REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION NO. 20 (E023) OF 2022

(Coram: Mwilu, DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

— BETWEEN—

ISAAC ALUOCH POLO ALUOCHIER.............................APPELLANT

- AND-

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...1ST RESPONDENT

SHADRACK OTIENO NYAWADE,

EAST KAMAGAMBO WARD.................................2ND RESPONDENT

JOSHUA ONYANGO OUMA,

WEST KAMAGAMBO WARD................................3RD RESPONDENT

DANIEL OOKO OKENDO,

SOUTH KAMAGAMBO WARD.............................4TH RESPONDENT

HILARY OCHOLA MAERI,

WASWETA II WARD..5TH RESPONDENT

BONFACE OUMA,

EAST KAMAGAMBO WARD.................................6TH RESPONDENT

JOHNSON WILLYS OYUGI OLOO,

GOT KACHOLA WARD...7TH RESPONDENT

OTIENO NESTORY OWIYO,

WEST SAKWA WARD..8TH RESPONDENT

ALBERT ODETTE AMOLLO,

WIGA WARD..9TH RESPONDENT

MALLAN OGEGA OMOLO,

RAGANA ORUBA WARD....................................10TH RESPONDENT

PETER OCHIENG MIJUNGU,

WEST KAMAGAMBO WARD...............................11TH RESPONDENT

ALEX JAOKO AKUGO,

CENTRAL KAMAGAMBO WARD.........................12TH RESPONDENT

BRIAN ODHIAMBO OSODO,

KACHIENG WARD..13TH RESPONDENT

THOMAS OMONDI AKUNGO,

KALER WARD...14TH RESPONDENT

HEVRONE KILLMESS MAIRAH,

MUHURU WARD..15TH RESPONDENT

ELIAS JUMA NYAHURE,

ISIBANIA WARD..16TH RESPONDENT

OFFICE OF THE REGISTRAR OF

POLITICAL PARTIES..17TH RESPONDENT

MIGORI COUNTY ASSEMBLY............................18TH RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal at Kisumu (**Kantai, Mumbi Ngugi** & **Laibuta**, JJ.A.) dated 29th July 2022 in Civil Appeal No. E176 of 2022)*

JUDGMENT OF THE COURT

A. INTRODUCTION AND BACKGROUND

[1] In the just concluded (2022) general elections conducted under the supervision of the 1st respondent, the appellant and the 2nd to 16th respondents contested for the position of Member of County Assembly (MCA) to represent various wards in Migori County. Only the 8th, 11th, 13th and 14th respondents were successful, meaning the appellant and the rest failed in their bids.

[2] In the 2017 elections, the 2nd to 16th respondents were elected to the County Assembly of Migori on the Orange Democratic Movement (ODM) Party ticket and were serving as such until the 1st respondent declared the date for political parties and independent candidates to submit names of the aspirants for various elective positions. With that announcement, the 2nd to 16th respondents elected to contest, and were indeed cleared to run, this time around, as independent candidates, effectively resigning from the ODM Party. They, however, continued to serve in the Assembly. Their decision to continue serving in the Assembly after abandoning the party on whose ticket they were elected, according to the appellant, was in violation of the Constitution and the law. They ought to have resigned both from the party and the Assembly.

B. LITIGATION HISTORY

(i) Before the Dispute Resolution Committee

[3] The appellant, who is known for his public interest litigation, challenged the decision of the 15 respondents before the 1st respondent's Dispute Resolution Committee, (the Committee) this time as a candidate for the position of Member of County Assembly for East Kamagambo Ward, Migori County. The appellant's grievance was that the 15 respondents were required to resign from their position as MCAs the moment they were cleared to contest as independent candidates; that, their continued occupation of offices as MCAs after resignation from the ODM party, contravened Articles 193, 194(1) (e), 75(1), 2(2), 3(1) and 74 of the Constitution, Sections 2 and 45 of the Anti-Corruption and Economic Crimes Act, Section 313 of the Penal Code and Section 13(1) (b) of the Leadership and Integrity Act; and that they did not satisfy the moral and ethical requirements under Article 193(1) (b) of the Constitution.

