



**Mageto & another v Ngare & 4 others (Petition E049 of 2022)  
[2023] KEHC 2378 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E049 OF 2022  
OA SEWE, J  
MARCH 24, 2023**

**BETWEEN**

**EVANS MAGETO ..... 1<sup>ST</sup> PETITIONER**

**PHILIP KARISA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MILKA MORAA NGARE ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**CLERK, COUNTY ASSEMBLY OF MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT ..... 4<sup>TH</sup> RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petition herein was filed on September 21, 2022 by the petitioners, Evans Mageto and Philip Karisa, for the following remedies:
  - (a) A declaration that Gazette Notice No 186 published in Vol CXXIV No 131 on September 9, 2022 in so far as it purports to gazette the name of the 1<sup>st</sup> respondent as a nominated member of Mombasa County Assembly under the gender top up is null and void;
  - (b) An order of mandatory injunction compelling the Independent Electoral & Boundaries Commission (IEBC) to withdraw the name of the 1<sup>st</sup> respondent from the Gazette Notice in so far as it lists the 1<sup>st</sup> respondent as a nominated member of the County Assembly of Mombasa.
  - (c) An order of injunction prohibiting the 3<sup>rd</sup> respondent from swearing in the 1<sup>st</sup> respondent as a nominated member of the County Assembly of Mombasa.



- (d) Any other orders the Court may deem fit and expedient in the circumstances of this case.
2. The petitioner alleged that on September 9, 2022, the 2<sup>nd</sup> respondent published Gazette Notice Vol CXXIV, No 186 which included the name of the 1<sup>st</sup> respondent as a nominee for Orange Democratic Movement, the 4<sup>th</sup> respondent herein for purposes of Article 177(1)(b) of the Constitution, yet her name did not appear in the 4<sup>th</sup> respondents Party List for gender top up. According to them, the 1<sup>st</sup> respondent was undeserving of nomination as a member of the County Assembly of Mombasa; hence the Petition.
3. Concomitantly, the petitioners filed a Notice of Motion September 21, 2022 under a Certificate of Urgency, seeking orders that:
- (a) Spent
- (b) The Court be pleased to issue conservatory orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents either by themselves and/or their servants, agents, and/or any other person claiming under them from swearing the 1<sup>st</sup> respondent as a nominated member of the County Assembly of Mombasa pending the hearing and determination of the application.
- (c) The Court be pleased to issue conservatory orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents either by themselves and/or their servants, agents, and/or any other person claiming under them from swearing the 1<sup>st</sup> respondent as a nominated member of the County Assembly of Mombasa pending the hearing and determination of the application (presumably the Petition).
- (d) That costs of the application be provided for.
4. In response to the Petition as well as the Notice of Motion dated September 21, 2022, learned counsel for the 1<sup>st</sup> respondent, Mr Oluga, filed a Notice of Preliminary Objection on September 23, 2022 contending that the Court lacks jurisdiction to hear and determine the Petition and the application because of the following reasons:
- (a) The Court is not an election court and therefore lacks jurisdiction to hear the issues raised in the Petition and the application which are related to the election by way of nomination into the County Assembly of Mombasa.
- (b) The orders sought in the Petition challenge the validity of the nomination of persons who have been gazetted and the orders if granted would amount to nullification of election of the nominated persons which is the province and jurisdiction of the election courts under Section 75(1A) of the Elections Act.
- (c) The true character of the petitioner's cause, despite being disguised as a constitutional petition, is in fact an election petition, questioning the validity of nomination of elected members of the County Assembly of Mombasa who have been gazetted and such a challenge can only be commenced in the election court under Section 75(1A) of the Elections Act.
- (d) This Court does not have jurisdiction to hear and determine nomination disputes.
5. Similarly, Mr Mutugi for the 2<sup>nd</sup> respondent filed a Notice of Preliminary Objection on September 23, 2022 on the following grounds:
- (a) This Court sitting as a constitutional court is not clothed with jurisdiction to listen to and determine the application herein and the Petition; and the same offends Section 75(1A) of the Election Act.



