Republic v Independent Electoral and Boundaries Commission & another; Oinga & 3 others (Interested Parties); Parent Multi Purpose Development Group & another (Exparte Applicants) (Judicial Review Application E006 of 2022) [2022] KEHC 16615 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

JUDICIAL REVIEW APPLICATION E006 OF 2022

RE ABURILI, J

DECEMBER 20, 2022

IN TH EMATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ARTICLES 22(1), (2), (D), 23(3) (F) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 9(1) OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF KENYA GAZETTE NOTICE NO. 10712DATED THE 9 TH SEPTEMBER, 2022 AND KENYA GAZETTE NOTICE NO. 11259 DATED 21 ST SEPTEMBER, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

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

ORANGE DEMOCRATIC MOVEMENT ..... 2ND RESPONDENT

AND

DOROTHY AWINO OINGA ..... INTERESTED PARTY

FREDRICK ODHIAMBO OLOO ..... INTERESTED PARTY

ANN WANZILA OLOO ..... INTERESTED PARTY

SHALOM ODUOR OTIENO ..... INTERESTED PARTY

AND

PARENT MULTI PURPOSE DEVELOPMENT GROUP . EXPARTE APPLICANT

JAPHETH MANYALA ..... EXPARTE APPLICANT

RULING

1. This ruling determines the *exparte* applicants' application brought by way of chamber summons dated December 5, 2022 seeking the following prayers:

2. I have perused the application for leave to apply for judicial review orders and the oral submissions by Mr Magesa Leonard counsel for the *exparte* applicants.

3. The reasons why leave is necessary before a substantive judicial review proceeding are filed has been explained in the case of *Republic v County Council of Kwale & another ex-parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996 as follows:

> " The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

4. In the case of *Uwe Meixner & another v Attorney General* [2005] eKLR, it was held that:

> " The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion...The appellants invoked the judicial review jurisdiction rather that the constitutional jurisdiction to question the exercise of the discretion by the Attorney General. In deciding whether or not to grant leave the learned judge was entitled to consider, as he did, whether the grounds of challenge were within the narrow scope of judicial review...The test to be applied in deciding whether or not to grant leave is whether the applicant has an arguable case."

5. It therefore follows that the grant of leave is subject to the discretion of the judge. The court must be satisfied that the intended notice of motion is arguable. The application is exparte however the court may direct that the same be served upon the respondent before granting leave. The court may also consider the application on its own motion or call upon the applicant to lay the basis for the application for leave before making appropriate orders, as I have done in this case.

6. It is trite that the applicant seeking leave must demonstrate a *prima facie* case. In the case of *Felix Kiprono Matagei v Attorney General & Law Society of Kenya (amicus curiae)* [2021] eKLR it was stated as follows:

> "The court upon hearing an application for leave will determine whether there exists an arguable case and will proceed to dismiss the case where an arguable case has not been established. It is undeniable that leave has been established in law and practice as a necessity for smooth administration of justice. The necessity of rules of procedure in judicial review proceedings is to ensure the court process is not abused by busybodies filing frivolous suits thus impeding instead of enhancing access to justice."

7. This court also asked the exparte applicants' counsel to address the court on the jurisdiction of this court in matters of this nature and counsel submitted that this court has jurisdiction under article 22 and 23 of the *Constitution* as the applicants' right to vote for the members to be nominated to fill the special seats was violated by the IEBC and the Orange Democratic Party. I consider jurisdiction to be such an important factor in every proceeding before any court or tribunal that any court or tribunal exercising judicial or quasi-judicial or administrative function or powers must first and foremost examine whether it has the necessary jurisdiction to entertain the matter before it, before it can delve into the merits of that matter.

8. Jurisdiction cannot be conferred by parties, not even by consent and neither can the court arrogate itself jurisdiction that it has not been vested with by statute or the *Constitution*.

9. In *R v Karisa Chengo* [2017] eKLR, the Supreme Court determined that:

> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

10. Further, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the apex court held that:

> "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."

11. This principle has been replicated in a plethora of determinations by the Supreme Court as binding on all other courts below the Supreme Court, of common cause being that, a court, even the Supreme Court itself cannot arrogate itself jurisdiction through crafts of interpretation (see *Interim Independent Electoral Commission Constitutional (advisory opinion)* Application No 2 of 2011) and that a court ought to exercise its powers strictly within the jurisdictional limits. See *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* [2012] eKLR.

12. In *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1, the *locuss classicus* on matters jurisdiction, it was stated as follows:

> "Jurisdiction is everything and 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."

13. Section 35 of the *Elections Act*, under the rubric "nomination of party list members" is relevant. The section provides that:

> "(1) A political party shall submit its party list to the commission on the same day as the day designated for submission to the commission by political parties of nominations of candidates for an election before the nomination of candidates under article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the *Constitution*."

14. The Act further provides under section 36(1) that:

> "....
>
> (e) e) Article 177 (1) (b) of the *Constitution* shall include a list of the number of candidates reflecting the number of wards in the county."

15. The fundamental question in this judicial review application for leave to apply for judicial review orders of certiorari and mandamus is whether a constitutional petition or judicial review proceedings before the High Court can be invoked to initiate an election related or party nomination dispute subsequent to gazettement of nominated candidates. This question goes to the root of the jurisdictional competence of the High Court to hear and determine election or nomination disputes by way of judicial review or constitutional petition.

