



**Omwoyo v Independent Electoral & Boundaries Commission & another
(Petition E005 of 2023) [2023] KEHC 24521 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E005 OF 2023
WA OKWANY, J
OCTOBER 31, 2023**

BETWEEN

MICHELLE KEMUMA OMWOYO PETITIONER

AND

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

THE SPEAKER, NYAMIRA COUNTY ASSEMBLY 2ND RESPONDENT

RULING

Background

1. The Petitioner/Applicant herein sued the Respondents through the Petition dated 29th June 2023 seeking the following orders: -
 - a. An order does issue compelling the 1st Respondent's Chief Executive Officer to gazette the Petitioner as a Member of the Nyamira County Assembly under the Gender Top Up List representing Jubilee Party within 7 days.
 - b. Failure to comply with order (a) above, within the stipulated time, the Honourable Court be and is hereby pleased to direct the 2nd Respondent to swear in the Petitioner as the duly nominated member of the County Assembly Nyamira, under the Gender Top Up list representing Jubilee Party.
 - c. Failing to comply with order (a & b) above within the stipulated time, the Petitioner be deemed as having been elected and she be at liberty to take her position as a Member of Nyamira County Assembly representing Jubilee Party under the Gender Top Up Category.



- d. A Declaration that the Constitutional Rights of the Petitioner as set out under Articles 27 (1) & (2), 28, 29 (d), 40 (3), 41 (1) and 47 (1) of *the Constitution* as read together with Section 4 (1) of the Fair Administrative Actions Act has been violated by the Respondents.
 - e. A declaration that the 2nd Respondent (Enock Okero) has breached the provisions of Chapter 6 of *the Constitution* of Kenya and he is unfit to hold any public office in the Republic of Kenya.
 - f. General Damages for the violation of the Petitioner's rights under Articles 27 (1) & (2), 28, 29 (d), 40 (3) and 47 (1) of *the Constitution* as read together with Section 4 (1) of the Fair Administrative Actions Act.
 - g. Costs of the Petition and interest thereon.
 - h. Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.
2. A summary of the facts giving rise to the Petitioner's case are explained at paragraphs 36 to 47 of the Petition as follows: -
36. Prior to the General Elections of 9th August 2022, the Jubilee Party being a registered political party, nominated and submitted the name of the Petitioner in the gender top-up list, among others, to the IEBC as required under Article 90 (2) (a) of *the Constitution*.
 37. On the 9th September 2022, the IEBC vide Gazette Notice No. 10712 Volume CXXIV No.186 published a list of the successful candidates placing one Dolphine Nyangara Onkoba as number 1 and the Petitioner as number 3.
 38. The Petitioner challenged the actions by the 1st Respondent in Nyamira Chief Magistrates Court.
 39. By the judgment of Nyamira Chief Magistrates Court in Election Petition Number E 001 of 2022 Michelle Kemuma Omwoyo vs. IEBC & 2 Others, the trial Court held:
 1. The Petition is allowed.
 2. An order is hereby issued declaring the nomination of the 2nd Respondent (Dolphine Nyang'ara Onkoba) as a Member of the County Assembly, Nyamira County under the Gender Top Up List of the Interested Party (Jubilee Party) vide Gazette Notice published on 9th September 2022, Kenya Gazette No. 10712 Volume CXXIV - No. 186, null and void.
 3. An Order is hereby issued compelling the 1st Respondent (IEBC) to forthwith Gazette the Gender Top up List of the Interested Party for Nyamira County Assembly using fresh/new list dated 9th September, 2022 submitted by the Secretary General of the Interested Party (Jubilee Party) in compliance with the Judgment and Decree of the Political Parties Dispute Tribunal dated 8th September, 2022 where the Petitioner's name (Michelle Kemuma Omwoyo) is listed at position one (1).
 4. For avoidance of doubt, the 1st Respondent IEBC) is directed to ensure compliance with the orders of this Court within seven days (7) days from the date of delivery of this Judgement.



5. Each Party to bear its own costs.
40. In the aforementioned Judgment, the Court rightly found in page 11 of the judgment:

The 1st Respondent acknowledged receipt of the Judgment, Decree of the Tribunal and the fresh list contained in the Interested Party's Letter dated 9th September, 2022 by its Secretary General. It however, stated that it was unable to comply with the said fresh list as it had already forwarded the list for its nomination to the Government press for gazettment. However, the 1st Respondent did not lead any evidence on the date and time when the entire nomination list was forwarded to the Government press for gazettment. It is also not disputed that the nomination list was published in the 1st Respondent's official website on 12th September, 2022 as evidenced by annexure MKO -1 of the Petitioner's further Affidavit dated 1st November, 2022. This Court finds that the 1st Respondent had control of the nomination list and hence could comply with Decree of the Tribunal between 9th and 12th September, 2022 before it was released to the public domain.

