



**Agoro v Independent Electoral & Boundaries Commission & another (Constitutional Petition E002 of 2022) [2022] KEHC 12626 (KLR) (2 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12626 (KLR)

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

**KW KIARIE, J  
AUGUST 2, 2022**

**BETWEEN**

**PETER ODHIAMBO AGORO ..... APPLICANT**

**AND**

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

**THE RETURNING OFFICER, KABONDO KASIPUL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Peter Odhiambo Agoro, the petitioner/applicant herein moved the court by a petition and a Notice of Motion dated July 15, 2022. The Notice of Motion was brought under sections 1A, 1B, 3A and 63(c) &(e) of the *Civil Procedure Act*, Order 40 Rule 1 of the *Civil Procedure Rules* and 159 of *the Constitution* of Kenya. In the application he is seeking the following orders:
  - a) That application herein be certified as urgent and the same be heard *ex parte* and service thereof be dispensed with in the first instance. [Spent]
  - b) That pending the hearing and determination of this application, an order of injunction do issue restraining the respondents, whether by themselves or their representatives, servants, agents, and/or assigns from howsoever printing, collecting, delivering and/or dispatching ballot papers at Polling Station and/or conducting elections for Member of County Assembly for Kabondo East Ward electoral area scheduled and slated for the August 9, 2022.
  - c) That pending the hearing and determination of this application, this honourable court be pleased to issue an order compelling the respondents to withdraw the Kenya Gazette Notice No.7995 Vol. CXX1V-No.129 “B” dated on the July 1, 2022, on the list of candidates named for Member of County Assembly for Kabondo East Ward for the August 9, 2022 General Elections.



- d) That pending the hearing and determination of this suit, this honorable court be pleased to issue mandatory orders compelling the respondents to withdraw the Notice vide the Kenya Gazette Notice No.799 Vol. CXXIV-No.129 “B” dated on the July 1, 2022, on the list of candidates named for Member of County Assembly for Kabondo East Ward for the August 9, 2022 General Elections.
  - e) The costs of this application be provided for.
2. In the petition, the petitioner is seeking the following reliefs:
- a) That this honorable court be pleased to issue an order of injunction restraining the respondents; whether by themselves or their representatives, servants, agents and/or assigns from howsoever printing, collecting, delivering and/or dispatching ballot papers at Polling stations and/or conducting elections for Member of County Assembly for Kabondo East Ward electoral area scheduled and slated for the August 9, 2022.
  - b) That this honorable court be pleased to issue an order compelling the respondents to withdraw the Kenya Gazette Notice No.7995 Vol. CXXIV-No.129 “B” dated on the 1<sup>st</sup> July 2022, on the list of candidates named for member of County Assembly for Kabondo East Ward for the 9<sup>th</sup> August, 2022 General Elections.
  - c) This honourable court be pleased to issue an order directing and compelling the respondents to enlist the petitioner as one of the candidates cleared for the contest for Member of County Assembly for Kabondo East Ward for the August 9, 2022 General Elections.
  - d) Any other or further relief that this honourable court may deem fit to grant.
3. The application was premised on the following grounds:
- a) That the applicant/petitioner declared interest and appeared before the 1<sup>st</sup> respondent for registration as a candidate for the contest for Member of County Assembly (Kabondo East Ward) Elections be conducted by the respondents on the August 9, 2022.
  - b) That the applicant/petitioner appeared before the 1<sup>st</sup> respondent as had been scheduled and he was duly so cleared, registered and issued with a certificate as a candidate for the contest for member of County Assembly for the Kabondo East Ward.
  - c) That when the respondent gazette the list of candidates for the Kabondo East Ward vide the Kenya Gazette Notice No.799 Vol. CXXIV-No.129 “b” dated the 1<sup>st</sup> July 2022, the applicant/petitioner’s name had been omitted from the list of persons nominated as candidates for Member of County Assembly (Kabondo East Ward) Elections for the August 9, 2022 General Elections.
  - d) The applicant/petitioner approached the respondents and pleaded to be enlisted and the respondents adamantly refused to correct the error and have the applicant/respondents’ name in the list of candidates.
  - e) That it is just and necessary that this application is heard immediately and a temporary restraints be made to secure the property.
4. The respondent raised a preliminary objection on the following grounds:
- a) That the application and petition before this honorable court are res judicata;



- b) That the petition and the application be dismissed for want of jurisdiction for they have been decided by the Independent Electoral and Boundaries Commission in Dispute Resolution Committee at Nairobi Complaint No.70 of 2022.
  - c) That this court’s jurisdiction is ousted as the petitioner should have filed a Judicial Review Application under the Fair Administration Action Act, 2015 against the stated IEBC’s decision and not this petition.
5. Mr. Nyakeriga, the applicant’s advocate undertook to file submissions by the close of business on July 25, 2022 but at the time of writing of this ruling he had not done so. The ruling therefore did not benefit from his submissions.
6. In order for a preliminary objection to be entertained by court, it must be on a point of law and nothing more. This was stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969]EA 696. At page 700 paragraph D-F Law JA as he then was, stated:

“...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.”

7. Section 41 (2) of *Political Parties Act* provides as follows:

An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.

The import of this section is that any party who is not satisfied with the decision of the Political Parties Dispute Tribunal ought to seek redress through the appeal procedure. However, if a party is challenging an administrative action or the lawfulness of the process by which the decision was arrived at, this would be by way of judicial review.

8. The Court of Appeal in the case of *Republic vs. National Environmental Management Authority* [2011] eKLR stated as follows:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example *R v. Birmingham City Council, ex parte Ferrero Ltd.* Case.

9. In a similar application to the present one, in the case of *Wachira Martin Ngiri & 3 others v Independent Electoral and Boundaries Commission & 5 others* [2013] eKLR the court delivered itself as follows:

The *Political Parties Act* and the *Elections Act* provide for an elaborate procedure of dealing with disputes arising from the Nomination Process. That procedure ought to have been followed and exhausted especially where the Petitioners had already presented



their grievance to The Independent Electoral and Boundaries Commission Tribunal. Of relevance here is section 41(2) of the *Political Parties Act*. What is before this Court is the Petition filed herein in this Court's original jurisdiction. The decision of the Tribunal still stands as it has not been challenged or set aside. It would be an unpleasant scenario to have the decision of the Tribunal and another one by this Court in its original jurisdiction over the same matter. My finding therefore is that this Court lacks jurisdiction to deal with this matter before it. I uphold the preliminary Objections raised and strike out the Petition.

10. The petition and the application cannot be entertained by this court for lack of jurisdiction.

I therefore sustain the objection and strike out the petition with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 2ND DAY OF AUGUST, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

