# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA

*(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

## PETITION NO. E014 OF 2025

-BETWEEN-

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

**VERSUS**

**THE SENATE.....1ST RESPONDENT**

**JEREMIAH M. NYEGENYE, CLERK OF THE SENATE.....2ND RESPONDENT**

**RT. HON. AMASON JEFFAH KINGI .....3RD RESPONDENT**

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*(Being an appeal from part of the Judgment of the Court of Appeal (Musinga (P), Asike Makhandia & Nyamweya, JJ.A) in Civil Appeal No. E104 of 2023 delivered on 21st March, 2025)*

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**Representation:**

Mr. Isaac Polo Aluochier, the Appellant
*(Acting in person)*

Ms. Mwaura h/b for Ms. Thanji for the 1st and 2nd Respondents
*(Wangechi Thanji, Advocate)*

Ms. Mwaura h/b for Mr. Wambulwa for the 3rd Respondent
*(Job Wambulwa, Advocate)*

# JUDGMENT OF THE COURT

## A. INTRODUCTION

**[1]** The petition of appeal, dated 28th March, 2025, and filed on 23rd April, 2025, under Article 163(4)(a) of the Constitution, challenges the judgment of the Court of Appeal delivered on 21st March, 2025, which upheld the High Court's dismissal of the appellant's case. The appeal raises questions concerning the law and process of resolution of a contest on the qualification of persons nominated for election as Speaker of the Senate.

## B. BACKGROUND

**[2]** Following the general election of 9th August 2022, the President of Kenya, through Gazette Notice No. 10528, notified the public that the first sitting of the Senate would be held on 8th September 2022 at 9.00 am. The 2nd respondent, through Gazette Notice No. 10531, announced that the election of the Speaker would take place on that day, inviting interested parties to collect nomination papers from his office, and return them duly completed, by 2.30 pm on 7th September 2022. The appellant expressed interest in the position, collected and duly returned the nomination forms within the stipulated time. On 7th September 2022, the 2nd respondent announced, through the Parliament of Kenya's Facebook page, that seven (7) candidates had been duly nominated, among them the appellant and the 3rd respondent. On 8th September 2022, the 3rd respondent secured the majority vote, was declared elected as Speaker of the Senate, and was subsequently sworn into office.

## C. LITIGATION HISTORY

### *i. Proceedings before the High Court*

**[3]** Aggrieved, the appellant, Isaac Aluoch Polo Aluochier, filed ***Constitutional Petition No. E489 of 2022*** before the High Court, dated 30th October 2022. He averred that on 28th September, 2022, he wrote to the 2nd respondent seeking information on the nomination process with the intention of moving to court to safeguard his political rights. After 30 days, he had received no response, contrary to Section 6(3)

of the Fair Administrative Actions Act. He thus alleged a violation of his fundamental rights and freedoms under Articles 38(3)(c), 47(1) and (2) and 106(1) of the Constitution, as well as Sections 4(1), (2), (3) and (4), 6(1) and (3) of the Fair Administrative Actions Act.

**[4]** The appellant's case was that, out of the seven candidates, he was the only one who, in law, had been duly nominated as a candidate for the office of Speaker of the Senate. He contended that the other candidates did not fulfil the eligibility requirements under Article 99(1) as read together with Article 85 of the Constitution, and Sections 13(1) and 22(1)(a) and 24(1) of the Elections Act. He further argued that the nomination results released at 6:00 pm on 7th September, 2022, left him with insufficient time to lodge and have a dispute determined by the IEBC on the same day. It was his other position that, pursuant to the Senate Standing Order No. 11, he, being the sole duly nominated candidate at the close of the nominations, ought to have been declared duly elected Speaker of the Senate. Accordingly, the appellant asserted that by declaring the 3rd respondent and not him as duly elected, the 2nd respondent, who had conducted the elections, acted in contravention of the Constitution and the law.

**[5]** The appellant further contended that the unlawful actions of the 2nd respondent had occasioned a constitutional tragedy, remediable only by the court invalidating the nomination and election of the 3rd respondent and substituting him with the appellant. He also concluded that, pursuant to Article 226(5) of the Constitution, the 2nd respondent was liable for the loss of all the public funds, paid as remuneration to the 3rd respondent, whom he described as illegally occupying the office of Speaker of the Senate.

**[6]** As a consequence of all the above complaints, the appellant prayed for the following orders:

> a. *The decision of the 2nd respondent, on behalf of the 1st respondent, communicated on the Parliament of Kenya Facebook page on 7th September, 2022 that the following seven persons were duly nominated as candidates for the contest of Speaker of the Senate, be quashed, with the said candidates being:*

*1. Aluochier Isaac Aluoch Polo,*

*2. Musyoka Stephen Kalonzo,*

*3. George Bush,*

*4. Kingi Amason Jeffah,*

*5. Kinyua Beatrice Kathomi,*

*6. Karuri Frederick Muchiri, and*

*7. Kuria George Njoroge.*

b. *The only duly nominated candidate for the election of Speaker of the Senate, being the only one fully compliant with all legal requirements for election to the said office, was [the appellant] - Isaac Aluoch Polo Aluochier.*
c. *Pursuant to Senate Standing Order 11, [the appellant], Isaac Aluoch Polo Aluochier being the only duly nominated person, was the Speaker-elect upon expiry of the nomination period at 2.30pm on 7th September, 2022.*
d. *The purported election of the 3rd respondent, Amason Jeffah Kingi, is hereby quashed, as he was not lawfully nominated as a candidate for the election of Speaker of the Senate.*
e. *[The appellant], Isaac Aluoch Polo Aluochier, be sworn in as soon as practically possible as the Speaker of the Senate, being the Speaker-elect following the expiry of the nominations at 2.30pm on 7th September, 2022.*
f. *Monetary compensation be paid to [the appellant], equivalent to the remuneration he would have earned in office as Speaker of the Senate, commencing the first sitting of the Senate on 8th September, 2022, payable by or on behalf of the 1st respondent.*
g. *The 2nd respondent to repay the public all public funds losses on account of the unlawful installation into office of the 3rd respondent as Speaker of the Senate, including but not limited to any remuneration paid to the 3rd respondent.*
h. *Costs be paid to [the appellant], as against the 1st and 2nd respondents.*

*i. Or such other order(s) as the court shall deem just.*

**[7]** In its Judgment delivered on 30th January, 2023, the High Court (*Thande J.*) delineated four issues for determination. On *the question of jurisdiction*, the court held that it was vested with authority to determine disputes concerning the election of the Speaker of the Senate, as the process is governed by the Senate Standing Orders and undertaken under the authority of the Constitution. The court found that the remedy under Article 119 of the Constitution, which permits the petitioning of Parliament, does not oust the court's constitutional mandate to determine the constitutionality of any act done by the Senate. Regarding the objection that the petition offended the doctrine of separation of powers, the court held that any unconstitutional exercise by the Senate of its mandate remains subject to judicial scrutiny and cannot be insulated by that doctrine.

