



Juma v Jubiles Party of Kenya & 2 others (Election Petition 2 'A' of 2022) [2022] KEHC 10865 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
ELECTION PETITION 2 'A' OF 2022**

JR KARANJA, J

JUNE 23, 2022

(FORMERLY NAIROBI PETITION NO.E208 OF 2022

IN THE MATTER OF:

**THE ELECTIONS ACT, NO.24 OF 2011, THE ELECTION LAWS (AMENDMENT) ACT, 2016
THE ELECTION LAWS (AMENDMENT) ACT.2017. THE ELECTIONS (GENERAL)
REGULATIONS, 2012, THE ELECTIONS (GENERAL) REGULATIONS, 2017**

BETWEEN

FREDRICK WAFULA JUMA APPLICANT

AND

JUBILES PARTY OF KENYA 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC 2ND RESPONDENT**

ROBERT OMANYO WABWIRE 3RD RESPONDENT

RULING

1. The petition dated 12th May 2022 as may be deciphered from the pleadings pits the petitioner, Fredrick Wafula Juma, against the Jubilee party of Kenya (first respondent), the Independent Electoral and Boundaries Commission (IEBC) (second respondent) and Nobert Omanyong Wabwire (third respondent) and arises from the facts that on the 21st January 2022, the second respondent issued a press statement to communicate to all and sundry that it had gazetted the 9th August 2022, as the date for the general elections vide Gazette Notice No.14 of 20th January 2022 (Vol.CXXIV).



2. Consequently, the current electoral period and process and all that appertains to it was effectively jumpstarted including the coming into force of the electoral code of conduct pursuant to Article 88 (4) (J) of *the Constitution* and Section 110 of the Election Act.

Being a member of the first respondent party, the petitioner applied and was cleared to vie for the party's ticket to represent Nambale township ward in Busia County as a member of the County Assembly (MCA), a position which attracted a total of four candidates including the petitioner, Joseph Onenga Ondebu, Dalmas Nyongesa Mukabane and Moses Omanyo Wabwire (third respondent).

3. The first respondent in the spirit of harmonization and consensus convened a meeting of the four candidates which resulted in two of the candidates i.e Joseph Onenga Ondebu and Dalmas Nyongesa Mukabana, shelving their ambition in favour of the petitioner and without any objection from the third respondent. A resolution to that effect was made and signed by all the parties and forwarded the first respondent's national office. The petitioner was thus nominated and issued with the necessary Nomination Certificate dated 22nd April 2022 and signed by the first respondent's National Chairperson and the chairperson of its National Elections Board.
4. However, contrary to the petitioner's expectation his name was never forwarded to the second respondent, but the name of the third respondent. The petitioner sought explanation from the first and second respondents and confirmed that the name of the third respondent was indeed forwarded by the first respondent for gazette of the third respondent as the nominated candidate for the Office of Member of the County Assembly for Nambale township Ward.
5. Being aggrieved by the turn of events, the petitioner brought this petition contending that the change of his name to that of the third respondent was not communicated to him and was made maliciously, irregularly, illegally and in total contravention of the first respondent's Constitution and Nomination Rules and also, in contravention and/or violation of his Constitutional rights under Article 38 (2) and Article 88 (4) of the Kenya Constitution, 2010.
6. The petition was initially filed on 12th May 2022, in the Constitutional and Human Rights Division of the High Court in Nairobi, before being transferred to this court for hearing and disposal.
Responses in opposition to the petition by way of replying affidavits were filed by the second and third respondents. In addition, the first respondent filed a notice of preliminary objection dated 27th May 2022, which was followed by another notice of preliminary objection by the second respondent dated 30th May 2022.
7. The court gave directions that the objections be heard in priority to the petition by way of written submissions.
In that regard, the first respondent's submissions were filed by Wanjiku & Wanjiku Associates on 14th June 2022, while those of the second respondent were filed on 13th June 2022 by Olendo, Orare & Samba LLP.
The third respondent's submissions were filed by J.P Makokha & Co. Advocates on 14th June 2022.
8. Basically, a preliminary objection must be on a point of Law, the facts of the case being deemed as agreed or undisputed as set out in the pleadings. The leading authority on preliminary objection is the decision in the case of *Mukbisa Biscuits Manufacturing Co. Ltd vs. West End Distributors* (1969) EA 696, where it was stated that:-

“ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point 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.”

