



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.E385 OF 2021

IN THE MATTER OF

AN OBJECTION OF NOMINATION OF MILTON MWENDA

AND

IN THE MATTER OF

THE BY ELECTION OF KIAGU WARD

AND

IN THE MATTER OF

THE CHAMA CHA KAZI CANDIDATE OF

THE MEMBER OF COUNTY ASSEMBLY OF KIAGU WARD

AND

IN THE MATTER OF

THE DECISION OF INDEPENDENT ELECTION COMMISSION

LEADERSHIP AND INTEGRITY VETTING COMMITTEE

AND

IN THE MATTER OF

ART. 1., ART.19. ART.20. ART.21., ART.22, ART.25, ART.27. ART.38. ART.47.

ART.48. ART.51. ART.165(2)(D). ART.258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

SECTION 74 (2) OF THE ELECTION ACT 2021

BETWEEN

CHAMA CHA KAZI.....1ST PETITIONER

MILTON MWENDA.....2nd PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

SALESIO MUTUMA THURANIRA.....2ND RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioners filed a Petition dated 24th September 2021 seeking the following orders:-

a) A declaration that the 1st and 2nd Respondent were duty bound to observe the Constitution and the law relating to the conduct of nomination when they discharged their constitutional mandate on 23rd September 2021.

b) A declaration that the 1st and 2nd Respondent failed to comply with the Constitution and the laws relating to the nomination of the 1st Petitioner while rendering itself on the nomination dispute of the 2nd Petitioner vide its ruling of 23rd September 2021.

c) A declaration that the 1st Respondent violated Articles 10, 27, 38, 47, 50, 165 of the Constitution of Kenya as well as Section 74(2) of the Election Act 2011.

d) This Honourable Court be pleased to issue orders of certiorari to remove to this Honourable Court and quash the 1st Respondent's decision dated 23rd September 2021 which decision invalidated the 2nd Petitioner's nomination and candidature.

e) This Honourable Court be pleased to issue orders of mandamus to remove to this Honourable Court compelling the 1st Respondent to comply with its Gazette Notice No.9214 of 8th August 2021 and include the 2nd Petitioner's details relating to the ballot papers which details include:

i. The 1st Petitioner's party symbol

ii. The 2nd Petitioner's photograph/image

iii. The 2nd Petitioner's name

f) Cost of the Petition.

PETITIONERS' CASE

2. The Petitioners case is encompassed in their Petition and the Supporting Affidavit of the 2nd Petitioner of even date and their Supplementary Affidavit dated 5th October 2021. Their case is that upon the death of the elected member of Kiagu Ward of the Meru County Assembly (MCA) in May 2021 the seat was declared vacant by the Speaker of the Assembly on 9th June 2021. This was followed by the publishing of Gazette Notice No.7520 by the 1st Respondent on 27th July 2021 informing the public of the scheduled by-election.

3. The 2nd Petitioner states that following the instructions under Paragraph C of the Gazette Notice he resigned from his position as secretary of the deceased MCA. He avers that termination of his Contract of Service dated 29th November 2017 would be upon *the end of the term of the current Assembly and as long as the MCA remained in office*. He states that immediately after his resignation he was duly nominated by the 1st Petitioner as its candidate.

4. It is further averred that as per Paragraph K of the 1st Respondent's Gazette Notice No.7520, members of the Public were informed that any disputes arising from the nominations would be determined within 10 days of lodging the Dispute.

5. The 2nd Petitioner asserts that following his nomination the 2nd Respondent filed an objection dated 30th August 2021 arguing that his nomination violated Chapter six of the Constitution and in addition disregarded the guidelines issued by the 1st Respondent in the Gazette Notice. The 2nd Petitioner equally raised a preliminary objection premised on Section 74(2) of the Election Act 2011 during the hearing of the 2nd Respondent's objection on 23rd September 2021. The Preliminary Objection challenged the 1st Respondent's jurisdiction to hear the matter. The Preliminary Objection was however dismissed by the 1st Respondent Committee in its Ruling of even date and a new hearing date issued.

6. The 2nd Petitioner asserts that at the hearing he raised concerns of the 1st Respondent's conduct, the effect of the MCA's death on his contract of service and lack of service of documents relied upon by the 1st Respondent on the 2nd Petitioner that formed part of its ruling. He as a result complains that the 1st Respondent upheld the 2nd Respondent's complaint and invalidated the 2nd Petitioner's nomination despite

having gazetted him as a validly nominated candidate vide Gazette Notice No.9214 dated 8th September 2021.

7. The Petitioners in light of this argue that the 1st Respondent violated their rights under **Article 38 of the Constitution** through the demonstrated bias against the 2nd Petitioner and further abuse of office by adjudicating over the dispute outside the statutory period of 10 days. Furthermore, the Petitioners contend that the 1st Respondent acted ultra vires and in excess of its power by purporting to disregard the import of the Gazette Notices No.7520 and 9214 dated 27th July 2021 and 8th September 2021 respectively issued in respect to the by – election and revoking the two Notices.