[4] In its decision rendered on 19th June 2022, the Committee dismissed the complaint because the complaint was *sub-judice* as the issue in contention was also before the High Court at Nakuru in Constitutional Petition No. E004 of 2022,

Peter Kibe Mbae v Speaker County Assembly of Nakuru & Another, Registrar of Political Parties & 49 Others (Interested Parties); and that the Committee lacked jurisdiction to hear and determine issues relating to constitutional interpretation and allegations of criminal nature.

(ii) Before the High Court

[5] Aggrieved by the Committee's decision, the appellant sought to review it in the High Court at Kisumu in **HC JR Appl. No. 12A of 2022** by directly, without leave, lodging a Notice of Motion. In the motion, the appellant contended: that the Committee erred in invoking the Civil Procedure Act and the Rules of Procedure made thereunder in a dispute relating to elections; that the Committee misapplied Section 6 of the Civil Procedure Act; that the Committee erred in staying proceedings in the complaint beyond the 10 days period prescribed for hearing and determination of such complaints in accordance with Section 74(1) and (2) of the Elections Act; that the Committee erred in law in concluding that only the High Court had the exclusive jurisdiction to hear and determine questions on constitutional interpretation; further, that it was in error for the Committee to decline jurisdiction to entertain matters touching on criminal conduct of the 2nd to 16th respondents; and that the Committee failed to take the administrative action as required of it under Section 11(2) of the Fair Administrative Action Act.

[6] Consistent with his original complaint, the appellant sought, among other orders, a declaration that the 2nd to 16th respondents were not eligible for election as members of County Assembly pursuant to Article 193(1) (b) of the Constitution; and orders directing that their names be excluded from those duly nominated to contest.

[7] Not persuaded by these arguments the High Court *(Wendo, J.)* dismissed the appellant's application with costs to the respondents, upholding the Committee's decision. In her considered view, the Committee properly found that it had no jurisdiction to hear the dispute on account of the *sub-judice* rule. It could not

engage in the determination of questions of constitutional interpretation, or resolution of criminal cases. She further held that the appellant's application was defective, bad in law, and an abuse of the court process. Specifically, the learned Judge stated that, even where the application is brought pursuant to Article 47 of the Constitution, in the absence of rules envisaged by Section 10 of the Fair Administrative Actions Act, Order 53 Civil Procedure Rules and Section 8 and 9 of the Law Reform Act will continue to apply to such applications. In that regard, she ruled that the appellant's failure to obtain leave before seeking orders of judicial review was fatal, just as was the omission to annex the decision of the Committee he was seeking to quash by *certiorari*.

(iii) Before the Court of Appeal

[8] Aggrieved by this judgment the appellant lodged an appeal to the Court of Appeal. The court framed one broad question; whether it was proper for the High Court to dismiss the appellant's motion for want of compliance with mandatory procedure applicable to applications for judicial review and for upholding the Committee's decision that it lacked jurisdiction to entertain the complaint.

[9] Agreeing with the conclusion of the High Court, the Court of Appeal *(Kantai, Mumbi Ngugi & Laibuta JJ.A)* dismissed the appeal with costs noting that, in the absence of specific rules tailored to suit applications for judicial review orders brought pursuant to Article 47 of the Constitution as read with Section 10 of the Fair Administrative Actions Act, Order 53 of the Civil Procedure Rules necessarily applies; and in view of the fact that the prescriptive provisions of Order 53 Rule 1 are mandatory, failure to comply with them rendered the appellant's application incompetent. The court also agreed that failure to annex the decision of the Committee sought to be reviewed was equally fatal, as it denied the High Court the chance to interrogate the impugned decision. There was nothing to be reviewed and the procedural defects could not be cured by Article 159(2) (d) of the Constitution.

