



**Musyoki v Independent Electoral and Boundaries Commission (IEBC) & 3 others; Persons with Disabilities – Kwale County (List annexed) (Interested Party) (Constitutional Petition E048 of 2022) [2023] KEHC 18103 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18103 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E048 OF 2022**

**OA SEWE, J**

**MAY 25, 2023**

**BETWEEN**

**LYDIA KANINI MUSYOKI ..... PETITIONER**

**AND**

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

**COUNTY ASSEMBLY OF KWALE ..... 2<sup>ND</sup> RESPONDENT**

**UNITED DEMOCRATIC ALLIANCE (UDA) ..... 3<sup>RD</sup> RESPONDENT**

**AGUSTINE NDEGWA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**PERSONS WITH DISABILITIES – KWALE COUNTY (LIST  
ANNEXED) ..... INTERESTED PARTY**

**RULING**

1.

(1) The petitioner, Lydia Kanini Musyoki, moved the Court vide her Petition dated 20<sup>th</sup> September 2022 seeking the following reliefs:

(a) A declaration that the actions of the respondents in failing to gazette the nomination of at least one (1) male and one (1) female to represent persons with disabilities violates the rights of the petitioner, the interested parties herein and other persons living with disabilities.

(b) A finding that the failure to gazette the nomination of at least one (1) male and one (1) female to represent persons with disabilities is discriminatory, and therefore illegal in the face of law.



- (c) A finding that owing to prayers [a] and [b] above, the 2<sup>nd</sup> respondent's continued business discriminates the petitioner, the interested parties herein and other persons living with disabilities and violates their constitutional rights.
  - (d) The Court be pleased to direct the 1<sup>st</sup> respondent to cause to be gazetted, the name of Lydia Kanini Musyoki of ID No. 2218078, who is a person living with disability, to represent the interested parties and other persons living with disabilities within Kwale County.
  - (e) That costs be awarded to the petitioner.
- 2.
- (2) The petitioner averred that on the 9<sup>th</sup> September 2022, vide Gazette Notice No. 186, the 1<sup>st</sup> respondent caused to be published the List of Nominated Members of the County Assembly, wherein Schedule 1 provided for the nominated marginalized members. She complained that, in respect of the County Assembly of Kwale, the 1<sup>st</sup> respondent failed to nominate at least one person to represent persons with disabilities, despite the fact that a number of persons with disabilities had been gazetted in the Party Lists to represent the persons with disabilities.
- 3.
- (3) Thus, the petitioner contended that the said action by the 1<sup>st</sup> respondent violates her constitutional rights as well as the constitutional rights of the interested parties and other persons with disabilities within Kwale County in that it is not only discriminatory but also infringes on the mandatory provisions of Articles 54, 90, 97(1)(c), 98(1)(b)(c) and 100 of *the Constitution* of Kenya.
- 4.
- (4) In response to the Petition, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objection on 6<sup>th</sup> February 2023 on the ground that the Court does not have jurisdiction to hear and determine the Petition pursuant to Section 75 of the *Elections Act*, 2011 and Rule 6(1)(b) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 as this Petition relates to a dispute of an election by way of nomination into the County Assembly of Kwale. A similar objection was raised by the 3<sup>rd</sup> respondent vide its Notice of Preliminary Objection dated 7<sup>th</sup> November 2022 but filed on 29<sup>th</sup> March 2023.
- 5.
- (5) The Preliminary Objections were canvassed by way of written submissions, pursuant to the directions given herein on 7<sup>th</sup> February 2023 and 8<sup>th</sup> March 2023. Accordingly, in his written submissions filed herein on 20<sup>th</sup> February 2023, Mr. Khagram, learned counsel for the 1<sup>st</sup> respondent relied on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and *Lady Justice Kalpana H. Rawal & 2 Others v Judicial Service Commission & 6 Others* [2016] eKLR in urging the Court to terminate this case at this stage for want of jurisdiction. Counsel pointed out that, although the petitioner has sought for redress for the infringement of her fundamental rights and the rights of the interested parties and other persons with disabilities within Kwale County, in essence she is challenging the validity of the elections by way of nomination.
- 6.



