



**Aluochier v Independent Electoral and Boundaries Commission (IEBC) & 15 others;
Office of the Registrar of Political Parties & another (Interested Party) (Judicial Review
Application 12A of 2022) [2022] KEHC 9774 (KLR) (12 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 9774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
JUDICIAL REVIEW APPLICATION 12A OF 2022**

RPV WENDOH, J

JULY 12, 2022

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, ARTICLES
47, 88 (4) (E), 193 (1) (B), 194 (1) (E) AND 249**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015
SECTIONS 7 AND 11**

IN THE MATTER OF THE ELECTIONS ACT SECTION 22 AND 25

**IN THE MATTER OF THE ANTI - CORRUPTION AND ECONOMIC
CRIMES ACT 2003 SECTIONS 2 AND 45**

**IN THE MATTER OF THE LEADERSHIP AND INTERGRITY ACT 2012
SECTION 13**

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER APPLICANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

**SHADRACK OTIENO NYAWADE - EAST KAMAGAMBO
WARD 2ND RESPONDENT**

JOSHUA ONYANGO OUMA-EAST KAMAGAMBO WARD .. 3RD RESPONDENT

**DANIEL OOKO OKENDO - SOUTH KAMAGAMBO WARD 4TH
RESPONDENT**

HILLARY OCHOLA MAERI-WASWETA II WARD 5TH RESPONDENT

BONFACE OUMA-EAST KANYAMKAGO WARD 6TH RESPONDENT



JOHNSON WILLYS OYUGI OLOO - GOT KACHOLA WARD	7 TH RESPONDENT
OTIENO NESTORY OWIYO - WEST SAKWA	8 TH RESPONDENT
ALBERT ODETTE AMOLLO - WIGA	9 TH RESPONDENT
MALLAN OGEGA OMOLO - RAGANA - ORUBA	10 TH RESPONDENT
PETER OCHIENG MIJUNGU - WEST KANYAMKAGO	11 TH RESPONDENT
ALEX JAOKO AKUGO - CENTRAL KANYAMKAGO	12 TH RESPONDENT
BRIAN ODHIAMBO OSODO - KACHIENG	13 TH RESPONDENT
THOMAS OMONDI AKUNGO - KALER	14 TH RESPONDENT
HEVRONE KILLMESS MAIRAH - MUHURU	15 TH RESPONDENT
ELIAS JUMA NYAHURE - ISIBANIA	16 TH RESPONDENT

AND

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES INTERESTED PARTY MIGORI COUNTY ASSEMBLY	INTERESTED PARTY
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JUDGMENT

1. Isaac Aluoch Polo Aluochier (the applicant) commenced these Judicial Review proceedings by way of a Notice of Motion Application dated 21/6/2022. The application is supported by the grounds appearing on its face and an affidavit of the applicant dated evenly together with unmarked annexures. The applicant further filed responses to the 2nd, 5th, 7th, 8th, 9th, 12th, 13th, 14th and 16th respondents' replying affidavit and notice of preliminary objection and a reply to the 3rd, 4th, 6th and 10th respondents' grounds of opposition. The judicial review orders which the applicant seeks are against the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee Panel No. 2 comprised of Geroge Murugu (Chair), Juliana Cherera (Commissioner) and Boya Molu (Commissioner) in IEBC/DRC/CRGE/185/2022 delivered on Sunday 19/6/2022.
2. The applicant seeks the following orders:-
 - a) Spent.
 - b. The 2nd, - 16th respondents are each not eligible for election as member of county assembly, pursuant to Article 193 (1) (b) of *the Constitution*.
 - c. The names of the 2nd - 16th respondents be excluded from those duly nominated for the appropriate county assembly wards.
3. The applicant deponed that he lodged a complaint with the 1st respondent on 9/6/2022 pursuant to the provisions of Article 88 (4) (e) of *the Constitution*, Section 74 of the *Elections Act* and the *Rules of Procedure for Settlement of Disputes* (RPSD) issued under the *Elections Act*; that the matter was heard on 15/6/2022 and by a determination delivered on 19/6/2022, the 1st respondent found that it lacked jurisdiction to hear and determine the complaint on the basis that there exists a similar matter in the High Court at Nakuru being Nakuru Constitutional Petition No. E004 of 2022, Peter Kibe



