



Case Number:	Election 13 of 2013
Date Delivered:	21 Jun 2013
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Rose Edwina Atieno Ougo
Citation:	Lydia Mathia v Naisula Lesuuda & another [2013] eKLR
Advocates:	-
Case Summary:	<p><u>Election Petition will not be stayed on the basis of an existing Constitutional Petition on the same subject matter</u></p> <p>Lydia Mathia v Naisula Lesuuda & Another</p> <p>Election Petition No. 13 of 2013</p> <p>High Court at Nairobi</p> <p>R. Ougo,J</p> <p>June 21, 2013</p> <p>Reported by Lynette A. Jakakimba</p> <p>Brief Facts</p> <p>The applicant, Naisula Lesuuda a nominated member of Senate, was seeking orders that the petition herein be stayed pending the determination and or termination of Constitutional Petition 175 of 2013 between the petitioner (Lydia Mathia) and the 2nd Respondent (Independent Electoral and Boundaries Commission) in which similar orders were sought.</p>

Naisula Lesuuda deposed that the content of the Constitutional Petition No. 175 of 2013 between the petitioner and The National Alliance (TNA) party on the one part and IEBC in this petition was filed prior to the current Election Petition and it raised substantially similar or identical issues and that the suit was still pending for determination before a 3 judge bench yet to be appointed by the Chief Justice of Kenya.

Lydia Mathia had filed Constitutional petition No. 175 of 2013 in which she alleged that her fundamental rights had been infringed and accused the IEBC for altering TNA party list in the nomination of women members to the senate and challenged the mode within which IEBC had applied in arriving at the nomination of Naisula Lesuuda.

Issues

- i. Whether the Election Petition should be stayed pending the determination and or termination of the Constitutional Petition No. 175 of 2013 between Lydia Mathia and the IEBC.
- ii. Whether the petition was *res judicata* or *subjudice*.
- iii. Whether the Election petition should be struck out and or dismissed for being an abuse of court process and or for not disclosing a substantial triable issue.
- iv. Whether the Civil Procedure Rules could be applied universally to all civil proceeding including election petitions.

Election Law –*election petition –nominations of candidates-political party’s nomination list-dispute arising out of the removal of a name from a political party’s nomination list to senate – Constitution of Kenya, 2010 article 90,98,105 – Elections Act section 80 (1)(d) – Elections (Parliamentary And County Elections) Petition Rules rule 4*

Civil Practice and Procedure – *striking out of*

suits – res judicata –subjudice-whether the election petition was res judicata or subjudice as the petitioner had filed already filed a constitutional petition on the same subject matter Civil Procedure Act section 6 and 7

Constitutional Law -fundamental rights and freedoms – right to fair hearing – right to institute suits-whether the applicant had the right to file the election petition in light of the existing constitutional petition concerning the same subject matter – Constitution of Kenya, 2010 article 50 (1),105,159 and 165

Elections Act

80. (1) An election court may, in the exercise of its jurisdiction—

(a)...

(b)...

(c)...

(d) decide all matters that come before it without undue regard to technicalities.

The Elections (Parliamentary And County Elections) Petition Rules

4. (1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1).

(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

Civil Procedure Act

6. No court shall proceed with the trial 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”

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Constitution of Kenya, 2010

Article 50(1)

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 105

(1) The High Court shall hear and determine any question whether—

(a) a person has been validly elected as a member of Parliament; or

(b) the seat of a member has become vacant.

(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

(3) Parliament shall enact legislation to give full effect to this Article.

Article 159

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

Held

1. The applicant was constitutionally permitted to pursue her rights as provided under article 50 (1) of the Constitution, which stated that every person had the right to have any dispute that could be resolved by the application of law decided in a fair and public hearing before a court.
2. The court would adjudicate on the election petition as mandated, as it took precedence over the petition filed in the constitutional court and also as provided under article 105 of the Constitution which provided very specific time limits within which the court had to adhere to.
3. The submissions that the suit was res

judicata could not stand as none of the petitions had been determined. On the issue of *subjudice* the Constitutional Petition dealt with fundamental rights and sought various declaratory orders whereas in the present Election Petition the Court was sitting in a special capacity with clear provisions provided for by the statute and the Constitution on the conduct of electoral disputes which was distinct from the constitutional Court.

