



**Paul v Independent Electoral and Boundaries Commission & 7 others;
Clerk, Laikipia County Assembly & another (Interested Parties) (Petition
003 of 2022) [2022] KEHC 16667 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
PETITION 003 OF 2022
CM KARIUKI, J
DECEMBER 21, 2022**

BETWEEN

NJAGI NDEGWA PAUL PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

UNITED DEMOCRATIC ALLIANCE 2ND RESPONDENT

YUSUF AMINA LAILA HUSSEN 3RD RESPONDENT

MWANGI BENSON KURIA 4TH RESPONDENT

MOILE EUNICE SALATEN 5TH RESPONDENT

CATHERINE UMIJA 6TH RESPONDENT

KIHIKA CAROLINE WANJIKU 7TH RESPONDENT

MURIUKI MARY GATHONI 8TH RESPONDENT

AND

CLERK, LAIKIPIA COUNTY ASSEMBLY INTERESTED PARTY

LAIKIPIA COUNTY ASSEMBLY INTERESTED PARTY

***(IN THE MATTER OF THE CONSTITUTION OF KENYA , ARTICLES 1, 2,3,6,
10,12,20,21,22,23, 24, 25, 26, 27, 28,47,48,50, 54, 56, 88, 90, 100, 174, 175, 177 ,232,
236 and 259 of THE CONSTITUTION OF KENYA 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 PEOPLES RIGHTS AND IN THE MATTER OF GAZETTE NOTICE NO. 1072 VOL. CXXIV NO. 186 DATED 9TH SEPTEMBER 2022 ON PAGES 7072 AND 7079 AND IN THE MATTER LIST OF NOMINATED MEMBERS OF THE COUNTY ASSEMBLY OF LAIKIPIA NON-INCLUSION OF THE PERSONS WITH DISABILITIES CONTRARY TO ARTICLE 54 OF THE CONSTITUTION OF KENYA 2010 IN THE MATTER OF ELECTIONS ACT, 201,1 ANN THE MATTER OF INDEPENDENT ELECTORALL BOUNDARIES COMMISSION ELECTIONS (GENERAL) (AMENDMENT) REGULATIONS, 2017)

RULING

1. By Petition dated 5th November 2022. The petition sought prayers:-
 - a. That this Honourable Courts issue a Declaration that the parties lists of Nominated members of the Laikipia County Assembly by the 2nd Respondent and published by the 1st Respondent in Kenya gazette Notice No. 10712 Vol. CXXIV- NO. One hundred eighty-six dated 9th September 2022 are unconstitutional and unlawful for violating provisions of Articles 177 (c) and 54 of *the Constitution* and hence null and void.
 - b. That this Honourable court do direct and compel the 1st and 2nd Respondents to prepare a fresh party list for the County Assembly of Laikipia in strict compliance with *the constitution* and the Relevant laws and Regulations of the land.
 - c. That an Order and direction do issue to the 1st and 2nd Respondents in preparation of such party list in (B) above to ensure that the name of the Petitioner, which was erroneously placed as Number One (1) in the Gender Top up list is placed at the same position under the marginalized list.
 - d. In the alternative, this Honourable Court do declare that the party lists by the 2nd Respondent and published by the 1st Respondent are unconstitutional for non-compliance with Articles 177(c) and 54 of *the Constitution* and other laws of the land and order the 1st Respondent to Gazette the Petitioner as a Member of the County Assembly of Laikipia to ensure proper constitution of the assembly and compliance with *the constitution* and the laws of the land.
 - e. The Honourable Court be pleased to issue any other reliefs it may consider just.
 - f. The costs of this petition be awarded to the Petitioner.
2. It is grounded on the grounds set out in the Petition. The petition emphasizes that the principles spelled out in articles 54, 81, 90 (b), 91, and 177 are not mere aspirations. They serve as a yardstick against which all elections are measured so that they are transparent, accountable, and verifiable at the minimum and that the end is justifiable by the means.
3. The Petitioner states that Article 54 requires that the state ensure the progressive implementation of the principle that at least five percent of the public members and in elective and appointive bodies are persons with disabilities.