41. The 1st Respondent herein and Dolphine Nyangara mounted 3 appeals as against the decision of the trial Magistrate. By the judgment of lady justice Lucy Njuguna delivered on 29th May 2023, all the 3 Appeals by the 1st Respondent and Dolphine Nyangara were dismissed. Effectively, the judgment of Nyamira Chief Magistrates Court in Election Petition Number E 001 of 2022 Michelle Kemuma Omwoyo v IEBC & 2 Others validating the Petitioner's nomination was upheld. ■
42. Despite 2 valid court judgments by 2 Courts of competent jurisdiction declaring that the Petitioner was validly nominated to represent Jubilee Party in the Nyamira County Assembly under the gender to up category, and despite the fact that there are no stay orders stopping the swearing in of the Petitioner as the Jubilee Party's nominee in the Nyamira County Assembly and despite several letters to the 2nd Respondent to swear in the Petitioner, the 2nd Respondent has failed, refused and or neglected to swear in the Petitioner.
43. The 2nd Respondent has been indicating that the Petitioner has to be gazetted so that the Petitioner can be sworn in as a Member of the Nyamira County Assembly despite the fact that there is no requirement in law for the Petitioner to be gazetted as a pre-requisite requirement for her to be a Member of the Nyamira County Assembly.
44. It is a matter of public notoriety that the 1st Respondent doesn't have Commissioners. 3 of its Commissioners resigned, one (I) was removed from office by a Tribunal while 3 of its Commissioners retired on 17th January 2023 after their 6 years' tenure in office came to an end.
45. As there are no signs that the Commissioners will be replaced anytime soon, it is prudent that an order does issue compelling the 1st Respondent's Chief Executive Officer to gazette the Petitioner as the Jubilee Party's Nominee in the Nyamira County Assembly under the Gender Top Up Category.
47. Thus, there is need for an order to issue to the effect that if the 2nd Respondent refuses to swear in the Petitioner within 7 days of her gazettment, the Petitioner be deemed as having been



elected and she be at liberty to take her position as a Member of Nyamira County Assembly representing Jubilee Party under the Gender Top up Category.

3. Concurrently with the Petition, the Petitioner filed the Application dated 29th June 2023 that is the subject of this ruling.

Application

4. The Applicant seeks the following orders in the subject Application: -
 1. Spent
 2. That an order does issue compelling the 1st Respondent's Chief Executive Officer to gazette the Petitioner as a Member of the Nyamira County Assembly under the Gender Top Up List representing Jubilee Party.
 3. That failure to comply with order (2) above, within the stipulated time, the Honourable court be and is hereby pleased to direct the 2nd respondent to swear in the Petitioner as the duly nominated member of the County Assembly Nyamira, under the Gender Top Up list representing Jubilee Party.
 4. That failing to comply with order (2 & 3) above within the stipulated time, the Petitioner be deemed as having been elected and she be at liberty to take her position as a Member of Nyamira County Assembly representing Jubilee Party under the Gender Top Up Category.
 5. That the costs of this Application and interest thereon be awarded to the Petitioner.
 6. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.
5. The Application is supported by the Applicant's Affidavit and is premised on the grounds highlighted hereinabove under the summary of facts giving rise to the Petition.
6. The 1st Respondent opposed the Application through the Replying Affidavit of its Director of Legal and Public Affairs, Mr. Chrispine Owiye, who avers that both the Application is an abuse of the court's process, is wanting in both form and substance and is merely intended to embarrass the court.
7. He states that based on the undisputed facts of the case, the Applicant is, through the instant Application merely seeking the summary enforcement and/or compliance with the orders issued before the Lower Court.
8. In this regard, the 1st Respondent's deponent contends that the Petition does not meet the threshold set in the landmark case of Anarita Karimi Njeru vs. Attorney General (1979) KLR 154 in where the court discussed what constitutes a constitutional petition.
9. The 1st Respondent's avers that the Applicant should have moved the Lower Court over the issue of default compliance with its orders instead of filing the instant Petition. He states that the Applicant has filed a similar Petition before the Employment and Labour Relations Court (ELRC) in Kisumu being ELRC Petition No. E019 of 2023 seeking similar orders based on the same facts.
10. Mr. Owiye avers that the 1st Respondent is unable to Gazette the Petitioner as ordered by the court as the 1st Respondent is not constituted as required under Article 250 (4) of *the Constitution* and Section



5 of the IEBC Act as all the Commissioners of the said Commission have retired and/or resigned and/or removed from office.

