



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL DIVISION**

**PETITION NO. 5 OF 2017**

**IN THE MATTER OF ARTICLES 2,3,19,20,22,23,48,165,38,40,87 AND 91**

**OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES  
48,165,38,40,87 AND 91 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF JUBILEE PARTY NOMINATIONS FOR MEMBERS**

**OF KISII COUNTY ASSEMBLY**

**BETWEEN**

**ESTHER NYAMWAMU NYONGO.....1<sup>ST</sup> PETITIONER**

**TABITHA BITUTU OKONGO.....2<sup>ND</sup> PETITIONER**

**AND**

**JUBILEE PARTY.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION OF KENYA.....2<sup>ND</sup> RESPONDENT**

**KITHEKA MANZI.....3<sup>RD</sup> RESPONDENT**

**KWAMBOKA JOYCE OMBASA.....4<sup>TH</sup> RESPONDENT**

**BEATRICE MONGINA DOYLE.....5<sup>TH</sup> RESPONDENT**

**MICHEKA MARY GOIMA.....6<sup>TH</sup> RESPONDENT**

**ROSE MOTURI MWENE.....7<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. In the just concluded general elections of August 2017, various candidates were elected whilst others were nominated for various political positions as stipulated under the Constitution and relevant electoral laws of Kenya. In their Petition dated 4<sup>th</sup> September, 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, who describe themselves as female adults of sound minds and disposition, instituted this Petition against the respondents to challenge the legality of the nomination of the 3<sup>rd</sup> to 7<sup>th</sup> Respondents as members of the Kisii County Assembly.

## Parties

2. 1<sup>st</sup> respondent (hereinafter “the party) is a political party registered as such in the Republic of Kenya and the petitioners are members of the said party while the 2<sup>nd</sup> respondent is the Independent Electoral and Boundaries Commission which is the commission mandated to manage all the elections and processes of political parties leading to a general election and by- elections. The 3<sup>rd</sup> to 7<sup>th</sup> respondents are the nominees of the 1<sup>st</sup> respondent who were nominated to the Kisii County Assembly as members of the said county assembly by dint of the gazette by the 2<sup>nd</sup> respondent in the Gazette Notice no. 5006 of 2017. In the present Petition, the petitioners challenge the nomination process alleging breaches of the Constitution.

## The Petitioners’ Case

3. In the 1<sup>st</sup> petitioner’s affidavit in support of the petition, she avers that she applied and participated in the 1<sup>st</sup> respondent’s nominations for the positions of nominated Members of the County Assembly of Kisii after being persuaded by her party (the 1<sup>st</sup> respondent) not to run for any elective positions in favor of certain candidates. She attached a bundle of her application form and all accompanying documents which were marked ‘ENN1’

4. The Petitioners contend that the 1<sup>st</sup> respondent assured them that they would be considered for nominations for the sacrifices they had made for the party and as a consequence thereof, they used a lot of resources to campaign for the party only to learn that the party neither listed them nor considered their applications at all. As a consequence thereof, the 1<sup>st</sup> respondent never invited them for the interviews and did not consider their applications for the nominations to the County Assembly.

5. The 1<sup>st</sup> petitioner further avers that instead, the 3<sup>rd</sup> to 7<sup>th</sup> respondents, who were neither active members of the party nor any special interest group were nominated and their names gazetted by the 2<sup>nd</sup> respondent. A copy of the gazette notice was attached to the 1<sup>st</sup> respondent’s affidavit and marked as ‘ENN2.’ She further averred that consequently, the 1<sup>st</sup> respondent has forwarded the names of the 3<sup>rd</sup> to 7<sup>th</sup> respondents to the 2<sup>nd</sup> respondent who proceeded to list the said respondents as the 1<sup>st</sup> respondents’ nominees for that assembly.

6. The Petitioners’ contended that disabled persons had been shortchanged by the nomination of the 3<sup>rd</sup> to 7<sup>th</sup> respondents who are all persons of good health without any natural physical challenge and that they were due be sworn to office anytime through a process that was manipulated and which denied them a right to fair hearing and fair administrative action.

