REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P, Mwilu DCJ &VP, Ibrahim, Wanjala & Ouko SCJJ)

APPLICATION NO. 6 (E012) OF 2022

BETWEEN

JIMI RICHARD WANJIGI.....PETITIONER

VERSUS

WAFULA CHEBUKATI.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION DISPUTES COMMITTEE.....3RD RESPONDENT

RULING OF THE COURT

[1] UPON perusing the Notice of Motion application by the applicant (Petitioner) dated 13th July 2022 and filed on 14th July 2022, pursuant to Article 163(4) of the Constitution, sections, 3, 21, 24 of the Supreme Court Act, and all enabling provisions of the law for the orders that:

i) *This Application be and is hereby certified urgent and heard ex parte in the first instance and appropriate directions issued;*
ii) *The Honourable Court do on a matter of urgency set down this Application and the main Petition on a priority and emergency basis;*
iii) *Due to the urgency and strict timelines in the electoral process, this Honourable Court do direct immediate hearing of the petition lodged herein by the petitioner;*

iv) *The Honourable Court do issue necessary directions to preserve the substratum of the petition including where necessary to stop the printing of ballot papers for the presidential elections pending the hearing and determination of the petition;*

v) *Any other or further orders of the court geared towards protecting the dignity and authority of the court.*

[2] UPON perusing the grounds on the face of the application that the Court of Appeal in its impugned judgment in ***Civil Appeal No.E404 of 2022*** dismissing the Applicant's appeal challenging the decision of the High Court in ***JR No. E083 of 2022*** has inadvertently created a legal crisis by allowing subordinate courts and public administrators to ignore binding decisions of Superior Courts in interpreting the law by conjuring up interpretations different from those of the Superior Courts; that the superior court erred in holding that there can be no merit review in judicial proceedings under Article 47 of the Constitution which position has been affirmed by the Court of Appeal; in creating uncertainty owing to the numerous judgments of the same court affirming merit review in judicial review proceedings; that the matter relates to the nomination and registration of candidates for the presidential elections scheduled for 9th August 2022 and it is imperative that the Court hears the same expeditiously otherwise it will be rendered nugatory; that the expeditious hearing and determination of the main petition will enable the applicant's right to access to justice to be actualized in a meaningful way; and that the matter in dispute relates to and affects the exercise of the free franchise of millions of Kenyans who have a right to choose a leader of their choice in a democratic free and fair election;

[3] FURTHER, that the appeal involves and raises substantial points of law of general public importance to wit:- the judgment by the Court of Appeal created bad law and precedent, created conflicting and contradictory position in law from that set out in section 22(2) of the Elections Act which affirms that a degree holder is any person who has completed his university education;

created confusion in direct conflict with settled legal position allowing merit review in judicial review proceedings; created wrong precedent in allowing public administrators to breach Article 38 of the Constitution by resorting to unreasonable and irrational parameters to refuse to register an otherwise qualified contestant for elections; and created an erroneous precedent contrary to Article 10 of the Constitution in affirming the violation of the principles of natural justice captured in the doctrine of *nemo judex in causa sua*.

[4] UPON considering the affidavit in support of the application by the applicant, Jimi Richard Wanjigi sworn on 13th July 2022 and the submissions dated 13th July 2022 and filed on 14th July 2022, we note that the crux of the application is for the Court to issue necessary directions to preserve the substratum of the petition including, where necessary to stop the printing of the ballot papers by the 2nd respondent for the presidential elections pending the hearing and determination of the petition. The applicant relies on this court's decisions in ***Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others*** [2013] eKLR and ***Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*** [2014] eKLR amongst other decisions to assert that the jurisprudence on judicial review is that it permits the court to undertake some merit review in certain circumstances. The applicant submits that he satisfies the twin principles of arguability and nugatory aspect to entitle him to the orders sought. He also submits that the petition of appeal has been filed contemporaneously with the present application and is due for hearing necessitating the prayer to preserve the substratum of the appeal.

[5] WE HAVE ALSO CONSIDERED the 1st and 2nd respondents' replying affidavit sworn by Chrispine Owiye, the 2nd respondent's Director, Legal and Public Affairs sworn on 15th July 2022 on behalf of and with the authority of the 1st and 2nd respondents together with their written submissions dated 15th July 2022. The 1st and 2nd respondents are opposed to the application on two

principal grounds - that this Honourable Court lacks jurisdiction to determine the appeal and petition filed herewith and that public interest mitigates against grant of the orders sought.

[6] On jurisdiction, the 1st and 2nd respondents submit that the applicant does not indicate the specific jurisdiction he seeks to invoke contrary to the holding in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*** SC Application No. 2 of 2011 [2012] eKLR rendering the appeal incompetent. In addition, that the issue before the superior courts below was the interpretation of section 22 (2) of the Election Act and the binding nature of the decisions cited in interpreting the said decisions. That the mere fact of citing Articles 38 and 10 of the Constitution without demonstrating its linkage to the Court of Appeal decision does not suffice as the applicant is merely arguing the rejection of his application for registration as a candidate for the presidential election.

[7] On public interest, the 1st and 2nd respondents submit that the test for grant of conservatory orders is settled in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR that the applicant needs to satisfy the public interest test. They submit that public interest militates against the grant of the conservatory orders for the reasons that the August elections date is set by the Constitution and cannot be moved or changed, the election has a strict constitutional timeline and granting the orders sought has the possibility of throwing the constitutional order in limbo and that ballot papers have already been printed and for good use of public resources as prescribed under Article 201 of the Constitution, the Court should decline the invitation to grant orders sought. The 1st and 2nd respondents also submit that in any event the applicant does not meet the essence of interlocutory application as held in ***Board of Governors, Moi High School Kabarak & Another v Malcolm Bell*** SC Petition 6 & 7 of 2013 [2013] eKLR.

