



**Agumba v Wafula Chebukati (The Chairman, IEBC) & another
(Constitutional Petition E390 of 2022) [2022] KEHC 13996 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E390 OF 2022**

**M THANDE, J
SEPTEMBER 30, 2022**

BETWEEN

SIGAR J. AGUMBA PETITIONER

AND

**WAFULA CHEBUKATI (THE CHAIRMAN, IEBC) 1ST RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

RULING

1. The Petitioner herein filed a Petition dated July 28, 2022 seeking the following reliefs:
 - i. A declaration that in the vacuum of Parliamentary sanction against the 1st Respondent as a holder of a constitutional office, the Honorable Court is properly seized with lawful remedies for the instant petition.
 - ii. A declaration that the 1st Respondent is unfit for his functions as the Chairperson of Independent Electoral and Boundaries Commission (IEBC) and as the Returning Officer for Presidential elections.
 - iii. A mandatory order requiring the 1st Respondent to immediately appoint and gazette a Deputy Returning officers for Presidential elections slated for August 9, 2022.
 - iv. The costs of the petition.
 - v. Any further relief that the Honorable Court may deem just and fit to grant.
2. The Petitioner also filed an application of even date seeking similar orders in the interim.



3. The Petitioner described himself as a gender and development specialist, a teacher and community civic leader within Homabay County. He contended that that is no longer tenable for the 1st Respondent to be in charge of the office of chairman of the 2nd Respondent, the Independent Electoral and Boundaries Commission (IEBC) and to be involved in the preparations of the General Elections scheduled for August 9, 2022. The Petitioner averred that the 1st Respondent is the chairman of IEBC having been appointed on January 18, 2017 vide Gazette Notice No 400/2017. He further stated that after IEBC headed by the 1st Respondent conducted the general elections in 2017, the presidential election was nullified by the Supreme Court. In its judgment, the Court blamed IEBC for illegalities and irregularities in the conduct of the polls.
4. It is the Petitioner's case that the 1st Respondent has failed in the discharge of his constitutional obligation to ensure that the elections are carried out in accountable and transparent manner; that he has not by his conduct, inspired public confidence in the electoral process and has threatened the integrity of the democratic system; that he has encouraged open interference with the peaceful and democratic transition of power in the country in allowing Venezuelan nationals to control strategic aspects of the election process; that the 2nd Respondent has awarded tenders in respect of strategic electoral materials in violation of the law; that the 1st Respondent has flip flopped on the use of manual voter register alongside the use of the KIEMS in voting, leading to serious fears of plans to manipulate the integrity of the voting process; that the 1st Respondent has not appointed a deputy returning officer for presidential elections; that the 1st Respondent has betrayed public confidence and trust in the institution of the IEBC thereby instilling fear for the country's peace and security were the general elections to be held with the 1st Respondent at the helm. In sum, the Petitioner contended that the 1st Respondent is unfit to hold office as Chairman of IEBC.
5. Further, the Petitioner stated that he has moved to this Court as there is a 'transgression of constitutional miss in the structure of removal powers over the officer of the 1st Respondent when Parliament is not sitting.' It is the Petitioner's case that the dispute herein has occurred outside the life of the National Assembly.
6. The Respondents opposed the Petition and Application vide a notice of preliminary objection (PO) dated August 1, 2022 and a replying affidavit sworn on August 3, 2022 by on Chrispine Owiye, the Director, Legal Services of IEBC.
7. The PO raises the following objections:
 1. The Application and the Petition is an invitation to the Honourable Court to exercise jurisdiction it does not possess to the extent that:
 - a. It requires the Court to restrain a constitutional office holder from exercising the responsibilities of their office yet the process of removal from such office has not been initiated and a suspension effected by the President in accordance with Article 251 of the [Constitution](#); and
 - b. It requires the Court to usurp the functions of the National Assembly, the President and the Tribunal with regard to removal of members of Commissions and Independent Offices under Article 251 of the [Constitution](#).
 2. The 1st Respondent was appointed the Chairperson of the 2nd Respondent pursuant to Article 250 (2) of the [Constitution](#) and in exercise of the powers conferred by section 5 (2) and Paragraph 4 of the First Schedule to the [Independent Electoral and Boundaries Commission Act](#), 2011, by His Excellency Uhuru Kenyatta, President of the Republic of Kenya and



Commander-in-Chief of the Kenya Defence Forces, vide Gazette Notice no 399 Vol CXIX— No 8 dated the January 18, 2017.