4. The Petitioner further states that Article 91 of *the constitution* spells out unqualified rights for minorities, women, and marginalized groups and communities to participate in the political process and which includes persons with disabilities.
5. The Petitioner further states that Article 177(c) stipulates that the County Assembly should consist of the number of marginalized groups, including Persons with disabilities and the Youth
6. The Petitioner avers that the instant petition revolves around the election of members to the County Assembly through the Parties lists as contemplated by Article 177 of *the Constitution* as read together with Sections 34,35,36 and 37 of the *Elections Act*, 2011, as well as regulation 56 of the Elections (General) Regulations, 2012 and The Elections (Party primaries and Party List Regulations 2017) Petition Rules.
7. The Petitioner avers that the 1st Respondent, in pursuit of the foregoing, published a notice requiring all parties to submit their party lists to the commission on or before the 25th Day of June 2022 for allocation of special seats to the National Assembly, Senate, and County Assemblies.
8. The Petitioner avers that he did apply to his Party United Democratic Alliance (UDA), the 2nd Respondent herein, for the nomination to the County Assembly in the marginalized list being a person confirmed to be living with a disability.
9. The petitioner avers that after the application to the 2nd Respondent, the 1st Respondent published a party list in the Standard News Paper on 27th July 2022 and later on its website and where the Petitioner's name appeared in the category of Gender Top up.
10. The Petitioner avers that he complained to the party through a letter stating that his name had been erroneously listed as number one (1) on the Gender top-up list instead of the marginalized under the category of person living with disabilities.
11. The petitioner avers he the applicant, was informed by the 2nd Respondent that his letter had been duly received and was promised that at the point of nomination, the error would have been rectified and that his name would be put under the marginalized category to which he had made his application.
12. The petitioner was shocked and surprised when the Gazzette Notice No. 10712 Vol. CXXIV No. 186 was published by the 1st Respondent for the nominated members of the County Assembly of Laikipia. His name was missing altogether despite the same having been put, albeit erroneously, at number one (1) in the 2nd Respondent's Gender Top Up Party List.
13. The Petitioner herein, being a person living with a disability, have requisite rights enshrined in Article 91 of *the constitution* for persons living with disabilities to participate in the political process and be specially elected to the 2nd interested party on priority.
14. The petitioner avers that his name was erroneously put in the Gender top-up category in the United Democratic Party List and published as such by the 1st Respondent. Yet, he is a person living with a disability. His name should have been placed on the marginalized list as per his application. Thus, both the UDA party lists of the County Assembly of Laikipia are unconstitutional and null and void abinitio.
15. The Petitioner avers that the purported gazette notice No. 10712 Vol. CXXIV-No. published by the 1st Respondent included the nomination of members under the Gender top-up and the marginalized categories excluding persons living with disability who are prioritized under *the constitution* and thus illegal and unconstitutional.



16. The Petitioner avers aforesaid lists, including the name of the 7th Respondent namely KIHKA CAROLINE WANJIKU, who is a stranger of Laikipia County and who is not marginalized in any way and not a registered voter in Laikipia County having contested as a member of the county assembly of Nakuru making the whole process flawed, unlawful and unconstitutional.
17. The 1st Respondent's use of the word marginalized without including the name (s) of persons living with a disability is unconstitutional. It amounts to discrimination against persons living with Disabilities under Articles 27 and 38 of [the Constitution](#).
18. That Petitioner avers That the said gazette notice by excluding the Petitioner herein, who is a person living with a disability further contravenes the provisions of Article 54 and 177 (c) of [the Constitution](#) that requires that at least five percent (5%) of the members of the public in elective and appointive bodies are persons with disabilities and 177 (c) which stipulates that the County Assembly should consist of the numbers of the marginalized groups, including persons with disabilities and the youth.
19. The Petitioner avers on the foundation of the said illegal and unlawful gazette notice of the impugned UDA Party Lists, the interested parties called for the swearing and indeed purported to swear in members of the County Assembly of Laikipia despite the same being unconstitutional unlawful, and/or illegal and/or null and void ab initio.
20. The Petitioner avers by reason of the contents of all and the foregoing paragraphs and by reason of non-compliance with [the constitution](#), the relevant laws, and regulations, the County Assembly of Laikipia is not properly constituted and is operating unlawfully and in vain.
21. The Petitioner avers that the aforesaid actions of discrimination were occasioned by the mistake of the 2nd Respondent, who forwarded his name in the category of Gender Top Up list instead of persons with disability.
22. The Petitioner contends that the aforesaid actions of discrimination were occasioned by the mistake of the 2nd Respondent, who forwarded his name in the category of Gender Top-up list instead of persons with disability.
23. The petitioner avers that the aforesaid Members unlawfully nominated to the County Assembly of Laikipia are likely to illegally and without authority, the law and constitution conduct business of the Assembly, enjoy salaries, allowances, and other privileges to the detriment of the people of Laikipia.
24. The Petition was contemporaneously filed with a Notice of Motion dated 5th November 2022, seeking directions.
25. That same be ordered to be heard within six(6) months.
26. The same was opposed by affidavit, responses to the Petition, and preliminary objections filed by the respondents.
27. The court directed parties to file submissions to canvass preliminary objections filed, which they did and highlighted same during their arguments which can be summarised as hereunder;
28. Submissions by the 2nd respondent, Submitted on the essence of "Section 75 Election Act. That election suits are supposed to be determined by Resident Magistrate's Court Gazetted by the Chief Justice, not High Court. The Petitioner did not engage the Political Parties Disputes Tribunal (PPDT), which hears disputes on party disputes. The dispute should undergo internal Party Dispute Resolution. See Article 8 of [the Constitution](#) of the party. Section 74 Elections 40 Political Parties Disputes Tribunal (PPDT) Section 27.



