



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 19 (E022) OF 2022

—BETWEEN—

JIMI RICHARD WANJIGI APPELLANT

—AND—

WAFULA CHEBUKATI 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION DISPUTES COMMITTEE 3RD RESPONDENT

*(Being an appeal from the Judgment and Orders of the Court of Appeal sitting at Nairobi (**Makhandia, M’Inoti & Omondi, JJ.A**) delivered on 12th July, 2022 in Civil Appeal No. E404 of 2022)*

Representation:

Mr. Willis Otieno for the appellant
(Otieno Ogola & Company Advocates)

Mr. Ochola, Moses Kipkoge & Anthony Mwangi for the 1st & 2nd respondents
(G & A Advocates LLP)

Mr. Ndaiga Gacheru for the 3rd respondent
(Mukele & Moni Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION AND BACKGROUND

[1] This is a Petition of Appeal dated 29th July, 2022 and filed on 1st August, 2022 by the Appellant, Jimi Richard Wanjigi, pursuant to Article 163(4)(a) of the Constitution. The appeal challenges the entire judgment and orders of the Court of Appeal (*Makhandia, M'Inoti & Omondi, JJ.A*) in **Civil Appeal No. E404 of 2022** delivered *extempore* on 12th July 2022 and whose reasons were rendered on 29th July, 2022.

[2] The appellant was the nominated Safina political party presidential candidate for the 9th August 2022 General Elections. On 6th June, 2022 he presented his nomination papers before the 1st Respondent, the duly gazetted returning officer for the presidential election, for registration as candidate pursuant to regulation 16 of the Elections (General) Regulations. Among the documents he submitted were: a letter from Daystar University indicating that he was pursuing a degree of Bachelor of Arts in International Relations and Security Management and had completed his coursework; copies of his transcripts; a letter from the Commission for University Education confirming that Daystar University was accredited and its degree is recognized in Kenya; and lists of voters from 24 counties who had nominated him for his presidential bid.

[3] Upon examining the documents, the 1st respondent ruled that the appellant was unqualified to be nominated to contest in the presidential election and rejected his candidature based on the following reasons: lack of a university degree as required by Section 22 (2) of the Elections Act; lack of nomination by at least 2,000 voters each from at least 24 Counties as required by Section 23 (1) (d) of the Elections Act; and lack of a nomination certificate by Safina Political Party for the appellant's running mate.

B. LITIGATION HISTORY

i. Before the Independent Electoral and Boundaries Commission Disputes Committee (the Committee)

[4] Aggrieved by the 1st respondent's decision, the appellant on 7th June, 2022, lodged a complaint with the 3rd respondent, the Independent Electoral and Boundaries Commission Disputes Committee (the Committee) challenging the validity of the grounds upon which the 1st respondent refused to register him.

[5] In its decision rendered on 17th June, 2022, the Committee (*George Murugu, Juliana Cherera & Boya Molu*) dismissed the complaint and upheld the 1st respondent's decision, *inter alia*, that: (a) the appellant did not comply with the requisites for registration to vie for the position of president in the general elections; (b) the appellant did not have sufficient supporters as required under the law; (c) the appellant did not submit a degree as is required under section 22(2) of the Elections Act as read with Regulation 47 (1) of the Elections (General) Regulations 2012; (d) the degree envisaged under section 22(2) of the Elections Act as read with Regulation 47 (1) of the Elections (General) Regulations, 2012 connotes a physical document; and (e) that the appellant did not submit the nomination certificate in respect of his running mate to the returning officer. No orders of costs were made.

ii. Proceedings at the High Court

[6] Aggrieved by the Committee's decision, and upon being granted leave, the appellant commenced judicial review proceedings in *High Court Judicial Review Application No. E083 of 2022* where he sought an order of *certiorari* to quash the decisions of the 1st and 3rd respondents dated 6th June, 2022 and 17th June, 2022 respectively, an order of *mandamus* directing the 1st respondent to gazette and include the appellant's name in the ballot paper and issue him with a nomination certificate as a presidential candidate for the elections scheduled for 9th August 2022. The judicial review proceedings were instituted on the grounds of illegality, irrationality, unreasonableness, bias and legitimate expectation.

[7] On *illegality*, the appellant complained that the decisions of the 1st and 3rd respondents were contrary to the Constitution; section 22 (2) of the Elections Act, which requires that a person nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor be a holder of a

degree from a university recognized in Kenya; and binding precedence from the High Court in **Janet Ndago Ekumbo Mbete v IEBC & 2 others** [2013] eKLR, and **Mable Muruli v Hon. Wycliffe Ambetsa Oparanya & 3 others** [2013] eKLR which held that a candidate need not present a hard copy certificate to satisfy the requirements in section 22(2) of the Elections Act. He urged that in holding that the appellant submitted the documents to the 1st respondent late, the 3rd respondent acted in violation of the law when it purported to base its decision on an issue which was not contested or complained of by the 1st respondent. He further averred that in any event, the 1st respondent had accepted and acted upon the documents arriving at a decision on the appellant's compliance in 24 counties.

