNTY ASSEMBLY.....2ND INTERESTED PARTY

GARISSA COUNTY ASSEMBLY.....3RD INTERESTED PARTY

EMBU COUNTY ASSEMBLY.....4TH INTERESTED PARTY

NAIROBI COUNTY ASSEMBLY.....5TH INTERESTED PARTY

MERU COUNTY ASSEMBLY.....6TH INTERESTED PARTY

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi
(Karanja, Sichale & M’Inoti, JJ.A.) in Civil Appeal No. 328 of 2019 delivered
on 18th December, 2020)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Following the declaration of the results of the 2017 general election, the Petitioner, NARC Kenya, a political party, had expected that its candidates would be nominated in Tharaka-Nithi, Mandera, Garissa, Embu, Meru and Nairobi counties in fulfillment of the Gender Top Up Rule in accordance with Article 177 of the Constitution. According to the petitioner, to the contrary, the Independent

Electoral Boundaries Commission, the Respondent, adopted a policy and criteria for gender top-up list that discriminated the petitioner and favoured certain political parties.

B. LITIGATION BACKGROUND

(i) *The High Court*

[2] Concerned, the petitioner approached the High Court with an amended constitutional petition dated 19th November, 2018, in which it prayed for:-

- “a. A declaration that the Petitioner is entitled to access to the information upon which the names of the nominated Members of the Interested Parties’ counties were selected.**
- b. A declaration that the Petitioner’s Members on its Nomination List were discriminately and/or unjustly denied nomination to the Gender Top Up slots available.**
- c. A declaration do issue that the Petitioner was entitled to have its members especially women in its party lists nominated in the county assemblies of Tharaka-Nithi, Mandera, Garissa, Embu, Meru and Nairobi Counties.**
- d. An order of mandamus do issue consequent to the above declarations compelling the Respondent to allocate the Petitioner its rightful entitlement of gender top up seats namely-two gender top up seats in Tharaka Nithi County, one additional seat in Mandera County and one seat each in Nairobi, Garissa, Embu and Meru counties from the Petitioner’s Gender Top Up Party List.**
- e. Costs.**
- f. Damages and any other relief that this court may deem fit and just to grant the Petitioner”.** (Our emphasis).

[3] In response, the respondent filed a notice of Preliminary Objection challenging the jurisdiction of the High Court to entertain the Petition, on the ground that it contravened Section 6 of the Elections (Parliamentary and County

Elections) Petition Rules, 2017 which requires an election court to be gazetted by the Chief Justice; that it also violated Section 10(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 which requires an election petition to be served within seven days from the date of its filing; and that the petition was filed out of time contrary to Section 77 of the Elections Act which provides that an election petition concerning an election, other than a presidential election, shall be filed within 28 days from the date of the declaration of the election results by the respondent. Like the respondent, the 1st Interested Party, Tharaka-Nithi County Assembly, filed a Preliminary Objection also challenging the jurisdiction of the court on those very grounds.

[4] Though the respondent and some of the interested parties also filed affidavits in response to the merits of the Petition, the High Court, Korir, J. limited his consideration to the objection. Citing the celebrated *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Judge restated the settled position that once a question of jurisdiction has been raised, the court seized of the matter is obliged to decide it right away; and that where a court finds that it has no jurisdiction, there would be no basis for continuing with the proceedings and but to down its tools that at point.

In sustaining the objection, the learned Judge relied on Articles 90 and 177 of the Constitution, Sections 75 (1A) (4) and 80 (3) of the Election Act whose combined effect is that a question as to the validity of the election of a member of a county assembly has to be heard and determined by the Resident Magistrate's Court designated by the Chief Justice; that an appeal from that court's decision lies to the High Court on matters of law only; and that all interlocutory matters in connection with a petition challenging results of county elections must similarly be heard and determined by the magistrate's court.

