



**Mongare v Chebukati & 2 others (Constitutional Petition E318 of 2022)  
[2022] KEHC 10186 (KLR) (Constitutional and Human Rights) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10186 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E318 OF 2022**

**AC MRIMA, J**

**JUNE 30, 2022**

**BETWEEN**

**WALTER ONCHONGA MONGARE ..... PETITIONER**

**AND**

**WAFULA CHEBUKATI ..... 1<sup>ST</sup> RESPONDENT**

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

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
DISPUTERS RESOLUTION COMMITTEE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction:**

1. The Petition herein revolves around the eligibility of Presidential candidates in respect to academic qualifications.
2. Whereas the Petitioner herein, Walter Mong'are Nyambane, contended that he was eligible to vie as a Presidential candidate in the forthcoming General election scheduled for 9<sup>th</sup> August, 2022, the Respondents held to the contrary.
3. This judgment, therefore, interrogates the above rival positions in light of *the Constitution* and the law.

**The Petition:**

4. The Petition is dated 24<sup>th</sup> June, 2022. It is supported by the Petitioner's Affidavit sworn on even date and a List of Authorities. Contemporaneously with the filing of the Petition was the application by way of Notice of Motion of evenly dated.



5. The application sought for various interim conservatory orders against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It sought to restrain them from gazetting and publishing names of candidates registered for the presidential election and the printing the ballot papers for the presidential election pending the hearing of the application and the main Petition.
6. It was the Petitioner's case that he was nominated by Umoja Summit Party as its Presidential candidate for the General election scheduled for the 9<sup>th</sup> August, 2022.
7. The Petitioner was, however, aggrieved by the decision of Wafula Chebukati, the 1<sup>st</sup> Respondent herein, who is the Chairman of the Independent Electoral and Boundaries Commission and the Returning Officer for the said presidential election in revoking his nomination and registration as a candidate for the presidential election. That was on 6<sup>th</sup> June, 2022.
8. He was further aggrieved by the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee, the 3<sup>rd</sup> Respondent herein, in upholding the decision of the 1<sup>st</sup> Respondent.
9. It is contended that the decisions by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents violated the Petitioner's rights and fundamental freedoms guaranteed under the provisions of Articles 1,10, 27, 38, 47, 50, 81, 137 and 259 of the Constitution.
10. While relying on Janet Mbete vs IEBC & Hassan Jobo Petition 116 of 2013 and Mable Muruli vs The Independent Electoral and Boundaries Commission (2013) eKLR, the Petitioner posited that his academic transcripts and the completion letter from the Daystar University coupled with the letter from the Commission for University Education were sufficient evidence that he is a holder of a degree and as such he had satisfied the requirements in Section 22(2) of the Elections Act.
11. The Petitioner took issue with the Respondents that they were not the appropriate authorities to question the competencies and mandate of the Commission for University Education. It was posited that the recognition as well as the transcripts and completion letter issued by Daystar University were binding upon the Respondents.
12. On the foregoing, the Petitioner further posited that the Respondents had no other alternative in respect of interpretation of Section 22(2) of the Elections Act than to abide by the High Court's interpretation of the provision.
13. It was his case that he had a legitimate expectation that the Respondents shall at all times be guided by the Constitution and the law and they will respect the authority and decisions of the Superior Courts of the Republic of Kenya in executing their mandates.
14. Deriving from the above, the Petitioner stated that the Respondents' decisions were ultra-vires and an affront to fair administrative action for failing to make lawful decisions as required under Section 3 of the Judicature Act which provision invites public bodies and authorities to adhere to judge made law.
15. In the main, the Petitioner sought for the following reliefs: -
  - a. A Declaratory Order that the Respondents have acted in violation of the Petitioner's rights under Articles 27, 38, 47 and 50 of the Constitution.
  - b. A Declaratory Order that the conduct of the Respondents has violated Articles 10 and 137 of the Constitution.
  - c. A Declaratory Order that the decisions of the Superior Courts interpreting Section 22 (2) Elections Act are binding on the Respondents.