[8] On *irrationality*, the appellant pleaded that the 1st and 3rd respondents' decisions were made without regard to his fundamental rights and freedoms guaranteed under the Constitution and in violation of due process of the law. He claimed that the finding that he had not garnered the required 2,000 supporters in 24 counties was irrational as the evidence and material before the Committee confirmed that he was compliant and had met the threshold under Article 137 of the Constitution. Further, that the 1st respondent acted irrationally by rejecting his running mate's nomination certificate, whereas Article 148 of the Constitution requires only that the running mate be nominated by the presidential candidate.

[9] On *unreasonableness*, the appellant averred that the 1st and 3rd respondents' decisions were unreasonable on account of being *ultra vires* the Constitution, section 22 (2) of the Elections Act, and fair administrative action for not being reasonably justifiable in a democratic state.

[10] On *bias*, it was the appellant's contention that the decision of the 3rd respondent was tainted by apparent bias and conflict of interest as the 1st respondent appointed Mr. George Murugu as the chairperson of the Committee whereas he had acted for the 1st respondent as a private advocate in **High Court Misc. Application No. E033 of 2021** in which case leave was being sought to institute contempt proceedings against the 1st respondent. The appellant argued that the 1st respondent, being a party to the proceedings before the 3rd respondent,

could not at the same time appoint members of the Committee who would proceed to hear and determine the disputes lodged against him.

[11] *On legitimate expectation*, the appellant argued that it was his legitimate expectation that the 1st and 2nd respondents would act in accordance with the Constitution, Laws of Kenya and binding precedent.

[12] The 1st and 2nd respondents opposed the application and averred that the appellant was not qualified for registration as required by the law as he did not present a certified copy of a degree from a recognized university in Kenya; was not nominated by not fewer than 2,000 voters registered in each of a majority of the counties as required by Article 137 (1) of the Constitution; that the appellant's list of nominators did not bear some of the particulars required by the Elections (General) Regulations, namely the names, signatures and identity card or passport numbers; and that the appellant did not submit the list of his supporters at least five days before the date for registration of candidates as required by regulation 18 of the Regulations. As regards the precedents, they averred that they were based on the law as it was in 2013 whereas the law has since been amended. On the complaint of bias, they contended that the appellant did not raise this issue when he appeared before the 3rd respondent whose decision was strictly in accordance with the Constitution and the law.

[13] The 3rd respondent also in opposition urged that it was lawfully constituted under Article 252 (1) of the Constitution and sections 11 and 12 of the IEBC Act; and that its decision was fair, unbiased and properly justified under the Constitution, the Elections Act and the Regulations made thereunder.

[14] The trial court (*Ngaah J*) vide the judgment dated 1st July, 2022 dismissed the application with costs for lacking merit. In his considered view, based on the traditional limits of judicial review, a judicial review court does not assume appellate jurisdiction or a merit review or interrogation of facts upon which an impugned decision was made, but only the decision-making process. Consequently, he concluded that he would not be concerned about whether the 3rd respondent was correct in concluding that the appellant had not satisfied the

requirements to contest as a presidential candidate, but whether, in coming to that decision, the 3rd respondent confined itself within the four corners of the law from which it derives its mandate. Consequently, it was his finding that the 3rd respondent's decision was not vitiated by any judicial review grounds, and that the appellant had failed to substantiate the grounds argued.

iii. Proceedings at the Court of Appeal

[15] Further dissatisfied, the appellant lodged an appeal to the Court of Appeal, in ***Civil Appeal No. E404 of 2020*** premised on ten grounds of appeal, which were summarised by the appellate court into two. Firstly, whether the appellant's application disclosed grounds for judicial review and Secondly, whether, if properly considered the appellant's complaints were meritorious enough to warrant interfering with the decisions of the 1st and 3rd respondents.

[16] The appellate court dismissed the appeal with costs to the respondents. On the first issue, it determined that the appellant's application disclosed cogently and in detail the grounds for judicial review which warranted a decision from the trial court. It was its view that under the Constitution 2010, a judicial review court has jurisdiction to review both the decision-making process and merits of a quasi-judicial administrative decision.

[17] On the second issue, the appellate court found no basis to fault the 1st and 3rd respondents' decisions as: the appellant, in not producing a certified copy of a degree certificate, did not satisfy the requisite educational qualifications when he appeared for registration before the 1st respondent; the respondents correctly applied the doctrine of *stare decisis* as the precedents relied on were before Legal Notice No. 72 of 2017 which amended regulation 47 of the Elections (General) Regulations, 2012; the appellant failed to meet the threshold under Article 137 (1) as read with Section 23 of the Elections Act and regulation 18 of the Elections (General) Regulations; the appellant failed to submit his running mate's nomination certificate contrary to Articles 148 (1) as read with Article 137 (1) of the Constitution; there was no basis to legitimately expect that a provision of the law will be interpreted and applied the same way even after it is amended; and on

allegations of bias, the appellant, did not prove any actual bias on the 3rd respondent, the court having applied the test of reasonable apprehension.