**[8]** On *whether Article 99(1) of the Constitution applies to the election of the Speaker of Senate,* the court held that, pursuant to Article 106 of the Constitution, read together with the Senate Standing Orders, a person seeking election as Speaker of the Senate must meet the same qualifications as those required for election as a Member of Parliament, notwithstanding that the Speaker is not an elected Member of Parliament. These qualifications, the court opined, include being a registered voter, meeting educational, ethical, and moral requirements, and either being nominated by a political party or, if running independently, having the support of at least 2,000 registered voters. The court further rejected the contention that these requirements do not apply to the Speaker, stating that the Constitution makes no such exception and that both the Constitution and the Senate's Standing Orders confirm that these qualifications apply to all candidates for the position aforesaid. The High Court on the issue at hand therefore found that Article 99(1)(c) applies to candidates for the office of Speaker of the Senate and disregarding these requirements would go against the Constitution and the Standing Orders of the Senate.

**[9]** *On whether the 2nd respondent violated the appellant's rights*, the court found that the appellant, along with six other candidates, was duly nominated for the position of Speaker of the Senate, and his name was publicly announced. That there was also no

evidence that he was denied the opportunity to participate in the election, nor did he make nor prove such a claim. The court observed further that Article 38(3)(c) of the Constitution grants every citizen the right to run for public office and, if elected, to hold that office. However, the right to hold office is contingent upon being elected. As the appellant received no votes in the election, he was not and could not have been said to have been validly elected. Accordingly, the court held that his rights were not violated as he was duly nominated, allowed to run, and participated and lost in the election, in accordance with the Constitution.

**[10]** On *the appellant's contention that he ought to have been given reasons for not being declared the elected Speaker of the Senate under Article 47(2) of the Constitution*, the court found that the Senate's Hansard of 8th September 2022 reflected that the 3rd respondent received all the 46 votes cast, while the appellant and the other candidates received no votes. The court in that context held that Article 47(2) only applies when someone's rights are negatively affected by an administrative action. In this case, the appellant was allowed to run and participate in the election under Article 38 of the Constitution, but did not win. Having received no votes, therefore, he had no right to be declared the winner or to hold the office. Consequently, no right was violated or negatively affected, and as such, Article 47 did not apply in the appellant's circumstances.

**[11]** In addressing the appellant's contention that he was the only candidate qualified to be nominated for the Speaker election, the court noted that, although the appellant requested the 2nd respondent for the nomination papers of the other candidates to pursue his claim, his request was denied. The court therefore questioned the basis of his assertion that the other candidates were unqualified when he had never examined their nomination papers. It held in that regard that, without reviewing those papers, the appellant could not prove that he was the only one qualified or that he ought to have been declared Speaker, without a vote being cast, as allowed under Standing Order 11. The court emphasized that it was insufficient for the appellant to merely allege that the respondents had misapplied Article 99(1)(c); he was required to adduce cogent evidence demonstrating that the other candidates did not meet the necessary legal requirements and that he alone satisfied them. Reaffirming the principle that a party must present all

relevant facts and evidence in support of their case, the court found that the appellant had failed to prove any violation of his rights under Articles 38 and 47 of the Constitution. Accordingly, it held that the petition lacked merit and dismissed it with costs.

### *ii. Proceedings before the Court of Appeal*

**[12]** Aggrieved, the appellant appealed to the Court of Appeal in ***Civil Appeal No. E104 of 2023*** relying on thirteen (13) grounds of appeal, contending, in summary, that the trial court erred in law and fact when it:

i. *Despite acknowledging that the constitutional qualifications under Article 99(1)(c) of the Constitution apply to Speaker candidates still upheld the election of the 3rd respondent, despite the undisputable evidence that he did not meet these requirements.*
ii. *By wrongly placing the burden of proof on the appellant instead of the 2nd respondent by dint of Section 112 of the Evidence Act, who is the custodian of all nomination records.*
iii. *By failing to find that the 2nd respondent failed to disclose nomination papers, violating Article 81(e)(iv) on transparency in elections.*
iv. *By ignoring Articles 259(1) and 50 of the Constitution on fair trial and the appellant's right to access evidence under Article 35(1), rendering the process unjust.*
v. *By overlooking evidence that the appellant was the only candidate fully compliant with nomination requirements yet the evidence on record demonstrated that he alone was fully compliant with the nomination requirements.*
vi. *By not declaring the appellant the duly elected Speaker under Standing Order 11 and Article 106(1)(a) of the Constitution, nor ordering his swearing-in.*

vii. *By failing to find that the 1st and 2nd respondents allegedly breached the Appellant's rights under Articles 38(3)(c), 47(1), and 47(2) of the Constitution.*

viii. *By failing to award the appellant compensation and not holding the 2nd respondent accountable for public funds spent on the allegedly unlawful installation of the 3rd respondent.*

ix. *By failing to award costs in favour of the appellant.*

**[13]** The appellant sought the same reliefs as in the High Court. The appellate court *(Musinga (P), Makhandia & Nyamweya, JJ.A*) identified one primary issue for determination: *the law on, and process of resolution of a contest on qualifications of persons nominated to stand for election as Speaker of the Senate*. The court observed in that regard that the determination of this primary issue would inform its consideration of the secondary questions, that is, whether the appellant's rights were violated in the circumstances of this appeal, and if so, what remedies he would be entitled to.

**[14]** On *the primary issue,* the Court of Appeal framed the fact in issue to be whether or not the candidates nominated for the election of Speaker of the Senate held on 8th September 2022 met the qualifications set out in Article 106 (1) (a) of the Constitution. It held that pursuant to Sections 107 and 109 of the Evidence Act, the burden rested on the appellant, as the party alleging that the other candidates did not meet the qualifications set out in Article 99 of the Constitution, to prove the existence of this fact, and demonstrate through credible evidence that the nominated candidates did not possess the qualifications. The appellant in that regard did not present any witness testimonies or documents to support his allegation, and instead invoked the provisions of Section 112 of the Evidence Act to attribute the evidential burden to the 2nd respondent.

**[15]** The appellate court in addressing the above issue cited this Court's decision in ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others*** Petition No. 2B of 2014 [2014] eKLR which held that Section 112 of the Evidence Act applies only to matters peculiarly within the knowledge of a defendant, and which the defendant could prove without difficulty or inconvenience and does not apply where the facts are such

that they are capable of being known by a person other than the defendant. The court consequently found that the principal custodian and repository of the information sought by the appellant was not the 2nd respondent but rather the nominated candidates. As affected persons, the appellant ought to have joined them as parties to his petition and sought, within those proceedings, an order for production of evidence of their qualifications, both to discharge his burden of proof and in the public interest.

**[16]** The court further held that the procedure under the Access to Information Act was neither applicable in this respect nor could it be invoked for the purpose intended by the appellant. It was further observed that, while Section 119 of the Evidence Act permits presumptions based on logical inference from established facts, the appellant had failed to provide any foundational facts to support an inference that the nominated candidates lacked the required qualifications. Instead, he improperly attempted to shift the burden of proof to the 2nd respondent without first establishing the necessary facts to justify such a presumption.

