



**Mberia v Independent Electoral And Boundaries Commission & 3 others;
Muthoni (Interested Party) (Petition E366 of 2022) [2022] KEHC 11594 (KLR)
(Constitutional and Human Rights) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11594 (KLR)

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

PETITION E366 OF 2022

HI ONG'UDI, J

JULY 29, 2022

BETWEEN

DAVID NJLITHIA MBERIA PETITIONER

AND

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

IEBC DISPUTE RESOLUTION COMMITTEE 2ND RESPONDENT

**IEBC RETURNING OFFICER LANGATA CONSTITUENCY 3RD
RESPONDENT**

ORANGE DEMOCRATIC MOVEMENT PARTY 4TH RESPONDENT

AND

ANTHONY MARAGU MUTHONI INTERESTED PARTY

JUDGMENT

1. The petitioner filed a petition and application dated 15th July 2022. The petition is seeking the following reliefs: -
 1. A declaration that the Respondents have violated the rights of the Petitioner under Articles 20, 27, 38(2) and (3), 47(2), 50(2), as read with Article 193(3) and hence acted ultra vires the Constitution of Kenya.
 2. A declaration that the 1st and 2nd Respondents have abdicated and violated Articles 3, 10, 47, 50(2), 249(1) and 259(1) of the Constitution of Kenya.



3. A declaration that the Petitioner is duly qualified under Article 193(3) of the *Constitution*, as a candidate for the seat of Member of County Assembly Candidate for Karen Ward- Nairobi County under the banner of the 4th Respondent Party for the forthcoming General elections scheduled for 9th August 2022.
4. An order for Certiorari to quash the decision of the 1st and 2nd Respondents disqualifying the Petitioner as a Candidate for the position of Member of County Assembly for Karen Ward- Nairobi County under the banner of the 4th Respondent Party for the forthcoming General Elections scheduled for 9th August 2022.
5. An order of Mandamus directed at the 1st and 3rd Respondents to accept the nomination papers submitted by the Petitioner herein.
6. An order for General damages for violation of the Petitioner's Rights and fundamental Freedom protected under the Constitution.
7. Any other order or relief as the court may deem fit and just to ensure that the law and order and constitutionality is observed.
8. Cost of the Petition.

DIVISION - The Petitioner's case

2. The petitioner's case is supported by his affidavit in support of the petition and notice of motion sworn on 15th July 2022, supplementary affidavit sworn 21st July 2022; and a further affidavit sworn on 22nd July 2022. A summary of his case is that, on 19th May 2022, he was validly nominated as the 4th Respondent's nominee for the seat of Member of County Assembly (MCA) Karen Ward. The 4th respondent forwarded his name to the 1st Respondent and his name was uploaded in the 1st Respondent's Candidates Registration Management System (CRMS)
3. On 31st May 2022, he received a communication from the 3rd Respondent for him to appear before her on 6th June 2022 to submit his nomination papers and registration. He appeared on 6th June 2022 as scheduled but the 3rd respondent rejected his nomination papers on the ground that his name had been dropped by the party following the communique by the 1st respondent release on 4th June 2022 wherein the 1st respondent purported to disqualify him as ineligible to vie in the 9th August 2022 as the ODM candidate for MCA Karen Ward.
4. He filed a complaint before the 2nd respondent No. IEBC/DRC/324/2022 dated 8th June 2022 which was dismissed on 20th June 2022 on the ground of lack of jurisdiction as the matter raised fell within the jurisdiction of the Party's Internal Dispute Resolution Mechanism as well as the PPDT.
5. He claimed that the 1st respondent exhibited procedural impropriety when they disqualified him on the ground that he was convicted of economic crimes but not pursuing an Appeal yet he had appealed the judgment, conviction and sentence and consequential orders thereto in Milimani Anti-Corruption Court No. 7 of 2019 vide ACEC N0. E005 of 2021 which Appeal was active and pending in court by the time the IEBC made the impugned decision. Furthermore, he was sentenced to pay a fine which he paid hence the alternative sentence to serve 12 months imprisonment was inconsequential the moment the fine was paid.
6. The Judgment on Appeal was delivered on 14th July 2022 with the court upholding the conviction and sentence but setting aside and quashing the order barring the petitioner from holding public office. The petitioner has since filed an Appeal against the judgment to the court of Appeal.