C. PROCEEDINGS BEFORE THE SUPREME COURT

a. Appellant's Case

[18] The appellant, aggrieved by the decision of the Court of Appeal, has now filed the present Petition of Appeal. The appeal is premised on grounds that the superior courts erred in law and misapprehended the Constitution by:

- a) *failing to uphold the established principles of stare decisis and binding precedents of superior courts on subordinate courts, administrative tribunals and committees in matters of interpretation and application of the Constitution, in contravention of Article 10 of the Constitution and this Court's Decision in **Attorney General & 2 others vs. Ndii & 79 Others** (Petition No. 12, 11 and 13 of 2021 Consolidated) [2022] KESC 8 (KLR) (**BBI Matter**);*
- b) *failing to consider the import and effect of Section 22 (2) of the Elections Act and binding precedents of the superior courts on subordinate courts, administrative tribunals and committees exercising quasi-judicial functions, thereby denying the appellant the legitimate expectation that such precedent would be applicable to him when he presented his nomination papers;*
- c) *misapplying and misinterpreting Article 10 of the Constitution by finding that a regulation can amend provisions of a statute, and in any event, failing to find that Regulation 47 as amended in 2017 did not occasion material changes to Section 22 (2) of the Elections Act, but only introduced the word 'certified';*
- d) *misconstruing and misapplying the appellant's political rights and freedoms under Article 38, in respect of his quest to participate in the Presidential Election scheduled for 9th August 2022;*
- e) *Failing to consider the misapplication of Article 83(3) of the Constitution which grants the right to stand for election and further provides that*

administrative arrangements are designed to facilitate, but not to deny the right of an eligible citizen to stand for election, (but instead relied on undisclosed administrative infractions);

- f) misapplying Article 83(3) of Constitution by relying on unsubstantiated qualitative measures to determine that he had failed to meet the threshold;*
- g) failing to apply the provisions of Article 83 (3) of the Constitution when they failed to consider that the petitioner was compliant in 24 counties and thereby met the threshold of supporters in a majority of counties but proceeded to deny him registration as a presidential candidate on the ground of insufficient supporters;*
- h) misapplying the provisions of Article 83(3) of the Constitution when having determined that he met the threshold of supporters in a majority of the Counties proceeded to rely on unsubstantiated qualitative measures to determine that he had failed to meet the threshold;*
- i) failing to apply the provisions of Articles 88 and 249 of the Constitution on the functions and independence of the 2nd respondent from external control by conflicted and biased strangers;*
- j) misapplying the provisions of Article 10 and principles of natural justice by failing to find that the 1st respondent had no power to appoint his personal advocate to preside over an independent function of the 2nd respondent and holding that allegations of bias must be proved and are not apparent;*
- k) Misapplying the provisions of Article 88 and 249 of the Constitution and failed to consider the purpose of independent commissions and the import of a stranger presiding over important functions of the Commission who was conflicted and has apparent bias in proceedings.*
- l) misapplying the right to fair administrative action when it failed to consider that the petitioner submitted his running mate's certificate and additional supporters on 6th June, 2022; and*
- m) Misapplying settled principles on costs by awarding costs against the appellant despite partially allowing his appeal on grounds that it had*

met the threshold and had disclosed sufficient grounds for judicial review.

[19] The reliefs the appellant seeks are as follows:

- a) The Petition of Appeal be allowed.*
- b) The Judgment of the Court of Appeal delivered on 12th July 2022 in Civil Appeal No E404 of 2022 be and is hereby set aside with an Order allowing the appeal.*
- c) The Honourable Court do find that the petitioner met the minimum requirements for clearance and registration as a presidential candidate in the 9th August 2022 Presidential Elections.*
- d) The Honourable Court do issue an order directing the 1st respondent to register the petitioner as a presidential candidate in the Presidential Elections to be held on the 9th August 2022.*
- e) The Honourable Court do issue an order directing the 1st respondent to include the name of the petitioner in the Presidential Elections ballot papers to be used in the 9th August 2022 Presidential Elections.*
- f) Any other and further relief that the Honourable Court may issue to achieve the ends of justice.*
- g) Costs of this petition and of the appeal before the Court of Appeal.*

[20] The appellant filed submissions dated 3rd August, 2022 in support of the petition of appeal and submissions of even date in opposition to the 1st and 2nd respondents' preliminary objection dated 2nd August, 2022.

