



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CONSTITUTIONAL PETITION NOS 3 AND 2 OF 2017
(CONSOLIDATED)

1. CHARLES NJURU KIHARA
2. DR HUMPHREY KIMANI NJUGUNA
3. SIMON MWANGI KAMAU.....PETITIONERS

VERSUS

1. CHRIS KINYANJUI KAMAU
(CLERK, COUNTY ASSEMBLY OF MURANG'A)
2. LEONARD NDUATI KARIUKI
(SPEAKER, COUNTY ASSEMBLY OF MURANG'A)
3. COUNTY ASSEMBLY OF MURANG'A.....RESPONDENTS

R U L I N G

1. By the petitions in these two matters (which are more or less identical), the Petitioners, **CHARLES NJURU KIHARA** and **DR. HUMPHREY KIMANI NJUGUNA** (in *Petition No 3 of 2017*), and **SIMON MWANGI KAMAU** (in *Petition No 2 of 2017*), have challenged the election of the 2nd Respondent, **LEONARD NDUATI KARIUKI**, as the Speaker of the 3rd Respondent (**COUNTY ASSEMBLY OF MURANG'A**) on 04/09/2017. In doing so the Petitioners have alleged various procedural and substantive improprieties, as well as violation of their constitutional rights and freedoms under **Articles 10, 27, 28, 38, 47, 50 and 177** of the *Constitution of Kenya, 2010*.

2. The Petitioners have also alleged that the election of the 2nd Respondent “was conducted in an opaque and flawed manner contrary to the procedure enumerated in the *First Schedule* (to) the *Elections Act, 2011* as well as the 3rd Respondent’s *Standing Orders*.”

3. Finally, the Petitioners have pleaded that at the time of the election of the 2nd Respondent, the 3rd Respondent was not properly constituted “contrary to **Article 177** of the *Constitution* and **sections 7 and 7A** of the *County Governments Act, 2012*.”

4. The Petitioners seek the following reliefs –

(i) An order of judicial review by way of ***certiorari*** to quash “the impugned decision and proceedings and/or subsequent decisions of the 1st Respondent that nullified/removed/disqualified the names of the Petitioners from being candidates for the election of Speaker of the County Assembly of Murang’a.”

(ii) A ***declaration*** that the election of the 2nd Respondent as Speaker of the County Assembly of Murang’a was irregular and in violation of the law, and was not free and fair, and thus null and void.

(iii) A ***declaration*** that the election of the 2nd Respondent as Speaker of the County Assembly of Murang’a “to the exclusion of nominated members of the 3rd Respondent” was discriminatory.

(iv) An order of ***judicial review*** “quashing the election of the 2nd Respondent as Speaker of the County Assembly of Murang’a”.

(v) An order of ***mandamus*** compelling the Respondents’ “applicable officers (other than the 1st Respondent) to conduct the election of the Speaker of the County Assembly of Murang’a in accordance with the ***Constitution***, the ***Elections Act, 2011*** and the ***3rd Respondent’s Standing Orders***.”

(vi) The court do “assess and award ***compensation*** and/or general, exemplary, aggravated and punitive ***damages*** against the Respondent.”

(vii) “Costs and interests on the above, and in the alternative, an order be made for the 1st and 2nd Respondents to personally pay the costs of this petition.”

5. On 26/09/2017 the Respondents filed a **notice of preliminary objection dated 22/09/2017** to the petitions. The legal points taken are as follows –

(i) That by dint of **section 75 (1A)** of the ***Elections Act, No 24 of 2011*** as read together with **Rule 6(1) (b)** of the ***Elections (Parliamentary and County Elections) Petitions Rules, 2017***, this court lacks jurisdiction to entertain these petitions.

(ii) That the question of the validity of the election of speaker of a county assembly is to be heard and determined by a ***Resident Magistrate’s Court*** under **section 75 (1A)** of the ***Elections Act***.

6. On 16/10/2017 the 1st Respondent filed a replying affidavit sworn by himself in response to the consolidated petitions.

7. The Interested Party never filed anything in response to the petitions.

8. On 18/10/2017 the court directed that the preliminary objection taken by the Respondents be canvassed by way of written submissions. The Respondents filed their submissions on 08/11/2017 while the Petitioners filed theirs on 14/11/2017. The learned counsels for the parties highlighted at length on 15/11/2017. Ruling was originally reserved for 29/12/2017, but due to pressure of work it could not be prepared and delivered then.

