



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.83 OF 2015

BETWEEN

ISAIAH GICHU NDIRANGU.....1ST PETITIONER
SEITA RIMOINE.....2ND PETITIONER
PARTY OF DEMOCRATIC UNITY.....3RD PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT
AHMED ISSACK HASSAN.....2ND RESPONDENT
JANE JEPKORIR.....3RD RESPONDENT
THE SPEAKER, NANDI COUNTY ASSEMBLY.....4TH RESPONDENT
NATIONAL RAINBOW COALITION.....5TH RESPONDENT

JUDGMENT

Introduction

1. According to their Petition dated 4th March, 2015 together with a Supporting Affidavit sworn on their behalf on the same date, the 1st and 2nd Petitioners describe themselves as Kenyan citizens while the 3rd Petitioner, Party of Democratic Unity (hereafter “PDU”), is a registered political party. They have instituted the Petition against the 1st Respondent, the Independent Electoral and Boundaries Commission (hereafter “**the Commission**”), a constitutional commission established under **Article 88** of the **Constitution** and charged with administering elections and for related purposes; the 2nd Respondent, Ahmed Issack Hassan, the chairman of the Commission, who is responsible for the smooth operation of its functions and is accountable for its actions; the 3rd

Respondent, Jane Jepkorir, an adult female, presently serving as a nominated member of the Nandi County Assembly; the 4th Respondent, the Speaker of the Nandi County Assembly and the 5th Respondent, the National Rainbow Coalition (hereafter “NARC”), a political party registered as such under the **Political Parties’ Act**.

2. Following the general elections of 2013, various candidates were elected whilst others were nominated for various political posts as stipulated under the Constitution and various electoral laws of Kenya such as the **Elections Act** and the **Political Parties Act**. The present Petition revolves around the legality or otherwise of the nomination made in regard to the 3rd Respondent as member of the Nandi County Assembly. The Petitioners have in that regard challenged the nomination process alleging breaches of the Constitution and various electoral laws.

The Petitioners’ Case

3. In their Affidavit in Support, sworn on their behalf by Isaiah Gichu, the Petitioners’ case was that under statutory and constitutional guidelines, Party list nominations in every County Assembly ought to include the number of special seats necessary to ensure that no more than two thirds of the membership of the assembly is of the same gender and that eight special seats, at least two of whom shall represent persons with disability, two youth and two representing marginalized groups as stipulated under **Article 177 (1) (b) and (d) of the Constitution**.
4. According to the Petitioners, after the General Elections of March, 2013, the Commission illegally and unprocedurally allocated a special seat to NARC in the Nandi County Assembly to the detriment of the 3rd Petitioner. Further, the Commission gazetted a purported nominee of NARC for allocation of a special seat in the Nandi County Assembly on the basis of a letter which did not meet the requirements of a Party List as is by law required, and which letter clearly stated that the said nominee was in fact a member of PDU.
5. The Petitioners averred that PDU, which had already submitted a fully compliant party list, was not allocated a seat on the basis that its elected members of Nandi County Assembly had garnered the least votes compared to KANU and NARC but all three were each equally entitled to a seat although only two seats were available for allocation. Additionally, that even after an election court found that NARC’s elected member’s election was invalid, the Commission did not revoke the special seat it had allocated it and thus continues to perpetuate the aforesaid illegality.
6. Their case was further that political parties are only entitled to be allocated special seats based on their performance in a general election and not a by-election and therefore although NARC retained the contested seat in a subsequent by-election, the nullification of the initial election results meant that any entitlement it may have claimed to a special seat, had dissipated.
7. From the foregoing, the Petitioners pray for the following reliefs:
 - a. ***A declaration that NARC does not qualify to nominate persons to serve as members of Nandi County Assembly.***
 - b. ***A declaration that the letter from NARC to the 1st Respondent forwarding the 3rd Respondent’s name as its nominee dated 11th April, 2013 does not meet the requirements of a party list as envisaged by Article 90 of the Constitution, 2010 and is therefore unlawful, invalid, null and void.***
 - c. ***A declaration that Jane Jepkorir, being a member of the 3rd Petitioner rather than the 5th Respondent, did not qualify to be nominated as a member of Nandi County Assembly by the 5th Respondent.***
 - d. ***A conservatory and/or a perpetual order of injunction suspending the 3rd Respondent from***