7. According to him, the decision by the 1st Respondent condemned him unheard amounting to procedural impropriety. It disregarded the recommendation in the EACC report requiring the petitioner to provide evidence of Appeal and proceeded to disqualify him without giving him a chance to do so. They also applied the law selectively through their communique of 4th June 2022 despite finding that convicted aspirants were protected by the provisions of Article 99(3) and 193(3) of the constitution. Consequently, Articles 10, 2(1) and (2), 3(1) and 38 of the Constitution were violated.
8. In his supplementary affidavit filed in response to the replying affidavit by the 1st -3rd respondents, he deposed that the suit is not res judicata as he has never filed any similar suit before this court touching on the same issues that have been heard and determined on merits. The matters alluded to by the 1st to 3rd respondents were Judicial Review suits where the court determined that it lacked the jurisdiction over the subject matter, the same were therefore not determined on merits. Further that res judicata does not apply in a case where a suit is struck out on account of jurisdiction as was the case in the said suits.
9. He deposed that the dispute in this petition is limited to the decision of the 1st Respondent communicated vide its media release of 4th June 2022 disqualifying him from participating as an aspirant for the MCA seat which is a constitutional issue.
10. He averred that the ruling by Justice Mumbi Ngugi (as he then was) was a Ruling for a stay of execution of the Judgment in Milimani ACEC no. 7 of 2019 pending Appeal and the same had nothing to do with the merits of the Appeal which was pending before court. That under Article 193(3) of the Constitution there is no requirement that one has to first obtain a stay of execution of the judgment to give effect to the said provision and therefore, the 1st -3rd respondents are estopped from relying on the said Ruling.
11. He deposed that on 14th July 2022, Maina J in her Judgment in HCACECA No. E005 of 2021 set aside and quashed the order barring him from holding public office on the ground that the same was made in error and was irregular. Further the allegation that the 1st – 3rd respondents were not party to the proceedings in Tribunal Appeal No. 60 of 2022 and had no notice of the decision was misleading as they were served by the petitioner and 4th respondent.
12. That this being a constitutional issue touching on his rights under Article 193(3) and Article 50(2) (q) of the Constitution this court is clothed with jurisdiction to hear and determine this petition.
13. According to him, the letter of the 4th respondent withdrawing his nomination and substituting with another candidate was quashed and the purported nomination of Anthony Maragu revoked and his nomination upheld by the ODM Appeals Tribunal in Appeal no. 60 of 2022 and therefore the 1st and 2nd respondents are bound by law to respect and obey the said order. The alleged gazettement of a candidate whose nomination had been revoked by the party is therefore inconsequential.
14. In his further affidavit in response to the interested party's replying affidavit, he admits the contents of the said affidavit to the extent that he was initially declared the winner for the MCA Karen ward nomination and the said nominations were successfully challenged. He however avers that after the conduct of the direct nominations by the 4th respondent he was the one nominated and not the interested party. He was subsequently issued with a Certificate of nomination dated 19th May 2022 and his name submitted to the IEBC. The interested party's nomination was as consequence of the 1st respondent media release on 4th June 2022. This is confirmed by the affidavit of the Chairperson of the 4th respondent national board Catherine dated 13th June 2022 in JR No. E063 of 2022.
15. He maintains that his nomination was affected by the decision of the 1st respondent to disqualify him against his constitutional rights enshrined under Articles 193(3) and 50(2)(g) of the Constitution. The