3. The 2nd Respondent (the 'Commission') is established under Article 88 and is an independent Commission under Chapter 15 of the Constitution of Kenya, 2010 with the mandate inter alia to conduct or supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament.
4. By virtue of Article 250 (1) and (2) of the Constitution of Kenya 2010 as read with section 5 (1) of the Independent Electoral and Boundaries Commission Act, 2011, the Commission consists of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act. Consequently, the Commission is properly constituted only when it has a substantive Chairperson who, in this case, is the 1st Respondent.
5. As was enunciated in the case of Katiba Institute & 3 others v Attorney General & 2 others Constitutional Petition No 548 of 2017; [2018] eKLR the Constitution protects the Chairperson's tenure and independence, and that only a person is was qualified under the Constitution as a Chairperson could fill such vacancy and perform the constitutional functions of a chairperson and that any other person, whether or not in an acting capacity cannot be defined as a chairperson.
6. The procedure of removal of Chairperson or a member of the Commission is well articulated under Article 251 of the Constitution wherein;
 1. A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for— serious violation of this Constitution or any other law, including a contravention of Chapter Six; gross misconduct, whether in the performance of the member's or office holder's functions or otherwise; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy.
 2. A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground. The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.
 3. On receiving a petition under clause (3), the President may suspend the member or office holder pending the outcome of the complaint; and shall appoint a tribunal in accordance with clause (5).
 4. The tribunal shall consist of a person who holds or has held office as a judge of a superior court, who shall be the chairperson; at least two persons who are qualified to be appointed as High Court judges; and one other member who is qualified to assess the facts in respect of the particular ground for removal.
 5. The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.
7. The Petition seeks to circumvent the Constitution and take a short cut towards the removal and or suspension of the holder of the Office of the Chairperson of the Commission i.e the 1st Respondent herein.



8. The Petition is incompetent, defective and lacks merit because it seeks to confer this court with powers it does not have. It seeks to bestow upon this court the powers and functions of Parliament, the President and those of the Tribunal contemplated under Article 251(5) towards the suspension and/or removal of the Chairperson of the Commission.
 9. The Petition is not only an egregious affront to the Constitution, the prevailing legislation and the doctrine of separation of powers, it is also a threat to public interest in the following ways:
 - a. Any attempt to restrain the 1st Respondent from the discharge of the functions of his office is tantamount to by-passing the Constitution that has bestowed only the President with the powers to suspend the member of a commission or office holder pending the outcome of a complaint for the removal of the said member.
 - b. Any invitation to suspend the 1st Respondent from the discharge of the functions of his office is an invitation to foment chaos and anarchy within the country as the same will render the Commission improperly constituted, thus negating its ability and competence to conduct the forthcoming general election on August 9, 2022.
 - c. The Constitution has bestowed upon the chairperson of the Commission with specific functions that only the holder of the said office can discharge to wit the declaration of results of the election of the President and Deputy President.
 10. The totality of the following is to render the Petition and the attendant Application a non-starter, incompetent, frivolous, vexatious, scandalous and an abuse of the court process amenable only to one outcome; Dismissal with costs.
8. The replying affidavit reiterated the objections raised in the PO.
 9. I have given due consideration to the Petition, the responses, the parties' respective submissions as well as the authorities cited. The issues that fall for determination are:
 - i. Whether the Court has jurisdiction to entertain the Petition and grant the reliefs sought.
 - ii. Whether there is a vacuum in Parliament.
 - iii. What this Court can direct the 1st Respondent to appoint a deputy returning officer for the presidential election.
 10. The law on preliminary objections is well settled. A preliminary objection must be raised on a pure point of law. In the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696*, Law, JA rendered himself thus:

[A] preliminary objection consists of a 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.

Sir Charles Newbold, P added the following:

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.



