



**Juma v ODM National Elections Board & 4 others (Petition
40 of 2022) [2022] KEHC 13041 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 40 OF 2022
OA SEWE, J
SEPTEMBER 23, 2022
IN THE MATTER OF ARTICLES 2, 10, 13, 177, 193 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE POLITICAL PARTIES ACT
AND IN THE MATTER OF THE ORANGE DEMOCRATIC
MOVEMENT PARTY ELECTION AND NOMINATION RULES
AND
IN THE MATTER OF THE PARTY NOMINATION LIST FOR
MEMBERS OF THE COUNTY ASSEMBLY FOR MOMBASA
COUNTY
BETWEEN
DENNIS OKONG’O JUMA PETITIONER
AND
ODM NATIONAL ELECTIONS BOARD 1ST RESPONDENT
REGISTRAR OF POLITICAL PARTIES 2ND RESPONDENT
SPEAKER OF THE COUNTY ASSEMBLY 3RD RESPONDENT
ORANGE DEMOCRATIC MOVEMENT 4TH RESPONDENT
INDEPENDENT AND ELECTORAL BOUNDARIES COMMISSION 5TH
RESPONDENT**



RULING

1. The petitioner herein is a resident of Mombasa and a member of the Orange Democratic Movement. At paragraph 7 of his Petition, he averred that, at all material times, he was eligible for nomination to the position member of the county assembly in Mombasa. His complaint was that, on July 27, 2022 or thereabout, the Independent Electoral and Boundaries Commission (IEBC) published the names of the nominees to the various county assemblies and it came to his notice that some nominees slated for nomination under the Orange Democratic Movement party (ODM) were neither members of ODM nor residents of Mombasa; and therefore did not fall under any of the categories envisaged in the nomination rules by either the IEBC or ODM. The petitioner averred that it came to light that the names of those who merited nomination and whose names were on the party list as representing special groups such as persons living with disabilities, youth, women and marginalized persons, were arbitrarily replaced without the input of stakeholders.
2. Accordingly, the petitioner approached the court for relief pursuant to articles 2, 10, 13, 177, 193 and 260 of the Constitution seeking the following orders;
 - (a) A declaration that the action by ODM of replacing the nominees for appointment as members of the Mombasa county assembly was illegal wrongful and violates the constitutional rights of the persons earlier nominated;
 - (b) A declaration that the substitution of the names of persons initially nominated with other persons without following due process amounts to discrimination;
 - (c) Declaration that gazette of any person other than the ones whose names were published on July 27, 2022 is null and void.
 - (d) That costs of the petition be provided for.
3. Contemporaneously, the petitioner filed the notice of motion dated September 2, 2022 seeking the following orders:
 - (a) that pending the hearing and determination of the petition, the court be pleased to issue conservatory orders restraining the respondents, their agents, employees and/or servants or any other person acting on their instructions from publishing in the Kenya gazette names of any nominee for the position of member of the county assembly in the county of Mombasa;
 - (b) That pending the hearing and determination of the application the court be pleased to issue conservatory orders restraining the 1st respondent from changing the names of nominees for member of the county assembly Mombasa as published by the 4th respondent on July 27, 2022;
 - (c) That costs of the application be provided for.
4. In response to that application, the 1st and 4th respondents filed a notice of preliminary objection dated September 2, 2022 which is the subject of this ruling, challenging the jurisdiction of the court to hear either the application or the petition on the following grounds:
 - (a) The court is not an election court and therefore lacks the jurisdiction to hear the dispute touching on the election, by way of nomination to the county assembly of Mombasa;
 - (b) The orders sought challenge the validity of the nominations of persons who had been gazetted; and the orders sought, if granted would amount to nullification of election of the nominated



persons which is the province and jurisdiction of the election court under section 75(1A) of the *Elections Act*;