8. The Petitioners assert that the 1st Respondent in addition violated **Articles 10 and 165 of the Constitution** by misapplying the provisions of **Section 74(3) of the Election Act 2011** in dismissing the Preliminary Objection dated 23rd September 2021. In doing so they say the 1st Respondent clothed itself with jurisdiction set out for the High Court by purporting to de-gazette the 2nd Petitioner’s nomination vide Gazette Notice No.9214. The 2nd Petitioner complains that this has the effect of violating his right under Article 27 of the Constitution as he was not afforded equal benefit of the law as espoused under **Section 74(2) of the Election Act**.

9. The 2nd Petitioner additionally argues that the 1st Respondents have violated **Article 47 of the Constitution** as read together with **Section 3 & 4 of the Leadership and Integrity Act** which fall under the jurisdiction of the Ethics and Anti-Corruption Commission. Further, **Article 50 of the Constitution** by drawing foreign evidence that the 2nd Petitioner was not provided with during the hearing.

1ST RESPONDENT’S RESPONSE

10. The 1st Respondent’s filed a Replying Affidavit dated 1st October 2021 sworn by Chrispine Owiye asserting that 2nd Petitioner appeared before the Returning Officer of Kiagu Ward on 26th August 2021. This nomination was shortly after contested by the 2nd Respondent, vide a letter dated 30th August 2021. The 1st Respondent thereafter through a letter dated 14th September 2021 informed the Clerk of the County Assembly of the complaint and proceeded to point out that it would carry out an investigation on the complaint.

11. It is asserted that the investigations revealed that the 2nd Petitioner was an employee of the County Assembly of Meru County and earned a salary in the month of August 2021. Moreover that the 2nd Petitioner had not submitted letters of resignation to the Returning officer of Kiagu Ward during the nomination period. Interestingly it was noted that the 2nd Petitioner in the Self Declaration Form had stated he is a farmer with no employment history and lastly that the 2nd Petitioner had submitted his resignation letter to the office of the Clerk of the Assembly on 10th August 2021.

12. The 1st Respondent asserts that in its Leadership and Integrity Committee Ruling dated 23rd September 2021 it was held that the 1st Respondent had jurisdiction to hear the matter. The Committee based on the evidence gathered went on to disqualify the 2nd Petitioner’s nomination. It further directed that the 1st Petitioner nominate an alternative candidate to the Returning Officer by 4:00pm on 27th September 2021. It is averred that the 1st Petitioner nominated the name of Mr. Jacob Mugambi Muriithi in a letter dated 26th September 2021 received at 5:00pm. The 1st Respondent avers that the nomination was time barred. This is because it was not in line with the Committee’s directions dated 23rd September 2021. This was communicated to the 1st Petitioner vide a letter dated 28th September 2021.

13. The 1st Respondent states in view of its narration in its Replying Affidavit it is its case that it acted within its constitutional mandate and other election laws. In addition it states that it upheld the 2nd Petitioner’s rights under **Article 47 and 50 of the Constitution**. Furthermore it is its argument that the Petitioners have failed to demonstrate that the 2nd Petitioner resigned from office within the requisite 7 days of the declaration of a vacancy as per **Section 43(5A) of the Election Act**.

2ND RESPONDENT’S RESPONSE

14. The 2nd Respondent filed a Response to the Petition dated 1st October 2021 asserting that the Petition contains misrepresentations and general allegations without any particulars. As a consequence it states it should be dismissed with costs. Moreover that the 1st Respondent’s decision invalidating the 2nd Petitioner’s nomination be upheld.

PETITIONER’S SUBMISSIONS

15. The Petitioner by way of written submissions dated 5th October 2021, discusses 3 issues for determination as follows:-

- i. An analysis of the decision of the 1st Respondent’s Committee;*
- ii. Whether the 1st Respondent had jurisdiction to entertain the complaint;*
- iii. Whether the 1st Respondent’s Committee usurped the powers of the High Court in entertaining the matter.*

16. On the first issue, it is submitted that the 1st Respondent failed to grant the Petitioners a fair hearing. As a result they claim their rights as enshrined under **Articles 38, 47, 50 and 165 of the Constitution** of Kenya as read with **Section 4, 5, 6, 7 and 8 of the Fair Administrative Action Act** and **Section 74(1), (2) and (3) of the Election Act** were violated. First the Petitioners submit that the evidence gathered was foreign and obtained by the 1st Respondent’s investigator, Secondly that the documents relied upon by the Committee to make its decision

were not part of the pleadings filed before it, thirdly these documents were not availed to them during the hearing of the complaint and fourthly the 1st Respondent failed to consider the Petitioners arguments during the hearing. The Petitioners rely on the case of **Republic vs. Capital Markets Authority & another Ex Parte Jonathan Irungu Ciano (2018) eKLR** on the threshold of a fair administrative action while conducting administrative proceedings.