[5] Applying these provisions to the facts before him, and guided by this Court's decision in *Moses Mwicigi & 14 Others v Independent Electoral and*

Boundaries Commission & 5 others [2016] eKLR, the learned Judge reached the conclusion that;

“I am inclined to agree with the Respondent and interested parties’ submissions that this court is not the appropriate forum for addressing the issues raised in the petition. My reasoning is firmly grounded on the nature of the case and the matters raised herein because it is not disputed that the core issue in this petition is in regard to nominations to county assemblies. The Petitioner’s main concern is that the law was not observed by the Respondent in regard to the selection of the nominees for the top up seats. This, to me, is a dispute about members of county assemblies elected through nomination. Such a dispute falls into the province of the special legislation elected for resolving electoral disputes. I therefore do not agree with the Petitioner’s submission that this Court should characterize the instant petition as a constitutional dispute instead of an election dispute. In my view, such characterization would go against the electoral laws and the Constitution which are tailored in such a manner that they provide a special dispute resolution mechanism for electoral disputes, nominations being one of them. Having said so, the only conclusion is that this court has no jurisdiction to handle this matter”.

With that, the petition was rejected.

ii. At the Court of Appeal

[6] Aggrieved, the petitioner moved to the Court of Appeal on 12 grounds, alleging that the learned judge:

- a. *failed to appreciate that the petition before the court was not an election petition but a challenge of unconstitutional abuse of discretion by the IEBC, and thereby erred in dismissing the entire petition on a preliminary objection;*
- b. *misapprehended the law relating to judicial review;*
- c. *failed to find that the IEBC was subject to the court’s supervisory jurisdiction with regard to the manner in which it discharged its constitutional and statutory duties;*

- d. failed to find that that the IEBC abused its discretion by performing its duties in flagrant disregard of the Constitution and electoral laws;
- e. erroneously found that the petition was an electoral dispute rather than a judicial review application,
- f. wrongly held that the court had no jurisdiction to entertain the petition before it;
- g. found in error that the petition before the court sought to quash the nominations of the MCAs in all the counties listed as interested parties and was therefore an election petition;
- h. misapprehended the import of the Supreme Court decision in **Moses Mwicigi & 14 Other versus the IEBC & 5 Others** (2016) eKLR and failing to distinguish the same from the petition before the court;
- i. failed to find that the IEBC conducted skewed, arbitrary and unconstitutional allocations of the gender top-up seats;
- j. failed to issue an order compelling the IEBC to allocate the appellant its rightful share of gender top-up seats as prayed in the Petition;
- k. failed to award the appellant damages for violation of its rights and by extension the constitutional rights of its members and breached the Appellant's right to fair hearing guaranteed by Article 50 of the Constitution of Kenya by dismissing the entire petition on a preliminary objection.

[7] Assessing the import of the petitioner's appeal, and since the matter was disposed of in the High Court by a preliminary objection, the Court of Appeal framed just one issue for resolution; whether the preliminary objection was merited. In affirming the decision of the High Court, and dismissing the first appeal, the Court of Appeal was of the view that the effect of the prayer in the Petition to compel the respondent to allocate the petitioner "its rightful entitlement of gender top-up seats" was bound to impact the County Assemblies of the Interested Parties. This is because the nomination of women to a County Assembly is on the basis of proportional representation by use of party top-up lists of nominated female members of the County Assemblies; that any interference with the nominations would in fact amount to a challenge as to the validity of the nominations of the members who had been gazetted and sworn into office; that

such an action was tantamount to call for purposes of quashing of a completed process whose outcome would be similar to nullification of election which is the province of the election courts under Section 75(1A) of the Elections Act.

iii. At the Supreme Court

[8] Before this Court, in its Petition dated 15th January, 2021, and premised on the provisions of Article 163(4)(a) of the Constitution, as read with Section 15(2) of the Supreme Court Act, the appellant prays that the judgment of the Court of Appeal be set aside and the reliefs sought in the Petition in the High Court be granted for the reasons contained in the grounds of appeal and subsequently summarized as follows by the appellant in the framed issues;

- (a) Whether the learned judges of the Court of Appeal erred in law by failing to find that the Elections Act does not and cannot oust the jurisdiction of the High Court under Article 165 of the Constitution to supervise the administrative/quasi-judicial function of the Respondent, or to determine matters of Human Rights violation or access to information.*
- (b) Whether the learned judges of the Court of Appeal erred in law by failing to find that the High Court ought to have considered and pronounced itself on each of the Appellant's prayers separately.*
- (b) Whether the learned judges of the Court of Appeal erred in law in failing to consider and pronounce themselves on each of the Appellant's grounds of appeal and in particular the grounds relating to violation of its members' rights, discrimination by the respondent and arbitrary use of the Respondent's administrative/quasi-judicial function.*
- (c) Whether the learned judges of the Court of Appeal erred in law in condoning the failure by the High Court to exercise its constitutional duty of judicial review.*

