



**Chumba & another v Independent Electoral and Boundaries Commission & 5 others  
(Constitutional Petition 22 of 2022) [2023] KEHC 289 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 289 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION 22 OF 2022  
RN NYAKUNDI, J  
JANUARY 27, 2023**

**BETWEEN**

**REGINAH CHEPKEMBOI CHUMBA ..... 1<sup>ST</sup> PETITIONER**

**ROBERT KIPTANUI KERING ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**UNITED DEMOCRATIC ALLIANCE PARTY (UDA) ..... 2<sup>ND</sup> RESPONDENT**

**WACHIRA JAMES MAINA ..... 3<sup>RD</sup> RESPONDENT**

**TIROP BELINDA CHEBICHII ..... 4<sup>TH</sup> RESPONDENT**

**WAIGANJO DAVID WAWERU ..... 5<sup>TH</sup> RESPONDENT**

**TIROP EVERYLNE CHEPKOECH ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. What is before this court is the notice of preliminary objection dated November 14, 2022. The 2<sup>nd</sup> respondent objected to the petition on the following grounds;
  1. That, this honourable court lacks jurisdiction to entertain, hear and determine the petition and the application pursuant to the provisions of section 75(1A) of the *Elections Act* as read with rules 3 and 6 of the *Elections (Parliamentary and County Elections) Petition Rules, 2017*.
  2. That the petition is bad in law and an abuse of the court process and ought to be struck out with costs to the 1<sup>st</sup> respondent.
2. The parties were directed to file submissions on the notice of preliminary objection.



## Applicant's/Respondent's Case

3. The 2<sup>nd</sup> respondent submitted that the honourable court lacks jurisdiction to hear and determine the issues raised therein pursuant to section 75 (1 a) of the [Elections Act](#), 2011 and rule 6 (1) (b) of the [Elections \(Parliamentary and County Elections\) Petition Rules, 2017](#). Further, that the petition does not disclose violations of the [Constitution](#) or the law and finally, that the petition is an abuse of court process.
4. Learned counsel for the 2<sup>nd</sup> respondent cited the cases of [Owners of Motor Vessel 'Lillian S' v Caltex Oil \(Kenya\) Limited, Kalpana H Rawal & 2 others v Judicial Service Commission & 2 others](#) (2016) eKLR and [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) (2012) eKLR on jurisdiction. He further submitted that it is manifest from the factual foundations of the petition that the petitioners' actual gravamen relates to the nomination of members of the county assembly of Uasin Gishu. Further, that the substratum of the petition before court is the nomination of persons to fill in the special lists being the marginalized list and the gender top up list.
5. Even though article 165 (3)(d) of the [Constitution](#) vests in this court jurisdiction to determine questions whether anything said to be done under the authority of the [Constitution](#) is consistent with or contravenes the [Constitution](#), that jurisdiction is deferred by the provisions of section 75 (1A) of the [Elections Act](#) which clearly states that;

“ A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice. ”
6. Learned counsel relied on the case of [Orange Democratic Movement v Yusuf Ali Mohamed & 5 others](#) [2018] eKLR where the court held that the High Court has no jurisdiction in these types of cases. The [Elections Act](#) has given jurisdiction to the Magistrates Court and the same has been enacted under the authority of the [Constitution](#). Thus, it follows that the jurisdiction of the Magistrates' Court to hear and determine election petitions relating to membership of the county assembly has a constitutional underpinning. He cited the case of [Moses Mwicigi and 14 others v Independent Electoral and Boundaries Commission and 5 others](#) SCK. Petition No. 1 of 2015 [2016] eKLR to buttress this argument.
7. The 2<sup>nd</sup> respondent stated that the issues raised in the petition ought to be heard and determined by the Magistrates Court as it is clear that post-gazettement electoral disputes relating to membership to a county assembly is vested upon the Magistrates Court.
8. The 2<sup>nd</sup> respondent contended that the petition is an abuse of the court process in view of the absence of jurisdiction or any violation of the [Constitution](#). Learned counsel urged the court to dismiss the petition with costs.
9. The 1<sup>st</sup> respondent supported the preliminary objection and filed submissions on December 22, 2022. It cited the following cases on jurisdiction;the [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) (1989) KLR1, [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) (2012) eKLR and [Benson Makori Makworo v Nairobi Metropolitan Services & 2 others](#) (2022) eKLR.
10. Learned counsel also relied on section 75 A of the [Elections Act](#) and rule 3 of the [Elections \(Parliamentary and County Elections\) Petition Rules, 2017](#) as read with rule 6 and submitted that the dispute herein emanates from the nomination and subsequent gazettement of the 3<sup>rd</sup> to 6<sup>th</sup> respondents as the nominated members of county assembly for Uasin Gishu county assembly. Further, that the



said nomination and gazettelement of the 3<sup>rd</sup> to 6<sup>th</sup> respondents as the nominated members of county assembly for Uasin Gishu county assembly constitutes an election and any disputes arising therefrom ought to be filed before an election court as stipulated under section 75 A of the [Elections Act](#) as read together with rules 3 and 6 [Elections \(Parliamentary and County Elections\) Petition Rules, 2017](#).

11. The 1<sup>st</sup> respondent maintained that the petition ought to be dismissed with costs.

### **Respondent/Petitioner's Case**

12. There are no submissions on record for the petitioners with regard to the preliminary objection despite the court directing that the parties prosecute the preliminary objection by way of written submissions. The petitioner however filed submissions on the petition.