17. On the second issue, it is submitted that the 1st Respondent did not have jurisdiction to entertain the complaint beyond the statutory timelines set out under the **Section 74(2) of the Election Act**. They argue that their jurisdiction is time bound. They aver that the complaint lodged on 30th August 2021 should have been heard by 9th September 2021. In support reliance was placed on the Supreme Court decision in the case of **Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others (2014) eKLR** where it was noted that the jurisdiction of a court to hear and determine electoral disputes is tied to the issue of time breach of which removes the dispute from the jurisdiction of the Court.

18. The Petitioners argue in light of the above that **Section 74(2) of the Elections Act** is applicable in this cases as it refers to an election that is certain and definite being 14th October 2021 which is distinguishable from **Section 74(3)** which provides for a prospective nomination or election. It is their case that the 1st Respondent Committee erred in relying on **Section 74(3) of the Election Act** while the by-election date was already determined. It is on this basis the Petitioners argue that the 1st Respondent Committee being time barred owing to the lapse of the stipulated 10 days lacked jurisdiction to entertain the complaint.

19. On the third issue, the Petitioners submit that the 1st Respondent's decision to disqualify the 2nd Petitioner while Gazette Notice No.9214 dated 28th September 2021 existed was ultra vires. This is because the power to de-gazette a person according to the Petitioner is vested in the High Court under **Article 165 (3) (b) (d) (ii) of the Constitution**.

1ST RESPONDENT'S SUBMISSIONS

20. The 1st Respondent filed Submissions and a list of Authorities dated 6th October 2021. It submits that it has jurisdiction to hear and determine disputes such as the one before this Court by virtue of **Article 88(4) of the Constitution** as read together with **Section 74(1) of the Elections Act and Section 4(e) of the Independent Electoral and Boundaries Commission Act**. This Statutes empower it to settle electoral disputes excluding election petitions and disputes arising after the declaration of the election results.

21. The 1st Respondent submits that **Article 252(1) of the Constitution** empowers it to conduct investigations. Furthermore the 1st Respondent's procedures are guided by the **Rules of Procedure on Settlement Disputes under the Elections Act** which also provide that the 1st Respondent's Committee can conduct investigations under **Rule 17(3)**. In addition it is submitted that the 2nd Respondent's complaint was determined within statutory timelines as stipulated under **Section 74(3) of the Election Act**.

22. The 1st Respondent contends that the 2nd Petitioner was validly disqualified as **Section 43(5A) of the Elections Act** states that a public officer should resign from public office within seven days of the declaration of a vacancy. This should have not been later than 16th June 2021. The 2nd Petitioner in this case failed to do so. He as a consequence was automatically disqualified by the operation of **Article 193(a) of the Constitution** for being a public officer. It is argued that publishing of the 2nd Petitioner's name in the Gazette did not grant him immunity from disqualification.

23. On the issue of violation of rights under Article 38, 47 and 50 of the Constitution it is submitted that the 1st Respondent granted the 2nd Petitioner an opportunity to file documents and defend himself at the hearing. It submits that it is imperative the Constitution and Election laws be interpreted as a whole as held in the cited case in support of **William Omondi vs. Independent Electoral & Boundaries Commission & 2 Others(2014)eKLR**. It is its argument therefore that the rights provided under **Article 38 of the Constitution** work in line with other laws to ensure an orderly efficient election process.

24. On the issue of grant of Judicial Review, the 1st Respondent asserts that the Petitioners have failed to meet the threshold for grant of Judicial Review. To buttress this argument reliance was placed on the cases of **Municipal Council of Mombasa vs. Republic Umoja Consultants LTD (2002)eKLR**, **Pastoli vs. Kabale District Local Government Canal & Others(2008) 2EA 300** and **Wycliffe Khisa Lusaka vs. Independent Electoral and Boundaries Commission(2017) eKLR**.

25. Finally, the 1st Respondent submits that the Petitioners have failed to demonstrate that the 2nd Petitioner resigned from office within the stipulated 7 days and prove that the 2nd Petitioner was not procedurally and lawfully disqualified. The Petition as a result is without merit and should be dismissed.

ANALYSIS AND DETERMINATION

26. Upon consideration of the Petition; the responses, parties rival submissions, I find that the following issues arise for consideration:-

a) *Whether the 1st Respondent had jurisdiction to entertain the 2nd Respondent's complaint.*

b) *Whether the 2nd Petitioner was qualified as a nominee.*

c) *Whether the 1st Respondent has power to degazette a nominee's name from the gazette.*

A. WHETHER THE 1ST RESPONDENT HAD JURISDICTION TO ENTERTAIN THE 2ND RESPONDENT'S COMPLAINT.

27. The Petitioners contend that the committee of the 1st Respondent did not have the pre-requisite jurisdiction to entertain the complaint beyond the statutory timelines, set out under **Section 74(2) of the Election Act**. It is further the Petitioners' case that the jurisdiction of the tribunal is time bound and that upon the lapse of the provided statutory period, the committee of the 1st Respondent seizes to have jurisdiction.

28. The 1st Respondent on its part contend that it has jurisdiction to hear and demine disputes by virtue of **Article 88(4) of the Constitution** as read together with **Section 74(1) of the Election Act** and **Section 4(e) of the Independent Electoral and Boundaries Commission Act**. It is contended first the statute empower it to settle electoral disputes excluding election petitions and disputes only after the declaration of the election results.