- (d) Whether the learned judges of the Court of Appeal misapprehended the Constitution and the Elections Act on what constitutes an Election Petition.*
- (f) Whether the learned judges of the Court of Appeal erred in law by failing to find that the Appellant's amendments removed its petition from the ambit of an electoral petition.*
- (g) Whether the learned judges of the Court of Appeal erred in law by failing to find that the Petitioner was entitled to the information sought from the Respondents.*
- (h) Whether the learned judges of the Court of Appeal erred in law by failing to find that the Respondent had violated its constitutional duty to provide the information*

[9] The respondent has filed a Notice of Preliminary Objection in opposition to the petition contending that the Court lacks the necessary jurisdiction to entertain it for it does not raise any question involving the interpretation or application of the Constitution within the meaning of Article 163(4)(a) of the Constitution and Sections 3 and 15 of the Supreme Court Act.

C. PARTIES SUBMISSIONS

(a) *The Appellant's written submissions*

[10] Highlighting the submissions on behalf of the appellant, **Ms. Karua S.C.** assisted by **Ms. Muthoni Nkonge** posited that the petition clearly involves the interpretation and application of the Constitution; that any other conclusion would be sacrificing justice at the altar of technicalities contrary to Article 159(2)(d) of the Constitution; that the appeal raises issues of discrimination in violation of Article 27 of the Constitution, unfair administrative action contrary to Article 47 of the Constitution and the issues of whether the Elections Act ousts the jurisdiction of the High Court to review administrative action under Article 165 of the Constitution.

[11] The appellant further submits that the overriding objectives of this Court under Rule 3 of the Supreme Court Rules directs that it be accessible, fair and efficient, for which reason it ought to decline the invitation to shut its doors on a litigant who has unambiguously and justifiably invoked its jurisdiction; that it was in error for the appellate court to give prominence to the Elections Act and to oust the jurisdiction of the court under the Constitution in matters of human rights violations, access to information and abuse of discretion in administrative or quasi-judicial functions of public bodies; and that the appellate court failed to apply the conventional holistic constitutional interpretation, ensuring that no one Article ousts the other but are rather complementary to each other.

[12] The appellant further contends that having, by amendment of the Petition in the High Court, abandoned the prayer for the recalling the nomination of members in the County Assemblies named in the Petition as interested parties, that petition was remarkably transformed, and ceased to have any semblance or character of an election petition; and that even before that amendment, the Petition raised issues of discrimination, denial of access to relevant information in order to pursue the petitioner's rights and those of its members. Specifically, the appellant has submitted that, other than Garissa County where gender proportions were achieved, the other interested parties are in violation of Article 27 on the gender threshold of no more than 66%; that this is so because the respondent failed to discharge its administrative function in accordance with the law; that the respondent refused and/or neglected to respond to the petitioner's letter which had sought information from the respondent on the criteria for the seats of nominated members; that in the absence of any explanation, the inevitable conclusion was that the criteria was arbitrary, skewed and discriminatory; and that the appellate court ought to have found that the respondent abused its discretion by failing to accord the petitioner fair administrative action in violation of Article 47 of the Constitution.

[13] Further, the appellant faults both the High Court and the appellate court for failing to evaluate and pronounce themselves on each of the appellant's prayers, with the result that they arrived at a wrong decision, that the former had no jurisdiction over the issues raised; and that Appellate Court was obliged to apply Article 259 of the Constitution and interpret the Constitution in accordance to the doctrine that the law is always speaking, so that there is no legal void on account of inability of a court of law to grant a justiciable relief. In this regard, it was submitted that the reliefs sought in any cause do not define the character of the cause; and that in the instance of the petition in question, it was possible to isolate what related to elections, and still answer the legitimate questions under Article 165 of the Constitution. Accordingly, after the petition was amended to remove the prayer for quashing the nomination, that effectively removed the aspect of elections, which issue would have been obvious had the courts looked at the entire pleadings to identify the multiple reliefs sought in the Petition based on several complaints, including access to the information, discrimination and unfair administrative action.