(iv) Before the Supreme Court

[10] The appellant now petitions this Court as of right in terms of Article 163(4)(a) of the Constitution, contending that the superior courts below ignored the mandatory provisions of Section 7(1) of the Sixth Schedule to the Constitution for the manner of construing laws existing immediately before the effective date of the Constitution; that the superior courts below elevated case law above the Constitution; that they acted devoid of jurisdiction when they usurped the authority of the Chief Justice who is enjoined by Section 10 (2) of the Fair Administrative Actions Act to make the rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action under Article 47; that both superior courts below erred by insisting that it is mandatory for a judicial review application to be accompanied by certain formal documentation, notwithstanding that no rules have been made under Article 47 of the Constitution and Section 10 of the Fair Administrative Actions Act; and that by imposing a pre-condition of leave before the institution of a judicial review application, they too erred.

[11] For these reasons, the appellant has asked the Court to allow the appeal, set aside the judgments of the Court of Appeal and the High Court; and to substitute the judgments with an order declaring that **"the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th respondents be excluded from those duly nominated for the appropriate county assembly wards".** He too sought to be awarded costs in this Court, in the Court of Appeal and in the High Court.

[12] The 1st respondent, IEBC, responded by filing Grounds of Objection. The 2nd, 5th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 16th respondents, on their part raised a preliminary objection, in addition to filing grounds of objection, while the 3rd, 4th, 6th and 10th respondents have relied on their grounds of opposition. The 17th and 18th respondents have not been active participants in the proceedings.

[13] The combined effect of the preliminary objection and grounds of objection was that this Court lacks jurisdiction to hear and determine the appeal for the following reasons; that the appeal does not involve matters of interpretation or application of the Constitution under Article 163(4)(a), the appellant's motion having been determined *in limine* for want of jurisdiction and for procedural infraction; and that the appeal was also not brought under Article 163 (4)(b) of the Constitution, as neither the Supreme Court nor Court of Appeal certified it as involving a matter of general public importance.

C. PARTIES' SUBMISSIONS

(i) Appellant's submissions

[14] The appellant has submitted that the preliminary objection is wrong in fact and law as this appeal is ultimately founded on his complaint before the Committee wherein he had contended that the 2nd to 16th respondents' conduct in changing their political party while still holding office was contrary to Articles 2 (2), 3(1), 10, 193(1)(b) and 194 (1) (e) of the Constitution; and that he challenged the decision of the Committee that it lacked jurisdiction before the High Court and Court of Appeal and again in the present Petition. He contends that his right to fair administrative action pursuant to Article 47 of the Constitution has equally been raised in this appeal, being the plunk of the High Court and Court of Appeal decisions. On these grounds, he argues that his appeal evidently qualifies as one of right under Article 163(4)(a) of the Constitution.

[15] Though that is the position he has presented to us, his subsequent arguments focus at great length on five broad issues, which largely relate to judicial review procedure. He submits, for instance, that by Article 22 (4) of the Constitution, the absence of rules of practice for judicial review under Article 47 of the Constitution and Section 10 of the Fair Administrative Actions Act, was not reason enough for the superior courts below to resort to Order 53 aforesaid; that by relying on procedural technicalities and insisting that leave prior to taking out a motion for

judicial review was mandatory was retrogressive; and that these technicalities act as a barrier to the institution of such proceedings, limiting or extinguishing fundamental rights guaranteed by Article 22 (1) of the Constitution.

[16] In his opinion, he petitioned the High Court claiming that his right to fair administrative action by the Committee under Article 47 had been denied, violated and infringed. Those proceedings were consequently, in substance founded on Article 22 (1), irrespective of whether or not they were instituted under the procedure of a constitutional petition or judicial review. That being the case, he did not need leave or certification prior to the institution of the proceedings.

[17] The appellant also submitted that pursuant to Article 47 (3), Parliament enacted the Fair Administrative Actions Act to give effect to the rights in Article 47 (1). Judicial review proceedings today are concerned, not only with the process of making a decision, but also with the merits of the decision itself, in view of the definition of the phrase "administrative action" in Section 2.