**[17]** In the circumstances, the Court of Appeal found no evidence to support the appellant's claim that he was the only candidate who possessed the requisite qualifications and was validly nominated for election as Speaker of the Senate, or that he ought to have been declared elected without a ballot. The court therefore concluded that the learned Judge of the High Court did not error in holding that the appellant had failed to establish his case, and that there had been no violation of his right to hold political office under Article 38, or to his right to fair administrative action under Article 47 of the Constitution. The Court of Appeal ultimately held that the appeal had no merit and dismissed it with no order as to costs, as the issues raised therein were of public interest.

### *iii. At the Supreme Court*

**[18]** Aggrieved by the decision of the Court of Appeal, the appellant filed the instant appeal and relies on nine (9) grounds of appeal viz;

a. *The 3rd respondent, having been proved beyond reasonable doubt, not to have complied with Article 99(1)(c) of the Constitution, in that he was not nominated by his political party PAA, failed to meet the eligibility*

*requirements for election as a member of Parliament. He consequently failed to comply with Article 106(1)(a). His nomination as a candidate for the election of Senate Speaker was therefore in contravention of the Constitution, and so is invalidated by Article 2(4).*

b. *As it is the 3rd respondent who emerged with the most votes in the purported Senate Speaker election held on 8th September, 2022, and was thereafter declared Senate Speaker, yet the said election was held in contravention of the Constitution, the said election is invalidated by Article 2(4).*

c. *There being no person lawfully in office as Senate Speaker, review must be made, in the public interest, of all five other candidates whose names were put forward for election as Senate Speaker, taking note that candidate Stephen Kalonzo Musyoka withdrew his candidature on the morning of 8th September, 2022 before any voting had taken place. This public interest is grounded in Article 81(e)(iv) and (v) of the Constitution, that provides that the electoral system shall comply with the principle of free and fair elections, which are transparent and accountable. This public interest is also grounded in the Article 10(2)(c) regardingtransparency and accountability as national values and principles of governance that are binding upon all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution or any law.*

d. *The burden of proof that all cleared candidates complied with Article 99(1) (c) of the Constitution lies with the 2nd respondent. Senate Standing Order 5(4) imposed upon him the requirement to ascertain that every candidate returning nomination papers is qualified to be elected as Senate Speaker under Article 106 of the Constitution. Under the transparency and accountability asnational values and principles of governance in Articles 10(2)(c) and 81(e), the 2nd respondent was required to openly, without withholding any information, demonstrate that every candidate that he cleared for election had indeed complied with Article 99(1)(c), a requirement he would have discharged by simply availing all the returned nomination*

*papers, especially those of the seven candidates that he had cleared for the election. As already noted, he refused to so avail the said returned nomination papers, and has consistently withheld the said nomination papers throughout these proceedings in the superior courts.*

e. *Had more than one candidate been found to have complied with Article 99(1)(c) of the Constitution, then these compliant candidates should have faced off in a legally valid election for the office of Senate Speaker. But where only the appellant is found to have complied with Article 99(1)(c), then, pursuant to Senate Standing Order 11, the appellant should have beendeclared forthwith to have been elected Speaker without any ballot or vote.*

f. *As the 2nd respondent failed to lawfully discharge his ascertainment obligation in Senate Standing Order 5(4), resulting in his nominating an unqualified candidate for the Senate Speaker election, being the 3rd respondent, who eventually occupied the said office, the 2nd respondent is responsible for making good the unlawful salaries and remuneration paid to the unqualified and invalid Senate Speaker from 8th September, 2022 to the present, pursuant to Article 226(5) of the Constitution.*

g. *Where only the appellant was found to have been duly nominated for the Senate Speaker election, then, pursuant to Article 38(3)(c) of the Constitution, he was entitled to occupation of office as Senate Speaker, following his declaration as Speaker-elect pursuant to Senate Standing Order 11, for the full term of office.*

h. *Where only the appellant was found to have been duly nominated for the Senate Speaker election, then, pursuant to Article 23(3)(e) of the Constitution, he is entitled to full compensation by way of all salaries and other remuneration due to the occupant of the said office as from 8th September, 2022 to the present, payable by or on behalf of the 1st respondent.*

i. *The superior courts below contravened the appellant's Article 50(1) of the Constitution right to a resolution of his dispute by the application of law. The superior courts below did not resolve the questions on the validity of the*

*nomination and subsequent election of the 3rd respondent, yet all evidence on this question was on record.*

*j. The superior courts also did not resolve the contingent question on liability and making good the said liability arising from unlawful remuneration paid to the 3rd respondent on account of his illegal occupation of office as Senate Speaker. The Court of Appeal also did not take into consideration the transparency and accountability requirements in Article 81(e), yet these had been brought to its attention.*

**[19]** The appellant for the above reasons seeks the following reliefs;

1. *THAT the purported election of the 3rd respondent, Amason Jeffah Kingi, as Senate Speaker, be hereby quashed as he was not lawfully nominated as a candidate for the said election.*
2. *THAT the decision of the 2nd respondent, on behalf of the 1st respondent, communicated on the Parliament of Kenya Facebook page on 7th September, 2022, that the following seven person were duly nominated as candidates for the contest of Speaker of Senate, be quashed with the said candidates being 1. Aluochier Isaac Aluoch Polo 2. Musyoka Stephen Kalonzo 3. George Bushe 5. Kingi Amason Jeffah 5. Kinyua Beatrice Kathomi 6. Karuri Fredrick Muchiri and 7. Kuria George Njoroge*
3. *THAT the 2nd respondent to repay the public all public funds losses on account of the unlawful installation into office of the 3rd respondent as Speaker of the Senate, including but not limited to any remuneration paid to the 3rd respondent.*
4. *THAT only candidates who returned nomination papers by the expiry of the nomination period at 2.30pm on 7th September, 2022 be declared duly nominated for the election of Senate Speaker, such candidates being only those who met all the legal requirements for election to the said offices. If only the Appellant, Isaac Aluoch Polo Aluochier, met all the said legal requirements, then only the Appellant be declared duly nominated for the said election.*
5. *THAT if only the appellant, Isaac Aluoch Polo Aluochier, is declared to have been duly nominated by the expiry of the nomination period at 2.30 pm on 7th*

*September, 2022, then pursuant to the Senate Standing Order 11, the appellant was the Speaker-elect.*

6. *THAT if indeed the appellant, Isaac Aluoch Polo Aluochier was the Speaker elect following the expiry of the nomination period at 2.30 pm on 7th September, 2022 he be sworn in as soon as practically possible as the Speaker of the Senate.*

7. *THAT if indeed the appellant, Isaac Aluoch Polo Aluochier, was the Speaker-elect following the expiry of the nomination period at 2:30pm on 7th September, 2022, monetary compensation be paid to him, equivalent to the remuneration he would have earned in office as Speaker of the Senate, commencing the first sitting of the Senate on 8th September, 2022, payable by or on behalf of the 1st respondent.*