office and therefore permanently prohibiting her from performing or continuing to discharge the duties of a nominated member of the Nandi County Assembly or any other duties or functions performed by her by virtue of her position as a nominated member of the Nandi County Assembly, pending the hearing and determination of this Application inter partes. (sic)

- e. *An order directing the 1st and 2nd Respondents to revoke the name of Jane Jepkorir in Gazette Notice No. 9794 through which she had been gazetted as a member of Nandi County Assembly as a nominee of the 5th Respondent, and further direct the 1st and 2nd Respondents to allocate and gazette the seat to the 3rd Petitioner's nominee from the party list it had submitted.*
- f. *That the costs of this Petition be borne jointly and severally by the Respondents.*

The Case of the Independent Electoral and Boundaries Commission

8. The Commission's case is contained inter alia in its Submissions dated 16th April, 2015.
9. It was its case that the present Petition is an abuse of the court process because the 3rd Respondent presently holding the position of a nominated member of the Nandi County Assembly is rightfully in office and as such, the Petition offends the provisions of the **Constitution**, the **Elections Act** and the **Independent Electoral and Boundaries Commission Act**.
10. It was its case further that it acted lawfully in allocating the special seat to NARC and that the 3rd Respondent was duly nominated as a member of the Nandi County Assembly as the nomination rules were complied with together with the attendant law in forwarding the 3rd Respondent's name for nomination, and allocation of the special seat.
11. According to the Commission, this Court lacks the jurisdiction to entertain the Petition and the Petitioners should have first filed a complaint at the Commission's Dispute Resolution Committee. In that regard, it was its averment that this Petition is a mockery of the role of the Commission and the Political Parties Tribunal. In addition, it contended that this Petition is merely an afterthought and brought after too long a time and the same should be struck out.
12. It further contended that it allocated special seats to the political parties that participated in the general election; employed the formula to determine which political party was entitled to the special seats based on the proportional number of seats won at the general election and was guided by the provisions of the **Elections Act** in doing so. That it did not allocate the special seat for Kabisaga Ward based on the results of the by-election, but on the results of the general election and that there is no subsequent allocation of special seats to political parties after a by-election. In this regard, it added that the instance in which it can re-allocate special seats had not occurred, which include the death of a candidate or the declaration by a Speaker of a County Assembly of a vacancy. Furthermore, that re-allocation of a special seat is only done within the same party (that is that a member of the same party will be allocated the seat entitled to another member of the same party where for some reason that particular candidate cannot take up the seat allocated to their political party.)
13. Accordingly, the Commission averred that it is *functus officio* after gazettment and any challenge regarding a gazetted nominee should be addressed by the relevant County Assembly through the Speaker and that it could not usurp powers and de-gazette or vary any of the gazetted nominees unless advised by the relevant Speaker of a vacancy required to be filled.

The Case of the 3rd and 4th Respondents

14. While opposing the Petition, the 3rd and 4th Respondents filed a Notice of Preliminary Objection dated, 10th April, 2015, a Replying Affidavit dated 10th April, 2015, and Written Submissions dated 10th April, 2015.