- d. An Order of certiorari quashing the decision of the 1st Respondent made on the 6th June 2022 cancelling and revoking the Petitioner's registration and nomination as a presidential candidate in the presidential elections scheduled for 9th August 2022.
  - e. An Order of certiorari quashing the decision of the 3rd Respondent made on the 19th June 2022 dismissing the Petitioner's case in Case Number 221 of 2022 before the IEBC Dispute Resolution Committee.
  - f. An Order finding that the Petitioner met the minimum academic requirements for registration and nomination as a candidate for the presidential elections scheduled to be held on 9th August 2022.
  - g. An Order of Mandamus directing the 1st Respondent to gazette the name of the Petitioner as a candidate in the presidential elections scheduled for 9th August 2022 and to forthwith and within 9 hours re issue him with a nomination certificate as a presidential candidate for 9th August 2022 presidential elections.
  - h. An Order of Mandamus directing the 1st Respondent to include the name of the Petitioner in the ballot paper for presidential elections scheduled to be held on 9th August 2022.
  - i. An Order for compensation for the violation of the Petitioner's fundamental rights that have caused him to loss days when he could be campaigning for his presidential quest and for the violation and infringement of his fundamental rights and freedoms.
  - j. Any further Relief or Orders that this Honourable Court may deem just and fit to grant.
16. The Petitioner, through Counsel, tendered extensive submissions buttressing the above at the hearing. Several decisions were also referred to.
17. It was the Petitioner's call that the Petition be allowed as prayed.
- The Responses:
- The 1<sup>st</sup> and 2<sup>nd</sup> Respondents:
18. Wafula Chebukati and The Independent Electoral & Boundaries Commission (hereinafter referred to as 'the 1<sup>st</sup> Respondent' and 'the 2<sup>nd</sup> Respondent' respectively) opposed the Petition through the Replying Affidavit of Chrispine Owiye, the Director, Legal and Public Affairs of the 2<sup>nd</sup> Respondent. The Affidavit was deposed to on 29<sup>th</sup> June, 2022.
19. Firstly, Mr. Owiye submitted that the orders sought in the Petition are far sweeping in scope and will affect parties not enjoined in the suit.
20. On the merits of the Petition, it was his case that the Petitioner has not demonstrated any violation of his rights and fundamental freedoms as he lacked the requisite educational qualifications to be registered as a presidential candidate.
21. On the foregoing, it was his case that the revocation of the Petitioner's nomination and registration by the 1<sup>st</sup> Respondent was in accordance with the law since the Petitioner was not a holder of a degree at the time of registration as a candidate.
22. He posited that the 1<sup>st</sup> Respondent, as the Returning Officer for the Presidential elections, enjoys discretion under the law to recall a certificate of registration which was erroneously issued.