Whether the Court has jurisdiction to entertain the Petition and grant the reliefs sought

11. The Petitioner seeks a declaration that the 1st Respondent is unfit for his functions as the Chairperson of Independent Electoral and Boundaries Commission (IEBC) and as the Returning Officer for Presidential elections. On their part, the Respondents contended that what the Petitioner seeks falls squarely within the provisions of Article 251 of the Constitution of Kenya, 2010 and that he ought to have petitioned Parliament. The Petitioner is thus seeking relief from an institution that neither has jurisdiction to entertain his concerns nor powers to grant the reliefs sought.
12. The 1st Respondent is a member and chairperson of the IEBC, an independent commission established under Article 88. His removal must therefore be in accordance with the procedure stipulated in the Constitution. The removal of a member of IEBC from office is stipulated in Article 251 which provides in part:
 - (2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.
 - (3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.
 - (4) On receiving a petition under clause (3), the President—
 - (a) May suspend the member or office holder pending the outcome of the complaint; and
 - (b) Shall appoint a tribunal in accordance with clause (5).
 - (5) The tribunal shall consist of—
 - (a) A person who holds or has held office as a judge of a superior court, who shall be the chairperson;
 - (b) At least two persons who are qualified to be appointed as High Court judges; and
 - (c) One other member who is qualified to assess the facts in respect of the particular ground for removal.
 - (6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.
 - (7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.
13. It is evident that Article 251 provides an elaborate procedure for removal of a member of an independent commission. Any person who wishes to have a member of a commission removed from office is required to present a petition to the National Assembly, setting out the alleged facts constituting the grounds upon which the removal is sought. The National Assembly shall, upon being satisfied that the petition discloses a ground, then forward the petition to the President who will in turn appoint a tribunal. After investigating the matter, the tribunal shall report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days. There is nothing in Article 251, that to suggest that this Court has any role in the removal of a member of an independent constitutional commission such as the 1st Respondent.



14. In *Samuel Clinton Elijah v Wafula Chebukati; Independent Electoral and Boundaries Commission & another (Interested Parties) [2021] eKLR*, Ong’udi, J upheld a preliminary objection on grounds similar to the grounds herein and had this to say:

27. The petitioner wants this court to find the respondent guilty of all the above and make declarations. What next after the declaration? The *Constitution* has provided for a clear forum where such complaints should be directed under Article 251. Complaints on the violation of the *Constitution* and the Law is part of what forms the terms of reference to the National Assembly, as outlined under Article 251.

30. This court will not usurp that power of the National Assembly by restricting itself to violations of the *Constitution* when a reading of the petition clearly shows that the petitioner is accusing the respondent of incompetence, lack of leadership and integrity issues. Let him place all his complaints before the National Assembly which will then act under the provisions of Article 251 of the *Constitution*.

31. The upshot is that the preliminary objection raised has merit. I find that this court is not seized with the jurisdiction to handle this matter.

15. Further, Courts have time and again stated that where a clear procedure for redress has been provided by law, such procedure must be followed to the letter. One such case is *Speaker of the National Assembly v James Njenga Karume [1992] eKLR* where the Court of Appeal stated:

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

16. Additionally, the *Constitution* has made clear provisions of separation of powers between the 3 arms of government namely, the Legislature, the Executive and the Judiciary, ensuring that none of the co-equal arms of government encroach on the authority or functions of the others. In the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment)* a 3-judge bench of this Court considered this principle of separation of powers in relation to the judiciary and the legislature, and observed as follows:

63. In answering these constitutional questions, it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the Courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others.

17. Article 93(2) provides that the National Assembly shall perform its functions in accordance with the *Constitution*. Similarly, under Article 129(1) the President shall exercise executive power in accordance with the *Constitution*. In seeking orders for removal from office of the 1st respondent, the Petitioner is asking this Court to usurp the clearly stated authority and functions of both the National Assembly and the President. This is something our Constitution cannot countenance.



18. Accordingly, I find that this Court lacks the jurisdiction to entertain the Petition and to grant the orders sought.

Whether there is a vacuum in Parliament

19. The Petitioner stated that he moved to this Court because there is a vacuum in the national assembly. It is the Petitioner's case that the dispute herein has occurred outside the life of the National Assembly. Accordingly, this Court has powers to save the country's constitutional democracy and act in the face of an insurmountable threat. It was further submitted that the removal of constitutional office holders was made subject to parliamentary authority to secure their tenure of office. The requirement further bolstered separation of powers. The Petitioner argued that it however never intended to give a permanent seal of immunity to office holders away from the torch of judicial intervention.

20. The National Assembly is established under Article 93(1) which provides:

There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.

21. The term of the National Assembly as one of the 2 Houses of Parliament is stipulated in Article 102 as follows:

(1) The term of each House of Parliament expires on the date of the next general election.

22. The date of the general elections was August 9, 2022. At the time of filing the Petition herein dated July 28, 2022 therefore, the term of the National Assembly had not expired. There was no vacuum as claimed by the Petitioner. In light of this, the Petitioner ought to have filed the Petition in the National Assembly as clearly stipulated under Article 251.