8. *THAT costs be paid to the appellant in all superior courts, unless this Honourable Court deems the proceedings to have been in the public interest, in which event each party should bear its own costs in all superior courts.*

9. *THAT both the High Court and the Court of Appeal contravened the appellant's Article 50(1) right to a resolution of his dispute by the application of law on the validity of the nomination and subsequent election of the 3rd respondent, Amason Jeffah Kingi, as the Senate Speaker, by failing to so resolve.*

10. *THAT both the High Court and the Court of Appeal contravened the appellant's Article 50(1) right to a resolution of his dispute by the application of law on the liability and making good of the unlawful remuneration paid to the 3rd respondent, Amason Jeffah Kingi, on account of his illegal occupation of office as Senate Speaker from 8th September, 2022, by failing to so resolve.*

11. *THAT the Court of Appeal contravened the appellant's Article 50(1) right to a resolution of his dispute by the application of law on the constitutional requirement of transparency upon the 1st and 2nd respondents, which would have informed upon which party bore the burden of proof, by failing to so resolve.*

12. *THAT such other order(s) as this Honourable Court shall deem just.*

**[20]** In opposing the appeal, the 1st and 2nd respondents jointly filed a Preliminary Objection dated 6th May 2025 while the 3rd respondent also filed a Preliminary Objection dated 7th May, 2025.

## D. PARTIES' RESPECTIVE SUBMISSIONS

### *i. The Appellant's case*

**[21]** The appellant first challenges the Preliminary Objections, asserting that they contravene Article 27(1) and (2) of the Constitution as well as Rules 59(1) and 63(1) of the Supreme Court Rules as they were filed without payment of court fees or a waiver thereof. He also maintains that his appeal lies as of right as it concerns the interpretation and application of the Constitution specifically Articles 106(1)(a), 99(1), 226(5), 38(3)(c), 23(3)(e), 50(1), 10(2)(c) and 81(e) and, therefore, the Preliminary Objections are devoid of merit.

**[22]** On the merits of his appeal, the appellant contends that the 3rd respondent failed to meet the eligibility requirements for being a Member of Parliament under Article 99(1) of the Constitution and was therefore not validly elected as Speaker of the Senate. He argues in that regard that the 3rd respondent neither demonstrated nomination by his political party, Pamoja African Alliance, nor obtained support of at least 2000 registered voters from Kilifi County, as required, rendering him ineligible for election as Speaker of the Senate under Article 106(1)(a).

**[23]** The appellant further notes that the trial court records contain nomination papers for only two of the seven candidates, being himself and the 3rd respondent. He contrasts his nomination, which was by his political party, the Justice and Freedom Party of Kenya, and fully compliant with Article 99(1)(c), while that of the 3rd respondent, he says fell short of constitutional requirements. He furthermore disputes the 2nd respondent's position that all seven candidates met the qualifications under Article 106 and the Senate Standing Orders, arguing that the 2nd respondent had failed to supply the requested nomination documents in breach of Article 50(2)(j) of the Constitution on the duty of disclosure, thereby limiting his rights under Articles 25(c) and 35(1). He further alleges repeated contraventions of Articles 35(1), 50(2)(j), 10, and 81(e) of the Constitution by the 2nd respondent before, during and after the contested election.

**[24]** From the foregoing, he argues that, being the only candidate who was duly nominated for election following the close of nominations, according to Senate Standing Order No. 11, he should have been declared the elected Speaker, without a ballot. He also seeks a declaration that the 3rd respondent's nomination and election were invalid under Article 99(1)(c) of the Constitution; an order that the 3rd respondent do refund all remuneration unlawfully received; and, in the event of a shortfall, an order under Article 226(5) of the Constitution holding the 2nd respondent personally liable for any loss of public funds occasioned by his unlawful conduct.

**[25]** Additionally, invoking Articles 23(3) and 22 of the Constitution, the appellant seeks compensation equivalent to the remuneration due to him since 8th September 2022, together with interest at no less than 12% per annum or 1% per month. He also argues that the superior courts' failure to determine the validity of the nomination and election of the Senate Speaker infringed his right to a fair hearing under Article 50(1) of the Constitution and contravened Article 20(3)(b) thereof, which obliges courts to adopt interpretations that most favour the enforcement of rights and freedoms.

**[26]** He urges this Court to allow the appeal and grant the reliefs sought for all the above reasons.

### *ii. The 1st and 2nd Respondents' Case*

**[27]** The 2nd and 3rd respondents rely on a circular dated 17th December 2015, by the then Chief Justice Dr. Willy Mutunga, which directed that all state organs at national and county levels, as defined in Article 1(3) of the Constitution, should be exempted from paying court fees. They contend that the 1st respondent, the Senate, and the 2nd respondent, the Clerk of the Senate, qualify as state organs as defined under Article 260 of the Constitution and are therefore both exempted from paying court filing fees. Accordingly, they maintain that their Preliminary Objection is properly before the Court.

**[28]** On the merits of their objection, they argue that the appellant's appeal essentially challenges the superior courts' refusal to shift the burden of proof to the 1st and 2nd respondents to produce the nomination papers and demonstrate that all candidates met the qualifications for election as Speaker of the Senate. They assert that these are factual matters lacking a constitutional basis, and therefore outside the Supreme Court's

appellate jurisdiction. They further submit that the appeal in essence involves issues of general public importance and is therefore improperly before the Court because no requisite certification was sought or granted under Article 163(4) of the Constitution.

**[29]** Regarding the merit of the appeal, they submit that the appellant has reproduced all arguments advanced before the High Court and the Court of Appeal as if an appeal to this Court is a regular appeal before any superior court. Citing ***Odinga & 5 Others Vs IEBC & 3 Others*** (Petition 5, 3 & 4 of 2013 Consolidated) [2013] KESC 6 (KLR) and ***Odinga & Another Vs IEBC & 2 Others*** (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR), they reiterate that Sections 107 and 109 of the Evidence Act places the burden of proof on a party that institutes a suit, and that, the nomination and election of a speaker are *sui generis* in nature, just like election petitions and therefore the standard of proof is higher than the balance of probability. The 1st and 2nd respondents further maintain that the High Court and Court of Appeal correctly held that the onus was on the appellant to prove, through credible evidence, that the nominated candidates did not possess the necessary qualifications for the elected election, and that the appellant should have joined the other nominated candidates as parties to the suit and then applied for the production of evidence of their qualifications to aid his case. Having failed to do so, the appellant did not discharge the burden of proof to support his claim.

**[30]** On the alleged violation of the appellant's political rights, the 1st and 2nd respondents submit that the appellant was granted access to Parliament to campaign and lobby for his election and that he was afforded equal opportunity to participate in the ballot alongside other nominated candidates. They furthermore argue that the Court of Appeal thus correctly found that there was no violation of the appellant's right under Article 38 of the Constitution, and that the appellant is not entitled to any relief or compensation arising from the nomination and election of the Speaker of the Senate.