[18] He argued further that, since Article 88 (4)(e) of the Constitution provides that IEBC is responsible for, *inter alia*, settlement of electoral disputes, including disputes arising from or relating to nominations but excludes disputes subsequent to the declaration of election results, his complaint having been a pre-election dispute, the Committee had the jurisdiction to hear and determine it; that the *sub-judice* rule in Section 6 of the Civil Procedure Act does not apply to the resolution of electoral disputes; and that the Committee had jurisdiction in constitutional interpretation and application as well as to make findings on the allegations of commission of criminal offences.

[19] Finally, he argued that, according to Article 194 (1) of the Constitution, once the 2nd to 16th respondents changed their political party membership, the offices they were elected to, fell vacant and they should not have continued to serve in those offices. Their conduct therefore did not satisfy the moral and ethical

requirements contained in Article 193 (1)(b) of the Constitution. Consequently, they were not eligible for election as MCAs.

(ii) The Respondents' submissions

a) The 1st Respondent (IEBC)

[20] The 1st respondent's submissions mirror the grounds of objection summarized earlier in this judgment to the effect that the appeal is incompetent, fatally defective and inadmissible as it does not raise matters of constitutional interpretation or application; that the superior courts below correctly found that in the absence of specific rules to be applied in applications for judicial review pursuant to Section 10 of the Fair Administrative Actions Act, Order 53 (1) of the Civil Procedure Rules, applies. In any case, they have argued, the Fair Administrative Actions Act did not repeal the Law Reform Act or Order 53 Rule 1(2) of the Civil Procedure Rules, nor did it take away the requirement for leave before bringing substantive application in judicial review proceedings.

b) The 2nd, 5th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 16th Respondents' submissions

[21] The 2nd, 5th, 7th, 8th, 9th, 12th, 13th, 14th and 16th respondents reiterate the grounds for their preliminary objection and grounds of objection that the main focus of both the High Court and Court of Appeal was the rules and procedure of judicial review. At no point did the two courts consider or determine any question involving the interpretation or application of the Constitution; that the appellant has been engaged in a fishing expedition, citing numerous Articles like 2, 10, 19, 20, 21, 22, 47, 99, 159, 193, 194, 249 and 259 of the Constitution to fit his case. These Articles are not relevant and indeed did not form the basis of the decision of the Court of Appeal.

[22] Finally, the respondents expressed concern that the appellant who was an MCA candidate for East Kamagambo within Migori County and who they accuse of being involved in vexatious litigation, has engaged in unnecessary court

proceedings from the Committee through to the apex Court without paying costs ordered by the courts below; and that his intention has all along been to frustrate and scuttle their campaigns. On costs, they urge that the appeal is not public interest litigation but an election dispute within the meaning of the Elections Act and the Constitution, for which reason they have pleaded the appellant be condemned to pay costs of this appeal should it be lost.

c) The 3rd, 4th, 6th & 10th Respondents' submissions.

[23] The 3rd, 4th, 6th and 10th respondents' submissions are on all fours with those of the 2nd, 5th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 16th respondents, and no useful purpose will be served to rephrase them, save that they argue, in addition that the case presented by the appellant before the Committee, is different from what he argued before the Court of Appeal. Yet, this Court's jurisdiction can only be invoked by demonstrating that the superior courts below misinterpreted or misapplied specific provisions of the Constitution.

[24] They further submit that Article 193 (2) of the Constitution sets out the grounds upon which one can be disqualified from the election for the position of Member of County Assembly. This question, they argue, was the subject matter of the decision of a three-judge bench in Nakuru High Court Petition No. E004 of 2022 ***Peter Kibe Mbae v. Speaker, County Assembly of Nakuru & Another & 49 Others***, which matter was pending in the court when the appellant filed the complaint before the Committee. The High Court ultimately determined the question, holding that, by declaring to contest as independent candidates, *per se,* was not enough to disentitle the MCAs from continuing to serve in the Assembly.