- Mbae vs Speaker, County Assembly of Nakuru & Another; Registrar of Political Parties & 49 Others (Interested Parties), thus Section 6 of the *Civil Procedure Act* prohibits the 1st respondent from hearing the matter; that the complaint raised constitutional issues that are the exclusive preserve of the High Court pursuant to Article 165 (3) (d) of *the Constitution* and the complaint sought the making of criminal findings which is outside the 1st respondent's jurisdiction.
4. The applicant faulted the 1st respondent for placing reliance on the *Civil Procedure Act* in its consideration of the electoral dispute before it; that Section 12 of the *Civil Procedure Act* applies to proceedings before all other courts but the 1st respondent is not a court of law but a Constitutional Commission established pursuant to Articles 88 and 248 of *Constitution*; that unless specifically provided for in law, the 1st respondent's electoral dispute resolution processes are subject to Article 88 (4) (e) of *the Constitution*, Section 74 of the *Elections Act* and the Rules of Procedure for Settlement of Disputes (RPSD) issued under the *Elections Act* in Legal Notice No. 139 of 2012.
 5. The 1st respondent entered appearance through the firm of Ogejo, Omboto & Kijala Advocates. It filed grounds of opposition dated 5/7/2022. The grounds of opposition can be summarized as follows:-
 - i. That the Judicial Review Application does not meet the evidentiary threshold of granting the orders sought.
 - ii. The facts/grounds which the application is anchored and/or the petition is incompetent, fatally defective, misconceived and an abuse of the court process as it negates the well laid down principles and essence of res judicata in so far as the Judicial Review Application is concerned.
 6. The firm of Midenga and Company Advocates entered appearance on behalf of the 2nd, 5th, 7th, 8th, 9th, 12th, 13th, 14th and 16th respondents. In opposing the application, they filed an affidavit to swear an affidavit, replying affidavit sworn by Shadrack Otieno Nyawade on behalf of his co-respondents, a notice of preliminary objection and a list of authorities all dated 1/7/2022.
 7. It was deponed that the 1st respondent was right in its decision in finding that it lacked jurisdiction to hear the complaint before it; that the applicant sought that the 1st respondent do find that the respondents had violated Chapter Six of *the Constitution*, the provisions of the *Anti - Corruption and Economics Crimes Act*, 2003, the *Leadership and Integrity Act*, 2012 and the *Penal Code*, Cap 63 Laws of Kenya without tabling evidence on the allegations; that the respondents are serving members of the County Assembly Migori having been elected on ODM ticket in 2017; that they fall under the category of state officers who do not need to rescind their positions if they wish to defend their positions pursuant to section 25 (a) of the *Elections Act*, No. 24 of 2011.
 8. The 2nd respondent alleged that after the shambolic nominations carried out by ODM, they opted to defend their seats as independent candidates; that in compliance with *the Constitution*, *Elections Act*, No. 24 of 2011 and the *Political Parties Act*, they do not belong to any political party and therefore it is not true that their nomination is not in accordance with the law.
 9. Further to the foregoing, their preliminary objection was premised on the following grounds:-
 - i. That the applicant did not seek leave of the court as mandatorily required by way of Chamber Summons prior to filing the Notice of Motion dated 22/6/2022.
 - ii. That the application offends the provisions of sections 9, 12 and 14 of the *Fair Administrative Actions Act*, 2015, Sections 8, and 9 of the *Law Reform Act*, Cap 26 as read with Order 53, Rule 1 (2) of the *Civil Procedure Rules*.