[21] On *jurisdiction*, the appellant submits that the appeal involves questions of interpretation and application of the Constitution. He specifically urges that the appeal challenges the application of Articles 10, 25, 38, 47, 50, 83, 88, 99, 137, 148 and 249 of the Constitution as well as Sections 22 (2) of the Elections Act. He emphasizes that the determination of the dispute before the 3rd respondent all the way to the appellate court involved the enforcement of the appellant's political rights enshrined under Article 38, and actualized under Article 83 (3), 137 (1), 99 (1) (b) and 148 (1) of the Constitution.

[22] The appellant contends that the principles enshrined under Article 10(2) of the Constitution demand that public bodies and private individuals must comply with court decisions. It is his case that this Court has upheld the application of the doctrine of *stare decisis* as a constitutional principle in **AG & 2 others vs. Ndi & 79 Others; Prof. Rosalind Dixon & 7 others (Amici Curiae)** (Petition No. 12, 11 and 13 of 2021 Consolidated) [2022] KESC 8 (KLR); **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others** [2013] eKLR; and **Mable Muruli vs Wycliffe Ambetsa Oparanya & 3 others** SC Petition No. 11 of 2014 [2016] eKLR wherein the Court held that adherence to precedent is the rule and not the exception and is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. He reiterates the arguments he made in the superior courts that they failed to take into consideration binding precedent settled in **Jane Mbete** and **Mable Muruli cases** (supra) and faults the appellate court's reliance on regulation 47 of the Elections (General Regulations) 2012 as amended in 2017 on the grounds that there was no material amendment effected in 2017 to warrant departure from the settled precedents. He maintains that the 2017 amendment only introduced the word 'certified copies of educational certificates' in place of 'copies of educational certificates.'

[23] He submits that the appellate court's insistence on a physical copy of a degree certificate was an administrative arrangement that violates his rights protected under Articles 38 and 83 (3) of the Constitution. He buttresses that the importance and value of these two provisions was restated by this Court in **Attorney General v Kituo Cha Sheria & 7 others** [2017] eKLR. In the circumstances, he urges that he had met the purposes and intent of Section 22(2) of the Elections Act and the decision by the 3rd respondent was illegal and unlawful.

[24] The appellant submits that he organized his affairs in full knowledge and *legitimate expectation* that the doctrine of *stare decisis* was binding on the 3rd respondent, and that precedent on the interpretation and application of Section 22 (2) of the Elections Act would be relied on and applied by superior courts.

[25] On the issue of *whether the appellant was supported by at least 2,000 registered voters in a majority of the counties*, the appellant submits that the 1st respondent, having made a finding that he was compliant in 24 counties, could not place unspecified and unidentified additional administrative arrangements to undermine his right under Article 83. It is argued that neither the respondents nor the Court of Appeal were able to point out which of the appellant's county lists had illegible identification cards or even more, which administrative measures were not complied with and in which county.

[26] It is his submission that the appellate court failed to consider uncontroverted evidence that his *running mate's nomination certificate* was submitted on the day of nomination, but instead the appellate court proceeded on a tangent as if the running mate nomination certificate was never submitted at all.

[27] On the issue of *impropriety and conflict of interest* the appellant submits that the Court of Appeal misapplied the provisions of Article 10 and 50 on principles of natural justice and fair hearing when it failed to consider that the presiding member of the 3rd respondent (*George Murugu*) was biased as he was the 1st respondent's personal lawyer. By the 1st respondent appointing the presiding member of the 3rd respondent, he undermined the independence of the 2nd respondent as protected under Article 249.

[28] Lastly, the appellant faults the Court of Appeal for awarding costs against him in an appeal that had partially succeeded for reason that it goes against settled principles on costs. It is on the above submissions that the appellant asks the Court to overturn the Court of Appeal's finding on costs.

b. 1st and 2nd Respondents' Case

[29] In opposing the appeal, the 1st and 2nd respondents rely on their preliminary objection dated 2nd August 2022 and filed on 3rd August 2022 challenging this Court's jurisdiction; a replying affidavit sworn and filed on 3rd August 2022 by *Chrispine Owiye*, the 2nd respondent's Director of Legal and Public Affairs, in response to the petition of appeal; and two sets of submissions in support of their

preliminary objection and in opposition of the petition both filed on 3rd August 2022.

[30] It is the 1st and 2nd respondents' argument that the appeal does not raise any matter involving the interpretation or application of the Constitution as contemplated under Article 163(4)(a) of the Constitution since the Articles cited by the appellant were neither in issue nor decided on by the courts below. They aver that the appellant has not presented any grounds in support thereof.

[31] It is urged that pursuant to Section 22 (2) of the Elections Act as read with regulations 47 of the Elections (General) Regulations 2012, the appellant was required to demonstrate that he was a holder of a degree by submitting to the Commission a certified copy of the degree certificate, which he failed to do.