15. Their Notice of Preliminary Objection was worded thus:

1. *This Honourable Court lacks jurisdiction to hear and determine this Petition in view of the provisions of Article 88 (4) (e) of the Constitution, Section 74 (1) of the Elections Act, 2011 and Section 39 of the Political Parties Act.*
2. *The Petitioners' Petition is time-barred in view of the provisions of Article 87 (2) of the Constitution and Sections 74, 75 and 76 of the Elections Act, 2011.*
3. *The Petitioners' Petition is incompetent and legally untenable in view of the provisions of Article 88 (4) (e), Section 74 (1) of the Elections Act and Regulation 99 (2) of the Elections (General) Regulations, 2012 which vests the 1st Respondent with power to settle nomination disputes.*
4. *The Petitioner's Petition is incompetent for lack of security deposit contemplated in Section 78 of the Elections Act.*

16. The 3rd and 4th Respondents further denied the assertions that the election of a NARC member of the County Assembly for Kabisaga Ward, Baruch Suge, was nullified on grounds of malpractices but simply because a recount showed a tie between him and another candidate. That a fresh election was conducted and the said Suge was re-elected as the Member of the County Assembly, Kabisaga Ward on a NARC ticket.

17. According to them, NARC indeed qualifies to nominate a person to serve as member of the Nandi County Assembly based on the results of the General Elections and in any event, even after the by-election, the NARC candidate won by a huge margin and so the party would still be entitled to one nominee to the Nandi County Assembly on account of that fact.

18. It was their other argument that PDU has not disclosed which name they submitted to the Commission for nomination as a member of the County Assembly and in their letter dated 7th October, 2013, the 1st Petitioner supported the nomination of the 3rd Respondent to the Nandi County Assembly albeit on a PDU ticket and as such, the 1st Respondent cannot therefore approbate and reprobate on that issue.

19. They contended further that the instant Petition is actuated by malice owing to a misunderstanding between some parties because the 1st and 2nd Petitioners had sought to extort money from the 3rd Respondent for assisting her to get nominated and that the 2nd Petitioner is not a resident of Nandi County yet she is agitating for her nomination to the Nandi County Assembly and in fact, the entire party list of the PDU comprises residents of Nairobi County who do not qualify to be nominated to the Nandi County Assembly.

20. It was also the 3rd Respondent's deposition that she is a member of NARC and has been submitting monthly contributions of Kshs.10,000/= to the party while PDU is a brief case party owned and controlled by the 1st Petitioner who uses it to extort unsuspecting members of county assemblies of other parties as he claims to be in a coalition agreement with NARC. That she is not a member of PDU and the annexure submitted in this Court contains a forgery of her signature and that she was duly and lawfully nominated by NARC. Further, that it is shocking that while the 1st and 3rd Petitioners have been supporting her nomination as a member of the Nandi County Assembly, they have now done an about-turn two years into her term and seek the revocation of that nomination.

21. Their case was further that pursuant to **Article 88 (4) (e) of the Constitution**, the Commission is responsible for settlement of electoral dispute including disputes relating to or arising from nominations but excluding election Petitions and disputes subsequent to the declaration of election

results. It thus argued that the Petitioners herein did not lodge any nomination dispute with the Commission at any one time prior to or after the gazettment of the name of the 3rd Respondent as duly nominated.

22. While arguing that the Petition is an afterthought and is misconceived and baseless, it was also their case that under **Article 90** of the **Constitution**, allocation of seats for nominated members should be on the basis of proportional representation by use of party lists and such seats are allocated to political parties in proportion to the total number of seats won by candidates of the political party at the General Election and as such, the nomination of any such candidate is for a term of 5 years and is independent of by-elections.
23. It was their other contention that the Petition is incompetent in view of the mandatory provisions of **Articles 87 (2)** and **88 (4)** of the **Constitution**, **Section 74 (2)** of the **Elections Act** and **Regulation 99 (2)** of the **Elections (General) Regulations, 2012** and **Section 39** of the **Political Parties Act** and should be struck out with costs to the Respondents. That this Court in any event lacks the jurisdiction to handle the present dispute since it should have been first filed at the Political Parties Disputes Tribunal or the Commission's Dispute Resolution Committee.
24. Additionally, that the Petition is incompetent for lack of a deposit for security for costs contrary to **Section 78** of the **Election Act** and is time-barred in view of the provisions of **Article 87 (2)** of the **Constitution** and **Sections 74** and **76** of the **Elections Act, 2011**.
25. Their final contention was that the 3rd Respondent has been nominated as a member of the Nandi County Assembly for a term of five years and her term is independent of elected members of her party and that she can only lose her nomination if she dies, withdraws from the party list, changes parties, resigns or is expelled from the party as provided for in **Section 37** of the **Elections Act**.

