



**Mutuma v Independent Electoral and Boundaries Commission (Constitutional  
Petition E016 of 2022) [2022] KEHC 12984 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 12984 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E016 OF 2022**

**EM MURIITHI, J**

**SEPTEMBER 21, 2022**

**IN THE MATTER OF ARTICLES 1, 2, 10, 19, 20, 21, 22, 23, 27, 28,  
41, 47, 48, 50, 90, 88, 177, 232 AND 236 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES 2013)**

**AND**

**IN THE MATTER OF ARTICLES 2, 3, 4, 7, 13 AND 19 OF THE AFRICAN CHARTER  
ON HUMAN RIGHTS AND PEOPLE'S RIGHTS AND OTHER PROVISIONS THEREOF**

**IN THE MATTER OF INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION ACT, NO. 19 OF 2011**

**AND**

**IN THE MATTER OF POLITICAL PARTIES ACT OF 2011 SECTIONS 34, 35, 36 AND 37**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015**

**AND**

**IN THE MATTER OF PERSONS LIVING WITH DISABILITIES ACT 14 OF 2013**

**BETWEEN**

**THURANIRA SALESIO MUTUMA ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... RESPONDENT**



## RULING

1. The application before the court is dated 16/9/2022 by the petitioner seeking an array of orders to wit:
  1. Spent.
  2. A declaration that the respondent discriminated against the persons with disabilities shortlisted by political parties that participated in the 2022 general elections in Meru County in the published gazette notice No. 10712 Vol. CXXV-NO. 186
  3. This honourable court be pleased to issue an order of certiorari quashing the respondent's published gazette notice No. 10712 Vol. CXXV-NO. 186 schedule 1.
  4. This honourable court be pleased to issue a conservatory order to prohibit and/or restrain the Clerk of County Assembly of Meru from presiding over the swearing in of the published marginalized persons in gazette notice No.10712 Vol. CXXV-NO. 186 schedule 1.
  5. This honourable court be pleased to issue a conservatory order to prohibit and/or restrain the Clerk of County Assembly of Meru from induction of the published marginalized persons in gazette notice No.10712 Vol. CXXV-NO. 186 schedule 1.
  6. This honourable court be pleased to issue an order of certiorari directing the proper definition of "marginalized" persons according to the constitution.
  7. This honourable court be pleased to declare that the respondent violated the Persons with Disabilities rights to Civil and Political representation in the county Assembly of Meru.
  8. This honourable court be pleased to issue an order to compel the respondent to publish a Corrigenda to declare new list of special seats that include a male and a female for persons with disabilities.
2. The application is supported by the grounds on the face of it and the supporting affidavit of the petitioner sworn on even date. He avers that the respondent used the word "marginalized" with a lot of ambiguity thus discriminating against Persons With Disabilities (henceforth called PWD) shortlisted by political parties that participated in the 2022 general elections in Meru County. The respondent duly invited political parties *vide* gazette Notice No. 6378 Vol. CXXIV-No. 101 to submit lists of special seats nominees for the county assemblies of the 47 counties in line with section 36(4) of the *Elections Act*. The respondent *vide* gazette Notice No. 9952 Vol. CXXIV-No. 170 declared persons elected as Members of County Assemblies. On 9/9/2022, the respondent *vide* gazette Notice No. 10712 Vol. CXXC-No. 186 published a list of nominated members to the county assemblies. The said gazette notice had a schedule for nomination of marginalized members to the county assemblies and another one for nomination of gender top up to the county assemblies. It is that gazette notice that has necessitated these proceedings. The petitioner's contention is that, the said notice was disadvantaged PWD as it did not provide a slot for them.

### Analysis and Determination

3. In his oral submissions in court, the petitioner has urged the court to grant prayers 4 and 5 of the application.
4. Article 177 of the *Constitution* provides as follows: - "(1) A county assembly consists of (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on



the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year; (b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender; (c) the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and (d) the Speaker, who is an *ex officio* member. (2) The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90. (3) The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward. (4) A county assembly is elected for a term of five years.”

5. The sole issue for determination is whether the petitioner has met the threshold for grant of the conservatory orders sought. This threshold was established by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows: “[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

6. The respondent invited political parties to submit lists of special seats nominees for the member of county assemblies. The respondent, *vide* the impugned Gazette Notice picked 2 youths, one special interest person and one person from marginalized groups. Section 36(1) (f) of the *Elections Act* provides for allocation of special seats as follows: “(1) A party list submitted by a political party under — (f) Article 177(1) (c) of the *Constitution* shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group.” Section 36(8) of the *Elections Act* provides that, “For purposes of Article 177(1) (c) of the *Constitution*, the Commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.” It is clear that the respondent did not include a name of a PWD in the impugned Gazette Notice.

This court therefore finds that a *prima facie* case has been made out for grant of a conservatory order, because the respondent contravened the express provisions of Section 36(1) (f) (8) of the *Elections Act*, in not including a PWD in the impugned Gazette Notice.

7. Since majority of the orders sought are directed at the Clerk of County Assembly, who is not a party to this case, and since the Political parties listed in the impugned Gazette Notice, are key players in this proceedings, because they are the custodians of the original lists of applicants for nomination, this court, invokes the provisions of Rule 5(d) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, and joins the said Clerk of County Assembly and Devolution Empowerment Party, Jubilee Party, Party of National Unity, United Democratic Alliance (the political parties listed in the impugned Gazette Notice) as parties to this case. Rule 5(d) provides as follows: “The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties— (d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just— (i) order that the name of any party improperly joined, be struck out; and (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.”



As the persons nominated under the marginalized list are affected by the orders sought there are similarly persons “who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter,”

8. Section 7A of the [County Governments Act](#) provides that

“(1) A county assembly shall not be fully and duly constituted for the first sitting after a general election unless all the members provided for under paragraphs (b) and (c) of Article 177(1) of the [Constitution](#) have been duly nominated and their names published in the Gazette.

(2) Sub-section (1) shall not apply where the nomination of a member of a county assembly under paragraphs (b) and (c) of Article 177(1) of the [Constitution](#) is the subject of a court order stopping or otherwise pending the nomination of the member.

(3) Despite sub-section (1), a county assembly shall be deemed to be fully and duly constituted for first sitting notwithstanding the death, on or before the date of the first sitting of the county assembly, of a member nominated under paragraphs (b) and (c) of Article 177(1) of the [Constitution](#).”

9. In the end, this court finds the application dated 16/9/2022 merited. The court also notes that the grant of the orders sought will not affect the constitution of the County Assembly for the first sitting, in accordance with section 7A (2) of the [County Governments Act](#).

### **Final Orders**

10. Accordingly, for the reasons set out above, the court makes the following orders:

1. A conservatory order is hereby issued prohibiting and/or restraining the Clerk of County Assembly of Meru from presiding over the swearing in of the published marginalized persons in gazette notice No.10712 Vol. CXXV-NO. 186 schedule 1(Meru County-012- Marginalized list).
2. For avoidance of doubt, this order does not affect the swearing in of the elected members of the County Assembly of Meru whose swearing in shall proceed as the Assembly is, despite this order, properly constituted by virtue of section 7A (2) of the [County Governments Act](#).
3. The petition together with the application dated 16/9/2022 be served upon the respondent, the Clerk of the County Assembly and the Political Parties listed in Gazette Notice No.10712 Vol. CXXV-NO. 186 schedule 1(Meru County-012- Marginalized list) together with the persons shown nominated thereunder, to enable them file and serve their respective responses before close of business tomorrow the 22<sup>nd</sup> September 2022.
4. The matter shall be heard on Friday 23/9/2022 at 10.00 am.
5. Costs in the cause.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**



Applicant in Person.

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