



**Khaemba v Mutua & 2 others (Election Petition E001 of 2022)  
[2022] KEHC 15532 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
ELECTION PETITION E001 OF 2022**

**MM KASANGO, J**

**NOVEMBER 22, 2022**

**N THE MATTER OF ELECTION FOR THE MEMBER OF NATIONAL  
ASSEMBLY FOR KIMILILI CONSTITUENCY BUNGOMA COUNTY**

**BETWEEN**

**BRYAN MANDILA KHAEMBA ..... PETITIONER**

**AND**

**DIDMUS WEKESA BARAZA MUTUA ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**OMONDI GEORGE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me for my consideration is an interlocutory application by way of Notice of Motion dated 30<sup>th</sup> September, 2022. The application is filed by the 1<sup>st</sup> respondent, Didmus Wekesa Baraza Mutua. The prayers in that application are that:-
  - a. The petitioner’s petition dated 31<sup>st</sup> August, 2022 and the supporting affidavits filed therein be struck out in their entirety;
  - b. In the alternative to (a) above paragraphs 15–23 of the petition and paragraph 15–33 of the petitioner’s supporting affidavit (deponed on 31<sup>st</sup> August, 2022, and all annexures thereto be struck out;
  - c. In the alternative to (a) & (b) above, the annexures marked as “BMK-6” appearing in the petitioner’s (Titled ‘Report of the examining officer (pages 34-39 of the petitioner’s pleadings) be struck out from the record and all reference thereto be similarly struck out;



- d. The 1<sup>st</sup> respondent awarded the costs of this application and petition.
2. The citizenry of Kimilili Constituency, like many other Kenyans, on the 9<sup>th</sup> of August 2022 participated in the General Election. In that election, they elected the 1<sup>st</sup> respondent as their representative at the National Assembly.
  3. This petition by Bryan Mandila Khaemba seeks declaration the election of the 1<sup>st</sup> respondent as a Member of National Assembly for Kimilili Constituency on 9<sup>th</sup> August, 2022 was not conducted in accordance with the principles laid down in *the Constitution* and in written law; a declaration the 1<sup>st</sup> respondent was not validly elected as Member of National Assembly, Kimilili Constituency; a declaration that an election malpractice of a criminal nature may have been committed by 1<sup>st</sup> respondent in using a public resource to campaign for the purpose of the election of Member of National Assembly, Kimilili Constituency and in shooting and killing Brian Odinga Olunga (Deceased); a direction that the order declaring election malpractice of a criminal nature be transmitted to the Director of Public Prosecutions (DPP) for the purpose of investigations; and an order for conduct of a fresh election of Member of National Assembly, Kimilili Constituency by the 2<sup>nd</sup> respondent, the Independent Electoral and Boundaries Commission.
  4. The petitioner pleaded that he “does not in any way challenge the conduct of the elections by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents” but that rather, he the petitioner impugns the election results of Member of National Assembly, Kimilili Constituency on the conduct of the 1<sup>st</sup> respondent, that is, that the 1<sup>st</sup> respondent, “without any form of provocation, drew his pistol and shot the petitioner’s aide, Brian Odinga”, and further, that the 1<sup>st</sup> respondent used the Constituency Development Fund (CDF) car in campaigns for position of Member of National Assembly, Kimilili Constituency.
  5. Although the petitioner pleaded that the 3<sup>rd</sup> respondent, the IEBC Returning Officer, Kimilili Constituency recorded “that there were threats during the vote”, the petitioner did not suggest in his pleading the 1<sup>st</sup> respondent was the source of that said threat.
  6. Petitioner in his affidavit in support of the petition dated 31<sup>st</sup> August, 2022 deponed that the aforestated shooting of his aide was investigated by police where after, the 1<sup>st</sup> respondent was charged with the offence of murder before the Kakamega High Court, being Criminal Case No. E037 of 2022.
  7. The 1<sup>st</sup> respondent in his affidavit in support of the application under consideration avowed that the petitioner in the guise of an election petition, had “gone all out to prosecute various criminal cases that are active matters in other courts as against” the 1<sup>st</sup> respondent in violation of the principles of natural justice, the Bill of Rights and rules of pleading. The 1<sup>st</sup> respondent accordingly stated the petition was an abuse of court process.
  8. He further deponed that he was charged with the offence of the murder of Brian Odinga Olunga (deceased) to which, he pleaded not guilty. He is awaiting his trial on that criminal charge to commence. That, for this Election Court to conduct a trial of an election offence on the same exact particulars as the criminal charge pending before the High Court at Kakamega, will require him to answer to the charges he has already pleaded not guilty to. Such a trial by the election court of the alleged election offence that is alive in the criminal court will not only embarrass the criminal court, but will additionally prejudice and compromise his defence before that court. That the prayer in the petition for the election court to make findings on the shooting of Brian Odinga Olunga (deceased) and report to DPP is redundant since the petitioner filed a complaint with the police which resulted in the 1<sup>st</sup> respondent being arrested and charged with the offence of murder in the criminal court.