29. The 1st Respondent additionally avers that **Article 252(1) of the Constitution** empowers it to conduct investigations. It is 1st Respondents position that in doing so its procedures are guided by the Rules of procedure on settlement Deputes under the **Elections Act**, as provided under **Rule 17(3)**. The 1st Respondent further contends the 2nd Respondent's complaint was determined within the statutory timelines as stipulated under **Section 74(3) of the Election Act**.

30. The timely settling of electoral disputes is of pertinent importance and well provided in the Constitution. **Article 87(1) of the Constitution** provides that parliament shall enact legislation to establish mechanising for timely settling of electoral disputes. Further **Article 88(4) (e) of the Constitution** provides that **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;”

31. **Article 252 of the Constitution** provides that:-

“Each commission, and each holder of an independent office-

a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

b)

c)

d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

32. The **Election Act** clearly sets timelines within which an election dispute must be determined. **Section 74(2) of the Election Act** provides that an election disputes under **subsection (1)** shall be determined within ten 10 days of the lodging of the dispute with the commission.

33. The **Election Act No.24 of 2011** under **Section 74(1) (b) and (c) of the Constitution** provides that:-

a) 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.

b) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.

c) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

34. The Petitioners contend that the complaint that was considered by the Committee of the 1st Respondent was lodged on 30th August 2021 and was supplied to be dealt with at least within 10 days of lodging the complaint, that is 9th September 2021.

35. The 1st Respondent urge that **Article 88(4) of the Constitution** as read together with **Section 74(1) of the Election Act** and **Section 4(e) of the Independent Electoral & Boundaries Commission Act** empowers the Commission to settle electoral disputes, including disputes relating to or arising from nominations but excluding Election Petitions and disputes subsequent to the declaration of election results.

36. The Commission therefore contends it has the mandate and jurisdiction to hear and determine disputes such as the one which led to the disqualification of the 2nd Petitioner. Therefore it is Respondents contention that it has mandate and jurisdiction to hear and determine disputes such as the one which led to the disqualification of the 2nd Petitioner.

37. It is further asserted on behalf of the 1st Respondent that under **Article 252 of the Constitution** the 1st Respondent is empowered to investigation on its own motion or on a complaint made by a member of public guided by the Rules of Procedure of settlement Disputes under the Election Act.

38. The 1st Respondent relies on **Section 74 (3) of the Election Act**, which provides that notwithstanding **subsection (2)**, where a dispute under **subsection (1)** relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable. The 1st Respondent urges therefore that it was within the timelines to hear and determine the 2nd Respondent's complaint.

39. The Respondents places further reliance in the provisions of **Section 43(5) of the Elections Act**, which gives time within which a public officer should resign from public office in order to contest in a by –election. It provides that a public officer who intends to contest in a by-election under this Act shall resign from public office within seven days of the declaration of a vacancy. The 1st Respondent therefore urges that **any public officer such as the 2nd Petitioner who intended to contest in the Kiagu by-election ought to have resigned from public office within seven (7) days meaning not later than 16th June 2021. The 2nd Petitioner failed to resign from the County Assembly of Meru within the required time.**

40. The Petitioner's urging that the 1st Respondent Committee acted without jurisdiction and out of time, placed reliance in the case of **Supreme Court of Kenya** in the case of **Lamanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR** at paragraph 69 where their Lordships noted as follows:-

“We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court.” (Emphasis mine)

41. The Supreme Court in making the above pronouncement was faced with an electoral dispute, which such dispute was such as this one before this Court today. The same related to a known election, a candidate already nominated/participated in an election. There is no doubt in the instant Petition, that **Subsection 74(2) of the Elections Act** is very relevant to this case, to the extent that it relates to the nomination by the 1st Petitioners nominating the 2nd Petitioner to take part in the by-election of 14th October 2021. The election is known, it is certain and definite. The Petitioners on their part contend that the action of the committee of the 1st Respondent, to seek refuge in **Section 74(3) of the Election Act** is a misconstruction of the provision of the Act.

42. It is noted from the Respondents submissions that it clothed itself with jurisdiction under **Section 74(3) of the Elections Act**, which clearly relates to prospective nomination or election. It should be noted that **Section 74(3) of the Election Act** provides:-

“Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

43. From the reading and understanding of **Section 74(3) of the Election Act**, I find that it does not and was not intended to take away the time bound jurisdiction under **Section 74(2) of the Elections Act**.

44. It should be appreciated that in distinguishing the same, **Section 74(2) of the Elections Act** relates to a nomination or an election that is known, certain and definite, an election that has a date like this one in this Petition. Whereas **Section 74(3)** relates to a prospective nomination or election and that the dispute thereto should be determined before the date of the nomination or election – prospective nomination or election - is unknown, indefinite and undefined. I find therefore that it is erroneous for the 1st Respondent to rely on **Section 74(3) of the Election Act** in clothing itself with jurisdiction merely because the Petition herein is dealing with a certainable known election as per **Section 74(2) of the Election Act**.