D. ANALYSIS AND DETERMINATION

[25] The 2nd, 5th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 16th respondents had prayed that the question of jurisdiction of the Court to entertain this appeal be determined *in limine litis* without arguments on merit. Though we heard arguments on the appeal, as a matter of practice, this Court before considering the merits of arguments in any appeal before it, first ascertains if it has properly been moved. This is because, as *Nyarangi, JA* said in his famous and time-honoured statement in the ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*** [1989] eKLR, jurisdiction is everything. If we find, as we have in previous cases that we do not have jurisdiction, we down tools at that point, save in exceptional circumstances as we shortly shall demonstrate. It is equally now firmly established that a point of jurisdiction can be raised at any time, formally by a notice of preliminary objection, grounds of opposition, *viva voce* during arguments or by the Court *suo motu* because challenging the jurisdiction of a Court is a threshold issue. Jurisdiction can only be conferred on a court by either the Constitution or statute. A court cannot expand its jurisdiction through judicial craft or innovation. See ***S.K. Macharia and Another v. Kenya Commercial Bank Ltd. & 2 Others,*** Sup. Ct. Civil Application No. 2 of 2011; [2012] eKLR. Nor can a party confer on a court power it does not have. Similarly, parties cannot by mutual consent confer jurisdiction when there is none.

[26] By defining in specific terms the jurisdiction of the Supreme Court in Article 163(4), the Constitution itself makes it clear that the Court must not treat with levity any action or proceedings brought outside those limits because such an action would amount to an abuse of its process, recalling that not every grievance from the decision of the Court of Appeal lies to the Supreme Court. An appeal from the decision of the Court of Appeal must meet the test under Article 163(4)(a) and (b), upon which the Court has made several decisions over the years.

[27] Whether or not the jurisdiction under Article 163(4) has been properly invoked will depend on either the nature of the pleadings, the nature of the proceedings or the relief claimed or the decisions of the superior courts below, or

in some cases, all the four. This requires a party relying on Article 163(4)(a), like here, to demonstrate that the grievance he has presented, concerns the application or interpretation of the Constitution. It is not the mere statement in the pleadings or submissions by a party to the effect that the appeal involves constitutional interpretation or application that clothes the Court with jurisdiction.

[28] The party must identify precisely the relevant Articles of the Constitution, the subject of the impugned decision and further demonstrate that the subject of the appeal was the same issue in controversy and around which both the High Court and the Court of Appeal based their respective decisions on. Where the decision being challenged on appeal has nothing or little to do with the interpretation or application of the Constitution, such a decision cannot be the subject of a further appeal to this 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. It must, as consequence, follow that the provisions of the Constitution cited by a party as requiring the interpretation or application by this Court, must be the same provisions upon which the High Court's decision was based, and the subsequent subject of appeal to the Court of Appeal; in other words, the Article in question must have remained a central theme of constitutional controversy, in the life of the cause. See ***Zebedeo John Opore v. Independent Electoral and Boundaries Commission & 2 others***, SC Petition No. 32 of 2018; [2018] eKLR.

[29] Whether a matter is originated as a judicial review application or a constitutional reference, the foregoing considerations are constant and the strictures of Article 163 (4)(a) have to be satisfied. See ***Peninah Nadako Kiliswa v. Independent Electoral & Boundaries Commission (IEBC) & 2 others***, SC Petition No. 28 of 2014; [2015] eKLR.

[30] We have set out these principles to test the objection that we have no jurisdiction to entertain or determine this appeal.

[31] The appellant's concerns that precipitated a complaint to the Committee was that the 2nd to 16th respondents' conduct, in changing their political party while still holding office as MCAs, was in violation of national values and principles of governance; that they did not satisfy the moral and ethical requirements to continue serving in the Assembly after being cleared as independent candidates; and that they were deemed to have resigned from the sponsoring party. The appellant specifically cited Articles 2 (2), 3(1), 10, 193(1)(b) and 194 (1) (e) of the Constitution as the foundation of his petition. He also pleaded that, in addition to these constitutional infractions, the respondents were in contravention of Sections 2 and 45 of the Anti-Corruption and Economic Crimes Act, Section 313 of the Penal Code and Section 13(1) (b) of the Leadership and Integrity Act, and therefore did not satisfy the moral and ethical requirements to continue being MCAs.

