



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E345 OF 2021

BETWEEN

NORNAEL OKELLO G’OGANYO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL COMMISSION SELECTION PANEL.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST INTERESTED PARTY

FRANCIS MATHENGE WANDERI.....2ND INTERESTED PARTY

JUSTUS ABONYO NYANG’AYA.....3RD INTERESTED PARTY

IRENE CHEOP MASSIT.....4TH INTERESTED PARTY

JULIANA WHONGE CHERERA.....5TH INTERESTED PARTY

KATIBA INSTITUTE.....6TH INTERESTED PARTY

FIDA KENYA.....7TH INTERESTED PARTY

RULING NO. 2

Introduction:

1. *The Hon. Attorney General*, the 3rd Respondent herein, and the *Independent Electoral and Boundaries Commission*, the 1st Interested Party herein, filed objections on the lack of any further jurisdiction on the part of this Court upon the appointment of the 2nd to 5th Interested Parties herein as Commissioners of the 1st Respondent.
2. On Court’s directions, parties filed written submissions and the objections were heard on 24th March, 2022.
3. This is the resultant ruling.

The Preliminary Objections:

4. The grounds in support of the Preliminary Objection by the Hon. Attorney General dated 28th February, 2022 were tailored as follows:

1. That this Honourable Court is not vested with the requisite jurisdiction to hear and determine removal of holders of Independent Offices according to Article 251 (2) of the Constitution which states that “A person desiring the removal of a commission or a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground”

2. That the Petition be struck off with no orders as to costs.

5. The 1st Interested Party preferred the following grounds of objection vide its Preliminary Objection dated 15th December, 2021: -

1. That the petition is bad in law, inadmissible and incurably defective and incompetent for want of jurisdiction.

2. That members of the commission, that is the 1st Interested Party herein, enjoy security of tenure and can only be removed under the procedure laid out under Article 251(2) of the Constitution of Kenya.

3. That the petition has been overtaken by events.

4. That the 2nd, 3rd, 4th and 5th Interested Parties have since taken oath and assumed office as commissioners of the 1st Interested Party.

5. That accordingly, the Honourable Court lacks jurisdiction to hear and determine the petition.

The Submissions on the objections:

6. The objections by the 3rd Respondent and the 1st Interested Party were supported by the 2nd Respondent and the 4th Interested Party.

7. The Petitioner and the 7th Interested Party opposed the objections.

8. The 1st Respondent and the rest of the Interested Parties did not take part in the hearing of the objections.

9. The proponents of the objections mainly contended that this Court no longer has the jurisdiction over the matter since the 2nd to 5th Interested Parties were duly nominated, vetted, appointed and sworn into office as Commissioners of the Independent Electoral and Boundaries Commission, the 1st Interested Party.

10. It was further argued that, given the turn of events, the only way forward was for the Petitioner to invoke the removal process under Article 251(2) of the Constitution since the Petition was then rendered moot.

11. Several decisions were referred to in support of the various submissions by Counsel.

12. Opposing the objections, the Petitioner and the 7th Interested Party submitted that the appointment and the swearing into office of the 2nd to 5th Interested Party did not divest the Court of the jurisdiction over the matter neither did it render the Petition moot.

13. Counsel made reference to decisions in support of the position.

Whether the objections are sustainable:

14. Objections to the jurisdiction of a Court can be raised in many ways. In this matter, the objections are by way of preliminary objections. As such, I will consider the law on such objections.

15. The locus classicus case is **Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd**, (1969) E.A. 696 where the Court at page 700 observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

16. In *Civil Suit No. 85 of 1992, Oraro vs. Mbaja* [2005] 1 KLR 141, **Ojwang J**, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

.... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

17. In *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

18. On the question as to whether jurisdiction is a point of law, the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.

19. Having settled that jurisdictional issues constitute pure points of law and can be raised by way of preliminary objections, I will now briefly look at the doctrine of jurisdiction in general.

What jurisdiction is about:

20. Jurisdiction is defined in *Halsbury's Laws of England* (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". **Black's Law Dictionary**, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.

21. In *Words and Phrases Legally Defined* Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

22. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA*, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

23. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;*

1)

2) *The jurisdiction either exists or does not ab initio ...*

3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

24. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others* (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

25. On the source of a Court's jurisdiction, the **Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

26. And, in **Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR**, the Court of Appeal further stated: -

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

27. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

The crux of the objections:

28. The heart of the objections under consideration was whether the Court's jurisdiction stand deferred on the basis of the doctrine of mootness.

29. In Judicial Review 441 of 2018, **Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi** [2019] eKLR, the Court made the following compelling remarks on the mootness doctrine: -

27. The legal doctrine known as mootness is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it

...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.

28. Furthermore, a case will be moot:

...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision.

29. Barron and Dienes put it succinctly when they observe that a case or controversy requires present flesh and blood dispute that the courts can resolve [20] Loots, a South African constitutional commentator, endorses these sentiments and points out that a case

....is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists...

30. Mootness is, therefore, a facet of justiciability that ensures there exists a real controversy throughout all stages of judicial proceedings. The mootness doctrine ensures that a case merits Court's intervention for actionable solutions.

31. In this matter, it seems that the controversy raised in the objections has already been settled by the Court of Appeal.