4. In deciding whether to grant a stay, the court should essentially weigh the pros and cons of granting the order and in considering those matters it should bear in mind such factors as the need to expeditious disposal of cases the *prima facie* merits of the intended appeal in the sense of not whether it would probably succeed but whether it was an arguable one the scarcity and optimum utilisation of judicial time and whether the application had been brought expeditiously. (*In The Matter of Global Tours and Travels Limited Nairobi High Court Winding Cause Number 43 of 2000*)
5. The fact that there was a pending suit before the Constitutional Court did not in any way impede the court from executing its constitutional obligation of determining the election petition. The petitioner had asked the constitutional court to determine on the alleged infringement of her constitutional rights and what the present court was being asked by the same petitioner was the procedure within which the 1st Respondent was nominated to the senate by the IEBC and that was precisely what the court would act upon, among other issues in the petition
6. On the applicability of Civil Procedure Rules in election petitions, the Elections Act had rules that had to be complied with but where it was silent, any High Court having civil jurisdiction was at liberty to fall back and be guided by the provisions of the Civil Procedure Act and Rules.

Application dismissed. Costs shall be in the cause.

Cases referred to

1. In The Matter of Global Tours and Travels Limited Nairobi High Court Winding Cause Number 43 of 2000
2. Gideon Wambua –vs.-IEBC &Others EP No 4 & 9 of 2013
3. Anthony Mugambi Wachira –vs.- Kenya Airports Authority Cause No. 1590 of 2010
4. Wavinya Ndeti-vs.-Independent Electoral and Boundaries Commission & 4 Others
5. Stephen Kariuki –vs.- George Mike Wanjohi and 2 others ,Nairobi Election Petition No 2 of 2013
6. Kiama Wangai –vs.- John Mugambi & Another [2012]e KLR
7. Anthony Muthumbi Wachira –vs.-Kenya Airports Authority Cause 1590 of 2010
8. Kapa Oil Refineries Ltd –vs. - Kenya Revenue Authority & 2 other HCCC No. 370 of 2012
9. TNA & Another –vs.-IEBC Const. Petition No 175 of 2013

Cases

East Africa

1. In The Matter of Global Tours & Travels Limited Winding Cause Number 43 of 2000 – (Followed)
2. Kapa Oil Refineries Ltd v Kenya Revenue Authority & 2 other Civil Case No 370 of 2012 – (Explained)
3. Kiama Wangai v John Mugambi & Another Civil Case 433 of 2010 - (Explained)
4. Stephen Kariuki v George Mike Wanjohi & 2 others , Election Petition No 2 of 2013-(Explained)
5. speaker of the National Assembly v Karume [1992] 22 – (Followed)
6. Wachira ,Anthony Mugambi v Kenya Airports Authority Cause No 1590 of 2010- (Followed)
7. Wambua, Gideon v Independent Electoral & Boundaries Commission & 2 others EP No 4 & 9 of 2013 – (Followed)
8. Wavinya Ndeti v Independent Electoral and Boundaries Commission & 4 Others Election Petition 4 of 2013 – (Explained)

Statutes

East Africa

	1. Constitution of Kenya of Kenya,2010 articles 27,28,36,38, 47(1); 48; 50 (1); 87(1);88;90; 91;98;105(3);159(2); 165(3)(a)(b)(4)- (Interpreted) 2. Civil Procedure Act (cap 21) sections 6,7 - (Interpreted) 3. Civil Procedure Rules,2010 (cap 21 Sub Leg) order 2 rule 15 (1) (d) - (Interpreted) 4. , Elections Act,2011 (Act No 24 2011) sections 2, 80 (1)(d),(3);85 - (Interpreted) 5. Elections (Parliamentary and County Elections)Petition Rules 2013 (Act No 24 of 2011 Sub Leg) rules 4(1);5(1);17 (1)(d) - (Interpreted)
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION NO 13 OF 2013

**IN THE MATTER OF THE ELECTION ACT 2011 AND THE ELECTIONS (PARLIAMENT AND COURT
COUNTY ELECTIONS) PETITION RULES, 2013**

AND

**IN THE MATTER OF THE WOMEN MEMBERS NOMINATED TO THE SENATE AND GAZETTE
NOTICE NO. 3508 PUBLISHED IN THE KENYA GAZETTE DATED 20TH MARCH 2013**

BETWEEN

LYDIA MATHIA.....PETITIONER

VERSUS

NAISULA LESUUDA.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

RULING

1. The application for determination is the Notice of Motion dated 15th May 2013 brought under Article 50 (1), 159 and 165 of the Constitution of Kenya, Section 80 (1)(d), (3) of the Elections Act, Rules 4, 5, 17 (1)(d) of the Elections (Parliamentary and County Elections) Petition Rules 2013 and to the extent applicable section 6 of the Civil Procedure Act Order 2 Rule 15 (1) (d) Civil Procedure Rules. The applicant/1st Respondent is seeking for orders that the petition herein be stayed pending the determination and or termination of Constitution Petition 175 of 2013 between the petitioner and the 2nd Respondent in which similar orders are sought and in the alternative the petition be struck out and or dismissed for being an abuse of the court process for not disclosing a substantial triable issue and that the petitioner be condemned to pay costs.