[14] In support of these arguments, the appellant has cited the following decisions, ***Martha Wangari Karua vs The IEBC & 3 Others*** SC Petition No. 3 of 2019 [2019] eKLR, the Ugandan case of ***Tinyefunza vs. Attorney General*** Const. Pet. No. 1 of 1996 (UGCC3) which was cited with approval in the case of ***Speaker of the Senate & Another vs. The Attorney General*** [2013] eKLR and ***Equity Bank Limited vs. West Link Mboi Kamiti Limited*** [2013] eKLR.

(b) The Respondent's written submissions

[15] **Mr. Lesaigor**, learned counsel, on behalf of the respondent in highlighting the Notice of Preliminary Objection dated 27th January 2021, insists that the petition does not raise any matter involving the interpretation or application of the

Constitution, and therefore, in his view, the Court lacks jurisdiction to entertain it. This view is buttressed, according to counsel, by the absence of any specific allegation of any Article of the Constitution that calls for the Court's interpretation or application, and which the Court of Appeal failed to properly apply or interpret. Further, that the petition fails to meet the admission criteria under either Article 163(4)(a) or 163(4)(b) of the Constitution.

[16] On the merits, the respondent submits, in the alternative that, though the petition raises ten grounds, the truth is that it revolves only around a single issue; whether the Court of Appeal erred in upholding the decision of the High Court that, as a constitutional Court, it had no jurisdiction to determine disputes arising from elections; that from the amended Petition, it was clearly discernible that indeed the dispute related to elections of members of county assemblies, though couched and characterized as a constitutional petition; and that the main prayer in that Petition was an order of mandamus directed at the Respondent to compel it to allocate seats in relation to matters arising from the general elections and subsequent gazetted nomination of August 2017. That prayer left no doubt that what was being challenged was an electoral outcome which could only be questioned through an electoral petition; and that the procedure outlined in Article 87 of the Constitution and Section 75(1A) of the Elections Act must be strictly adhered to.

[17] On his part, **Mr. Lesaigor** relies on the decisions in ***Suleiman Mwamlole Warrakah and 3 Others vs. Mwamlole Tchappu Mbwana and 4 Others*** [2018] eKLR, ***Nasra Ibrahim Ibren vs. IEBC & 2 Others*** [2018] eKLR, ***Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Limited & 2 Others*** [2012] eKLR, ***Jaldesa Tuke Deballo vs. IEBC & Another*** (2015) eKLR and ***Speaker of the National Assembly vs. James Njenga Karume*** [1992] eKLR.

[18] We have to explain at this point that the proceedings were conducted virtually and stress that whether in open or virtual court, court proceedings remain dignified and solemn. As part of courtroom customs, etiquette and decorum must be observed by both the court and counsel, who are officers of the court. Highest standards of behavior is expected of advocates who appear before the apex court and as judges in that Court we shall demand the observance of and adherence to those customs, because arguably, they engender public respect, authority, and dignity of the court and advocates as representatives of a learned profession.

We have set out the foregoing in relation to the conduct of **Mr. Njoroge**, learned counsel representing the 4th Interested Party who was, of all the counsel virtually appearing before us on the morning of the hearing the odd one out. We could neither “see nor hear” him on account of his inappropriate attire.

Since the establishment of the Court, it has been its tradition that counsel appearing at hearings in open court or virtually before judges who are themselves robed must be robed. For this reason, we did not hear **Mr Njoroge**. Besides that, his client, the 4th interested party did not file submissions or any other documents in response to the Appeal.

The 1st, 2nd, 3rd, 5th and 6th interested parties did not participate in the matter.

D. ISSUES FOR DETERMINATION

[19] Having carefully re-evaluated the arguments in this appeal, the pleadings, the decisions of the two courts below and the Notice of Preliminary Objection before us, we are of the considered view that the petition raises two issues;

- i. whether we have jurisdiction to entertain the petition, and*
- ii. whether the amended petition presented before the High Court converted the original cause of action from what appeared to be a challenge on the*

election of members of the concerned county assemblies to a constitutional petition, alleging specific violation of the petitioner's members' constitutional rights.

E. ANALYSIS AND DETERMINATION

Because, as it has been repeatedly said, on the authority of the famous ***Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd*** (1989) KLR 1, that jurisdiction is everything and without it, a court has no power to make one more step. In addition, where the Constitution exhaustively provides for the jurisdiction of a court, the court must operate within those limits. It cannot expand its jurisdiction through judicial craft or innovation. See ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*** [2012] eKLR.

