



**Republic v Independent Electoral and Boundaries Commission & 2 others;
Mandera County Assembly (Interested Party) (Judicial Review 153 of 2023)
[2024] KEHC 15071 (KLR) (Judicial Review) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW 153 OF 2023
JM CHIGITI, J
NOVEMBER 28, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**THE CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION 2ND RESPONDENT**

**THE SELECTION PANEL FOR THE RECRUITMENT OF NOMINEES
OF APPOINTMENT AS CHAIRPERSON AND MEMBERS OF THE
IEBC 3RD RESPONDENT**

AND

MANDERA COUNTY ASSEMBLY INTERESTED PARTY

JUDGMENT

Background

1. The application that is before this court for determination is the one dated 24th October, 2023 wherein the applicant seeks the following orders:
 1. That the Honourable Court be pleased and do hereby grant Judicial Review Order of Certiorari to remove into this Court and quash the 2nd Respondent’s illegal Gazette Notice No. 13544 Vol. CXXV –No 221 dated 6th October, 2023 purporting to gazette names of



nominees of the members of the Mandera County Assembly in violation of Articles 88, 90, 177, and 250 of *the Constitution* and the *Independent Electoral and Boundaries Commission Act*.

2. A declaration that the swearing in of Abdiwelly Haji Bukura and Suban Ahmed Abdinoor by the Interested Party on 11th October, 2023 pursuant to Gazette Notice No. 13544 Vol. CXXV –No 221 dated 6th October, 2023 is null and void and of no legal effect whatsoever.
3. An order of prohibition to restrain the 2nd Respondent from re-gazetting or in any manner whatsoever purporting to gazette names of nominees of the members of the Mandera County Assembly in violation of Articles 88, 90, 177, and 250 of *the Constitution* and the *Independent Electoral and Boundaries Commission Act*.
4. That Costs of the Application to be provided for.

The Applicants Case

2. Isaack Lango Guyo, a resident of Nairobi County and of Post Office Box C/o Ilham & Company Advocates, Kindaruma Road, Top Plaza, 4th Floor, P.O. Box 6574-00100, Nairobi do hereby make oath and state as follows: -
 1. That I am a Kenyan male adult of sound mind, the Applicant herein with the knowledge of the facts attendant to this Application hence I am competent to swear this affidavit in support of the instant Application.
 2. That there are several elective posts that have since become vacant owing to various reasons including death and nullification of electoral results from the date when the term of the former commissioners expired.
 3. That in case of a vacancy in an elective post where an election has been nullified, the 1st Respondent, IEBC, is required to: -
 - i. To delete the names of those whose elections have been nullified;
 - ii. To Publish in the Kenya Gazette names of the replacements as declared by the courts;
 - iii. To repeat the process of allocation of party lists as directed by the Courts and de-gazette the names of the members whose elections were nullified by court in respect to certain political parties and publish the resultant names in the gazette; and
 - iv. To receive fresh lists from the concerned political parties, process and publish the resultant names in the gazette.
 4. That *the Constitution* vests the responsibility for the conduct and supervision of the elections including elections by way of nomination upon the Independent Electoral and Boundaries Commission corporately and not to the Secretary and/or Chief Executive Officer and/or Secretariat.
 5. The offices of Chairperson and Commissioners of the Independent Electoral and Boundaries Commission (IEBC) have been vacant from various dated between 21st February, 2023 and 1st March, 2023.
 6. That the selection process for the chairperson and commissioners of the IEBC is moving at a snail's pace in complete disregard of the fact that it is absolutely essential to complete the



said process in order to give effect to the provisions of Articles 88, 90, 177 and 250 of the Constitution and section 4 of the Independent Electoral Boundaries Commission Act.

3. The 4th Respondent issued an Advisory dated 11th May, 2023 on what transpires in absence of the Commission and powers of the 2nd Respondent as far as publication of directives on election related compliance in Kenya Gazette Notice is concerned to wit: -

“It is important to note that it is the commissioners who are ultimately responsible and accountable to Kenyans for the proper discharged of IEBC ‘s constitutional and statutory mandate. It thus follows that in absence of a quorate commission that no gazette notices may be executed for publication to enable the conduct of any by elections as the same would lack the sanctions of the Commission thereby violating the provisions of article 250 (1) of the Constitution.”