2. This application is premised on the grounds and the affidavit of Naisula Lesuuda. The applicant deposed that the content of the *Constitutional Petition No 175 of 2013* between the petitioner and The National Alliance [TNA] party on the one part and the 2nd Respondent in this petition was filed prior to the current Election Petition raises substantially similar or identical issues and that the suit is still pending for determination before a 3 judge bench yet to be appointed by the Chief Justice of Kenya. That the applicant is aware that since filing the said petition, TNA party officials have considered the matter of Senate nominees and have decided to support her nomination and approved the decision of the 2nd Respondent to include her in the TNA list on account of legal and constitutional regional and ethnic

diversity requirements as well as to withdraw TNA from the aforesaid Constitutional petition. That it is an abuse of the court process for two concurrent High Court petitions touching on the very same matter and seeking similar remedies to subsist at the same time and which amounts to double jeopardy against her thus violating her legal and constitutional rights besides prejudicing her rights to prepare a defence in this petition. That in the absence of an election by the petitioner between the aforesaid constitutional petition and the current Election petition this Court is obliged to apply the law and stay the current suit or alternatively strike it out for abuse of the court process.

3. The Petitioner Lydia Mathia opposed this application and filed a replying affidavit on 22nd May 2013. The applicant deposed that the application is actuated by ulterior motives and grossly incompetent because by dint of Article 105 of the Constitution this Honourable court has no jurisdiction to stay this petition, that the 1st Respondent has not given any reason to justify the notion that the petition does not disclose substantial triable issue and on the contrary the application betrays the 1st Respondent's existential fear of this petition given that there is no legal basis to justify save fraudulently procured gazettelement and subsequently her swearing in as a Senator. That the petitioner cannot abuse the court process by seeking the enforcement of her fundamental rights before the appropriate division of the High Court and the application amounts to an abdication by this Honourable court to abdicate its jurisdiction under the constitution. That the disposition by the applicant that the *Constitutional application No. 175 of 2013* which seeks no single order against her raises substantively similar and identical issues as the petitioner are false, opportunistic and actuated by bad faith. In reply to the applicant's affidavit at paragraph 3, the petitioner states that besides David Onyango Oloo there is no other official of the TNA party who has sworn an affidavit to support the nomination of the 1st Respondent and in any event such support would be an afterthought which cannot cure the illegality the applicant is complaining about. That TNA sought withdrawal as petitioner in *Constitution Petition No 175 of 2013* in order to avoid the political embarrassment caused by the 1st Respondent's acquiescence and complicity in the 2nd Respondent's illegal and unfair variation of the TNA Senate Nominee's list after the General Election was held on 4th March 2013. That the applicant is intrigued that the 1st Respondent has the courage to swear that TNA party is now conditioning the illegal actions of the 2nd Respondent. That this petition is the first that the 1st Respondent is being called upon to account for the invalidity of her gazettelement and subsequent swearing in as Senator therefore her plea of double jeopardy is a red-herring. That the only duty of this court is to hear and determine this petition and avoid consideration of matters pending before other courts of competent jurisdiction. That the applicant is attempting to assume the moral and political high grounds in this petition given that the applicant is not even a member of TNA party yet the applicant is holding onto the position only available to TNA party members.

4. The 1st Respondent and the petitioner filed written submissions as was ordered by the court. The 2nd Respondent however choose not to file written submissions but submitted orally. The applicant/1st Respondent filed her submissions on 14th June 2013. The applicant submitted that the petitioner together with TNA had earlier filed a *Constitutional Petition No 175 of 2013* where the 2nd Respondent herein was the Respondent, that the applicant has however filed an application to be enjoined in that Constitutional Petition by an application dated 15th May 2013. TNA subsequently withdrew from the Constitutional Petition vide an amended petition filed by the petitioner on 3rd May 2013 and now the petition is pending awaiting the appointment of a three judge bench by the Chief Justice. The applicant submitted that the petitioner had declined to withdraw the constitutional suit and has indicated to this court that the applicant intends to proceed with it. The applicant's issues that the applicant wants this court to determine for are namely on the jurisdiction of this court to stay and dismiss this petition and whether this

petition is an abuse of the court process.

