



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CONSTITUTIONAL PETITION NO 10 OF 2017**

**WANJA MAINA HANNAH..... PETITIONER**

**VERSUS**

**1. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**

**2. COUNTY ASSEMBLY OF MURANG'A**

**3. CLERK OF THE COUNTY ASSEMBLY OF MURANG'A.....RESPONDENTS**

**RULING**

**1. In the amended petition dated 05/09/2017 (the original petition was dated 30/08/2017) the Petitioner, **Wanja Maina Hannah**, impugns –**

(a) The nomination list for the marginalized for the **County Assembly of Murang'a** gazetted by the 1<sup>st</sup> Respondent (**Independent Electoral and Boundaries Commission**) on 28/08/2017 for “being non-disability compliant and thus in contravention of **Articles 10, 27, 54, 100** and **177(1) (c)** of the **Constitution** and sections **34(10)** and **36(1) (f)** of the **Elections Act** and **section 7** of the **County Governments Act.**”

(b) The election of the Speaker of the **County Assembly of Murang'a** conducted on 04/09/2017 “as the same was conducted without the representation of the people with disability as well as nominated members of the county assembly.”

**2. The Petitioner has pleaded the following factual background –**

(i) That on 24/06/2017 she applied to her political party for nomination to the **County Assembly of Murang'a** as a person with disability.

(ii) That in July 2017 her political party presented her name to the 1<sup>st</sup> Respondent for publication.

(iii) That on 23/07/2017 the 1<sup>st</sup> Respondent published her name in the local dailies as nominated to the **County Assembly of Murang'a** to represent persons with disability.

(iv) That on 28/08/2017 the 1<sup>st</sup> Respondent gazetted names of the nominated candidates to the county assemblies in Kenya, upon which she discovered that her name and that of her co-nominee had been omitted from the list.

(v) That she further discovered that the said gazetted list was “non-disability compliant” as no person had been nominated to represent persons with disability in the **County Assembly of Murang'a**.

3. The Petitioner's case is -

- (a) That her removal from the nomination list was unconstitutional as the same was done without affording her a fair hearing and deprived her of her right to equal protection and benefit of the law.
- (b) That the 1<sup>st</sup> Respondent abdicated its duty of ensuring that the nomination list presented by the Petitioner's political party was constitutionally compliant.
- (c) That the election of Speaker of the **County Assembly of Murang'a** conducted on 04/09/2017 violated the Constitution in various pleaded ways.

4. The Petitioner therefore sought the following reliefs –

- (i) A **declaration** that the nomination list for the marginalized for the **County Assembly of Murang'a** gazetted by the 1<sup>st</sup> Respondent on 28/08/2017 is inconsistent with **Articles 10, 27, 54 and 177(1)** of the **Constitution**, and therefore null and void to the extent of the inconsistency.
- (ii) A **declaration** that the removal of the Petitioner by the 1<sup>st</sup> Respondent from the nomination list violated her right to fair hearing as guaranteed under **Articles 47 and 50** of the **Constitution**.
- (iii) A **declaration** that the 1<sup>st</sup> Respondent failed in its duty under **Article 88(4) (k)** of ensuring that the list presented to it by the Petitioner's political party was legally compliant.
- (iv) An **order** directing the 1<sup>st</sup> Respondent to include the Petitioner's name in the list of nominated persons for the marginalized for the **County Assembly of Murang'a** representing persons with disability.
- (v) A **declaration** that the election of the Speaker of the **County Assembly of Murang'a** conducted on 04/09/2017 was null and void.
- (vi) An order directing the 3<sup>rd</sup> Respondent to conduct fresh nominations and election of the Speaker of the **County Assembly of Murang'a**.

There is a supporting affidavit sworn by the Petitioner.

5. On 20/09/2017 the 1<sup>st</sup> Respondent filed a **notice of preliminary objection** to the petition. The legal point taken is that this court has no jurisdiction to hear the petition by dint of **Articles 87 and 105(1) (b)** of the **Constitution**; **sections 75(1) (a) and 76** of the **Elections Act**; and **Rule 6(3)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**.

6. On 10/10/2017 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a similar notice of preliminary objection with an additional legal ground, to wit, that the question as to the validity of election by nomination of members of a county assembly, and the election of the speaker of the county assembly, is to be heard and determined by a Resident Magistrate's Court under **section 75(IA)** of the **Elections Act** as read together with **Rule 6(1) (b)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**.

7. This ruling concerns those two notices of preliminary objection.

8. On 20/09/2017 the learned counsels for the parties agreed to file written submissions with liberty to highlight. On 26/09/2017 the 1<sup>st</sup> Respondent filed its written submissions, followed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, and also the Petitioner, on 10/11/2017. On 13/11/2017 the parties highlighted their submissions. Originally this ruling was reserved for 08/12/2017, but due to pressure of work it could then not be prepared and delivered.