11. He states that the role of the Commission to gazette a Member of County Assembly nominee cannot be performed by the secretariat whose activities are ratified by the said Commission. He further states that in the absence of the Commission, no gazette notices may be executed for publication to enable the conduct of any election either by ballot or nomination.
12. The 2nd Respondent opposed the Application through the Replying Affidavit sworn by the Clerk to Nyamira County Assembly, Mr. Daniel Orina, who confirms that he is aware of the court's decision in Election Petition No. E001 of 2022 regarding the membership of Nyamira County Assembly but adds that the Applicant is under a duty to comply with the provisions of the *Elections Act* specifically Section 86 thereof. He states that the Application does not meet the threshold set for the granting of orders of mandamus against the Respondents as the 1st Respondent cannot discharge the duties of the Independent Electoral and Boundaries Commission (hereinafter "the Commission").
13. He contends that the Petitioner should abide by the statutory provisions governing her assumption of the officer of a nominated Member of the County Assembly.

Submissions

14. The Application was canvassed by way of written submissions which the parties' respective Advocates highlighted at the hearing of the Application.

Applicant's Submissions

15. Mr. Mokuu, Learned Counsel for the Applicant submitted that since the Respondents do not dispute the existence of a court order directing the 1st Respondent to gazette the Applicant, the 2nd Respondent had no justification for declining to swear in the Applicant as a duly nominated Member of County Assembly (MCA). It was submitted that the Petition meets the threshold set for a constitutional petition.
16. On whether the Chief Executive Officer (CEO) of the Commission can gazette the Applicant, the Applicant argued that the 1st Respondent had not pointed out any statutory or constitutional provision barring the CEO from gazetting the Applicant. The Applicant noted that the absence of all the Commissioners from office resulted in extraordinary circumstances that necessitates the granting of extraordinary orders directing the CEO to issue the gazette notice.
17. On whether the Applicant should have gone back to the Lower Court for the enforcement of the said court's orders, the Applicant submitted that election disputes are sui generis in nature and that in the instant case, there is a continued violation of her constitutional rights.
18. Regarding the 2nd Respondent's claim that he was not served with a Certificate of Election that could have enabled him to swear in the Applicant, the Applicant reiterated that she duly served the said certificate on the 2nd Respondent on 13th January 2023 but that he still declined to swear her into office.
19. On the Respondent's claim that there is a similar case before Kisumu ELRC, the Applicant submitted that the issues and parties in the Kisumu case are different from the issues in this case.

1st Respondent's Submissions

20. Mr. Owuor, Learned Counsel for the 1st Respondent submitted that the Petition does not meet the threshold of a constitutional petition as it merely seeks the execution of the Certificate of the Election



court. According to the 1st Respondent, there are clear procedures for execution of such certificates that do not include the filing of a constitutional petition.

21. It was the 1st Respondent's case that this petition has created a multiplicity of suits that could result in conflicting orders. It was submitted that the CEO of the Commission is not a member of the commission as defined under Section 5 of the IEBC Act and that he cannot therefore perform the functions of the Commission. Reference was made to the decision in *Lamenken Amarat and Michael Sistu Mwaura v EACC* [2017] eKLR where it was held that the secretariat can only act/implement the resolutions of the commission.
22. The 1st Respondent argued that the instant Petition is sub judice owing to the existence of a similar case before Kisumu ELRC.

2nd Respondent's Submissions

23. Mr. Nyambati, Learned Counsel for the 2nd Respondent submitted that in the absence of a duly constituted IEBC, this court can only give an advisory opinion but cannot order for the Applicant's gazettelement.
24. On whether the 2nd Respondent's deponent is a non-party to these proceedings, it was submitted that the Petitioner had acknowledged the participation of the said deponent in these proceedings when she averred that she served the Clerk of Nyamira County Assembly with the Certificate of Election.
25. It was the 2nd Respondent's case that the Petition is premature as the process of gazettelement leading into his exercise of the power to swear in the Applicant had not been complied with.

Analysis and Determination

26. I have carefully considered the pleadings filed herein and the parties' respective submissions. The main issues for determination are as follows: -
 - a. Whether the petition meets the threshold of a constitutional petition.
 - b. Whether the instant suit is sub judice.
 - c. Whether the Applicant is entitled to the orders sought in the Application.

