



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

ELECTION PETITION NO. 5 OF 2017

IN THE MATTER OF ELECTIONS ACT NO. 24 OF 2011 LAWS OF KENYA

SHADRACK MUTUA KITILI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...1ST RESPONDENT

NATIONAL RAINBOW COALITION.....2ND RESPONDENT

COUNTY ASSEMBLY OF KITUI.....3RD RESPONDENT

CLERK TO THE COUNTY ASSEMBLY OF KITUI.....4TH RESPONDENT

WAZIRI BAKARI KARAKA.....5TH RESPONDENT

FLORENCE M. SINGI.....6TH RESPONDENT

MUNYOKI MWINZI.....7TH RESPONDENT

JOSEPHINE M. SINGI.....8TH RESPONDENT

BEATRICE VELESI MUSYOKA.....9TH RESPONDENT

COLLETA K. KIMANZI.....10TH RESPONDENT

GRACE MUTUA.....11TH RESPONDENT

MARY NDUMBU.....12TH RESPONDENT

ELIZABETH NDUNGE PETER.....13TH RESPONDENT

ANNE MWENDE MUMO.....14TH RESPONDENT

CHARITY SYOMITI MWANGANGI.....15TH RESPONDENT

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REGINA MUENI ISHMAIL MUSYOKI.....16TH RESPONDENT

MUNIRA MOHAMED.....17TH RESPONDENT

ESTHER KALUNDA NDILE.....18TH RESPONDENT

RULING

1. **Shadrack Mutuku Kitili**, the Petitioner, filed an **election Petition** in respect of nomination in **Kitui County Assembly 2017** dated the **26th** day of **September, 2017**.

2. It was his contention that he was a male nominee of the 2nd Respondent, the National Rainbow Coalition (NARC) Party as a Member of the County Assembly for Kitui to represent persons with disabilities as required by **Article 81 (c)** and **177 (b)(c)** of the **Constitution** together with **Section 36** of the **Elections Act No. 24 of 2011** and **Section 7** of the **County Government Act, 2012**. Following the nomination, his name was published in the Sunday Standard Newspaper of 23rd July, 2017 to represent persons with disabilities. However his name was missing in the further publication in the Kenya Gazette Notice of 28th August, 2017 Vol. CXIX No. 124. This, according to him, was unconstitutional.

3. That the list of nominated members to represent persons with disabilities contained names of female individuals, Florence M. Singi and Josephine K. Mutie who was not a person with a disability and none of the nominees came from Kitui West Constituency which was contrary to the constitutional requirement and discriminatory on grounds of disability and gender.

4. Consequently he sought orders as follows: That the nomination process done and gazette be declared unconstitutional, unfair, discriminatory and a violation of the Petitioner's rights; That the 1st Respondent, I.E.B.C. be directed to degazette the 28th August 2017 notice nominating the 5th to 18th Respondents and re-gazette afresh addressing representation in the County Assembly and include his (Petitioner's) name; That the Kenya Gazette Notice of 28/8/2017 Volume CXIX No. 124 which did not reflect the face of the County of Kitui for being discriminatory to persons with disabilities be declared as such; The 2nd Respondent be directed to prepare and forward to the 1st, 3rd and 4th Respondents the initial list of party nomination that had the name of the Petitioner; and a declaration be made that the 5th to 18th Respondents were not nominated per the constitution hence are illegally in office.

5. As at the 14th day of December, 2017 the Petitioner had only served the 1st, 2nd, 3rd and 4th Respondents with the Election Petition.

6. The 1st Respondent filed a response to the Petition on the 31st October, 2017 where it averred that it is vested with the responsibility of conducting and supervising the elections for seats on the basis of proportional representation by use of party lists and to provide for the submissions of party lists within the defined timelines. That the Petitioner couldn't be said to have been nominated to the County Assembly of Kitui by the 2nd Respondent who has no power in law to nominate any person to an elective post but is merely mandated to submit party lists to it (1st Respondent) pursuant to **Article 90(2)(c)** of the **Constitution**. That the Petitioner was not shortchanged as the Gazette Notice of 28th August, 2017 reflected the proper individuals nominated pursuant to the party list submitted and the number of seats secured by the 2nd Respondent in the August, 2017 elections. That no complaint was made by the Petitioner to either the 1st Respondent or Political Parties Dispute Tribunal regarding the party list submitted. It was the contention of the 1st Respondent that it adhered to the Constitution and legislation. It concluded the response by arguing that this court has no jurisdiction to hear the subject Petition by virtue of **Section 75(1A)** of the **Elections Act, No. 24 of 2011** and the Petition was filed out of time contrary to **Section 76** of the **Elections Act**.

