



REPUBLIC OF KENYA



KENYA LAW
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**Chemtai v Independent Electoral Boundaries Commission & 4 others
(Petition E013 of 2022) [2023] KEHC 18031 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PETITION E013 OF 2022**

REA OUGO, J

MAY 31, 2023

**IN THE MATTER OF ARTICLES 3 (1) & (2), 10 (1) & (2), 22, 23, 27 (1) (3) (4)
& (6), 47(1)&(2), 54, 55, 56(A), 179, 181(A), 197 OF THE CONSTITUTION**

AND

IN THE MATTER OF SABAOT ETHNIC COMMUNITY NATIVE TO BUNGOMA COUNTY

AND

**IN THE MATTER OF THE RESOLUTION OF THE MABANGA
PEACE CONFERENCE FINALISED ON 21/10/2011**

AND

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE
GAZETTEMENT OF NOMINATED MEMBERS OF COUNTY ASSEMBLY**

BETWEEN

LINET CHEMOS CHEMTAI PETITIONER

AND

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

FORD KENYA 2ND RESPONDENT

CLERK COUNTY ASSEMBLY – BUNGOMA 3RD RESPONDENT

MILDRED APIYO BARASA 4TH RESPONDENT

JOHN KENNEDY WANYAMA 5TH RESPONDENT



RULING

1. The petitioner in this case is a life member of the 2nd respondent. By way of a brief background, the petitioner in this case filed her petition claiming that the 4th and 5th respondents were not eligible for nomination as members of minority and marginalised communities. According to the petitioner the nomination of the 4th and 5th respondents as members of the county assembly of Bungoma was invalid. She seeks inter alia an order of injunction to restrain the 3rd respondent from swearing in the 4th and 5th as members of the county assembly; the quashing of the nomination of the 4th and 5th respondents contained in the gazette notice No Vol Cxxiv No 186; and consequently an order directed at the 1st respondent to de-gazette the 4th and 5th respondent as nominated members of the County Assembly Bungoma.
2. The 1st, 2nd, 4th and 5th respondents have opposed the petition by filing of their respective notice of preliminary objections. The 1st respondent in its preliminary objection dated September 26, 2022 challenged the petition on the following grounds:
 1. This court lacks jurisdiction to hear and determine this petition in view of the provisions of article 88 (4) (e) of the Constitution, section 74 of the Elections Act, 2011 and section 39 of the Political Parties Act.
 2. The petitioner's petition is incompetent and legally untenable in view of the provisions of article 88 (4) (e), section 74 (1) of the Elections Act and regulation 99 (2) of the Election (General) Regulations 2012 which vested the 1st respondent with powers to settle nomination disputes.
3. The 1st respondent in its submissions argue that the 4th and 5th respondents were deemed officially elected as nominated members of Bungoma County Assembly after the gazette of their nominations. Consequently, their membership to the said County Assembly can only be challenged in accordance with section 75 (1) (a) of the Elections Act. While relying on the provisions of rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules 2017, the 1st respondent submitted that the dispute ought to have been filed in form of an election petition before an election court with competent jurisdiction, in this case, a resident magistrate's court. They cited the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited (2012) eKLR where the court stated that a court's jurisdiction flows from either the Constitution or legislation or both and a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. The 1st respondent submits that this honourable court cannot exercise jurisdiction over an electoral dispute which falls within the exclusive competence of a different court.
4. The 2nd respondent in its preliminary objection dated March 8, 2022 has raised the following grounds:
 1. That where upon the petition before this court is clothed as a constitutional petition, the same is actually an election petition in disguise. Since among the prayers sought for is "...an order quashing the nomination of the 4th and 5th respondents as members of the County Assembly of Bungoma...and An order to compel the 1st respondent to de-gazette the 4th and 4th respondents as nominated members of county assembly, Bungoma from the marginalized list."
 2. Being that the petition contests the nomination of the 4th and 5th respondents as Members of the County Assembly of Bungoma, a nomination which was integral part of the electoral



process. Thus any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition in accordance with section 75 of the [Elections Act](#).