45. In view of the conclusion that have come to on this issue, it is my finding that the committee of the 1st Respondent did not have the jurisdiction to deal with the complaint dated 30th August 2021 and received by the 1st Respondent on 31st August 2021 outside the timeliness provident under **Section 74(2) of the Election Act** of 10 days.

46. Reliance in support of the above proposition on timelines and the importance of addressing the Constitutional timelines in election disputes is placed in the Supreme Court of Kenya case of **Lemanken Aramat v Harun Meitamei Lampaka & 2 others [2014] eKLR** (Supra) at paragraph 71 where it was stated that:-

“This Court has recently pronounced itself again, on the issue of time, and the importance of adhering to constitutional timelines in electoral disputes, in the Munya Case. The Court held (at paragraph 62) that:-

“Article 87(1) grants Parliament the latitude to enact legislation to provide for ‘timely resolution of electoral disputes.’ This provision must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election Petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about ‘timelines and timelines’, was intended to redress this aberration in the democratic process. The Country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representative are. The people’s will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.” (Emphasis mine)

47. I find the reason why **Section 74(1) of the Election Act** relates to the known, definite and certain election is so important in electoral disputes because if the same is not complied with it may be used to disenfranchise people and make a mockery to the peoples' democratic

space. In the instance case it was important for the committee to make a decision within 10 days of the complaint so that the Petitioners are not denied the rights under **Article 38 of the Constitution** to participate in an election as well as not to deny the rights of the 1st Petitioner to field a candidate. For the 1st Respondent to cloth itself with perpetual jurisdiction is a clear indication of its violation of **Section 74(2) of the Elections Act**.

48. In view of the aforesaid I find that the Committee of the 1st Respondent acted without jurisdiction as it acted out of time on the 2nd Respondent's complaint.

B. WHETHER THE 2ND PETITIONER WAS QUALIFIED AS A NOMINEE.

49. The 1st Petitioner nominated the 2nd Petitioner to run for the seat of the Kiagu ward by-election following the demise of the then member of country assembly in the month of May 2021.

50. The complaint was subsequently filed against the 2nd Petitioner before the committee of the 1st Respondent challenging the nomination of the 2nd Petitioner by the 1st Petitioner. The complaint was filed on 30th August 2021 and heard on 23rd September 2021. The committee of the 1st Respondent upheld the complaint, struck out the name of the 2nd Petitioner from running for the Kiagu ward by-election and directed the 1st Petitioner to nominate another candidate in 72 hours.

51. It is urged the administrative action by the committee of the 1st Respondent violated the rights of the 1st Petitioner to nominate and participate in an election and it's the Petitioners' submission that the same was not lawful, reasonable and procedurally fair.

52. The pleadings filed before the committee of the 1st Respondent are:-

1. Complaint – objection of nomination of same Kiagu-ward by-election

2. Notice of Preliminary Objection dated 23rd September 2021.

These are the only pleadings placed before the 1st Respondent for discharging the complaint, culminating into the decision delivered on the 23rd September 2021.

53. The decision of the committee as provided made the following orders:-

1. That the 1st Respondent Milton Mwenda and the 2nd Respondent Nathan Gitonga are hereby disqualified from being candidates in the by elections of Kiagu Ward in Meru County scheduled to be held on 14th October 2021.

2. That Chama Cha Kazi Party has a right to nominate another candidate to contend in the Kiagu Ward by-election.

3. That the Chama Cha Kazi Party is directed to present an alternative candidate to the Returning Officer Kiagu Ward within 72 hours and in any event not later, close business at 4.00p.m on 27th September 2021.

54. Under **Article 84 of the Constitution** it is provided that:-

“In every election, all candidates and all political parties shall comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.”

55. **Section 25 of the Election Act** provides that:-

“25. (1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person— is registered as a voter; satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and is either—

i. nominated by a political party; or

ii. an independent candidate supported by at least five hundred registered voters in the ward concerned.

A person is disqualified from being elected a member of a county assembly if the person—

a) is a State officer or other public officer, other than a member of the county assembly;

b)

c)”

56. Further *Section 2 of the Elections Act*:-

“Public officer” has the meaning assigned to it in Article 260 of the Constitution;”

57. Article 260 of the Constitution:-

“public officer” means—

any State officer; or

any person, other than a State Officer, who holds a public office;

“public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;”

58. The Court of Appeal in the case of *Kennedy Moki (Supra)* observed as follows:

“57. an election court has jurisdiction to hear and determine pre-election nomination disputes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the Certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate

58.....A nomination dispute that goes to the root of the electoral process, or one that determines qualification and eligibility of a candidate to vie, is an issue of substance that goes to the root of the election, and an election court has jurisdiction to hear and determine the dispute.”

59. Further in the case of *Kennedy Irungu Ngodi & another v Mary Waithera Njoroge & 11 others [2021] eKLR* the Court opined as follows:-

“167. In a case where a vacancy occurs in Parliament in the course of an election cycle and a by-election is to be conducted, if a Member of County Assembly intends to be elected as the Member of Parliament for the vacant seat, then that member must resign from the position of the member of County Assembly once the declaration of vacancy is made by the Speaker of either House of Parliament.

