



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 12 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

KAMENCU PURITY KENDI.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WANYONYI CHEBUKATI.....2ND RESPONDENT

PHILIP OBONYO OLUOCH OKELLO.....3RD RESPONDENT

RULING

1. The nature and tenor of this petition can be seen from the principal prayers in the petition as follows;

(a) It be determined and ordered that the gazettelement of the 3rd respondent as Nominated Member of the County Assembly of Meru was in any event null and void and he was, therefore, not duly gazette on the Kenya Patriots Party Ticket.

(b) The 1st respondent be compelled to declare the petition as the rightfully gaetted Nominated Member of the County Assembly of Meru on the Kenya Patriots Party and subsequently proceed to organize to have her sworn in.

2. In the petition and her supporting deposition, the petitioner's complaint is that she was fronted to fill the position nominated member of the County Assembly by the Kenya Patriots Party but the 3rd respondent connived with the 1st and 2nd respondents to have himself gazette and sworn in yet he was not a member of the party. That he was not a resident of Meru County and that he was registered in Siaya County to vote and in fact stood for an elective seat in the general elections in 8th August 2017.

3. When this matter came up for mention on 30th May 2018 for directions, I directed the petitioner to show cause why the petition should not be struck out as it was not an election petition for the reason that I doubted that this court had jurisdiction to entertain this petition.

4. Counsel for the petition argued that the complaint before the court was a petition under **Article 90** of the Constitution which deals with allocation of party seats in the County Assemblies hence the petition was valid. He submitted that the petitioner had a legitimate claim to the seat as the 3rd respondent was unqualified to be nominated as enumerated in the petition and all he sought was to declare such nomination unconstitutional as it was contrary to Article 90 aforesaid.

5. Counsel for the 1st and 2nd respondent took the view that the petition was incompetent under the Constitution and the **Elections Act, 2011** as it was not an election petition and that any further proceedings in the matter were a waste of the court's time.

6. I have set out the main prayers in the petition to show that in fact what the petitioner seeks to achieve is to remove a duly nominated member of the County Assembly from his position in this petition. The manner of contesting an election is first provided by **Article 105 (1) (a)** of the Constitution confers jurisdiction on the High Court to hear and determine any question whether a person has been validly elected as a member of parliament. In line with **Article 87 (1)** of the Constitution Parliament enacted the **Section 75 (1)** of the **Elections Act, 2011** which reiterates the provisions of **Article 105 (1) (a)** of the Constitution while **section 75 (1A)** confers jurisdiction to hear and determine disputes arising from the election of a Member of a County Assembly.

7. The manner of challenging an election was stated by the Supreme Court in **Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** as follows:

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'.

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. (emphasis added)

8. It is clear from the case I have cited that this the nomination of a member of a Member of the County Assembly is deemed an election and that election can only be challenged on in the manner contemplated by the Constitution and the **Elections Act, 2011** and that a constitutional petition of the nature before the court falls outside the boundaries of what is permitted in law. In **Isaiah Gichu Ndirangu & 2 others v IEBC & 4 others [2016] eKLR**, Lenaola J., (as he then was) in denying himself jurisdiction over an election question disguised as constitutional petition had this to say;

I also do not agree with the contentions by the Petitioners that this Court should characterize the instant Petition as a constitutional dispute instead of a nomination/election dispute. In my view, such characterization would go against the electoral laws and the Constitution which was tailored in such a manner that it intended to have a special dispute resolution mechanism for electoral disputes, nominations being one of them.

9. In **IEBC v. Jane Cheperenger & 2 Others Supreme Court Petition No. 5 of 2016 (UR)**, the Supreme Court held that the Court of Appeal lacked jurisdiction to hear and determine an appeal relating judicial review matter arising from a dispute over party list as the IEBC had gazetted the nominees to the County Assembly of Bungoma soon after the decision of the High Court in the Judicial Review matter therefore transforming the matter into an election dispute which could only be pursued through the filing of an election petition. The Supreme Court observed that:

At this juncture, we reiterate and affirm the position that, upon gazettement of nominated members

of County Assemblies, any aggrieved party would have to initiate the process of challenging the said nominations by filing an election petition at the Resident Magistrate Court designated as an Election Court under Section 75 of the Election Act. In this instant matter therefore, upon the gazettment of the name of the 3rd respondent as a nominated member of County Assembly for Bungoma County, any aggrieved party ought to have filed an election petition before an Election Court. It is only upon such filing and determination by an Election Court, and where such a matter rises through the ordinary appellate process, that other Courts in the judicial hierarchy can rightly assume jurisdiction with powers to give any consequent orders. To this extent therefore, we agree with the petitioner and the 3rd respondent that indeed the Court of Appeal had no jurisdiction to revoke the nomination and election of the 3rd respondent or to issue any other consequent orders.

10. From the law and authorities I have cited, it must now be clear that this petition cannot proceed as doing so would only be an academic exercise. The court has a duty to draw this to the attention of the petitioner and to take steps to avoid subjecting parties to further costs and embarrassment of a case that will ultimately be struck out.

11. Even if I were to assume that this is an election petition, I also wish to point out that the continued hearing of this matter would be a violation of the 6 months constitutional and statutory timeline for hearing of election petition provide for in **Article 105(2)** of the Constitution. For purposes of an election petition contesting the membership of a person to the County Assembly, the same timeline is reiterated at **section 75(2)** of the *Elections Act, 2011* which states that, “A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.”

12. Further and even assuming that this was an election petition, this court, the High Court lacks jurisdiction to hear the matter as any matter challenging the nomination of election of a member of the County Assembly must in accordance with **section 75(1A)** of the *Elections Act, 2011* be heard by the Magistrates Court (see *Claudia Chebet Kosgei and 2 Others v Jubilee Party and 2 Others KTL EP No. 8 of 2017 [2017]eKLR*).

13. Striking out, I am aware, is a drastic remedy but this is a case that cannot stand the bright light of Constitution, the law and authorities I have cited. I strike out the case but direct each party to bear their own costs.

DATED and DELIVERED at MERU this 31st day of May 2018.

D.S. MAJANJA

JUDGE

Mr Mutuma instructed by Mutuma, Gichuru and Associates Advocates for the petitioner.

Mr Marete instructed by Mulondo, Oundo, Muriuki and Company Advocates for the 1st and 2nd respondents.