- (6) Counsel submitted that, pursuant to Section 75(1A) of the Election Act, No. 24 of 2011 as read with Rule 6(1)(b) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, a Resident Magistrate’s Court is the only designated court with powers to hear and determine questions as to the validity of election of a member of County Assembly. He relied on *Moses Mwicigi & 14 Others v Independent Electoral & Boundaries Commission & Others* [2016] eKLR to buttress his argument in this regard and urged for the dismissal of the Petition with costs.
- 7.
- (7) On behalf of the 3<sup>rd</sup> respondent, Mr. Kamotho filed his written submissions on 17<sup>th</sup> March 2023 and proposed the following issues for determination:
- (a) Whether the 3<sup>rd</sup> respondent’s Preliminary Objection dated 7<sup>th</sup> November 2022 raises clear points of law to warrant consideration by the Court;
- (b) Whether the Court lacks jurisdiction to hear and determine the instant Petition;
- (c) Whether the Petition is an abuse of the process of the Court.
- 8.
- (8) In respect of the first issue, counsel made reference to the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra) and submitted that what have been raised by way of Preliminary Objection are pure points of law touching on the jurisdiction of the Court and are based on the facts as pleaded. On the issue of jurisdiction, counsel relied on *Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Limited* [1989] eKLR; *Kalpana H. Rawal & 2 Others v Judicial Service Commission & 2 Others* (supra) and *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR for the submission that a decision by a court or tribunal without the requisite jurisdiction is a nullity.
- 9.
- (9) Mr. Kamotho urged the Court to find that, since the foundation of the Petition and the petitioner’s actual gravamen relates to the nomination of members of the County Assembly of Kwale, the Petition is merely disguised as one and does not meet the threshold for a constitutional petition. To underscore this submission, counsel relied on *Orange Democratic Movement v Yusuf Ali Mohamed & 5 Others* [2018] eKLR and *Moses Mwicigi and 14 Others v IEBC & 5 Others* (supra) as well as Section 75(1A) of the *Elections Act*, which confers jurisdiction on the Magistrates Courts to determine the validity of election of a Member of a County Assembly.
10. [10] On the third issue, namely, whether the Petition is an abuse of the process of the Court, Mr. Kamotho made reference to *Kenya Section of the International Commission of Jurists v Attorney General and 2 Others* [2012] eKLR in which the Supreme Court defined “abuse of process” to entail “...a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice...” He therefore submitted that, in view of absence of jurisdiction or any violation of *the Constitution*, the Petition can only be termed as an abuse of this Court’s process. He accordingly urged the Court to uphold the 3<sup>rd</sup> respondent’s Preliminary Objection and strike out the Petition with costs.
- 11.



- (11) On his part, Mr. Obonyo for the petitioner filed his written submissions on 3<sup>rd</sup> March 2023 and reiterated the foundation of the Petition to be human rights violation and not an election dispute; and that the reliefs sought are all sought pursuant to Article 23 of *the Constitution*. In Mr. Obonyo’s submission, the Court has jurisdiction under Article 165 of *the Constitution* to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. He therefore took the view that the Preliminary Objections raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondents lack substance and ought to be dismissed with costs.
- 12.
- (12) The application was premised on the grounds that the petitioner was nominated by the 3<sup>rd</sup> respondent as a Member of the County Assembly of Kwale under Membership No. UDA80164: PWD; and that she was shocked to discover that she was not among the nominees gazetted vide Gazette Notice No. 186 dated 9<sup>th</sup> September 2022. She drew the attention of the Court to the fact that, one male by the name Augustine Ndegwa, who has been impleaded herein as the 4<sup>th</sup> respondent, was nominated as a female in the gazetted list; and that no provision was made at all for persons with disabilities, in gross violation of *the Constitution*.
- 13.
- (13) I have given due consideration to the grounds raised in the Notices of Preliminary Objection filed by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. The beginning point of my analysis is a consideration of whether the issues raised qualify as proper grounds for purposes of the test laid 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.”
- 14.
- (14) In the said decision, Sir Charles Newbold, P added:
- 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...”
- 15.
- (15) In the premises, the issue of jurisdiction, which is the sole issue emerging from the two Notices of Preliminary Objection dated 7<sup>th</sup> November 2022 and 6<sup>th</sup> February 2023, has been properly taken as a preliminary issue. Indeed, in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (supra) 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...”

16.

- (16) Similarly, in *Kalpana H Rawal & 2 Others v Judicial Service Commission & 2 Others* (supra) the Supreme Court quoted with approval the decision of the Supreme Court of Nigeria in Case No. 11 of 2012: *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others* thus:

“...It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

17.

- (17) Needless to say that jurisdiction is conferred either by *the Constitution* or a statute. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held:

“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.”

18.

- (18) The main argument advanced herein by learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents is that, since the petition seeks to challenge the nomination by UDA party under the Party List, it is merely disguised as such and has nothing to do with the vindication of human rights. Thus, according to counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents, this dispute ought to have been referred to the election court for purposes of Section 75(1A) of the Election Act; and therefore that this Court, sitting as a constitutional court, has no jurisdiction to entertain the same. Section 75(1A) provides 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.”

19.