10. The firm of Elvis Nanda & Co. Advocates entered appearance on behalf of the 3rd, 4th, 6th and 10th respondents. They filed grounds of opposition dated 1/7/2022. The 15 grounds can be summarized as follows:-
 - i. That the application is in contravention of the mandatory provisions of Order 53 of the Civil Procedure Rules and Section 9 of the Law Reform Act and all legal provisions on Judicial Review Proceedings.
 - ii. That the application lacks sufficient cause for granting prerogative orders that form the substratum of a Judicial Review cause and is therefore wanting not only in form but also in substance; the applicant has not sought any prerogative writ and the application is misconceived and untenable.
 - iii. The motion lacks merit by delving into the merits of the decision delivered by the IEBC Dispute Resolution Committee on 19/6/2022 as opposed to the process. The application does not qualify as a Judicial Review application.
 - iv. The applicant has not lodged any form of appeal against the decision of the IEBC Dispute Resolution Committee delivered on 19/6/2022 and the orders sought herein are thus unavailable, no explanation has been afforded on why the committee cannot be moved to review its own orders.
11. Directions on the application were given. The parties through their respective Counsel highlighted their submissions.
12. Mr. Aluochier submitted that the dispute involves Migori County Members of Assembly (MCA) who resigned from political parties but they are still in office despite Article 194 which states that the seats remain vacant; that when the matter was taken to the IEBC, it ruled that they did not have jurisdiction because it was sub judice, the matter was a constitutional interpretation issue, it raised criminal findings and they did not have jurisdiction to do so.
13. The applicant submitted that there were various Supreme Court findings which supported the view that a pre - election matter comes to the High Court by way of a Judicial Review; that Judicial Review applications used to be governed by Order 53 Civil Procedure Rules pre - 2010 Constitution but they are now governed by Article 47 of the Constitution and the Fair Administrative Act that is why he did not seek leave of the court to file this Judicial Review application; that this court has jurisdiction to hear this matter. It was also submitted that Judicial Review does not only deal with the process but the merits of the decisions; that when it comes to Judicial Review Applications, the Constitution is supreme to govern the conduct before court; that the right to fair administration inherent and not discretionary and that is why he did not seek leave to file Judicial Review proceedings.
14. Further, it was submitted that the MCAs had not complied with the moral and ethical standards as provided for under Article 194(1) of the Constitution and ought to have resigned.
15. Mr. Okoth submitted on behalf of the 1st respondent. He stated that this is a Judicial Review matter and the proof is whether the 1st respondent acted within its mandate under Article 160 of the Constitution; that the subject matter is already before the High Court and therefore the IEBC had no jurisdiction to make any decision on the same. Reliance was placed on the case of Nancy Baraza vs Judicial Service Commission (2012) eKLR where it was held that if a matter is brought under Judicial Review, the issues for consideration are procedural fairness that one actually acted within his powers. Counsel urged that the 1st respondent could not deal with a matter pending in the High Court.



16. It was also submitted that the election petitions are sui generis and the court is under discretion to ensure all questions like a misjoinder under Section 6 of the Civil Procedure Act as was held in the Raila Odinga Case. Counsel also submitted that the application as presented is not merited and should not qualify as a Judicial Review; that the applicant has not availed any evidence to show how the 1st respondent acted wrongly.
17. Mr. Midenga submitted that the preliminary objection is on want to seek leave before filing a Judicial Review application; that the applicant has admitted that what is before the court is a Judicial Review application which is special jurisdiction in nature and with a special procedure to follow; that Article 47 is the substantive provision which is supported by other laws. Counsel asked this court to consider the persuasive decision of Republic vs Retirement Benefits Authority ex parte Alex Anyona Momanyi & 6 Others (2021) eKLR.
18. Counsel submitted that the Fair Administrative Act did not repeal the Law Reform Act and Order 53 of the Civil Procedure Rules which contain the procedure for bringing Judicial Review applications; but compliments the two legislations; that paragraphs 11, 25 and 43 of the applicant's submissions are authorities none of which talk of leave in Judicial Review they are petitions. It was also submitted that these are not technical objections but they go to the root of the dispute as was held in the case of Telkom Kenya Limited vs John Ochanda. The application is not known in law and the prayers as couched are not calling this court to review the decision of the IEBC.
19. As regards the complaint before the IEBC, Mr. Midenga submitted that the applicant wanted the IEBC to try the respondents citing the Penal Code, Integrity Act and that the IEBC rightfully dismissed it; that the respondents resigned to seek re-election; that the applicant wants them to vacate office; that the High Court analysed Sections 23 and 43 of the Elections Act and concluded that there are categories of protected offices like the office of the MCAs. Mr. Midenga referred the court to the decision of Kennedy Irungu Ngodi vs Mary Waithera Njoroge & 11 Others at page 21 paragraph 188. It was also submitted that the applicant admits that this is an election dispute and he is one of the contestants. The application is fatally defective and should be struck out with costs since it is not a public interest litigation.
20. Mr. Nanda submitted that what is before this court is a Judicial Review application which is not known in law; that the Notice of Motion application is accompanied by an affidavit without any annexure; that the affidavit raises allegations not proved; that Rule 9 of the Oaths and Statutory Declaration Rules which is couched in mandatory terms provides that documents to be relied on must be sealed and marked but none of the documents have been sealed or marked by a Commissioner for Oaths; that the decision which the applicant wishes to be quashed, has not been lodged as this is a mandatory requirement in Judicial Review.
21. On the competence of the application, Mr. Nanda submitted that if the applicant wanted to rely on Article 47, he should have filed a different pleading; that the application should have complied with Order 53 Civil Procedure Rules. It was also submitted that Section 13 of the Fair Administrative Act provides that the Chief Justice is to make Rules on procedure; that since there are no rules made the recourse is to comply with Order 53 of the Civil Procedure Rules. On whether Order 53 is unconstitutional, it was submitted that this was settled in the case of Felix Kiprono vs AG Petition No. 337 of 2018 where the court decided that it was not unconstitutional.
22. In a brief rejoinder, Mr. Aluochier reiterated his position that the application was brought under the provisions of Article 47 of the Constitution which is supreme.