9. The 1<sup>st</sup> respondent further deponed that this Court lacks jurisdiction to determine an alleged pre-election violation of the IEBC Code of Conduct, and that the jurisdiction of the same lay with IEBC and that the jurisprudence over such allegations is that, party who fails to pursue pre-election dispute through proper forum, such a dispute cannot be a ground to support an election petition.
10. The 1<sup>st</sup> respondent by his submission stated that the present proceedings before the election court are founded on the same facts as those in the criminal court and that this is demonstrated by the petitioner seeking to rely on his statement recorded in support of the criminal complaint made to the police regarding the murder offence; that the petitioner moreover seeks to adduce before this election court, the Postmortem Form and the Firearm Examination Report, the Ballistic Report.
11. 1<sup>st</sup> respondent cited Article 50(1) of *the Constitution* which provides that every person has a right to have any dispute that can be resolved by the application of law decided in fair and public hearing before a court or an independent impartial tribunal or body; Article 50(2) which provides rights to an accused person such as presumption of innocence, right to remain silent, right to refuse to give self-incriminating evidence; and Article 50(4) which provides evidence obtained in violation of any right or fundamental freedom in the Bill of Rights shall be excluded, if such admission of that evidence would render the trial unfair or would be detrimental to administration of justice. 1<sup>st</sup> respondent submitted that the admission of the allegation stated at paragraph 15 to 19 of this petition: which paragraphs plead that the petitioner arrived at the polling station at Chebukwabi Primary School in the company of his driver and the deceased, and as they began to drive away, the 1<sup>st</sup> respondent impeded their driving away and shot at the deceased; would embarrass the criminal court and would lead the 1<sup>st</sup> respondent to give self-incriminating evidence and would prejudice whatever defence he intends to raise at the murder trial. The 1<sup>st</sup> respondent encapsulated that argument in his submissions as follows:-

“A question that should be alive to the court should be considering that the 1<sup>st</sup> respondent is subject to an ongoing murder trial founded on the same facts that are in issue herein can be compelled to give incriminating evidence or give any evidence that will compromise his defence in the criminal court?”

12. To respond to that rhetorical statement, 1<sup>st</sup> respondent submitted that the 1<sup>st</sup> respondent's protection available under Article 50(2) is likely to be prejudiced if the trial before the election court on the alleged offence of shooting the deceased does proceed. This he stated is because the evidence to prove that offence is extricable linked to the evidence to be adduced in the criminal trial. Further, that the petitioner's aim to rely at the hearing of this petition on the postmortem report and ballistic report without calling their makers, will deprive the 1<sup>st</sup> respondent his right to challenge the evidence contained in those reports. The 1<sup>st</sup> respondent also submitted that the petitioner's reliance on his statement recorded when he filed his criminal complaint with the police would risk the finding of the election court influencing the criminal court to the prejudice of the 1<sup>st</sup> respondent.
13. The 1<sup>st</sup> respondent in his discourse on the amendment to Section 87 of the Election Act submitted that, the election court can no longer make a finding of guilt of an election offence but that the Section requires the election court to make a finding whether the election offence 'may have occurred'. That such a finding in the light of the fact the petition does not challenge the conduct of the election would not lead to the election court directing IEBC not to issue a certificate of election to one elected in political office as provided in Section 80(4)(b) of the Election Act. That Section stipulates that a Certificate of Election would be issued to one whom the election court has made a finding he/she did to commit the election offence. I understand 1<sup>st</sup> respondent to argue that Certificate of election as



provided under Section 80(4)(b) of the Election Act can only be granted when the winner of elections is found not to “have committed an election offence.”