3. This honourable court therefore lacks jurisdiction to hear and determine the constitutional petition herein as the same offends the provisions of section 75 (1A) of the [Elections Act](#) which jurisdiction is under pinned in article 87 (1) of the [Constitution](#).
5. The 2nd respondent submits that the petitioner aggrieved with the nomination of the 4th and 5th respondents ought to have filed an election petition in accordance with section 75 of the [Elections Act](#). They maintained that the court does not have the jurisdiction to hear and determine the petition as presented and placed reliance in the case of [Orange Democratic Movement v Yusuf Ali Mohamed & 5 others](#) [2018] eKLR.
6. The 3rd respondent in its preliminary objection dated January 25, 2023 opposed the petition on the following grounds:
 1. That the entire petition runs counter to the provisions of article 88 (4) (e) of the [Constitution](#) of Kenya 2010.
 2. That the entire petition offends the provisions of section 74 (1) of the [Elections Act](#) 2011.
 3. That the entire petition runs counter to the provisions of section 39 and 40 of the [Political Parties Act](#).
 4. That the petition offends the spirit of the Supreme Court's judgment in the case of [Moses Mwicigi & 14 others v IEBC & 5 others](#)
 5. That the petition offends the spirit of the Court of Appeal's decision in the case of the [Speaker of the National Assembly v the Hon. James Njenga Karume](#).
7. The 3rd respondent in his submissions argue that the dispute in the petition relates to nomination of candidates to Bungoma County Assembly. In view of article 88 (4) (e) of the [Constitution](#) and section 74 (1) of the [Elections Act](#), resolution of such a dispute lies within the IEBC. This is in the sense that the commission is clothed with the responsibility of settlement of electoral disputes including disputes relating to nominations but excluding election petitions.
8. The 4th respondent in its preliminary objection dated March 7, 2023 raised the following grounds in opposing the petition:
 1. That the court lacks jurisdiction to hear and determine the petition in view of provisions of article 88(4) (e) of the [Constitution](#) of Kenya 2010, section 74 (1) of the [Elections Act](#) 2011 and section 39 of the [Political Parties Act](#).
 2. That the petition is bad in law and incompetent in view of the Supreme Court of Kenya Ruling in the case of Supreme Court petition No 1 of 2015 [Moses Mwicigi & 14 others v IEBC & 5 others](#).
 3. That this is an election petition disguised as a constitutional petition.
9. The 4th respondent in support of the objection raised submits that the petitioner has failed to explore the relevant resolution mechanisms provided under the [Constitution](#) and statutes. The petitioner ought to have filed any nomination dispute before the 1st respondent Dispute Resolution Committee as this court lacks jurisdiction to hear the matter. In the case of [Dr. Billy Elias Nyonje v The National Alliance Party Kenya & others](#) Nairobi judicial review No 6 of 2013 where the court dismissed a petition before it as the petitioner failed to explore the internal dispute mechanisms provided for in article 88 (4) (e) of



the Constitution. They also cited the case of Isaiab Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others [2016] eKLR Lenaola J as he then was observed that:

- “ 49. My understanding of the laws that I have cited above is that the legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. Section 74 (1) of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act as reproduced above makes it explicit that the Commission shall be responsible for settling disputes arising from or relating to nominations. It therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission.....
53. Based on the foregoing, I am inclined to agree with the respondents’ submissions that this court is not the appropriate forum for addressing the issues raised in the petition. My reasoning is firmly grounded on the nature of the case and the matters raised herein because it is not in dispute that the dispute is in regard to nominations to a County Assembly. The petitioners’ main concern is that the law was not observed by the respondents in regard to the conduct and the final selection of the nominee. This in my mind is one such dispute in regard to nominations that the legislature contemplated and thus created a dispute resolution body as the first port of call.....
58. I also do not agree with the contentions by the petitioners that this court should characterize the instant petition as a constitutional dispute instead of a nomination/election dispute. In my view, such characterization would go against the electoral laws and the Constitution which was tailored in such a manner that it intended to have a special dispute resolution mechanism for electoral disputes, nominations being one of them.”
10. She also cited the case of Supreme Court Petition No. 1 of 2015 Moses Mwicigi & 14 others v I.E.B.C & 5 others and urged the court to strike out the petition with costs. In any event, the 4th respondent argues that the petition has been overtaken by events as the events they seek to restrain has already happened and the 4th respondent has already been gazetted and sworn in as a nominated member of the County Assembly.
11. The 5th respondent contends that this court lacks the jurisdiction to entertain the petition in his preliminary objection dated March 8, 2023. The 5th respondent submits that it was not in issue that he was gazetted and sworn in as a member of the County Assembly. The petitioner’s prayers suggest that she requires the court to interrogate the process of nominating, gazetted and the swearing in of the 5th respondent. The 5th respondent argues that the petitioner’s first port of call ought to have been her political party or the 1st respondent or the political parties’ tribunal. The suit was instituted after the 5th respondent’s name was published in the gazette notice as a nominated member of the county assembly of Bungoma. This act of publication shifted the mandate of challenging any validity of his nomination to an elections court, the resident magistrates’ court. He relied on the decision of Supreme Court petition No 1 of 2015 Moses Mwicigi & 14 others v IEBC & 5 others.
12. The petitioner opposed the preliminary objections filed by the respondents and maintained that the court has the jurisdiction to entertain the petition pursuant to article 165 (3) (a) & (b) of the Constitution of Kenya. The petition is justified to institute proceedings claiming that a right or



fundamental freedom in the bill of rights has been denied or violated pursuant to article 22 of the [Constitution](#).