23. I have carefully considered the application and its supporting affidavits and documents annexed thereto, the responses by the respondents, the annexures, the notice of preliminary objections, the grounds of oppositions and both the written and oral submissions of the parties through their Counsel. The issues for determination are:-
- i. Whether the petition is competent.
 - ii. Whether the Independent Election and Boundaries Dispute Resolution Committee had jurisdiction to determine the dispute before it.
24. On the competency of the Judicial Review application, it was jointly submitted by the respondents that the application is not known in law and the prayers sought therein are not in tandem with a Judicial Review Application. The application by the applicant seeks to have the names of the 2nd - 16th respondents be excluded from those duly nominated for elections of the Member of County Assembly (MCA) position. The application stems out of a decision rendered by the 1st respondent's dispute resolution committee on 19/6/2022. The applicant brought the instant application to review the decision of the 1st respondent.
25. On the competency of the application, this court shall address it in three folds.
26. First, Article 47 of *the Constitution* provides that every person has a right to fair administrative action. If a right or fundamental freedom of a person has been or is likely to be affected by administrative action, they have a right to be given written reasons for the action. Under Article 47 (3) (a) Parliament was mandated to enact legislation to provide for review of administration action by court, or if appropriate, an independent and impartial tribunal. The provision under *the Constitution* is clear that legislation was to be enacted specifically for review of administration action. To give effect to Article 47 of *the Constitution*, Parliament then enacted the *Fair Administrative Actions Act*.
27. The *Black's Law Dictionary* 10th Edition at page 53 defines an administrative action as:-
- “A decision or an implementation relating to the government's executive function or business's management.”
28. Section 2 of The *Fair Administrative Action Act*, No. 4 of 2015 defines administration action to include:-
- i. The powers, functions and duties exercised by authorities or quasi – judicial tribunals; or
 - ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
29. The *Black's Law Dictionary* (supra) at page 977 defines Judicial Review as:-
- “A court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional.”
30. The remedy of Judicial Review is therefore available to a person who has been aggrieved by the administrative decision/action of a government or other public body. The prayers sought in a Judicial Review are the orders of: Mandamus, that is to quash the decision arrived at; Certiorari to compel the body to which the order is directed to, to quash the public body's decision and Prohibition to prevent the public body from continuing in its illegal actions.



31. The scope of judicial review was spelt out by the Court of Appeal in the case of:- [Municipal Council of Mombasa vs Republic Umoja Consultants Ltd](#), Nairobi Civil Appeal No. 185 of 2007 7(2002) eKLR, as follows:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

32. What entails Judicial Review was explained in the case of [Kenya National Examination Council vs Republic Exparte Geoffrey Gathenji & 9 Others](#), Nairobi Civil Appeal No.266 of 1996 (1997) eKLR where the Court of Appeal held:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not. However, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128...What is the scope and efficacy of an ORDER OF MANDAMUS? an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

33. What then is the procedure for bringing Judicial Review application? The submission by Mr. Aluochier that this application is under Article 47 of [the Constitution](#) and therefore not subject to Order 53 [Civil Procedure Rules](#) and Section 8 and 9 of the [Law Reform Act](#) cannot hold water. Judicial Review is a special jurisdiction. In so far as no rules have been made under Article 47 of [the Constitution](#), there can be no vacuum in law. A party approaching court for Judicial Review orders of Certiorari, Mandamus and Prohibition must comply with the procedure under Order 53 of the [Civil Procedure Rules](#). He must seek the court’s leave first through a Chamber Summons Application supported by a Statement of Facts and a Verifying Affidavit and annexures in support of the prayers. In this case, the applicant should have annexed the impugned decision. It is after grant of leave, that an applicant is allowed to file the Notice of Motion application within 21 days. Seeking of leave is meant to expedite the process and weed out any frivolous applications.
34. The applicant has done none of that. What is before the court is neither a Judicial Review application nor a Petition. If the applicant wanted to file a Petition to seek any Constitutional remedies available



including Judicial Review orders, he should have done so under the rules under the Constitution (Mutunga Rules). Article 23 (3) of the Constitution outlines the remedies a person can seek in a Constitutional Petition which includes Judicial Review orders. If it was a petition, then the applicant would have not needed to seek leave of court to file the petition.