14. In support of that argument, 1<sup>st</sup> respondent submitted thus: -

“We submit so because the phrasing ‘may have occurred’ does not connote any finding of guilt/proof of an election offence whereas under Section 80 of the Election Act, a certificate of election cannot be issued if a person is found to have committed an election offence.”

15. 1<sup>st</sup> respondent cited the decision before the Court of Appeal in the case *Moses Masika Wetangula Vs. Musikari Nazi Kombo & 2 others* (2014) eKLR where the court held that, the Law as it then was, required allegations of election offence be proved beyond reasonable doubt. That holding was affirmed by the Supreme Court in the appeal of that case. The legislative reform of Section 87 of the Election Act requires the election court to make a finding that election offence may have been committed. 1<sup>st</sup> respondent therein submitted that, “an election court no longer has jurisdiction to annul election on account of possible commission of an election offence per se, without a challenge of the numbers”, as is the case at bar.

16. 1<sup>st</sup> respondent referred to the other allegations in the petition where the petitioner pleaded that 1<sup>st</sup> respondent branded a government vehicle with the colours of the political party of UDA, and also pleaded 1<sup>st</sup> respondent placed thereon his portrait, whose number plates were changed and which vehicle was purchased with CDF funds. Petitioner’s pleadings are that 1<sup>st</sup> respondent used the said vehicle during the campaign leading to the general elections on 9<sup>th</sup> August, 2022. 1<sup>st</sup> respondent reproduced the petitioner’s deposition as follows:-

“... in late May, 2022, I saw the CDF Kimilili Constituency motor vehicle, double cabin pick-up, branded in UDA colours and the portrait of the 1<sup>st</sup> respondent and those of Dr. William Samoei Ruto in a campaign procession of the 1<sup>st</sup> respondent. The said motor vehicle is well known to me, as I am a resident to Kimilili Constituency. Its ordinary registration number was GK 948J but it was fitted with number plates reading KBS 798D which I verily believe was aimed at masking the fact that it was a government vehicle.”

17. Based on the petitioner’s own above deposition, 1<sup>st</sup> respondent submitted that the aforesaid allegation falls within the category of pre-election dispute. Reference was made of the Supreme Court’s decisions in the case *Summy Ndungu Waity V. Independent Electoral & Boundaries Commission & 3 others* (2019) eKLR, *Silverse Lisamula, Supreme Court Petition No. 30 of 2018* (2019) eKLR and *Mohamed Mohamad Vs. Ahmed Abdullahi Mohamad & 3 others: Ahmed Ali Muktar (Interested Party) Supreme Court Petition No. 7 of 2018* (2019) eKLR. The jurisprudence of these cases is that all pre-election disputes should be brought to either IEBC or Political Parties Dispute Tribunal (PPDT), whichever is applicable, and that the person who knew or ought to have known the facts forming the basis of pre-election dispute but fails to refer the dispute to the relevant forum which determines pre-election disputes is forbidden from making such a dispute the ground of an election petition before an election court.

18. In view of the above decision, 1<sup>st</sup> respondent submitted that the petitioner having known of the alleged pre-election violation 3 months prior to general election, he was barred from raising it before this Court.

19. On behalf of 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it was submitted that the alleged act of violence which resulted in the death of the deceased falls within the ambits of Section 11 of the *Election Offences Act* and accordingly, that this Court lacks jurisdiction to entertain that pleading more so, because the same



issues raised in this petition are the same issues before the criminal court in the murder trial. Further, in view of the fact that the conduct of the election of National Assembly representative for Kimilili Constituency is not questioned in this petition, the respondents prayed that the court does accede to the prayers of the 1<sup>st</sup> respondent's application and does strike out the petition.