7. The Petitioners further claimed that their rights under article 38, 40, 87 and 91 had been threatened and are likely to be violated by the 1<sup>st</sup> respondent hence, their recourse to the High Court in exercise of their right to access justice which is jealously guarded by article 48 of the Constitution.

8. From the foregoing, the Petitioners sought the following reliefs:

**1. A declaration that the 1<sup>st</sup> respondent’s refusal to consider the petitioners’ application for nomination at all and the nomination done by the 1<sup>st</sup> respondent as gazetted by the 2<sup>nd</sup> respondent in Gazette Notice no. 5006 of 2017 as the 1<sup>st</sup> respondent’s nominees to Kisii County Assembly violated and threatened the petitioners’ rights contemplated at Articles 38, 40, 87 and 91 and the nominations is therefore null and void.**

**2. An order of certiorari do issue to quash he nominations of the 3<sup>rd</sup> to 7<sup>th</sup> respondents in Gazette Notice no. 5006 of 2017 and an order of mandamus do issue to compel the 1<sup>st</sup> respondent to consider all applications made to it in an administratively just manner.**

**3. Exemplary damages and costs of and incidental to this suit.**

## The 1<sup>st</sup> Respondent’s case

9. The 1<sup>st</sup> respondent filed a Notice of Preliminary Objection dated, 26<sup>th</sup> January, 2018 and a Response to Petition 24<sup>th</sup> January, 2018, and Notice of Preliminary Objection dated 31<sup>st</sup> January, 2015.

10. The Notice of Preliminary Objection was worded thus:

**1. THAT the issues canvassed in the said petition arise from the 8<sup>th</sup> August 2017 General Elections and the nomination thereof to the Kisii County Assembly hence making this an Election Petition but not a Constitutional Petition.**

**2. THAT this honourable court lacks jurisdiction to hear and determine an election petition challenging election and or nominations on the basis that the time line has since lapsed.**

**3. THAT the political parties after the 8<sup>th</sup> August 2017 general election procedurally nominated the candidates as per the Constitution 2010 and the Elections Act. The nominated candidates have since been gazetted and assumed office and any revocation of the gazette would be a contravention of their constitutional rights.**

**4. THAT the petitioners’ petition is frivolous, vexatious, defective and an abuse of the court process.**

## **The 2<sup>nd</sup> Respondent's case**

11. In opposing the Petition, the 2<sup>nd</sup> respondent raised a Preliminary Objection on the following grounds: -

**1. THAT the High Court does not have jurisdiction to hear the matter in accordance with section 75 of the Elections Act and Rule 6(1) of the Elections (Parliamentary and County Elections) Petitions Rules.**

**2. THAT the Petition is incurably defective and should be struck out with costs.**

12. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed written submissions on the preliminary objections which I have perused and considered.

### **Determination**

13. After considering the pleadings and the submissions I note that the main issue for determination is whether this Court has the jurisdiction to determine the petition. I note that as at the time of writing and delivering this ruling, the petitioners had not filed their written submissions to the respondents' preliminary objection.

14. The Respondents maintained that this Court lacks the jurisdiction to entertain the matter owing to the availability of the Independent Electoral and Boundaries Commission Disputes Resolution Committee and the Political Parties Disputes Tribunal. They further submitted that election petitions are special proceedings which are regulated under a strict time frame as stipulated under **Article 87 (1) and (2) of the Constitution**.

15. Before delving into the merits on the preliminary objections raised by the respondents, it is important to determine if the objections raised meet the threshold of a preliminary objection. In the celebrated case of **Mukhisa Biscuit Company vs West End Distributors Limited (1969) EA at page 701** a preliminary objection was defined as follows: -

*“A preliminary Objection is in the nature of what used to be a demurrer. It raises pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper rising of points by way Preliminary Objection does nothing but unnecessarily increase costs and occasion confusion on issues. This improper practice should stop.”*

16. In the instant case I have already found that the objection is anchored on the jurisdiction of this court to entertain the petition and in that context, I find that the objection falls within the purview of a preliminary objection as was envisaged in the **Mukhisa Biscuit** case (supra).

