

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 22 (E025) OF 2022

—BETWEEN—

KENNETH NJAGI NJIRU 1ST PETITIONER
MESHACK CHURCHILL SUBA 2ND PETITIONER
JACKSON MWALULU 3RD PETITIONER
BEATRICE KAMAU 4TH PETITIONER
AMOS WAFULA 5TH PETITIONER
SOPHIE DOLA 6TH PETITIONER
JULIA WANJIKU CHEGE 7TH PETITIONER
JAMES MAINA MURIMI 8TH PETITIONER
SIMON LOKOMA 9TH PETITIONER
CAROLINE AYITSO NYARUNDA 10TH PETITIONER
JOHNSON MWAKABA 11TH PETITIONER

—AND—

HON. WILLIAM SAMOEI ARAP RUTO 1ST RESPONDENT
HON. RIGATHI GACHAGUA 2ND RESPONDENT
UNITED DEMOCRATIC ALLIANCE 3RD RESPONDENT
INDEPENDENT ELECTORAL & COUNDARIES
COMMISSION (IEBC) 4TH RESPONDENT
WAFULA CHEBUKATI 5TH RESPONDENT
THE HON. ATTORNEY GENERAL 6TH RESPONDENT

—AND—

AZIMIO LA UMOJA ONE-KENYA

COALITION 1ST INTERESTED PARTY

AGANO PARTY2ND INTERESTED PARTY

ROOTS PARTY OF KENYA3RD INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION

COMMISSION4TH RESPONDENT PARTY

(Being an application for conservatory orders restraining the 1st and 2nd respondents from being sworn into office of President and Deputy President respectively, in the event that they got elected during the General Elections then scheduled for 9th August 2022)

RULING OF THE COURT

[1] UPON considering the Petition dated 5th August, 2022 and filed on 8th August 2022, which is brought pursuant to Articles 3, 10, 88(4) (e), 99, 137, 148 and 163 (3) (a) of the Constitution and Section 12 of the Supreme Court Act, 2011, the petitioners seek ten declarations herein condensed into four main prayers, *to wit*; a declaration that the 2nd respondent is unfit and unsuitable to hold office of Deputy President by dint of his non-compliance with Chapter Six of the Constitution and Articles 99 (1) as read with Article 148 (1) of the Constitution; a declaration that the nomination of the 2nd respondent as a running mate by the 1st respondent was invalid, null and void **ab initio**; a declaration that the 1st respondent violated Articles 99 (1), as read with Articles 137 (1), 148 (1) of the Constitution by nominating the 2nd respondent as a candidate for Deputy President in the General Elections conducted on 9th August 2022, hence unfit and unsuitable to hold office of President; and an order quashing the 4th respondent's Gazette Notice No. 7995 published on 1st July 2022 declaring the 1st and 2nd respondents as the President and Deputy President candidates for the 3rd Respondent; and

[2] UPON perusing and examining the Notice of Motion dated 5th August 2022 and filed on 8th August 2022, which is brought pursuant to the provisions of Article 163(4)(a) of the Constitution, Sections 21 (1) (a) and 24 (1) of the Supreme Court Act, 2011) and Rules 3 (5), 31 and 32 of the Supreme Court Rules, 2020, wherein the applicants seek an order of conservatory injunction to restrain the 1st and 2nd respondents from being sworn into offices of President and Deputy President respectively, in the event they got elected during the General Elections then scheduled on 9th August 2022;

[3] UPON reading the supporting affidavit in support of the motion sworn by **Kenneth Njagi Njiru** on 5th August 2022, further affidavit sworn on 12th August 2022 and the 1st to 3rd respondents' replying affidavit sworn by **Veronica Maina** on 11th August 2022 in opposition of the motion; and

[4] UPON considering the Notice of Preliminary Objection by the 1st to 3rd respondents dated 11th August and filed on even date, as well as the 4th and 5th respondents' similar Notice of Preliminary Objection and Grounds of Opposition dated 11th August 2022 and filed on 15th August 2022, challenging the jurisdiction of the Court to entertain the present appeal and motion; that for those reasons, the Court is only clothed with exclusive original jurisdiction pursuant to Article 140 of the Constitution; that the petition and motion offends the principle of exhaustion as regards avenues of recourse available pursuant to Article 88 (4) (d) and (e) of the Constitution; that it fails the test of justiciability and ripeness and offends the principle of *sub-judice* as **Constitutional Petition No. E395 of 2022** is pending before the High Court; and