32. In Nairobi Civil Application Nai. 201 of 2018 **Katiba Institute v. Attorney General & 9 others** [2018] eKLR, the Court of Appeal addressed a similar question as the prevailing one in this case. In answering the question as to whether a Petition is rendered *facit accompli* where Commissioners of the Judicial Service Commission were nominated, vetted, appointed and sworn into office and whether the only recourse upon the assumption of office by the Commissioners was to the removal process under Article 251(2) of the Constitution, the Court of Appeal held as follows: -

35 The submission that the intended appeal will be rendered nugatory has no merit. The 5th, 6th, 7th respondents were nominated, appointed and vetted by the Parliament. The High Court, having heard and determined the Petition challenging their nomination has cleared them. Article 251(2) of the Constitution provides the procedure for removal of a member of an Independent

Commission. Even the applicant in its draft memorandum of appeal appreciates that this Court has power to nullify and declare the nomination of the 5th, 6th and 7th respondents to be invalid. In the draft memorandum, the applicant prays in the alternative that this Court do issue an order invalidating the nomination, approval and appointment of the 5th, 6th and 7th respondents, as the case may be, as members of the JSC. This alternative prayer performe acknowledges that even if the 5th, 6th and 7th respondents were to be sworn in and take office, this Court has power to invalidate their membership to the JSC. **If it is ultimately found that the nomination of the 5th, 6th and 7th respondents is invalid, we opine that nothing would prevent the Court from nullifying the same. See Macfoy vs. United Africa Co. Ltd. (1961) 3All E.R. 1169.**

33. The subject was also dealt with by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR where the Court disallowed the argument that the High Court lacked jurisdiction to deal with the Petition on the assumption into office of the Appellant as the Chief Executive Officer of the Ethics and Anti-Corruption Commission.

34. The Court, categorically and authoritatively, rightly so stated as follows: -

(37) It is clear that on its face, the jurisdiction of the High Court is broad enough to cover review of the constitutionality or legality of appointments by other organs of government. However, the analysis does not end there. We were urged by learned counsel for the appellant that having been gazetted, the appellant could only be removed through the procedure provided under Article 251 of the Constitution; that the High Court had no jurisdiction to set aside the appellant’s appointment because such an order amounted to a removal exercisable only by a tribunal appointed under Article 251 of the Constitution. It was contended further that had the learned Judges of the superior court below considered the provisions of section 42 of Leadership and Integrity Act, 2012, they would have laid down their tools and required the 1st respondent to comply with the procedures set therein for lodging complaints against a State Officer. We considered this latter argument as an averment that the petition was rendered moot by the gazetting of the appointment of the appellant.

(38) We disagree with this approach and are not prepared to hold as urged by the appellant as such an approach would pose a recharacterization risk in similar forms of constitutional litigation. In our considered opinion, the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant’s appointment. This Court takes the view therefore that it is not the outcome of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure. We note with affirmation the holding of the High Court in the Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another (2011) eKLR, which we cite below in extenso for its relevance:

In our view the jurisdiction of this Court under Article 165 is completely different from that of Tribunal under Article 168. It is clear that the Tribunal’s jurisdiction kicks in when there is an alleged misconduct on the part of the Judge or when he is unable to perform the functions of his office ...

.....

On the other hand, the question that is for our determination is about the process and it is our view that no step is greater than the other and any of the three steps are equally important and constitutionally mandatory. Therefore, what is at stake is the process used to nominate and appoint the Supreme Court Judges. It is our duty to evaluate and assess whether the business conducted by the Judicial Service Commission was in accordance with the law, fairness and justice. If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this Court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this Court is dependent on the process and constitutionality of appointment. In this sense, if the Judicial Service Commission a State Organ does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court shall be invalid. Accordingly, we find and hold that we are properly seized of this Petition as we have the requisite jurisdiction.” (emphasis supplied)

35. The foregoing legal position has been applied by the High Court including in the ruling in this matter rendered on 2nd September, 2021 where **Korir, J** stated as follows: -

..... in the occurrence of any of the stated events, the judgment of the Court will be sufficient remedy and there will be no need to go the tribunal route. As such, the Petitioner’s argument that the Petition will be rendered nugatory if orders are not given is without merit.....

36. I believe the above sufficiently settles the objections.

37. In sum, there is a difference between the procedure towards the appointment of Commissioners, on one hand, and the removal processes of the Commissioners under Article 251(2) of the Constitution, on the other hand.

38. The Petition raises weighty and fundamental issues on the constitutionality of the process towards the appointment of the 2nd to 5th Interested Parties as Commissioners. In other words, the Petition questions the integrity of the whole process that led to the appointment of the Interested Parties as Commissioners and does not deal with any of the grounds of removal in Article 251(1) of the Constitution.

39. Article 251(1) and (2) of the Constitution states as follows: -

(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for:

- a. serious violation of this Constitution or any other law, including a contravention of Chapter Six;*
- b. gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;*
- c. physical or mental incapacity to perform the functions of office;*
- d. incompetence; or*
- e. bankruptcy.*

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

40. A plain reading of sub-article 2 shows that the removal proceedings must be only limited to the grounds provided in sub-article 1 and no more. It is plainly clear that any challenge to the nomination, vetting, appointment and swearing into office of the Commissioners or holders of an independent offices is not among the grounds provided for removal under sub-article 1.

41. The grounds in sub-article 1 seem to focus on the individual conduct of the Commissioners and not the processes of appointment. As such, the argument that any challenge to the process of appointment ought to be treated as a ground for removal under sub-article 1 cannot hold. That argument is itself unconstitutional since it runs contra Article 251(1) and (2) of the Constitution.

42. Having said so, I hereby return the verdict that the objections do not have any legal legs to stand on and are for rejection.

59. Consequently, the following final orders do hereby issue: -

(a) This Court has the jurisdiction to further entertain the Petition.

(b) The Preliminary Objections dated 6th December, 2021 and 28th February, 2022 respectively are hereby (c) Given the nature of the litigation, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST MARCH, 2022.

A. C. MRIMA

JUDGE