7. The 2nd Respondent in the response dated 16th November, 2017 stated that its final list of nominated members for each category was submitted to the 1st Respondent after it conducted the nomination exercise in accordance to its regulations and National Legislation in respect to Kitui County. That the Petitioner's name was submitted alongside two (2) other nominees. One of them (8th Respondent), a female, presented a certificate showing she was physically disabled and was therefore selected by the 1st Respondent. That the nomination was conducted in a free, fair, transparent, impartial, neutral, efficient, accurate and accountable manner.

8. The 3rd and 4th Respondents filed a joint Response where they averred that they played a role in swearing in of the nominated Members of the Kitui County Assembly based on the top list(s) duly gazetted by the 1st Respondent and in accordance with the constitutional principles enacted under the **Article 81 and 177 of the Constitution of Kenya, 2010** as read with **Section 36 of the Elections Act, No. 24 of 2011** and **Section 7 of the County Government Act of 2012**. They denied having control of the nomination process or having altered the list of nominees that were gazetted.

9. Further, they stated that the Petitioner had not deposited security for payment of any costs in compliance with **Section 78(2)(b) and (c) of the Elections Act**. That there was no compliance with the timelines stipulated in the **Elections (Parliamentary and County Elections) Rules 2017** relative to the filing of Election Petitions, service on the Respondents and the deposit of the security for costs.

10. On the 14th December, 2017 Keli and Associates Advocates filed a notice of appointment to act for the 5th to 18th Respondents.

11. On the 31st day of October, 2017 the 1st Respondent filed a Notice of Preliminary Objection on grounds that: this court lacks jurisdiction to determine the Petition herein subject to **Section 75 (1A) of the Elections Act No. 24 of 2011**; and that the Petition was filed in violation of the express timelines laid out in **Article 87(2) of the Constitution of Kenya, 2010** and the **Section 76 of the Elections Act, 2011**.

12. When the Petition was mentioned for directions, Counsel for the petitioner purported to seek leave to serve the Petition upon the 5th to 18th Respondents by way of substituted service by advertising in the Newspapers.

13. The Preliminary Objection was canvassed by way of the written submissions that were highlighted by respective counsels.

14. Counsel for the 1st Respondent Ms. Mwendwa submitted that this court lacks the jurisdiction to determine the Petition subject to **Section 75 (1A) of the Elections Act No. 24 of 2011** and the strict timelines set under **Article 87 (2) of the Constitution** and **Section 76(1)(a) of the Elections Act** were violated. That the Respondents having been published as specially elected under **Legal Notice No. 8380 dated 28/8/2017** and the **Election Petition** having been filed on the **4/10/2017**.

15. Mr. Maseki, Counsel, holding brief for Apollo Muinde, Advocate for the 3rd and 4th Respondents supported the Preliminary Objection raised by the 1st Respondent. Citing the case of **Raila Odinga versus I.E.B.C. and 3 others SC Petition No. 5 of 2013**, he argued that timeliness was not negotiable. Therefore the Petition is null and void. Secondly, he stated that the Petitioner did not deposit security as required. That there was no dispensation given for payment of costs.

16. Ms. Keli for the 5th to 18th Respondents also supported the Preliminary Objection raised. Her argument was that pursuant to **Section 75 (1A) of the Elections Act, 2011** it is the Resident Magistrate who has jurisdiction to hear the Petition. That the High Court can only hear the matter on appeal. She cited the **Supreme Court Constitutional Application No. 2 of 2011, In the matter of the Interim Independent Electoral Commission (2011) eKLR**. That the timelines set were not adhered to and leave of the court sought to serve some Respondents by way of substituted service is not available.