**[31]** As to the alleged violation of the right to a fair hearing, it is submitted that both superior courts accorded the parties a fair opportunity to present their respective cases. Finally, on jurisdiction, the above respondents emphasize that appeals to the Supreme Court are confined to matters of law, unlike the Court of Appeal, which, in appeals before it, has jurisdiction to consider and determine both law and fact. For a matter to qualify

as a question of law, they assert, an appellant must demonstrate that the superior courts' conclusions were unsupported by established facts or were based on a misdirection, as was stated by this Court in ***Sonko Vs County Assembly of Nairobi City & 11 Others*** [2022] KESC 76 (KLR).

**[32]** In conclusion, they urge the Court to find that the appeal lacks merit and to dismiss it with costs.

### *iii. The 3rd Respondent's case*

**[33]** The 3rd respondent joins issue with the 1st and 2nd respondents adding that he submitted his nomination papers in line with Standing Order No. 5 of the Senate Standing Orders, accompanied by the names and signatures of two senators-elect and a declaration sworn on 6th September, 2022. That he was thereafter duly nominated and elected for the position of Speaker of the Senate, garnering 46 votes, while the appellant failed to secure any votes. He accordingly urges the Court to uphold his Preliminary Objection and dismiss the appeal with costs.

### *iv. The Appellant's Rejoinder*

**[34]** In rejoinder, the appellant reiterates all the arguments in his written submission. In addition, he contends that the respondents have failed to produce evidence of the circular dated 17th December 2015 on the waiver for the payment of court fees and therefore, its existence must be disregarded for purposes of these proceedings. He further argues that, under Article 163(2) of the Constitution, the quorum of the Supreme Court is five (5) judges, yet the circular was issued by one judge, thereby rendering it invalid. Furthermore, the respondents did not apply for a fee waiver under Rule 63(1) of the Supreme Court Rules; consequently, any purported waiver of court fees is invalid. He has added that, under Rule 64(2) of the Supreme Court Rules, the Court does not have discretion to disregard its Rules, with the effect being that the respondents do not have any valid pleadings formally before the Court.

**[35]** The appellant also submits that, since the 3rd respondent has not been sued in his capacity as Speaker of the Senate, but rather on account of alleged ineligibility for that office, he does not qualify to be considered a state organ as defined under Article 260 of

the Constitution. It is further submitted that, as such, the 3rd respondent cannot validly claim to rely on the circular, and without a valid fee waiver applicable to him, none of his documents filed are formally and validly filed before the Court.

**[36]** On jurisdiction, the appellant argues that the Supreme Court can address both matters of law and fact, particularly in disputes relating to the occupation of the office of Speaker of the Senate. He urges the Court, pursuant to section 20 of the Supreme Court Act, to call for and admit further evidence of the returned nomination papers of all candidates, including the 3rd respondent to determine for itself whether the nominees had met the eligibility requirements under Article 99(1)(c) of the Constitution. Finally, he invokes Article 3(2) of the Constitution, submitting that any attempt to establish a government otherwise than in compliance with the Constitution is unlawful.

## E. ISSUES FOR DETERMINATION

**[37]** Having considered the respective parties' pleadings and submissions in the instant petition, this Court is of the considered view that the following issues crystallize for our determination:

i. *Whether the respondents' pleadings are to be expunged for failure to pay the requisite court fees?*
ii. *Whether this Court has jurisdiction to hear and determine the appeal, and if so;*
iii. *Whether the appellant proved his claim before the superior courts below to the required standard;*
iv. *Whether the appellant's constitutional rights were infringed;*
v. *What reliefs are available to the parties?*

## F. ANALYSIS AND DETERMINATION

### *i. Whether the respondents' pleadings are to be expunged for failure to pay the requisite court fees*

**[38]** The appellant has made heavy weather of the respondents' failure to pay the requisite fees attendant to the filing of court pleadings. In response, the respondent has

made reference to a circular issued by the former Chief Justice Dr. Willy Mutunga dated 17th December 2015, which directed that state organs should be exempted from paying court fees. In rejoinder, the appellant not only took issue with the circular, as it was made by a single judge of the Court, but also submitted that, even if the same were to be valid, it ought not apply to the 3rd respondent.

**[39]** On our part, and while the objection has nothing to do with the core issues arising for our determination in the appeal, we have decided to address it nonetheless. In that regard, we note that the circular dated 17th December 2015 was in relation to the waiver of fees for County Governments upon a request being made by the then Chairman of the Council of Governors, Mr. Peter Munya. The exemption was acceded to by the Chief Justice, Dr. Willy Mutunga, who also stated that it has been the practice in all courts in Kenya to exempt National Government organs and agencies from payment of court fees and in line with the Constitution 2010, it was necessary to extend the waiver to County Governments. This fact alone dismisses the appellant's argument that the National Government is not exempt from payment of court fees. We shall, however, consider the appellant's argument, based on the content and intent of the circular *vis-à-vis* prior application of the principle to the National Government and its applicability at the Supreme Court.

**[40]** Article 163 (8) of the Constitution provides that the Supreme Court shall make rules for the exercise of its jurisdiction. The Supreme Court Act 2011 and the Supreme Court Rules 2020 provide regulations for the conduct of proceedings before the Supreme Court. Section 31 (c) of the Supreme Court Act specifically provides that, without limiting the generality of Article 163 (8), the Supreme Court under that Article may make provision for-

> ***"(c) prescribing forms and fees in respect of proceedings in the Supreme Court and regulating the costs of and incidental to any such proceedings;"***

**[41]** Rule 63 of the Supreme Court Rules provides for the waiver of fees, which includes the making of a formal application for such waiver. This provision must, however, be read with the generality attached to Article 163 (8), essentially providing that there is no

limitation to the Court making its own rules for the exercise of its jurisdiction, and Rule 64, which provides that:

> ***"(1) The President of the Court may issue practice directions for the better carrying out of the provisions of these Rules."***

**[42]** Arising from the wider mandate bestowed upon the Chief Justice as the head of the Judiciary and as the President of the Supreme Court, and our understating of the provisions of Article 163 (8) as read with Section 31 of the Supreme Court Act, applicable at the time of the circular, the Chief Justice was within his right to issue the directions in the circular dated 17th December 2015, and by operation of its practice, the Supreme Court adopted the directions in the circular.