20. The petitioner filed a replying affidavit dated 11<sup>th</sup> October, 2022 in response to the application. He faulted the application through that affidavit by disposing that the application fails to meet the general rule of striking out pleadings. Petitioner cited the case of Gerald Iha Thoya vs. Chiriba Daniel Chai & Another (2018) eKLR where Justice W. Korir (as he then was), stated thus:-

“64. Looking at the pleadings that were placed before the Election Court, I find that the Court acted in haste in striking out the Appellant's petition. Courts are tools of justice and for the courts to be perceived to be the guardians of justice, those who preside over cases should be slow in striking out cases hence denying the parties a chance to ventilate their grievances. When a court terminates a case on technicalities, the impression created is that the court is assisting the respondent to bury the claimant's evidence before the same can be put in the public domain.

65. A case should only be struck out where it is hopelessly defective, and no amount of panel beating can salvage it. The cry of the people of Kenya to the courts as communicated through *the Constitution* is: hear us. I therefore find that in the circumstances of this case the learned trial Magistrate did not exercise her discretion correctly and the Appellant's submission that his petition was erroneously terminated has merit.”

21. The petitioner submitted that he had presented a petition which is “very precise and particularized in its merit.” That to strike out the petition as sought by the 1<sup>st</sup> respondent, would run afoul of the provisions of Article 50(1) which confers on every person, the right to have any dispute resolved by application of law and is decided in a fair and public hearing.

22. Petitioner also relied on the decision of the Court of Appeal in the case D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & another (1980) eKLR where it was held that, courts should be cautious when considering an application to strike out pleadings. In the case it was stated viz: -

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial ...

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal...

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.”



23. Petitioner cited Section 193A of the Criminal Procedure Code in advancing the argument that same facts between the parties can give rise to different legal proceedings. Section 193A provides: -
- “Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
24. Petitioner relied on the Supreme Court decision in the case *Moses Masika Wetangula Vs. Musikari Kombo & 2 others* (supra) where the court stated:-
- “While the election court has the competence to look into offences that are criminal in nature, such a bribery and treating of voters, its inquiry on the relevant instances of election offence do not constitute a criminal trial with its dedicated procedures and safeguards ...”
25. According to the petitioner, the elements of murder charge are different from those of election offence of violence and therefore the 1<sup>st</sup> respondent can be charged with the two offences, the offence under Section 87 of the Election Act and the murder charge without the issue of double jeopardy arising. This argument was buttressed by reliance on provisions of Section 7 of the *Evidence Act* which provides: -
- “Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction are relevant.”
26. Petitioner submitted that one of the issues the election court will be called upon to determine at the trial is whether the election was free from violence. That accordingly, the evidence regarding the shooting of the deceased will be relevant and admissible.
27. The petitioner submitted the petition and the evidence to be offered in its support does not compel the 1<sup>st</sup> respondent to give self-incriminating evidence and that accordingly, cannot lead to double jeopardy.
28. On the allegation that the 1<sup>st</sup> respondent’s action of using government resources, the petitioner argued that the action amounted to undue influence and the election court therefore had jurisdiction.

### **Analysis and Determination**

29. Petitioner argued that the election court should be slow to strike out the petition unless it appears that the pleading is hopeless. Petitioner relied on the case *Gerald Iha Thoya Vs. Chiriba Daniel Chai & another* (2018) eKLR (supra). The portion of that decision the petitioner cited did not reveal that Justice W. Korir having stated the strictures under which an application for striking out pleadings should be considered, did proceed to uphold the trial court’s striking out of the amended election petition.
30. I am therefore of the view that, indeed election petition, just like any other pleadings, when it is hopelessly defective can be struck out. I also concur with the submissions of the petitioner, the court as with any other pleading, should approach such an application to strike out an election petition with caution and it should where justice demand, aim at sustaining a suit rather than terminating.
31. On the 9<sup>th</sup> of August, 2022, at the polling station of Chebukwabi Primary School, there was an unfortunate incident which led to the death of Brian Odinga Olunga (deceased). The 1<sup>st</sup> respondent



was charged with offence of murder of the deceased before the High Court at Kakamega. He pleaded not guilty and his trial is yet to commence.