4. It is his case that vide Gazette Notice No. 13544 Vol. CXXV –No 221 dated 6th October, 2023, the 2nd
5. Respondent purported to publish names of nominated members of the County Assembly in Kenya, an act which is a preserve of a fully constituted commission and not of a Chief Executive Officer.
6. According to the Applicant, the action of the 2nd Respondent is illegal unconstitutional, marred with procedural impropriety and flies in the face of Articles 88, 90, 177 and 250 of the Constitution and sections 2 and 4 of the Independent Electoral Boundaries Commission Act.
7. The Honourable Court granted an order granting leave to operate as stay of the implementation of the said Gazette Notice through the Order dated 10th October, 2023.
8. Although served with the said order, the Interested Party proceeded to swear in Abdiwelly Haji Bukura and Suban Ahmed Abdinoor purportedly pursuant to the Gazette Notice.
9. It is against the foregoing background that he seeks that the orders sought should be granted.

1st and 2nd Respondent's Case

10. They oppose the Application on the following principal grounds;
 - a. Prayer No. 1 seeks to quash Gazette Notice No. 13544 Vol. CXXV - No. 21 dated 6th October 2023 that was published pursuant to a Court Order, which Court Order has not been challenged on appeal or review.
 - b. Prayers Nos. 2 and 3 seek orders different from those for which leave was granted.
 - c. Prayer No. 2 seeks an order of declaration which does not fall under the purview of judicial review.
11. It is their case that on 7th August 2023, the High Court at Garissa delivered its Judgment on the appeal filed by Abdow Bishar Maalim in Election Appeal No. E002 of 2023, Abdiwelly Haji Bukura in Election Appeal No. E004 of 2023 and United Democratic Party (UDM) in Election Appeal No. E005 of 2023.
12. These appeals arose from the Judgment of the Resident Magistrates Court at Mandera (Hon. P.W. Wasike) dated 2nd February 2023 in Election Petition No. MCEP No. E007 of 2022 as consolidated with Election Petition No. MCEP E006 of 2022.



13. In the Judgment, the Garissa High Court directed, inter alia, that Commission publish in the Kenya Gazette, the UDM's Party List for Mandera County (Marginalized Category) in the same priority order as published in the Standard Newspaper of 27th July 2022.
14. The order of 7th August 2023 presented both legal and practical difficulties on the part of the Commission on compliance for the following reasons: -
 - a. The orders given on 7th August 2023 required the Commission to degazette Abdow Bishar Maalim and Sokorey Maalim Isaakow as United Democratic Movement Party's nominated members of the County Assembly of Mandera and in their place gazette Suban Ahmed Abdinoor and Abdiwelly Haji Bukura as the duly elected nominated members.
 - b. The responsibility/ mandate of publishing a Gazette Notice being a policy based decision is vested on the Commission and therefore it requires the presence and the sanction of the Commission Chairperson and Commissioners pursuant to Section 1 (A) (a) of the [Independent Electoral and Boundaries Commission Act](#), 2011 (IEBC Act).
15. It is their case that the execution and publication of gazette notices by the Commission is a preserve of the Chairperson of the Commission.
16. The offices of the Chairperson and Members of the Commission are vacant and are yet to be filled.
17. There are no commissioners to carry out certain activities including publication of election related Gazette Notices as required by the orders issued on 7th August 2023.
18. Owing to the vacancies in the Commission, the Commission was unable to make policy based decisions and as a result, it faced challenges in complying with court orders.
19. On 11th May 2023, the Attorney General advised as follows:
 - i. The Chief Executive Officer is not a member of the Commission as contemplated under Article 250 (1) of [the Constitution](#) and is an employee of the Commission.
 - ii. [The Constitution](#) reposes the responsibility for the conduct and supervision of elections upon the Commission corporately and not to the secretary or secretariat alone.
 - iii. The process leading up to and the conduct of elections must be authorised and sanctioned by the commissioners who are required to exercise oversight over the secretariat and to give strategic direction to the Commission in the performance of its functions under [the Constitution](#) and applicable Acts of parliament.
 - iv. It is the Commissioners who are ultimately responsible and accountable to Kenyans for the proper discharge of the Commission's constitutional and statutory mandate.
20. On 2nd October 2023, the Garissa High Court, issued the following orders, inter-alia:
 - a. The speaker of Mandera County Assembly having attended court pursuant to the Summons, he is hereby discharged.
 - b. The application dated 28th September 2023 is on the undertaking of the Commission's Counsel marked as withdrawn without costs.
 - c. On the basis of that undertaking and submissions by the parties this morning the Chief Executive Officer of IEBC be and is hereby directed to publish a Notice in the Kenya Gazette



giving effect to the orders in this Court's Judgment of 7/8/2023 degazetting two named Members of the County Assembly (MCA) and gazetting the two new MCAS.