9. I have considered the written and oral submissions of the parties, including the various cases cited. There are two broad legal issues to decide in these preliminary objections –

- (a) **Whether this court has the requisite jurisdiction to hear and determine this petition.**
- (b) **If not, whether the court has jurisdiction to transfer the petition to an appropriate court for hearing and determination.**

10. Within the first broad issue of whether this court has jurisdiction to hear and determine the petition, there are the following sub-issues –

- (i) **Whether nomination to the party lists of county assemblies are elections within the meaning of the *Elections Act* and therefore subject to that statute and Rules made thereunder for election dispute resolution.**
- (ii) **Whether election of speakers of county assemblies is similarly an election within the meaning of the *Elections Act* and therefore subject to that statute for election dispute resolution.**

**Is the nomination of members of county assemblies by political parties an election within the meaning of the *Elections Act*?**

11. It was held by the *Supreme Court of Kenya* in the case of *Moses Mwicigi & 14 others –vs- IEBC & 5 others {2016} eKLR* at paragraph 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”.***

12. As already seen, the Petitioner has complained in her amended petition, firstly about her exclusion from her party nomination list to the *County Assembly of Murang’a*. That party nomination list, by the aforesaid holding of the *Supreme Court* above-quoted, was an election as envisaged in the *Constitution* and the *Elections Act* to the *County Assembly of Murang’a*. Any challenge to that mode of election must be by an election petition as provided for under the *Constitution* and the law.

13. The *Constitution of Kenya, 2010* at **Article 87(1)** decreed as follows –

**“87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”**

Indeed Parliament enacted such legislation in the *Elections Act, Cap 7* which provides at **section 75(1A)** as follows –

***“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.”***

14. The Petitioner herein in her petition has questioned her political party nomination list to the County Assembly of Murang’a, her specific complaint being that she was excluded from that list in violation of her constitutional and legal rights. But the bottom-line is that she is questioning the failure to elect her to the County Assembly of Murang’a by way of nomination through her political party nomination list.

15. Alleging violation of several of her constitutional rights in that failure to elect her by way of nomination to the *County Assembly of Murang’a* does not make her petition any less of an election petition and more of an ordinary constitutional petition under **Article 165(3)** of the *Constitution*. The *Supreme Court*, in the aforesaid case of *Moses Mwicigi & 14 Others –vs- IEBC & 5 Others* had this to

say on that point at paragraph 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.”***

16. It is clear therefore that what the Petitioner should have filed to challenge the failure to include her in her political party nomination list to the **County Assembly of Murang’a** was an election petition under the **Elections Act** and the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**.

**Was the election conducted on 04/09/2017 of Speaker of the County Assembly of Murang’a 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?**

17. 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**.

18. **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)** demands that Parliament enact legislation providing for the election and removal from office of speakers of county assemblies. Such legislation regarding election of county assembly speaker 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”.**

20. And **subsection (2)** of section 21 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.”**

21. “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.”**

22. 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.

23. 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, as already seen, 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.”**

24. It is thus the finding of this court that the petition now before the court, is an election petition challenging the failure to elect by nomination the Petitioner to the **County Assembly of Murang'a**, and also challenging the election of the speaker of that assembly conducted on 04/09/2017. The election petition is disguised as a constitutional petition seeking the vindication of the Petitioner's constitutional rights. The petition is not properly before this court and is incompetent. This court has no jurisdiction to hear and determine it.

**Having found that this court has no jurisdiction to hear and determine the petition, does the court have jurisdiction to transfer it to an appropriate court?**

25. The petition before this court is not an ordinary civil suit upon which the court can exercise its powers of transfer of suit under **section 18(1)(a)** of the **Civil Procedure Act, Cap 21**. The petition, as already held, is actually an election petition under the **Elections Act** disguised as a constitutional petition under **Article 165(3)** of the **Constitution** to vindicate the Petitioner's constitutional rights.

26. The election dispute-resolution regime under the **Elections Act** is a special **sui generis** jurisdiction that was ordained by the **Constitution** itself at **Article 87**. It is a jurisdiction that is strictly exercised as set out in the statute. One of the provisions of the statute is that the **Chief Justice** designates a particular Resident Magistrate's Court to hear and determine a particular election petition questioning the validity of the election of a member of a county assembly. That is not a function that this court can arrogate to itself.

27. The long and short of it is that this court has no jurisdiction to transfer the petition herein to a Resident Magistrate's Court for disposal.

28. The result is that the petition herein being not properly before this court, is incompetent, and this court has no jurisdiction to hear and determine it, or even transfer it to an appropriate court. The petition is hereby struck out with costs to the Respondents. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 27<sup>TH</sup> DAY OF DECEMBER 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 29<sup>TH</sup> DAY OF DECEMBER 2017**