Threshold of a Constitutional Petition

27. The Respondents argued that the instant petition is purely based on an alleged non-compliance with the Lower Court's decision which is an issue that cannot give rise to a constitutional petition. According to the Respondents, the Applicant should have presented her case before the Lower Court over the issue of non-compliance with its orders. The Respondents argued that this Petition does not meet the threshold of what constitutes a constitutional petition as was set out in the *Anarita Karimi Njeru* case (supra).
28. The Applicant, on the other hand, maintained that the Petition is properly before this court as the Respondents had violated her constitutional rights. She highlighted the particulars and nature of the violations at paragraphs 48 – 56 of the Petition wherein she enumerated the various Articles of *the Constitution* alleged to have been violated as follows; Article 10 which enjoins the Respondents to uphold the Rule of Law, democracy, human dignity, equity social justice, equality, human rights and non-discrimination; Article 47 on the right to fair administrative action; political rights under Article 38; Article 27 on equal protection under the law; Article 28 and 29 on the right to human dignity and freedom from psychological torture; and Article 40 on the right to own property.



29. The question that arises is whether this Petition meets the threshold set for a constitutional petition. A constitutional petition is a legal process for upholding and enforcing the principles of *the constitution* through which an individual or entities can challenge the constitutionality of laws, regulations, government action or decisions that violate fundamental rights and freedoms.
30. The next issue for consideration is whether failure to comply with a court order can form a basis for a constitutional petition. The answer to this question is to the positive. My take is that when a government agency, institution or individual fails to comply with a court order, it may be viewed as a violation of the rule of law and the principles of the Kenyan Constitution. Such a violation can be a ground for seeking constitutional redress through a petition.
31. It is trite that a constitutional petition should not however be used as a blanket avenue for seeking redress where one claims to be aggrieved by the actions of another. One must always consider whether there are other avenues of redress before instituting a constitutional petition. This is the position that was adopted by the Court of Appeal in *Gabriel Mutava & 2 Others vs. Managing Director, Kenya Ports Authority* (2016) eKLR where it was held that: -
- “Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”
32. A constitutional petition must also set out the manner in which the petitioner’s constitutional rights have been infringed or are likely to be infringed. This principle was aptly explained in the celebrated case of *Anarita Karimi Njeru vs. Attorney General* (supra) as follows: -
- “We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”
33. As I have already noted in this ruling, the Applicant herein not only highlighted the various articles of *the Constitution* alleged to have been violated but also stated the particulars and the manner of their violation. A determination of whether the Respondents actually violated her said rights and the remedies for such violations are, however, matters that can only be determined upon hearing the main Petition and not at this interlocutory stage. It is therefore my finding is that this Petition meets the threshold of a constitutional petition.

a. Sub Judice

34. The Respondents invoked the sub judice doctrine and argued that this matter contravenes the said doctrine owing to the existence of a similar matter before the ELRC at Kisumu in Petition No. 019/2023.
35. The Applicant, on her part, acknowledged the existence of the ELRC matter but argued that the parties and the issues before the ELRC are different and distinguishable from the issues before this court.



36. The doctrine of sub judice is founded on Section 6 of the [Civil Procedure Act](#) which provides as follows:

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6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

37. In *Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others* (Interested Parties [2020] eKLR the Supreme Court explained the rationale of the sub judice doctrine and its parameters as follows: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

38. Similarly, in *Republic vs. Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR the court held that: -

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

39. Applying sub judice doctrine to the instant case, I find that it was not disputed that there is a related suit before the ELRC at Kisumu where the parties are more or less the same as the parties in this case. A perusal of the ELRC matter shows that it was filed a few days before the filing of this Petition. I note that no material was presented before this court to show the status of the ELRC case as at the time that the parties presented their arguments before me. It is therefore not possible to establish whether or not the ELRC matter is still pending determination.

40. The current status of the ELRC case notwithstanding, I find that the ELRC is a court with limited/ specific jurisdiction that does not extend to matters of election as is the position in the instant case. I note that there is a clear distinction between this Petition and the matter before the ELRC in as far as the cause of action and the jurisdiction of the two courts is concerned. A perusal of the pleadings filed before the ELRC reveals that it is founded on the allegation that one Dolphine Nyang’ara Onkoba is illegally drawing salaries from Nyamira County and carrying on with the duties of a Member of



County Assembly when the said position should be occupied by the Applicant herein. To my mind, the case before the ELRC is purely an employment matter while the instant case revolves around the import of the orders emanating from the election court and whether the Applicant's right to be gazetted and sworn in as a nominated MCA has been violated.