Analysis And Determination

13. I have considered the arguments by the parties and the gravamen of the petition is the nomination of 4th and 5th respondents and their subsequent gazette by the 1st respondent as members of the County Assembly, Bungoma. It is therefore not disputed that the 1st respondent has already published in the gazette notice No 10712 Vol cxxiv-No 186 of September 9, 2022 the 4th and 5th respondents as the nominated candidates for the 2nd respondent.
14. The petition herein was filed on September 20, 2022 after the Members of the County Assembly of Bungoma who were nominated based on the party lists had been gazetted by the 1st respondent. The gazetted nominees are now members of the County Assembly of Bungoma. Courts have consistently maintained that once nominees have been gazetted any issue on their nomination can only be challenged by way of an election petition. This was the position in [Vitalis Ojuang Odek v Independent Electoral and Boundaries Commission & 3 others](#) [2017] eKLR where the court held that:
 - “9. The petitioner’s claim though based on constitutional principles is an election petition on the basis that it seeks to challenge nomination of persons with disability to the Kisumu County Assembly.
 10. It is not disputed that the County Assembly nominees have been gazetted by virtue of gazette notice No 8330 The position concerning gazette was clearly stated in *National Gender Commission v IEBC and another (Ruling No 2)* Petition 147 of 2013 where the court (Lenaola, Mumbi Ngugi and Majanja JJ) stated as follows,
 - [11] We have anxiously considered the position of members of the Senate and National Assembly nominated under articles 97(c), 98(1) (b), (c) and (d) of the [Constitution](#). They were gazetted on March 20, 2013 by Gazette Notice No 3508. Upon such gazette they became members of the respective houses of Parliament. Under article 105 of the [Constitution](#), a question of determination of membership can only be determined by way of an election petition [13] In the case of *Kones v Republic and Another ex-parte Kimani wa Nyoike and others* (2008) 3 KLR EP 29, the Court of Appeal considered whether the nomination of Hon. Kones to Parliament under the former Constitution could be challenged by way of proceedings of judicial review. The court held that, “we think we have said enough to show that a seat in the National Assembly can only be declared vacant under the circumstances stated in the [Constitution](#) and through the processes set out therein. That has always been the position taken by the courts in previous decisions. There is, first the case of *The Speaker of The National Assembly v The Hon James Njenga Karume*, civil application No Nai 92 of 1992 [Nai 40/92 UR] (unreported) But the Court of Appeal, consisting of Kwach, Cockar & Muli, JJ.A did state as follows in their ruling dated May 29, 1992. “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. We observe without



expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

12. ...upon gazettelement of the County Assembly nominees...they became members of the County Assembly... a question of determination of membership can only be determined by way of an election petition.
15. The respondents in their submissions also placed reliance on the Supreme Court decision in *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR that explained the process of election through nomination. The court was of the view that the process is finalized by publication of the members in a gazette notice. The court held:
 - “ [105] It is clear from the foregoing provisions that the allocation of nomination-seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the *Constitution* and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettelement of the nominees’ names by the IEBC, as an integral part of the election process.
 - [106] The gazette notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the assembly in question.
 - [107] It is therefore clear that the publication of the gazette notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the election courts. The gazette notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.”
16. The petitioner in her submissions argues that the petition is a constitutional petition. However, the prayers sought in the petition do not touch on infringement on any provision of the *Constitution* of Kenya. Instead, the prayers touch on the nomination and gazettelement of the 4th and 5th respondents as members of the County Assembly. Therefore, I find that the petition is in the nature of an election petition challenging the election of members of the County Assembly of Bungoma through nominations.
17. Consequently, I find that this court has no jurisdiction to consider a dispute concerning an election through nomination as the petition ought to have been filed in the Magistrates Court. The result is that the preliminary objections filed by the respondents are therefore merited. The respondents are awarded costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF MAY, 2023.

R.E. OUGO

JUDGE

In the presence of:

For the Appellant



For the 1st Respondent

For the 2nd Respondent

For the 3rd Respondent

For the 4th Respondent

For the 5th Respondent

Wilkister - C/A