32. This petition which challenges the validity of election of the Member of National Assembly for Kimilili Constituency is based on the grounds that, the election was not done in accordance with the principles laid out in *the Constitution* and written law in so far as the election was marred with violence and improper influence perpetrated by the 1<sup>st</sup> respondent; and that the 1<sup>st</sup> respondent engaged in election offences and illegal practices contrary to the law. The petitioner provided particulars of those violations by setting out the happenings at the polling station on 9<sup>th</sup> August, 2022 at 17.20 hours. I reproduce those particulars as follows:-

“I. Violence Perpetrated by the 1<sup>st</sup> Respondent

15. On 09/08/2022 at about 1720 HRS at Chebukwabi Primary School Polling Station of Code 0392231111003, the Petitioner had visited Chebukwabi Primary School Polling Station of Code 0392231111003 together with his driver namely Joshua Simiyu Wanjala and his aide Brian Odinga Olunga.
16. They found the 1<sup>st</sup> Respondent standing at the door of one of the polling streams and when (sic) saw them, he got into the polling room and sat down. The Petitioner proceeded to get into the room where the 1<sup>st</sup> respondent was, which was the second, since he had earlier in the morning voted in the first stream. The petitioner then walked out within two minutes of entering upon observing that everything was proceeding well.
17. The 1<sup>st</sup> respondent, without any form of provocation, followed the petitioner to his vehicle and ordered the people that he, the 1<sup>st</sup> respondent, was with to block the Petitioner’s motor vehicle from leaving the compound of the polling station.
18. The 1<sup>st</sup> respondent stood in front of the motor vehicle trying to stop the petitioner from leaving. He then walked towards the driver’s side and tried to forcefully snatch the ignition keys of the vehicle but the driver, Joshua Wanjala Nasokho blocked him. The 1<sup>st</sup> Respondent then went towards the co-driver’s side, drew his pistol and shot the Petitioner’s aide Brian Odinga Olunga on the forehead which subsequently led to his death.
19. The matter was reported to Kimilili Police station and upon investigations, the 1<sup>st</sup> respondent was charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code at the High Court at Kakamega.
20. In addition to the violence perpetrated by the 1<sup>st</sup> respondent at Chebukwabi Primary School Polling Station, the Presiding Officer Chebukwabi Youth Polytechnic Polling Station 2 reported that there were threats during the counting of the votes.”



33. In respect to the alleged offence of undue influence, this is what the petitioner pleaded: -

“ II. Undue Influence And Misconduct by the 1<sup>st</sup> Respondent

21. The 1<sup>st</sup> Respondent branded a government motor vehicle, registration number GK 948J bought using Constituency Development Fund in UDA Party colours and his portraits and used the said motor vehicle to campaign for the position of Member of National Assembly Kimilili Constituency. To hide its identity during his campaigns, the 1<sup>st</sup> respondent had changed its number plates to one bearing registration number KBS 709D.

22. The Petitioner avers that the use of the said motor vehicle, being a public resource, by the 1<sup>st</sup> respondent amounted to improper influence by contrary to the constitutional principle that elections should be free from improper influence and an election offence under Section 14 of the *Election Offences Act*.”

34. It is on those grounds and particulars that the following orders and reliefs in the petition spring from: -

- a. A declaration that the election of 09/08/2022 for Member of National Assembly, Kimilili Constituency was not conducted in accordance with the principles laid down in *the constitution* and in written law.
- b. A declaration the 1<sup>st</sup> respondent, Mutua Didmus Wekesa Barasa was not validly elected as Member of National Assembly, Kimilili Constituency in the election held on 09/08/2022.
- c. A declaration that an election malpractice of a criminal nature may have been committed by 1<sup>st</sup> respondent in using a public resource to campaign for the purpose of the election of Member of National Assembly, Kimilili Constituency and in shooting and killing Brian Odinga Olunga (Deceased).
- d. A direction that the order in c. above be transmitted to the Director of Public Prosecutions for the purpose of investigations.
- e. An order for conduct of a fresh election of Member of National Assembly, Kimilili Constituency by the 2<sup>nd</sup> respondent.”