[5] UPON considering written submissions by the applicants dated 9th August 2022, filed on 10th August 2022 and further submissions dated 12th August 2022, filed on 15th August 2022 to the effect that the preliminary objections are unmerited; that the Court is vested with exclusive original jurisdiction under Article 163 (3)(a) and that the application seeks to preserve the subject matter of the petition;

[6] UPON considering the written submissions by the 1st to 3rd Respondents dated 11th August 2022 and filed on even date restating the grounds of objection and urging that both the petition and motion are incompetent; that they are an abuse of the Court and ought to be struck out; and

[7] **NOTING** that the objections raised by the 1st to 5th respondents raise questions challenging this Court’s jurisdiction to hear and determine this application or the petition within which it is brought. And further noting that the questions having been raised at the earliest opportunity, then this Court must determine the preliminary objection in the first instance.

WE NOW THEREFORE FIND as follows:

[8] We have carefully considered the reasoned arguments by all parties as pertains the jurisdiction of this Court, to hear and determine disputes relating to the election to the office of President arising under Article 140 of the Constitution. To this end, where jurisdictional questions have arisen, Article 163 of the Constitution is the first point of call and the guiding provision. Specifically, Article 163 (3) (a) provides that:

“The Supreme Court shall have:

exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140” [emphasis added].

[9] Article 140 (1) on the other hand provides that:

*“A person may file a petition in the Supreme Court to challenge the election of the President-elect **within seven days after the date of the declaration of the results of the presidential election**”* [emphasis added].

[10] The Constitution therefore confers upon the Supreme Court, exclusive original jurisdiction to determine disputes relating to the election of the President, limited only to the circumstances contemplated under Article 140 (1). In the case of ***Okiya Omtatah Okiiti v. Independent Electoral and Boundaries Commission & Others***; SC Petition No. 18 of 2017, [2020] eKLR, the Court has, with finality settled the question of its jurisdiction under Article 163 (3) (a) as follows:

“We hasten to restate the position that, the Constitution confers upon the Supreme Court, exclusive original jurisdiction, to determine disputes relating to the election of the President arising under Article

140 only. Though exclusive and original, this jurisdiction is limited to the circumstances contemplated in Article 140 (1). It is not a blanket jurisdiction that empowers the Supreme Court, to extend its judicial authority over any and all interpretational questions, touching upon the election of the President. It must be further emphasized that, Article 163 (3) of the Constitution does not oust the High Court's original jurisdiction to interpret the Constitution under Article 165 (3) (d). The Supreme Court's exclusive and original jurisdiction to determine the validity of a presidential election, only kicks in after the declaration of results, following a petition challenging the election.

...

[52] The Supreme Court cannot determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. It is one thing for the Court to pronounce itself on a constitutional or legal question, but it is another thing to determine the validity of an election. In other words, the Supreme Court cannot anticipate the validity of a presidential election, within the meaning of Article 140 (1) of the Constitution” [emphasis added].

[11] It is general knowledge that the Presidential Elections were held on 9th August 2022 and the declaration of results of the Presidential Election made on the 15th August 2022. On the other hand, the petition and motion before us were filed on 8th August 2022, a day before the General Elections and seven days before the declaration of the results of the Presidential Election. Therefore, the applicants are inviting the Court to assume jurisdiction outside the confines of Article 163 (3) as read with Article 140 (1) of the Constitution. They are inviting the Court to unconstitutionally expand its jurisdiction. To wait until a day to the General Elections, before seeking the Orders of such magnitude, casts the petitioners/applicants in a cynical scheme of abuse of the processes of this Court.

[12] Consequently, applying the settled principles, we find that this Court lacks jurisdiction to hear and determine the petition and also the present application. We reiterate that this Court's jurisdiction under Article 163 (3) (a) of the Constitution only

kicks in after the declaration of the presidential election results and subsequent to a competent petition challenging the election.

[13] Accordingly, we make the following Orders:

- (i) *The Objections raised by the 1st to 5th respondents in respect of the Notice of Motion dated 5th August 2022 and Petition dated 5th August 2022 are allowed;*
- (ii) *The Notice of Motion dated 5th August 2022 and Petition dated 5th August 2022, are for the reasons given, incompetent and are hereby struck out;*
- (iii) *The Applicants shall bear costs.*

[14] Orders accordingly.

DATED and DELIVERED at NAIROBI this 6th Day of September, 2022.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

**REGISTRAR,
SUPREME COURT OF KENYA**