- (b) The Petition herein is an election petition disguised as a constitutional petition.
6. The same approach was taken by Mr Tajbhai for the 3<sup>rd</sup> respondent. His Notice of Preliminary Objection dated September 23, 2022 is premised on the grounds that:
- (a) The applicant does not have the requisite *locus standi*.
  - (b) the application and the Petition are premature and incompetent in that the petitioner has not used the alternative mechanisms, such as the party's dispute resolution tribunal or the Political Parties dispute resolution mechanism, before approaching the Court.
  - (c) The orders sought in the Petition challenge the validity of the nominations of the persons who have been gazetted and the orders if granted would amount to nullification of the election of the nominated persons which is the province and jurisdiction of the election courts under Section 75(1A) of the [Elections Act](#).
  - (d) The instant application and Petition is framed as a constitutional petition, however the nature of the dispute is an election petition, questioning the validity of nomination of an elected member of the County Assembly of Mombasa.
  - (e) The application has since been overtaken by events.
  - (f) The application is unfounded, frivolous and vexatious and is a waste of the Court's time.
  - (g) The application be dismissed with costs to the 3<sup>rd</sup> respondent.
7. In the light of the Notices of Preliminary Objection filed by counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, directions were given herein on October 5, 2022 that the same be canvassed by way of written submissions. The 1<sup>st</sup> respondent's written submissions were filed thereafter on October 18, 2022 by Mr Oluga. He proposed a single issue for determination, namely, whether this Court has jurisdiction to hear and determine the application and the Petition. He reiterated the 1<sup>st</sup> respondent's stance that, since the Petition challenges the validity of the nomination of the 1<sup>st</sup> respondent, it ought to have been filed as an election petition. He relied on Section 75(1A) of the [Elections Act](#) as well as [National Rainbow Coalition Kenya \(NARC KENYA\) v Independent Electoral & Boundaries Commission & Others](#) (Petition 1 of 2021) [2022] KESC 6 (KLR) and [Dennis Okong'o Juma v ODM National Elections Board & Others](#) for the proposition that there are two modes of election, namely, election by universal suffrage and election by way of nomination.
8. On behalf of the 2<sup>nd</sup> respondent, Mr Mutugi likewise submitted that this petition ought to have been filed before an election court, constituted for that purpose by the Chief Justice in accordance with the provisions of Sections 34 and 75(1A) of the [Elections Act](#). Counsel also relied on [Moses Mwigigi & Others v Independent Electoral & Boundaries Commission & Others](#) [2016] eKLR and [National Rainbow Coalition Kenya \(NARC KENYA\) v Independent Electoral & Boundaries Commission & Others](#) (*supra*) as well as [Owners of Motor Vessel Lilian "S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR for the proposition that where the true character of the cause, despite being disguised as a constitutional petition, is in fact an election petition, questioning the validity of nomination of an elected member of a county assembly, then such a challenge can only be commenced in the election court envisaged under Section 75(1A) of the [Elections Act](#).
9. It appears that no submissions were filed either by Mr. Egunza for the petitioner or Mr. Tajbhai for the 3<sup>rd</sup> respondent as no such documents are on the file. I have nevertheless given consideration to all



the three Notices of Preliminary Objection in the light of the principles laid down in *Mukisa Biscuit Company v West End Distributors Limited* [1969] EA 696, in which it was held that:

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”

10. In this instance, the main issue for determination is whether this Court has jurisdiction to entertain the petition and the pending interlocutory application. The centrality of jurisdiction was well articulated in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, in which it was held:

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

11. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court also expressed itself on the matter 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 by law. We agree with counsel 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 on 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.”

12. According to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents, in so far as the petition seeks to challenge the nomination by ODM party under the Party List, it ought to have been referred to the election court as envisaged by Section 75(1A) of the Election Act. It was therefore the submission of counsel that this Court, sitting as a constitutional court, has no jurisdiction to entertain the same. Indeed, Section 75(1A) of the Elections Act is explicit that:

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



13. Accordingly, I have perused and considered the Petition dated September 21, 2022 and noted that indeed it seeks to challenge the validity of the 1<sup>st</sup> respondent’s nomination as a member of the County Assembly of Mombasa. At paragraph 10 thereof, the petitioner avers that:

“...the name of the 1<sup>st</sup> Respondent did not appear in the Orange Democratic Movement party list for gender top up that was published on September 9, 2022 and as such is undeserving of the position of member of County Assembly.”

14. At paragraphs 12 the petitioner asserted that, in nominating the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent acted in total disregard of the law and the procedures attendant thereto, thereby giving undue advantage to the 1<sup>st</sup> respondent above all other members of the Orange Democratic Movement desirous of the impugned nomination. Similar sentiments recur in paragraphs 13 to 22 of the Petition and are embedded in the reliefs sought. Thus, it is manifest that although disguised as a constitutional petition, the instant cause seeks, as a matter of fact, to challenge the nomination of the 1<sup>st</sup> respondent as a member of the County Assembly of Mombasa.

15. In *Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others (supra)* the Supreme Court held that:

“It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition...

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 view, carries the risk of opening up a parallel electoral dispute resolution regime. Such an event would serve not only to complicate, but ultimately 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.

This decision and others before and after it, like *Hassan Ali Joho & Another v Suleiman Shabbal & 2 Others Sup Ct Petition No. 10 of 2014* and *Independent Electoral and Boundaries Commission v Jane Cheperenge & 2 Others, Petition No. 5 of 2016 [2018] eKLR*, have all firmly settled the law, that once a gazette notice, signifying the decision of the electorate or, like here, the nominating political party, has been issued, only an election court has the powers to disturb that status quo.”

16. Likewise, in the *NARC (KENYA) Case (supra)*, the Supreme Court reiterated its stance that:

“...We could not agree more with the respondent’s submissions before us and the conclusions reached by the two courts below that the true character of the appellant’s cause, despite being disguised as a constitutional petition, was in fact an election petition, questioning the validity of nomination of elected members of the County Assemblies who had been gazetted; and that such challenge could only be commenced in the election court, in this case, under section 75(1A) of the Elections Act.”



17. In the instant matter, the Petition was filed on September 21, 2022 after the gazettelement of the 1<sup>st</sup> respondent's nomination on September 9, 2022. It is plain then that this Court lacks the requisite jurisdiction to hear and determine not only the application but also the Petition itself. Accordingly, the preliminary objections filed herein by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are hereby upheld. The Petition must be and is hereby struck out along with the interlocutory application filed herein. It is further ordered, that, given the public interest nature of this dispute, each party shall bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF MARCH 2023**

**OLGA SEWE**

**JUDGE**