9. Both the preliminary objections by the first and second respondents herein are anchored on the jurisdiction of this court to deal with the petition in the first instance. The question of jurisdiction raises a pure point of law. Therefore, the preliminary objections are competent and proper before this court and offer a challenge to the jurisdiction of the court on the basis of the principle or doctrine of exhaustion and on the periphery, the Constitutional tenet provided under Article 159 (2) (c) of the Constitution catering for alternative forms of dispute resolution.
10. [10] For the avoidance of doubt, the present dispute although brought under provisions of the Constitution and statutory law tends to weigh more as an election rather than Constitutional petition regard being given to the pleadings and the actual cause of action which is not essentially breach and/or violation or intended breach and/or violation of Constitutional rights, but failure by the first respondent to forward the name of the petitioner to the second respondent for gazettment as the duly nominated member of the first respondent for the elective position of Member of the County Assembly for Nambale township Ward – Busia County.
11. The alleged breach or violation of the petitioner’s Constitutional rights if at all would arise from and be incidental to the alleged omission by the first respondent against the petitioner.

As was held by the Supreme Court in the case of IEBC vs Jane Cheprenger & Others [2015] eKLR, “preliminary objection serve two purposes of merit, firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially, and on the merits.
12. Herein, there is no doubt that the first and second respondents’ respective preliminary objections serve as shields to guard against wastage of time and resources rather than as swords for “short changing” the petitioner and prevent the petition proceeding to full hearing on the merits. In that regard, the court after giving due consideration to the objections on the basis of the supporting grounds and the rival submissions of the parties was of the view that the main issue arising for determination was whether the court ought to divest itself of the jurisdiction to deal with this matter at this stage, as contended by the respondents herein.
13. It is evident that the entire petition germinates from an electoral process ordained and activated under chapter seven (7) of the Constitution containing three segments or parts to wit electoral system and process (part one), The Independent Electoral & Boundaries Commission and Delimitation of Electoral Units (Part two) and political parties (part three).

In the respective objections, Articles 81,82,87,88 and 92 hold sway.
14. Under Article 81, the electoral system shall comply with the following principles-
 - a. Freedom of citizens to exercise their Political rights under Article 38.
 - b. not more than two thirds of the members of elective public bodies shall be of the same gender.
 - c. fair representation of persons with disabilities.



- d. universal suffrage based on the aspiration for fair representation and equality of vote and
 - e. free and fair elections, which are-
 - i. by secret ballot
 - ii. free from violence, intimidation, improper influence or corruption,
 - iii. conducted by an independent body
 - iv. transparent and
 - v. administered in an impartial, neutral, efficient, accurate and accountable manner.
- (15) Under Article 82 (1) (b) and (d), Parliament was obligated to enact legislation to provide for “inter alia” the nomination of candidates and the conduct of elections, and referenda and the regulation and effective supervision of elections and referenda, including the nomination of candidates for elections and under Article 87 (1), Parliament was obligated to enact legislation to establish mechanisms for timely settling of electoral disputes.
- 16 The Independent Electoral and Boundaries Commission was established under Article 88 (1) with responsibility for conducting or supervising referenda and elections to any elective body or office established by *the Constitution* and any other elections as prescribed by an Act of Parliament.
- Such responsibility is specified under Article 88 (1) (4) and includes the regulation of the process by which parties nominate candidates for elections, the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results and the development of a code of conduct for candidates and parties contesting elections “inter alia”.
- 17 Parliament was obligated under Article 92 to enact legislation to provide “inter alia”, the regulation of political parties and the roles and functions of political parties.
- By dint of Article 82, Parliament enacted the *Elections Act* No.24 of 2011, which provides among other things for settlement of electoral disputes in the terms specified under S.74 (1) of the Act which states that:-
- “Pursuant to Article 88 (4) (e) of *the Constitution*, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of elections results.”
- 18 It is therefore clear that the jurisdiction of the Independent Electoral Boundaries Commission [IEBC] in relation to disputes relating to or arising from nominations is conferred by *the Constitution* cascading to the *Elections Act*. Parliament also enacted the *Political Parties Act* pursuant to Article 92 of *the Constitution*. The Political Parties Disputes Tribunal (PPDT) was established under S.39 of the Act and conferred with jurisdiction under S.40 to determine disputes between:-
- (a) Members of political party
 - (b) Member of political party and a political party
 - (c) Political parties
 - (d) an independent Candidate and a political party



- (e) between coalition Partners and
- (f) arising out of party primaries.