5. On the issue of whether this court has jurisdiction to determine this application, the applicant submitted that this Court is a High Court which retains its powers as a Constitutional Court and with unlimited original jurisdiction in civil and criminal matters under Article 165 (3) (a). The applicant relied on the case of **Gideon Wambua –vs.-IEBC & Others EP No 4 & 9 of 2013** where Odunga J. held that *“There is no court established applicant under Article 165 of the Constitution known as the Election Court .The term “Election Court “however appears in section 2 of the Elections Act under which the term election court is defined to mean the High Court is the exercise of jurisdiction conferred upon it by Article 165 (3) (a) of the constitution”* The applicant also submitted that the election petitions are matters for which Civil procedure Act and Rules apply but special civil matters for which Civil procedure Rules and Act only apply in a rather restricted sense .That the legal controversy of the nature of this court is whether the court is duly constituted as an Election court in compliance with the Election Act and deriving further constitutional mandate from Article 87 and 105 of the Constitution .The question therefore arises whether the High Court can concurrently discharge its mandate as a Constitutional and Election Court .The applicant quoted the case of **Anthony Mugambi Wachira –vs.- Kenya Airports Authority Cause No. 1590 of 2010** an industrial court decision where the presiding judge held that *there will always be an overlap between the jurisdiction of the High Court and the industrial court in respect of the enforcement of fundamental constitutional rights .This was so because Article 165 (3) of the constitution vests power on the High Court to determine the question whether a fundamental freedom in the Bill of Rights has been denied ,violated infringed or threatened.* The judge in the above case considered section 6 of the Civil Procedure Act and noted that rather than look at technical considerations in the distinction between the two cases they were are inclined to look at the substance of the two proceedings. The applicant submitted that the Election Petition Rules did not provide for certain procedures and in this vacuum Majanja J. in **Wavinya Ndeti-vs.-Independent Electoral and Boundaries Commission & 4 Others** stated that *“Rule 4 and 5 of the Election Rules is a consideration of the provisions of Article 159 (2) (d) of the constitution which obliges every court to dispense justice without undue regard to technicalitiesthus the essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump over the primary object of dispensing substantive justice to the parties”* the learned judge agreed with and adopted the sentiments of Kimondo J. in **Stephen Kariuki –vs.- George Mike Wanjohi and 2 others ,Nairobi Election Petition No 2 of 2013** where he observed that , *“once seized of the dispute, the court is enjoined by Article 159 (2) (d) of the constitution to do substantial justice to the disputants expeditiously and without undue regard to the technicalities. Rules of procedure have aptly been described as hand maidens of justice not mistresses...Electoral disputes resolution is unique in many ways but the principles applicable in a motion to strike out a pleading or action cut across the board. A good starting point is the standards applied in ordinary civil suits”* The applicant further submitted that this court in a limited extent should be guided by the provision of the Civil Procedure Rules 2010 in determining the issues as sought in the Notice of Motion dated 15th May 2013 stating that there is a clear procedure for stay and striking out suits set out in the civil procedure Rules and Act of parliament which is within the law in following such procedure in this election petition.

6. On the issue of whether this petition should be stayed, the applicant quoted Section 6 of the Civil Procedure Act and stated that the matters in issue in this petition were the validity of the 1st Respondent's nomination as member of the senate, whether the publication of Gazette Notice No.3508 by the IEBC was a violation of Articles 90 and 98 of the Constitution and whether the petitioner in both matters should be declared as the validly nominated woman member of senate for TNA. The applicant submitted that the two petitions are premised on the same issues and submitted that it would not be proper for the matters to be heard concurrently only for two different courts hearing the matters to deliver different rulings over the same issues and submitted that this petition be stayed or dismissed so as to

avoid such a scenario. The applicant relied on the case of **Kiama Wangai –vs.- John Mugambi & Another [2012]e KLR** the learned Justice Odunga dealt with the matter of stay and striking out where he referred to Section 6 of the Civil Procedure Act that *“Where the courts find that the suits in question fall within the four corners of section 6 aforesaid the court has no discretion in the matter but has to stay the subsequent suit(s)”* The applicant relied on the case of **Anthony Muthumbi Wachira –vs.-Kenya Airports Authority Cause 1590 of 2010** where it was held that *“the mischief that section 6 seeks to cure is the possibility of two suits dealing with the same subject matter and involving the same parties running concurrently. In other words it outlaws the institution of parallel civil proceedings either in the same court or different courts”* and similarly cited the case of **Haystead and others –vs.-Taxation Commissioner [1925]ALL ER** where it was held that *“the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon different assumption of fact ;parties are not permitted to begin fresh litigation because new views they may entertain of the law of the case or new versions which they present as to what should be proper apprehension by the court of the legal results either of the construction of the documents or the weight of certain circumstances .If this was permitted litigation would have no end except when legal ingenuity is exhausted .It is the principle of law that this cannot be permitted”* and submitted that both petitions fall under section 6.

