



Mwenda v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party) (Petition E015 of 2022) [2023] KEHC 2901 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E015 OF 2022**

TW CHERERE, J

MARCH 30, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27, 38 AND 47 OF ~~THE CONSTITUTION~~ OF KENYA, 2010

AND

**IN THE MATTER OF THE INTERNATIONAL
CONVENTION ON CIVIL AND POLITICAL RIGHTS**

AND

**IN THE MATTER OF NOMINATION FOR ELECTIONS
OF SPEAKER OF THE MERU COUNTY ASSEMBLY**

BETWEEN

JOHNSTONE MWENDA PETITIONER

AND

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

THE CLERK, MERU COUNTY ASSEMBLY 2ND RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

1. By Gazette Notice No. 435 of 20th January, 2022, Independent Electoral and Boundaries Commission (IEBC) who is the 1st Respondent herein notified members of public that a public officer who intended



to contest in the General Election should have resigned from public office within 6 months before the date of election being on or before 09th August, 2022.

2. On 14th September, 2022, the office of the Assembly Clerk of the County Assembly of Meru (2nd Respondent) declared vacancies in the office of Speaker and Deputy Speaker of the County Assembly of Meru. 2nd Respondent also developed a 15-point check list for compliance one of them being that a public servant shall have resigned from public office within 6 months before the date of election being on or before 09th August, 2022 and called on interested persons to submit their nomination papers.
3. On 16th September, 2022, Petitioner submitted his application for clearance to contest the position of speaker of the County Assembly of Meru to 1st Respondent but was not cleared on the ground that he had resigned as a lecturer with the Meru University of Science and Technology on 05th September, 2022 which was less than 6 months before the 09th February, 2022 general elections and did therefore not satisfy the requirements of Section 43(5) of the [Elections Act](#).

Petitioner's case**

4. Petitioner's case is contained in Petition dated 15th September, 2022 and amended on 06th October, 2022. It is Petitioner's case that it is not possible to determine 6 months within which a person who intends to contest the position of speaker arises for the reason that the position falls vacant long after the general election and it is determined by when the governor gazettes the first sitting of the County Assembly among other factors.
5. Petitioner argues that section 43(5) of the [Elections Act](#) is unreasonable in its limitation of rights of public servants under Article 24 of the [Constitution](#) such as the Petitioner herein to vie in an election that takes place after the general election and denies him equal benefit and protection of the law.
6. The Petitioner therefore seeks the following reliefs: -
 1. A declaration that section 43(5) of the [Elections Act](#) is not applicable to persons seeking to vie for position of speaker of the County Assembly of Meru
 2. Declaration that section 43(5) of the [Elections Act](#) is in contravention and/or violation of Article 38(2) of the [Constitution](#) in so far as the same is deemed to apply to election of speaker of the County Assembly of Meru
 3. Declaration that section 43(5) of the [Elections Act](#) applies to by-election and other elections that take place subsequent to the general election and as per Article 24(1)(c) of the [Constitution](#) , section 43(5) of the [Elections Act](#) would have less restrictive means to adhere or that would have achieved the purpose of Article 192(2) (a) of the [Constitution](#) and Standing Order No. 4 and 5 of the County Assembly Rules
 4. Declaration that the 1st Respondent's actions of refusing to clear the Petitioner and/or bar the Petitioner from contesting for the position of speaker of the County Assembly of Meru is a violation of Section 45 (3) and (5) of the [Elections Act](#) and Article 38(2) of the [Constitution](#). Costs be provided for

1st Respondent's case

7. The 1st Respondent opposed the Petition by a replying affidavit sworn on 18th September, 2022 by William Wambugu Ndung'u employed by Independent Electoral and Boundaries Commission (IEBC) as the Returning Officer for Meru County for the 09th August, 2022 general elections.



8. He avers that Petitioner did not present his request for clearance to contest the position of Speaker of the County Assembly of Meru and that this Petition is anticipatory and speculative.
9. The 1st Respondent argues that the application of section 43(5) of the *Elections Act* and its constitutionality by dint of Articles 24 and 27 of the *Constitution* have been determined by courts of competent jurisdiction and are therefore res judicata.

2nd Respondent's case

10. The 2nd Respondent opposed the Petition by way of a replying affidavit sworn by Jacob Kirari (the 2nd Respondent) on 16th September, 2022.
11. According to him, Petitioner did not qualify to contest for election of speaker of the County Assembly of Meru having not resigned as a lecturer with the Meru University of Science and Technology 6 months before the 09th February, 2022 general elections and did therefore not satisfy the provisions of section 43(5) of the *Elections Act*.
12. In addition, 2nd Respondent similarly argues that the issue before the court is res judicata the same having been determined in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment),

Determination

13. I have considered the Petition, the affidavit in support, the responses, the, the submissions and authorities referred to in support of the parties' respective positions
14. I have deduced the following issues for determination
 1. Whether the subject matter in this Petition is res judicata
 2. What orders are merited

Whether the subject matter in this Petition is res judicata

15. The Court of Appeal had an opportunity to deal with the issue of whether a matter is or is not res judicata in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR and the court stated thus:

Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“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 the 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.”

- i. In *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR, the Supreme Court of Kenya had this to say about the application of the res judicata principle (58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these



are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v. James Nderitu Gitbae & 2 Others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

16. In this Petition, Petitioner challenges the constitutionality of section 43(5) of the *Elections Act* which requires a public officer who intends to contest an election under the Act to resign from public office at least six months before the date of election.
17. In *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (*supra*)), the Petitioner sought to, inter alia, challenge the constitutionality of section 43(5) and (6) of the *Elections Act*, 2011. The petition was said to be anchored on article 22(1) of the *Constitution* of Kenya, 2010 (the *Constitution*). In filing the petition, the petitioner was aggrieved by a circular dated 1st December 2016 issued by the Chief of Staff and Head of Public Service to all public officers requiring those of them who were intending to vie for any elective position in the 2017 general election to resign at least six months before the general election, pursuant to the provisions of section 43(5) and (6) of the *Elections Act*, 2011. The trial judge agreed with the Petitioner but on appeal, the Court of Appeal stated that:

Our view therefore is that the provisions of sections 43(5) and 6 are justifiable and reasonable and are not in contravention of any provisions of the *Constitution* .
18. From the foregoing decision, I have come to the conclusion that the issue of the constitutionality of section 43(5) of the *Elections Act* which requires a public officer who intends to contest an election under the Act to resign from public office at least six months before the date of election has been determined in a previous decision thereby settling the matter with finality.
19. What the Petitioner has done is to try and evade the doctrine of res judicata by introducing a new cause of action yet seeking the same remedy. This attempt must however fail for the reason that the matter before the Court has been resolved by another Court of competent jurisdiction.

What orders are merited**

20. Section 43(5) of the *Elections Act* applied to the Petitioner who was a lecturer at the Meru University of Science and Technology. By resigning on 05th September, 2022 which was less than 6 months before the 09th February, 2022 general elections, Petitioner failed to satisfy the requirements of Section 43(5) of the Act.
21. Having said that, I find that 1st Respondent acted lawfully when it failed to clear the Petitioner to contest for the position of speaker of the County Assembly of Meru.
22. In the end, I find that this Petition has no merit and it is dismissed with costs to the Respondents.

DATED AT MERU THIS 30TH DAY OF MARCH 2023

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Petitioner - Mr. Otieno for Otieno C & Co. Advocates



For 1st Respondent - Mr Ochieng for C.B. Mwangela & Co. Advocates

For 2nd Respondent - Mr. Kinyua Advocate

For Interested Party - N/A