17. Turning to the issue of jurisdiction, it is trite law that courts can only act in cases where they have jurisdiction. In the case of **The Owners of Motor Vessel “Lillian S” vs Caltex Oil Kenya Ltd [1989] KLR 1** Nyarangi J observed that:

*“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”*

18. Further, in **Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011** the Supreme Court stated thus:

*“[68] A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”*

19. More recently in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal had the following to say on the centrality of the issue of jurisdiction: -

*“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at 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 a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”*

20. The dictum from the above cited decisions is that once a Court finds that it has no jurisdiction then it must down its tools accordingly and act no further. If on the other hand, the finds that it has jurisdiction over a matter it must not hesitate to discharge its duty accordingly. I will now proceed and determine whether or not this court has jurisdiction to handle this dispute.

21. The jurisdiction of this Court originates from **Article 165(3) of the Constitution** which stipulates that subject to **Clause (5)**, the High Court shall have-

**“(a) Unlimited original jurisdiction in criminal and civil matters;**

**(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**

**(d) Jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of-**

**i. The question whether any law is inconsistent with or in contravention with the Constitution;**

**ii. The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;**

**iii. Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;**

**iv. A question relating to conflict of laws under Article 191; and**

**v. Any other jurisdiction, original or appellate, conferred on it by legislation.**

22. Besides the provisions of the above article of the constitution, the jurisdiction of the High Court may also be donated by a legislation. It is on that basis that **Section 2 of the Elections Act** donates a special jurisdiction to the High Court as one of the election courts. The Supreme Court of Kenya had the following to say in this regard in the case of **Lemanken Aramat v. Harun Maitaml Lempaka & 2 others (2014) eKLR (Petition No. 5 of 2014): -**

**“ The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3)(a) of the Constitution, is unlimited. In addition, the High Court has a special jurisdiction in electoral matters, conferred by the Constitution, and given effect under the Elections Act: this is the jurisdiction to determine any question as to whether a person has been validly elected as a Member of Parliament (Article 105(1)(a) of the Constitution). This jurisdiction is activated upon a declaration by the authorized electoral body (IEBC) that a particular person has been returned as Member of Parliament, when there is a challenge to that electoral declaration (Article 87(2) of the Constitution) .....” (emphasis added).**

23. Turning to the issue at hand, I find several court decisions that have laid down the jurisdictional context of the High Court in cases such as the one before the court a few of which I will now highlight in this ruling as follows:-

24. In the Supreme Court case of **Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others (2016) eKLR** a similar dispute such as the instant one arose and the matter began in the High Court with two separate proceedings. There was **Nairobi Judicial Review No. 218 of 2013** where the applicants sought an order of *certiorari* to quash the decision of the IEBC Nomination Dispute Resolutions Committee which dismissed their complaints on *inter alia* the grounds that the dispute on the party lists was a purely internal matter within a political party and the parties ought to have invoked the party’s dispute resolution mechanism or moved to the Political Parties Disputes Tribunal. The High Court (**Mumbi, Majanja and Korir, JJ.**) dismissed the Judicial Review application on account of lack of jurisdiction. The other proceedings were in **Nairobi High Court Constitutional Petition No.238 of 2013** where the Petitioners sought a declaration that the list of nominees to the Nyandarua County Assembly published in the IEBC website violated **Articles 90, 98, 174 and 177 of the Constitution**. This petition was also dismissed on the holding that the mode of distribution of the nomination slots was a party matter and the High Court lacked jurisdiction.