- (19) In addition, Rule 6(1)(b) of the Elections (Parliamentary and County Elections) Petition Rules, states:
- (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
20. [20] Accordingly, the question to pose is what is the true character of the Petition? In this regard, the petitioner pleaded, at paragraph 2 that the 1<sup>st</sup> respondent has been sued in connection with its mandate under Article 248 and 249 of *the Constitution* and the IEBC Act, No. 9 of 2011. At paragraph 6, the petitioner made reference to Gazette Notice No. 186 by which the 1<sup>st</sup> respondent caused to be published the List of the Nominated Members of the various County Assemblies. At paragraph 7 the petitioner gave the names of the 4 nominees for County Assembly of Kwale to be:
- (a) Farun Mohamed – from the Orange Democratic Movement (ODM) representing the Youth
  - (b) Josephine Wairimu Kinyanjui – from the Pamoja African Alliance (PAA), representing the marginalized.
  - (c) Augustine Ndegwa - from the United Democratic Alliance (UDA), representing the Minority Group.
  - (d) Mulki Abdullahi Adan – from the United Democratic Movement (UDM) representing the Ethnic Minority.
- 21.
- (21) The petitioner further averred, at paragraphs 8 to 17 of the Petition, that although the 1<sup>st</sup> respondent nominated one person to represent persons with disabilities in respect of Mombasa, Tana River and Lamu Counties, in the case of Kwale the 4<sup>th</sup> respondent was given the slot that ought to have gone to the People With Disabilities; and therefore that the said action violated the provisions of Articles 54, 90, 97(1)(b)(c) and 100 of *the Constitution*. In particular, the petitioner complained at paragraph 16 of the Petition that:
- “...the failure to nominate a person with disabilities to the County Assembly of Kwale, further violates the provisions of Section 34 and 36 of the *Elections Act* No. 24 of 2011 of the laws of Kenya, which is the enabling statute in respect of nominations to the County Assembly.”
- 22.
- (22) Last but not least are the prayers sought in the Petition. The petitioner prayed for:
- (a) A declaration that the actions of the respondents in failing to gazette the nomination of at least one (1) male and one (1) female to represent persons with disabilities violates the rights of the petitioner, the interested parties herein and other persons living with disabilities.
  - (b) A finding that the failure to gazette the nomination of at least one (1) male and one (1) female to represent persons with disabilities is discriminatory, and therefore illegal in the face of law.



- (c) A finding that owing to prayers [a] and [b] above, the 2<sup>nd</sup> respondent's continued business discriminates the petitioner, the interested parties herein and other persons living with disabilities and violates their constitutional rights.
- (d) The Court be pleased to direct the 1<sup>st</sup> respondent to cause to be gazetted, the name Lydia Kanini Musyoki of ID No. 2218078, who is a person living with disabilities, to represent the interested parties and other persons living with disabilities within Kwale County.

23.

- (23) It is therefore manifest that the Petition challenges the nomination of the Members of County Assembly of Kwale. Needless to mention that nomination for purposes of Party Lists is different from pre-election nomination for purposes of the exercise of universal suffrage at a General Election. In *Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* the Supreme Court had occasion to make this distinction thus:

“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.’

24.

- (24) The Court made it clear that a nomination vide the party lists can only be challenged by way of an election petition. It added:

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.”

25.

- (25) In the same vein, the Court of Appeal in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 Others* [2018] eKLR held:

48. An issue urged by the 1<sup>st</sup> respondent is whether the threshold for a constitutional petition was met in the petitions filed at the High Court. In our considered view, the claims by the 1<sup>st</sup> and 2<sup>nd</sup> respondents not only met the threshold for a constitutional petition but also substantially met the threshold and grounds for an election petition. The substratum of the 1<sup>st</sup> respondents claim is founded on nomination to the County Assembly using Party List as an electoral process. In our view, the undisputed background facts in support of the 1<sup>st</sup> respondent's claims in the constitutional petition and his claim founded on nomination to the County Assembly are intertwined and inseparable. Being intertwined and not severable, the specific election dispute resolution mechanism provided under *the*



Constitution and the Elections Act is the procedure to be adopted. The mechanism provided is that an election petition is the only way to challenge post-gazettment electoral disputes.

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 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.

26.

(26) Similarly, in the National Rainbow Coalition (NARC) Kenya v Independent Electoral and Boundaries Commission [2022] KESC 6 (KLR), the Supreme Court reiterated 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.”

27.

(27) In the light of the foregoing, it is plain that this Court lacks the requisite jurisdiction to entertain the Petition. The Preliminary Objections raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondents are hereby sustained with the result that the Petition dated 20<sup>th</sup> September 2022, is hereby struck out with no order as to costs, granted the public interest nature of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25<sup>TH</sup> DAY OF MAY 2022

**OLGA SEWE**

**JUDGE**

CONSTITUTIONAL PETITION NO. E048 OF 2022 RULING 5