35. The petitioner has impugned the aforesaid election “purely on the misconduct of the 1<sup>st</sup> respondent”, as set out in the above particulars. He does not, by any way challenge the conduct in the election of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. In his affidavit in support of the petition, the petitioner annexed a copy of his statement to the police following his criminal complaint, a copy of a letter written by him addressed to 3<sup>rd</sup> respondent dated 10<sup>th</sup> August, 2022, the postmortem report of the deceased; and a report by ballistic examiner and the exhibit memo form of Kimilili police station.

36. From the above document, it becomes clear that the allegation in this petition that the 1<sup>st</sup> respondent engaged in violence is based on the very facts as those of murder trial. This is clear from the fact the petitioner relies on his witness statement made to the police when the criminal complaint was filed. The petitioner further provided in this petition exhibits made in furtherance of the criminal trial.



37. The 1<sup>st</sup> respondent seeks to argue that, having already been charged with the offence of murder, the election court cannot proceed to hear the petition as it is premised on the same facts as the criminal trial. The petitioner argues that the right to fair trial afforded under Article 50(1) ‘cuts’ both ways and that the 1<sup>st</sup> respondent cannot use that provision to displace the petitioner’s dispute before the election court.
38. Nothing in *the Constitution* or in the written law per se prevents proceeding against a party whose actions amount to a criminal offence and also violates the electorate’s right to free and fair elections: that is, an election free from violence intimidation and improper influence. Such one can be prosecuted in the criminal court and can also be sued in the election court for such a court to determine whether an electoral malpractice of a criminal nature has occurred. The charge in the criminal court would be in respect to criminal act in contravention of written law and the inquiry under the Election Act would be on whether an electoral malpractice of a criminal nature occurred. The issue of electoral malpractice would be in respect to those acts that have directly affected the rights of the electorates which act impeded free and fair election. In that regard, I am wholly in agreement with the arguments and submissions of the petitioner.
39. In that respect, I rely on the holding in the case *Moses Masika Wetangula vs. Masikari Nazi Kombo* (supra) thus: -

“Based on the centrality of this right to our criminal justice system, Article 50(2) was enacted to afford every accused person, this non-derogable right. Although the principle of trial is a common thread in any judicial process, it bears certain essentials when the matter in question is one of a criminal nature. It bears emphasis that the electoral dispute resolution process is fundamentally distinct from criminal trial. While the proceedings before an election court are sui generis (neither criminal nor civil) criminal proceedings require the observance of certain pre-trial process with certain institutions of the State, such as the police and the Director of Public Prosecutions.

More importantly, the inquiry into the criminal conduct of an elected candidate transcends the interest of the accused/petitioner and bears upon that of the entire electorate.”

40. The latter part of that above quotation needs further consideration as it relates to this petition. The inquiry into the violence allegedly perpetrated by the 1<sup>st</sup> respondent must be shown to have violated or undermined the electoral rights of all or the majority of electorates of Kimilili Constituency.
41. I have reconsidered, over and over again the pleadings in the petition and my findings are that the same is absent of any allegations of the alleged violence having a bearing on the said electorates.
42. To reiterate, the petition clearly does not impugn the way the election was conducted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. The petitioner also at paragraph 16 of the petition indicates that on 9<sup>th</sup> August, 2022, he observed in the different streams at the Chebukwabi Primary School polling station and the process was proceeding well. This was at 17:20 Hrs. the alleged altercations and violence that is pleaded in the petition occurred outside the polling station. No mention whatsoever is pleaded how those alleged acts which by the petitioner’s own account occurred outside the polling station affected the rights of the electorates. The petitioner ought to have pleaded how, if at all, the alleged acts of violence affected the electorates. Such pleading ought to have been clear with specification. It is worth considering a passage



from the case of Fredrick Otieno Outa Vs. Jared Oduyo Okello & 4 others (2014) eKLR before the Supreme Court as follows: -

“The valuable verdict of the people at the polls must be given due respect and endure and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or on evidence which is of a shaky or prevaricating character. It is well settled that the onus lies heavily on the election petitioner to make out a strong case for setting aside an election. At the same time it is necessary to protect the purity and sobriety of the election by ensuring that the candidates do not secure the valuable votes of the people by undue influence, fraud, communal propaganda, bribery or other corrupt practices as laid down in the Act.”