**[43]** The circular seeks to exempt only state organs from the payment of court fees, and all other parties seeking exemption must apply for such an exemption in the manner stated above. Section 260 of the Constitution defines a state organ to mean:

> ***"....a commission, office, agency or other body established under this Constitution."***

**[44]** It is not in dispute that the 1st respondent is a state organ, while the 2nd and 3rd respondents rely on the provisions of Article 260 by virtue of the offices that they hold. We note in that context that the 1st and 2nd respondents have surmounted a joint response to the appeal. Our reading of the provisions of Article 260 confirms that its provisions relate to the offices that the 2nd and 3rd respondents hold and not to their persons. The dispute before us also concerns the functions and duties of the 2nd and 3rd respondents in their official capacities, although the appellant chose to sue them in their own names for alleged infractions committed in their official capacities; they have not been sued in their personal capacities. At the time the action was instituted, the 3rd respondent was in office as the Speaker of the Senate. Accordingly, Article 260 of the Constitution applies to them. This is, however, distinguishable from situations where a dispute bears no connection to the duties or functions of a state office, for example, a dispute against a state officer concerning a private land sale transaction which has nothing to do with the office that he/she holds.

**[45]** We therefore have no hesitation in finding that the pleadings filed on behalf of the respondents are properly on record, and we overrule the appellant's objection in that respect. The rationale for the exemption should be obvious. Requiring the State to pay court fees would be circular, amounting to the State paying itself.

**[46]** We further find that the admission of pleadings, even with the advent of the e-filing system, remains the prerogative of the Court registry. In cases where filing fees have not been paid, the appropriate remedy would be for the Court to direct the payment of the outstanding fees, as has been the practice in the lower courts. It cannot be an issue to engage an apex Court with. At any rate, the question of whether or not fees have been paid is a question of fact. Courts should always, however, be mindful of their mandate under Article 159 of the Constitution, which is to administer justice without undue regard to procedure and technicalities.

### *ii. Whether this Court has jurisdiction to hear and determine the appeal*

**[47]** The respondents' Preliminary Objections are premised on the contention that this Court lacks jurisdiction to hear and determine the appeal. The respondents specifically submit that the appeal before us challenges the Court of Appeal's analysis of the evidentiary burden of proof, and therefore, does not involve the interpretation and application of the Constitution. The respondents also submit that the appropriate avenue to raise such a claim is through the provisions of Article 163 (4) (b) of the Constitution, as a matter of general importance. In response, the appellant maintains that the appeal concerns the nomination and election of the Speaker of the Senate under Articles 99 read with Article 106 and in addition, that the issue of evidence and the evidentiary burden of proof, as determined by the Court of Appeal, significantly impacts his right to a fair hearing under Article 50. Therefore, all these issues bring his appeal squarely within the purview of Article 163(4)(a) of the Constitution – appeals as a matter of right.

**[48]** In ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & another,*** SC. Pet. No 3 of 2012; [2012] eKLR, this Court set the guiding principles on its Article 163(4)(a) jurisdiction as follows:

***".....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)....."***

**[49]** We have examined the background of the dispute in the lower courts; the appellant raised the issue of the qualifications and eligibility of a candidate for the office of the Speaker of the Senate pursuant to Article 106 as read with Article 99 of the Constitution. The appellant also sought a declaration that his rights under Articles 38 and 47 of the Constitution had been violated. A challenge to the jurisdiction of the High Court to hear the matter was dismissed, the court finding that the election of the Speaker of the Senate is governed by the Senate's Standing Orders and conducted under the authority of the Constitution. The High Court, in doing so, determined that, under Article 165, it had jurisdiction to hear and determine the petition. At the Court of Appeal, the court considered *inter alia* whether the appellant's rights under Articles 38 and 47 had been violated and determined that no such violation had been proved and dismissed the appeal.

**[50]** It is our finding, without stating more, that the record bears out the appellant's contention that the dispute before the courts below related to the interpretation of Article 99 as read with Article 106 of the Constitution. We agree with the appellant's submission that he has consistently argued in the courts below that his rights had been violated under Article 38 and Article 47 and therefore, we are entitled to interrogate those allegations under Article 163(4)(a) aforesaid. We also do not see how Article 163(4)(b) can be invoked in such obvious circumstances.

**[51]** We therefore find that the issues herein were canvassed before the courts below us; they have transcended to this Court and concern the interpretation and application of the Constitution. This Court has jurisdiction to hear and determine the appeal before us.

### *iii. Whether the appellant proved his claim before the superior courts below to the required standard*

**[52]** The main challenge before the High Court and Court of Appeal was that the 3rd respondent was ineligible for nomination to the elective seat of the Speaker of the Senate. The appellant also contends that he was the only candidate who met the qualifications for the election of the Speaker.

**[53]** Article 106(1)(a) provides:

> ***"(1) There shall be—***
> ***(a) a Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as Members of Parliament but are not such members…"***

**[54]** Article 99 on the other hand stipulates the qualifications for election as a Member of Parliament. Article 99(1) specifically provides as follows:

> ***"(1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—***
> ***(a) is registered as a voter;***
> ***(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and***
> ***(d) is nominated by a political party, or is an independent candidate who is supported––***
> ***(i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or***
> ***(ii) in the case of election to the Senate, by at least two thousand registered voters in the county."***

**[55]** The High Court, in determining whether the provisions of Article 99 (1) (c) of the Constitution apply to the election of the Speaker of the Senate, concluded that the said provision is applicable. The High Court in so finding referred to the plain reading of Standing Order 5 (3), which provides as follows:

> ***"……The nomination papers of a candidate shall be accompanied by the names and signatures of two Senators-elect who support the candidate and a declaration by them that the candidate is qualified to be elected as a Member of Parliament under Article 99 of the Constitution and is willing to serve as Speaker of the Senate……."***

**[56]** The Court of Appeal did not apply its mind to this issue; it, however, proceeded to reassess the evidence, considering the applicability of Article 99 and whether the appellant had proved its case on a balance of probabilities.

**[57]** On our part, we agree with the determination of the High Court to the extent that the provisions of Article 99 apply to the election of the Speaker of the Senate. The Constitution is specific as to the qualifications for nomination of a person seeking to be elected as Speaker of the Senate. Such qualifications have been adopted in the Senate Standing Orders. Going against these clear objectives would be derogating the tenure and meaning of the Constitution.

**[58]** The issue then remains whether, in the circumstances of this case, due procedure on the eligibility, nomination, and election of the Speaker was adhered to, in line with Articles 99 and 106 of the Constitution as read with the Standing Orders of the Senate.

**[59]** The first argument raised by the appellant concerns his request to the 2nd respondent dated September 28, 2022, for copies of all the nomination papers submitted by all the candidates. The request was made under Article 35 of the Constitution and the requirements of the Access to Information Act. The appellant specifically requested for;

1. The Register of the collection of nomination papers.
2. The Register of return of nomination papers.

3. All nomination papers submitted by all persons who returned nomination papers, irrespective of whether or not their names were included in the ballot papers

**[60]** The 2nd respondent, in responding to the request, only acceded to the first two (2) documents but declined to give copies of the third, citing that the information was not to be disclosed under Article 31 of the Constitution (on account of privacy).