The first preliminary objection successfully challenged the jurisdiction of the High Court to which this appeal is all about. But before us, is another objection to the Court's jurisdiction pursuant to Article 163(4) of the Constitution and Sections 3 and 15(2) of the Supreme Court Act, to which we now must turn.

[20] The respondent has, in the Notice of Preliminary Objection before us, contested the Court's jurisdiction to entertain the petition, arguing that, contrary to Article 163(4)(a), the Appeal does not identify any single issue touching on the interpretation or application of the Constitution; that, on the other hand, the appeal has not been certified as raising any question of general public importance under Article 163(4)(b); and that, as presented, the appeal appears to be inviting the Court to assume jurisdiction by elimination, contrary to settled authority in ***Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others*** [2018] eKLR, ***Nasra Ibrahim Ibren v Independent***

Electoral Boundaries & 2 others [2018] eKLR and ***Daniel Kimani Njehia v Francis Mwangi Kimani & another*** [2015] eKLR.

[21] It has been stated time without number that appeals from the Court of Appeal will lie to this Court under Article 163(4) of the Constitution specifically, either on matters of constitutional interpretation and application, or upon certification, by either the Court of Appeal or this Court, on matters of general public importance.

The appeal before us, we confirm, is expressed to be brought “**pursuant to the Constitution, section 15(2) of the Supreme Court and other enabling provisions of the law**”. It, therefore, does not specify the provision of the Constitution upon which it is brought. The Court has consistently and resolutely stated in numerous decisions, such as ***Suleiman Mwamlole Warrakah*** (supra), ***Nasra Ibrahim Ibren*** (supra), ***Daniel Kimani Njehia v Francis Mwangi*** (supra) and ***Margaret Wanjiru Wainaina & another v James Njenga Kinyanjui & 4 others*** [2020] eKLR, that, it is only properly moved by invoking the correct constitutional or statutory provision that clothes it with jurisdiction. It stated in ***Suleiman Mwamlole Warrakah***, (supra) that;

“[53] In this appeal, what Counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This Court is being called upon to hold that, because certification, was not sought by the intending appellant, then it must follow that the said appellant, is invoking the Court’s jurisdiction as of right, under Article 163 (4) (a) of the Constitution, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter. In *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another* [2015] eKLR this Court was categorical that in preferring an appeal, “a litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution.” This statement of principle, in

our view, still holds sway, and we see no reason to engineer a shift from it”.

[22] Given the ‘specialized’ nature of the jurisdiction of the Supreme Court as far as appeals from the Court of Appeal are concerned in terms of Article 163(3) of the Constitution, it is of paramount importance to identify on which one of the two limbs (a) or (b) the Court is being moved as succinctly stated by the Court in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione* [2013] eKLR as well as in *Nasra Ibrahim Ibren* (supra). In the latter, the Court emphasized that;

“[43] parties seeking to appeal to the Supreme Court have a duty to outrightly state the particular jurisdiction of the Court that they invoke. Jurisdiction is thus so fundamental that it should not be left to conjecture. The Court, and other parties in a matter, should not be left agonizing under what appellate jurisdiction a matter is filed. Consequently, we are surprised by the Appellant’s approach to this Court and fault her for not having outrightly disclosed under which appellate jurisdiction she moved this Court. She left this fundamental indicator far late in the day during her submissions when she mentions that this Court has jurisdiction to hear this appeal under Article 163(4)(a) of the Constitution”.

These are not idle pontifications and monologues by the Court. Apart from their binding effect on all courts other than itself, in terms of Article 163(7) of the Constitution, decisions of this Court also act as a guide to practitioners when drafting pleadings in a particular area of the law.

[23] No single provision of the Constitution has been the subject of interpretation and construction like Article 163(4). In nearly all the petitions filed before the Court, the traditional starting point will invariably be its jurisdiction. Before deciding to take his or her case to the journey's end in the apex court, a party must decide which of the two limbs are applicable to his or her case. This is important because, as the Court stressed in *Peter Oduor Ngoge v. Hon. Francis Ole*

Kaparo and 5 Others, Supreme Court Petition No. 2 of 2012, [2012] eKLR the Court will not entertain an appeal on an ordinary question in contest.

[24] It is therefore a matter of concern to us that having expressed discontent at the inelegant drafting of the appeal in ***Martha Wangari Karua vs. Independent Electoral and Boundaries Commission & 3 others***, (supra) where counsel for the appellant in this appeal also represented the appellant in that appeal, that a similar mistake would be repeated. In the previous matter, the appeal was stated to have been brought pursuant to Rules 9 and 33 of the Supreme Court Rules, 2012 (repealed), which clearly did not deal with the Court's jurisdiction, but with the contents of a petition and the manner of instituting appeals, respectively. Reference to Article 163(4)(a) of the Constitution was only made in the body of the Petition. While excusing this infraction, distinguishing the case from ***Suleiman Mwamlole Warrakah*** (supra) and being satisfied that the infraction was not fatal, the Court warned that inelegant drafting will not be countenanced in the Court.

[25] Whether or not we have jurisdiction under Article 163(4)(a) can only be tested by ascertaining whether the petition discloses issues of constitutional interpretation or application.

Before the High Court, the gravamen of petitioner's complaint was that the respondent had violated Article 177 by nominating candidates to county assemblies in a manner that was not only opaque but also against the established practice and tradition; and that the nominations were discriminatory and favoured certain political parties over others, particularly the petitioner. For that reason, the petitioner asked the High Court to, among other reliefs, declare that it is entitled to access to the information upon which the names of the nominated Members of the Interested Parties' county assemblies were selected; that the petitioner's Members on its Nomination List were discriminately and/or unjustly denied nomination to the Gender Top Up slots available; and that the petitioner

was entitled to have its members, especially women in its party lists nominated in the county assemblies of Tharaka-Nithi, Mandera, Garissa, Embu, Meru and Nairobi Counties. In the result the petitioner prayed that the respondent be compelled by an order of *mandamus* to allocate to the petitioner its rightful entitlement of gender top up seats in the concerned county assemblies from its Gender Top Up Party List.

[26] This question was not determined on merit both by the High Court and the Court of Appeal as, *in limine* on a point of objection, the High Court found, and the Court of Appeal agreed, that it did not have jurisdiction.

We reiterate that to admit an appeal under Article 163 (4) (a), it is not the mere allegation in pleadings by a party that clothes the Court jurisdiction. It is also settled that for the Court to entertain an appeal from the Court of Appeal on the question of constitutional interpretation or application, it must be shown that the issues of contestation in both courts below revolved around the interpretation or application of the Constitution.

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

See *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*, SC Petition No. 3 of 2012; [2012] eKLR. See also *Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others*, SC Petition No. 10 of 2013; [2014] eKLR, *Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No. 32 of 2018; [2018] eKLR; and *Sammy Ndung’u Waity v Independent Electoral &*

Boundaries Commission & 3 others, SC Petition No. 33 of 2018; [2019] eKLR.

[27] The impugned decision of the Court of Appeal has no bearing on the merits of the original main cause as laid before the High Court and as set out above. The preliminary objection raised at the High Court itself did not invoke any issue that would require constitutional interpretation or application. It was brought pursuant to the provisions of the Elections Act and the Rules made thereunder. Naturally, the decisions of the courts below concentrated on the point raised in the Preliminary Objection and only referred to the Constitution in so far as the jurisdiction of the High Court was concerned. In paragraph 5 above, we have reproduced a passage from *Korir, J's* judgment in which the learned Judge dismissed the petition simply for being an election petition challenging the Respondent's power to nominate members for special seats, but camouflaged as a constitutional reference.

The Court of Appeal, for its part, once more, focusing on the Preliminary Objection, agreed with the conclusion that what the petitioner sought in the amended petition was only available from the election court under Section 75(1A) of the Elections Act.

In concluding this ground, we borrow from ***Paul Mungai Kimani & 2 others vs. Kenya Airports Authority & 3 others***, [2021] eKLR, where we explained the law in such circumstances as follows;

“..., we dismiss the Appellants’ assertion that the Court has jurisdiction, and that they have a right of appeal before this Court because in their original pleadings, they alleged contraventions of their rights under Sections 3, 75, 77, 82 and 85 of the former Constitution. This is because, their substantive suit as filed before the High Court was not fully determined. The same was struck out by Mwera, J (as he then was) in determining a Preliminary Objection filed by the 1st Respondent. Hence, in determining the

jurisdiction question in this matter, this Preliminary Objection is the focal reference point.”

See also *Benson Ambuti Adegwa & 2 others vs. Kibos Distillers Limited & 5 others*, [2020] eKLR and *Kenya Section of the International Commission of Jurists v Attorney-General & 2 others* [2012] eKLR.

[28] The only argument around the Constitution raised in this Petition is about Article 165; that the High Court erred in failing to find that its jurisdiction to supervise administrative and quasi-judicial functions of the respondent under that Article can never be ousted by the provisions of the Elections Act. Clearly, that was not the question presented to the High Court and upon which that court and indeed the Court of Appeal’s determination has been founded.

[29] By failing to observe the well-known practical guidelines on the Court’s admission criteria for appeals from the Court of Appeal; by failing to outrightly invoke the particular jurisdiction of the Court; by leaving the whole question on the Court’s jurisdiction to conjecture; and by failing to show that the issues of contestation in the courts below revolved around the interpretation or application of the Constitution, this petition is incompetent and we have no jurisdiction to entertain it.

In the result, the Notice of Preliminary Objection dated 27th January, 2021, meets the threshold in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, and therefore we sustain it.

This conclusion should have been sufficient to dispose of this petition. We however feel duty-bound to settle the second framed issue which goes to the merit of the petition.

[30] Did the amended petition presented to the High Court convert the original cause of action from what appeared to be a challenge on the election of members of the concerned county assemblies to a constitutional petition, alleging specific violation of the petitioner’s members’ constitutional rights? Given the approach

taken by the Court in the previous similar cases, we do not intend to devote more time than necessary on this ground.

[31] Before the High Court, the appellant had applied for three declaratory reliefs in paragraphs (a), (b) and (c) to the effect that a declaration be issued that the appellant was entitled to access to information upon which the names of the nominated Members of the county assemblies were selected; that it be declared that the appellant's Members on its Nomination List were discriminately and/or unjustly denied nomination to the Gender Top Up slots available; and that the appellant was entitled to have its members, especially women in its party lists nominated in the county assemblies concerned.

The only additions to these original prayers in the High Court the amendment introduced, in so far as they are relevant to this appeal, Paragraph 13(a) in which the provisions of Article 47 of the Constitution were merely paraphrased without indicating the relevance to the complaint before that court. The second amendment was with regard to the reliefs, introducing a prayer for;

“an order of mandamus....compelling the Respondent to allocate the Petitioner its rightful entitlement of gender top up seats namely-two gender top up seats in Tharaka Nithi County, one additional seat in Mandera County and one seat each in Nairobi, Garissa, Embu and Meru counties from the Petitioner's Gender Top Up Party List”. (Our Emphasis).

And the third prayer was for **“damages and any other relief”** which the Court would deem fit and just to grant the appellant.

[32] Because the contention is that before the amendment, the original Petition appeared to give the impression that it was challenging the election of members of the county assemblies in question, it is apposite to state what the original Petition had sought;

“An order do issue consequent to the above declaration directing the respondent to recall nominations for Tharaka

Nithi, Mandera, Garissa, Embu, Meru and Nairobi Counties for revision and inclusion of the petitioners members especially women”. (Our Emphasis).

We seriously do not discern the distinction that we are being invited to draw between the original Petition and the Amended Petition. Article 23(3)(f) of the Constitution declares that a court may grant such reliefs as an “**order of judicial review**”. Mandamus, by section 8 of the Law Reform Act, is indeed an “order”. Therefore, by including “mandamus” after the word “order” was merely to create an artificial distinction where in fact or in law no real difference existed.

An order of mandamus, as was held in the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform to the detriment of a party who has a legal right to expect the duty to be performed.

[33] Learned counsel for the appellant submitted before us that even if we were to find that the prayer for mandamus was misplaced, we could nonetheless proceed to consider the complaints around the violation of the appellant’s rights to information and against discrimination, or even make appropriate declarations and award damages for these transgressions. We find those submissions not only outrightly misleading but also fairly inaccurate. At paragraphs 2 and 32 we have highlighted the word ‘**consequent**’ to illustrate the symbiotic connection between the declaratory orders and the prayer for mandamus. An order of mandamus was only to issue ‘consequent’ upon the declaratory orders being granted. In other words, the factual background of the petition and the prayers sought in the Amended Petition leave us in no doubt as to the purpose of this litigation. The manifested intention was to challenge the nominations of the 8th of August, 2017 and, therefore, by asking the High Court to compel the respondent to allocate to it

“its rightful entitlement of gender top up seats” the appellant was plainly contesting those nominations. The request to allocate seats for the appellant’s members came after the nominees were gazetted. The granting of the Petition would have had the effect of nullifying the nominations of those already gazetted.