[32] The Committee did not address itself to any of these grounds, but instead downed tools, finding that it had no jurisdiction to entertain or determine issues involving constitutional interpretation and application; that a similar question was pending determination before the High Court and was therefore *sub judice*; and that it had no criminal jurisdiction to determine the guilt or otherwise of the respondents.

[33] Rejecting the appellant's application to review by quashing this decision, the High Court agreed and upheld the reasons and conclusions by the Committee for dismissing the complaint. It also found that the application, though constitutional, sought judicial review reliefs and ought to have been commenced in accordance with the relevant rules.

[34] The Court of Appeal, on a second challenge affirmed this determination, answering the two issues framed by the High Court; whether the application was competent and whether the Committee had jurisdiction to determine the dispute before it. It appears to us that the *ratio* emanating from the High Court decision was around, the nature and scope of judicial review; the doctrine of *sub-judice;* and the jurisdiction of the Committee.

[35] On the first question, the learned Judge rendered this statement;

> **"33. What then is the procedure for bringing Judicial Review application? The submission by Mr. Aluochier that this application is under Article 47 of the Constitution and therefore not subject to Order 53 Civil Procedure Rules and Section 8 and 9 of the Law Reform Act cannot hold water. Judicial Review is a special jurisdiction. In so far as no rules have been made under Article 47 of the Constitution, there can be no vacuum in law. A party approaching court for Judicial Review orders of *Certiorari*, Mandamus and Prohibition must comply with the procedure under Order 53 of the Civil Procedure Rules. He must seek the court's leave first through a Chamber Summons Application supported by a Statement of Facts and a Verifying Affidavit and annexures in support of the prayers. In this case, the applicant should have annexed the impugned decision. It is after grant of leave, that an applicant is allowed to file the Notice of Motion application within 21 days. Seeking of leave is meant to expedite the process and weed out any frivolous applications.**
>
> **34.The applicant has done none of that. What is before the court is neither a Judicial Review application nor a Petition. If the applicant wanted to file a Petition to seek any Constitutional remedies available including Judicial Review orders, he should have done so under the rules under the Constitution (Mutunga Rules). Article 23 (3) of the Constitution outlines the remedies a person can seek in a Constitutional Petition which includes Judicial Review orders. If it was a petition, then the applicant would have not needed to seek leave of court to file the petition.**

…

42.Secondly, the prayers which the applicant is seeking are not in the nature of Judicial Review writs (sic) **of Mandamus, Certiorari and Prohibition. If at all this was a Judicial Review Application which it is not, those are the only appropriate orders and/or prayers a party can seek. Looking at the prayers, the applicant wants this court to review the decision of the 1st respondent. This is an appellate court. A person aggrieved by the decision of the 1st respondent can only approach this court by way of an appeal and Judicial review of the decision of the 1st respondent".**

[36] Reference in this passage to Articles 23 and 47 of the Constitution is only in relation to the scope of judicial review in terms of the Constitution, a totally different cause from the initial complaint before the Committee, where Articles 193(1)(b) and 194 (1) (e), among others, were alleged to have been breached.

[37] On the second matter, the learned Judge accepted that it was common ground that a similar issue was pending determination before the High Court even as the appellant filed a complaint with the Committee; that in the circumstances it would have been *sub-judice* for the Committee to entertain a matter the High Court was already seized of. The court was also not convinced that the claim, as framed reposed jurisdiction in the Committee. Any consideration of the original dispute in the judgment of the High Court was wholly gratuitous after the court found that the Committee lacked jurisdiction and, in any case, the Committee did not express any opinion on the complaint that would have given rise to a consideration by the High Court.