[32] The 1st and 2nd respondents object to the appellant's reliance on the impugned precedent on grounds that: regulation 47 (7) was amended post 2017 to introduce the requirement of certified educational qualification; the impugned precedent was set prior to the said amendment; the issue in the aforesaid precedent was 'who is a graduate' as opposed to 'who is a holder of a degree certificate'; decisions cited were decisions of court of concurrent jurisdiction; and in any event, the 3rd respondent considered a more recent decision in the case of **Walter Ochonga Mong'are vs Wafula Chebukati, IEBC & another**; HC Petition No. E318 of 2022 [2022] KEHC 10186 (KLR) which analyzed the issue at hand post the 2017-amendment.

[33] On the issue of whether the appellant's *nomination was supported by at least 2000 registered voters in a majority of the counties*, it was the 1st and 2nd respondents' contention that the appellant's application for registration was non-compliant with Article 137 (1) as read with Section 23 of the Election Act. They contend that in the appellant's supporters' lists, there was mismatch of supporters and their identities; inconsistency between the electronically submitted copy and the hard copy; and were supported by illegible copies of identification documents.

[34] As regards the *appellant's running mate's nomination certificate*, the 1st and 2nd respondents submit that pursuant to Articles 148 and 137 of the Constitution, a presidential candidate as well as their running mate must be persons who qualify for nomination for election as President and consequently, clearance by the nominating political party was a prerequisite.

[35] Concerning the issue of *bias*, it is submitted that a reasonable apprehension of bias of the 3rd respondent in the discharge of its mandate had not been met for reasons that: it was not true that George Murugu was a personal lawyer of the 1st respondent; the firm of George Murugu was one of the law firms enlisted in the panel of the 2nd respondent and only represented the 1st respondent in his capacity as the chairperson of the 2nd respondent; allegations of bias were an afterthought and not founded on any *bona fide* grounds; and in appointing George Murugu, the 1st respondent was at all times exercising his official functions under Section 12 of the IEBC Act and Section 52 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya.

[36] It was consequently urged that the appellant's contestation has failed to meet the standards settled in ***Gladys Boss Shollei v JSC & another*** SC Petition 34 of 2014 [2018] eKLR (at para 53) and ***Attorney General vs Prof. Peter Anyang Nyongo & 10 Others***, EACJ Application No. 5 of 2007, *to wit*, that the circumstances must give rise to reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public that the judge will not exercise his/her mind to the case impartially.

c. 3rd Respondent's Case

[37] The 3rd respondent in opposing the appeal relies on its grounds of objection to the petition of appeal and written submissions both dated and filed on 3rd August 2022 and 4th August 2022 respectively. The 3rd respondent agrees with the 1st and 2nd respondents that the appellant has failed to properly invoke the jurisdiction of this Court under the provisions of Article 163 (4) (a) of the Constitution. It argues that in any event, the appellant also fails the criteria for certification as a matter of general public importance under Article 163 (4) (b), as

he has not been certified by this Court or the Court of Appeal. In these circumstances, it is the 3rd respondent's submission that the appeal is incompetent, fatally defective and an abuse of the Court's processes.

[38] The only other issue the 3rd respondent submits on is the issue of *bias*. It is its argument that this issue does not constitute a question of constitutional interpretation and application appealable under Article 163 (4) (a) of the Constitution. In any event, it submits that the Court of Appeal correctly found that nothing had been placed before it to meet the objective test in support of an apprehension that there was reasonable likelihood of bias.

D. ISSUES FOR DETERMINATION

[39] First and foremost, the jurisdiction of this Court has been brought to question by the respondents by way of preliminary objection and grounds of objection filed on their respective behalf. Secondly, the cause of action of this matter arises from a pre-election dispute wherein the appellant sought to be registered as a presidential candidate in the general elections held on 9th August 2022. Acknowledging that the general elections were already conducted, the Court during highlighting of the submissions on 18th October 2022 posed the question to the appellant's counsel as to what remedies he seeks from the Court. It was his submission that they sought clarity on the law and that the remedies they seek are for posterity.

[40] Having considered parties respective cases and their submissions thereof as well as the remedies sought, the issues that arise for determination before this Court are:

- (i) *Whether this Honourable Court has jurisdiction to hear and determine the appeal under Article 163(4)(a) of the Constitution;*
- (ii) *Whether the Court of Appeal erred in dismissing the appeal; and*
- (iii) *Whether the appellant is entitled to the remedies sought.*

In framing the above issues, we are conscious that should we find that we do not have jurisdiction, it may be unnecessary to proceed with the other issues as framed.

E. ANALYSIS AND DETERMINATION

i. Whether this Honourable Court has jurisdiction to hear and determine the appeal under Article 163(4)(a) of the Constitution

[41] The respondents argue that the appeal does not raise any matter involving the interpretation or application of the Constitution as stated under Article 163(4)(a) of the Constitution. They aver that the Articles cited by the appellant were neither in issue nor decided by the superior courts and that the appellant has made mere allegations and does not present any grounds that can clothe this Court with jurisdiction. It is their averment that the appeal does not qualify as an appeal as of right to invoke this Court's jurisdiction under Article 163(4)(a) of the Constitution. Then again, the 3rd respondent asserts that the appellant also fails the criteria for certification as a matter of general public importance under Article 163 (4) (b) for the reason that this matter has not been certified as such.

