



Imbodoka v Independent Electoral and Boundaries Commission & 2 others; Odera & another (Interested Parties) (Constitutional Petition 4 of 2022) [2023] KEHC 22885 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION 4 OF 2022**

JN KAMAU, J

SEPTEMBER 27, 2023

**IN THE MATTER OF ARTICLES 2, 3, 27, 38, 54, 81, 88(4), 90,
91, 165 AND 177 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 34(4), 36, 37 & 74 OF THE ELECTIONS ACT

AND

**IN THE MATTER OF ORANGE DEMOCRATIC MOVEMENT PARTY
TO IEBC OF NOMINATED TO COUNTY ASSEMBLY OF VIHIGA (SIC)**

IN THE MATTER OF GAZETTE NOTICE NO 10712 AND 11259 OF 9TH SEPTEMBER (SIC)

BETWEEN

NICODEMUS MUKOVWA IMBODOKA PETITIONER

AND

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

ORANGE DEMOCRATIC MOVEMENT PARTY 2ND RESPONDENT

SPEAKER COUNTY ASSEMBLY OF VIHIGA 3RD RESPONDENT

AND

JACOB ODERA INTERESTED PARTY

MISHEL STIKA INTERESTED PARTY



RULING

Introduction

1. In his Petition dated and filed on 3rd October 2022, the Petitioner sought the following reliefs:-
 - a. A declaration that the 1st Respondent lacked lawful authority to remove the name of the Petitioner from the list presented to it by the 2nd Respondent as duly nominated member representing persons with disability thereby substituting the same with the names of the interested parties without following the due process of the law as set out under the constitution and the *Elections Acts* (sic).
 - b. A declaration that the Gazette Notice No 10712 of the 9th September 2022 which purported to publish the substituted names of the interested parties as representing the youth to the county assembly of Vihiga and leaving out the names of the Petitioner was irregular null and void (sic).
 - c. A order (sic) of mandatory injunction do issue compelling the independent electoral and boundaries commission to withdraw the names of the interested parties herein as gazette notice no 10712 of 9th September 2022 in so far as it purports to publish the names of the interested parties as gazetted nominated members of the county assembly of Vihiga and in place thereof insert the name of the petitioner as duly nominated to represent persons with disabilities in the county assembly (sic) of Vihiga.
 - d. A declaration that the constitutional right of the petitioner vide actions of the 1st and 2nd Respondent (sic) have been violated and or (sic) denied on account of discrimination of his status as a disabled (sic) and right his (sic) to be appointed to a public office and should be compensated.
 - e. An order directing the 3rd respondent (sic)- the speaker of the county assembly (sic) of Vihiga to immediately swear in the petitioner upon compliance of order c above.
 - f. An order compelling the 2nd respondent (sic) to immediately issue a directive to the 1st respondent (sic) as to whom from its ranks shall fill the special seat of youth to the county assembly (sic) of Vihiga.
 - g. Any other order or further orders the court deems just and fit to grant.
 - h. Cost of this petition be provided for.
2. On 23rd February 2023, the 1st Respondent filed a Notice of Intention to Raise Preliminary Objection dated 18th February 2023. The ground was that this court had no jurisdiction to take cognisance of the Petition herein, hear and/or determine the issues that had been raised therein as it was an abuse of the court process and hence ought to be struck out with costs to the Respondents.
3. On 23rd February 2023, P.J. Otieno J who was at the time seized of this matter directed that the said Preliminary Objection would be heard before the Petition herein and gave directions on the filing of Written Submissions.
4. The 1st Respondent's Written Submissions were dated 2nd March 2023 and filed on 20th March 2023 while those of the 1st and 2nd Interested Parties were dated 20th March 2023 and filed on 29th March 2023. The Petitioners' Written Submissions were dated and filed on 30th March 2023. The 2nd and 3rd Respondents were not opposing the said Preliminary Objection and did not therefore file any Written