7. On the issue whether this petition is an abuse of the court process the applicant quoted Order 2 Rule 15 (d) of the Civil Procedure Rules which provides that the court may order to be struck out or amended any pleadings on the ground that it is otherwise an abuse of the court process. The applicant submitted that the judge in Kiama Wangai’s case stated that it must always be remembered that the court is clothed with inherent jurisdiction to strike out proceedings which are deemed to be an abuse of the court process of the court. Therefore where a party decided to file a suit between same parties with the same cause of action with either an intention of vexing or annoying his opponent and without pursuing the first suit in the production line to its logical conclusion that action may be construed to amount to an abuse of the court process and submitted that the filing of this petition is an abuse of the court process by the petitioner as the applicant had already filed a petition of a similar nature in the *Constitution Petition No 175 of 2013* where the court refused to grant her prayers and one of the petitioners withdrew from the matter and that the petitioner’s intention in filing this second and subsequent petition is only to vex the Respondents and to frustrate them further.

8. Mr.Gatonye for the 2nd Respondent’s supported the 1st Respondents application and argued that there is only one issue for determination that is whether the petitioner can be allowed to litigate two petitions concurrently in the High Court. That there exists a petition filed before this petition and the petition is between the same parties’ .That looking at the substantive pleadings filed in both cases the petitioner seeks one prayer that underlines those proceedings and that is whether the decision of IEBC should be nullified so that the nomination of the 1st Respondent is nullified. He submitted that the petitioner has declined to make an election on which of the two petitions the applicant should proceed on and posed the question on whether the applicant should be allowed to proceed in the manner in which the applicant has chosen. In answer to his question he submitted that the petitioner should not be allowed as it is not allowable to invoke the jurisdiction of this court in the matter .He relied on the authorities submitted by Mr Kanjama on whether the procedure set out in the Civil Procedure Rules can be applied universally to all civil proceedings inclusive of the election petitions which are civil in nature. He submitted that no party should be allowed to have parallel proceedings to run in the same or different court and the court has no discretion but to state the subsequent suit, noting that the petitioner had been given a chance to make an election but the applicant declined. He submitted further that the petitioner will suffer no prejudice even if this petition is stayed as the applicant will be heard in the constitution petition by a three bench and that there is no need to vex the Respondents to defend the 2nd petition before prosecuting the first one .That it is personal prejudice that should not be allowed by this court and

it is a clear case of abuse of court process. He cited the case of **Kapa Oil Refineries Ltd –vs. - Kenya Revenue Authority & 2 other HCCC No. 370 of 2012** and asked the court to be persuaded by this decision where Majanja J held that *“to proceed with the petition of a petitioner who had filed an appeal from a judgment of Wendoh J in a judicial review matter relating to the same parties was not permitted and it an abuse of the court process as the direct result of such an inquiry would be to ignore the fact that Justice Wendoh dismissed the petitioner’s case”*. He submitted that even if the constitutional petition No 175 of 2013 awaits a decision it raises the same issues as the one in the election petition.

9. The petitioner in her submission filed on 14th June 2013 submitted that the applicant’s application is incompetent and actuated by ulterior motives .The petitioner submitted that the jurisdiction of this Court is to hear and determine this petition which is derived from Article 105 of the Constitution which provides that the High Court shall hear and determine any questions whether a person has been validly elected as a member of parliament or the seat of a member has become vacant .The question under clause 1 shall be heard and determined within six months of the date of lodging the petition. That pursuant to Article 105 (3) Parliament enacted the Elections Act 2011 whose Section 2 defines an Election Court as *“election court” means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the constitution*” Thus for purposes of parliamentary elections the jurisdiction to hear and determine election disputes vests in the High Court constituted as a special court and relied on the ruling of **TNA & Another –vs.-IEBC Const. Petition No 175 of 2013**. That the jurisdiction of this Court is exclusively restricted to determining this election Petition and cannot hear and determine *Constitutional Petition No. 175 of 2013* or issue any order or direction concerning it. That this court cannot stay this petition on the grounds that *Constitution Petition No 175 of 2013* is pending for the simple reason that the said case will be adjudicated by a three bench judge in accordance with Article 165 (3) (b) and (4) of the Constitution whilst this court is enjoined to determine this petition pursuant to Article 105 and 165 (3) (a) of the constitution. The attempt by the applicant/ 1st Respondent to merge the two causes of action has no legal merit and is clearly borne of mischief. He additionally submitted that the applicant was not serious in her application and that the prayer that the applicant is seeking is the prayer for stay and that there was no reason or ground that have been cited or adduced to show that this election petition does not disclose a substantial triable issue, that by law the determination of the validity of the 1st respondent’s membership of the senate is the sole triable issue on the basis of which this court has been constituted as an Election Court. The petitioner submitted that pursuant to Article 105 of the Constitution the exclusive duty of this Honourable court is to hear and determine the petition within six months and failure to do so amounted to abdication of jurisdiction.