- (c) The true character of the petitioner's cause, despite being disguised as a constitutional petition, is in fact an election petition, questioning the validity of nomination of elected members of the county assembly of Mombasa.
5. In addition to the issue of jurisdiction, the 1st and 4th respondents contended that the orders sought in the petitioner's notice of motion have been overtaken by events; that the petitioner has not met the legal threshold for granting of the orders sought; and that the orders sought in both the Petition and the application will affect the nominated persons who are not parties to this suit. It is my considered view however, that these are issues touching on the merits of the application and therefore do not qualify for consideration as preliminary points.
6. Mr. Oluga, learned counsel for the 1st and 4th respondents, urged the matter before me and underscored the argument that, since the petition and the interlocutory application filed herein by the petitioner seek to challenge the nomination of certain persons by the 1st and 4th respondents, the matter is in effect an election petition and ought therefore to have been referred to an election court as envisaged by section 75(1A) of the *Election Act*. He relied on the Supreme Court case of *National Rainbow Coalition (NARC) Kenya v Independent Electoral and Boundaries Commission* [2022] KESC 6 (KLR). He also relied on article 50 of the *Constitution* for the proposition that, in so far as the orders sought will affect persons who are not parties to this petition and who have not been given an opportunity to be heard, the petition is untenable. Mr. Oluga further urged the court to find that the petition and the application have both been overtaken by events.
7. The submissions of Mr. Oluga were echoed by both Mr. Tajbhai and Mr. Ndege, counsel for the other respondents. They reiterated their common stand that since this is not an election court for purposes of section 75(1A) of the *Election Act*, it has no jurisdiction to entertain the petition. Mr. Tajbhai also pointed out that there exist other dispute resolution mechanisms which the petitioner skipped before approaching this court. He posited that the petitioner ought to have first gone to the ODM dispute resolution board; and thereafter to the political parties' dispute tribunal before seeking the intervention of the court. On his part, Mr. Ndege relied on Section 34(1) of the *Elections Act* and urged the court to find that it is not clothed with the requisite jurisdiction to entertain the matter. In his view, the orders prayed for in the petitioner's application as couched are so wide that they have the potential of affecting persons who have nothing to do with the ODM party, and who have not been given an opportunity to respond to the subject application.
8. In response to the preliminary objection, the petitioner insisted that he approached the right court in defence of the Constitution as the issues complained of affect not only the members of ODM party in Mombasa but also other marginalized Kenyans countrywide. He pointed out that before coming to court he invoked the internal party machinery without success. He therefore urged the court to dismiss the preliminary objection and to afford him an opportunity to prosecute the application and the petition for a merit decision.
9. In *Mukisa Biscuit Company v West End Distributors Limited* [1969] EA 696}}, in which it was held that a preliminary objection consists of:
- “...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”

10. [10] In terms of jurisdiction, the enduring principle was laid down in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 thus:

“...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

11. The Supreme Court of Kenya also expressed itself on the issue of jurisdiction in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, as hereunder:

“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 to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. *Nor* can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

12. The main argument advanced herein by learned counsel for the respondents is that, since the petition seeks to challenge the nomination by ODM party under the Party List, this dispute ought to have been referred to the election court for purposes of section 75(1A) of the *Election Act*; and therefore that this court, sitting as a constitutional court, has no jurisdiction to entertain the same. The aforementioned provision states that:

“A question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

13. Accordingly, what comes to the fore is the question as to the true character of the petition. Needless to say that nomination for purposes of party lists is markedly different from pre-election nomination for purposes of the exercise of universal suffrage at a general election in so far as such nomination, ipso facto, constitutes an election. The Supreme Court had occasion to consider the issue in *Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* and held thus:

“It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition.’



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 view, carries the risk of opening up a parallel electoral dispute resolution regime. Such an event would serve not only to complicate, but ultimately 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.

This decision and others before and after it, like *Hassan Ali Jobo & Another v Suleiman Shabbal & 2 Others Sup Ct Petition No. 10 of 2014* and *Independent Electoral and Boundaries Commission v Jane Cheperenge & 2 Others, Petition No. 5 of 2016* [2018] eKLR, have all firmly settled the law, that once a gazette notice, signifying the decision of the electorate or, like here, the nominating political party, has been issued, only an election court has the powers to disturb that status quo.”

14. Similarly, in the NARC (Kenya) Case (supra), the Supreme Court was resolute in its finding that:

“...We could not agree more with the respondent’s submissions before us and the conclusions reached by the two courts below that the true character of the appellant’s cause, despite being disguised as a constitutional petition, was in fact an election petition, questioning the validity of nomination of elected members of the county assemblies who had been gazetted; and that such challenge could only be commenced in the election court, in this case, under section 75(1A) of the Elections Act.”

15. In the premises, I have no hesitation in holding that this court lacks the requisite jurisdiction to entertain the petition. The preliminary objection is hereby sustained with the result that the petition, including the notice of motion dated September 2, 2022, is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022.

OLGA SEWE

JUDGE