Rejoinder by the Petitioners

26. In their Further Affidavits sworn on their behalf by Isaiah Gichu on 17th March, 2015 and 28th July, 2015, the Petitioners averred that their case is neither frivolous nor vexatious as alleged but is a legitimate challenge to the unconstitutional actions of the Respondents and therefore not an abuse of the court process.
27. It was their other contention that the 3rd Respondent was not nominated to the Nandi County Assembly by way of a party list as alleged but rather through a letter dated 11th April, 2013, which letter does not meet the legal definition of a party list as envisioned by the Constitution and the Elections Act. The foregoing notwithstanding, they argued that this Court is imbued with inherent powers to issue summons to the 3rd Respondent to appear before it and explain how she was nominated to the Nandi County Assembly by NARC whilst being a registered member of PDU.
28. Their submission in rejoinder was further that the Affidavit in Reply by the Commission is a deliberate attempt to conceal the flaws in the nomination process and that rather than uphold the rule of law as the Constitution requires of them, the Respondents have effectively cut corners for selfish reasons and thus betraying the will of the people of Kenya. In addition, that the Respondents have not availed the party list that they alleged to have used in the nomination of the 3rd Respondent and that the Constitution envisages allocation of special seats based on the outcome of general elections and not subsequent by-elections, no matter how stellar the performance of a political party was.
29. Furthermore, that it is misleading for the Commission to argue that its constitutional duty ends upon gazettment of qualifying nominees because it has residuary power and discretion to rectify any anomaly that is brought to its attention. In this regard, they cited the example of the Kiambu County Assembly where the Interim Clerk to the Assembly on 20th September, 2013 discovered that two gazetted nominees had failed to turn up for the swearing in ceremony on 24th July, 2013

despite having been gazetted as nominated members, which amounted to a contravention of **Article 177 (b)** of the **Constitution** and the same was regularized by the Commission vide gazette notices dated 17th December, 2013 and 3rd January, 2014 as corrigenda. Based on the foregoing, it was the Petitioners' case that they, through a letter dated 11th December, 2013, after the nullification of the Kabisanga Ward election results, notified the Commission that the composition of the Nandi County Assembly did not meet the threshold set by the Constitution and further that the NARC nominee in the gender top-up list was in office illegally. That rather than rectifying the said situation as it did for the Kiambu County Assembly, the Commission washed its hands off the matter claiming to be *functus officio*.

30. Accordingly, that PDU's records indicate that the 3rd Respondent was one of its registered members having enrolled as such on 1st January, 2013 as records by the Registrar of Political Parties indicated and that any resignation from a political party must be preceded by a letter of resignation as stipulated under **Section 14 (1) (a)** of the **Political Parties Act, 2011**. That there is no evidence, either at the Registrar of Political Parties or at PDU offices that she ever resigned from PDU or joined NARC at any time and that pursuant to **Section 14 (4)** of the **Political Parties Act, 2011**, it is illegal for one to be a member of two political parties at the same time and that officials from NARC have confided to the 1st Petitioner that on several occasions, when they met at political fora, they never prepared or forwarded a party list to the Commission in respect of the Nandi County Assembly.

31. Lastly, they averred that the Respondents are under the illusion that their illegal actions cannot be met with legal challenge as the time for filing election petitions had lapsed and in any event, that this Petition is premised on **Article 258** of the **Constitution** invoking **Article 165 (3) (d) (ii)** of the **Constitution** and which seeks to remedy a violation of constitutional provisions.