17. In response, the learned counsel for the Petitioner, Mr. D. M. Mutinda submitted that this court has jurisdiction to hear the Petition. He cited **Article 177(1)(c)(ii)** as read with **Article 90** of the **Constitution** as pointing to the High Court as the court with jurisdiction to determine the matter. He called upon the court to interpret the decision of **Moses Mwigigi & Others -Vs- I.E.B.C.&5 Others (2016) eKLR, paragraphs 107 and 108** as being an implication that the High Court has jurisdiction to hear the Election Petition.

18. On the question of extension of time it was his argument that this was not an ordinary case of election by voters therefore strict timelines expected by the Election Rules could not be followed. That the right to extend time is within the discretion of the court.

19. Further, he stated that if one counts the days from the 28/8/2017 to 4/10/2017 and subtract the weekends and holidays it comes to a period within the timelines set and that the petition concerns public interest as it is a matter of marginalized groups, gender and disability.

20. On the issue of security of costs, he conceded that it was not deposited but added that the Petitioner could be exempted from payment of the costs. In the alternative he urged the court to grant him time to pay.

21. I have duly considered submissions filed and highlighted by counsels on record.

22. This court has been asked to determine:

(i) The issue of jurisdiction.

(ii) Whether timelines set within which the Election Petition was filed were violated

(iii) Consequences of non-payment of security for costs.

23. The Preliminary Objection raised by the 1st Respondent herein is based on matters of law. This is as was stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd. –V– West End Distributors Ltd (1969) EA 696** by Law JA that:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

24. The question of jurisdiction in the Election Petition was raised at the outset as stated in the celebrated case of the owners of the **Motor – Vessel “Lillian S” –vs– Caltex Oil Kenya Ltd (1989) KLR**, where Nyarangi, JA stated that:

“...the question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it, Jurisdiction 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 lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. In the **Court of Appeal Case of Kakuta Maimai Hamisi –vs– Peris Pesi Tobiko & 2 Others (2013) eKLR** the issue of jurisdiction was considered. The court stated thus:

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question at best taken at the inception. It is definitive and determinative and prompt pronouncement on it once it appears to

be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac like nature, must not sit in vain.”

26. Courts derive their jurisdiction from the Constitution or legislation. This was well put by the Supreme Court in **Constitutional Application No. 2 of 2011, Re the Matter of the Interim Independent Electoral Commission (2011) eKLR** where it was stated that:

“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.”

27. Section 75(1A) of the Elections Act, No. 24 of 2011 (Elections Act) provides thus:

“A question as to the Election of a Member of the County Assembly shall be heard and determined by the Resident Magistrate’s court designated by the Chief Justice.”

This is a case where nomination was done. After the nomination process was concluded; names of the 5th to 18th Respondents were submitted and gazetted as Members of the County Assembly of Kitui. The question of whether this process amounts to an election through nomination was considered in the case of **Moses Mwicigi & 14 Others –V– Independent Electoral and Boundaries Commission & 5 Others (2016) eKLR** where the Supreme Court stated that:

“[105] It is clear from the foregoing provisions that the allocation of nomination – seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designate’ or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazetting 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 constituting the Assembly in question.

[107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC regarding nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated Members of a County Assembly.”

28. From the foregoing it is apparent that any dispute arising from the nomination process whose gazetting has been done should be determined by the Election Court. However, it is argued by the Petitioner that this court is seized of jurisdiction to determine the matter because the Petition deals with vulnerable groups which brings in issues of rights and freedom from discrimination on the basis of gender and disabilities. To address the issue of breach of fundamental rights or freedom the Petitioner would be required to file a Constitutional Petition. He cannot purport to bring up such an issue and hide behind an Election Petition. What is before this Court is an Election Petition and therefore the issue to be determined remains whether this Court is seized of jurisdiction to determine it.

29. In the case of **Samuel Kamau Macharia & Another –vs– Kenya Commercial Bank Limited and Others (2012) eKLR** it was stated that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law... it cannot expand its jurisdiction through judicial craft innovation.”

