



**Kingori & 2 others v Independent Electoral & Boundaries Commission
& 5 others (Judicial Review Miscellaneous Application E110 of 2022)
[2023] KEHC 21891 (KLR) (Judicial Review) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E110 OF 2022**

JM CHIGITI, J

JULY 27, 2023

BETWEEN

**MARY WANGUI KINGORI 1ST APPLICANT
MARGARET WANJIKU MIGONGO 2ND APPLICANT
JUDY WAIRIMU MIRANGO 3RD APPLICANT**

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT
THE COUNTY ASSEMBLY OF NAKURU 2ND RESPONDENT
UNITED DEMOCRATIC ALLIANCE 3RD RESPONDENT
ANN WAMAITHA 4TH RESPONDENT
MERCY CHEPKIRUI KILEL 5TH RESPONDENT
MARY W ANJIKU NJOROGE 6TH RESPONDENT**

JUDGMENT

1. The Application before this court is by a Notice of Motion dated February 8, 2023 – under Section 1A,1B, and 3A of the [Civil Procedure Act](#), Order 51 Rule 1 of the [Civil Procedure Rules](#) – for orders:
 1. That this honourable court be minded to transfer this suit to the subordinate court for proper disposal and determination.



2. That costs of this application be provided for.
2. The Application was supported by the grounds on the face of the Application, and an Affidavit evenly dated and sworn by Mary Wangui Kingori. The grounds relied upon were that the Chief Magistrate's Courts have jurisdiction to hear and determine this matter; that it is in the interest of justice that this Application be allowed; that this matter was instituted in the High Court where they (Applicant's) were directed to have the file transferred to the Chief Magistrate Court for disposal of the same; that the claim herein is electoral in nature which can be competently adjudicated and determined by the subordinate court; and that no prejudice shall be suffered by any party if the orders sought herein are granted.
 3. In response and opposing the Application, the 1st and 6th Respondents filed their Grounds of Opposition. The 1st Respondent Grounds of Opposition dated March 24, 2023 relied on the grounds:
 1. That this Honourable Court dismissed the Application for reinstatement dated October 4, 2022 via judgement delivered on January 25, 2023 citing lack of jurisdiction to determine the issues in question.
 2. That further to this, this Court having downed its tools in the matter, it lacks the jurisdiction to transfer the defunct suit to another court.
 3. That by virtue of the gazette notice dated September 9, 2022 whereby nominated members were published, any dispute relating thereof should be determined by the Resident Magistrate's Court as an election court vide Section 75 of the [Elections Act](#).
 4. That the Application herein is vexatious since the Applicant also filed a similar dispute in the Political Parties Dispute Tribunal and the same was also dismissed on March 14, 2023. Thus, it is clear that the Applicant is forum shopping which is an abuse of court process.
 5. That the Application should be dismissed with costs.
 4. The 6th Respondent's Grounds of Opposition dated February 17, 2023 relied on the grounds that:
 1. That on January 25, 2023 this Honourable Court delivered a Ruling which it struck out the suit filed by the ex parte Applicants on grounds that the same was filed in a court that lacked jurisdiction, therefore, this Honourable Court cannot transfer a suit that is struck out as there is nothing to transfer.
 2. That having struck out the suit filed by the ex parte Applicants, this Honourable Court is functus officio and cannot take any further step in the matter.
 3. That without prejudice to the above, section 76 of the [Elections Act](#) requires that election petitions to challenge the election or nomination of Members of County Assembly can only be presented within 28 days of the declaration of the results. The 1st Respondent published a Gazette Notice on 9th September, 2022 which contained a list of the 6th Respondent as a nominated Member of the County Assembly of Nakuru on the Gender Top-up List and there was no election petition in the court with the requisite jurisdiction to challenge such nomination.



4. That the Applicant is terribly out of time to file an election petition to challenge the nomination of the 6th Respondent and no court whatsoever has jurisdiction to entertain a Petition over the aforesaid nomination.
 5. That the instant Application is misconceived, incompetent and otherwise legally untenable and as such an abuse of the process of this Honourable Court and should be struck out with costs.
5. Further, in opposing the Application, the 3rd, the 4th, and the 5th Respondent filed their respective Replying Affidavits. The 3rd Respondent in their Replying Affidavit dated February 17, 2023 and deponed by Anthony Mwaura, the Chairperson National Elections Board of the 3rd Respondent, averred that vide a judgment dated January 25, 2023 this Honourable Court (Justice A.K Ndung'u) dismissed the Application for reinstatement dated October 4, 2022 - on grounds that it (court) lacked the requisite jurisdiction to determine the issues in question. Resultantly, that by this Honourable Court having struck out the suit filed by the ex parte Applicants, it (Court) become functus officio and, thus cannot make any further step in the matter.
 6. Also, to the 3rd Respondent, the court's lack of jurisdiction infers that this suit is a nullity in law, and whatever is a nullity in law is in the eyes of the law nothing. Therefore, that this court cannot be requested, as this Application purports to do, to transfer nothing and mould it into something for a court bestowed with the powers to hear and determine the suit.
 7. It was averred, by the 3rd Respondent, that this Honourable Court has no jurisdiction to transfer a suit which is incompetent. Further, that nonetheless, in any case the 1st Applicant has not provided sufficient reasons to justify that the transfer is merited.
 8. That on the contrary, even if this Honourable Court is inclined to allow the Application, the suit has slim chances of success - as it relates to nomination and gazettement of members to the County Assembly Nakuru, published on September 9, 2022 - as the law clearly dictates that such disputes should be heard and determined before the Magistrate's Court with six (6) months after the date of filing; and before specific gazetted election courts, which has not been done in this instance.
 9. Additionally, the 3rd Respondent stated that the mandatory requirements that election petitions ought to be filed within 28 days post the date of gazettement, and upon filing, security of costs be deposited by the Petitioner with 10 days after filing of the said petition are untenable at this stage.
 10. According to the 3rd Respondent, this Application is an afterthought by the 1st Applicant, and a backdoor manoeuvre meant to revive an incompetent suit. Further, that this transfer of the case from the High Court to the Magistrate's Court is a typical example of an abuse of the process of this Honourable Court. Consequently, the prayer for dismissal with costs to the 3rd Respondent was sought.
 11. On her part, the 4th Respondent, in her Replying Affidavit dated April 12, 2023 and sworn by her (Ann Wamaitha); in her averment the deponent reiterated the averments by the 3rd Respondent, as captured herein above. Additionally, the 5th Respondent (Mercy Chepkirui Kilel) in her Replying Affidavit dated April 12, 2023 also averred similarly to the 3rd and 4th Respondent.
 12. In advancing their cases, parties filed their respective written submissions. The 2nd and 3rd Applicants in their written submissions dated 5th May, 2023 submitted that that the instant matter is of a public interest litigation in nature, thus should not attract cost. That this Application was filed in good faith



- to respect, uphold, and defend the Bill of Rights and Constitution. Additionally, that the Application meets the test of bona fide public interest litigation.
13. Reliance was placed on the cases of *Impressa Ing Fortunato Federice v Nabwire* [2001] 2 E4 383; *Re Ebuneiri Waisswa Kafuko (Deceased)* Kampala HCM4 No. 81 od 193; *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR; *John Harun Mwau and others v Attorney General and 2 others* [2012] eKLR; *Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamni and 4 others*, [2014] eKLR; *Thakur Babadur Singh and Another vs Government of Andhra Pradesh; and People's Union for Democratic Rights & Others v Union of India & Others* (1982) 3 SCC 235. Also relied on Article 1 (1), and Article 1(3)(c) of the *Constitution*.
 14. In promoting their case, the Respondents: (3rd Respondents in their submissions dated April 20, 2023; and jointly the 4th & 5th Respondent in their submissions dated April 20, 2023) filed their similar written submissions, respectively.
 15. The said Respondents submitted that this court lacks jurisdiction to entertain the present Application as the court was rendered functus officio when it struck out the matter for lack of jurisdiction; thus it cannot make any further move in the matter.
 16. The Respondents maintained that this instant suit was filed before a court bereft of jurisdiction, and thus the suit is a nullity in law. Therefore, that this court cannot grant the reliefs that the Applicants purports to seek.
 17. Reliance was placed on the case of *Dickson Muricho Muriuki v Timothy Kagonda Muriuki & 6 others* Nyeri Civil Application No. 21 of 2013 (UR5/2013); *Macfoy v United Africa Co Ltd* [1961] 3 All ER, 1169; *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others* [1998] eKLR; and *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR.
 18. Additionally, the Respondents averred that from the grounds on the face of the Application, the 1st Applicant has not provided sufficient reasons to justify that the transfer sought is merited – in light of Section 75 (1A) and (2) of the *Elections Act, 2011*. That, even if this Honourable Court is inclined to allow the Application, the suit has slim chances of success as it relates to nomination and gazettement of members to the County Assembly of Nakuru published on September 9, 2022.
 19. Notably, that the law clearly dictates that such disputes - Election related, as the subject matter herein - should be heard and determined before the Magistrate's Court with six (6) months after the Petition was lodged. Also that Section 2 of the *Elections Act, 2011* defines an Election Court as the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of the Act. Hence, that election petitions are designated to specific gazetted election courts which in this instance has not been done; therefore, rendering this Application incompetent.
 20. Further, that election petitions are special types of proceedings with strict timelines having rules cast on stone – as stipulated under Section 76 of the *Elections Act*. The Respondents posited that therefore, this present Application is a non-starter, and an abuse of the court process; thus, that this Honourable Court ought to dismiss this Application.
 21. On costs, the Respondents submitted that costs follow events, albeit courts discretion. That in view of absence of jurisdiction, the Application herein is frivolous, and vexatious, without any jurisdictional foundation, or lawful and logical backing; thus cost be to the 3rd, 4th and 5th Respondents. Relied on Section 27 of the *Civil Procedure Act*, and the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR.



22. After carefully consideration of the Application, responses thereto, annexures, counsel’s submissions, and authorities cited therein; the following issues crystalizes for determination:

Whether this court lacks jurisdiction to entertain this Application for being functus officio? and; Who bears the cost of this Application?

23. On the issue of jurisdiction or lack thereof on account of court being functus officio, it is trite law that this question should be determined at the earliest. This is particularly so as jurisdiction is everything and a court with no jurisdiction cannot continue with proceedings. The court in Owners of Motor Vessel ‘Lillian S’ vs. Caltex Oil (Kenya) Ltd 1989 KLR 1 observed that,

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance 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 the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the 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 power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

24. At this juncture, I will deal with the argument about this Court being functus officio. The Black’s Law Dictionary, Ninth Edition points out at page 743 that functus officio is a Latin term meaning “having performed his or her office”, and refers to a situation where an officer or official body has no further authority or legal competence because the duties and functions of the original commission have been fully accomplished. A person is therefore said to be functus officio when he or she has acted as to exhaust the power that was being exercised, and that person may not further exercise that power. This rule as applied to judicial bodies is in instances where a Judge finally disposes of the matter before him or her, and neither that Judge or any other Judge of equal jurisdiction may vary that order.
25. In the Canadian case of *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 it was explained that the rule of functus officio holds that the court has no jurisdiction to reopen or amend a final decision, except in two cases: namely here there has been a slip in drawing up the judgment, or where there has been error in expressing the manifest intention of the court. This position has also been upheld in various Kenyan cases including *Chacha Mwita Mosenda v Baya Tsuma & 2 Others* (2017) eKLR and *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 966 former employees of Telkom Kenya Limited)* (2014) eKLR.
26. The exceptions to the rule are also reflected in our Civil Procedure Act in sections 80 and Order 45 of the Civil Procedure Rules, and section 99 of the Civil Procedure Act, which provide for review of judgments and corrections of judgments, respectively. Therefore, whether in its common law or statutory form, the rule on functus officio provides that it is only in strictly limited circumstances that a court can revisit an order or judgment, the main policy concern being that of finality of litigation.
27. Turning back to the instant Application, this Court is being asked to transfer the (struck out) suit to the subordinate court for proper disposal and determination.



28. It is not in doubt that the court (Justice A.K Ndung'u) in its ruling dated October 4, 2022 struck out the matter for the reason that with the gazettment of the members, the subject of the proceedings placed the matter in the realm of the election petition, which the court lacked jurisdiction to hear and determine.
29. Further, from the record before this court, the Applicant in an Application dated 4th October, 2022 moved the court (Justice A.K Ndung'u) for reinstatement of the struck out suit; wherein the court -via judgement delivered on 25th January, 2023 - cited lack of jurisdiction to determine the issues in question and dismissed the Application.
30. The instant Application before this court germinates from the preceding series of events. The Applicants are presently before this court by a Notice of Motion Application dated 8th February, 2023 seeking the transfer of the (struck out) suit to the Magistrate court.
31. In this matter, the court had rendered a valid final judgment/decision; therefore, the court has no jurisdiction to reopen or amend the final decision unless in the exceptional allowed circumstances – which exceptions are not applicable in this case, as discussed hereinabove.
32. In any event, even where the circumstances would have allowed reopening of the matter, the same would be defeated due to this courts lack of jurisdiction to hear and determine election petitions, which forms the subject matter of this matter; particularly, given the fact that the members of county were already gazetted and published on 9th September, 2022.
33. Also, given the obvious lapse of time, since the declaration, publication, and gazettment of the county assembly members, the court would also be devoid of jurisdiction due to the strict timelines in election matters. Section 76 of the [Elections Act](#) provides that,

“A petition to question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation.”
34. In the premises, it is clear that the court is functus officio with regards to this matter, and the legal exceptions are not available to the Applicants, in the present circumstances. Its trite law that cost follow the events.

Order:

35. The Notice of Motion dated February 8, 2023 is dismissed.
36. The Applicants to bear the cost of this Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023

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J. CHIGITI (SC)
JUDGE