**[61]** The Court of Appeal, in addressing the above issue, found that, for the simple reason that the principal custodians and repositories of the information were all the nominated candidates and being affected persons by the request, the appellant ought to have joined them as parties to the petition. The appellate court added that the appellant could have and ought to have made an application for the production of evidence of their qualifications within the said proceedings, to aid his cause in discharging his burden of proof as well as in the public interest. The procedure available under the Access to Information Act was therefore neither inapplicable in this respect, nor could it be used for the purposes intended by the appellant.

**[62]** Article 35 of the Constitution provides for access to information and states that:

> ***"35. (1) Every citizen has the right of access to—***
> ***(a) information held by the State; and***
> ***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.***
> ***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***
> ***(3) The State shall publish and publicize any important information affecting the nation."***

**[63]** The Access to Information Act No. 31 of 2016 enforces the right of citizens to access information as outlined in Article 35 of the Constitution. Section 5 of the Act details the procedures for disclosing information by public entities, including the decision-making process, channels of supervision, accountability, and norms for fulfilling their functions. Section 6 sets out the limits on disclosing information. These limits include, under

Section (d), disclosures that could result in an unwarranted invasion of an individual's privacy, other than that of the applicant or the person on whose behalf an application has been made with proper authority. Section 6 (5) also states that a public entity is not required to provide information to a requester if that information can reasonably be obtained through other means.

**[64]** If a decision has been made to refuse access to the information requested, Section 14 of the Act states that an applicant may submit a written request to the Commission on Administrative Justice for a review of the public entity's decision. Such a review should be requested within thirty days of the public entity's decision. Sections 20 to 23 outline the broad mandate and functions of the Commission in its inquiries, including investigative roles. A person who is dissatisfied with the commission's decision may appeal to the High Court within 21 days of the order being issued.

**[65]** In ***Njonjo Mue & Another Vs Chairperson of Independent Electoral and Boundaries Commission & 3 others*** [2017] KESC 45 (KLR) this Court expunged internal correspondence between members of the Independent Electoral and Boundaries Commission in the presidential election petition from the record of the Court. In its determination, the Court stated that the information should flow from the custodial of such information and that citizens should follow the prescribed procedure whenever they require access to information (paragraphs 13 to 23):

> ***"...Article 35(1)(a) and (b) of the Constitution, read with section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies.....We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.... Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such***

***information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process....”***

**[66]** In ***Kenya Railways Corporation & 2 others Vs Okoiti Omtatah & 3 others*** [2023] KESC 38 (KLR), this Court reaffirmed the principle in the ***Njonjo Mue case*** (supra) at paragraphs 86 to 88 of its judgment while considering whether documents presented by the appellant were illegally obtained and therefore warranted expunging. In addressing the issue this Court stated:

***“Article 35 of the Constitution of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The Access to Information Act No 31 of 2016 was enacted to give effect to article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency.....The right to institute an action in court only crystallizes once a citizen has requested for the information from the State and the request has been denied or not provided.....This court has previously addressed the question of admissibility of unlawfully or improperly obtained evidence in the Njonjo Mue case (supra). In that case, we recognised that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. We further observed that a duty is imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such***

***information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law....”***

**[67]** We have examined the request made by the appellant in accordance with the limits outlined in Section 6 of the Access to Information Act and in light of our jurisprudence above. We conclude that the information requested by the appellant from the 2nd Respondent (which was nomination papers submitted by candidates for the election of Speaker), is information that is a public record, this being a publicly conducted nomination process for election to a public office. Therefore, that information does not fall within the category of information falling in the exception provided for in Section 6 (1) as read with Section 5 of the Act. However, that said, we find that if the appellant was dissatisfied with the 2nd respondent's decision, he was still required to pursue the remedies explicitly provided by the Act. This he did not do. He inexplicably chose not to follow the prescribed statutory procedure and thus failed to exhaust the available remedies before filing his case in the High Court.

**[68]** Having so held, we deem it necessary to add that the Senate ought to consider amending its Standing Orders to include a provision that grants candidates for election to the position of Speaker reasonable and sufficient access to all necessary documentation that they may require prior to and after such an election. That way, complaints about the fairness of the entire process will be eliminated, more so because the process of election of a Speaker transcends the individual interest of candidates and involves the wider public. The need for all information relating to the election to be made public, including that relating to the qualifications of candidates, ought therefore not to be constrained by the strictures and demands of privacy per se.

**[69]** The appellant has further submitted that, once he raised the claim as to the ineligibility of the 3rd respondent and the failure of the 2nd respondent to ascertain compliance with Articles 99 as read with Article 106 of the Constitution, then the burden of proof shifted to the respondents. Section 107(2) of the Evidence Act defines what constitutes burden of proof thus:

***"2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

**[70]** Section 108 of the Evidence Act also provides that:

***"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

**[71]** Other relevant provisions of the Evidence Act include Section 109, which provides that *the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*; Section 112 which states that *in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him;* and Section 119 which outlines that *the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

**[72]** The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue. In ***Raila Odinga & 5 others Vs Independent Electoral and Boundaries Commission & 3 others*** (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (par. 195 of the judgment), this Court remarked that evidence in an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner or plaintiff, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswerable case has been made.

**[73]** In ***Raila Odinga & another Vs Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another*** (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR), this Court described the application of the legal and evidential burden of *proof in election cases in the following words:*

***"...a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court." That is fixed at the onset of the trial and unless circumstances change, it remains unchanged."***

**[74]** The Court distinguished between the legal and evidential burden of proof and the circumstances under which the burden may shift to the opposite party;

***"[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.***

***[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law."***

**[75]** In ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others*** Petition No. 2B of 2014 [2014] eKLR, this Court when contextualizing Section 112 of the Evidence Act and whether the electoral register is a public document within the knowledge of the IEBC, determined that its production will be a matter of course, upon

an application by a party who wishes to rely on its contents, this burden activated, in an election petition, only when the initial legal burden has been discharged. The Court stated:

> ***"...188. Can it be said that an electoral register, a public document, is a fact 'especially' within the knowledge of the IEBC in the context of the provisions of Section 112 of the Evidence Act? In our view, what is within the power of the IEBC is the custody of the register, and its production will be a matter of course, upon an application by a party who wishes to rely on its contents. We would agree with the learned Judges of Appeal, however, that the evidential burden regarding the contents of the register and declared results lies on the IEBC; save that this burden is activated, in an election petition, only when the initial legal burden has been discharged.***
>
> ***189. Section 112 of the Evidence Act, on which the learned Judges of Appeal placed reliance, is an exception to the general rule in Section 107 of the same Act. Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof...." (Emphasis Ours)***

**[76]** Applying the above findings to the present case, did the appellant provide sufficient evidence to shift the burden of proof to the respondents? The record shows that the appellant's claim before the High Court was not supported by documents to prove that the 3rd respondent and the other nominated candidates were ineligible to vie for the position of Speaker of the Senate. The appellant only provided documents proving his own eligibility. The 2nd respondent, in reply to this contention, stated that he vetted and established that the seven (7) nominated candidates had met all the requirements and qualifications set out in Article 106 of the Constitution as well as Standing Order No. 5 of the Senate Standing Orders. Further, in a press release dated 7th September 2022, the 2nd respondent also stated that he had received forty-one (41) nomination papers, out of which seven (7) were complete. The 3rd respondent also replied, and stated that he met all the qualifications and attached an affidavit which indicated he is a registered voter in Magarini Constituency, a curriculum vitae, evidence of his education, and clearance

certificates to ascertain ethical and integrity requirements. He also attested to being the party leader for Pamoja Africa Alliance and was nominated by two senators, i.e. Aaron Cheruiyot Kipkurui and Hon. Ali Ibrahim Roba.