30. The written law is very clear on this matter. The court seized of jurisdiction to determine the dispute that arose in the instant case is the Resident Magistrate's Court. This court would be seized of jurisdiction to determine an appeal emanating from the decision of the Magistrate's Court (see Section 75(4) of the Elections Act).

31. On the question of timelines, the 5th -18th Respondents were published as specially elected per the **Legal Notice No. 8380** dated the **28th day of August, 2017**. The Petition was filed on the **4th October, 2017**. It is apparent that the Election Petition was filed outside the provided 28 days after the declaration of the results of the County Election. (See **Article 87(2)** of the **Constitution of Kenya, 2010; Section 76 of the Elections Act**).

32. In the case of **Raila Odinga – Vs – I.E.B.C. & 3 others, Supreme Court Petition No. 5 of 2013** it was held that the Constitutional timeliness set were stringently demarcated and had to be complied with.

33. In the case of **Hon. Lemanken Aramat – Vs – Harun Meitamei Lempaka & 2 Others (2014) eKLR** it was stated that:

“...electoral disputes resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timeliness prescribed by the constitution and 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...”

34. It was argued by the Petitioner that the right to expand timelines set lies with the discretion of the court which should be applied judiciously. The High Court is seized of jurisdiction to extend procedural rules determined by directions of the court but it cannot extend the Election Disputes Resolution timelines set by the Constitution or the Elections Act (see **Said Buya Hiribae – Vs – Hussan Dukicha Abdi & 2 Others, Msa Election Petition No. 7 of 2013**).

35. The Petitioner herein approached the Court on the day set for directions seeking leave to serve some respondents by way of substituted service, and in particular by advertising in the Newspaper. His oral application that was vehemently opposed was based on an argument that the 5th to 18th Respondents were elusive. **Article 87(3)** of the **Constitution** is very clear. Service of the Petition is either direct or by advertisement in a newspaper with a national circulation (Also see **Section 77(2)** of the **Elections Act**). The Petitioner argued that he was not at fault therefore the Court could use its discretion to extend time. However, the law is very clear. The Petitioner slept on his rights of serving the respondents as stipulated, as a result, leave sought cannot be granted.

36. It is conceded that security for costs was not deposited. It is a requirement for a Petitioner to deposit security for costs to be paid to the Respondents in case the Petition is dismissed (see **Section 78** of the **Election Act**). It was submitted by Counsel for the Petitioner that the Disabilities Act, Kenya states types of groups of disabled persons could be exempted in paying security of costs. Disability means a physical, sensory, mental or other impairment including visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation (see **Section 2** of the **Persons with Disabilities Act**). In his pleadings the Petitioner states that he was a nominee by the 2nd Respondent as a Member of the County Assembly for Kitui to represent persons with disabilities. It is not alleged or proved that he is a person with a disability. Therefore the argument that he was exempted from depositing security for costs on that ground does not hold water. That notwithstanding, the law is silent on the issue of a person not depositing security on the ground of being disabled. Having not been exempted from depositing the security for costs, the Petitioner was expected to comply with the law.

37. In the case of **Evans Nyambaso Zedekiah & Another – V – I.E.B.C. & Others** Sitati J. stated that:

“...I entirely agree with the learned judges in holding that the deposit of security for costs is a substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of jurisdiction to deal with the matter further. I also agree that the requirement for

deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying costs once they lose their cases. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it.”

38. This is a matter where no effort was made to seek leave to comply with the law. No seriousness on the part of the Petitioner is demonstrated regarding prosecution of the Petition.

39. In the premises the Preliminary Objection raised by the 1st Respondent is meritorious. It is allowed as prayed. Therefore I make orders as follows:

(i) The Petition herein be and is hereby struck out.

(ii) The 1st Respondent is awarded Costs of the Application and Petition capped at KShs. 50,000/=

(iii) The 3rd and 4th Respondents are awarded Costs of the Application and Petition capped at KShs. 22,000/=

(iv) The 5th to 18th Respondents are awarded a global figure of costs capped at KShs. 28,000/=

40. It is so ordered.

Dated, Signed and Delivered at Kitui this ...9th.... day of January, 2018.

L. N. MUTENDE

JUDGE