Determination

32. I have read and considered all the pleadings submitted by the Parties in the instant Petition. The key question that begs for an answer is whether the Constitution and the various laws have been contravened as alleged by the Petitioners. If this Court reaches a conclusion that there has been any such contravention, it shall proceed on to determine the remedies to be availed to the Petitioners. Before I embark on the foregoing determination, I must however address my mind to the objections to the Petition as raised by the Respondents, the main one being whether this Court has the jurisdiction to determine the matter. I must also at this juncture point out that this is not the appropriate forum to address the questions raised herein in regard to alleged extortions and forgeries and as such, this Court shall not accept the invitation by the Parties to address those issues. Those are matters that are well within the mandate of other organs of the State such as the Inspector General of Police and the office of the Director of Public Prosecutions.

Does this Court have the Jurisdiction to Determine the Instant Petition?

33. The Respondents maintained the position 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 relied on the decisions in **Dr. Billy Elias Nyonje vs The National Alliance Party of Kenya and 2 Others, Judicial Review No 61 of 2013; Anthony Salau and Another vs Independent Electoral and Boundaries Commission and 2 Others; and Republic vs Independent Electoral and Boundaries Commission and Another, Judicial Review No 223 of 2013** for that proposition.

34. It was in addition their submission 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** and in this regard, their argument was that the 3rd Respondent was declared as a member of the Nandi County Assembly way back in July 2013 and since then no Petition has been filed challenging her nomination. That the Petition has therefore been brought inordinately out of time.

35. According to the Petitioners on the other hand, while arguing that this Court is the appropriate forum for resolution of the present dispute, they submitted that **Articles 258 and 259 of the Constitution** should be the guide in resolving the instant Petition and that the Civil Procedure Act and its Rules do not apply in constitutional Petitions. That the Court therefore has no jurisdiction to apply the Civil Procedure Act and Rules for the invocation of the same is simply not provided for and in any event, if the Legislature had wanted to have such a law to be so applicable then the Constitution and the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 (the Mutunga Rules)**, would have said so in simple terms.
36. Further, the Petitioners argued that the jurisdiction of the Court is to hear and determine any Petition filed, not to strike the same through the application of strained technical rules against the principles stipulated under **Article 159 (i) (d) of the Constitution**. They relied on the decision in **John Moses Opiyo vs Attorney General, Kisumu HC Misc Civil Application No 175 of 2006** in that regard and where it was held that the Constitution is the supreme law and takes precedence over all other laws and the Civil Procedure Rules cannot reign supreme over the Constitution for such would be a reliance on archaic law. On this basis they submitted further that neither under the Constitution nor under the Mutunga Rules, is this Court granted the jurisdiction to strike out the Petition and in any case, the only jurisdiction the Court has is to hear and determine such a Petition as provided for under **Rules 20, 21 (3), 23, 26 (2) 27 (2) of the Mutunga Rules**.
37. The Petitioners' other position was that the net effect of the said Rules and **Articles 2 (4), 10, 47, 50, 159, 258 and 259 of the Constitution** is that the instant Petition should be determined on its merits and not struck out on a technicality. Further, that until this Petition is heard and determined, this Court cannot determine that the Petition is an election Petition disguised as a constitutional petition or otherwise and so, therein lies the strongest reason why this Petition should be determined on the merits so that this Court may further determine whether the issues raised herein are akin to those in an election petition or a constitutional petition. That whether or not a matter overlaps and may be viewed as both an election related matter or a constitutional related matter may be too close to call for it is a very thin line, a most delicate and intricate difference.
38. Accordingly, they took the view that the Political Parties Disputes Tribunal has no jurisdiction to entertain this Petition since the Tribunal cannot declare the actions of the 1st and 2nd Respondents as unconstitutional; and nowhere in the relevant Act is the Tribunal given powers to try criminal acts, electoral offences, fraudulent acts or unconstitutional acts. They thus contended that it is only this Court that can declare such acts as unconstitutional. In that regard, they relied on **Arabe Espanol vs Bank of Uganda [1999] 2 EA** and **Silas Otuke vs Attorney General and Others, Petition No 44 of 2013** and reiterated the position that this Petition is not an election dispute.
39. In that context, Nyarangi J in **The Owners Of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1** made the observation 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.”