35. In the case of Republic vs Retirements Benefits Authority (supra) the court held:-

“This rule (Order 53) leaves no doubt that grant of leave is a precondition to filing of a substantive motion for prerogative orders of mandamus, prohibition or certiorari; without such a leave the substantive application cannot be entertained...the leave stage is a procedure which provides an expeditious method according to which the courts sift cases with no chance of success at a relatively little cost to the applicant and no cost to any prospective respondent...”

36. Judicial Review is therefore not concerned with the merits or demerits of a decision of an inferior court, tribunal or a public body. It is only concerned with the process of reaching the final decision. The process would entail whether the decision maker took into account relevant or irrelevant matters before making the decision or whether the persons affected by the decision was given a hearing.

37. The applicant complained that his rights under the Fair Administrative Act were violated. Section 3 of the Fair Administrative Action Act provides that it also applies to persons who exercise quasi-judicial functions under the Constitution like the 1st respondent herein.

38. The grounds upon which a party may seek review of the administrative action are provided for under Section 7 (2) as follows:-

- (a) The person who made the decision was-
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
- v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person’s case.

39. Section 7 (3) of the Fair Administrative Action Act as read together with Order 53 (1) of the Civil Procedure Rules provides that before consideration of an application for review of the administrative action, the Court must satisfy itself that:-

- i. The administrator is under duty to act in relation to the matter in issue;
- ii. The action is required to be undertaken within the prescribed period of time
- iii. The administrator has refused, failed or neglected to take action within the prescribed period of time.

40. The dispute filed before the 1st respondent was a pre-nomination one. In sitting and making a decision thereof, the 1st respondent was exercising its mandate under Article 88 (4) (e) of the Constitution, Section 74 of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act.



41. The applicant has not demonstrated that in exercising its mandate, the 1st respondent breached the provisions of Section 7 (2) of the *Fair Administrative Actions Act*. The 1st respondent did not deny the applicant a chance to state his case but simply declined to proceed for want of jurisdiction as the matter touching on the same issues presented to it, was already pending before the High Court in Nakuru Petition No. E004 of 2022 *Peter Kibe Mbae vs Speaker, County Assembly of Nakuru & Another; Registrar of Political Parties & 49 Others (Interested Parties)*. If the 1st respondent would have proceeded to the merits of the issue before it having found it had no jurisdiction, then the decision would be a nullity. Therefore, this is not a case suited for Judicial Review proceedings as there is no evidence that the 1st respondent acted without or in excess of jurisdiction or breached the rules of natural justice.
42. Secondly, the prayers which the applicant is seeking are not in the nature of Judicial Review writs of Mandamus, Certiorari and Prohibition. If at all this was a Judicial Review Application which it is not, those are the only appropriate orders and/or prayers a party can seek. Looking at the prayers, the applicant wants this court to review the decision of the 1st respondent. This is an appellate court. A person aggrieved by the decision of the 1st respondent can only approach this court by way of an appeal and Judicial review of the decision of the 1st respondent.
43. Thirdly, Mr. Nanda submitted that the applicant has not annexed the documents he intended to rely on contrary to Rule 9 of the *Oaths and Statutory Declaration Rules*. I have perused the application. The affidavit in support, does not refer the court to consider the documents which the applicant seeks to rely on. That is to say, the applicant has not stated in his affidavit for instance, “Annexed and marked as ABC is the decision of the 1st respondent.” for this court to make a reference to it.
44. The Supreme Court of Kenya in the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* (2018) eKLR found that an affidavit which is uncommissioned remains to be fatally defective. In making reference to the said decision, the Court of Appeal in *Pharmacy and Poisons Board & another; Mwiti & 21 others (Respondent)* (Civil Appeal E144 of 2021) (2021) eKLR also held that:-
- “The same fate befalls unmarked and unsealed annexures. They are of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules.”
45. In the absence of marked and sealed annexures, there is nothing for this court to consider. The application alone cannot stand as evidence has not been properly tendered to support therefore the application as it is, is defective and fatally incompetent.
46. Article 159 of *the Constitution* cannot come as a saving grace to applicant at this instance. The said Article cannot be used to circumvent the mandatory rules of practice laid down in law. This is not a mere technicality. In the case of *Raila Odinga vs I.E.B.C & 2 Others* (2012) eKLR the Supreme Court held:-
- “Article 159 (2) (d) of *the Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”



