

THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PRESIDENTIAL PETITION NO. E009 OF 2022

REUBEN KIGAME LICHETEPETITIONER/RESPONDENT

VERSUS

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT/APPLICANT

THE CHAIRPERSON INDEPENDENT

ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

ODINGA RAILA.....1ST INTERESTED PARTY

RUTO WILLIAM SAMOEI.....2ND INTERESTED PARTY/APPLICANT

WAIHIGA DAVID MWAURE.....3RD INTERESTED PART

WAJACKOYAH GEORGE LUCHIRI.....4TH INTERESTED PART

FREE KENYA

INITIATIVE (MOVEMENT).....5TH INTERESTED PART

RULING OF THE COURT

*(Being applications by the 1st Respondent and the 2nd Interested Party/applicant
strike out the petition)*

[1] UPON perusing the Notice of Motion by the 2nd Interested Party/applicant William Ruto Samoei dated 26th August 2022 and brought under Rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 seeking to strike out this petition; and

[2] UPON considering the grounds in support of the application wherein the applicant claims that the petitioner has a pending appeal before the Court of Appeal, *Independent Electoral and Boundaries Commission & Wafula Wanyonyi Chebukati v Reuben Kigame Lichete & Hon Attorney General*; Nairobi Civil Appeal No. E2456 of 2022, and that the Court of Appeal also granted a stay of execution of the High Court Judgment delivered on 18th July, 2022 in *Reuben Kigame Lichete v Independent Electoral and Boundaries Commission & Wafula Chebukati*; Constitutional Petition No. E275 of 2022, which is pending determination of the appeal and that there being a pending appeal, this matter is not within the purview of Article 140 of the Constitution hence this Court lacks jurisdiction to entertain this petition; and

[3] HAVING considered the averments in the 2nd interested party's supporting affidavit sworn on 27th August, 2022 and his written submissions dated the same date wherein he claims that this petition is a pre-election dispute that is pending before the Court of Appeal; that the jurisdiction of this Court under Article 140 is circumscribed to challenge the election of the president-elect only and; that the issues in this petition are not within the parameters of Article 140 of the Constitution and the petition thus only serves to crowd issues and is a hindrance to a quick resolution under Article 140 and the 2nd interested party relies on the High Court's decision in *Sammy Ndungu Waiti v IEBC and 3 others* [2019] eKLR to support this submission; and

[4] FURTHER NOTING the contents of the Notice of Motion dated 27th August, 2022 filed by the 1st respondent brought under the provisions of Articles 88(4), 140(1), and 163(3)(a) of the Constitution, Section 74(1) of the Elections Act, Sections 3A and 24 of the Supreme Court Act 2011, Rule 31(6) of the Supreme Court Rules 2020, Rule 17 of the Supreme Court (Presidential Election Petition) Rules 2017 and all other enabling provisions is also seeking to have the petition struck out, which application is premised on grounds in its support as well as the

supporting affidavit of Chrispine Owiye, Director of legal services of the 1st respondent where it is also claimed that the petition raises pre-election issues regarding clearance and registration of independent presidential candidates, and therefore fails to meet the threshold of this Court's original exclusive jurisdiction under Article 163(3)(a) as read with Article 140(1) of the Constitution; and

[5] ALSO noting the 1st respondent's grounds of opposition dated 27th August, 2022 where the petition is again opposed on the grounds that; this Court lacks jurisdiction to handle the petition; the petition runs afoul of the doctrine of exhaustion of remedies provided for in the dispute resolution mechanism in Article 88(4)(e) of the Constitution; that the petition is not a presidential election petition and; that the petition is *sub judice*; and

[6] HAVING also considered the written submissions by the 1st respondent dated 27th August, 2022 reiterating the grounds in its application and further submitting that jurisdiction is everything while relying on the decision in ***The Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd*** (1989) KLR 1 and that the petition fails to fall within the provisions of Article 140(1) of the Constitution and that the petition is *sub judice* as the issues are similar to those before the Court of Appeal;

[7] HAVING also noted that the petitioner has yet to file his response to the two applications by the 2nd interested party as well as the 1st respondent;

[8] WE NOW OPINE as follows:

- i) Article 163(3) of the Constitution grants this Court exclusive jurisdiction to hear and determine disputes relating to the elections to the office of the president arising under Article 140 of the Constitution.
- ii) Article 140 (1) of the Constitution provides:

‘ 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.’

- iii) The petition as filed does not seek to challenge the declaration of the 2nd interested party as the president-elect, but as rightly submitted by the applicants, seeks to address issues arising before the presidential election and is essentially a pre-election dispute. Article 140 of the Constitution is also instructive in that a presidential petition filed before this Court must be one that seeks to challenge the election of a president-elect.
- iv) Furthermore, an appeal on the same issues now presented before this Court as rightly submitted, is pending determination before the Court of Appeal, and the appellate court is yet to render its determination on the said appeal.
- v) Jurisdiction, as has been held, is everything. It was our finding in ***Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others*** (2012) eKLR that ***“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law.”***

[9] In the circumstances, it is our finding that we lack jurisdiction to handle the petition as filed and it is accordingly, struck out.

[10] The petitioner is therefore entitled to a refund of the security for costs paid upon lodging of the petition. Accordingly, we hereby order the sum of Kshs. 1,000,000/- deposited as security for costs upon lodging of this petition be refunded to the petitioner.

[11] Each party shall bear its costs.

[12] It is so ordered.

DATED and DELIVERED AT NAIROBI this 29th day of August 2022

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

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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