29. The petition is dead on arrival for the above violations. The claim by Petitioner is not anchored on any provisions of *the Constitution*. Thus, prayed for the Petition to be dismissed with costs. The party ought to have gone through a dispute resolution mechanism.
30. On preliminary objections dated 13th November 2022, it has contended that section 75(1), (a) *Elections Act* denies High Court Jurisdiction on Member of County Assembly's (MCA's) Election dispute.
31. On 14th November 2022, the Chief Justice Gazetted Magistrate Court for proposes of resolution of Elections of Members of the County Assembly. This court and no other High Court were Gazetted as election court for M.C.A
32. By dint of Rule 6 (1)(b) Parliament election Rules, 2017, a question on members elected to MCA can only be specifically addressed in Resident Magistrate's Court (RM's court).
33. The High Court does not lie within authorized courts to entertain such disputes. See: Supreme Court Moses Mwigigi & 2 others Soko 1 of 2015 versus The Independent Electoral and Boundaries commission, section 5 (a) confers Resident Magistrate's Court jurisdiction on Elections nomination of Members of County Assembly. Thus, this court cannot entertain the instant petition.
34. See also Orange Democratic Movement - versus Yusuf Ali Mohamed & 5 others [2018] EKL.R. The Court stated Nomination disputes which arise from the Gazettement of MCA once Gazetted must be heard on the first instant in Resident Magistrate's Court.
35. Thus, only the Resident Magistrate Court can entertain the same disputes. The High Court entertains only appeals from the Resident Magistrate's Court decision thereof. This court, thus, cannot entertain the instant dispute.
36. Thus, the court is urged to reject the petition and uphold the preliminary objection.
37. Submissions by the 3rd Respondent Submitted on preliminary objection dated 11th October 2022 and filed on 12th October 2022 on the essence of the issues of jurisdiction over section 75 (a) *Elections Act*; thus, the Counsel adopted the 1 and 2nd respondent submissions. That the dispute is about a member of the county Assembly election.
38. The jurisdiction of the Court is conferred by law see: Orange Democratic Movement - versus- Yusuf Ali supra.
39. The question of the validity of a Member of the County Assembly should, in the first instance entertained in Resident Magistrate's Court, gazetted by Chief Justice as Election Court.
40. The High Court is not so Gazetted. This court can only await an Appeal. See Soko case Moses Mwigigi supra. On Section 75 (a) Election Act Right court to Entertain such dispute Court to entertain dispute is Resident Magistrate's Court. Thus, the court urged to uphold the Preliminary Objection.

Submissions by the 4th Respondent

41. Submitted on the preliminary objection dated 14th October 2022, filed on 9th November 2022 and contended that once nominations are gazetted, the nominee becomes an elected member of the County Assembly; thus, elections can only be challenged in Resident Magistrate's Courts Gazetted as election court. It is submitted that the High court can only entertain an appeal from an election Petition from Resident Magistrate's Court Appointed by Chief Justice as Elections Court. On the issue of service of 6th and 8th Respondents, he submitted that same was effected via WhatsApp platform in breach of Article 87 (3) of Constitution and section 77 *Elections Act*. Rule 2 and 12 (1) election petition



Parliamentary Rule dictates the mode of Service of Election Petition. Order J see S R 22 (b) in-service upon on the client.

42. It is contended that CPR does not apply Election Petition on matters of service. There was no proper service upon 6th and 8th Respondents, the court is urged to dismiss the petition with costs to 6th 8th Respondents.