23. He deposed that the Petitioner failed to meet the mandatory requirement of Article 137 of *the Constitution* as read with Section 22(2) of the *Elections Act*.
24. It was further his case that contrary to Regulation 47(1) of the Elections (General) Regulations, 2012 which makes it a mandatory requirement for candidates to submit to the 2<sup>nd</sup> Respondent certified copies of the certificates of the educational qualification, the Petitioner submitted copies of university transcripts together with his application for graduation.
25. He deposed that the transcripts had not been certified to authenticate its genuineness and that Commission was not sure if the transcripts were subject to change.
26. It was further his case that typically, the conferment of a university degree is different from completion of academic programme. He deposed that, accordingly, one finishes course work first then makes a formal application to the University Registrar for graduation.
27. It was his case that one is included in a graduation list upon an audit being undertaken and if successful the University officially confers the degree upon the person.
28. On the basis that a degree is either conferred or awarded, it was deposed that it was not sufficient for the Petitioner to simply indicate that he holds a degree on the strength of a letter requesting for graduation and for completing course work.
29. Mr. Owiye deposed that it is the degree certificate that demonstrates that the holder has been awarded or conferred.
30. On the foregoing, it was deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot be faulted for making decisions based on the law.
31. While seeking to distinguish the decision in Janet Mbete -vs- IEBC & Hassan Joho & Another and Mable Muruli -vs- IEBC (2013) eKLR, as relied on by the Petitioner, Mr. Owiye deposed that the two cases were decided in the 2013 after which the *Elections Act* and the General regulations therein were amended to the effect that a person seeking nomination would be required to submit to the 2<sup>nd</sup> Respondent certified copies of certificates.
32. He rebutted the Petitioner's violation of the right to legitimate expectation, fair administrative action and fair hearing rights by deposing that the Petitioner was invited by the 1<sup>st</sup> Respondent on 6<sup>th</sup> June, 2022 at 2 p.m. to clarify the issue which he failed to honour.
33. It was further his case that for purposes of elections, the Commission for University Education authenticates university degrees attained in foreign universities only and correspondence from it cannot be used to suspend explicit provisions of the law.
34. Mr. Owiye further asserted that the Petitioner's right to fair hearing and access to justice was not contravened by being denied the opportunity to cross-examine since the 1<sup>st</sup> Respondent did not depose any Affidavit or evidence before the Dispute Resolution Committee.
35. Oral submissions were tendered in buttressing the foregoing.
36. In the end, this Court was urged to dismiss the Petition with costs.

**The 3<sup>rd</sup> Respondent:**

37. The Independent Electoral & Boundaries Commission Disputes Resolution Committee did not take part in the hearing of the Petition and the application.



### Issues for Determination:

38. In view of the urgency in this matter and the strict timelines by the 2<sup>nd</sup> Respondent towards the upcoming General election, Counsel for the parties proposed and this Court so directed that both the Notice of Motion and the Petition be heard together and by way of oral arguments.
39. Counsel further agreed that the Court shall render its finding on the matter and will supply its reasons thereof later.
40. The Petition and the Notice of Motion was orally heard yesterday as from 5:00pm.
41. On the basis of the aforesaid, and upon considering the pleadings, the submissions and the decisions referred to, the following issues arose for determination: -
  - i. Whether the Petitioner is a holder of a degree from a University recognized in Kenya.
  - ii. Based on (i) above, whether the Petitioner is eligible to be nominated as a Presidential candidate.
  - iii. Whether the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to revoke the nomination of the Petitioner as a Presidential candidate infringed Articles 47 and 50 of *the Constitution*.
  - iv. Whether the Petitioner's rights under Articles 27 and 38 of *the Constitution* were violated.

### The Findings:

42. The findings of the Court on the above issues are as follows: -On issue (i):The Petitioner is not a holder of a degree from a University recognized in Kenya.
  - \* On issue (ii):

As a result of the finding in issue (i) above, the Petitioner is not eligible to be nominated as a Presidential candidate.
  - \* On Issue (iii):

The decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to revoke the nomination of the Petitioner as a Presidential candidate infringed Articles 47 and 50 of *the Constitution*. However, the said constitutional infractions do not confer the Petitioner the eligibility to be nominated as a Presidential candidate.
  - \* On Issue (iv):

The Petitioner's rights under Articles 27 and 38 of *the Constitution* were not violated.

### Disposition:

43. Flowing from the foregoing, the Petition and the Notice of Motion are finally determined as follows: -
  - a. A declaration hereby issues that the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to revoke the nomination of the Petitioner as a Presidential candidate infringed Articles 47 and 50 of *the Constitution*.
  - b. The rest of the prayers sought in the Notice of Motion and the Petition are hereby dismissed.
  - c. As the Petition has partly succeeded, each party shall bear its own costs.
  - d. Given the number of the election related matters this Court is currently handling, the reasons herein shall be availed on notice within 120 days of the date hereof.



Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**A. C. MRIMA**

**JUDGE**