41. The promulgation of the 2010 Constitution and the enactment of the Employment and *Labour Relations Act* marked a paradigm shift in the resolution of labour and employment disputes in Kenya as it resulted in the creation of the Employment and Labour Relations Court (ELRC). *The Constitution* and ELRC Act not only resolved the question of the jurisdiction and status of the ELRC as a superior court of record, but it also established the court as the exclusive judicial body for the resolution of all labour, employment and industrial relations disputes in the country. ELRC is a court of limited jurisdiction and cannot entertain any matter outside its prescribed area. Indeed, the preamble to the ELRC Act stipulates that it is "An act of parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes."
42. Section 12(1)(a) – (f) of the ELRC Act stipulates that: -
 1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of *the Constitution* and the provisions of this act or any other written law which extends jurisdiction to the court relating to employment and labour relations including —
 - a. Disputes relating to or arising out of employment between an employer and an employee;
 - b. Disputes between an employer and a trade union;
 - c. Disputes between an employers' organisation and a trade unions organisation;
 - d. Disputes between trade unions;
 - e. Disputes between employer organizations;
 - f. Disputes between an employers' organisation and a trade union;
 - g. Disputes between a trade union and a member thereof;
 - h. Disputes between an employer's organisation or a federation and a member thereof;
 - i. Disputes concerning the registration and election of trade union officials; and
 - j. Disputes relating to the registration and enforcement of collective agreements.
43. My finding is that matters relating to elections fall within the jurisdiction of this court and cannot be determined by the ELRC as had been suggested by the Respondents. Courts have taken the position that constitutional issues can be determined by the ELRC only if they arise from an employer-employee dispute. In the present case I find that the pertinent issue of the nomination, gazettement and swearing in of the Applicant does not arise from an employer-employee relationship and is not listed under Section 12(1)(a)-(f) of the ELRC Act as a matter that falls for the determination by the



ELRC. Furthermore, the reliefs sought in the present suit cannot be obtained from the ELRC owing to the jurisdictional limitations of the said court.

44. I therefore find that the sub judice doctrine is not applicable to this case and that the instant petition is properly before this Court for determination.

45. The Respondents also argued that the Applicant should have gone back to the Lower Court in Election Petition E001 of 2022 for the enforcement of the orders to gazette and swear the Applicant into office. My finding is that the nature of election courts is such that they are only constituted for a limited period of 6 months within which they must be heard and determine election disputes after which cease to operate until they are reconstituted in the next election cycle.

46. Section 75 of the *Elections Act* stipulates as follows: -

County election petitions

(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.

(1A) 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.

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be -

(a) filed within thirty days of the decision of the Magistrate's Court; and

(b) heard and determined within six months from the date of filing of the appeal.

47. As I have already observed in this ruling, the Lower Court rendered its judgment on the election petition on 11th January 2023 after which the losing party appealed to the High Court which upheld the Lower Courts decision in a judgment delivered in May 2023. Having regard to the clear, strict timelines granted to the election courts, I find that the election court became functus officio at the expiry of 6 months from the time the petition was lodged and cannot entertain any other matter arising from its decision outside the 6 months period. This means that the applicant is justified in seeking a redress from this court through the current petition. This is the position that was taken in the case



of of Lemanken Aramat v Harun Meitamei Lempaka & 2 others SC Petition No. 5 of 2014; [2014] eKLR where it was held that: -

[70] “[T]here are instances when *the Constitution* links certain vital conditions to the power of the Court to adjudicate a matter. This is particularly true in the context of Kenya’s special electoral dispute-resolution mechanism. By linking the settlement of electoral disputes to time, *the Constitution* emphasises the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed electoral justice, that has plagued this country in the past...

[76] The ultimate principle is: while citizens are at liberty to contest electoral outcomes, they will proceed within prescribed timelines, and in this way help to sustain the due functioning of other constitutional processes.”

48. A similar finding was made in the case of Martha Wangari Karua vs Independent Electoral and Boundaries Commission & 3 others [2019] eKLR where it was held that: -

“(45) The need to adhere to the constitutional timeframes was also emphasised in the cases of Hassan Ali Joho & Another v. Suleiman Said Shahbal and Others, SC Petition No 10 of 2013; [2013] eKLR and Evans Odhiambo Kidero & 4 others v. Ferdinard Ndungu Waititu & 4 others, S.C Pet. No. 20 of 2014; [2014] eKLR. In that regard, we still hold the position that the period provided for the settlement of electoral disputes cannot be extended by any Court and we see no reason to depart from that position in this or any other case.”

b. Whether the Applicant is entitled to the orders sought in the Application.

49. The 1st Respondent submitted that it is not able to gazette the Applicant as the duly nominated MCA owing to the fact that the Commission not properly constituted. The Applicant’s case, on the other hand, was that in the absence of the Commission this Court should direct the Chief Executive Officer (CEO) of the Commission to gazette her or in the alternative, direct the Speaker of the County Assembly to swear her in without gazette.

