



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 1 OF 2017**

**IN THE MATTER OF THE ELECTIONS ACT (2011) AND THE ELECTIONS  
(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013**

**AND**

**IN THE MATTER OF NOMINATION TO THE COUNTY ASSEMBLY OF KISUMU**

**BETWEEN**

**VITALIS OJUANG ODEK.....PETITIONER**

**Versus**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1ST RESPONDENT**

**THE CLERK OF THE COUNTY ASSEMBLY OF KISUMU....2ND RESPONDENT**

**ORANGE DEMOCRATIC PARTY.....3RD RESPONDENT**

**KISUMU COUNTY DISABILITY FORUM.....4TH RESPONDENT**

**RULING**

**Preliminary Objection**

1. On 11th December, 2017, by consent of the parties, the court issued the following directions:

**That the Preliminary Objection filed by the 2nd respondent on 17th October, 2017 filed on 24/4/13 and on 3/5/2013, be disposed off by way of written submission which the petitioner and the 2nd respondent dutifully filed.**

2. The Preliminary objection referred to above, is questioning the jurisdiction of this court to hear and determine this petition.

**2nd Respondents' submissions**

3. It was submitted for the 2nd respondent that this court has no jurisdiction to try this petition which is challenging an election of a member of county assembly and that the petition ought to be heard and determined by a Resident Magistrate designated by the Chief Justice under Section 75 (1A) of the

Elections Act. To this end, the 2nd respondent on the following judicial authorities in support of its perspective on this matter:

1. **Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others, Supreme Court Petition No. 1 of 2015** where the court held that Section 75 (1A) of the Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly

2. **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others, Civil Appeal (Nairobi) No. 154 of 2013** where the Court of Appeal restated the decision in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1** and held that to deal with a matter that a court had no jurisdiction over would be to embark on a meaningless misadventure the net result of which would be a nullity.

### **Petitioner's submissions**

3. The Petitioner submitted that that this petition is not only challenging the nomination to the County Assembly but also the violation of the petitioner’s constitutional rights under Article 10, 20, 21, 90 and 177 of the Constitution and urged the court to find that it has jurisdiction to enforce the Bill of Rights. To this end, the 2nd respondent on the following judicial authority in support of his perspective on this matter:

**Ernest Kevin Luchidio v Attorney General & 2 Others [2015] eKLR** where the court reiterated 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 precedents.

### **Determination**

4. Jurisdiction is everything. Since the 2nd Respondent raised the issue revolving around this Court’s jurisdiction, it is important that the said issue be resolved *in limine*.

5. This was the position adopted in the decision of **Sir Ali Salim v Shariff Mohammed Sharray 1938 KLR** where the court held:

***“If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver or their part cannot make up for the lack of jurisdiction. “***

This point was echoed in the celebrated case of **THE M.V. LILLIAN ‘S’** where the court held that:

***“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 of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.***

6. It is a fundamental and cross-cutting principle of the Constitution and the country’s electoral system that not more than two-thirds of the members of elective bodies are of the same gender (Articles 27 (8), 81 (b), 175 (c), 177 (b) and 197 (1) of the Constitution).

7. Another fundamental principle of the Constitution and the country’s electoral system is the protection and advancement of the interests of the youth, women, persons with disabilities, ethnic minorities and other marginalised groups (Articles 21 (3), 55, 97 (1) (b), (c), 98, 100 and 177 (1) (c) of the Constitution).

8. Article 165 (3) of the Constitution gives jurisdiction to the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

9. The petitioner's claim though based on constitutional principles is an election petition on the basis that it seeks to challenge nomination of persons with disability to the Kisumu County Assembly.

10. It is not disputed that the County Assembly nominees have been gazetted by virtue of **Gazette Notice No. 8330** of 28th August 2017. The position concerning gazettement was clearly stated in **National Gender Commission v IEBC and another (Ruling No. 2) Petition 147 of 2013** where the court (Lenaola, Mumbi Ngugi and Majanja JJ) stated as follows,

*“[11] We have anxiously considered the position of members of the Senate and National Assembly nominated under Articles 97(c), 98(1) (b), (c) and (d) of the Constitution. They were Gazetted on 20<sup>th</sup> March 2013 by Gazette Notice No. 3508. Upon such gazettement they became members of the respective houses of Parliament. Under Article 105 of the Constitution, a question of determination of membership can only be determined by way of an election petition ..... [13] In the case of Kones v Republic and Another ex-parte Kimani wa Nyoike and Others (2008) 3 KLR EP 29, the Court of Appeal considered whether the nomination of Hon. Kones to Parliament under the former Constitution could be challenged by way of proceedings of judicial review. The Court held that, “We think we have said enough to show that a seat in the National Assembly can only be declared vacant under the circumstances stated in the Constitution and through the processes set out therein. That has always been the position taken by the courts in previous decisions. There is, first the case of THE SPEAKER OF THE NATIONAL ASSEMBLY VS. THE HON. JAMES NJENGA KARUME, ..... Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported)..... But the Court of Appeal, consisting of KWACH, COCKAR & MULI, J.J.A did state as follows in their Ruling dated 29<sup>th</sup> May, 1992. “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”*

11. From the foregoing; I find that upon gazettement of the County Assembly nominees vide **Gazette Notice No. 8330**; they became members of the County Assembly. Under section 75(1A) of the Elections Act and rule 6(1) (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, a question of determination of membership can only be determined by way of an election petition.

12. In accordance with section 75(1A) of the Elections Act and rule 6(1) (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, the proper court to hear and determine a petition questioning the validity of the election of a member of a county assembly, is a Resident Magistrate's Court designated by the Chief Justice. That jurisdiction is not disputed, and the High Court does not intend to usurp jurisdiction.

## **ORDERS**

17. Accordingly, it is hereby ordered that:

*a) The Preliminary Objection by the 2nd respondent is meritorious and it is upheld*

*b) The petition herein is hereby struck out with costs to the respondents*

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF DECEMBER 2017**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Petitioner - Ms. Adwar

1st Respondent - N/A

2nd Respondent - Ms. Nyamita

3rd Respondent - N/A

4th Respondent - N/A