



Kenya Human Rights Commission & 3 others v Independent Electoral & Boundaries Commission & 3 others; National Council for Persons with Disability & another (Interested Parties) (Election Petition E454 of 2022) [2022] KEHC 16358 (KLR) (Election Petitions) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ELECTION PETITIONS
ELECTION PETITION E454 OF 2022**

**M THANDE, J
DECEMBER 16, 2022**

BETWEEN

**KENYA HUMAN RIGHTS COMMISSION 1ST PETITIONER
UNITED DISABLED PERSONS OF KENYA 2ND PETITIONER
ACTION NETWORK FOR THE DISABLED 3RD PETITIONER
CONSORTIUM OF DISABLED PEOPLE ORGANIZATIONS IN
KENYA 4TH PETITIONER**

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
COUNTY ASSEMBLIES FORUM 3RD RESPONDENT
REGISTRAR OF POLITICAL PARTIES 4TH RESPONDENT**

AND

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITY INTERESTED
PARTY
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED
PARTY**



RULING

1. Before court for determination is the preliminary objection (PO) by the IEBC dated October 13, 2022 in opposition to an application dated September 23, 2022 and petition of even date and amended on October 5, 2022.
2. In the petition, the petitioners describe themselves as non-governmental organisations that campaign to create a culture in Kenya where human rights and democratic culture are entrenched. They challenge Gazette Notice No 10712 of September 9, 2022 in which the IEBC gazetted the nominees by political parties to county assemblies. The gazette was done in keeping with section 36(4) of the Elections Act that requires the gazette within 30 days of the declaration of the results of the general elections.
3. It is the petitioners' case that the list of nominees gazetted did not comply with the Constitution, legislation and international law as in most counties, there was total neglect of persons with disabilities (PWDs) contrary to the requirement under section 36(1)(f) of the Act. Further, that in some counties, the nominations did not have youth representatives as required under section 36(10)(f) of the Act. In some cases, some of those nominated as youth do not meet the age requirement. In some counties, those nominated are not residents or registered voters of the county they represent, while in others, those nominated to represent marginalised groups do not in fact belong to such groups. In yet other counties, men have been passed off as women, the order of priority in the lists was not honoured while in other cases persons not in nomination lists have been gazetted.
4. The foregoing provoked the petitioners to move to court seeking the following reliefs:
 - A. A declaration that the IEBC was duty bound to ensure that the final nomination list published on September 9, 2022 (No 10712) complied with articles 177(1)(b) & (c) as read with sections 34(5) and 36 of the Elections Act.
 - B. A declaration that the final lists on the gazette notice of September 9, 2022 (No 10712) violated articles 1, 2, 10, 20, 21, 28, 47, 54, 55, 91 and 177 of the Constitution of Kenya, 2010.
 - C. An order of certiorari bringing to the High Court the Gazette Notice No 10712 of September 9, 2022 for quashing.
 - D. A mandatory order compelling the IEBC to conduct the process of nomination of Members of County Assemblies afresh in compliance with the dictates of the Constitution and the Elections Act.
 - E. The costs of this petition be borne by the respondents."
5. Filed contemporaneously with the petition is an application of even date seeking the following orders:
 1. Spent.
 2. That there be and is hereby issued a conservatory order barring the Members of the County Assembly nominated pursuant to Gazette Notice No 10712 of September 9, 2022 in all the 47 counties from participating in legislation or oversight or any other business of the County Assemblies pending hearing and determination of this application.
 3. That there be and is hereby issued a conservatory order barring the Members of the County Assembly nominated pursuant to Gazette Notice No 10712 of September 9, 2022 in all the



47 counties from participating in legislation or oversight or any other business of the County Assemblies pending hearing and determination of this Petition.