50. It was not disputed that the Lower Court declared the Applicant as the rightful nominee for the Jubilee party Gender Top-Up position through its decision of 11th January 2023. The said court directed the 1st Respondent (IEBC) to gazette the Applicant and the 2nd Respondent to swear her into office as a nominated MCA. As I have already stated in this ruling an appeal against the Lower Court’s judgment was dismissed by this court (differently constituted) in a decision rendered 29th May 2023. This court is aware that a further appeal to the Court of Appeal was also unsuccessful as the said court, in a ruling rendered on 24th October 2023, found that it lacked the jurisdiction to entertain the appeal.

51. It was also not disputed that as at the time this court determined the appeal in May 2023, all the Commissioners of the 1st Respondent were no longer in office for various reasons ranging from retirement, resignation and removal from office. It is not in doubt that in the absence of the Commissioners, the 1st Respondent cannot be said to be properly constituted or constituted at all, for that matter. I take judicial notice of the fact that, as matters currently stand in respect to *the constitution* of the Commission, it is not certain if and when the 1st Respondent will be reconstituted so that it can carry out its mandate as stipulated under *the Constitution* and the *Independent Electoral and Boundaries Commission Act* (IEBC Act). I hasten to add that the issue of the reconstitution of the Commission is a matter that it not in the control of the parties herein or this Court for that matter.



52. Section 5 of the [Independent Electoral and Boundaries Commission Act](#) stipulates as follows: -

5. Composition and appointment of the Commission

1. The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250 (4) of [the Constitution](#) and the provisions of this Act.
2. The chairperson and members of the Commission shall be appointed in accordance with the procedure set out in the First Schedule.
3. The process of replacement of a chairperson or a member of the Commission shall commence at least six months before the lapse of the term of the chairperson or member of the Commission.
4. The procedure set out in the First Schedule shall apply, with the necessary modifications, whenever there is a vacancy in the Commission.

53. The functions of the CEO are spelt out under Section 10 (7) of the IEBC Act as follows: -

(e) responsible for-

- i. executing decisions of the Commission;
- ii. assignment of duties and supervision of all employees of the Commission;
- iii. facilitating, co-ordinating and ensuring execution or Commission's mandate;
- iv. ensuring staff compliance with public ethics and values; and
- v. the performance or such other duties as may be assigned by the law and Commission.

54. The above provisions are clear on the composition of the Commission and the primary function of the CEO to execute the decisions of the Commission and to perform duties assigned to him/her by the law and Commission. My understanding of Section 10(7) of the IEBC Act is that the CEO is neither an independent entity from the Commission nor an alternative to the Commissioner. This means that the CEO cannot, on his own motion or assume the role of the Commission in instances where the Commission is either not properly constituted or not constituted at all. I therefore find that the Applicant's prayer for orders directing the 1st Respondent's CEO to perform the functions of the Commission to gazette her is misconceived as such a prayer is not anchored on any law. It is trite that courts must adhere to the principles of the Rule of Law and refrain from issuing orders that may lead to an illegality. I therefore decline to grant the prayer to order the CEO to gazette the Applicant.

55. It is noteworthy that [the Constitution](#) of Kenya 2010 did not envisage the scenario that is currently prevailing in the country where there is, strictly speaking, no member of the Commission. Indeed, [the Constitution](#) and the Act are clear on the steps to be taken to replace commissioners in the event of retirement, resignation or removal. Section 5 of the Act states that the replacement process should commence at least six months before the lapse of the Commissioners term. In the



present circumstances, I note that no replacement process was initiated prior to the lapse of the Commissioners' terms in office and none has been initiated to date, almost 10 months after the expiry of their said term.

56. Having found that the 1st Respondent's CEO can only execute the directives of the Commission and does not have the mandate to gazette the Applicant, the next question that the court has to grapple with is whether the issue of gazette is such a fundamental step to an election process that it can keep a duly elected person from assuming office. Article 259 of *the Constitution* provides that *the Constitution* should be construed in a manner that promotes its purposes values and principles; advances the Rule of Law, Human Rights Fundamental Freedoms and that permits the development of law and good governance. Courts have held that *the constitution* is a living document and that they must always breath life to its provisions.
57. The country is confronted with a situation where there is, technically speaking, no IEBC. The Respondents have urged this court to put the Applicant's rights on hold until such a time that the IEBC will be properly constituted. Was this the intention of the framers of *the Constitution*?
58. While this Court appreciates the fact that *the Constitution* and the IEBC Act did not envisage a situation where there are no IEBC Commissioners, thereby holding all it functions in abeyance, the court is also aware of its duty to provide answers or remedies to aggrieved parties. I therefore find that the court cannot 'fold its hands', remain helpless and watch the glaring prejudice that has been occasioned to the Applicant/Petitioner herein who has been unable to assume her office as an MCA despite the existence of a valid court orders merely because she has not been gazzeted. What then is the purpose of gazette? Is it a mandatory legal requirement? Is it a mere formality?
59. The answer to the above question can be found in the decision by the Court of Appeal in *Nderitu Gachagua vs Dr. Thuo Mathenge & 2 others Civil Appeal No. 14 of 2013 (Nyeri)*, where the learned judges explained the purpose of a gazette notice and held thus: -