40. 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.”

41. In that regard the jurisdiction of this Court stems from **Article 165(3)** of the **Constitution** which is to the effect 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.*

42. The genesis of the Petitioners' case herein revolves around the question of nominations to Nandi County Assembly pursuant to the General Elections of 2013 and they allege violation of the **Constitution** and the **Elections Act** among others.

43. What then is the law in regard to disputes revolving around questions of nominations to County Assemblies among others?

44. **Article 87** of the **Constitution** provides that:

- 1. Parliament shall enact legislation to establish mechanisms for timely setting of electoral disputes.*
- 2. Petitions concerning an election, other than a Presidential election, shall be filled within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*
- 3. Service of a Petition may be direct or by advertisement in a newspaper with national circulation.*

45. **Article 88 (4)** of the **Constitution** on the other hand outlines the mandate of the Independent Electoral and Boundaries Commission in the following terms:

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-

- a. The continuous registration of citizens as voters;*

- b. *The regular revision of the voters' roll;*
- c. *The delimitation of constituencies and wards;*
- d. *The regulation of the process by which parties nominate candidates for elections;*
- e. *The settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*
- f. *The registration of candidates for election;*
- g. *Voter education*
- h. *The facilitation of the observation, monitoring and evaluation of elections;*
- i. *The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*
- j. *The development of a code of conduct for candidates and parties contesting elections; and*
- k. *The monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.*

46. Parliament has also enacted various legislations on elections among them being the Elections Act and the Political Parties Disputes Tribunal Act. In this regard, the Elections Act was enacted as *an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.* Part VII of this Act is titled “ELECTION DISPUTES RESOLUTION” and Section 74 provides that:

- 1. *Pursuant to Article 88(4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.*
- 2. *An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.*
- 3. *Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.*

47. The above position is also reiterated in the Independent Electoral and Boundaries Commission Act which was established as *an Act of Parliament to make provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution, and for connected purposes.* Section 4 thereof provides that:

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- a. *The continuous registration of citizens as voters;*
- b. *The regular revision of the voters' roll;*
- c. *The delimitation of constituencies and wards in accordance with the Constitution;*
- d. *The regulation of the process by which parties nominate candidates for elections;*
- e. *The settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election Petitions and disputes subsequent to the declaration of election results;*
- f. *The registration of candidates for election;*
- g. *Voter education;*
- h. *The facilitation of the observation, monitoring and evaluation of elections;*
- i. *The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*
- j. *The development and enforcement of a code of conduct for candidates and parties contesting elections;*

- k. *The monitoring of compliance with the legislation required by Article 82(1)(b) of the Constitution relating to nomination of candidates by parties;*
- l. *The investigation and prosecution of electoral offences by candidates, political parties or their agents pursuant to Article 157(12) of the Constitution;*

48. Other than the **Elections Act** and the **Independent Electoral and Boundaries Commission Act**, the **Political Parties Act** was enacted as *an Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes*. On this basis, **Section 39 (1)** of the Act establishes a Tribunal to be known as the **Political Parties Disputes Tribunal**. The jurisdiction of the Tribunal is provided for under **Section 40** of the said Act as follows:

“The Tribunal shall determine—

- a. *disputes between the members of a political party;*
- b. *disputes between a member of a political party and a political party;*
- c. *disputes between political parties;*
- d. *disputes between an independent candidate and a political party;*
- e. *disputes between coalition partners; and*
- f. *appeals from decisions of the Registrar under this Act.*

Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

49. My understanding of the laws that I have cited above is that the Legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. **Section 74 (1)** of the **Elections Act** and **Section 4** of the **Independent Electoral and Boundaries Commission Act** as reproduced above makes it explicit that the Commission shall be responsible for settling disputes arising from or relating to nominations. It therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission. The next question then that begs for an answer is whether the Petitioners utilized the Commission’s dispute resolution port as required of them before approaching this Court. Based on their pleadings and submissions before this Court, their argument was that the instant Petition has been filed not as an election dispute but rather that the jurisdiction being invoked herein is the one under **Articles 165** and **258** of the **Constitution** and no more.

50. I appreciate the Petitioners’ contentions in that regard but I am however in disagreement with their reasoning. I agree that indeed this Court has unlimited jurisdiction in civil and criminal matters and further the jurisdiction to determine the constitutionality of anything alleged to have been done under the Constitution. I also appreciate that **Article 258** of the **Constitution** grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. I however take the view that Parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.

51. I take the further view that the existence of **Articles 165** and **258** of the **Constitution** is not a substitute or a means of excluding such other dispute resolution organs and agencies from exercising their statutory duties. Perhaps it suffices to quote the dictum by the court in **Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010** where the Learned Judge made the observation that:

“Jurisdiction we all know is everything and once raised it must be confronted from the onset and if successful the court must down its tools. I have no doubt at all that under article 165(3) of the Constitution, I have unlimited and inherent jurisdiction. I am also

aware that under article 23(1) of the same constitution this court has jurisdiction, in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. I also agree as pointed out by counsel for the petitioner that any interpretation of the Constitution that seeks to curtail such wide and unfettered jurisdiction would be contrary to the spirit and letter of the constitution and would thus render itself invalid. I do not however agree that the bodies created under the provisions of the CDF such as the 1st respondent are invalid, null and void as per the constitution. As I have already stated elsewhere in this ruling, it is not uncommon in this country for a statute to provide the procedure through which proceedings founded under the statute are to be handled. Such is section 52 of the CDF. There is nothing unconstitutional about it. The section does not deny the petitioners the right to come to court. It only provides a procedure to be followed when dealing with the disputes under the Act, like the instant dispute. The petitioners have a right to come to this court on whatever matter and howsoever but that must be done in the correct way. It cannot therefore be the case of the petitioners that section 52 of the CDF is in conflict with articles 22, 23, 48 and 50 of the Constitution. Similarly, it cannot be their case that section 52 qualifies the right to access justice in this court...

The Learned Judge went on to state:

“I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights...

... Coming to court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose.” (Emphasis added)

52. In *The National Gender and Equality Commission vs The Independent Electoral and Boundaries Commission and Another* [2013] eKLR it was opined that:

“Section 34(6) of the Elections Act, 2011 specifically provides that, “The party lists submitted to the Commission under this section shall be in accordance with the Constitution or the nomination rules of the political party concerned.” This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances... While the parties have submitted at length on the need to define the terms such as “special interest” to give clarity to the process of nomination, we are of the view that it is not necessary to do so in this case. The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC. The IEBC is required to scrutinise the lists forwarded to

it to ensure that the lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists.” (Emphasis added)