43. The petitioner by his affidavit in support of the petition annexed a letter dated 10<sup>th</sup> August, 2022 which because of its relevance to my determination, I will reproduce as follows:-

“ 10<sup>th</sup> August, 2022

IEBC

Returning Officer

Kimilili Constituency

Dear Sir/Madam

RE: Murder Incident Report

Yesterday 9<sup>th</sup> August, 2022, at around 5 pm upon arrival I found Didmus Barasa in one of the polling stations. I entered the stream and saw the IEBC officials sorting out ballot papers in readiness for counting. I stayed there for 3 minutes then left and headed to my car. My aide and the driver also entered in the car and the driver started the exit.

However, Didmus Barasa rushed at the front and ordered his boys not to allow my car to leave that spot. When my driver started to drive away, Didmus Barasa took his pistol and shot at my aide by the name of Brian Olunga, who was at the co-driver's seat, on the forehead. We rushed him to the Kimilili sub-county hospital where he was pronounced dead on arrival. We reported the incident at Kimilili Police Station OB No. 32/9/8/2022.

The incident caused a lot of panic and fear making my agents in many polling stations to leave for their homes, especially when the counting was going into the night whereas the few who remained in their respective polling stations were turned into rubber stamps for fear of being killed while on their way home.

I therefore demand that the election for Member of Parliament Kimilili Constituency be repeated so that the will of the people can be manifested without fear.

Yours faithfully,

Bryan Mandila Khaemba

Dap Candidate of National Assembly

Kimilili Constituency.”

44. It is important to note from the content of that letter annexed to the petitioner's affidavit that the unfortunate incident which led to the shooting of the deceased occurred outside the polling station when the votes were being sorted out in readiness for counting.



45. The content of that letter should be considered in the light of the pleading in the petition that the petitioner does not impugn the conduct of election by 2<sup>nd</sup> and 3<sup>rd</sup> respondent. That means that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, according to the petition conducted the whole election process as required by the constitution and the written law.
46. The pleading in this petition relating to the alleged violence points squarely at the murder charge that the 1<sup>st</sup> respondent is facing before the criminal court. It follows as argued by the 1<sup>st</sup> respondent that in defending this petition, the 1<sup>st</sup> respondent will undoubtedly disclose his complete defence in response to this petition as he will, in respect to the criminal trial. Undoubtedly, the 1<sup>st</sup> respondent will have to testify viva voce evidence in this election case and what evidence he tenders may be accessed by the prosecution in the criminal trial. This is more so because the petitioner by his pleading in this petition has directed his case at the alleged act of killing of the deceased but has miserably failed to show how the alleged violence affected electorates.
47. This petition in seeking the determination that 1<sup>st</sup> respondent committed the murder without stating how that finding affected the results, leads this Court to find that the cardinal principle of law which is encapsulated in Article 50 (2)(o) that, a man shall not be placed in jeopardy twice for the same action will be violated if the court receives the same evidence that will be adduced at the criminal trial. The Latin maxim ‘nemo debet bis vexari pro ura et eadem causa’ (no man ought to be fixed twice for the same cause) will apply in this case where the petitioner has failed to impute in his pleadings, violation of the will of the people of Kimilili Constituency.
48. The petitioner erred to argue that to strike out the petition would violate his right of access to justice. Conversely, I would state that the respondents have a right to avoid facing what is a vexatious action which does not fall within the ambits of election dispute.
49. The petitioner’s other argument that, despite the criminal charge the 1<sup>st</sup> respondent is facing, the election court can still direct an order to DPP to carry out further investigation fails because as stated before the petitioner does not disclose election offense per se.
50. It follows that all pleadings relating to the alleged violence fails and will be struck out. It will be a high price to pay to allow the allegations of election malpractice of criminal nature to proceed at the risk of affecting the murder trial, in the absence of evidence of the alleged malpractice being pleaded to show it affected the rights of the electorate.
51. The petitioner also pleaded that the 1<sup>st</sup> respondent was guilty of undue influence by him using the CDF vehicle to campaign. The petitioner through his affidavit deponed:-
 