9. I have read and considered the written and oral submissions of the parties, including the various cases cited.

10. The main issue in this preliminary objection is **whether this court has jurisdiction to hear and determine the consolidated petitions herein**. Within that main jurisdictional issue are the legal questions ***whether the speaker of a county assembly is a member of that assembly, and whether the election of Speaker of the County Assembly of Murang’a on 04/09/2017 was an election within the meaning of the Elections Act***, and therefore liable to be challenged only as provided for in the said

statute and the Rules made thereunder.

11. The Respondents' case in the preliminary objection is that by dint of various constitutional and statutory provisions, speakers of county assemblies are clearly members of their respective county assemblies, and that their elections are governed by the Elections Act. It was the further submission of learned counsel for the Respondents that any dispute regarding the election of such speaker must be resolved using the machinery laid out in the said statute.

12. Learned counsel for the Petitioners on the other hand submitted that the speaker of a county assembly is only an *ex officio* member of the county assembly and therefore not a member of the assembly for the purposes of the Elections Act. He further submitted that there is no provision for election dispute-resolution regarding the election of county assembly speakers under the ***Election's Act*** or the ***County Government Act***.

13. Learned counsel for the Petitioners further submitted that there are other reliefs sought in the petitions in addition to those seeking to nullify the election of the 2nd Respondent as speaker – judicial review, declarations and compensation. Counsel pointed out that only this court has the necessary original jurisdiction under **Article 165(3)** of the Constitution to grant the vindication of the Petitioners' constitutional freedoms and rights sought, and that the jurisdiction of a Magistrate's Court under **section 8** of the ***Magistrate's Courts Act, 2016*** in that regard is limited only to **Article 25(a) and (b)** of the ***Constitution***. Learned counsel also pointed out the limited and specific nature of the reliefs that an election court can grant under **section 75(3)** of the ***Elections Act***.

14. This court had occasion very recently to consider this very same issue in ***Murang'a High Court Constitutional Petition No 10 of 2017, Wanjah Maina Hannah –vs- IEBC & 2 Others*** where a decision was rendered on 29/12/2017.

15. By dint of **Article 177(1) (d)** of the Constitution the speaker of a county assembly, once elected, becomes a member of the assembly. This constitutional provision is echoed in **section 7(1) (b)** of the ***County Governments Act, Cap 265***.

16. **Article 178(1)** of the Constitution provides that the speaker of a county assembly shall be elected by the county assembly from among other persons who are not members of the assembly. The Constitution at **Article 178(3)** demanded that Parliament enact legislation providing for the election and removal from office of speakers of county assemblies. Such legislation regarding **election** of county assembly speakers was enacted in **section 21** of the ***Elections Act***. **Subsection (1)** of that section provides as follows –

“The speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members”.

And **subsection (2)** of section 21 aforesaid provides –

“For the purpose of the election of the speaker of the county assembly after the first election under the Constitution, the procedure set out in the First Schedule shall apply.”

That schedule contains detailed and precise provisions about how the election of a county assembly speaker is to be conducted.

17. **“Election”** is defined in **section 2** of the ***Elections Act*** as -

“...a presidential, parliamentary or county election, and includes a by-election”.

“County election” is itself defined in the same section as -

“...the election of a county governor or a member of a county assembly”.

18. We have already seen that the speaker of a county assembly is a member of the county assembly by virtue of the Constitution and statute. It is clear from the above constitutional and legal provisions that the election of speaker of a county assembly is an election under the *Elections Act*. Any dispute regarding the election of speaker of a county assembly must therefore be resolved as provided for in the *Elections Act*, the relevant provision being **section 75(1A)** of the Act which provides –

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

19. It is thus the finding of this court that the petitions herein now before this court, are election petitions challenging the election of the 2nd Respondent as Speaker of the *County Assembly of Murang’a* conducted on 04/09/2017. They are disguised as constitutional petitions seeking the vindication of the Petitioners’ constitutional rights. However, nearly all the reliefs sought betray their true character. The *Supreme Court of Kenya* in the case of *Moses Mwicigi & 14 others –vs- IEBC & 5 others {2016} eKLR* had this to say at paragraph 119 about such petitions–

“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.”

20. The Petitioners themselves are alive to the true character of their present petitions. It emerged in the course of these proceedings that they did file an appropriate election petition before the Resident Magistrate’s Court at Murang’a challenging the same election of the 2nd Respondent as Speaker of the *County Assembly of Murang’a*. They can also, if they are so minded, lodge a proper constitutional petition for the vindication of their constitutional rights.

21. The petitions herein being in reality election petitions, are not properly before this court and are incompetent. This court has no jurisdiction to hear and determine them. The petitions are hereby struck out with costs to the Respondents. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 4TH DAY OF JANUARY 2018

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 4TH DAY OF JANUARY 2018