[38] It is the foregoing conclusions that were once more challenged in the Court of Appeal on a whopping 24 grounds. In summary, the appellant complained that his application was competent as it was anchored on *inter alia* Articles 47 of the

Constitution and on Sections 7(2) and 11(2) of the Fair Administrative Action Act; and that the procedure contemplated in the Law Reform Act and Order 53 Rule 1 of the Civil Procedure Rules were not applicable to his application. Furthermore, he faulted the High Court for failing to pronounce itself on the conduct of the 2nd to 16th respondents which amounted to resignation from the Assembly in accordance with Article 194(1)(e) of the Constitution.

[39] The original arguments morphed from the qualification of the 2nd to 16th respondents to contest elections for the office of MCA before the Committee into the nature and scope of judicial review under the 2010 Constitution before the High Court and the Court of Appeal. Premium was put on and heavy weather made of issues that did not aggrieve the appellant when he set out to challenge the conduct of the respondents. From the High Court, matters turned on whether the character and scope of judicial review under the Constitution and the Fair Administrative Actions Act has changed from one limiting the court's consideration to the decision-making process only to one where the court can now interrogate the merits as well as the process; whether the rules of procedure promulgated in 2013, Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, were to be applied in the absence of rules under Section 10 (2) of the Fair Administrative Actions Act; and whether, after the enactment of the Fair Administrative Actions Act, the requirement for leave to apply for judicial review under Section 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, 2010 were still relevant.

[40] Looking at the nature of the pleadings, proceedings, reliefs before the Committee, and on the other hand, the decisions of the two superior courts below, we cannot say that the grievance presented to this Court concerned the application or interpretation of the Constitution. The cause in the High Court was distinctly short on the interpretation or application of the Constitution. The lengthy arguments about Articles 23 and 47 of the Constitution had nothing to do with the

original grievance. Their citation, *per se* cannot be the basis for our assumption of jurisdiction.

[41] The instant appeal having emanated from the High Court in a judicial review application, must be considered under the parameters set out by this Court in ***Peninah Nadako*** (supra). By those parameters, the appellant is required to identify the particular(s) of constitutional character that were canvassed at both the High Court and the Court of Appeal; and to demonstrate that both superior courts below had misdirected themselves in relation to prescribed constitutional principles, and either granted, or failed to grant Judicial Review remedies, the resulting decisions standing out as illegal, irrational, and/or unprocedural, hence unconstitutional.

[42] The appellant having properly identified precisely the relevant Articles of the Constitution which in his view were violated by the 2nd to 16th respondents, was expected to convince us that the subject of the appeal was the same issue in controversy and around which both the High Court and the Court of Appeal based their respective decisions. The decision being challenged in this appeal has nothing to do with the interpretation or application of Articles 23 and 47 of the Constitution.

[43] We come to the conclusion that, for the reason that the Court lacks jurisdiction, this appeal fails. We down tools at this stage. It presents neither exceptional circumstances nor opportunity for the Court to provide interpretive guidance on the Constitution. See ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai and 4 Others***, SC Petition No 4 of 2012; ***In the Matter of the Speaker of the Senate & another***, Advisory Opinion Reference 2 of 2013 and ***Sonko v. Clerk, County Assembly of Nairobi City & 11 others***, SC Petition 11 (E008) of 2022.

The appeal lacks merit and is accordingly dismissed.

E. COSTS

[44] Costs follow the event but are in the discretion of the Court. We are guided by the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others***; SC Petition 4 of 2012; [2013] eKLR. We have observed in paragraphs 1 and 3 that this appeal was not brought as a public interest litigation but by a candidate against other candidates for elective positions in various wards in Migori County. It is in consideration of this fact that we award costs to the respondents other than the 17th and 18th respondents who did not participate in these proceedings.

F. ORDERS

[45] Consequent, upon our conclusion above, we order that:

> ***i) The Petition dated 2nd August, 2022 is hereby dismissed.***
>
> ***ii) Costs are awarded to the respondents other than the 17th and 18th respondents.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **20th** Day of **December**, **2022.**

....

P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

....

S.C. WANJALA
JUSTICE OF THE SUPREME COURT

....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA