



**Saverio v County Returning Officer in Tharaka Constituency & 2 others (Constitutional
Petition E002 of 2022) [2022] KEHC 12640 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CONSTITUTIONAL PETITION E002 OF 2022**

LW GITARI, J

JULY 25, 2022

**IN THE MATTER OF: THE ELECTION OF MEMBER OF COUNTY ASSEMBLY
UNDER ARTICLE 177 OF THE CONSTITUTION OF KENYA AND IN THE MATTER
OF: ARTICLE 193(2)(A) OF THE CONSTITUTION OF KENYA 2010 AND IN THE
MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 193(2)(A) OF THE
CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF: VIOLATION OF
SECTION 43(5) OF THE ELECTIONS ACT NO. 24 OF 2011 LAWS OF KENYA**

BETWEEN

GITONGA CHUKANU SAVERIO PETITIONER

AND

**COUNTY RETURNING OFFICER IN THARAKA CONSTITUENCY 1ST
RESPONDENT**

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

THARAKA NITHI COUNTY 3RD RESPONDENT

RULING

1. Gitonga Chukanu Saverio, the petitioner herein, sought clearance and registration to contest for the elective post of Member of County Assembly for Mukothima Ward in Tharaka Nithi County in forthcoming Kenya General National Elections slated for August 9, 2022.
2. On the other hand, the respondent is an employee of the Independent Electoral and Boundaries Commission established under article 88 of the *Constitution of Kenya*.
3. It is the Petitioner's contention, which the Respondent does not dispute, that on June 7, 2022, the Petitioner presented his nomination papers/documents to the Respondent in line with Section 36(1)



of the Elections Act for nomination as a member of County Assembly for Mukothima Ward, Tharaka Constituency, Tharaka Nithi County.

4. Section 35 as read with Section 36 of the Elections (Registration of voters) Regulations 2012 provides as follows:

"35. Nomination of independent candidate for county assembly

An independent candidate at a county assembly member election shall deliver to the returning officer on the day fixed for the nomination of candidates at that election, of an application for nomination in Form 18 set out in the Schedule.

36. Supporters of nomination of candidate for county assembly

(1) The person delivering a nomination application under regulation 35 shall at the same time deliver to the returning officer, standard A4 sheets of paper bearing the names, respective signatures and identity card numbers of five hundred voters registered in the ward.

(2) The sheets of paper delivered under sub-regulation (1) shall—

- (a) be serially numbered; and
- (b) each have at the top, in typescript, the wording at the top of Form 18; and
- (c) be accompanied by copies of the identity cards of the voters referred to in sub regulation (1)."

5. The petitioner alleges that the respondent maliciously and without any justification declined his nomination on the ground that he had not met the minimum number of supporters as required under regulations 36(1) of the Elections (General) Regulations 2012.
6. He contends that the reason given by the respondent for declining his nomination was unfair as he had allegedly availed a total of 557 ID's and additional 47 of his supporters all from Mukothima Ward hence fully compliant with section 36(1) of the Elections (General) Regulations 2012.
7. It is the petitioner's further contention that the respondent alleged that he had not submitted statutory form No 15, when he had indeed submitted the same.
8. Aggrieved by the decision of the respondent, the petitioner lodged a complainant with the Dispute Resolution Committee at Nairobi (hereinafter the "Committee") and by a decision made on June 17, 2022, the said Committee dismissed the complaint by the petitioner. It was the Committee's finding that the petitioner failed to meet the requirements as to the number of supporters as prescribed under regulation 36(1) of the Elections (General) Regulations, 2012.
9. Dissatisfied by the foregoing turn of events, the petitioner lodged these proceedings vide a petition dated July 8, 2022 that was filed under a certificate of urgency. He is seeking the following declarations:
- i. A declaration that the denial by the respondent to approve the petitioner as an independent candidate Member of County Assembly of Mukothima Ward in the forthcoming elections on August 9, 2022 is a violation of the petitioner's right as guaranteed under article 38(1) as read with article 45(3) of the constitution.



- ii. A declaration that the petitioner ought to be approved as a candidate contesting for the post of member of County Assembly, Mukothima Ward in Tharaka Nithi County.
 - iii. A declaration that the respondent abdicated, neglected and/or failed to uphold his duties as envisaged under the *constitution of Kenya, 2010* by refusing to nominate the petitioner as a qualified person for the elective position of Member of County Assembly in the upcoming elections of August 9, 2022.
 - iv. A declaration that the respondent do accept the petitioner for nomination as a candidate for the ward elections for Mukothima Ward scheduled for the August 9, 2022.
 - v. A declaration that the petitioner is qualified to view for the seat of Member of County Assembly, Mukothima Ward in Tharaka Nithi County in the elections scheduled for August 9, 2022, on account of having satisfied the qualification as required by Section 36(1) of the Elections (General) Regulations 2012.
 - vi. Costs of the Petition.
10. The Respondent opposed the petition and relied on two affidavits both sworn on July 20, 2022. The first affidavit is sworn by Rosemary Njoki Njogu, the Respondent herein, and the other is sworn by Chrispine Otieno Owiye, the Director Legal and Corporate Affairs of the Independent Electoral and Boundaries Commission.
- Basically the deponents are denying the allegations by the applicant and are stating that he failed to comply with the requisite number of supporters, ie. 500 voters registered in the respective ward as required under Article 193(1) (c) (ii) and Regulation 36 (1) of the Elections (General) Regulations 2012. She further deposes that the Petitioner lodged a complaint which was heard and a verdict given on 17/6/2022, a decision which the petitioner has not faulted as he has not filed this matter as an appeal or Judicial Review. It is her contention that the court has no jurisdiction to grant the declarations sought by the petitioner as it is preserves of the commission to clear candidates to contest in election. It has further contended that the delay by the petitioner has not been explained and further that the application has been overtaken by events since the ballot papers for the upcoming general elections in respect of Tharaka Nithi Constituency Mukothima Ward have been printed and all systems put in place for the general election in the ward.
11. Presently before this court is the Respondent's Notice of Preliminary Objection dated July 20, 2022 challenging the jurisdiction of this court to hear the said petition. The specific grounds raised in the preliminary objection are:
- i. That the Honourable Court lacks jurisdiction to entertain the petition pursuant to provisions of Article 88(4)(e) of *the Constitution* of Kenya 2010.
 - ii. That the Petitioner having submitted to the internal dispute mechanism of the Independent Electoral and Boundaries Commission through Dispute Resoluton Committee vide Complaint No 237 of 2022, the petition before this court is misconceived and an abuse of court process in that it does not fault the decision of the Disputes Committee.
 - iii. That through this petition the petitioner is re-litigating a replica of his complaint before the Independent Electoral and Boundaries Commission through the Dispute Resolution Committee.
 - iv. That the petition fails the test of specificity as required in constitutional petition litigation.
12. The objection was heard by way of oral submissions.



Analysis

13. Since the Respondent has raised the issue of the jurisdiction of this court in its objection, I will, first, deal with the law on the subject.
14. Law, JA in *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696* had the following to say: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”
15. In *John Musakali vs Speaker County of Bungoma & 4 others (2015)* eKLR, the Court held that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”
16. In *Omondi -vs- National Bank of Kenya Ltd & Others [2001] 1 EA 177*, the court opined that it was opined that, while Courts are cautioned against the purported use of contested facts in determining preliminary objections, they are at liberty to look at the pleadings and other relevant in documents on the record. The said court expressed itself as follows:

“...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....”
17. I have considered the issues raised in the preliminary objection against the contents of the petition and the law on preliminary objections. In my view, the preliminary objection has attained the required threshold and is well founded on a point of law. The objection, if successful, can determine the Petition at once.
18. The objection is to the effect that this Court lacks jurisdiction to determine the dispute raised in the petition. A challenge on jurisdiction should be addressed at the earliest opportunity as it goes to the foundation of the Court’s competence and authority to determine a matter.



19. It is a well settled principle in law that jurisdiction is everything and without it, a court has no power to make one more step. [See: Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1]

20. The Court of Appeal in [Jamal Salim v Yusuf Abdulabi Abdi & another \[2018\]](#) eKLR stated as follows:

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

- 1)
- 2) The jurisdiction either exists or does not *ab initio* ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”

21. From the foregoing authorities, it follows that a court acting without jurisdiction acts in vain and engages in process which is a nullity.

22. In this case, it was the Respondent’s submission that the law ousts the jurisdiction of this Court since a party dissatisfied by the decision of the Committee could only move this Court as an appeal of the Committee’s decision or by seeking judicial review orders challenging the procedure or legality of the decision. To buttress its argument, it relied on the Supreme Court decision in [Sammy Ndungu Waity v Independent Electoral and Boundaries Commission & 3 Others \[2019\]](#) eKLR and laid emphasis on the following excerpt:

“[60] Coming to pre-election disputes, including disputes relating to, or arising from nominations, *the Constitution* is clear. These are to be resolved by the IEBC (through its Committee on Dispute Resolution as provided for by Section 12 of the enabling Act) or where applicable, by the Political Parties Disputes Tribunal. Where *the Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

- (61) That an election is a process, a continuum, which begins from the registration of voters right up to the declaration of results, is a truism. But this fact is not in itself capable of conferring jurisdiction on an Election Court, to inquire into the entire electoral process. Again, while we agree with the assertion that an election is a process, in the context of dispute resolution, it must be a structured process. That is why, the framers of the 2010 Constitution, were mindful of the need, for a clear roadmap for the resolution of disputes along this continuum. Hence those disputes that arise before an election are to be resolved by the organs established for that purpose. By the same token, those that arise, during and after the elections, are reserved for the Election Court.



Indeed, the “Election Court” itself, comes into real existence, after the elections proper. It is for this reason that *the Constitution* restricts every organ to its operational sphere. Hence, the IEBC is only 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. The latter are definitely a preserve of the Election Court, which means that the former, are a preserve of the IEBC or the PPDT as the case may be. This in our view is what this Court held in *George Mike Wanjohi v. Steven Kariuki* [supra].

(62) We are also in total agreement with the assertion that disputes relating to nominations or eligibility go to the root of an election. However, as we have observed elsewhere, this fact does not confer jurisdiction on an Election Court to determine “nomination related” disputes, precisely because, “these disputes” are reserved for the IEBC by Article 88 (4) (e) of *the Constitution*. An Election Court ought not to trample upon the electoral process like a colossus, in the face of clear and unambiguous provisions of *the Constitution* regarding its jurisdiction.

(63) 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. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR*; wherein the Appellate Court observed:

“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.”

23. In the *Sammy Ndungu Waity’s* case (*supra*), the Supreme Court was quick to note the recurring frequency in which the question as to whether an election court has jurisdiction to determine pre-election disputes has fallen for determination before the superior courts. In this regard, they examined the two schools of thought that have emerged as the courts deal with this issue. The court identified the two schools of thought as follows:

“[45]...On the one hand, there is the judicial strand that holds the notion that the establishment of other organs by the 2010 Constitution to address pre-election disputes, including those relating to nominations, divests an election Court of jurisdiction to determine the same. Towards this end, Article 88 (4) (e) of *the Constitution* provides that the IEBC shall inter alia, be responsible for “the settlement of electoral disputes, relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results [emphasis added]. In the same vein, The Political Parties



Disputes Tribunal is also vested with the mandate to determine and settle pre-election disputes. For purposes of our analysis, we shall refer to this strand as the Divestiture School.

(46)(On the other hand, there is the school of thought, which maintains that an election, being a process and not an event, means the same continues, until the declaration of results. This being the case, an election Court must satisfy itself that the election was at all times conducted in accordance with the tenets of *the Constitution*. The Court cannot undertake such a task unless its jurisdiction including the power to look into pre-election disputes is preserved. We shall refer to this strand as the Preservative School.”

24. The court reviewed the two schools of thoughts aforesaid and in the end, pronounced itself as follows:

(62) We are also in total agreement with the assertion that disputes relating to nominations or eligibility go to the root of an election. However, as we have observed elsewhere, this fact does not confer jurisdiction on an Election Court to determine “nomination related” disputes, precisely because, “these disputes” are reserved for the IEBC by Article 88 (4) (e) of *the Constitution*. An Election Court ought not to trample upon the electoral process like a colossus, in the face of clear and unambiguous provisions of *the Constitution* regarding its jurisdiction.

...

...

(64) Our foregoing conclusion regarding the various institutional mandates relating to pre-election disputes, should on the face of it, resolve the conflicting strands of judicial opinion. However, as we observed earlier, each of these schools of thought is borne out of the best traditions of judicial inquiry, and none can be dismissed lightly. Such traditions for example require courts of law to interpret *the Constitution* holistically and purposively. They also remind us that, *the constitution* is a living charter, which is always speaking, and in interpreting any of its provisions, a court of law must keep in mind that, *the constitution* cannot subvert itself. Towards this end, every constitutional provision supports the other, and none can be read so as to render another inoperable.

...

...

(67) In our perception, this conflict cannot be resolved by either, out-rightly discounting one school of thought or wholly embracing the other. What is critical is the need to harmonize these well-reasoned opinions so as to give effect to both Articles 88(4) (e), and 105 (1) (a) of *the Constitution* as read with Section 75 (1) of the *Elections Act*. Doing so would be to stay faithful to the edict that a constitution must be interpreted purposively and holistically.

(68) It is undeniable that the mandate of resolving pre-election disputes as provided for in Article 88 (4) (e) of *the Constitution* and affirmed by this Court in *Mike Wanjohi v. IEBC* (Supra), lies with the IEBC. By the same token, it is also true that the main issue for determining the validity of an election may turn on whether a person, ought to have been nominated in the first place. The implication in such a situation is that, an election Court retains a jurisdictional residuum from which it may draw, to determine the said question in certain exceptional circumstances.”

The Supreme Court affirmed that the jurisdiction to determine pre-election disputes is rested on IEBC under Article 88(4) of *the Constitution*.



25. From the prayers of the Petitioner and his submissions before this court, it is clear that the Respondent is correct in stating that the petition as drafted is not an appeal. The Petition challenges the decision made by the Respondent and not the decision of the Committee. For this reason, I opine that this court should not assume jurisdiction challenging the nomination of the petitioner as an independent candidate. This is the presence of IEBC which has resolved the dispute and it would be acting in vain for this court to re-hear the dispute. It is important here to quote for the relevant provision of Article 88 of the Constitution. It is provided under Article 88 (4) (d) & (e) of the Constitution as follows:

“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,

- (d) the regulation of the process by which parties nominate candidates for elections;
- (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;”

Quite clearly and as held in the above decisions, the Constitution confers jurisdiction on Independent and Electoral and Boundaries Commission (IEBC) the jurisdiction to conduct elections to any elective body or office and in particular as it relates to this matter settlement of pre- electoral disputes arising from nominations. The dispute was heard and determined and a finding made. The Petitioner does not fault the decision of the Dispute Resolution Committee. No jurisdiction is conferred on this court to determine pre-election disputes and this court cannot revisit the dispute by determining the dispute against the 1st Respondent as urged by the Petitioner.

Conclusion

26. I find that the Pre-liminary Objection by the respondent is well founded for the reasons stated above. The Petition is not properly before this court and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

25/7/2022

The ruling has been read out in open court.

L.W. GITARI

JUDGE