53. Based on the foregoing, I am inclined to agree with the Respondents’ submissions that this Court is not the appropriate forum for addressing the issues raised in the Petition. My reasoning is firmly grounded on the nature of the case and the matters raised herein because it is not in dispute that the dispute is in regard to nominations to a County Assembly. The Petitioners’ main concern is that the law was not observed by the Respondents in regard to the conduct and the final selection of the nominee. This in my mind is one such dispute in regard to nominations that the Legislature contemplated and thus created a dispute resolution body as the first port of call.
54. I also note that in previous decisions of this Court, a view was taken along the above lines and that is why in **Republic vs Speaker of County Assembly of Nyandarua and Another Ex parte David Mwangi Ndirangu, Miscellaneous Application No.414 of 2013**. Having participated in the elections of March 4th 2013, The National Alliance (TNA) Party of Kenya was entitled to nominate members to the County Assembly of Nyandarua as prescribed by law and pursuant thereto the foregoing, TNA submitted its list of nominees to the County Assembly of Nyandarua to the Commission as by law required. The Applicant averred that on the 15th day of March 2013, the Commission published in the Daily Nation Newspaper the names of individuals whose names were submitted to them by Political Parties and wherein the Applicant was included in the said list as having been nominated by TNA to the County Assembly of Nyandarua. Further, on the 21st day of May, 2013, the Commission’s Dispute Resolution Committee published in the “Daily Nation” Newspaper the amended nominees to County Assembly Special Seats list of the political parties to various County Assemblies and the Applicant’s name was once again in the said list alongside others nominated by TNA to the County Assembly of Nyandarua. Being dissatisfied with the publication of the party list in the Newspaper by the Commission, proceedings were instituted to bar and or challenge the aforesaid list. Complaints were then made to the Commission’s Dispute Resolution Committee which sufficiently deliberated on the matter and gave a well-reasoned determination. Still being dissatisfied by the said verdict of the aforesaid Dispute Resolution Committee, the Applicants filed **JR No. 218 of 2013** and **Petition 238 of 2013** wherein the complaints were adequately canvassed and considered judgments given after all the parties were heard by a three (3) Judge bench, which, in a well-reasoned ruling, dismissed the application.
55. Further, in **Narc Kenya and Another vs Independent Electoral and Boundaries Commission Another, Election Petition No.12 of 2013**, the 2nd Petitioner raised a complaint over the nomination of the 2nd Respondent with the dispute resolution committee of the Commission. The Committee heard the complaint and dismissed the same in its decision of 7th June, 2013. The Petitioner not being satisfied with the outcome filed **Judicial Review No.203 of 2013** challenging the nomination of the 2nd Respondent as the gender top up nominee for Garissa County for NARC Kenya party. The point is that the first port of call was the Commission.
56. In **Beatrice Nyaboke Oisebe vs Independent Electoral and Boundaries Commission 2 others, Civil Appeal No. 179 of 2013**, in the run-up to the general elections held on 4th March 2013, the Commission requested political parties to submit party lists under Article 90 in respect of the Senate, the National Assembly and the County Assemblies. Based on these party lists, and the result of the general elections published on 13th April 2013, the Commission published the allocation of nominees to county assembly special seats. Thereafter a constitutional reference, **Petition No.147 of 2013, The National Gender & Equality Commission vs the IEBC, the Hon. The Attorney General** was filed, challenging the manner in which the Commission had allocated the said special seats. The High Court delivered a ruling which ordered that the Commission ought to put in place mechanisms to resolve any disputes concerning the lists in accordance with **Article 58(4) (e) of the Constitution** as read with **Section 74 of the Elections Act, 2011**. This was to ensure that while dealing with the disputes touching on the said lists the Commission was

discharging its constitutional responsibility to satisfy itself that the lists, met the constitutional criteria.

57. I have deliberately set out the above decisions with a view to highlighting the approach the courts have taken, which I believe is the correct one, in addressing disputes in regard to nominations pertaining to election matters. In the above cited decisions, I note that the parties alleged violation (s) of the Constitution and the various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission's Dispute Resolution Committee. Being dissatisfied with decision of the Committee, they thereafter approached the Courts. It is thus clear that the parties did not bypass the Commission's dispute resolution avenue as the Petitioners have now done.

58. 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.

59. Having answered the question of jurisdiction in the negative, I am inclined to down my tools at this juncture for this is not the appropriate forum and time to address the issues raised in the Petition.

60. In light of my findings above, I hereby dismiss the instant Petition but each party shall bear its own costs.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

1st Petitioner Present

No appearance for Respondents

Mr. Mbithi holding brief for Mr. Oyuke for 2nd and 3rd Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

19/2/2016