10. I have considered the affidavits filed, the submissions and the authorities relied on. The issues for determination in this application are:-

- i. Whether the Election Petition No 13 of 2013 should be stayed pending the determination and or termination of the Constitution Petition No 175 of 2013 between the petitioner and the 2nd Respondent.
- ii. Whether the Election petition should be struck out and or dismissed for being an abuse of court process and or for not disclosing a substantial triable issue.

This application has arisen from the filing of this election petition. The applicant is of the opinion that this petition should be stayed and or dismissed because it is similar in content with Constitution Petition No 175 of 2013 and by dint of Article 165 (3) (b) of the Constitution that gives this court unlimited original jurisdiction in criminal and civil matters. In my view election petitions are however special proceedings that neither falls within the ambit of criminal or civil matters as was held in the case of **Gideon Wambua –vs.-IEBC & Others E.P No 4 & 9 of 2013** where Odunga J. held that “*There is no court established applicant under Article 165 of the Constitution known as the Election Court .The term “Election Court “however appears in section 2 of the Elections Act under which the term election court is defined to mean the High Court is the exercise of jurisdiction conferred upon it by Article 165 (3) (a) of the constitution”*, therefore this court has jurisdiction to hear and determine this petition. Section 87 (1) of the Election Act states that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes. I am cognizant to the fact that time is of essence. Once an election dispute has arisen the dispute must be determined within the time frame given by the Constitution. This has been settled in Article 105 (1) of the Constitution states that **“the High Court shall hear and determine any question whether a person has been validly elected as a Member of Parliament further sub article (2) states that a question under clause (1) shall be heard and determined within six months of the date of lodging the petition.** This is buttressed by Section 85 of the Election Act which states that an election petition shall be heard and determined within the period specified in the constitution.

11. All parties in this petition have the right to be heard as enshrined in Article 48 of the Constitution which says that the **State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.** Indeed the petitioner should be given her day in court as well as the applicant so that they can canvass their legitimate complaint and the conduct of the 2nd Respondent and allow this court to adjudicate on the raised issues. Article 47 (1) of the constitution affirms to this fact that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It is incumbent upon this court to ensure that this petition is dealt with expeditiously to the satisfaction of all the parties therein.

12. The petitioner filed a *Constitutional petition No 175 of 2013* in which the applicant has alleged that her fundamental rights have been infringed and accuses the 2nd Respondent for altering TNA party list in the nomination of women members nominated to the senate and challenges the mode within which the 2nd Respondent applied in arriving at the nomination of the 1st Respondent. That is her right and the applicant is constitutionally permitted to pursue the same as Article 50 (1) of the Constitution elucidates that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. In exercising my authority as conferred to me by Article 159 (2) of the Constitution ,I am alive to the fact that in exercising judicial authority, the courts

shall be guided by the doctrines that justice shall not be delayed and that the purpose and principles of this Constitution shall be protected and promoted. Indeed Rule 4 (1) of the Election Act states that the overriding objective of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act and which this court will unreservedly adopt. Rule 5 (1) of the same rules emphasizes the overriding objective provided in Rule 4 provides that the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims:-

- a. The just determination of the election petition and
- b. The efficient and expeditious disposal of an election petition within the timelines provided in the constitution and Act