“The court observes that the Gazette is an official document of the Government of Kenya in which official matters including official notices by the Government are published. Any notice published in the Gazette is deemed as notice to the general public and one is barred from pleading ignorance of the same.”

60. Section 69 of the *Interpretation and General Provisions Act*, Chapter 2, Laws of Kenya provides that: -

69. The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the Government printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.

61. Section 85 of the *Evidence Act* provides thus: -

85. Gazette, etc., to be prima facie evidence.

The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.



62. The above provisions and cited cases posit that a gazette notice is evidence, at face value, of the existence of a law or a notice that has been duly formulated. This implies that a gazette notice merely brings to the attention of the public, information or a law or a directive. In simple terms, a Gazette notice is an official communication or a formal expression of the existence of the notice or law.
63. In *Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Another* (2012) eKLR Odunga J. (as he then was) considered the import of gazette and held thus: -
- “What this implies is that, in absence of proof to the contrary, the Gazette notice becomes a formal expression of the existence of the notice or law in question. The Gazette does not, as it were, constitute the notice or the law itself but rather the official announcement of its existence or coming into force. Such that the validity or otherwise of a law or notice is not resident in the Gazette but the persons or bodies tasked with the responsibility to make such laws or issue such notices in accordance with the law and *the Constitution*. The Gazette merely confers a seal of authority or officialdom to existence of the notice or the law.” (Emphasis added)
64. The 2nd Respondent argued that since the 1st Respondent is not duly constituted, the office of the Speaker of the County Assembly had not been served with the requisite certificate to enable it declare a vacancy in the seat in contention so as to swear in the Applicant. On its part, 1st Respondent argued that in the absence of the Commissioners, court orders for gazette cannot be complied with until such a time that the Commission will be constituted. My finding is that in the face of the uncontested fact that the 2nd Respondent was on 13th January 2023 served with the Certificate of Election issued by court, the Respondents’ insistence on gazette as a prerequisite to the swearing in is untenable. The Respondents’ argument amounts to an attempt to take advantage of the lacuna created by the absence of the Commissioners from office so as to perpetuate an illegality.
65. I have considered the provisions of the County Government Act with respect to the process of assumption of office of Members of County Assembly. Section 7A of the said Act provides as follows: -
- 7A. County Assemblies to be duly constituted at first sitting
1. A county assembly shall not be fully and duly constituted for the first sitting after a general election unless all the members provided for under paragraphs (b) and (c) of Article 177(1) of *the Constitution* have been duly nominated and their names published in the Gazette.
 2. Sub-section (1) shall not apply where the nomination of a member of a county assembly under paragraphs (b) and (c) of Article 177(1) of *the Constitution* is the subject of a court order stopping or otherwise pending the nomination of the member.
 3. Despite sub-section (1), a county assembly shall be deemed to be fully and duly constituted for first sitting notwithstanding the death, on or before the date of the first sitting of the county assembly, of a member nominated under paragraphs (b) and (c) of Article 177(1) of *the Constitution*.
66. My understanding of the above provision is that once members of the county assembly are nominated and/or elected, the IEBC publishes their names in the Kenya gazette to inform the public of the prospective office holders. I note that there is no mandatory provision to the effect that an MCA can only be sworn in after gazette. The gazette of the MCAs only serves to inform the public of



the successful aspirants thereby marking the close the election process. The Supreme court discussed the subject of Nomination for county Assembly and the role of the IEBC in the of gazettelement of the nominees in the case of Moses Mucigi & 14 Others vs Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR as follows: -

“[104] Section 36 (7) (8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:

“(7) For purposes of Article 177 (1) (b) of *the Constitution*, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

“(8) For purposes of Article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

“(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of *the Constitution* shall be proportional to the number of seats won by the party under Article 177 (1) (a) of *the Constitution*.”

[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. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.

[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.” [Emphasis added].