[42] On the contrary, it is the appellant's position that the present appeal is proper before this Court as it involves questions of interpretation and application of the Constitution since it touches on the enforcement of his political rights enshrined under Article 38 and actualized under Articles 83 (3), 137 (1), 99 (1) (b) and 148 (1) of the Constitution. The appellant submits that the appeal challenges the application of Articles 10, 25, 38, 47, 50, 83, 88, 99, 137, 148 and 249 of the Constitution as well as Section 22 (2) of the Elections Act.

[43] Jurisdiction is a preliminary issue that ought to be dealt with at the onset given that, without jurisdiction a court is obligated to down its tools as it does not have the power to adjudicate upon the proceedings before it. A court's jurisdiction normally emanates from either the Constitution or legislation or both. This Court stated so in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** SC Application No. 2 of 2011 [2012] eKLR as follows:

“(68) 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. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

[44] The Supreme Court’s appellate jurisdiction is set out in Article 163(4) of the Constitution of Kenya which states:

“(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

a) as of right in any case involving the interpretation or application of this Constitution; and

b) in any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”

[45] This Court has stipulated the confines of its jurisdiction under Article 163(4)(a) of the Constitution in a plethora of its decisions. In ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another***, Sup Ct Petition No. 3 of 2012; [2012] eKLR, a two-Judge Bench of this Court (Tunoi and Wanjala SCJJ) set the guiding principles as follows:

“[28] The appeal must originate from a Court of Appeal case where issues of contestation 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 or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

[46] Further, in ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others***, Sup Ct Petition No. 10 of 2013 this Court stated as follows:

“[37] In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution. ...”

[47] In *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* Sup Ct Petition 45 of 2018 [2020] eKLR we held that it is not enough to invoke constitutional provisions in order to sustain an appeal to this Court. We stated:

“[62] We cannot over-emphasize the specialized nature of Article 163(4)(a)’s Appellate jurisdiction of this Court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower Court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this Court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the Court(s)’determination and the matter turned on purely factual and or statutory issues. Thus, the following attributes are imperative for an appeal to the Supreme Court under Article 163(4)(a) of the Constitution:

- (i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial Court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.*
- (ii) The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the Court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not*

enough for one to generally plead that his case involves issues of Constitution interpretation and application.

- (iii) A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under Article 163(4)(a).*
- (iv) Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a).*
- (v) Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of Article 163(4)(a)."*

[48] In the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** Sup Ct App. No. 5 of 2014 [2014] eKLR we emphasized that at the very least where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, an appellant should demonstrate that the appellate court's reasoning and conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

[49] It is therefore evident that the issues that this Court would exercise its jurisdiction over pursuant to Article 163(4)(a) of the Constitution are only issues involving the interpretation or application of the Constitution, which constitutional issues had been considered and determined by the superior courts. A question identified as involving interpretation or application of the Constitution thus must be one that was argued in the court of first instance and canvassed through the hierarchy of courts, at the Court of Appeal and finally in this Court. Mere allegation by a party that a question of constitutional interpretation or application is involved does not automatically bring the appeal within the ambit of Article 163 (4) (a) of the Constitution, unless the party can show that the matter by

virtue of the court's determination took a constitutional trajectory of interpretation and application.

[50] The appellant is aggrieved by the decision of the 1st respondent, as affirmed by the 3rd respondent, rejecting his application to be registered as a presidential candidate in the elections scheduled for 9th August, 2022 on account of failure to meet the requisite qualifications. His judicial review application was subsequently dismissed by the High Court and his appeal disallowed by the Court of Appeal.

[51] Having perused the record before us, we note that at the High Court, the grounds set out in support of the Judicial Review application were illegality, irrationality, unreasonableness, and bias. The appellant submitted that the 1st and 3rd respondents' actions were contrary to Section 22(2) of the Elections Act, and that he had legitimate expectation that the respondents would apply the law and the Constitution including binding precedent. The trial Judge dismissed the application holding that judicial review does not concern itself with the merits of the decision but only on the decision-making process. For that reason, the Learned Judge found he had no jurisdiction to hear the matter as he could not look into the correctness or otherwise of the 3rd respondent's conclusion that the appellant had not satisfied the requirements to contest as a presidential candidate.

[52] At the Court of Appeal, the issues framed for determination by the court were whether the appellant's application disclosed grounds for judicial review in the context of the nature of judicial review proceedings and whether, properly considered, the appellant's complaints were meritorious enough to warrant interfering with the decision of the 1st and 3rd respondents in finding the appellant as unqualified to contest in the elections scheduled for 9th August, 2022.

