



**Abdalah v Chebukati, Chairman, IEBC Independent Electoral and Boundaries Commission  
(Constitutional Petition E009 of 2022) [2022] KEHC 10911 (KLR) (3 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10911 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E009 OF 2022**

**JM MATIVO, J**

**JUNE 3, 2022**

**BETWEEN**

**YUSUF GITAU ABDALAH ..... PETITIONER**

**AND**

**W. CHEBUKATI, CHAIRMAN, IEBC INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. This Petition was drawn and filed by the Petitioner in person without the benefit of a legal counsel. The facts in support of the Petition as pleaded are relatively slim and hazy. The averments in the Petition and the prayers sought are of a rambling nature and lack cohesion. Nevertheless, in order to appreciate the contentions raised in this Petition, it would be advantageous to read the averments in juxtaposition with *the Constitution*. The Petitioner commenced the Petition by rehashing the Preamble to *the Constitution*. He also cited provisions of articles 1(1), 2(5), (6), 16 and 141(1) of *the Constitution*.
2. His contestation is captured in the following excerpts from his averments: - one, “the reality of the leadership that holds the sovereign power after the Bomas draft and reason why Kenyans sought to congregate at the Bomas of Kenya. Two, “illegal operations from Naivasha to Kilifi planned to steal the peoples well documented will which deceit was revealed by the BBI trajectory. Three, “to prove historical injustices to the Swahili is real and a disaster for future generations.” Four, “the Miguna Miguna migration a further prove that we are under siege from illegal operatives who have no respect for court orders. Five, “the inhuman police showing that colonial ways remained because respect of *the Constitution* is lacking.”
3. The reliefs sought are: -
  - a. That the IEBC even though a creation of illegal projections be allowed to run an election under the Lancaster Constitution, a referendum of the Boma draft



with elective positions of equal tribe 9 MCA's plus one for Nairobi. 10 MPs for every tribe, 14 Senators and 14 Governors.

- b. That the Ballot Paper should have information to accommodate both the Lancaster Constitution and the Bomas Draft with yes/no referendum and the candidates they would prefer.
  - c. That the 2010 Constitution be declared illegal as articulated in court of Appeal and Supreme Court BBI judgment.
  - d. That all elected officials in the 2017, 22 county Governments, Parliament, Senate be barred from elections as candidates for failing to protect the Constitution.
  - e. That the IEBC be ordered to ensure all elective posts be for all tribes in equal numbers so as to run away from what has been called tyranny of numbers whereby big tribes become the only law makers.
  - f. That all laws created by the Government since the Bomas draft be declared illegal among them the anti-terror bill, the Covid Laws, the war operations in Somalia to stop immediately and the current government be refused the right to make any new laws as it is an illegal creation.
  - g. That to ensure a smooth running of the elections, the court creates a citizen panel with no political seat ambitions by way of a secret ballot comprising of 6 from every tribe who will be the people's eyes.
  - h. That IEBC be allowed to run elections and resign to pave way for creation of a new body.
  - i. That media houses be ordered to print the Bomas Draft.
4. The Respondents through the firm of Muthee Kithiko Soni & Associates LLP filed grounds of opposition dated 14<sup>th</sup> April 2022. They contend that:- the Petition is vexatious, indecipherable, unmaintainable and a total waste of this court's judicial time; that the Petition is wanting both in form and substance; that it contains spurious incoherent and generalized allegations against all and sundry; that it lacks specificity; it impugns the current constitution; it seeks to declare the Constitution illegal; and, lastly the Petitioner misunderstood the decision in David Ndiu & others v AG & others,<sup>1</sup> IEBC & 4 others v David Ndiu & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae),<sup>2</sup> and Attorney General & 2 others v Ndiu & 79 others; Prof Rosalind Dixon & 7 others (Amici Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)).<sup>3</sup>
5. A second Notice of Preliminary Objection also dated 14<sup>th</sup> April 2022 and filed the same day as the above objection was filed by the firm of Arwa & Change advocates. They described the Petition as time barred, that it does not raise constitutional issues, fatally defective and overtake by events. On 21<sup>st</sup> April 2022 I directed the two firms of advocates to sort out their issue of representation and scheduled the Preliminary Objection for hearing on 20<sup>th</sup> May 2022.

<sup>1</sup> {2021} e KLR.

<sup>2</sup> [2021] e KLR.

<sup>3</sup> [2022] KESC 8 [KLR]