25. Both matters went on appeal before Court of Appeal where the appeals were consolidated and heard together and in its judgment the said court faulted the High Court in declining jurisdiction and proceeded to quash the decision of the IEBC Nomination Dispute Resolutions Committee and revoked the Gazette Notice by IEBC and further ordered TNA Party to submit a fresh party list within 7 days of the order. The Court also declared that the IEBC’s list of nominees to the Nyandarua County Assembly in its website violated the provisions of **Articles 90, 98, 174 and 177 of the Constitution** and further that it was unconstitutional to the extent that it purported to discriminate against some constituencies in the County. As would be expected in such highly charged political cases, the dispute then found its way to the Supreme Court.

26. Several questions arose before the Supreme Court for determination key among them being; ‘**At what point did the appellants become ‘elected’ MCAs for Nyandarua County and at what point in time does the Court become clothed with jurisdiction to determine disputes relating to the nomination of members of a County Assembly, by virtue of Article 177(2) (b) of the Constitution.**’ The Court, in an in-depth analysis and in consideration of the **Constitution, the Elections Act, the Independent Electoral and Boundaries Commission Act, the Political Parties Act, the Elections (General) Regulations** and other relevant judicial decisions answered the said twin questions in **paragraphs 91 to 107** inclusive of its judgment as follows:-

**“95. The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.**

**96. A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite**

steps to finalize the “elections” for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.

102. Article 90(2) of the Constitution provides that the IEBC shall be responsible for the conduct and supervision of elections, in respect of seats provided for under clause (1). Seats in this category include the special seats provided for under Article 177 (1) (b) and (c) of the Constitution. And these seats, by Article 90(3), “shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.”

103. Section 36(4) of the Elections Act provides that “within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.”

104. Section 36 (7) (8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:

“(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection (1) (e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender,

“(8) For purposes of Article 177 (1) (c) of the Constitution, the Commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.”

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 '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 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 of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer's mandate, and shifts any issue as to the validity of 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 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.

27. A similar finding was made by the Court of Appeal in the case of **Rose Wairimu Kamau & 3 others vs. IEBC C.A. No. 169 of 2013**. wherein it was held: -

“.....In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 971 (c) and 177 (2) respectively have been gazetted ... they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Articles 105 of the Constitution or Part VIII of the Elections Act as the case may be.”(emphasis)

28. Similarly in the case of **Jaldesa Tuke Debalo vs. Independent Electoral and Boundaries Commission and Another (2015) eKLR** the Court of Appeal, differently constituted, had the following to say: -

“We are cognizant of the principle that upon gazetting of members of the County Assembly, they are deemed to be elected members of the County Assembly...”

29. My finding therefore, is that it is now settled that once IEBC publishes the Gazette Notice of the names of the nominees to the County Assembly then that marks the end of the nomination process and the people whose names so appear in the notice stand ‘elected’ into the County Assembly. It is also settled that any challenge to that ‘election by nomination’ can only be entertained by way of an election petition and not otherwise.

30. In the **Moses Mwigigi case** (supra) the Supreme Court also addressed the notion or argument that the petition therein was a pure constitutional petition for vindication of the fundamental rights as enshrined in the Bill of Rights and not an election petition as envisaged in law and held as follows: -

“117. It is clear to us that the Constitution provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'.

*119. To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute – resolution mechanisms, and notwithstanding the vital role of electoral dispute settlement in the progressive governance set-up of the current Constitution.”*

31. Arising from the above cited decisions I hasten to state that since the petition herein relates to an election dispute, it ought to have been filed in an election court as the High Court, as a Constitutional Court, has no jurisdiction over this matter. I further find that the appropriate election court in this case is the Resident’s Magistrate’s Court pursuant to **Section 75(1A) of the Act** and again, not the High Court.

32. In light of my findings above, I hereby find that the preliminary objection raised by the respondents is merited, I therefore uphold the objection and dismiss the instant Petition with costs to the respondents.

Orders accordingly.

**Dated, signed and delivered in open court this 20<sup>th</sup> day of March, 2018**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the Petitioners
- Mr. Okenye for the 3<sup>rd</sup> Respondent
- Omwoyo: court clerk