47. Similarly, Mutungi J in *Abdul Aziz Juma v Nikisubu Investment & 2 Others* ELC Suit No. 291 of 2013 held:-

“ Article 159 of *the Constitution* was never intended to override clear provisions of statute unless such revisions of the statute had been found and held to be unconstitutional. Acts of Parliament.... make provision for the application of the law and *the Constitution* demands of the courts to protect *the Constitution*, the law and the Acts enacted by Parliament. In my view, Article 159 of *the Constitution* cannot be resorted to where there are clear and express provisions of the law.”

48. The first issue for determination is sufficient to determine this application. However, I see it prudent to address the second issue which was the main reason the 1st respondent declined to hear the applicant. The crux of the matter is the eligibility of the 2nd - 16th respondents, is what made the applicant file the dispute in the first place.

49. The 1st respondent declined to determine the merit of the dispute before it, as it was sub judice. Section 6 of the *Civil Procedure Act* provides:-

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

50. Indeed, all parties agreed that there is a pending case before the Nakuru High Court being Petition No. E004 of 2022 *Peter Kibe Mbae vs Speaker, County Assembly of Nakuru* (supra) touching on the same issue. None of the parties furnished this court with the pleadings in the matter before the High Court in Nakuru to determine whether the principle of sub judice was applicable. Be that as it may, on 7/7/2022, the Bench determining this matter, delivered its judgement.

51. From the summary of the case, the issue in controversy is a replica of the one the applicant had presented before the 1st respondent’s dispute resolution committee. The applicant’s case was and is that the 2nd - 16th respondents should not be allowed to run for office on account of resigning from the political parties in which they were elected as MCAs in 2017. For the 2nd - 16th respondents to be allowed to run, it would be contrary to the provisions of Article 193 of *the Constitution*. The question in issue in the Nakuru matter was also touching on the eligibility of MCAs to run for elective posts after resigning from their previous political parties.

52. The Bench considered in depth the interpretation of Article 193, 194 of *the Constitution* and other provision of the County Government Act in particular Sections 14 which provides for the functions of the County Government. The court held that despite there being resignations or switching of political parties in the final 180 days immediately before the general elections, this should not be tied down to loss of seats. The effect of the MCAs losing their seats, is that the constituents will remain unrepresented and the functions of the County Assembly, National Assembly and the Senate will be paralyzed and bring the entire nation to a Constitutional anarchy.



53. The Court of Appeal in *Kibeh v Waibara & another* (Civil Appeal E468 of 2020) (2022) KECA 388 (KLR) (Civ) (4 March 2022) (Judgment) also rendered itself in relation to resignation of Members of Parliament and Members of County Assembly prior to elections as follows:-

“The rationale for excluding public officers mentioned in section 43(6) of the *Elections Act* from the obligation to resign 6 months before the elections was understandable. They all held positions of a political nature by virtue of their elections or nominations. Those included the president, deputy president, member of parliament, governor, member of county assembly, who were elected for a 5-year term, that ordinarily terminated at the next general elections. If those State officers were to resign 6 months before the general elections, their term would be reduced to four and a half years. There would also be a vacuum as the constituencies they represented would be left without a representative for the 6 months as no by-elections could be held within that period. That was further reinforced by article 103(1)(f) of *the Constitution* which provided that the office of a member of parliament became vacant at the end of the term of the relevant House. The members of parliament did not need to resign before the elections, as their positions would automatically cease at the end of the 5-year term to facilitate the elections and a new term in the House. Under article 194(1)(f) of *the Constitution*, a member of a county assembly would serve until the term ended automatically at the end of the term of the assembly when new elections were held and the term of a new assembly started.”

54. The 1st respondent was therefore correct in finding that it had no jurisdiction to hear the dispute before it on account of the sub judice rule and also that the matter concerned Constitutional interpretation which it was divested of jurisdiction.
55. The foregone position is that the Application dated 21/6/2022 is defective, bad in law and an abuse of the court process. It is hereby dismissed in its entirety with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 12TH DAY OF JULY 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Aluochier in person for the Applicant.

N/A for the 1st Respondent.

N/A for the 2nd, 5th, 7th, 8th, 9th, 12th, 13th, 14th and 16th Respondents.

Mr. Sigei H/B for Mr. Nanda for the 3rd, 4th, 6th and 10th Respondents.

Nyauke Court Assistant