- 4th respondent withdrew his candidature without informing him, and without giving him a chance to be heard.
16. He deposed that from the affidavit of Catherine Muyeka Mumma, the ODM NEB chairperson, it is clear that the letter dated 3rd June 2022 withdrawing his candidature and the nomination certificate issued to the interested party dated 3rd June 2022 after his nomination was backdated to justify their illegal action considering the communique was made on 4th June 2022. Neither the 4th respondent nor the interested party adduced evidence to confirm that they received the 1st respondent's decision to disqualify him on a date earlier than 4th June 2022.
 17. He maintained that the matters in HCJR Misc. E063 of 2022 and IEBC DRC Complaint No. 324 of 2022 were dismissed on account of lack of jurisdiction and therefore the dispute was not heard on its merits. The dispute herein concerns the fundamental breach of his constitutional rights and is not disguised as an election petition as alleged.
 18. He avers that the removal of his name by the 4th respondent vide its backdated letter dated 3rd June 2022 was null and void because his name had already been submitted to the IEBC nominations as the 4th Respondents candidate for Karen ward and the same amounted to a violation of his rights and fundamental freedom protected under Articles 10, 38, 193(3) of the Constitution and Section 13(2) of the Elections Act.
 19. Therefore the 2nd respondents' pronouncement on his eligibility and the process leading to the withdrawal of his nomination and substituting his name with that of the interested party was unlawful, unconstitutional and a violation of his rights and fundamental freedoms protected under the Constitution and law.

1st, 2nd & 3rd respondents' case

20. The 1st, 2nd & 3rd respondents filed a replying affidavit by Chrispine Owiye sworn on 21st July 2022. He deposed that pursuant to Article 88(4) (f) and 193(2) (g) of the Constitution and section 4(1) of the IEBC Act, the 1st respondent is obligated to inquire into the eligibility of candidates for elections and to register only those candidates who meet the legal requirements for the positions they aspire to hold.
21. He asserted that the petitioner failed to disclose that the suit is *res judicata* having been determined by different courts of concurrent jurisdiction on the same subject matter of nomination of the petitioner. To wit,
 - i. Misc. Application No. E063 of 2022 *David Njilithia Mberia versus the IEBC and ODM*. The suit was determined by Hon. Justice Ngaah on 17th June 2022 who dismissed the suit that it was misconceived and bad in law.
 - ii. Misc. Application No. E081 of 2022 *David Njilithia Mberia versus IEBC and ODM*. The suit was determined by Hon. Justice Ngaah on 14th July 2022 who dismissed it on the grounds that it was misconceived.
22. He averred that the petitioner failed to disclose the existence of orders in ACEC Appeal No. E005 of 2021 *David Njilithia Mberia vs Republic*. To wit, he was charged in Milimani Anti-Corruption Case No. 7 of 2019 with three offences under section 6(1)(a) as read with section 18 of the Bribery Act No. 47 of 2016. He was found guilty as charged in counts II, III and IV. In count II, he was sentenced to a fine of Kshs. 300,000 in default to serve 12 months imprisonment. Count III he was to pay a fine of Kshs. 200,000 in default to serve 12 months imprisonment while in IV, he was sentenced to a fine of Kshs. 200,000 in default to serve 12 months imprisonment on each count, the sentences to run



- consecutively. The trial court also directed that the petitioner shall be barred from holding public office as an MCA. The court further directed that a certified copy of the judgment, sentence and order be served upon the Speaker of the Nairobi City County Assembly for compliance. Aggrieved he appealed vide ACEC Appeal No. E005 of 2021. The Hon. Justice Ngugi J declined to stay execution of the orders that barred him from holding Public Office.
23. He averred that during the pendency of these suits, the petitioner also filed another suit before the ODM Appeals Tribunal being Tribunal Appeal No. 60 of 2022 David Njilithia Mberia vs ODM National Elections Board & Others. The 1st Respondent was not a party to the suit and did not have notice of the proceedings before the Tribunal. It is the decision of the Tribunal that the Petitioner seeks to enforce before this Court in disguise of a petition for breach of fundamental rights. Also, the Petitioner filed another suit before the Political Parties Tribunal Complaint E098 of 2022 David Njilithia Mberia versus ODM National Elections Board & others where the 1st respondent was enjoined as an interested party which suit has since been withdrawn.
 24. He claimed that the 1st respondent has no power as to the political parties' nominations under the *Political Parties Act*. These are exclusive powers of the Political Parties and it only acts on the directions of the 4th respondent in respect to who has been nominated as the legitimate candidate for the party. Accordingly, on 3rd June, 2022, the 1st respondent received a letter from the chairperson of the 4th respondent's National Elections Boards instructing it to drop the name of the petitioner and replace it with that of the interested party as the party nominee for the MCA Karen Ward.
 25. He deposed that by dint of Article 193(1) (c), sections 28 and 34 of the *Elections Act* and Regulations 16 and 26 of the Elections (Party Primaries and Party Lists 2017), the 1st Respondent can only register for elections individuals who have been nominated by a political party or independent candidates. The petitioner was a member of the 4th respondent's party and presented his candidature for registration through the 4th respondent. As such, the 1st respondent was bound to revoke the petitioner's nomination upon instruction of the 4th respondent.
 26. According to him, the questions relating to the 1st respondent's press briefing of 4th June 2022 is res judicata as the same have been litigated and determination made in two different cases in Misc. application No. E 063 of 2022 and Misc. Application No. E 081 of 22 facts which the petitioner has failed to disclose to this Court.
 27. That notwithstanding, the 1st respondent's communique of 4th June 2022 was released based on reports from EACC that raised questions as to the petitioner's integrity to hold a public office in accordance with article 10 and Chapter six of the Constitution. The 1st respondent considered the application made by the petitioner for registration and wrote to the EACC on 18th May 2022 forwarding all names of the interested aspirants and inviting the EACC to make representations on the aspirants with a focus on their compliance with chapter six of the Constitution. On 31st May 2022, EACC responded implicating the petitioner as having been prosecuted and convicted for economic crime offense and barred by court from holding a public office pursuant to the *Bribery Act* 2016. Further that in High Court Appeal no. E005 of 2021 where the 1st Respondent was not a party, the Court upheld his conviction and sentence, on 14th July 2022.
 28. He deposed that by dint of Article 193(1)(b) a report in the nature of an integrity verification report submitted by the EACC notifying the 1st respondent that the petitioner does not satisfy the requirements of Chapter six of the Constitution as prescribed by section 22 of the *Elections Act*, 2011 bestowed upon the 1st respondent an obligation to disqualify from registration of the petitioner from participating in the forthcoming elections.



29. Moreover, the 4th respondent wrote to the 1st respondent on 4th June 2022 instructing it to revoke the registration for the petitioner. Hence, the 1st respondent acted within its constitutional mandate. Further that Article 38(3)(c) of the Constitution is not absolute and is subject to eligibility criteria under Articles 193(1) of the Constitution and the Rule of Law.
30. He asserted that despite the recited constitutional provisions there is no breach of the constitution on the part of the 1st, 2nd and 3rd respondents capable of having this court's intervention. He deposed that the petition herein fails to meet the test set in the *Mumo Matemu* case.
31. He maintained that the suit herein is *res judicata* and offends section 7 of the *Civil Procedure Act*. Moreover, the petition challenges the 1st respondent's press briefing of 4th June 2022 which rips this court of jurisdiction to determine the matter by dint of Article 88(4) of the Constitution and section 74 of the *Elections Act*. Article 88(4) (e) of the Constitution and section 74(1) of the *Elections Act* bestows on the IEBC powers to adjudicate over pre-election disputes such as disputes emanating from nominations and registration of eligible candidates. (*Moses Mwigigi & 14 others v IEBC & 5 others* [2016] eKLR and *EACC v Granton Graham Samboja & another; Kenyatta University & another (Interested Parties)* [2021] eKLR).
32. That once a gazettelement has been issued any person aggrieved by it can only challenge the same through an election petition as held in the case of *IEBC vs Jane Cheperenger & Others*, petition No. 5 of 2016. This court has not been gazetted as an election court hence lacks the jurisdiction to entertain the matter.
33. He asserted that the petitioner is bound by the order of the Court in Anti- Corruption & Economic Crimes Division ACEC Appeal no. E005 of 2021 *David Njilithia Mberia vs Republic* in which the High Court held that the orders barring the petitioner from holding public office were properly in place hence could not be set aside. The 1-3rd respondents are bound by the said ruling in enforcement of Article 88(5) of the Constitution.
34. The Interested Party filed a replying affidavit sworn on 21st July 2022. He deposed that he was validly nominated by the 4th respondent as its candidate. He presented his papers to the 1st respondent on 6th June 2022 and was duly cleared by the 2nd respondent as a candidate for MCA Karen Ward and has been duly gazetted as such by the 1st respondent.
35. He averred that after the 4th Respondent conducted primary elections to nominate candidates for MCA Karen Ward on 22nd April 2022, the petitioner was declared the purported winner. Being dissatisfied, together with other aspirants, they challenged the nominations at the 4th respondent's election appeals tribunal in Kisumu Tribunal Appeal No. 33 of 2022 and vide a judgment delivered on 26th April 2022 it allowed the appeal, set aside the nomination certificate and referred the matter to the 4th respondent's National Elections Board for appropriate action.
36. That since the 4th respondent was slow in acting on the ruling, they again lodged an appeal at the PPDT Case No. E073 of 2022 which delivered its ruling on 14th May 2022 finding that the case was premature and directed that the 4th respondent conduct fresh nominations by 18th May 2022.
37. He deposed that the 4th respondent on 15th May 2022 via its secretariat invited all candidate for nomination consensus and the petitioner was also in attendance. The parties failed to arrive at a consensus and as a result the 4th respondent conducted direct nominations. It settled on the interested party as its preferred candidate and issued a Nomination Certificate to him on 28th May 2022. The 4th respondent made that communication to the 1st respondent vide letter dated 3rd June 2022.



38. That pursuant to a communication from the 2nd respondent on 4th June 2022, he appeared before the 3rd respondent on 6th June 2022, presented his documents for clearance by the 1st respondent and the 2nd respondent verified that he had been formally nominated by the 4th respondent. It cleared him and issued him with the Nomination certificate to contest for the MCA Karen Ward on the 4th respondent's ticket. He further dismissed the communication by the 3rd respondent inviting the petitioner to appear before it on 6th June 2022 since no proof had been produced in the petitioner's bundle of documents.
39. According to him, the petitioner has attempted to clothe this case as a constitutional petition despite the fact that it is a party primary dispute. This court has no jurisdiction to entertain the matter since the decision of the IEBC to disqualify the petitioner was challenged before the IEBC DRC vide Complaint No. 324 of 2022 which was dismissed and has not been appealed against. The petition is an attempt by the petitioner to appeal the IEBC decision unlawfully and unprocedurally. The IEBC decision can only be set aside by this court in its capacity as an appellate court.
40. He asserted that the petitioner is a vexatious litigant and this Court can dismiss his case on that basis and on the proceedings being an abuse of the court process as enunciated by the High Court decision in R v Commissioner of Domestic Taxes Panalpina Airflo Ltd which gave the grounds which the court shall use to determine an abuse of the court process.
41. He deposed that the petitioner filed an application seeking leave to institute Judicial Review proceedings in HCJR E063 of 2022 against the same parties herein, seeking the same orders and relying on the same facts as presented in the present application. On 8th June, 2022 in the subsistence of the said suit, he filed a fresh application before the IEBC DRC against the same parties herein, seeking similar orders to the ones in the said JR suit and relying on similar facts.
42. He did not pursue the hearing until 18th June 2022 a date after the Court ruling in the JR suit. The matter was heard and a decision delivered on 20th June 2022 and dismissed for lack of evidence and want of jurisdiction. On 24th June 2022, the petitioner filed a fresh suit HCJR MISC E081 of 2022 before the High Court JR division. The same was heard and determined on the grounds that there were no grounds for the Court to grant leave as sought by the petitioner. The said behavior amounts to forum shopping and is an abuse of the court processes as defined by the Court of Appeal in R vs. Commissioner of Domestic Taxes Exparte Panalpina Airflo Ltd.
43. He averred that the press release by the 1st respondent's chairman dated 4th June 2022 did not affect the process of nomination by the 4th respondent since its decision had been forwarded to the 1st respondent vide the letter dated 3rd June 2022. Hence the 1st respondent's communication about the eligibility of the petitioner had been overtaken by events, as he was found not to have been nominated by the 4th Respondent.
44. According to him, the 4th respondent cannot revoke a nominated candidate after clearance by the 1st respondent pursuant to section 13(2) of the Elections Act after clearance and gazettelement by the IEBC. Hence the 4th respondents' purported communication to substitute its candidate is bad in law and cannot be used to subvert the election process to the petitioner's benefit. The petitioner has also been engaged in endless litigation which have not been set aside.

The 4th Respondents case

45. The 4th respondent did not file any response to the petition. It supported the petitioner's case.



Oral Submissions

46. The parties proceeded by way of oral submissions on 22nd July 2022. Mr. Ayieko for the petitioner, more or less reiterated the contents of the petitioner's pleadings. He maintained that the case is informed by the IEBC media release of 4th June 2022 where they purported to disqualify the petitioner from vying on the ODM party. He had been nominated and a certificate issued on 6th June 2022. He argued that the IEBC disqualified him without giving him a chance to be heard.
47. He reiterated that the petitioner had filed an Appeal ACEC No. E005 of 2021. In the self-declaration Form of the EACC it disclosed that this matter showed a pending appeal. In a letter dated 6th June 2022 the IEBC was informed of this but refused to review their decision, and it did not utilize its mandate to investigate. Article 50(q) and Article 193(3) provide for Appeal. The decision violated his political rights. The ODM withdrew his nomination & substituted it with that of the interested party. The petitioner had expectations to vie, and is still eligible to vie. On 14th June 2022 the Court upheld the conviction and sentence but set aside the order barring him from holding public office. He had filed an appeal to the Court of Appeal dated 15th July 2022. The DRC found it had no jurisdiction to hear the matter. There is no Court that has decided the petitioner's eligibility and under section 13(2) of the *Elections Act*, once a name has been forward to the IEBC as a candidate, the same cannot be withdrawn.
48. Mr. Anzala for the 4th respondent supported the petitioner and did not make any further submissions.
49. Mr. Muganda for the 1st to 3rd respondents opposed the petition relying on their replying affidavit. He submitted that Article 88(5) binds the 1st to 3rd respondents. It is the 4th respondent that submitted a letter recalling the petitioner's candidature, and any subsequent actions are internal matters. The letter dated 15th June 2022 had not reached the 1st – 3rd respondents. The Gazette Notice in respect of the interested party was dated 1st July 2022 and by then there was no order barring the gazettment.
50. He submitted that the IEBC in its ruling dated 20th June 2022 found that it had no jurisdiction and the same was challenged. The petitioner filed JR E061 of 2011 and Ngaah J who dismissed it on 17th June 2022. He again filed another one before the ODM Tribunal No 60 of 2022 and a ruling was delivered on 27th June 2022. The respondents have not received the ruling for their necessary actions. The petitioner filed E081 of 2022 before JR and Ngaah J dismissed it on the grounds that there was no appeal against it. The two rulings have not been set aside.
51. He submitted that the ruling by Mumbi J, did not set aside the issue of holding public office. On 14th June 2022 Maina J upheld the conviction and sentence and the issue of being barred was not set aside. He further submitted that the Notice of Appeal is not an appeal, and there was no Record of Appeal. He reiterated the fact that the petitioner did not point to any breaches of the constitution by the 1st -3rd respondents. On section 13(2) the name of the interested party had been submitted and the IEBC followed the law. There was also no certificate for the petitioner to be cleared. He urged that the petition be dismissed.
52. Mr. Koome Muketha for the interested party argued that the interested party was cleared on 6th June 2022; gazetted on 1st July 2022; and that it is the ODM which submitted his name. He submitted that the IEBC Complaint No 324 of 2022 was dismissed; and the petitioner sought similar orders as those herein. He again reiterated that, this is not a constitutional petition but is an appeal against the IEBC decision. He submitted that the conduct of the petitioner is an abuse of the court process and amounts to forum shopping; and, the clearance by IEBC is a nomination process. That upon gazettment ODM could not come up with another name. He urged that the petition be dismissed.



53. Mr. Ayieko in reply argued that the letter dated 3rd June 2022 by the 4th respondent should be read in line with the affidavit by Catherine Mumma. He also argued that stay of a conviction or a sentence is not a requirement for one to vie and that the other orders by Maina J are subject of Appeal. In the Court of Appeal a Notice of Appeal is an appeal. Lastly, he submitted that the petitioner's name is what was presented to the IEBC and it should be reinstated.

Analysis and determination

54. Having carefully considered the parties' pleadings and oral submissions, I find the following issues to arise for determination:-

i. Whether the petition offends the doctrine of res-judicata

55. The 1st to 3rd respondents argued that the matter herein is res-judicata the matter having been determined by different courts of concurrent jurisdiction on the same subject matter of nomination of the petitioner. They make reference to Misc. Application No. E063 of 2022 David Njilithia Mberia versus the IEBC and ODM and Misc. Application No. E081 of 2022 David Njilithia Mberia versus IEBC and ODM.

56. The petitioner denied that this suit offends the doctrine of res judicata and argued that he has never filed any similar suit before this court touching on the same issues that have been heard and determined on the merits. According to him, the matters alluded to were Judicial Review suit which were dismissed on the basis that the Court lacked jurisdiction and therefore were not determined on merit. He argued that jurisdiction does not apply where a suit is struck out on account of jurisdiction.

57. The Civil Procedure Act Cap. 21 Laws of Kenya under section 7 provides for the doctrine of res judicata. It provides as follows:-

SUBPARA 7.

Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating

58. The rationale for this doctrine was discussed in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) eKLR where the court state as follows:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

Further that,

“... the general rule is that where a litigant seeks to re-open in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (The finality principle) outweighs the public interest in achieving justice between the parties (the justice principle) and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because a competent tribunal has jurisdiction to decide wrongly, as well as correctly and if it makes a mistake its decision is binding unless corrected on appeal”

59. For operation of this doctrine in the case of E.T. v Attorney General & another (2012), eKLR, the court stated;

“53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia and another v The Attorney General and others [2005] 1 EA 83, 89).

60. The Court further stated,

“57. The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the Court quoted Kuloba J., in the case of *Njangu v Wambugu* and



another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata’

61. In *National Land Commission v Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another* [2019] eKLR it was held;

“For the doctrine to be successfully invoked the following elements must suffice and it has been held that they are conjunctive rather than disjunctive. In *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* (2017) eKLR, it was stated as follows,

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

62. For avoidance of doubt in the Misc. Application No. E 063 of 2022 *David Njilithia Mberia vs IEBC and ODM*, the parties are David Njilithia Mberia as the petitioner and IEBC (1st respondent) IEBC Returning Officer Langata Constituency (2nd respondent) ODM National Elections Board (3rd respondent) Orange Democratic Movement Party (4th respondent), EACC (5th respondent) and Anthony Maragu Muthoni (interested party).

63. The orders that were being sought were for leave to apply for an order of certiorari for the purposes of quashing the decision of the 1st respondent (IEBC) disqualifying the petitioner herein from election as a MCA Karen ward as communicated through its media release press statement of 4th July 2022; leave for an order of prohibition directed against the 3rd and 4th respondent prohibiting them nominating another aspirant as the party nominee of the said ward; leave for prohibition directed at the 1st and 2nd respondents prohibiting them or their agents from receiving clearing registering and or gazetting the name of any other aspirant as the valid nominee or candidate of the 4th respondent; leave for an order of mandamus compelling the 1st and 2nd respondents to receive the nomination papers, clear register and issue him with a certificate of registration for the MCA Karen Ward; and that the leave of the aforesaid orders do operate as a stay of the orders and or any proceedings.

64. The Court in its ruling dismissed the matter on the basis that there was an existing alternative remedy. Basically, on failure to exhaust the existing dispute settlement mechanisms and secondly on the there was no ground of Judicial Review that the petitioner’s motion would be anchored on assuming leave was granted. Hence the same was misconceived and bad in law.

65. In Misc. Application No. E081 of 2022 *David Njilithia Mberia vs IEBC and ODM* the parties were David Njilithia Mberia (Petitioner) IEBC (1st Respondent) IEBC Returning Officer Langata



Constituency (2nd Respondent) ODM National Elections Board (3rd Respondent) ODM Party (4th Respondent) and Anthony Maragu Muthoni (5th Respondent)

66. The petitioner was seeking orders for leave to apply for certiorari for the purposes of quashing the decision made on 20th June 2022 by the IEBC's DRC dismissing his complaint No. DRC/IEBC/324/2022; leave to apply for certiorari for the purpose of quashing the decision of the 2nd Respondent to refuse to admit the register or receive the petitioner's nomination papers to vie for the MCA seat under the 4th respondent's party.
67. The Court in dismissing the application, held that the petitioner was challenging the decision by the 1st respondents DRC for downing its tools and referring the matter for Party's internal Dispute Resolution and the PPDT. It stated that the Judicial review court cannot assume the appellate jurisdiction only the appellate court and the not a JR one would interrogate the facts and the law and reach a conclusion.
68. In the suit herein the parties are David Njilithia Mberia (petitioner), IEBC (1st respondent), The IEBC Dispute Resolution Committee (2nd respondent), The IEBC Returning Officer for Langat constituency (3rd respondent), The Orange Democratic Movement Party (4th respondent), and Anthony Maragu Muthoni (interested party).
69. This orders being sought are clearly set out in paragraph 1 of this Judgment.
70. It can be seen that all the parties in this suit are parties in the JR suits. The issues raised therein basically on the refusal of the IEBC to nominate the petitioner. The prayers sought are for that decision to be quashed and for the IEBC, the DRC of the IEBC and the Returning Officer to accept his nomination papers and to register him as a candidate for the MCA seat. In addition, this petition seeks a declaration for violation of constitutional rights and that the petitioner is eligible to vie for the seat of MCA. In my view some of the issues were similar especially on the 1st respondent refusing to accept his nomination papers and to register him but the same were not conclusively determined in the said JR decisions.
71. In one decision the court dismissed it on the grounds that the existing remedies had not been exhausted, in the second decision it was dismissed because the Court was being asked to sit as an appellate court. The issue of declarations on breach of constitutional rights was not raised in the JR suits. The petition does not offend the doctrine of res-judicata.

ii. whether this court has jurisdiction

72. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (2022) eKLR, a decision rendered on 8th February, 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.

73. 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.

74. 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.

75. 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.

76. The 1st to 3rd respondents raised the issues that the petition challenges the 1st respondent’s press briefing of 4th June 2022 which rips this court of jurisdiction to determine the matter by dint of Article 88(4) of the constitution and section 74 of the *Elections Act*. The said provisions bestow upon the IEBC powers to adjudicate over pre-election disputes such as disputes emanating for nominations and registration of eligible candidates.

77. The interested party argued that this court has no jurisdiction since the decision of the IEBC to disqualify the petitioner was challenged before the IEBC DRC which was dismissed and has not been appealed against. The petition is also an attempt to appeal the IEBC decision unlawfully and unprocedurally and that can only be set aside by this Court in its capacity as an appellate court.

78. In response the petitioner argued that the dispute herein concerns the fundamental breach of his constitutional rights and is not disguised as an Election petition as alleged. That this being a constitutional issue touching on his rights under Articles 193(3) and Article 50(2) (q) of the Constitution this court is clothed with jurisdiction to hear and determine this petition.

79. The respondents and interested party have submitted otherwise. This petition emanates from the decision of the 1st respondents press briefing disqualifying him from and rejecting his nomination papers to run as an MCA for the Karen ward. In my view he is aggrieved by the said actions and that is what gives rise to this petition. Issues to do with nomination and registration of candidates are squarely



dealt with by the IEBC. These are pre-elections disputes. The mandate of the IEBC is well outlined in law.

80. 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; and
- (e)

81. Article 88, 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--
- (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;

82. 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.

83. Section 4 of the *Independent Electoral and Boundaries Commission Act* (IEBC Act) provides the functions of the Commission 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;

84. 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.

85. 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 DRC or (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 3rd 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 3rd 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.

86. In *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR the Supreme Court held: -

(119) To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.

87. The provisions of the law also cited above and case law, 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. This Court cannot also on its own motion review the decisions of the 1st respondent and 2nd respondents or sit on appeal on that decision because it has not been so moved by the Petitioner. The decision by the 1st Respondent stands unchallenged.

88. The petitioner herein wasted a lot of time moving from one forum to another. He should have challenged the decision of the IEBC's Dispute Resolution Committee by way of an Appeal. He elected to file this petition which is his own undoing.

89. The upshot is that there is no merit in this petition which I dismiss with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF JULY 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