[34] Given these facts, with respect, we could not agree more with the respondent’s submissions before us and the conclusions reached by the two courts below that the true character of the appellant’s cause, despite being disguised as a constitutional petition, was in fact an election petition, questioning the validity of nomination of elected members of the County Assemblies who had been gazetted; and that such a challenge could only be commenced in the election court, in this case, under Section 75 (1A) of the Elections Act.

[35] It is now settled beyond debate that the gazette notice of party nominees signifies the completion of the election by nomination. The process comes to an end and the County Assemblies are constituted.

These principles were expressed with clarity in the following words in the case of ***Moses Mwicigi & 14 Others vs. Independent Electoral and Boundaries Commission and 5 Others***, (supra), which has been applied in many cases,

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

.....

[119] To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime.

Such an event would serve not only to complicate, but ultimately, to defeat the *sui generis* character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.”

This decision and others before and after it, like *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others* Sup. Ct. Petition No. 10 of 2014 and *Independent Electoral and Boundaries Commission vs Jane Cheperenge & 2 Others*, Petition No. 5 of 2016; [2018] eKLR, have all firmly settled the law, that once a gazette notice, signifying the decision of the electorate or, like here, the nominating political party, has been issued, only an election court has the powers to disturb that *status quo*.

[36] Once again, in view of the foregoing, we cannot, with respect, agree with the position presented in arguments by learned Senior Counsel for the appellant, that the appellant had two legal pathways to come to Court; by invoking the Elections Act or judicial review under the Constitution; that it was open to the Court to dismiss a relief not properly brought but consider those that touched on the violations of the Constitution; and that, that way the Court would be doing substantive justice without undue regard to procedural technicalities under Article 159.

In the circumstances of this case, considering the clear cause of action and the reliefs in the Amended Petition, there were no two pathways for the appellant. The appellant chose a pathway that could only and inevitably lead it, as it has, to a dead end.

[37] First, we cannot emphasize enough the fact that constitutional remedies are sacrosanct and transcendental in importance to be invoked in all and conceivable situations. They are reserved only for true and verifiable breaches of the Constitution and not for correction of errors which can be resolved by alternative

means of redress provided in statute. Though constitutional provisions may be breached in the course of the elections, this *per se* would not convert the nature of dispute from an election contestation to a constitutional question.

Agreeing with the dicta in *Speaker of National Assembly vs Njenga Karume* (2008)¹ KLR 425 and *Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others* (2008) 3 KLR (EP), this Court in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others*, Sup Ct. Petition 3 of 2016, [2019] eKLR, this Court reaffirmed that;

“... from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance”.

We, like the courts below, get the feeling that the cause was instituted more solely for the purpose of avoiding the necessity of applying in the normal way to the election court for the appropriate remedy under the Elections Act.

[38] Secondly, Article 159 (2) (d) of the Constitution has repeatedly been invoked as a cure-all, a magic bullet even where, as here, it is inapplicable. It was never the intention of the framers to oust the obligations of litigants and parties to comply with the law or procedural imperatives as they seek justice from the courts.

[39] From the facts of this petition and the totality of our analysis of the questions it raises, we come to the conclusion that even on its merit, this petition remains unmeritorious.

F. FINAL ORDERS

[39] Upon considering the submissions and applying the relevant provisions of the Constitution and the law, and as a result of the foregoing conclusion, we make the following orders.

- i. The preliminary objection is sustained and, on merit, we dismiss the Petition dated 15th January 2021.*
- ii. We award costs to the respondent and the 1st interested party.*

DATED and DELIVERED at NAIROBI this 17th Day of February, 2022.

.....
M.K. IBRAHIM	S.C. WANJALA
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT
.....
NJOKI NDUNGU	I. LENAOLA
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT
.....	
W. OUKO	
JUSTICE OF THE SUPREME COURT	

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

REGISTRAR
SUPREME COURT OF KENYA