Submissions by the 7th Respondent

43. Submitted on preliminary objection dated 26th October 2022 and filed on 31st October 2022. The issue raised is on the jurisdiction that the court cannot entertain the petition herein; only the Resident Magistrate's Court is empowered to do so when gazetted by Chief Justice as Election Court.
44. Section 75 Provides mechanism of sorting out Elections Disputes vide sub-section (1) (a) as to a question as to the validity of a member of the County Assembly to be heard by Resident Magistrate's Court designated by the Chief Justice.
45. Then, Section 75 (4) is on appeal under sub-section 1A, which shall be in High Court vide Rule 6 (1) Election Petition Rules, 2017 Election court is properly constituted in respect of Election of Member of County Assembly if it is composed of (1) Resident Magistrate's Court Gazetted by Chief Justice under section 75 of Election Act.
46. The jurisdiction of the court is crucial as any decision made without jurisdiction is void and will have no force in law reliance is made on the case of Jaldesa- versus -IEBC see 21/11/2022 submission relied on Soko case of Kamau Macharia versus KCB & others; see holding by Supreme Court jurisdiction flows from the court has on both laws can only exercise the jurisdiction conferred by law.
47. The Petition questions the 7th respondent's nomination as a member of the Laikipia County Council. It raises issues preserves of Election Court.
48. Resident Magistrate's Court is designated as Election Court once's Gazetted vide section 75 (1) E.A. and, thus,would have jurisdiction.
49. The High court is not an election court on post-election membership of Members of the County Assembly. Petitioner could not challenge nomination via constitutional petition as held in Rosemary Njeri Nyambura – versus- IEBC & 2 Others. The court held that; the exercise of special jurisdiction set up by law is a mandate for Election Court
50. Even though High Court has jurisdiction over violations of Human Rights, not every matter is entertained by High Court where a specific procedure has been set down to deal with them. This court can only entertain an appeal under section 75 (4) of E.A.
51. Thus, the Petition and application thereof are incompetent and should be struck out with costs to the respondent.

Submissions by the Petitioner

52. Submitted that the Petitioner is a member of the Laikipia County Assembly and United Democratic Alliance (UDA) party member and a person living with a disability under Article 177 (c) of [*The Constitution*](#), also Article 54, where 5% of the Elective Body Constitution. Article 65 (2)(b).
53. On breach of fundamental Rights or thereat; see Okiya Omtatah Okoiti versus – Anne Waiguru on Article 165 (3). The matter certification is raising the substantive point of law. There is a public interest



as there is no membership in the Laikipia County Assembly of Persons with disabilities. The Applicant has obligation to raise the issue.

54. Article 177 and 54 Constitution on *the Constitution* of Laikipia County is unconstitutional for the want of membership of a person with a disability. The High Court has inherent jurisdiction to interpret the Bill of Rights and render remedy. The High Court is not denied jurisdiction to determine the membership of County Assembly Laikipia.
55. Articles 177 (c) and 54 have been violated. The Petitioner represents persons with Disability see; Githinji - versus- IEBC 5 of 2022 EKL.R. Muriithi J upheld the preliminary objection in High Court and transferred the matter to the proper court. Section 18 CPR on the transfer of matter.

ISSUES, ANALYSIS, AND DETERMINATION

56. The issues arising from the pleadings and submissions on record are whether this court has jurisdiction to entertain instant petition and orders as to costs.
57. The Petitioner herein filed a Petition dated 5th October, and the same is supported by an affidavit sworn by the Petitioner on the even date. The Petitioner contends that he applied for nomination to the Laikipia County Assembly party list under the Marginalized List category.
58. Thus, the petition attracted preliminary objections on a point of law from the respondents herein. The common thread in all the POs is whether the High court has jurisdiction to entertain the instant petition. It is trite law that a PO “A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point of law dispose of the suit see Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696 (cited by the Supreme Court in Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Supra. Court Application No. 23 of 2014).
59. It goes that a preliminary objection can be raised on pure points of law. These are points of law touching on the jurisdiction of the court inter alia. To discern a point of law, the Court has to be satisfied that there is no contest as to the facts on record. The facts have to be deemed as agreed as prima facie presented on record. It is trite that jurisdiction is everything. The centrality of jurisdiction was succinctly captured by Nyarangi, J.A. in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited (supra);

“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...”

60. In Kalpana H Rawal & 2 others vs Judicial Service Commission & 2 others [2016] eKLR cited with approval the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs Hon. Atai Aidoko Aliusman & 4 Others, where Walter Samuel Nkanu Onnoghen, JSC, expressed himself as follows: -

“...It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”



61. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where it pronounced itself thus:

“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 upon it by law. 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....”