### **Analysis and Determination**

13. It is trite that a preliminary objection ought to be based on points of law. Sir Charles Newbold in the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 defined a preliminary objection as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by dear implication out of pleadings and which if argued as a preliminary point may dispose of the suit examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. ”

14. From the preliminary objection, it is evident that the points of law raised by the 2<sup>nd</sup> respondent, which shall form the issues for determination are;
  1. Whether this court has jurisdiction to hear the petition.
  2. Whether the petition discloses any constitutional violations.

### **Whether this court has jurisdiction to hear the petition**

15. The *locus classicus* for jurisdiction is the celebrated case of the [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) (1989) KLR1 where the court stated as follows;

" .....by jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restrictions or limit is imposed the jurisdiction is said to be limited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognisance or as to the area over which the jurisdiction shall extent, or it may partake of area of over which the jurisdiction of an inferior court or tribunal. (including and arbitrator) depends on existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction, but except where the court or tribunal has been given powers to determine conclusively whether the facts exists. Where the court



takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be inquired before judgement is given”

16. Further, the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

” A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ... where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law. ”

17. To determine whether this court has jurisdiction, the nature of the dispute before the court must be established. The petitioner has approached this court under the guise of a constitutional petition but the main question that will settle this issue is; what is the cause of action in the petition? A perusal of the petition reveals that the dispute arises from the nomination of members of the county assembly of Uasin Gishu pursuant to the gazette notice published on September 9, 2022.

18. For all intents and purposes nomination to the county assembly is part of an election and as a result this is clearly an election dispute. The High Court was faced with a similar scenario in *Orange Democratic Movement v Yusuf Ali Mohammed & 5 others* [2018] eKLR where it expressed itself as follows;

49. On the question whether there is a specific constitutional or statutory bar to the High Court to entertain a constitutional petition on settlement of electoral disputes in relation to membership to a county assembly we answer in the affirmative. There is an express statutory bar to the original Jurisdiction of the High Court to handle post-gazettment nomination or electoral disputes relating to membership to the county assembly. The original jurisdiction to hear and determine post-gazettment electoral disputes relating to membership to a county assembly is vested upon the Magistrates Court. The High Court has appellate jurisdiction in respect to disputes relating to post-gazettment of members to a county assembly. The express statutory bar is section 75 (1A) of the *Elections Act*. The section provides:

A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice. ”

19. In *Jane Ochieng Muboli v IEBC & 2 others* [2015] eKLR, Lenaola J (as he then was) after analysing decisions on the issue of party nomination lists, set down the guidelines on disputes relating to party nomination lists as follows;

From the above decisions, for this court to have jurisdiction in a matter of a dispute relating to political party lists for nominations to membership of a county assembly, the following conditions must be met;



- i. The proper manner to challenge the membership of any member of a county assembly whether elected or nominated is by way of an election petition under the relevant law, in this case parts iii and iv of the [Elections Act](#), No 24 of 2011
  - ii. Where a complaint giving rise to the dispute was lodged with the IEBC or the High Court before gazettelement of the nominees, then the need for an election petition would be dispensed with.
20. The petitioners did not provide any evidence or allude in any way that the complaint had been lodged with the 1<sup>st</sup> respondent regarding the party nomination lists.
21. Section 75 (1A) of the [Elections Act](#) states that;
 

" A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice. "
22. Rule 6 of the [Elections \(Parliamentary and County Elections\) Petition Rules, 2017](#) provides as follows;
  - 1) An election court shall be properly constituted, for purposes of hearing—
    - a) a petition in respect of an election to parliament or to the office of governor, if it is composed of one High Court judge; or
    - b) a petition in respect of an election to a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under section 75 of the Act.
  - 2) The Chief Justice may—
    - a) in consultation with the principal judge of the High Court, designate such judges; and
    - b) designate such magistrates as are necessary for expeditious disposal of petitions.
  - 3) The Chief Justice shall publish the name of the judge or magistrate designated under sub-rule (2) in the gazette and in at least one newspaper of national circulation.
23. The court takes cognizance of the constitutional provision of article 165(3) of the [Constitution](#) which clothes the court with the jurisdiction as follows;
  - (3) Subject to clause (5), the High Court shall have—
    - (a) unlimited original jurisdiction in criminal and civil matters;
    - (b) jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened;
    - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this [Constitution](#) to consider the removal of a person from office, other than a tribunal appointed under article 144;
    - (d) jurisdiction to hear any question respecting the interpretation of this [Constitution](#) including the determination of—
      - (i) the question whether any law is inconsistent with or in contravention of this [Constitution](#);



- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- (iii) any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws under article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

24. This court is further guided by the wisdom of the apex court in the Supreme Court decision in *Moses Mwicigi & 4 others v Independent Electoral & Boundaries Commission* (2016) eKLR where at para 119 it stated;

To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.

25. In the premises, it is evident that the only avenue that was available to the petitioners for the present dispute was an election petition before a duly gazetted magistrate and not a constitutional petition. Had they filed a complaint on the issue with the 1<sup>st</sup> respondent, they might have had a better chance at being heard by this court, but they did not. The court cannot arrogate itself jurisdiction to determine the matter through judicial craft and must down its tools.

26. The upshot of the foregoing is that the preliminary objection succeeds and the petition is hereby struck out with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF JANUARY 2023.**

**In the Presence of Oyaro for the Petitioner.**

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**R. NYAKUNDI**

**JUDGE**