4. That in the alternative to prayer 3, there be and is hereby issued a conservatory order restraining the members of the 3rd respondent from involving the Members of County Assembly nominated pursuant to Gazette Notice No 10712 of September 9, 2022 in the legislative and oversight mandate of the County Assemblies pending hearing and determination of this petition.
5. That costs be provided for.
6. The PO by the IEBC raises the following objections:
 1. The petition as filed is defective, incompetent, misconceived and lacks merit, is an abuse of the court process and should be dismissed in limine.
 2. The court lacks jurisdiction to entertain the petition.
 3. The petition offends the provisions of article as against the gazetted and duly elected members of the county assemblies, the 47 county assemblies and all political parties whose members are in the contested party lists and impugned gazette notice.
 4. The petition offends the provisions of article 87(1) and (2) of the *Constitution*, sections 35a(3), and 75(1A) of the *Elections Act*, sections 38, 40 and 41 of the *Political Parties Act* and regulations 9 and 13 of the Rules of Procedure on Settlement of Disputes (Legal Notice No 139).
7. Submissions were filed by the petitioners and the IEBC. The 2nd and 4th respondents opted to associate with the submissions of the IEBC.
8. The court has duly carefully considered the petition, the PO, the rival submissions as well as the authorities cited. The only issue for determination is whether this court has jurisdiction to hear and determine the petition.
9. It is the case of the IEBC that this court lacks the requisite jurisdiction to hear and determine the petition and grant the orders sought therein. This submission is informed by the uncontested fact that the IEBC did on September 9, 2022, vide Gazette Notice No. 10712, gazette the nominees to county assemblies following the general elections of August 9, 2022. The IEBC further submitted that the amended petition as filed and the orders sought are not ripe for argument or settlement before this court.
10. The petitioners countered these submissions by arguing that they are rightly before this court. They contended that they seek an interpretation of what a duly and fully constituted county assembly is as per section 7A of the *County Governments Act*. Further, whether the IEBC discharged its mandate as required under articles 10, 47, 54, 81, 82, 91 and 177 of the *Constitution* as read with section 36(3) of the *Elections Act* as well as article 29 of the *Convention on the Rights of Persons with Disabilities*. They further contended that they seek an interpretation of section 36(8) of the *Elections Act* which purports to restrict the mandate of the IEBC vis-a-vis section 36(3). Additionally, the petitioners seek a determination as to whether the manner in which the nominees for county assemblies were elected complied with the *Constitution* and the law and by extension whether the gazette notice complied with the law.
11. The petitioners further submitted that the petition challenges the manner in which the IEBC exercised its mandate to conduct the election of MCAs to special seats. They contend that the IEBC violated



the Constitution and statute. They disagree with the IEBC's contention that they ought to have approached the Political Parties Dispute Tribunal, the IEBC Dispute Resolution Committee and the Election Court. They do not challenge the party lists submitted by political parties but the decision by the IEBC to issue a final list that fails to comply with the Constitution, statute and international law. Accordingly, failure to comply with the law in effecting final allocations from party lists, renders the county assemblies that do not have persons with disabilities, unlawful.

12. The right of PWDs, minorities and the marginalised to enjoy political rights is anchored in and protected by the Constitution, national and international law. Article 29 of the Convention on the Rights of Persons with Disabilities requires states parties to guarantee to persons with disabilities, political rights and the opportunity to enjoy such rights on an equal basis with others and to ensure that such persons can effectively and fully participate in political and public life on an equal basis with others. The Constitution of Kenya makes similar provisions. Under article 10, non-discrimination and protection of the marginalised is one of the national values and principles of governance that bind all state organs, such as the IEBC, whenever it applies the Constitution or any law. Article 54(2) enjoins the State to ensure the progressive implementation of the principle that at least 5% of the members of the public in elective and appointive bodies are persons with disabilities. Article 82(2) requires that any legislation governing the conduct of elections shall ensure that voting takes into account the special needs of persons with disabilities. Political parties are not left behind. Under article 91(1)(e) they are enjoined to respect the right of all persons including minorities and marginalised groups, to participate in the political process.
13. The inclusion of PWDs, minorities and the marginalised in county assemblies is provided for through special seats. Article 177(1)(b) and (c) of the Constitution which provides that a county assembly shall consist of *inter alia*, 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 and that the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament. Section 34(5) of the Elections Act requires political parties to submit party lists to IEBC at least 45 days before the date of the general election. Section 36(1)(f) provides for allocation of special seats and requires that a party list submitted by a political party under article 177(1)(c) of the Constitution shall include 8 candidates, at least two of whom shall be persons with disability, 2 of whom shall be the youth and 2 of whom shall be persons representing a marginalized group.
14. Section 34(6A) of the Act requires that party lists shall be submitted in order of priority.
15. Under section 34(6A), the IEBC is required to review the party list submitted to it for compliance and thereafter issue the political with a certificate of compliance.

"Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and —

- a. issue the political party with a certificate of compliance; or
- b. require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list."

