



**Benson v Independent Electoral & Boundaries Commissions & another  
(Constitutional Petition E365 of 2022) [2022] KEHC 12643 (KLR)  
(Constitutional and Human Rights) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12643 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E365 OF 2022**

**HI ONG'UDI, J  
JULY 29, 2022**

**BETWEEN**

**JULIUS INGANJI BENSON ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSIONS .... 1<sup>ST</sup>  
RESPONDENT**

**RETURNING OFFICER (RUARAKA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The respondents filed a notice of preliminary objection dated July 20, 2022. It is predicated upon the following grounds, that:-
  - i. The application be dismissed for want of jurisdiction as the application and by extension this court are in effect usurping the respondent's independence, jurisdiction and mandate under articles 82, 85, 88, 193 (1)(c) (ii) and 249 (2)(a) and (b) of the Constitution, 2010, sections 25(1) (c) (ii) and 109 of the Elections Act, 2011 and regulations 35, 40 and 43 of the Elections (General) Regulations, 2012 to nominate, validate or invalidate the petitioner/ applicant's nomination.
  - ii. The petition and the application be dismissed as they seek this court to interfere and direct the 1<sup>st</sup> and 2<sup>nd</sup> respondents on how to carry out their mandate under the constitution and the Elections Act.
  - iii. The petition and the application be dismissed for want of jurisdiction by dint of article 88(4) (d) and (e) of the Constitution, 2010 as read with section 74 of the Elections Act, 2011 and the Rules of Procedure on Settlement of Disputes that mandates and grants the IEBC with authority



and jurisdiction to resolve disputes relating to or arising from nominations of candidates for the forthcoming general elections.

- iv. In the alternative this court's jurisdiction is ousted as petitioner should have filed a judicial review application under the *Fair Administrative Action Act, 2015* against the stated IEBC's decision and not this petition.
- v. In the alternative this court's jurisdiction is ousted as the petitioner should have preferred an appeal to this court against the stated IEBC's decision and specifically the Dispute Resolution Committee and not this petition.

### **Background Of The Case**

2. The petitioner filed a petition and application dated July 14, 2022 and filed on July 15, 2022. A summary of his case, is that the petitioner / applicant is aggrieved as a result of the respondents rejection of his nomination papers for the position of an MCA within Nairobi Lucky Summer Ward in the forthcoming elections of August 9, 2022. He therefore wants this court to, enlarge time for him to present his nomination papers to the respondents; compel the respondents to allow him present his nomination papers out of time; and declare that his nomination papers legally conform with the *Constitution* and the *Elections Act, 2011*.
3. That he exhausted all the mechanisms of dispute resolution as required by the Independent Electoral and Boundaries Commission (IEBC) when he appeared before the Dispute Resolution Committee on the June 19, 2022.
4. He subsequently approached Nakuru Chief Magistrates Court on the June 30, 2022 but the case was struck off because of territorial jurisdiction wide ruling delivered on July 6, 2022.

### **The Respondents' Case**

5. The respondent filed grounds of opposition dated July 20, 2022.

### **The Respondents' Submissions**

6. The respondents filed submissions dated July 21, 2022 through Olendo Orare Advocates. Counsel submitted that the petition cannot be entertained by this court as there are two competent courts that rendered a decision on the issues raised by the petitioner (IEBC Dispute Resolution Committee (DRC) and Nakuru Chief Magistrates Court; Civil Case No E579 of 2022; Julius Inganji Benson v IEBC & the Returning Officer- Ruaraka) and the only recourse for the petitioner was to appeal or file judicial review against the decisions.
7. Relying on *IEBC v Jane Cheperenger & 2 others* [2015] eKLR, counsel submitted that the issues raised in the preliminary objections raise points of law as they go to the root of this court's jurisdiction. Further relying on article 165(6) of the *Constitution* and the case of *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* [1989] KLR 1 he submitted that the IEBC's DRC carries out quasi-judicial functions and that it is in this Courts supervisory jurisdiction that the petitioner ought to have filed his appeal and /or judicial review against the two decisions and not this petition.
8. In the alternative counsel submitted that should this court find otherwise, he urged the court to find that its jurisdiction is still ousted by the petitioner's want of proof that he exhausted all the electoral dispute resolution mechanisms established by the law under the doctrine of exhaustion.



## The Petitioner's Submissions

9. The petitioner filed submissions dated July 22, 2022 by Emily Kimani Advocate. Relying on *Mukisa Biscuit Co Limited v West End Distributors Limited East Africa* (1969) EA 696 and *Oraro v Mbanja* [2005] eKLR she argued that the preliminary objection does not stand the test to qualify as one as the issues raised need to be ascertained by evidence.
10. She further submitted that articles 82, 85, 88 and 249(2) (a) and (b) relate to the independence of the IEBC and that the petitioner appeared before the DRC of the respondents on the June 19, 2022 and a decision rendered on June 21, 2022. That whereas the said articles ventilate on the independence of the DRC the same had already been met by him.
11. She submitted that pursuant to article 165(6) and (7) of the *Constitution* and the case of *Director of Public Prosecutions v Perry Mansukh Kansagara and 8 others* [2020] eKLR, this court has discretion over this matter and has jurisdiction to preside over the same.