Whether this Court can direct the 1st Respondent to appoint a deputy returning officer for the presidential election.

23. It is the Respondents' submission that there is no legal requirement or provision for the appointment and gazetting of a deputy returning officer for the presidential election. Further, that under law, it is only the chairperson of the IEBC who has the constitutional mandate of performing the duties of a returning officer for the presidential election. Reliance was placed on the case of *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR where Mwita, J stated:

60. In my respectful view, and from the reading of the Constitution, this is not possible. Ordinarily, the vice chairperson would perform certain minimal administrative functions in the absence of the chairperson. That would not however entitle him/her to assume the full duties and perform critical functions including constitutional mandate of the Chairperson when he does not meet the qualifications to be chairperson, and has not been appointed in accordance with the Constitution. When the Constitution provides that chairperson be appointed in a particular manner, there can be no shortcut but to stick to the constitutional dictates. An appointment done in any other manner would be unconstitutional.

24. The issue before the Court in that case was the Elections Law Amendment Act, 2017 which inter alia amended to Section 2 of the IEBC Act which introduced a new definition for the chairperson of IEBC to include the vice chairperson and a member elected by the commissioners who would then perform all the duties of the chairperson. The Court stated such commissioner so appointed would not be entitled to assume the full constitutional mandate of the chairperson. This is because such commissioner would not have been appointed in accordance with the Constitution. The Court



found the amendment to be unconstitutional as the Constitution makes very specific provisions for appointment and qualifications of the chairperson of IEBC.

25. In the present case, the issue before the Court is not appointment of chairperson but a deputy returning officer. The Petitioner contended that the Respondents have appointed and gazetted returning officers for constituency and gubernatorial elections but no such appointment is made for deputy returning officer for the presidential election. The 1st Respondent being a mortal person could fall sick or die. What then would happen on the day he is to announce results of the presidential election as required by Article 138(10) and Section 39 of the Elections Act? The Petitioner relied on the case of TN Seshan v Union of India & Others (1995) where it was submitted that the Supreme Court of India added 1 more commissioner to the election commission saying that 2 heads were better than one, especially in such an important and vital entity.

26. I have carefully looked at the said decision. The Court stated:

The concept of plurality is writ large on the face of Article 324, clause (2) whereof clearly envisages a multi-member Election Commission comprising the CEC and one or more ECs. Visualising such a situation, clause (3) provides that in the case of a multi-member body the CEC will be its Chairman. If a multi-member Election Commission was not contemplated where was the need to provide in clause (3) for the CEC to act as its Chairman? There is, therefore, no room for doubt that the Election Commission could be a multi-member body. If Article 324 does contemplate a multi-member body, the impugned notifications providing for the other two ECs cannot be faulted solely on that ground.

27. My understanding is that the Court was dealing with the question of having a multi-member election commission consisting of the Chief Election Commissioner as chairman, and other Election Commissioners. The issue before the Supreme Court of India is very different from what is before this Court, namely appointment of a deputy returning officer for the presidential election. As such, the cited authority is not helpful.

28. The Petitioner is concerned about a situation where the 1st Respondent would be unable to perform his duties under Article 138(10) which provides for the declaration of the result of the presidential election by the chairperson. Section 7A of the Independent Electoral and Boundaries Commission Act provides as follows:

1. The office of the chairperson or a member of the Commission shall become vacant if the holder —
 - a. Dies.
 - b. resigns from office by notice in writing addressed to the President; or
 - c. is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.
2. The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.
3. Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).

29. Parliament made very clear provisions as to what is to happen in the event of a vacancy in the office of the chairperson. Appointment of a deputy returning officer is not envisaged in the Constitution or in



the Act. Indeed, the chairperson of the IEBC is not referred to as the returning officer of the presidential election in the law. Accordingly, this Court lacks the jurisdiction to issue a mandatory order requiring the 1st Respondent to immediately appoint and gazette a deputy returning officer for the presidential election slated for August 9, 2022, a position unknown in law.

30. In the end and in view of the foregoing, I uphold the Preliminary Objection dated August 1, 2022 with the result that the Petition dated July 28, 2022, is hereby dismissed. This being a matter filed in the public interest, I make no order as to costs.

DATED AND DELIVERED IN NAIROBI THIS 30TH SEPTEMBER 2022

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M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the Respondents

..... Court Assistant