16. The Supreme Court in *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR extensively expressed itself as follows in relation to the judicial review proceedings as a mechanism for challenging nominations to membership to the national or county assembly after gazettement by the Independent Electoral and Boundaries Commission (IEBC). The court articulated as follows, in extenso:

> "[105] It is clear from the foregoing provisions that the allocation of nomination-seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then 'designates', or 'draws from' the allocated list the number of nominees required to join the county assembly. To 'designate' or 'draw from' entails the act of selecting from the list provided by the political party. It is plain to us that the *Constitution* and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettement of the nominees' names by the IEBC, as an integral part of the election process.
>
> [106] The gazette notice in this case, signifies the completion of the "election through nomination", and finalizes the process of constituting the assembly in question. On the other hand, an "election by registered voters", as was held in the Joho case, is in principle, completed by the issuance of Form 38, which

terminates the returning officer's mandate, and shifts any issue as to the validity of results from the IEBC to the election court. (emphasis supplied)

[107] It is therefore clear that the publication of the gazette notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the election courts. The gazette notice also serves to notify the public of those who have been "elected" to serve as nominated members of a county assembly. (emphasis supplied)

(115) The *Elections Act* confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a county assembly; section 75 (1A) of the Act provides 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."

(117) 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'.

(119) 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 opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to 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." (emphasis supplied)

17. I have also considered dicta in *Thande v Montgomery* (1970) EA 341, in which the East African Court of Appeal held that nominations to stand for elections is part of the election process and as such, can only be challenged after the election by way of an election petition. In *Mwihia & another v Ayah & Another* [2008] 1 KLR (EP) 450, 456-458 it was held that nominations to stand for elections are part of the election process and as such, they could only be challenged after the elections by way of an election petition. In *Kipkalya Kiprono Kones v The Republic & another ex-parte Kimani Wanyoike & 4 others* [2006] eKLR it was held that an election petition was the only valid means of challenging an election and the court would only be seized with the petition once the election results have been declared.

18. Guided by the foregoing judicial decisions, the Supreme Court in *Kennedy Moki v Rachel Kaki Nyamai & 2 others* [2018] eKLR, expressed itself as follows:

> " 56. Notwithstanding the foregoing, we are alive to dicta which state that an election court is the proper forum at which to challenge by way of petition nomination disputes. On our part, having reviewed the case law, we are persuaded that the dicta in Kipkalya Kiprono Kones v The Republic &Another Ex-parte Kimani Wanyoike & 4 others [2006] eKLR is good law where it was held that an election petition was the only valid means of challenging an election. All other proceedings before PPDT or judicial review

> are not proceedings challenging the declared results of an election and such proceedings cannot vitiate or validate the declared results of an election. We are also persuaded with dicta in Mwihia & another v Ayah & another [2008] 1 KLR (EP) 450where it was held that nominations to stand for elections are part of the election process and as such, they could only be challenged after the elections by way of an election petition. We are further convinced that the decision in Wamboko v Kibunguchi & another, (2008) 2 KLR 477, is good law where it was held that an election court has jurisdiction to hear and determine a petition where one of the issues is nomination of a candidate - as nomination is a process of election."

19. In the instant application, the issue that I must determine in the first instance is whether this court has the necessary jurisdiction to hear and determine a nomination dispute relating to membership of the Siaya county assembly. Just as the Court of Appeal held in CA 26 of 2018 in *Feisal Shaib Khan & Warda Abdalla Mohamed v IEBC, KANU &4 others*, the High Court has no jurisdiction in such matters for the following reasons:

> "(a) (a) Party nomination disputes after gazettement by the IEBC can only be heard and determined by way of an election petition. Neither a judicial review application nor a constitutional petition can resolve or initiate electoral dispute resolution after gazettement of nomination or election results.
>
> (b) As regards membership to the county assembly, jurisdiction to hear an election petition is vested upon the Magistrate's Court and not the High Court. In the instant case, the petition filed by the appellants at the High Court was not an election petition before an election court presided over by a magistrate duly gazetted by the Chief Justice.
>
> (c) In addition, the prayers sought by the appellants in the petition before the High Court was de-gazettement of the 3rd and 4th respondents who had already been gazetted as members of the Lamu county assembly. The jurisdiction to deal with any such disputes after gazettement lies with the magistrate's court which can only be moved by way of an election petition."

20. The above pronouncement by the Court of Appeal is as clear as the day. In arriving at the above decision that the trial court had no jurisdiction to hear the petition filed before it, the Court of Appeal was cognizant of its own previous decision in *Hamdia Taroi Sheikh Nuri v Faith Tumaini Kombe & 2 others*, Election Petition Appeal No 27 of 2018 where it was held that the Court of Appeal lacks jurisdiction to hear appeals relating to membership to the county assembly. In holding that thee Court of Appeal has no jurisdiction, it was expressed that "it would seem that election appeals by members of the county assembly to thee Court of Appeal were neither contemplated nor permitted."

21. In their decision in the *Feisal Shaib Khan case*, the Justices of Appeal were guided and bound by the Supreme Court decision in *Moses Mwicigi & 14 others* (supra)where the court stated that "any contest to an election, whatever its manifestation, is to be by way of 'election petition'."

22. Therefore, guided by the judicial authorities cited and bound by the Supreme Court decision in the *Moses Mwicigi case*, I find that this application for leave to apply for judicial review orders challenging the gazettement of the interested parties as members of the Siaya county assembly by the IEBC *vide* gazette notices No 10712 of September 9, 2022 and 11259 of September 21, 2022 has no merit.

23. For reasons stated above, I am satisfied that this court has no jurisdiction to hear and determine the dispute as filed. In other words, the intended substantive motion will be a waste of judicial time and resources. I decline to grant leave to apply and dismiss the application herein dated December 5, 2022 with an order that the applicants bear their own costs of the application which was argued *exparte*. This file is closed. I so order

DATED, SIGNED AND AND DELIVERED AT SIAYA THIS 20TH DAY OF DECEMBER, 2022.

R.E. ABURILI

JUDGE