



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**PETITION NO. 4 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 73, 75, 77, 80, 160 AND 179 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT NO. 9 OF 2011**

**AND**

**IN THE MATTER OF THE ELECTIONS ACT, ACT NO. 24 OF 2011**

**AND**

**IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, NO. 19 OF 2012**

**AND**

**IN THE MATTER OF THE PUBLIC FINANCE AND MANAGEMENT ACT, 2012**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENTS ACT, NO. 17 OF 2012**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT, NO. 3 OF 2005**

**AND**

**IN THE MATTER OF THE SUSTAINABILITY OF THE GOVERNOR OF KIRINYAGA COUNTY**

**BETWEEN**

**PURITY MADRINE WANGUL.....PETITIONER**

**-VERSUS-**

**HON. JOSEPH K. NDATHI.....1<sup>ST</sup> RESPONDENT**

**AND**

**THE INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**THE SECRETARY GENERAL, JUBILEE**

**ALLIANCE PARTY.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The petitioner **Purity Madrine Wangui**, filed this petition against the 1<sup>st</sup> respondent **Hon. Joseph K. Ndathi**, and the interested parties, that is, **Independent Electoral and Boundaries Commission, the Secretary General, Jubilee Alliance Party** and the **Auditor General**. She was seeking declarations that:-

*(a) Has neglected or failed to uphold his duties as envisaged under Article 179 (4) of the Constitution.*

*(b) Using his position and/or power has involved himself in corrupt ways and activities.*

*(c) Has failed to comply with and/or breached the provisions of Chapter Six of the Constitution, Public Finance Management Act, Integrity Act, Public Procurement and Disposal Act in discharging his duties as Governor of Kirinyaga County Government and thus a gross violation of the law.*

*(d) Actions of the respondent as the CEO of Kirinyaga County Government amounts to gross misconduct by a person holding the office of Governor.*

*(e) Should be surcharged for all public funds lost as per the Auditor General's reports by the Kirinyaga County Government during his tenure as Governor in light with provision of Article 179 (4) of the Constitution.*

*(f) Is unfit to hold any public office.*

The Petitioner therefore sought an order that the second Interested Party be restrained from nominating the Respondent to vie for the governor of Kirinyaga County.

**2. Respondent's Case**

He raised a preliminary objection on a point of law based on the following grounds:

*(i) That this Honourable Court lacks jurisdiction to investigate acts of corruption and/or violation of codes of ethics by dint of Section 11 (d) of the Ethics and Anticorruption Commission Act which vests such jurisdiction in the Ethics and Anti-Corruption Commission.*

*(ii) That the orders sought in the application violate the provisions of Article 50(2)(a) of the Constitution which encapsulates the right to be presumed innocent until the contrary is proven.*

*(iii) That the orders sought in the application violate the provisions of Article 180 (2) as read with Article 193(3) of the Constitution which provides that a candidate for the office of Governor can only be barred from contesting an election after all possibility of appeal or review of the relevant decision has been exhausted.*

*(iv) That the import of the application and Petition presently before this Honourable Court is to usurp the constitutional functions of the Ethics and Anti-Corruption Commission, the Senate, the County Assembly and the Office of the Director of Public Prosecutions.*

*(v) That the application and Petition presently before this Honourable Court violates the provisions of Article 229 (7) of the Constitution that directs the Auditor General to present his Audit Report to the County Assembly for its consideration.*

*(vi) That the application and Petition presently before this Honourable Court contravenes the provisions of Section 64 (1) of the Public Audit Act which direct the Auditor General to report to the Police, Ethics and Anti-Corruption Commission or Public Procurement Oversight Authority whenever he establishes that a person has been in fraud or corrupt practices.*

*(vii) That the Application and Petition presently before this Honourable Court violates the accountability framework prescribed for governors under Article 181 (1) of the Constitution as read with Section 33 of the County Government Act which empowers the County Assembly and Senate to impeach a Governor on the following grounds: gross violation of the Constitution or any other law; commission of crimes under national and international law; abuse of office or gross misconduct.*

*(viii) That the proper forum to issue the Declaratory Orders sought in the Petition is the Anti-Corruption and Economic Crimes Division.*

*(ix) That the proper party to seek Declaration (e) of the Petition is the Assets Recovery Agency by way of an application to the Anti-Corruption and Economic Crimes Division of the High Court.*

He prayed that the application and the petition be struck out and be dismissed with costs. The Respondent also filed a replying affidavit.

3. The 1<sup>st</sup> interested party filed a replying affidavit and urged the Court to dismiss the petitioner's application with costs in favour of the 1<sup>st</sup>

interested party.

4. The 2<sup>nd</sup> interested party did not file any papers.

5. As for the 3<sup>rd</sup> interested party they filed a replying affidavit together with an application seeking to strike out the petitioner's suit against them for failing to disclose any cause of action against them.

6. The pleadings closed and the preliminary objections were given a hearing date on 24<sup>th</sup> July, 2017. On the said date the Petitioner and the respondent were absent and the matter was stood over generally. Thereafter the preliminary objection was listed for hearing on 21<sup>st</sup> September, 2017 but on the said date the preliminary objection could not proceed as the petitioner and the respondent were absent though they were both duly served.

7. The 1<sup>st</sup> interested party's advocate applied to have the petition dismissed on the ground that the petition had been overtaken by events and the petitioner has not shown any interest in proceeding with it. The 3<sup>rd</sup> interested party who was present in Court did not oppose the application for dismissal.

8. The only issue arising is dismissal of the suit for non-attendance. Order 12, rule 3 of the Civil Procedure rules provides:

***“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”***

The petitioner appears to have lost interest in the matter as he has failed to turn up in court on two occasions when the matter came up in Court. Despite being served with the preliminary objections to dismiss the petition he has not turned up in Court to oppose the move. As such there has been no good cause shown why the suit should not be dismissed. Such matters where parties come to Court with a lot of funfair only to lose the steam mid-way should not be allowed to clog the justice system with unnecessary backlog. The Courts have not hesitated to dismiss such matters and unclog the system to allow a free flow and expeditious disposal of cases. In the case of **Counties Efficiency In Development V Kenya Airports Authority Ltd & another Interested Party One Way Cleaning Services Ltd & 2 others [2015] eKLR** in an application to set aside the order dismissing the suit for non-attendance, the court held:

***“The Court's record indicates a party who has no interest in pursuing its claim, such as it is, and has taken advantage of the indulgence of the Court to engage both the Court and the respondents in a circus that should not be permitted to continue. The words used by the Court in dismissing the petitioner do not alter the essential fact, evident from the Court record, that the petition has been intent on wasting time in Court with a petition it had no interest in pursuing.”***

The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality.

9. The petitioner has not contested this prayer to dismiss the petition. The petition has been overtaken by events as the nominations took place and the elections which the 1<sup>st</sup> interested party was set to conduct are long gone and concluded. The petitioner and her advocate have not bothered to follow up on the petition and have not appeared in Court twice when the matter came up with no explanation offered. They are guilty of inaction and there is no good reason why this matter should remain pending. I make an order the petition be dismissed with costs to the respondent and the 1<sup>st</sup> and 3<sup>rd</sup> interested parties.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of January, 2018.***

**L. W. GITARI**

**JUDGE**

Read out in open Court, Mr. Wanda for 1<sup>st</sup> interested party – present. Other parties – absent, court assistant Naomi Murage this 25<sup>th</sup> day of January, 2018.

**L. W. GITARI**

**JUDGE**