



**Mogaka v Orange Democratic Movement & 4 others (Election Petition Appeal  
E003 of 2023) [2023] KEHC 21838 (KLR) (31 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
ELECTION PETITION APPEAL E003 OF 2023  
FG MUGAMBI, J  
AUGUST 31, 2023**

**BETWEEN**

**DORCAS MONYANGI MOGAKA ..... PETITIONER**

**AND**

**ORANGE DEMOCRATIC MOVEMENT ..... 1<sup>ST</sup> RESPONDENT**

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

**THE CLERK, KISII COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT**

**THE SPEAKER, KISII COUNTY ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT**

**MIRIAM MUSA EGGE ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. Before the Court is an appeal against the judgment delivered by Hon. S.N. Abuya on 2<sup>nd</sup> February, 2023 in Election Petition No E008 of 2022. The appeal challenges the decision of the Court upholding the nomination of the 5<sup>th</sup> respondent, Miriam Musa Egge to the Kisii County Assembly under the gender top-up category.
2. The appellant argues that she successfully applied to the 1<sup>st</sup> respondent for nomination as a member of the Kisii County Assembly. Her name amongst others was forwarded by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent and published in the Standard Newspaper of Wednesday 27<sup>th</sup> July, 2022. The appellant's name appeared second on the list under the gender top up list and the 5<sup>th</sup> respondent's name was listed tenth.



3. Subsequently, on 9<sup>th</sup> September 2022, the 2<sup>nd</sup> respondent vide a special issue of the Kenya Gazette No 10712 Vol. CXXIV-No 186, published a list of six (6) Members of County Assembly nominated to Kisii County under the gender top up list as allocated to the 1<sup>st</sup> respondent. Missing from the gazette was the appellant's name which had been replaced by that of the 5<sup>th</sup> respondent. For sure, on 22<sup>nd</sup> September, 2022 the 5<sup>th</sup> respondent was sworn in as a Member of the Kisii County Assembly to represent the 1<sup>st</sup> respondent under the gender top-up category.
4. It was the appellant's case that the 5<sup>th</sup> respondent was undeserving of the nomination as she is not a registered voter in any of the Wards in Kisii County and neither was she a member of the 1<sup>st</sup> respondent. The appellant also took issue with the alteration of the initial party list arguing that there was no legal basis or authority for the 2<sup>nd</sup> respondent to remove her name and replace it with the 5<sup>th</sup> respondent's name even after being issued with the initial list by the 1<sup>st</sup> respondent which had the name of the appellant in it. This turn of events led to the filing of the election petition and to this appeal.

### **The appeal**

5. The Memorandum of Appeal dated 1<sup>st</sup> March, 2023 cites nine (9) grounds of appeal which are:
  - i. That the learned trial magistrate erred in law and in fact in finding and declaring that the gazette of the 5<sup>th</sup> respondent vide special issue of Kenya Gazette No 10712 Vol. CXXIV-No 186 dated 9<sup>th</sup> September, 2022 by the 2<sup>nd</sup> respondent as a nominated Member of County Assembly under the gender top-up category for Kisii County Assembly was in conformity with the law.
  - ii. That the learned trial magistrate erred in law and in fact in finding and declaring that the purported special issue of Kenya Gazette No 10712 Vol. CXXIV- No 186 dated 9<sup>th</sup> September, 2022 by the 2<sup>nd</sup> respondent was legal notwithstanding the fact that it deletes the nomination of the appellant herein and purports to replace her with the 5<sup>th</sup> respondent as the duly nominated MCA Kisii County Assembly under the gender top-up category.
  - iii. That the learned trial magistrate erred in law and fact in concluding that the 2<sup>nd</sup> respondent complied with the law on gazette of the names of the 5<sup>th</sup> respondent whereas there was glaring evidence of no such compliance.
  - iv. That the learned trial magistrate erred in law and in fact in concluding that the party list relied on by the 2<sup>nd</sup> respondent in gazetting the 5<sup>th</sup> respondent as a nominated MCA is the one that was sent by the party and thereby reaching a wrong decision.
  - v. That the learned trial magistrate erred in law and in fact in finding that the nomination of the 5<sup>th</sup> respondent as a member of the County Assembly Kisii was lawful and valid and failed to appreciate that the appellant had made out her case the nomination being bungled and evidence adduced to that effect.
  - vi. That the learned trial magistrate erred in law and in fact by completely and totally failing to appreciate the evidence by the 1<sup>st</sup> respondent who was the maker of the party list and that the same ought to be on priority wherein the appellant ranked higher than the 5<sup>th</sup> respondent and thus ought to be nominated.
  - vii. That the learned trial magistrate erred in law by directing that a certificate do issue to the clerk of the County Assembly Kisii pursuant to section 86(1) of the *Elections Act* 2011 based on a wrong finding in her decision.



- viii. That the learned trial magistrate erred in law and fact by completely and totally failing to appreciate and ignoring the fact and evidence before her by the appellant.
  - ix. That the learned trial magistrate completely misdirected herself on the applicable principles, made a serious error of law and thereby arrived at a wrong decision.
6. Relying on these grounds the appellant has asked this Court to set aside the judgment and decree of the trial court, allow the appeal, declare that the gazettement of the 5<sup>th</sup> respondent as a nominated Member of Kisii County Assembly under the gender top-up category as illegal, unlawful and unconstitutional and for the costs of the appeal to be borne by the respondents.

### **Parties' submissions**

7. The appellant, as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents filed written submissions and were also heard on the same. The 3<sup>rd</sup> and 4<sup>th</sup> respondent did not file any submissions.

### **The appellant**

8. The appellant filed written submissions dated 16<sup>th</sup> June 2023 through the Firm of M.O.M. Advocates and compressed the grounds of appeal into three (3) issues for determination as follows:
- i. Compliance with the law.
  - ii. The procedure in the nomination of the 5<sup>th</sup> respondent in the gender top-up category.
  - iii. The principle of legitimate expectation.
9. On the first two limbs, Counsel submitted that rules 54 to 63 of the 1<sup>st</sup> respondent's Party Primaries and Nomination Rules provides for the procedure, qualifications and requirements to be fulfilled by members of the party to be considered in the party list. Having followed the process and been nominated, Counsel submitted that the list ought to have been adhered to in the order of priority as by law provided. It was further contended that once the 1<sup>st</sup> respondent submitted the list to the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> had no authority in law to vary the order of priority in the said list.
10. Finally, the appellant submitted that upon her nomination by the 1<sup>st</sup> respondent and based on the pro-rata allocation of seats by the 2<sup>nd</sup> respondent after the elections, she had a legitimate expectation that she would be among the 1<sup>st</sup> respondent's nominees. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> respondents had offered a solitary explanation as to why and how her name was changed and for what reasons. This action was unconstitutional and thwarted the appellant's legitimate expectations in respect of her nomination.

### **The 1<sup>st</sup> respondent**

11. The 1<sup>st</sup> respondent's written submissions were filed through its Advocates, Ms. Makori & Karimi Advocates. The 1<sup>st</sup> respondent maintains that it followed the law in the preparation and submission of its party list. More specifically, that it publicly advertised the vacancies for all eligible party members to apply and that the consideration of the received applications was done in a transparent, equitable, procedural and lawful manner.
12. The 1<sup>st</sup> respondent further insisted that only the party had the power to decide the priority of the nominees in tandem with Rule 60(8) of the ODM Party Rules. Once this was done, the 1<sup>st</sup> respondent submitted the final list dated 15<sup>th</sup> November 2022 to the 2<sup>nd</sup> respondent and as a party it thereafter was functus officio. The 1<sup>st</sup> respondent acknowledged that the law prohibited any changes from being made on the list but stated that this was during the term of the County Assembly.



13. Finally, the party prayed for costs of defending the appeal since it complied with the law and the party rules in the submission of the party list and played no part in the appellant's grievance.

### **The 2<sup>nd</sup> respondent**

14. In response to the appeal, the 2<sup>nd</sup> respondent, through the law firm of Isinta & Company Advocates filed submissions dated 27<sup>th</sup> June 2023. The 2<sup>nd</sup> respondent was emphatic about its mandate under the Constitution and the Elections Act, noting that the law required it to receive party lists submitted by political parties at least 45 days prior to the date of the general elections. In the present case, the 2<sup>nd</sup> respondent acknowledges publishing a gazette notice dated 3<sup>rd</sup> June 2022, requiring political parties to submit the names of persons they had nominated.
15. The 2<sup>nd</sup> respondent acknowledges receiving a list from the 1<sup>st</sup> respondent with a total of 27 names for nomination under the gender top up seats in Kisii County. This was pursuant to the gazette notice. Upon reviewing the party lists and being satisfied that they met the threshold set by provisions of law, the 2<sup>nd</sup> respondent published the said party lists, including that of the position of gender top up.
16. Subsequently, the 2<sup>nd</sup> respondent issued a joint public notice with the Political Parties Dispute Tribunal (PPDT), attaching the political party lists so as to allow for any disputes to be raised and determined through the proper channels. At this point, the 1<sup>st</sup> respondent wrote to the 2<sup>nd</sup> respondent, invoking the provisions of Article 90 of the Constitution as read with section 388 (l)(a) of the Political Parties Act requesting to use their internal dispute resolution mechanisms to solve disputes that would arise from the published party lists. The 2<sup>nd</sup> respondent allowed the 1<sup>st</sup> respondent to go ahead.
17. The 2<sup>nd</sup> respondent avers that subsequently, an official communication dated 5<sup>th</sup> September 2022 and signed by the Chairperson to the ODM National Election Board was sent by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent stating that the 1<sup>st</sup> respondent had been directed by the PPDT to reconstitute the County Party List for Kisii County Assembly (marginalised and gender top-up lists).
18. The 2<sup>nd</sup> respondent confirmed in its submissions that indeed, the 5<sup>th</sup> respondent's name appeared 3<sup>rd</sup> while that of the appellant was missing from the latter list. In line with its mandate, the 2<sup>nd</sup> respondent confirmed that it used the attached latter list to gazette the names of persons who had qualified for the position of gender top-up in the Kisii County Assembly. It distanced itself from the internal issues of the 1<sup>st</sup> respondent stating that the "1<sup>st</sup> respondent would be misleading court if they purport to not know of the said list as it was sent to the Commission having been signed by the chairperson of the ODM National Elections Board".
19. Relying on articles 90 and 177 of the Constitution as well as sections 4A and 38A of the Political Parties Act and section 28A of the Elections Act, the 2<sup>nd</sup> respondent also cited judicial pronouncements to emphasize the fact that it was not involved in nomination of party lists. Its role was limited to receiving names of persons nominated by the political parties.

### **The 5<sup>th</sup> respondent**

20. The 5<sup>th</sup> respondent filed submissions dated 28<sup>th</sup> June 2023 through the firm of Nyamurongi & Company Advocates. The main grounds of the submissions were that the 2<sup>nd</sup> respondent had no role to play in the adjudication of the nomination processes of a political party. That the process of preparation of party lists was an internal affair of the political party. The 5<sup>th</sup> respondent cited various judicial decisions to support her case that there were various actors involved in the election dispute resolution process and that there was need to empower these institutions.



21. It was further submitted by the 5<sup>th</sup> respondent that the appellant was not correctly before the Court having not adhered to the doctrine of exhaustion. The appellant had not demonstrated that she availed herself of the remedies before the IDRМ and the PPDT. Citing several judicial pronouncements, the 5<sup>th</sup> respondent argued that this Court could not arrogate jurisdiction to itself.
22. In any case, the 5<sup>th</sup> respondent argued that she was validly nominated by the 1<sup>st</sup> respondent, after its initial list had been reviewed following a directive by the PPDT. The 1<sup>st</sup> respondent had reviewed the list and submitted the list to the 2<sup>nd</sup> respondent in compliance with those directions. The 5<sup>th</sup> respondent argues that the legitimate expectation held by the appellant was therefore unfounded and that the 2<sup>nd</sup> respondent had not done anything wrong in gazetting her as a member of the Kisii County Assembly.

### **Analysis**

23. I have carefully analysed the petition, authorities and rival submissions by parties as well as the entire record of appeal and the record from the election court. I proceed with the determination of this appeal cognisant that the jurisdiction bestowed to this Court under section 75(4) of the *Elections Act* is limited to matters of law only.
24. I begin from the submission by the 5<sup>th</sup> respondent questioning the validity of these proceedings. I note that although the Learned Magistrate correctly singled out the question of non-compliance with the dispute resolution process as an issue for determination at pg 37 of its judgment, the election court unfortunately failed to make a determination on the same. This is despite the fact that the 5<sup>th</sup> respondent had raised the issue that the appellant had not followed the right channels of dispute resolution before approaching the Court.
25. I am of the opinion that being a jurisdictional question, this is an issue that requires priority attention to the other substantive issues raised in the appeal. I begin by setting out the relevant legal framework upon which my decision on this question ought to be based.
26. Of particular relevance is the *Elections (Party Primaries and Party Lists) Regulations, 2017*. Regulation 27(1) provides that:

“Every political party shall establish an internal dispute resolution mechanism in relation to the party primaries and party list.”

Regulation 27(4) further provides timelines for the internal dispute resolution mechanism (IDRM) processes in the following terms:

“The dispute resolution mechanism of a party shall hear and determine all nomination disputes not later than ninety days before the date of the general election.”

27. Also relevant is the *Political Parties Act* of 2011. Section 39 of the Act establishes the Political Parties Disputes Tribunal (PPDT) which is clothed with jurisdiction under section 40(1) to amongst others, determine disputes between members of a political party and disputes arising out of party primaries. As far as the jurisdiction of the PPDT relates to that of the IDRМ, section 40(2) provides and in mandatory terms that:

“Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”



28. The summary of this analysis is that there is in place an elaborate and structured election dispute resolution process which is aligned to and underpinned by constitutional imperatives, as was observed by Majanja J in *Francis Gitau Parsimei v National Alliance Party and another*, Nairobi Petition No 356 of 2012, [2012] eKLR. The process places political parties at the heart of the dispute resolution process by providing for IDRMs as the first point of call in resolving disputes relating to party lists. The PPDT avenue is open to parties who are then unable to resolve their dispute at the IDRMs level. Subject to having gone through these forums and within the defined timelines, once nominees have been gazetted as members of the County Assembly after the elections, the disputes then escalate under section 75 of the *Elections Act*, to the Courts as election petitions.
29. The need for parties to exhaust the laid-out procedure for election dispute resolution through IDRMs and PPDT before filing a petition in the Courts is now of esteemed juridical lineage in Kenya. The Court of Appeal emphasized the justification of the doctrine of exhaustion in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others*, [2015] eKLR noting that:
- “It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews. ... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
30. While dealing with an election dispute appeal, the Court re-emphasized this position in *Kennedy Moki v Rachel Kaki Nyamai & 2 others*, [2018] eKLR in the following terms:
- “We affirm the principle that where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.”
31. In yet another decision, the Court of Appeal also cited with approval, from the case of *Jared Odoyo Okello v Independent Electoral & Boundaries Commission (IEBC) & 3 others*, [2013] eKLR stating that:
- “The High Court correctly held that if a petitioner loses an opportunity to challenge the decision of a nominating body, such a petitioner cannot be heard to raise the issue in an election court.”
32. Likewise, in *Francis Mutuku v Wiper Democratic Movement - Kenya & others*, [2015] eKLR, Mumbi, J (as she then was) held thus:
- “The law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point; where there are specialized procedures provided by law or the *Constitution* for the resolution of disputes they should be followed... The circumstances of this case dictate that this Court, despite its wide jurisdiction under the *Constitution*, does not assume such jurisdiction. The dispute is clearly a dispute that falls within the mandate of the institutions in which the *Political Parties Act* vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right to appeal to the High Court. It would be to undermine and defeat the mechanism



and institutions provided by law, which are underpinned by the Constitution, to hold otherwise.”

33. With these few examples of judicial pronouncements, majority of which are binding on this Court, I believe that I have clearly set out the legal position with respect to the electoral dispute resolution processes.
34. Turning to the appeal before me, and having thoroughly perused the record and submissions by parties, I am left with no doubt that the appellant did not exhaust the IDRМ provided for by the 1<sup>st</sup> respondent neither did she avail herself to the PPDT dispute resolution forum. As I stated earlier, this issue was raised before the Learned Magistrate but was not comprehensively dealt with. I note that the appellant did not controvert the averment by the 5<sup>th</sup> respondent before the election court and even on appeal has remained quiet and has not responded to the issue or produced any evidence at any point to prove that the matter proceeded to IDRМ or before the PPDT.
35. It is quite clear that the appellant knew all along about the reviewed party list, although the reasons leading to the review remain very scanty hence the present appeal. This is all the more reason as to why the appellant ought to have pursued the dispute with her party. Having not done so, the appellant cannot allege any breach of the law or the Constitution by the 1<sup>st</sup> respondent.
36. This position is widely supported by judicial pronouncements for example the Supreme Court decision in Moses Mwicigi & others v Independent Electoral and Boundaries Commission & another, [2015] eKLR. The Supreme Court agreed with the High Court in National Gender and Equality Commission v The Independent Electoral and Boundaries Commission & another, [2013] eKLR that where there is failure to follow the process prescribed by law with respect to election disputes, a party cannot successfully lodge a petition alleging non-compliance with the Constitution and the law.
37. The appellant had an opportunity to present her grievances about the party nominations to the 1<sup>st</sup> respondent. She did not avail herself of this opportunity. Instead, she waited until after the gazettelement of the 5<sup>th</sup> respondent to file her election petition and seek the reliefs that she should have sought from the internal party mechanism of the 1<sup>st</sup> respondent and the PPDT. This is not procedural. It is only parties who utilize the specialized procedures provided for by law and who are unsuccessful who can then approach the Court under section 75 of the Elections Act by way of an election petition after gazettelement of the nominees.
38. This view is espoused by numerous decisions including Lorna Chemutai & 4 others v Independent Electoral and Boundaries Commission & 18 others, [2018] eKLR as well as in Isaiab Gichu Ndirangu & 2 others v IEBC & 4 others, (2016) eKLR.

#### **Determination and final orders**

39. As such, and for the reasons that I have stated, I must find in congruence with the overwhelmingly supported judicial view that the proceedings before the election court were void *ab initio* and I too regrettably must lay down my tools and shall not consider the merits of the appeal as this would be an exercise in vain. However, I now make the following orders:
  - a. That the appeal herein lacks merit and is accordingly struck out.
  - b. That the proceedings, judgment and consequential orders of the Hon. S.N. Abuya given on 2nd February, 2023 in Election Petition No E008 of 2022 are hereby declared null and void.



- c. For the avoidance of doubt, the gazettelement by the 2<sup>nd</sup> respondent of the 5<sup>th</sup> respondent as Member of the Kisii County Assembly representing the 1<sup>st</sup> respondent under the gender top-up category is upheld.
- d. In order to avoid over burdening the appellant with costs but also noting that this is an appeal which ought not to have been filed in the first place, the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents who opposed the appeal shall have the costs of the appeal, each capped at Kshs 300,000/=.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 31<sup>ST</sup> DAY OF AUGUST 2023.**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri

In the presence of:

Mr Awele and Mr. A. Makori for the appellant

Ms. Ochieng h/b for Mr. S. Makori for the 1<sup>st</sup> respondent

Mr. Isinta for the 2<sup>nd</sup> respondent

Mr. Isinta h/b for Mr. Nyamurongi for the 5<sup>th</sup> respondent