“That in late May 2022 I saw the CDF Kimilili Constituency motor vehicle ... in a campaign procession of the 1<sup>st</sup> respondent.”
52. The allegation thereof is that the petitioner became acquainted with the fact that 1<sup>st</sup> respondent used government resource contrary to Section 14 of the Election Offences Act, as far back as May, 2022. The petitioner as correctly argued by the 1<sup>st</sup> respondent had an obligation to make use of the constitutional mechanism for resolving pre-election dispute: See Article 88(4)(e).
53. The Supreme Court in the case Sammy Ndungu Waity v. Independent Electoral & Boundaries Commission & 3 others (2019) eKLR held that pre-election disputes including disputes relating to,



arising from nomination, are to be resolved as provided under *the constitution* by IEBC or where applicable, by PPDT. The Supreme Court proceeded to give the following guiding principles, viz:-

- “(i) All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.
- (ii) Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, such dispute shall not be a ground in a petition to the election Court.
- (iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.
- (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.
- (v) The action or inaction in (4) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, even after the determination of an election petition.
- (vi) In determining the validity of an election under Article 105 of *the Constitution* or Section 75 (1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.”

54. The fourth guideline above is applicable to this case. The petitioner knew the facts forming the basis of pre-election dispute but failed to have it resolved as provided by *the Constitution* and the written law by complaining to the IEBC.

55. The Supreme Court in the case Mohamed Abid Mohamud vs. Ahmed Abdullahi Mohamad & 3 others: Ahmed Ali Muktar (Interested Party) (2019) eKLR pronounced itself on the issue of Pre-election dispute thus:-

- “[70] The 1<sup>st</sup> respondent herein did not file any complaint to the IEBC, questioning the petitioner’s academic qualifications, nor did he pursue the original complaint, which had been lodged by Mohamed Abdille. In fact, he is on record as stating that he had all along been aware of questions surrounding the petitioner’s academic qualifications, not just in 2017, but, since the year 2013...
- (71) On both occasions, he chose not to lodge any complaint at the IEBC until after the elections of 2017, when the petitioner had been declared the winner of the election. In other words, the 2<sup>nd</sup> respondent decided to ignore, or overlook



the clearly established constitutional mechanisms for resolving pre-election disputes, until after he had lost the election.

- (72) What are we to make of a situation where a contestant ignores *the Constitution*, drags an entire County through a gruelling election, only to turn around and intone that his rival was not qualified to vie in the first place? Is an election Court to assume jurisdiction over such a dispute in such circumstances? We think not. If we were to allow contestants, or any other person, to consciously incubate a dispute, bypassing *the Constitution*, and originating it at an election Court, that would surely render Article 88 (4) (e) of *the Constitution* inoperable. For if one can originate any dispute at an election Court, why bother with the IEBC? The IEBC, in relation to election disputes, would surely become otiose! It is in this regard that we developed principle number (iv) hereinabove, which states that:-

“Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.”

56. It is because of the above discussion that this Court finds and holds that the Notice of Motion application dated 30<sup>th</sup> September, 2022 is merited. It succeeds and the petition dated 31<sup>st</sup> August, 2022 and the supporting affidavits filed herein are hereby struck out in limine.

### **Disposition**

57. The orders of this Court are:-
- a. That the petition dated 31<sup>st</sup> August, 2022 and its supporting affidavits are hereby struck out with costs.
  - b. The 1<sup>st</sup> Respondent is awarded costs of the Notice of Motion dated 30<sup>th</sup> September, 2022 and the costs of the struck-out petition which costs are assessed at Kshs.300,000 and Kshs.800,000 respectively.
  - c. Costs of the struck-out petition are awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents assessed at Kshs.800,000.
58. Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2022.**

**MARY KASANGO**

**JUDGE**

**In the presence of :-**

Coram:

Court Assistant: - Kenei

Mr. Ongoya Instructed by Ongoya & Wambola Advocates for the Petitioners

Miss Kitony Instructed by Nchogu, Omwanza & Nyasimi Advocates for the 1<sup>st</sup> respondent



Mrs. Owuor Instructed by Ogejo, Omboto & Kijala Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Court

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**