62. It is manifest from the factual foundations of the Petition that the Petitioner’s actual gravamen relates to the nomination of members of the County Assembly of Laikipia. It is alleged that the entire nomination process was illegal and irregular as it discriminated against persons with disabilities. That position is also reflected in the prayers sought in both the Petition and the Application.

63. The substratum of the Petition before the Court is the nomination of persons to fill in the special lists of the Marginalized List and the Gender Top Up List, as the Petitioner alleges that his name was erroneously listed as number one in the Gender Top Up list instead of the Marginalized List under the category of persons living with disabilities.

64. It is apparent that the real question before the Court is the nomination of the members of the County Assembly of Laikipia clothed as a constitutional petition.

65. Even though Article 165(3)(d) of the Constitution vests in this Court jurisdiction to determine questions whether anything said to be done under the authority of the Constitution is consistent with or contravenes the Constitution, that jurisdiction is deferred by the provisions of Section 75 (1A) of the Elections Act which clearly states that;

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

66. The Court of Appeal in the case of Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR emphatically held that the High Court has no jurisdiction in these kinds of cases. That court stated: -

“An issue urged by the 1st respondent is whether the threshold for a constitutional petition was met in the petitions filed at the High Court. In our considered view, the claims by the 1st and 2nd respondents not only met the threshold for a constitutional petition but also substantially met the threshold and grounds for an election petition. The substratum of the 1st respondents claim is founded on nomination to the County Assembly using Party List as an electoral process. In our view, the undisputed background facts in support of the 1st respondent’s claims in the constitutional petition and his claim founded on nomination to the County Assembly are intertwined and inseparable. Being intertwined and not severable, the specific election dispute resolution mechanism provided under the Constitution and the Elections Act is the procedure to be adopted. The mechanism provided is that an election petition is the only way to challenge post-gazettment electoral disputes. On the question whether there is a specific constitutional or statutory bar to the High Court to entertain a constitutional petition on settlement of electoral disputes in relation to Membership to a County Assembly we answer in the affirmative. There is an express statutory bar to the original jurisdiction of the High Court to handle post-gazettment nomination or electoral



disputes relating to Membership to the County Assembly. The original jurisdiction to hear and determine post-gazettement electoral disputes relating to membership to a County Assembly is vested upon the Magistrates Court. The High Court has appellate jurisdiction in respect to disputes relating to post-gazettement of Members to a County Assembly. The express statutory bar is Section 75 (1A) of the *Elections Act*. The Section provides: A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

67. In addition, Article 87 (1) of *the Constitution* of Kenya enjoins Parliament to enact legislation to establish mechanisms for the timely settlement of election disputes. The *Elections Act* has given jurisdiction to the Magistrates court, and the same has been enacted under the authority of *the Constitution*.

68. Thus, it follows that the jurisdiction of the Magistrates’ court to hear and determine election petitions relating to Membership of the County Assembly has a Constitutional underpinning. This position was emphasized by the Supreme Court in *Moses Mwigigi and 14 Others v Independent Electoral and Boundaries Commission and 5 Others* SCK Petition No. 1 of 2015 [2016] eKLR where it held that;

“Section 75(1A) of the *Elections Act* confers upon the Magistrates Court jurisdiction to determine the validity of the election of a member of a County Assembly and that such an election includes nomination of members County Assembly through party lists.”

69. From the foregoing, the issues raised in the Petition ought to be heard and determined by the Magistrates Court as it is clear that post-gazettement electoral disputes relating to membership to a County Assembly is vested upon the Magistrates Court.

70. The petitioner seems to admit the matter is in the wrong court and seeks a transfer of suit as an alternative. This is not tenable as section 77 E. A on longing for an Election Petition is to be fulfilled 28 days after results are declared. Results were declared on 9th September 2022; thus, it is time-barred. Section 75 (1) EA would require a court to be Gazetted to hear the instant matter. So far, no court is gazetted to handle this petition. Section 78 (2) (e) E. A requirement to deposit security costs and the provisions are mandatory that it has to be done within ten days, which has not been done.

71. Thus, the court finds that the High court has no jurisdiction to entertain the instant petition and thus strikes out the same with no orders as to costs as petitioner whom court sympathises with has physical conditions and only that he missed the way in search of justice.

Dated, Signed, and Delivered at NYAHURURU on this 21st day of DECEMBER 2022.

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CHARLES KARIUKI

JUDGE