- d. The same be published this week
 - e. Mention on 11/10/2023 to confirm if the Notice will have been published, as this being nomination slots and not by- election, they do not need the commission to be fully constituted. It is a function performed to effect a court order hence not a policy action.
 - f. Summons for Marjan Hussein Marjan attendance are hereby extended and will be discharged automatically upon the said notice being published in the Kenya Gazette.
21. Pursuant to the Court order given on 2nd October 2023, the respondents published the Gazette Notice dated 6th October 2023.
 22. The Speaker confirmed that said members were sworn into office on 11th October 2023 and consequently, the Court closed the files and indicated that in view of the instant case the Garissa High Court files be transferred to this Honourable Court for perusal and for appropriate orders.

Interested parties case:

23. The interested party opposes the application through the replying Affidavit of the Speaker of the National Assembly of Mandera County.
24. It is his case that the orders sought by the Applicant herein are untenable to be granted by the Court and the same should be sought in the Court of Appeal.
25. In the application, the Applicant is seeking leave to apply for orders of certiorari, prohibition, stay/ conservatory orders against the implementation of the 2nd Respondents Gazette Notice No. Vol. CXXV-No. 221 dated 6th October 2023.
26. The Application herein and from the reliefs sought, that the Applicant is challenging publishing of the Gazette Notice by the 2nd Defendant and its implementation.
27. It is his case that The application is an election Appeal matter sui generis in nature as the judges who handle the said matters are directly appointed by the Chief Justice in accordance with the Section 75 of the [Elections Act](#) and as such the orders issued by the said Courts cannot be set aside by the Court of the same level.
28. Where an order has been issued by a Court and the order has been partially or fully perfected, then then the Court is rendered functus officio.
29. In so arguing it relies on the certificate dated 9th August 2023, a court order dated 3rd October 2023 and 11th October respectively issued by Justice Prof Sifuna.
30. It argues that the application herein is an afterthought meant to direct infringe the weighty rigid right that of the nominees of the members of Mandera County Assembly to enjoy the fruits of the judgment delivered in their favour.
31. It is his case that the Judicial Review application herein has been overtaken by events cannot be tenable anymore and if it proceeds to success the victory would be pyrrhic. The Gazette Notice No. Vol. CXXV-No. 221 dated 6th October 2023 being challenged herein has already been implemented and the members in question have already been sworn in as members of the County Assembly of Mandera County.



32. The issues being raised in the present application were dealt with and the Court ruled on them thus Res Judicata.
33. The Judicial Review Application herein is therefore misconceived, scandalous, frivolous an utter abuse of the solemn Court's process and should be treated with extreme prejudice as it deserves and that it be dismissed with costs.

Analysis and Determination:

Following is the issue for determination:

1. Whether this court has the jurisdiction to hear and determine this suit.
2. Whether the applicant is entitled to the orders sought.

Whether this court has the jurisdiction to hear and determine this suit.

34. It is not in dispute that on 7th August, 2023 the Garissa High Court rendered a Judgment and on 2nd October 2023, issued the following orders, inter-alia:
 - a. The speaker of Mandera County Assembly having attended court pursuant to the Summons, he is hereby discharged.
 - b. The application dated 28th September 2023 is on the undertaking of the Commission's Counsel marked as withdrawn without costs.
 - c. On the basis of that undertaking and submissions by the parties this morning the Chief Executive Officer of IEBC be and is hereby directed to publish a Notice in the Kenya Gazette giving effect to the orders in this Court's Judgment of 7th August, 2023 degazetting two named Members of the County Assembly (MCA) and gazetting the two new MCAS.
 - d. The same be published this week
 - e. Mention on 11th October, 2023 to confirm if the Notice will have been published, as this being nomination slots and not by- election, they do not need the commission to be fully constituted. It is a function performed to effect a court order hence not a policy action.
 - f. Summons for Marjan Hussein Marjan attendance are hereby extended and will be discharged automatically upon the said notice being published in the Kenya Gazette.
35. Pursuant to the Court order given on 2nd October 2023, the respondents published the Gazette Notice dated 6th October 2023. No appeal has been filed challenging the said judgment.
36. In the circumstances It is this court's finding and I so hold that this court is bound by the doctrine of finality and it lacks the jurisdiction to quash Gazette Notice No. 13544 Vol. CXXV - No. 21 dated 6th October 2023 given that it was published pursuant to a Court Order, which has not been challenged on appeal or review.
37. The doctrine of Res judicata has a similar effect on this suit.

Disposition;

38. Only the Court of appeal can interfere with the High Court Judgment and not the High court Judicial Review division.



39. Only the court of appeal has the jurisdiction to determine whether the Respondents and the interested parties acted illegally or contrary to Articles 88, 90, 177 and 250 of *the Constitution* and sections 2 and 4 of the Independent Electoral Boundaries Commission Act.

Order;

The application lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2024.

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J. CHIGITI (SC)

JUDGE