## Analysis And Determination

12. Having carefully considered the parties' pleadings, submissions, cited authorities and the law, I find the following issues to arise for determination: -

### i. Whether This Is A Preliminary Objection

13. The petitioner submitted that, this is not a preliminary objection as it requires this court to look into the evidence and does not raise points of law. The respondents submitted that the Notice of preliminary objection raises points of law.
14. What constitutes a preliminary objection was ably examined in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 which was emphasized by the Supreme Court of Kenya in the case of *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* [2014] eKLR as follows at paragraph 31:

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696:

“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”.

15. The Supreme Court further pronounced itself on the purpose of a preliminary objection in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR as follows:

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves 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.” (Emphasis added).

16. The respondents are challenging this court’s jurisdiction to entertain the constitutional petition. According to them, this ought to be an appeal or a review and not a petition. I do agree with them that the issue of jurisdiction is a point of law. In doing so, I am guided by the decision of the Supreme Court in Petition No 7 of 2013 *Mary Wambui Munene v Peter Gichuki Kingara & 6 others* [2014] eKLR, where the court stated that:-

‘Jurisdiction is a pure question of law’ and should be resolved on priority basis.

## ii. Whether This Court Has Jurisdiction

17. In their notice of preliminary objection, the respondents have challenged this court’s jurisdiction to handle this petition and application. According to them, this court’s handling this matter amounts to usurping their independence, jurisdiction and mandate under articles 82, 85, 88, 193 (1) (c) (ii) and 249 (2) (a) and (b) of the *Constitution, 2010*, sections 25(1) (c) (ii) and 109 of the *Elections Act, 2011* and regulations 35, 40 and 43 of the *Elections (General) Regulations, 2012* to nominate, validate or invalidate the petitioner/ applicant’s nomination.
18. They claim that the petitioner should have either filed a review or an appeal against its decisions and not this petition. That pursuant to article 88(4) (d) and (e) of the *Constitution, 2010* as read with Section 74 of the *Elections Act, 2011* and the *Rules of Procedure on Settlement of Disputes* the IEBC has authority and jurisdiction to resolve disputes relating to or arising from nominations of candidates for the forthcoming general elections.
19. The Court of Appeal in Nakuru Civil Appeal No 119 of 2017 *Public Service Commission & 2 others v Eric Cheruiyot & 16 others* consolidated with Civil Appeal No 139 of 2017 *County Government of Embu & another v Eric Cheruiyot & 15 others* [2022] eKLR, a decision rendered on February 8, 2022 discussed the doctrine of jurisdiction as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at page 113 defines court 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 the 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 the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.



20. The locus classicus on jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA held as follows:

...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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

21. The Supreme Court *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No 2 of 2011 held in part as follows:

...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

22. In *Samuel Kamau Macharia and another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No 2 of 2011, the Supreme Court held as follows:

(68). 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 itself jurisdiction exceeding that which is conferred upon it by law.

23. The instant matter relates to a dispute to the elections scheduled for August 9, 2022. Hence, a pre-election dispute.

24. Article 82(1) of the *Constitution* provides as follows: -

Parliament shall enact legislation to provide for-

- (a) .....
- (b) the nomination of candidates;
- (c) .....
- (d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections;
- (e) .....

25. Article 88, of the *Constitution* establishes the IEBC. Sub- article (4) provides for its functions as follows: -

(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for--

- (a) - (d) .....
- (e) 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;
- (f) the registration of candidates for election;
- (g) -(k).....;



26. Section 74 of the *Elections Act* further provides for the settlement of disputes as follows: -
74. Settlement of certain disputes:
- (1) 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 election results.
  - (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.
  - (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.
27. Section 4 of the *Independent Electoral and Boundaries Commission Act* (IEBC Act) stipulates the functions of the Commission to be as follows: -
4. Functions of the Commission:
- As provided for by article 88(4) of the *Constitution*, the Commission is responsible 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 and, in particular, for—
- (e) 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;
  - (f) the registration of candidates for election;
28. Article 249(2) (a) and (b) of the *Constitution* provide for the independence of commissions as follows;
- (2) The commissions and the holders of independent offices-
    - (a) are subject only to this Constitution and the law; and
    - (b) are independent and not subject to direction or control by any person or authority.
29. Pursuant to the provisions of the *Elections Act*, there are in place the *Rules of Procedure on Settlement of Disputes* enacted through Legal Notice No 139 of 2012. Rule 3 provides that the object of these rules is to provide a procedure and mechanisms for the expeditious, efficient, lawful, reasonable and procedurally fair settlement of disputes including those contemplated under article 88 (4) of the *Constitution* and section 74 of the *Act*. Rule 4(1) provides for the application of the rules to, disputes or complaints arising from—
- a) registration of persons;
  - b) nomination of candidates;
  - c) violations of the electoral code of conduct; and
  - d) any other election related complaint.
30. Rule 8 provides for initiation of a complaint; Rule 9 provides for disputes arising from nomination of candidates; Rule 10 provides for when the returning officer or the Commission acting on appeal may



decline to accept a dispute; Rule 11 provides for powers of the returning officer to decide on any dispute arising from a nomination of a candidate within the electoral area; Rule 12 provides for the decision of the returning officer and obligates him/her to issue a written decision and record the reasons for the decision; Rule 13 provides for appeal of the returning officer's decision to the commission; and, Rule 14 provides for the power of the commission to delegate to the committee the power to settle disputes.

31. Regulation 43 of the *Elections (General) Regulations, 2012* provides for the validity of nomination papers and sub section (2) provides for when the returning officer shall hold a nomination paper invalid.
32. The reason for setting out the said *Rules* and *Regulation* is to demonstrate that indeed the respondents have the mandate to hear pre- election disputes including the ones touching on nomination of candidates and powers to nominate, validate or invalidate a nomination.
33. The petitioner herein being aggrieved by the decision of the returning officer for Ruaraka appealed to the commission on June 8, 2022 vide registration/ nomination dispute resolution complaint form. He has however not attached the decision of the DRC. He has also not appealed the said decision or sought a review against that decision. He has instead filed this instant petition. This therefore means that the decision stands.
34. The Supreme Court of Kenya in the case of *Silverse Lisamula Anami v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR had this to say on whether an election court is divested of jurisdiction to determine pre-election disputes, particularly where the issues in contestation were the subject of determination by either the IEBC Dispute Resolution Committee or the Political Parties Disputes Tribunal (PPDT);

"49. In the above context, it is not in doubt that the IEBC has been given the mandate to settle electoral disputes (including disputes relating to or arising from nominations) excluding election petitions and disputes subsequent to the declaration of results. Hence, even though the *Constitution* has not defined what "electoral disputes" in this regard means, it specifically provides that some of those envisaged disputes, which are under the purview of the IEBC, would emanate from nominations. Nomination is one of the qualifications through which one becomes eligible to participate in an election. The IEBC in that context is expressly excluded from adjudicating over election petitions. That mandate is pursuant to article 105 donated to the High Court...

54. How do we resolve the apparent conflicting positions taken by the Court of Appeal and election courts? Our view is that articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the *Constitution* and statute to resolve pre-election disputes including nominations, there are instances where the election court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the *Constitution*. Where a matter or an issue has been so determined, then the election court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the *Constitution*.

56. Consequently, our holding in the present case enriches the jurisprudence in this area by expounding on the broader powers of an election court with regard to determining questions of validity of an election. To put our holding into context therefore, there is evidence that the question whether the 3<sup>rd</sup> respondent was a registered voter in Shinyalu



Constituency by fact of a difference in names – Justus Kizito Mugali as opposed to Justus Gesito Mugali M’Mbaya – was determined by the IEBC Dispute Resolution Committee which resolved that the names referred to the same person and proceeded to issue a nomination certificate to the 3<sup>rd</sup> respondent. No appeal or judicial review proceedings were instituted to challenge that decision and although the Petitioner was not a party to the proceedings, it has not been shown that he was unaware of them or that when he became aware of the same, he took any action save the filing of the election petition before the election court. On what basis can this court now find otherwise? We submit none. In any event, the decision of that quasi-judicial body within the IEBC stands and has never been overturned. The election court and the Court of Appeal were bound by it and therefore properly declined to assume jurisdiction on that matter. We see no reason to overturn that decision.”

35. The provisions of the law and case law cited above, explicitly confirm that the IEBC is mandated to oversee nominations and handle pre-election disputes including matters to do with nominations. This is not the mandate of the court. This court however pursuant to articles 165(6) of the Constitution, has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. The court may further under sub article (7) make any orders or give any direction it considers appropriate to ensure the fair administration of justice.
36. This court cannot on its own motion review the decision of the respondent or sit on appeal on that decision before it has been moved by a party. The matter before this court is neither an appeal nor review. The decisions by the IEBC Dispute Resolution Committee and Chief Magistrate’s Court Nakuru have not been overturned or set aside. They still stand.
37. The upshot is that the preliminary objection has merit and is allowed. The petition and application are struck out with costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF JULY, 2022 AT MILIMANI NAIROBI.**

**HI ONG’UDI**

**JUDGE OF THE HIGH COURT**