6. On 20<sup>th</sup> May 2022, after hearing brief submissions on the Preliminary Objection, I directed that the Objection be treated as the Respondents' opposition to the Petition and that we proceed to hear the substantive Petition on merits. This I said will save judicial time and also afford the Petitioner to argue his Petition on merits.
7. Without demeaning the role, purpose and meaning of Preliminary Objections, it is my view that where possible, constitutional Petitions should much as possible be determined on merits. This is because in determining the Objection, more often than not, the parties and the court inevitably delve on merits. Courts are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities or Preliminary Objection which force the Parties to argue the merits of the Petition as if they are arguing the substantive Petition as happened in the brief submissions before me before I directed that we hear the main suit. Simply put, to be preferred is an approach that places emphasis on merits as opposed to undue technicalities. Courts should critically examine the meaning of the "on the merits," how the principle has permeated our procedural theory and architecture, courtesy of our transformative, liberal and progressive Constitution and why, despite the allure procedure, we should prefer the "on the merits" principle.
8. Perhaps, I should clarify that a resolution "on the merits" occurs when a lawsuit is decided according to procedural rules that (1) are designed, interpreted, and implemented to give the parties a full opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case, and (2) do not systematically affect the outcomes of cases due to the intended operation of a principle other than the principle of allowing the parties a full opportunity to participate. Major aspects of the procedural laws both criminal and civil flow directly from the constitutional dogma that parties deserve a full opportunity to participate in shaping decisions about their claims and defenses.
9. The Petitioner in his submissions essentially replicated his Petition, so it will add no value to rehash it here. I will only highlight few of his arguments, such as in 2002, President Kibaki promised to deliver a new Constitution within 100 days, but it took 2000 days to do so. He claimed he could not find a copy of *the Constitution*. It was his argument that *the Constitution* was stolen.
10. The Respondents counsel, Mr. Mutugi relied on the grounds in the Preliminary Objection. He cited Articles 255, 256 and 257 which provide for amendments to *the Constitution*. He argued that the Petitioner misunderstood *the Constitution* and argued that the orders sought seek to overturn *the Constitution*.
11. A useful starting point in determining this Petition is to underscore that *the Constitution* is basic and paramount law to which all other laws must conform and to which all persons, and all state organs must defer. No act shall be valid, however nobly intentioned, if it conflicts with *the Constitution*. *The Constitution* must ever remain supreme. The concept of Supremacy of *the Constitution* confers the highest authority in a legal system on *the Constitution*. All must bow to the mandate of this law. Expediency must not be allowed to sap its strength nor greed for power debase its rectitude. Right or wrong, *the Constitution* must be upheld as long as it has not been changed by the sovereign will of the people lest its disregard result in the usurpation of the majesty of the law.
12. Even though it cannot be said that any provision of *the Constitution* is superior to the others, the principle of the Supremacy of our Constitution is articulated in Article 2 which asserts the Supremacy of *the Constitution* as the fundamental law of Kenya. By these provisions, *the Constitution* emphasizes that it is *the Constitution* that governs. These provisions place *the Constitution* on a pedestal above that of the ordinary laws of the land. *The constitution*, mirrors the will and aspirations of the Kenyan people and it is the Supreme law of the land.



13. Constitutional supremacy trumps any other norm into the legal system in case of open conflict and/or conditions the interpretation of other norms that show some sort of inconsistency with the constitutional imperatives. Constitutional supremacy means that no laws or actions can violate a nation's constitution. The doctrine of constitutional supremacy holds that *the Constitution* is the supreme law of the land and all State organs are bound by it and must act within the limits laid down by *the Constitution*.
14. The principle of constitutional supremacy as applicable in Kenya was carved by all the people of Kenya as stated in the preamble to *the Constitution*. Clearly, it is without doubt that *the Constitution* of Kenya in the hierarchy of legal norms and laws in the legal system is most supreme and thus these principles have to be preserved and jealously guarded. *The Constitution* by virtue of Article 2 is the supreme and most fundamental law of Kenya and this court cannot shut its eyes to breaches of *the Constitution* when they loom large in a case before it.
15. The principle of Supremacy of *the Constitution* is necessary in a democratic state as Kenya and it is quite clear over the years that the upholding of the Supremacy of *the Constitution* is itself of great constitutional utility. A Constitution is organic and thus as a result allows for the growth and progressive development of its own peculiar conventions especially because it is an instrument of rights and not a catalogue of powers. The sacred nature of *the Constitution* thus demands that it grows with the development of the nation and adopts to new circumstances, challenges, etc. Thus, in interpreting a national constitution, it must be given a benevolent, broad, liberal and purposive construction so as to promote the apparent policy of its framers. In effect, a strict, narrow, technical and legalistic approach must be avoided.
16. A written Constitution such as ours embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life. *The Constitution* has its letter of law. Equally, *the Constitution* has its spirit. Its language must be considered as if it were a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.<sup>4</sup>
17. Kenya is in an era of constitutional supremacy which vests the power of supervising and enforcing the provisions of *the Constitution* in the courts whose judges have sworn to uphold and defend its provisions without fear or favor. This means that our courts must not and cannot under the cloak of constitutional interpretation undermine the Supremacy of *the Constitution* when it is to be upheld. It is for the courts, as the guardians of legality, to ensure that all agencies of the State, bodies and persons relating with the state keep within their lawful bounds. *The Constitution* must, notwithstanding being regarded as a document capable of growth, be read as an organic whole in order to determine the true intent and purport of the entire provisions therein. A constitution 'marries power with justice,'<sup>5</sup> it makes the exercise of power procedurally predictable, it upholds the rule of law, and places limits on the arbitrariness of power. It is the supreme law of the land, and it provides the standards that ordinary statutes have to comply with.
18. This court, like all other organs of the State are bound by *the Constitution*. The court is also bound by the doctrine of legality. The prayers sought are a direct affront to the Supremacy of *the Constitution*.

<sup>4</sup> See *Tuffuor v Attorney - General* [1980] GLR 637 per Sowah JSC.

<sup>5</sup> *Lutz, D. S., Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006).



Article 2 (1) provides that This Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government. As if to leave nothing to chance, the drafters clearly stated that *the Constitution* binds all persons and at Article 260 is defined to include a company, association or other body of persons whether incorporated or unincorporated.

19. Article 2(2) provides that: - No person may claim or exercise State authority except as authorized under *the Constitution*. The prayer that the forthcoming general elections be conducted under the Lancaster House conference flies on the face of this provision.
20. Article 2(3) provides: - The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ. The Petitioner invites this court to declare *the Constitution* illegal. Such a prayer is a serious affront to the entire Constitution. In fact, all the prayers sought seek to upset the constitutional order, which is a serious assault to the supremacy of *the Constitution* and the entire constitutional order.
21. To me the only prayer available from this court is a dismissal. I therefore dismiss this Petition with no orders as to costs.

Orders accordingly.

**SIGNED, DATED, DELIVERED VIRTUALLY AT MOMBASA THIS 3<sup>RD</sup> DAY JUNE 2022**

**John M. Mativo**

**Judge**