[53] In its determination, the Court of Appeal faulted the trial court for strictly constricting judicial review to the pre-2010 constitutional dispensation and for failing to see that the appellant's application revealed in sufficient detail grounds for judicial review which necessitated a decision from the court. The appellate court identified and determined the issues based on the grounds raised by the appellant for judicial review, and proceeded to make a determination on whether

the complaints were meritorious enough to warrant interference by the court, specifically whether the appellant was qualified for registration as a presidential candidate in the elections scheduled for 9th August, 2022.

[54] Having identified that the genesis of the appeal is from a judicial review application at the High Court, we note that this Court in ***Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others***; SC Petition No. 28 of 2014 [2015] eKLR stressed that by no means is this Court an open forum for all cases from the appellate court on judicial review matters and that each appeal is to be considered on its merits on a case-to-case basis. We enunciated that only causes bearing a real constitutional issue can be heard by this Court and a plain claim that a matter raises issues of interpretation or application of the Constitution does not suffice. We set out principles a party should comply with when appealing to the Supreme Court in a matter which has originated in the High Court by way of judicial review, as follows:

- (i) *Not all Judicial Review matters are appealable to the Supreme Court, as of right;*
- (ii) *It is open to the party concerned to move the Court on appeal under Article 163 (4) (b) of the Constitution, in which, the normal certification process applies;*
- (iii) *Where such an appeal comes under Article 163(4)(a), the petitioner is to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal;*
- (iv) *The party concerned should demonstrate that the superior Courts 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.*

[55] Based on the foregoing, the appellant having moved this Court under Article 163(4)(a) of the Constitution, we have to interrogate whether this appeal meets the criteria set out under the Constitution and the decisions set out above. The first question to answer therefore is whether the appellant has identified particular

issues of constitutional interpretation and application, and secondly whether the issues were canvassed at the superior courts which progressed through the normal appellate mechanism so as to reach this Court by way of appeal as of right and or demonstrated that the superior courts misdirected themselves in relation to prescribed constitutional principles. All these have to be further looked at in the context that not all appeals from judicial review satisfy this Court's jurisdictional prerequisite.

[56] The appellant is adamant that his appeal is as of right under Article 163(4)(a) of the Constitution as it involves the interpretation and application of the Constitution and specifically Articles 10, 38, 47, 27, 83, 88 and 249 of the Constitution. He avers that the decision of the Committee was challenged at the High Court seeking its intervention pursuant to its supervisory powers under Articles 1, 2, 3, 10, 25, 27, 38, 47, 48, 50, 81, 88, 136, 137, 138, 165, 258 and 259 of the Constitution. It is the appellant's submission that the Court of Appeal in making its determination considered the provisions of Articles 10, 38, 47, 50, 88, 137, 148 and 249 of the Constitution. He submits that application of Article 10 was core in the determination of the dispute before the 3rd respondent. He adds that the appeal relates to the application of Articles 10, 50, 88 and 249 of the Constitution as canvassed before the Court.

[57] To him, the key determination of the dispute is the application of the right to contest for public office under Article 38 including Article 83(3) of the Constitution which provides for the facilitation rather than denial of an eligible citizen of the right to vote or stand for election. He faults the Court of Appeal for failing to consider the import and effect of Section 22 (2) of the Elections Act and Regulation 47 of Elections (General) Regulations 2012 as amended in 2017 as well as binding precedent.

[58] As we noted in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) a question regarding the interpretation or application of the Constitution may arise from a

multiplicity of factors and interrelationships in the various facets of the law, and the Constitution should be interpreted broadly and liberally so as to capture the principles and values embodied in it.

[59] Evaluating the record, we discern that the appellant was partly successful with his argument on the extent of the jurisdiction of the Court in relation to judicial review applications. This paved way for the appellate court to proceed to analyse the merits of the decision by the 1st and 3rd respondents, in exercise of its powers as the first appellate court to reprise the evidence. In addressing itself to the crux of the appellant's contention relating to his qualification to contest as a candidate, the appellate court addressed itself to the import of the previous decisions in ***Janet Ndago Ekumbo Mbete v. IEBC & 2 Others (supra)*** rendered on 15th March 2013 based on section 22(2) of the Elections Act as read with Regulation 47(1) of the Elections (General) Regulations as they stood in 2013. The Court also took into account the decision in ***Mable Muruli v Wycliffe Ambetsa Oparanya & 3 Others*** [2013] eKLR and the amendment of regulation 47(1) by Legal Notice No 72 of 2017 and the more recent judgment rendered on 30th June 2022 in ***Walter Onchonga Mongare v. Wafula Chebukati & 2 Others (supra)***.