67. The reasoning by the Supreme Court was that the substantive process of electing or nominating an MCA is what may be challenged in a court of law and that gazettelement only serves the purposes of notifying the public of the outcome of the nomination. It my view that the process of gazettelement is merely an administrative task arising from an already concluded legal process. I find that gazettelement cannot vitiate the status of a person who has been duly elected or nominated during an election process.



This is the position that was adopted by Odunga J. (as he then was) in *Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Another* (supra), when he held thus: -

“...In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazettement, the gazettement is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment.”

68. In the said *Samuel Kimuchu Gichuru & Another* case (supra), the learned Judge referred to the decision by the Court of Appeal of Tanzania in *Catholic Diocese of Moshi vs. Attorney General* (2000) 1 EA 25 (CAT), where it was held that: -

“The requirement that administration and remission orders made by the Minister under to statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 1976), and section 28(1) of the Sales Tax Act of 1976 (Act 13 of 1976), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.”

69. Flowing from the above provisions and legal precedents, and considering the particulars of constitutional breaches outlined by the Applicant in the Petition, it is my considered view that it would be a travesty of justice to continue barring her from assuming the office that she was validly nominated to serve in on account of the pending the reconstitution of the IEBC whose timelines is currently unknown and/or indefinite.

70. I have, in the same vein, considered the fact that as a court of equity, this Court should consider the peculiarity of the circumstances that the parties find themselves in where, for some unexplained reason, there is no properly constituted IEBC, and draw reference from the equity maxim which states that; “Equity sees as done that which ought to have been done”. The Respondents herein have not disputed that the Applicant would have been gazetted if the 1st Respondent was properly constituted. Indeed, the Applicant would have been gazetted immediately upon the determination of the suit in the Chief Magistrate’s Court on 11th January 2023 in which the nomination of Dolphine Nyang’ara was nullified. The lower court’s decision was upheld on appeal. I therefore find that there is no impediment or barrier to the Applicant’s swearing in and assumption of office. This Court takes the view that, in the interest of justice and in circumstances of this case, the issue of gazettement, which is not a legal prerequisite but an administrative formality/directive, may be by-passed or be deemed to have been done. I find that nothing should further stand in the way of the Applicant, who has been vigilant in pursuing her cause, from assuming her rightful place in office as an MCA. My finding is bolstered by the provisions of Article 177 of *the Constitution* which limits the term of an MCA to 5 years. The section provides that: -

177. Membership of county assembly

(4) A county assembly is elected for a term of five years.

71. I note that elections were held in August 2022 and this means that as at the time of delivering this ruling, more than 1 year has lapsed from the 5-year period that the Applicant is supposed to serving as an MCA. I find that it will be an affront to the rule of law and indeed a recipe for chaos/anarchy for a litigant to obtain a court order only for the order to be rendered superfluous on account of inability



to secure publicity in the Kenya Gazette which, I have already found, is no more than directory. I am further guided by the maxim “Equity will not suffer a wrong to be without remedy”. My view is that, in the peculiar circumstances of this case, the issue of gazettelement should not be invoked so as to create a hurdle that ultimately prevents the Applicant from taking up her rightful position as an MCA of Nyamira County. I reiterate that gazettelement is merely a formality that serves as a notice to the general public of the Applicant’s nomination. In this case, one can say that the existence of court orders upholding the Applicant’s nomination is itself sufficient notice to the public of such nomination. It is trite that court orders are not issued in vain. I further find that in the circumstances of this case, the gazettelement of the Applicant is not necessary.

72. Having regard to the observations and findings that I have made in this ruling, I find that the application dated 29th June 2023 is merited and I therefore allow it in the following terms: -

- a. An order is hereby issued directing the 2nd Respondent to immediately declare the position of Jubilee Party Representative in the Gender Top Up List for Member of County Assembly of Nyamira vacant.
- b. Upon declaring the position vacant in terms of the order in (a) hereinabove, the 2nd Respondent shall within 24 hours from the time of the delivery of this ruling proceed to swear the Applicant into office as a duly nominated Member of the County Assembly of Nyamira County, under the Gender Top Up list representing Jubilee Party.
- c. That in the event of failure to comply with order (a & b) above within the stipulated time, the Petitioner shall be deemed to have been duly elected and sworn in, in which case, she will be at liberty to take up her position as a Member of Nyamira County Assembly representing Jubilee Party under the Gender Top Up Category.
- d. The costs of this application shall abide the outcome of the Petition.

RULING DATED AND DELIVERED AT NYAMIRA HIGH COURT VIRTUALLY VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER, 2023.

W. A. OKWANY

JUDGE

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