19 The present dispute is in essence between a member of a political party and a political party i.e. the petitioner and the first respondent respectively over the party's nomination for the elective office of Member of the County Assembly for Nambale township ward. Such dispute falls under S.40 (f) of the Political Parties Act, hence within the jurisdiction of the Political Parties Disputes Tribunal (PPDT). The provision was introduced through the Political Parties (Amendment) Bill 2016, with the intention of addressing "the challenge of concurrent jurisdiction with other bodies handling electoral disputes" (see clause 19 of the memorandum of objects and reasons to the bill and the case of Fredrick Odhiambo Oyugi vs. Orange Democratic Movement & 2 others (2017) eKLR).

20 In the Fredrick Odhiambo Oyugi case (supra), the Court of Appeal stated that conferment of jurisdiction on the PPDT to hear and determine disputes relating to party primaries under the Political Parties Act cannot however oust the jurisdiction of the IEBC to adjudicate a dispute arising from nominations provided such jurisdiction is properly invoked.

The court, in the case of Kyalo Peter Kyulu vs. Wavinya Ndeti & 3 others (2017) eKLR agreed with the distinction made by the High Court between the jurisdiction of the IEBC and that of the PPTD.

21 In that regard, the High Court stated that:-

"It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would imply that even where a decision of the PPDT has been the subject of the high court's appellant jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent."

22 However, the Court of Appeal stated that:-

"whilst agreeing with the High Court, this court qualified that pronouncement by observing that the jurisdiction of the PPDT extends beyond "appellate" No doubt the High Court was addressing the issue of jurisdiction of the IEBC and the PPDT from a hierarchical perspective. There can be no doubt, based on the Constitutional and statutory provisions to which we have referred that IEBC and the PPDT have jurisdiction in relation to disputes arising from nominations."

23 From all the foregoing it is an axiomatic truth that the first "ports of call" for disputes arising from the electoral process are the relevant Constitutional and statutory organs created for settlement of such disputes. The IEBC and the PPDT would come into mind for the purposes of the present disputes. Their existence serves to promote the Constitutional tenet of alternative dispute resolution mechanism which have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area and that the dispute is resolved much more expeditiously and in a more cost effective manner.



(see, *Samson Chembe Vuko vs. Nelson Kilumo and 2 others* [2016] eKLR and *Mutanga Tea & Coffee Company Ltd. vs. Shikera Ltd & Another* [2015] eKLR).

- 24 Besides, the IEBC and the PPDT, an alternative first port of call would be the political party's internal dispute resolution body. In the circumstances, this court can only be a second or even a third port of call in election disputes arising prior to the declaration of election results and in exercise of its judicial review powers or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution* or in the very least, in exercise of its appellate jurisdiction.
- 25 On the doctrine or principle of exhaustion, it is trite law that where the law provides a resolution mechanism the same should be adhered to. This is not a novel phenomenon. Whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.

In the case of Speaker of the *National Assembly vs. Njenga Karume* (2008) 1KLR 425, the Court of Appeal held that:-

“In our view there is considerable merit that, where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure would be strictly followed”.

- 26 In *Sammy Ndungu Waiti vs. IEBC & 3 others* (2019) eKLR, the Supreme Court stated that:-

“Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice.”

In that case, the Supreme Court referred to the Court of Appeal decision in *Geoffrey Muthinja Kabiru & 2 others* (2015) eKLR, where it was observed that:-

“It is imperative that where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews....the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

- 27 A court's jurisdiction flows from *the Constitution* or legislation or both. Therefore, a court of law can only exercise jurisdiction as conferred by *the Constitution* or statutory law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law.

As observed in the leading case of the *Owners of the motor Vessel Lillian S" vs. Caltex Oil (K) Ltd* (1989) eKLR, 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 continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction....”



28 In *Martin Kabubi Mwangi vs. County Government of Laikipia* (2019) eKLR, the Court of Appeal stated that the exhaustion principle does not permit an election as to the parts of a statute that one should rely on. That, it removes discretion on the part of a litigant from choosing whether to follow the applicable statutory provision or not. For all the foregoing reasons and observations and on the basis of the doctrine or principle of exhaustion, applicable Constitutional and statutory provisions referred hereinabove and the cited authorities of the superior courts, this court upholds the twin preliminary objections by the first and second respondents and must therefore divest itself of the jurisdiction to hear and determine this petition which jurisdiction it never had in the first place for reasons that the petitioner failed to invoke and exhaust all or any of the dispute resolution mechanisms available through the first respondents internal dispute resolution mechanisms, the second respondents Dispute Resolution Committee and the Political Parties Dispute Tribunal (PPDT).

29 In sum, the present petition is hereby dismissed basically for want of jurisdiction with costs to all the three respondents.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DATED & DELIVERED THIS 23RD DAY OF JUNE 2022]