**[77]** The appellant, despite the above, contends that it was the 3rd respondent's obligation to prove that he was nominated by his party, Pamoja Alliance Africa, which he failed to do so but our finding is that, the burden of establishing a case is not the same as the burden of adducing evidence because the former never shifts, while the latter may shift in certain circumstances and that the burden of proof shifts only in relation to the presentation of evidence. This means that the responsibility to prove a case remains with the party that initiated it, as stated in their pleadings, while the burden shifts only when adverse evidence is introduced; it then becomes the duty of the opposing party to provide such evidence. It was therefore, and in that context, the appellant's burden to present evidence showing, on the balance of probabilities, that his allegations were true. In this case, the appellant's pleadings only supported his eligibility for the nomination for the position of Speaker of the Senate and in our view, the evidence presented does not meet the expected standard to shift the burden of proof to the 2nd and 3rd respondents, and as outlined above, Section 112 of the Evidence Act does not absolve a party from the burden of proof more so in the manner suggested by the appellant.

**[78]** Regarding the appellant's claim that he was the sole nominee who qualified to be elected as Speaker of the Senate, the appellant's failure to include all the other candidates in the election as parties to the suit and his failure to request documentation during the trial at the High Court impacted his case. Without an explicit request for the production of documentation, a party that wishes to rely on such documents cannot compel the court or the opposing party to assume that they exist only because such a claim has been made without more. Additionally, the nominees were the custodians of the information and, therefore, we agree with the Court of Appeal that these candidates needed to be parties to the suit and that their individual and personal documents were theirs to produce once sued.

**[79]** Furthermore, we note that the Clerk of the Senate undertook various steps before the elections, including maintaining the register for the date and time the nomination

papers were received in line in Order 54 of the Standing Orders, publicizing to the public and making available to all Senators the list of all qualified candidates, inclusive of copies of their curriculum vitae without any objection by the appellant. The Senators thereafter proceeded to elect the 3rd respondent as Speaker of the Senate, triggering the current litigation.

**[80]** The upshot of our above finding is that the courts below us were correct in their assessment that the appellant had failed to prove his case as regards this ground on a balance of probabilities, and we have no hesitation in finding that due procedure in the election of the 3rd respondent as the Speaker of the Senate was adhered to in line with Article 99 as read with Article 106 of the Constitution.

***iv. Whether the appellant's rights were infringed?***

**[81]** The appellant claims violation of his rights under Articles 38, 47, and 50 of the Constitution. Article 38 (2) provides that every citizen has a right to free, fair, and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the Constitution. Article 47 (1) states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, while Article 50 provides for the right to a fair hearing.

**[82]** We have considered the process leading to the election of the 3rd respondent as Speaker of the Senate and the election process itself. All the nominees were accorded ample time to campaign and vie for the position aforesaid. The Hansard Report of the Senate dated 8th September 2022 shows that the election was conducted through a secret ballot. All the nominees were granted the opportunity to have their respective agents witness the balloting and counting of votes. The 3rd respondent was elected by a majority of 46 votes; no other nominee got a vote. The provision of Standing Order No. 7, on the election threshold, that *"A person shall not be elected as Speaker unless he or she is supported in a ballot by the votes of two-thirds of all the Senators*" was therefore met. If no candidate had been supported by two-thirds of all the Senators, a fresh election would have been held. In this case, the total number of Senators was 67, with two-thirds being 45. The Clerk found that the 3rd respondent therefore, met the two-thirds threshold and

was duly elected as Speaker of the Senate. The claim that the appellant's rights under Article 38 were infringed was therefore not substantiated.

**[83]** As regards his claim of infringement of his rights under Article 47 of the Constitution, we find, and agree with the High Court and Court of Appeal, that the appellant did not substantiate in what ways this right had been violated, and there was no sufficient justification to warrant relief as relates to the violation of this right. This case ought in the circumstances to be distinguished from our decision in ***Likowa Vs Isaac Aluochier & 2 others*** (Petition E008 of 2024) [2025] KESC 25 (KLR), where we found that in the conduct of the Clerk of the Migori County Assembly, and related to the election of the Speaker of the County Assembly, the processes constituted an administrative action. In that case, this Court dealt with the opaqueness of the process leading to the nomination and declaration of the results of the Speaker of the County Assembly of Migori. The Court in paragraph 96 of its judgment, determined that the conduct of the Clerk of Migori County Assembly did not meet the constitutional test of transparency as the same was not open to scrutiny by the public, or those who were interested in the seat of the Speaker of the County Assembly. The process undertaken in this case was conversely transparent, and we have no difficulty in upholding it. The Clerk of the Senate published all the processes and the results in both print and social media without any opacity. The appellant has therefore failed to elucidate and prove how due procedure in the Standing Orders was not adhered to.

**[84]** Lastly, on the right to fair hearing under Article 50 of the Constitution, we have appreciated the reasoning of the courts below us and the opportunity granted to the appellant to present his case. The appellant was accorded a fair hearing by both courts below. The High Court and Court of Appeal determined the issues presented before them, and determined compliance with Article 99 as read with Article 106 of the Constitution in the affirmative. Displeasure with the final orders of a court cannot amount to violation of the right to fair hearing. In the present case, we have seen no evidence and none has been presented to show that this fundamental right was violated in any way.

**G. CONCLUSION**

**[85]** Having determined that the appellant did not avail evidence to prove that the election of the 3rd respondent was not in line with the provisions of Articles 99 as read with 106 of the Constitution, or that his rights under Article 38, 47, and 50 were infringed, we fully agree with the determination of the Court of Appeal and hereby dismiss the petition of appeal.

**[86]** Costs are awarded at the discretion of the court and in accordance with laid down principles as enunciated in ***Jabir Singh Rai & 3 Others Vs Tarlochan Singh Rai Estate & 4 Others*** SC Petition No. 4 of 2012; [2023] eKLR, noting the nature of the appeal and the public interest involved in the matter, we shall make no orders as to costs.

**H. FINAL ORDERS**

**[87]** Accordingly, we make the following final Orders:

i. ***The Petition of Appeal dated 28th March 2025 and filed on 23rd April 2025 is hereby dismissed.***
ii. ***We hereby direct that the sum deposited as security for costs herein be refunded to the appellant; and***
iii. ***There shall be no order as to costs.***

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **3rd** day of **October 2025**

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

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

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

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| ..... | ..... |
| **I.LENAOLA** | **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**