[60] In addition, on the mismatch of the appellant's supporters and their identities, inconsistency between the electronically submitted copy and the hard copy and had illegible copies of identification documents, the Court of Appeal found that:

“There is no dispute that Article 137 (1) of the Constitution and section 23 of the Elections Act expressly demand that to be qualified for nomination, a presidential candidate's bid must be supported by not fewer than 2,000 voters in a majority each of the 47 counties. It is absolutely clear to us that read together, the concern of Article 137(1), section 23 and regulation 23, is not a mere list of names of supporting voters. In addition to the list of names of supporting voters, the list must contain their signatures, identity card or passport numbers, in both hard and electronic copies. The lists are

also required to be serially numbered and accompanied by copies of the identification documents of the supporting voters...

We are not persuaded that this argument has any merit. A reading of Article 137(1), section 23 and regulation 18 leaves no doubt in our minds that the purpose of these provisions is to ensure that a presidential candidate is supported by the prescribed number of genuine and verifiable voters in the prescribed number of counties. The concern is not production of a mere numerical list of names, even if they are just ghost voters. The law seeks to avoid manufactured list of non-existent supporters and that is why it requires, in addition to names of the supporters, their signatures and copies of identification documents. ...”

[61] On the issue of the appellant’s running mate’s nomination certificate, the appellate Court held:

“76. Article 137(1)(c) is clear enough and does not require further elucidation. To qualify for nomination for election as President, and therefore as a running mate, the running mate must be nominated by a political party.

77. The second noteworthy feature about Article 148 is that of the four qualifications set out in Article 137(1), it exempts from application to the running mate only the requirement in Article 137 (1) (d) for nomination by not fewer than 2000 voters from each of a majority of the counties. The express exclusion of Article 137 (1) (d) means that to qualify for nomination by the presidential candidate as a running mate, the running mate must satisfy the other three requirements in Article 137 (1), namely, be a citizen by birth, be qualified to stand for election as a member of Parliament and be nominated by a political party or be an independent candidate.”

[62] Lastly, on the issue of bias, the Court of Appeal’s finding was that the appellant’s allegations relating to Articles 88 and 249 of the Constitution on the functions and independence of the 2nd respondent was no more than a bland assertion unsupported by material evidence.

[63] On our part, it is evident that the Court of Appeal addressed each of the appellant’s grievances. The main grievance, in our view, is the qualification of the

appellant based on section 22(2) of the Elections Act and as read with Regulation 47(1) of the Elections (General) Regulations. The Court also made reference to Article 137(1), section 23 and regulation 23, regulation 18 ad Article 148. While the said provisions and grievances by the appellant are underpinned on Article 38 and 83(3) of the Constitution, the gravamen of the dispute in our view had nothing to do with the interpretation or application of the constitution but rather a factual exercise by the superior courts below to evaluate the appellant's compliance. None of the provisions of statute are by themselves under challenge.

[64] Although the appellant cites several provisions of the Constitution, he has not set out, to any extent and to our satisfaction, the manner in which the superior courts interpreted and applied the Constitution one way or the other. It cannot thus be said that the issues were determined in consideration and pursuant to the interpretation or application of the Constitution to therefore warrant an appeal to this Court under Article 163(4)(a) of the Constitution. The appellant seems to be inviting us to reprise the evidence and be persuaded as to make a conclusion that resonates with his. This is an invitation that we must decline.

[65] As we held in *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others*, [2017] eKLR, and *Petition No. 4 of 2015 and Paul Mungai Kimani & 2 others v Kenya Airports Authority & 3 others* [2021] eKLR, it is not granted that whenever the Court of Appeal mentions a provision of the Constitution in its decision, the matter under consideration automatically invokes this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. In any event, the Constitution is the supreme law of the land and all decisions have to abide by and follow it. Hence, a mention of the Constitution by the court when making a determination will not always clothe the matter with constitutional issues.

[66] Echoing our position in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* SC Petition 2 of 2016 [2018] eKLR, the appellant having not sustained a case that raises any constitutional issues, their interpretation or application, the Court is not vested with the jurisdiction to hear and determine the present appeal pursuant to the provisions of Article 163(4)(a) of the Constitution.

[67] Consequently, it serves no purpose to address ourselves to the remaining issues. Despite asking us to determine this matter for the sake of posterity, the appellant has not shown of the existence of any constitutional moment to be seized and the extent of such moment. The provisions of the Constitution not being in contention, qualifications and nomination of candidates will continue to be addressed as and when they arise based on peculiar circumstances obtaining.

[68] On the issue of costs, we are not persuaded to make any order for costs against any of the parties in this matter, the matter in issue is of the nature of public interest.

[69] We thank all counsel for their input, research and presentation in the course of this matter.

ii) ORDERS

[69] In the end, we make the following orders:

1. *The 1st and 2nd respondents' Preliminary Objection dated 2nd August 2022 is upheld.*
2. *The Petition of appeal dated 29th July 2022 and filed on 1st August 2022 is hereby struck out.*
3. *Each party shall bear their own costs.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of February, 2023.

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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