168. Section 43(5A) of the Elections Act specifies the period within which a State officer or any other public officer ought to resign, for purposes of a by-election, as follows: -

A public officer who intends to contest in a by-election under this Act shall resign from public office within seven days of the declaration of a vacancy.”

60. Similarly in the case of *Charles Omanga & another v Independent Electoral & Boundaries Commission & another & another [2012] eKLR* it was held that:-

“24. It is their common argument that public officers need to be restricted in their political activities so that while in office they should not be seen to be engaged in partisan political activities and which may impede the objective discharge of their duties...

.....

26. I also wish to state that the impartiality of public servants is a cardinal value enshrined in Article 232(1)(a) of the Constitution which provides that the public servant and service must be “responsive, prompt, efficient, impartial and equitable” in the provision of services. How can a public servant espouse those principles if he is allowed to remain in office until the election date?”

61. The 2nd Petitioner in response to the proceedings before the Committee of the 1st Respondent contend that he was not accorded a fair hearing and that the proceedings were laced with malice and bias; the 2nd Petitioner contend that the Committee violated the rights of the Petitioners as enshrined under *Article 38, 47, 50, 165 of the Constitution* as read with *Section 4, 5, 6, 7. And 8 of the Administrative Action Act* and *Section 74(1)(2) & 3 of the Election Act*.

62. It is urged in demonstrating the violation of the law the Committee of the 1st Respondent while reading itself through its decision of 23rd September 2021, did rely on the foreign evidence, obtained strangely and by an investigator of the 1st Respondent therefore violating *Article 47* as read with *Section 4(3) (g) of the Fair Administrative Action Act*. The Petitioner in demonstration thereof sought to rely on paragraphs 33, 34, 35 & 36 of the decision of the Committee of the 1st Respondent dated 23rd September 2021. It is submitted that the evidence relied on was as follows:-

i. *The letter dated 17th September 2021, is a correspondence by the investigation office of the 1st Respondent to the country assembly of Meru.*

ii. *The letter dated 17th August 2021 not before the committee neither this Court yet relied on.*

iii. *Investigation report dated 20th September 2021 allegedly investigating the objection to nomination.*

iv. *Alleged resignation dated 10th August 2021 by the 1st Petitioner.*

63. It is contended that the documents that form the basis on which the committee of the 1st Respondent relied on were not part of the pleadings filed before the committee, neither were they introduced by the Complaint and the Respondent therein. Furthermore it is contended that these evidentiary documents were not availed to the Petitioners during the hearing of the complaint and neither were the Petitioners given any notice that the document would be used in the hearing. The trial at the Committee of the 1st Respondent is urged was by ambush.

64. The Respondent in response urged that it answered that it complied with **Articles 47 and 50 of the Constitution** and the **Fair Administrative Action Act** by affording the 2nd Petitioner an opportunity to file documents in response to the complaint and to appear and defend himself against the complaint before the Committee.

65. The Respondent under paragraph 26 of the Affidavit of Chrispine Owiya sworn on 1st October state that the 1st Respondent relied on evidence and material placed before it all which were within the knowledge of the 2nd Petitioner and non was foreign as alleged by the Petitioners. The Respondent averred that it disclosed the material before it which was within the knowledge of the 2nd Petitioners.

66. I find that the Petitioners have demonstrated that the evidentially documents that form the basis on which this committee of the 1st Respondent relied upon to reach its decision did not form part of the proceedings filed before the committee. The committee of the 1st Respondent clearly in their action or omissions contravened the rights of the Petitioners to prepare adequately for the hearing before the committee as enshrined under **Article 47 and 50 of the Constitution of Kenya 2010** as read with **Section 4(1), 92), 3(a), (g) of the Fair Administrative Action Act**.

67. **Section 4(3)(a), (g) of the Fair Administrative Action Act** provides:-

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

b)

c)

d)

e)

f)

g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

68. I find that it is not enough to urge the information was within the knowledge of the Petitioners without demonstrating how the 2nd Petitioner had knowledge of the documents. The committee of 1st Respondent’s failure to provide the above referenced documents to the Petitioners i.e. the letter dated 17th September 2021, the Investigation Report dated 20th September 2021 to the Petitioner and the alleged resignation on letter by 1stPetitioner dated 10/8/2021 violated the provision of **Article 47, and 50 of the Constitution of Kenya** as read together with **Section 4(1) (2), (3)(a), (g) of the Fair Administrative Action Act**.