13. In the case of **TNA & Anor –vs. - IEBC Constitution Petition No 175 of 2013** the question the Majanja J. asked and answered in that suit was whether the suit as filed was an election petition or any other petition to enforce fundamental rights and freedoms and provisions of the Constitution. He was of the view that the prayers prayed by the petitioner that the Gazette Notice No 3508 be quashed applicant is a declaration that a person is a duly elected Member of Parliament .He stated that ***“An order quashing the gazette notice will result in the loss of seats by persons who are Members of Parliament. Since, there are already members of Parliament by virtue of the party list, flawed or otherwise, the 2nd petitioner can only regain her seat if a duly elected Member of Parliament loses her seat and the only way the Court is permitted to intervene is through an election petition. Prayer (g) of the petition seeks a declaration that the 2nd petitioner is the duly elected third member of TNA Senate party list. This prayer is consistent with the power of the election court under section 80 of the Elections Act, 2011. In whatever manner this matter is cut, sliced and diced it is one to determine whether a person has been validly elected to Parliament and it is therefore a matter governed by Article 105 of the Constitution. Even in determining election petition the High Court, is obliged not only to enforce fundamental rights and freedoms of the persons before it. The court must also consider the powers exercised by the IEBC in relation to its responsibility when these powers are called in to question. The insistence on this course does not in any way prejudice the petitioners’ case as the manner in which a challenge to an election is made is ordained by the Constitution itself. He referred to the case of Ferdinand Waititu -vs- Independent Electoral and Boundaries Commission and Others Nairobi Election Petition No. 1 of 2013 [2013] eKLR, Justice Mumbi Ngugi stated as follows; “[27] The petitioner has submitted that the Court has jurisdiction to entertain his Petition and application on the basis of Article 165(3) (a) of the Constitution, and that this right cannot be truncated by either the Elections Act or the Rules. In my view, however, and I agree with the 4th respondent on this, the provisions of the Elections Act and the Elections Rules, which are made pursuant to Article 87 (2) of the Constitution, constitute the constitutionally underpinned Code of Laws for dealing with election petitions. The jurisdiction to hear and determine election petitions is a special jurisdiction that is conferred by the Constitution itself, and the manner in which it is to be exercised is ordained by the Constitution when it donates power to Parliament to enact the*”**

requisite laws and regulations for its exercise. Such truncation as there may be of the right to approach the court under Article 165(3) (a) has therefore been done by the Constitution itself".

The petitioner guided by Justice Majanja's order filed this election petition No 13 of 2013. Should this petition therefore be stayed" The applicant has asked this court to stay this petition pending the hearing and determination of *Constitutional Petition No 175 of 2013*. Mr Kanjama for the applicant raised the issue of res judicata and subjudice. To determine this issues. I have looked at section 6 and 7 of the Civil Procedure Act. Section 6 of the Civil Procedure Act states that **"No court shall proceed with the trial 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"**. This section deals with subjudice.

14. Section 7 of the Civil Procedure Act provides that **"No court shall try any suit in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such order"**. This section deals with res judicata.

The proceedings in the constitutional petition seek the following reliefs:-

1. **A declaration that the list of women members nominated to the senate for TNA contained in the gazette notice dated 20th March 2013 violates Art 90 and 98 of the Constitution.**
2. **A declaration that the respondent has no power to reorganise or tinker with the order of priority indicated in the 1st petitioner's final list of nominees**
3. **A declaration that the 1st petitioners rights and freedoms as enshrined in Art 27,36,38,47 and 50 of the Constitution have been violated by the decision of the respondent.**
4. **An order of certiorari to quash gazette notice no 3508**
5. **A declaration that the decision of the respondent contained in the Kenya Gazette violates the rights privileges and power of the 1st petitioner enshrined in Art 36,38,90and 91 of the constitution**
6. **A declaration that the 2nd petitioner was the 3rd woman elected on 4th March 2013 as one of the 1st petitioners fur successful candidates on its list of women members nominated to the senate.**
7. **A declaration that the decision of the respondent to exclude the 2nd petitioner's list of women members nominated to the senate on the grounds that the applicant is Kikuyu amounts to gross abuse of her rights to equality and freedom from discrimination and human dignity protected by Art 27 and 28 of the Constitution.**
8. **A mandatory injunction to compel the respondent to gazette the election of the 2nd petitioner as a woman member nominated to the senate by the 1st petitioner in accordance with the TNA**

party's valid list of the 1st petitioner during the General election held on 4th March 2013.

While the Election petition is seeking for orders:-

1. That a declaration be issued to declare that Hon Naisula Lesuuda the First Respondent herein was not validly elected on 4th March 2013 as Senator on the Women's Members Nominated to Senate List for the National Alliance (TNA) party pursuant to Pursuant to Article 90 and 98 of the Constitution

2. That a declaration be issued to declare that the Gazette Notice 3508 published applicant in the Kenya Gazette dated 20th March 2013 is null and *void ab initio* to the extent that it provides and specifies that the 1st Respondent Naisula Lesuuda stood validly nominated or elected to the Senate on TNA party list of women Member Nominated to the senate following the General Election held on 4th March 2013

3. That a declaration be issued to declare that Article 88,90 and 98 of the constitution the second respondent had no p[power to alter the list of women members nominated to the senate by TNA party by removing the petitioners name from the said list and replacing her with the first Respondent

4. That a declaration be issued to declare that the first Respondent Naisula Lesuuda has not been validly elected as a member oof the Senate under Article 90 of the Constitution