16. It can be seen from the foregoing that the IEBC is enjoined to ensure that, in nominating persons for special seats, political parties comply with the law before gazettment. The Petitioners challenge the gazettment of the nominated members of 22 county assemblies. Their contention is that the list of nominees gazetted did not comply with the Constitution, legislation and international law, for not including PWDs, minorities and the marginalised. Further, some of those nominated did not meet the qualifications to represent of the groups they purportedly represent. Additionally, in some cases,



the order of priority in the lists was not honoured while in others, persons not in nomination lists were gazetted. In spite of the foregoing, the IEBC proceeded to gazette the flawed lists. As such, the petitioners contend that it is necessary for the court to step in and interpret and clearly define the bounds within which the IEBC must operate as it conducts nominations to the county assemblies.

17. The question that this court must answer however, is whether upon gazette of the party lists as was done by the IEBC, vide the gazette notice in question, this court has jurisdiction to intervene in respect of any alleged violation of the law.
18. Article 165(3) of the Constitution confers upon the High Court unlimited original jurisdiction in civil and criminal matters. The court also has jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of this Constitution or whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the Constitution.
19. This jurisdiction of the High Court was affirmed in the case of In the Matter of Interim Independent Electoral Commission [2011] eKLR where the Supreme Court declined to assume jurisdiction over the question of the date of elections and stated:

"(43) Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court."

20. The jurisdiction of the court as outlined above may however be limited by the Constitution and statute in certain instances. The court may thus only exercise that jurisdiction which has been conferred upon it by the Constitution, statute or both. This was the holding in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court succinctly stated:

"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

21. Similarly, in the case of Eliud Wafula Maelo v Ministry of Agriculture & 3 others [2016] eKLR, the Court of Appeal considered the question of limitation of the jurisdiction of the High Court and stated as follows:

"11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In Halsbury's Laws of England, volume 10 at paragraph 319, the learned authors state:

"The subject's right of access to the courts may be taken away or restricted by statute." ...

Paragraph 723 states:



“Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”

12. In *Narok County Council v Trans-mara County Council* (supra) this Court held that:

“ ... though section 60 of the Constitution gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty.”

13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of the Constitution only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court in the *Matter of the Interim Independent Electoral Commission* [2011] eKLR:

“[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.”

14. Similarly, in *Suleiman Ibrahim v Awadh Said* [1963] E. A. 179, Windham, CJ held that section 33 of the Rent Restriction Act of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.”

22. The people of Kenya when enacting the *Constitution* recognised that disputes relating to elections will inevitably arise. Provision was thus made under article 87(1) that Parliament shall enact legislation to establish mechanisms for the timely settlement of electoral disputes. The *Elections Act, 2011* is the legislation that was enacted to give effect to the said article. In determining the jurisdiction of this court in matters relating to elections, or indeed any other matter, the court must beyond the provisions of the *Constitution* have regard to the provisions of relevant statutes.

23. Under article 88(4)(e) and section 74 of the *Elections Act*, IEBC is vested with the mandate to resolve electoral disputes. However, that mandate does not extend to election petitions and disputes subsequent to the declaration of election results. Article 88(4)(e) provides as follows:

“(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;”

24. Section 74 of the *Elections Act* is couched in similar terms as follows:

“Pursuant to article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”



25. In the present case, the petitioners challenge gazette notice of September 9, 2022 by the IEBC, of the nominated members of 22 county assemblies. It is now well settled that gazette of nominated members of county assemblies, as in the present case, is an election. In the case of *Rabma Issak Ibrahim vs Independent Electoral & Boundary Commission & 20 others* [2017] eKLR Mwita, J reiterated the legal position on the effect of gazette of nominated members of a county assembly and stated:

"41. The legal position emerging from the above analysis is that once a member has been gazetted as duly nominated, that becomes an election result and anyone unhappy with that result can only challenge it as an election dispute in an election court."

26. The Court of Appeal while considering this very issue in the case of *Rose Wairimu Kamau and 3 others v IEBC*, CA No 169 of 2013 rendered itself as follows:

"[I]n reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under articles 971(C) and 177(2) respectively have been gazetted....they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under article 105 of the Constitution or part VIII of the Elections Act as the case may be."

27. Similarly, in the case of *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR, the Court of Appeal considered the question of the jurisdiction of the High Court in a dispute concerning gazette of nominated members of county assemblies. The court stated that the High Court lacked jurisdiction and stated as follows:

"We are cognizant of the principle that upon gazette of members of the County Assembly, they are deemed to be elected members of the County Assembly. Applying the foregoing dicta and principles of law to the instant case, section 75 (1A) of the Elections Act expressly indicates that the jurisdiction to consider, hear and determine the question as to the validity of election of a member of County Assembly is vested with the Resident Magistrate's Court designated by the Chief Justice. The proper and original forum to determine the question of whether the 2nd respondent was validly nominated and gazetted as representative of the marginalized communities in Isiolo County Assembly is the Resident Magistrate's Court. The learned Judge did not err in interpreting and applying section 75 (1A) of the Elections Act. We state that the High Court has no original jurisdiction to determine questions of membership to County Assemblies."

28. The Supreme Court also had occasion to consider this very same issue in the case of *Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, and had this to say:

"(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'.

(118) On such a foundation of principle, we hold it to be the case that whereas the Court of Appeal exercised jurisdiction as an appellate electoral court, it had not been moved as such, in accordance with section 85 A of the Elections



Act, and relevant provisions of the Constitution. The respondents had moved the appellate court on the basis that they were aggrieved by the High Court's decision in judicial review proceedings, in which that court had declined jurisdiction. This in our view, would have been a proper case for the appellate court to refer the matter back to the High Court, with appropriate directions.

(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."

29. The Supreme Court affirmed the legal position of election by way of nomination, through the party list. The court further affirmed the principle that any challenge of such an election may only be by way of an election petition.

30. Based on the foregoing, it is quite evident that upon gazetting of members of a county assembly who are nominated pursuant to article 177 of the Constitution, such members are deemed to be duly elected. Any person aggrieved by such gazetting as the petitioners herein are, may only find recourse in an election court designated under section 75(1A) which provides as follows:

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

31. A reading of the above provision makes it clear that the question as to the validity of the election of a member of county assembly may only be raised in the election court. Thus, a person wishing to challenge the gazetting of a member of a county assembly, as the Petitioners have herein, may only do so in an election court. Such election court is a Resident Magistrate's Court duly designated as such, by the Hon Chief Justice. A petition filed in any other court or forum to challenge such election, is incompetent for want of jurisdiction.

32. My view is that the issue of violation of the Constitution and statute by IEBC in gazetting the nominees for the various county assemblies ought to be raised in the election court as a ground for nullification of the election. Duly guided by the Supreme Court in the case of *Moses Mwigigi & 14 others*, I find that allowing the petitioners herein to move this court by way of a constitutional petition in the present circumstances, is to set up a parallel electoral dispute-resolution regime, thereby defeating the *sui generis* character of electoral dispute-resolution mechanism provided in law. It is in the election court that the validity or otherwise of the nominations in question is to be determined. Accordingly, this court must not allow an electoral dispute to be transmuted into a constitutional petition as sought by the petitioners herein.

33. The law has provided a clear procedure for redress and such procedure must be followed to the letter. In the case of such case is Speaker of the National Assembly v James Njenga Karume [1992] eKLR the Court of Appeal addressed its mind to this very issue and stated:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."



34. The court is of the view that prayers A, B D E and F sought in the amended petition, if granted, will have the effect of nullifying the election of members of the 22 county assemblies. As indicated herein, the jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. This is one such instance. Jurisdiction to adjudicate entertain a dispute in respect of the election of a member of a county assembly has been conferred upon the Resident Magistrate’s Court, as designated by the Chief Justice under section 75(1A) of the Elections Act.
35. The court is aware that the petitioners also seek a declaration that section 36(8) of the Elections Act is unconstitutional. This court has jurisdiction under article 165(3)(d)(i) to determine the question whether any law is inconsistent with or in contravention of this Constitution.
36. Having considered the foregoing, the inevitable conclusion that this court must draw is that it lacks jurisdiction to entertain the petition herein save for prayer C. It is trite law that without jurisdiction this court has no power to make one more step. See the case of Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA held as follows:
- "[J]urisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
37. In the end and in view of the foregoing, the final orders hereby issue:
- i. The preliminary objection dated October 13, 2022 partially succeeds.
 - ii. The court declines jurisdiction in respect of prayers A, B, D, E and F of the amended petition.
 - iii. The court has jurisdiction to deal with prayer C of the amended petition.
 - iv. Costs in the cause.

DATED AND DELIVERED IN NAIROBI THIS 16TH DAY OF DECEMBER 2022

.....

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioners**
 **for the 1st Respondent**
**for the 2nd Respondent**
**for the 4th Respondent**
**Court Assistant**