[8] WE HAVE FURTHER CONSIDERED the 3rd respondent's Notice of Preliminary Objection dated 15th July 2022 both to the application and to the petition of appeal. The grounds of objection is that the petitioner has failed to invoke the jurisdiction of the Court under Article 163(4) of the constitution; the petition does not raise any issue of constitutional interpretation or application as it is founded on mere allegations of violation of human rights on the presumption that these allegations automatically bring the appeal within the ambit of 163(4)(a) of the Constitution; that the petition has not been certified under Article 163(4)(b) of the Constitution as raising matters of general public importance as required and that having failed to properly invoke this Court's jurisdiction, the application and petition is incompetent and fatally defective and an abuse of the court process.

[9] TAKING INTO ACCOUNT the nature of the dispute and the urgency surrounding the determination of election-related disputes and the impending elections to be held on 9th August 2022, the applicant having sought to contest as a presidential candidate, and further taking into account that the judgment by the Court of Appeal sought to be appealed against is a brief judgment made without any reasons, the reasons for judgment having been reserved for 29th July 2022 pursuant to rule 34(7) of the Court of Appeal Rules 2022, and that the petition filed herein is not subject of our determination under the application before us at this juncture, we now opine as follows:

a) Before addressing the substantive prayers in the nature of conservatory relief, a challenge has been made by all the respondents as to the Court's jurisdiction to determine the application and petition which merits to be dealt with *in limine*. It is now settled that our jurisdiction is narrow and this Court is not just another appellate layer of courts to determine all appeals from the Court of Appeal (see ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another*** SC Civil Application 3 of 2014 [2015] eKLR). Our jurisdiction has to be specifically invoked and once

that is done, the Court must be satisfied that the threshold for the jurisdiction so invoked is met;

b) The present application is founded on Article 163(4) of the Constitution. This constitutional provision is two pronged. The appeal must either come as of right under Article 163(4)(a) or following certification as raising matters involving general public importance under Article 163(4)(b) of the Constitution. These jurisdictions are separate and cannot be jointly invoked in the same proceedings. In ***Hassan Nyanje Charo v Khatib Mwashetani & 3 others***, SC Application No.15 of 2014 [2014] eKLR, this Court disallowed counsel's argument that an intended appeal comprised a blend of "appeal-as-of-right" matters on the one hand, and "appeal-by-certification" matters on the other hand.

c) We note that in paragraph 6 of the supporting affidavit, Jimi Richard Wanjigi depones as follows:

> "***6. THAT*** *my Counsel immediately filed a Notice of Appeal and the same was served upon the Respondents giving them Notice of the intended appeal to the Supreme Court on questions of application and interpretation of the Constitution under Article 163(4) of the Constitution.*"

It is not immediately clear which provisions of the Constitution are subject of the appeal. Further, it is evident that the application is also stated as involving and raising substantial points of law of general public importance upon which the applicant raises six grounds (a) to (f) on the face of the application. This is reiterated in paragraph 25 of the supporting affidavit.

d) As we recently held in ***Hon. Mike Mbuvi Sonko vs The Clerk County Assembly of Nairobi City County & 11 others*** SC Petition No. 11 (E008) of 2022, even when a party invokes the jurisdiction as of right, it is upon the party to identify and specify how the appeal concerns interpretation and application of the Constitution.

It can never be the role of the Court to wander around in the maze of pleadings and averments in order to assume jurisdiction by way of elimination. That is what the Court has consistently cautioned in decisions made by it. In ***Erad Suppliers & General Contractors Ltd v. National Cereals & Produce Board,*** SC Petition 5 of 2012; [2012] eKLR, we firmly established that, for an appeal to be admissible under Article 163(4)(a), a petitioner must demonstrate that the matter coming on appeal was the subject of litigation before the High Court, involving the interpretation and application of the Constitution, which has risen through the judicial hierarchy on appeal to the Court of Appeal and ending in this Court. In the same vein, for our jurisdiction under Article 163(4)(b) to be invoked, the appeal has to be preceded by certification on the basis of the principles set out in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone*** SC Application 4 of 2012 [2013] eKLR, which is not the case in the present matter.

[10] FROM THE FOREGOING, the applicants have failed to exhibit that they meet the threshold for invoking our jurisdiction. With the above finding, we are unable to consider or grant the conservatory relief sought pending the determination of the status of the petition of appeal whose jurisdiction is also under challenge by way of preliminary objection. The urgency of the matter not being contested, we can only fast-track the determination thereof.

[11] We have already stated that what is on record is a brief judgment without reasons from the Court of Appeal. An appeal must of necessity be against the outcome of a case based on the reasons for such outcome. In the instant case, the reasons for the judgment are awaited. There can be no basis, we think, upon which the petition as currently drawn can be jurisprudentially determined in the absence of reasons for judgment. This

then renders any hearing of the petition before the 29th July 2022 and/or in the absence of the reasons for the judgment untenable.

[12] ACCORDINGLY, we make the following orders:

a) The Notice of Motion Application dated 13th July 2022 and filed on 14th July 2022 be and is hereby disallowed.
b) We make no orders as to costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 18th day of July 2022

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M.K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P.M. MWILU	**M.K. IBRAHIM**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
S.C. WANJALA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

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

REGISTRAR
SUPREME COURT OF KENYA