Submissions. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

5. The 1st Respondent submitted that it had raised a pure point of law on the question of jurisdiction. In this regard, it relied on the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA where it was held that a preliminary objection could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion.
6. It also referred this court to the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* [2014] eKLR where it was held that a preliminary objection consisted of a point of law which if argued, could dispose of the suit.
7. It further placed reliance on the case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where the holding was that the court had to down its tools once it determined that it had no jurisdiction to deal with a matter. The 1st and 2nd Interested Parties also relied on the same case to advance the same argument.
8. It also pointed out that under Article 177 of the Constitution of Kenya, 2010, membership to the County Assembly was either through elections by registered voters in a ward or by nomination through party lists ensuring that proportional representation of gender and marginalised groups was met as envisioned in Section 34(1) of the *Elections Act*.
9. It therefore submitted that the Petition herein emanated from nomination of party lists and hence was an electoral dispute that was governed by specialised legal regime as was asserted by Musyoka J in the case of *David Aoko Were v Independent Electoral and Boundaries Commission & 2 Others* [2021] eKLR and was not an ordinary suit that could be tried by any ordinary court as contemplated in Section 5 of the *Civil Procedure Act*.
10. It was emphatic that the court that had jurisdiction to hear and determine the Petition was the Resident Magistrate's as was provided in Section 75(1)(A) of the *Elections Act*, an argument that the 1st and 2nd Interested Parties also advanced.
11. It argued that even so, the Petition herein did not meet the threshold of the *Annarita Karimi Njeru v Republic* case (eKLR citation not given) and hence urged this court to dismiss the Petition in limine with costs to the Respondents herein.
12. In addition to what has been stated hereinabove, the 1st and 2nd Interested Parties further contended that the application (sic) herein ought to be dismissed for having been filed out of time. They relied on the cases of *Iga Makerere University* [1972] EA and *Hamilton v Sultan S. Team Laundry* [1946] 1KB 61, 81 where the common thread was ideally that a court could not grant orders where a claim had been barred by the statute of limitation.
13. On his part, the Petitioner argued that the High Court had the mandate to determine whether or not a fundamental freedom in the bill of rights had been denied, violated and/or infringed under Article 165 (2)(b) of the Constitution of Kenya. He was emphatic that this was a power that could not be donated to any other forum disguised as an electoral court.
14. He averred that the law mandated political parties to comply with the Constitution and that any list to the 1st Respondent that did not comply with the Constitution was therefore null and void.



15. He emphasised that Section 36(7) of the *Elections Act* obligated the 1st Respondent to ensure that the list presented to it was compliant with Article 177(1)(b) and (c) of the Constitution law requiring that it shall be proportional of the number of seats non by the party meter Article 177 (1)(a) of the Constitution (sic).
16. He therefore urged this court to find that it was clothed with jurisdiction and to proceed to hear and determine the Petition herein.
17. Section 34 Rules (1) and (4) of the *Election Act* No 24 of 2011 stipulates as follows:-
 1. The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.
 4. A political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (b) and (c) of the Constitution.
18. Article 177 of the Constitution of Kenya states that:-
 1. A county assembly consists of—
 - a. members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
 - b. the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
 - c. the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
 - d. the Speaker, who is an ex officio member.
 2. The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.
19. Further, Article 90 of the Constitution of Kenya stipulates that:-
 1. Elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.
 2. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—
 - a. each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;
 - b. except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and



- c. except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.
20. The question that arose was procedure was to be adopted when a person objected to a party list. Notably, Section 39(1) of the *Political Parties Tribunal Act* No 11 of 2011 provides that:-

“There is established a Tribunal to be known as the Political Parties Disputes Tribunal.”
21. The jurisdiction of the Political Parties Tribunal is set out in Section 40 (1) of the *Political Parties Tribunal Act*. It states that:-
 1. The Tribunal shall determine:-
 - a. disputes between the members of a political party;
 - b. disputes between a member of a political party and the political party (emphasis court);
 - c. disputes between political parties;
 - d. disputes between an independent candidate and a political party;
 - e. disputes between coalition partners;
 - f. appeals from decisions of the Registrar under this Act; and
 - fa. disputes arising out of party nominations (emphasis court)
 2. Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) or (fa) unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms (emphasis court).
22. In determining disputes, a pertinent issue for consideration is the period within which the disputes on party nominations should be determined. In this regard, Section 41 of the Political Parties Tribunal stipulates that:-
 1. The Tribunal shall determine any dispute before it expeditiously, but in any case shall determine a dispute within a period of three months from the date the dispute is lodged.
 2. An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.
 3. A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court but the Tribunal shall have the powers of the High Court to punish for any acts or omissions amounting to contempt of the Tribunal.
23. This court carefully looked at the documents the Petitioner annexed to his Petition and did not find any evidence of him having subjected himself to the dispute resolution mechanisms that were set out in the *Political Parties Tribunal Act*. He thus removed himself from jurisdiction of the *Elections Act*.
24. It was evident that under Article 90 of the *Constitution* of Kenya, the role of the 1st Respondent was limited to conducting and supervising elections to ensure that political parties submitted party lists consisting of names of persons who would stand elected on the basis of proportional representation. The 1st Respondent was also mandated to ensure gender balance by alternating male and female candidates in the list in order of priority and except in the case of nominations for county assemblies,



- to ensure the party list reflected the regional and ethnic diversity of the people of Kenya. It therefore did not have any role in altering the party lists whatsoever.
25. The Petitioner asserted that the 1st Respondent did not follow the due process of the law. He did not, however, provide proof of this or demonstrate any violations, breach and/or infringement on the part of the 1st Respondent. It was not sufficient to allege that there were violations, breaches or infringements of the Constitution of Kenya without showing how this was done to give the opposing party an opportunity to demonstrate how this was.
 26. As was held in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, a person is seeking redress from the High Court on a matter which involves a reference to the Constitution should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed to ensure that justice is done to his case. This court therefore came to the firm conclusion that the Petitioner did not attain the threshold of the Petition being entertained.
 27. The court has a duty to facilitate the efficient disposal of disputes before it so as not to strain the already scarce resources. The court must therefore very quickly remove any matter that may have the potential of clogging its system and causing backlogs if it can be determined right at the outset that the said matter does not disclose a reasonable cause of action and hence ought not to be in the system.
 28. Indeed, the court is enjoined to facilitate the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties as provided in Section 1B of the *Civil Procedure Act* Cap 21 (Laws of Kenya).
 29. As the Petitioner did not demonstrate any violations, infringement and breaches against him by the 1st Respondent herein, the Petition herein could not be sustained even if the same were to proceed for hearing. The issues raised therein were actually electoral in nature but had been couched as a constitutional matter.
 30. Ordinarily, the court would not have come to this conclusion as it had the potential of locking out the Petitioner from the seat of justice. However, it also recognised that he did not demonstrate that he exhausted the dispute resolution mechanisms under the *Political Parties Tribunal Act* causing it to raise guard against him seeking to have a second bite of the cherry after been locked out by the *Election Act* and expending the already scarce judiciary resources. This court had to exercise restraint to hear an electoral dispute that had the potential of circumventing the times lines that were stipulated in Section 41 of the *Elections Act*.
 31. As this court came to the firm conclusion that it had no jurisdiction to deal with a dispute that had arisen out of party list nominations by the 2nd Respondent herein as the same did not come before it pursuant to the provisions of Section 41(2) of the *Political Parties Tribunal Act*, it had no option but to down its tools as was held in the case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (Supra)*.

Disposition

32. For the foregoing reasons, the upshot of this court's Ruling was that the 1st and 2nd Respondents' Preliminary Objection dated 18th February 2023 and filed on 23rd February 2023 was merited and the same be and is hereby upheld. The effect of this Ruling is that the Petitioners' Petition dated and filed on 3rd October 2022 be and is hereby dismissed *in limine*.



33. As the Petitioner was a member of the 2nd Respondent herein and execution of costs against him would strain their relationship and further because it would be punitive for this court to order that a citizen pays a government institution costs, this court deviated from the general principal that costs follow the event and hereby directs that each party bears its own costs of the Petition herein.

34. It is so ordered.

DATED, SIGNED AND DELIVERED AT VIHIGA THIS 27TH DAY OF SEPTEMBER 2023

J. KAMAU

JUDGE