5. That a declaration be issued to declare that during the General elections held on 4th March 2013 the petitioner was validly elected as a senator on TNA party 's list of women members nominated to the senate submitted to the second respondent on 29th January 2013 pursuant to Article 90 of the Constitution

6. That the honourable court be pleased to issue an order quashing and or invalidating Gazette Notice No 3508 published applicant in the Kenya Gazette dated 20th March 2013 to the extent that it specifies that the 1st Respondent is validly nominated or elected or elected as a member of the senate under the list of women members nominated to the senate submitted by TNA for the General Election held on 4th March 2013 pursuant to Article 90 of the constitution

7. That the honourable court be pleased to order the 2nd Respondent to gazette the petitioner as the person duly elected on 4th March 2013 to the senate on the woman members nominated to the senate on the TNA party list submitted to the 2nd Respondent pursuant to Article 90 and 98 of the Constitution.

15. None of the petitions have been determined and therefore the submissions on res judicata cannot stand. On subjudice, the constitution petition deals with fundamental rights and seeks various declaratory orders. The High Court as constituted in the Constitutional and Human Rights division has a mandate and jurisdiction to hear the said petition. This Court is therefore sitting in a special capacity having been gazetted to conduct Election petitions which are *sui generis* it is therefore distinct from the constitutional Court. Moreover this court has clear provisions provided for by the statute and the Constitution. The Court of Appeal case of **The speaker of the National Assembly -vs- The Hon James Njenga Karume Civil Application No NAI 92 of 1992** stated that ***"In our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be strictly followed (my emphasis). We observe without expressing a concluded view that Order 53 of the Civil procedure Rules cannot oust clear Constitutional and statutory provisions"*** I couldn't agree more than what the appellate judges said that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be strictly followed. This court will adjudicate on this Election petition as mandated as it takes precedence over the petition filed in the constitution court and also as provided under Article 105 of the Constitution which provides very specific time limits which this court must adhere to. This therefore hushes submissions on sub judice. In my view, in the exercise of judicial discretion the court cannot legitimately look at a matter on one assumption alone favouring one party and ignoring the other party. I am persuaded by Ringera J.'s holding **In The Matter of Global Tours and Travels Limited Nairobi High Court Winding Cause Number 43 of 2000** when dealing with an application for stay though not similar to the stay sought in this petition, he stated that ***"Whether the interests of justice would be best served by the grant or the refusal of the order for stay the law whether or not to grant or the refusal of the order for stay of proceedingsis a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically (my emphasis). The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is on what terms it should be granted. In deciding whether to grant a stay, the court should essentially weigh the pros and cons of granting the order and in considering those matters it should bear in mind such factors as the need to expeditious disposal of cases the prima facie merits of the intended appeal in the sense of not whether it will probably succeed but whether it is an arguable one the scarcity"***

and optimum utilisation of judicial time and whether the application has been brought expeditiously (my emphasis)”.

16. The fact that there is a pending suit before the Constitutional Court does not in any way impede this court from executing its constitutional obligation of determining this petition. More so given the fact that the two petitions may look similar in form, I am persuaded by the decision of Hon Koskei in **Anthony Mugambi Wachira –vs.- Kenya Airports Authority Cause No. 1590 of 2010** an industrial court decision where the presiding judge held that “there will always be an overlap between the jurisdiction of the High Court and the industrial court *in respect of the enforcement of fundamental constitutional rights*. This was so because Article 165 (3) (b) of the constitution vests power on the High Court to determine the question whether a fundamental freedom in the of Rights has been denied, violated infringed or threatened”. In my view, what the petitioner asked the constitutional court to determine are the alleged infringement of her constitutional right and what this court is being asked by the same petitioner is the procedure within which the 1st Respondent was nominated to the senate by the 2nd Respondent and that is precisely what this court will act upon, among other issues in the petition. On the submissions related to the application of Civil Procedure Rules in Election petitions it is my view that the Election Act has rules that must be complied with but where it is silent any High Court having civil jurisdiction is at liberty to fall back and be guided by the provisions of the Civil Procedure Act and Rules. I note that the applicant did not submit that the election petition does not raise any substantial triable issues. Based on my findings in this ruling, I find no merit in the 1st Respondent’s application and decline to stay the election petition as prayed or grant the alternative prayer to strike out the election petition or dismiss it for being an abuse of the court process or for not disclosing substantial triable issues. Costs shall however be in the cause.

Orders accordingly.

Dated, signed and delivered this 21st Day of June 2013.

R.E. OUGO

JUDGE

In the Presence of:-

.....Petitioner/ Respondent

.....1st Respondent/Applicant

.....2nd Respondent

.....Court clerk



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