69. It is not in dispute that during the hearing of the complaint before the committee of the 1st Respondent, the committee entertained the evidence from the investigation officer of the 1st Respondent despite counsel for the Petitioner challenging that said evidence. At, paragraph 21 of the decision is instructive that the issue of foreign evidence was raised, but the committee ignored it and subsequently made a decision as seen in paragraph 33, 34, 35 and 36 of the decision in arriving at its decision. I find therefore as a result of the committee entertaining foreign evidence the Petitioners were aggrieved by the decision of the committee. Reliance in support is placed in a decision of G. V. Odunga in the case of **Republic v. Capital Markets Authority & another Ex-parte Jonathan Irungu Ciano [2018] eKLR** where the learned judge stated:-

“28. In this case it is clear that one of the documents which was crucial in the conduct of the impugned proceedings was the KPMG Forensic Report. It is this report that the ex parte applicant contended it received on the eve of his appearance before the Board. The Respondent however averred that the ex parte applicant had confirmed to it that they had received the same report a

week preceding his appearance before the Board and that the applicant did not apply for more time to prepare for his submission.

29. Whereas it is true that it would have been prudent for the applicant to seek more time to adequately deal with the issues facing him if he thought that the time given to him was too short, the current state of the law places the onus on an administrative body or authority to furnish the person against whom allegations are made with the information, materials and evidence to be relied upon in making the decision or taking the administrative action. In other words, it is not upon the applicant to ask to be supplied with the same as the right to be furnished the same is imposed on the administrator by law.

30. I have considered the material placed before me and I am not satisfied that the manner in which the Respondent conducted its proceedings met the threshold of a fair administrative action as contemplated under Section 4(3)(a) and (g) of the Fair Administrative Action Act.” (Emphasis mine)

70. In the instant Petition, the Applicant was not given / furnished with the information, materials and evidence relied on when the decision was made. Similarly, the Petitioners were not given the evidence that the committee relied on when rendering itself neither was the evidence tabled by the complainant. I therefore find that the Petitioners have demonstrated that the actions of the Committee to conduct investigation on the complaint lodged before it by the 2nd Respondent vide investigation correspondences dated 17th September 2021 and 20th September 2021 is a breach of **Article 50 of the Constitution**, to the extent that the arbiter is required to remain impartial. The 1st Respondent breached **Article 51 of the Constitution** by failing to resolve the dispute in a fair and an impartial manner. The action of the 1st Respondent of stepping into the arena of the dispute, investigating the complaint while still being the arbiter demonstrates that the 1st Respondent was not impartial and that it was biased.

71. No doubt, that I find the actions of the committee of the 1st Respondent has by its actions of conducting an investigation of a complaint already before it, exhibited the character of a biased and partial arbiter by becoming the investigator, prosecutor, judge, jury, executioner and persecutor-all rolled into one. It is further shown by the 1st Respondent committee failure to consider the arguments of the Petitioners in the hearing and relying solely on the evidence procured by themselves in disqualifying the 2nd Petitioner from participating in the elections.

72. It is noted amongst the said foreign documents relied upon is a letter dated 14th August 2021 purportedly issued by the 2nd Petitioner herein and playship for the month of July 2021. These documents are denied and challenged by the 2nd Petitioner under paragraph 22 of the supporting affidavit by Milton Mwenda, the Petitioner herein. The 2nd Petitioner under paragraph 9 of the affidavit depones that it was an express term of the said contract of employment of the 2nd Petitioner that his employment would automatically terminate upon the occurrence of two events namely:-

a) End of the tem of the current assembly

b) As long as the current MCA remained in office.

73. The Petitioner urge the committee of 1st Respondent breached **Article 50 of the Constitution** for failing to accord him fair and impartial hearing, by relying on foreign documents and purporting that he had issued a resignation letter. Further the Petitioners blame the committee of 1st Respondent for violating **Article 47 of the Constitution** as read with **Section 3 & 4 of the Leadership and Integrity Act**. The Committee of the 1st Respondent was in error when it sought to confer upon itself with the jurisdiction to hear and determine matters on leadership and integrity which by virtue of **Section 4(2) of the Leadership and Integrity Act** falls under the jurisdiction of the **Ethics and Anti-Corruption Commission** and not the Respondent.

74. In view of the above it is my findings that the Committee of the 1st Respondent contravened the rights of the 2nd Petitioner to prepare adequately for hearing before itself and also violated **Article 47 and 50 of the Constitution** as read with **Section 4(1) (2) (3) (a), (g) of the Fair Administrative Actions Act**. In view whereof the Committee of the 1st Respondent in violation of the Petitioners rights to fair hearing failed to determine the issue as regards whether 2nd Petitioner was not qualified as a nominee having previous found him qualified.

C. WHETHER THE 1ST RESPONDENT HAS POWER TO DEGAZETTE A NOMINEE’S NAME FROM THE GAZETTE.

75. The Petitioners contend that the decision of the committee of the 1st Respondent purportedly disqualify the 2nd Petitioner from running in the forthcoming by-election. This action was done in the backdrop of an existing Gazette Notice no. 9214 of 8th September 2021 that had published the 2nd Petitioner in the Kenya gazette as a candidate for the by-election of Kiagu Ward using the 1st Petitioner as the preferred Party. The effect of the order number one of the decision is that it de-gazetted the Gazette Notice no.9214 of 8th September 2021, an action that the Committee of the 1st Respondent does not have legal authority to perform.

76. The Respondent on its part aver that the 1st Respondent has the mandate and jurisdiction to disqualify a candidate and delete his/her name from the gazette notice at any time during the pendency of an election. Publishing the name of the 2nd Respondent in the gazette as a candidate for Kiagu Ward by election does not grant him immunity from disqualification upon being found to have committed a wrongdoing. The 1st Respondent acted within its mandate as donated by the Constitution and other election laws and did not violate any given provision of the law contrary to the allegations of the Petitioner.

77. Under **Article 165 (3) (b) (d) of the Constitution** the powers to question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with or in contravention of this Constitution is a preserve of the High Court.

78. The Supreme Court in the case of *Moses Mwicigi & 14 Other-Vs-The IEBC AND 5 Others-Petition 1 of 2015*, stated as follows:-

“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 the seats done 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 special seat, 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, and ‘election by registered voters’ as was held in the Joho case, is in principles, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of the results from the IEBC to the election court.

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 the 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.”

79. Further in the case of *Republic v Independent Electoral and Boundaries & another Exparte Abdia Hassan [2018] eKLR* it was held that:-

“40. Sections 34(4), 35 and 36 of the Elections Act as read with Regulation 54 of the Elections (General) Regulations place a duty on the IEBC to ensure that the party lists submitted to it comply with the relevant provisions of the law, and the Constitution and in particular Article 177 of the Constitution, and under Article 88(4) (e), the IEBC is mandated to resolve all disputes relating to or arising from nominations.

.....

42. After the IEBC receives the nomination list, it checks for compliance and takes necessary steps to finalise the process of election for special seats and in the event that a political party does not comply with the law then IEBC has the power to reject the party list by requiring an amendment or rectification and a fresh party list be submitted.

43. Once nominees are gazetted, any challenge to the process can only be through an election petition and not Judicial Review process. (Emphasis mine)

80. Similarly in the case of *Rahma Issak Ibrahim v Independent Electoral & Boundary Commission & 2 others [2017] eKLR* the Court concluded as follows:-

“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. Counsel for IEBC and interested parties attempted to argue, quite erroneously, that the petitioner should have filed this petition before the election Court and that was one of the grounds advanced to contend that this court did not have jurisdiction to hear this Petition. That is not the correct position in law. It is the interested party who should in fact have filed an Election Petition to challenge the petitioner’s nomination.

42. In view of what I have said above, and after considering the facts of this case and the applicable law, I am satisfied that IEBC acted outside its mandate and violate the constitution and the Elections Act. Its action of purporting to delete the Petitioner’s name as a duly nominated member of Mandera County Assembly and substitute it with that of the 1st Interested Party was ultra vires null and void. The 2nd respondent could also not lawfully swear in the 1st interested party following that illegal gazette notice no 8752 of 6th September 2017. (Emphasis mine)

81. I find that the consensus in the decisions set out above is that once the 1st Respondent publishes the name of a nominee in the Gazette it no longer has power to purport to de-gazette the name of the nominee. The mandate of the 1st Respondent is limited to ***disputes relating to or arising from nominations but excluding election Petitions and disputes subsequent to the declaration of election results***. If this interpretation of the law is to be followed, then it would mean that the 1st Respondent does not have the requisite jurisdiction to de-gazette the name of the 2nd Petitioner. In fact once the 1st Respondent’s Committee determined that the 2nd Petitioner was not a qualified nominee as discussed above, the 1st Respondent should have downed its tools at that point. This is because at that point, determination of the matter would entail instigation of an election Petition which is outside its jurisdiction. Therefore, the 1st Respondent’s argument otherwise does not suffice and in light of that, this Court’s jurisdiction under **Article 165(6) of the Constitution** was properly invoked.

82. In view of the conclusion that I have come to I further find the committee of the 1st Respondent acted ultra-vires and in usurpation of the powers of the Honourable Court.

83. **The upshot is that the Petition is meritorious and is allowed in the following terms:-**

a) A declaration be and is hereby issued that the 1st and 2nd Respondents were duty bound to observe the Constitution and the

law relating to the conduct of nomination when they discharged their constitutional mandate on 23rd September 2021.

b) A declaration be and is hereby issued that the 1st and 2nd Respondents failed to comply with the Constitution and the laws relating to the nomination of the 1st Petitioner while rendering itself on the nomination dispute of the 2nd Petitioner vide its ruling of 23rd September 2021.

c) A declaration be and is hereby issued that the 1st Respondent violated Articles 10, 27 ,38 ,47, 50, 165 of the Constitution of Kenya as well as Section 74(2) of the Election Act 2011.

d) An Order of Certiorari be and is hereby issued to remove to this Honourable Court and quash the 1st Respondent's decision dated 23rd September 2021 which decision invalidated the 2nd Petitioner's nomination and candidature.

e) An order of Mandamus be and is hereby issued to remove to this Honourable Court compelling the 1st Respondent to comply with its Gazette Notice No.9214 of 8th August 2021 and include the 2nd Petitioner's details relating to the ballot papers which details include:-

i. The 1st Petitioner's party symbol

ii. The 2nd Petitioner's photograph/image

iii. The 2nd Petitioner's name

f) Costs of the Petition to the Petitioners.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF OCTOBER, 2021.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA