



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
ELECTION PETITION NO. 9 OF 2015

(Formerly Homa Bay High Court Election Petition No. 1 of 2015)

NANCY ANYANGO ORINA.....PETITIONER

-VERSUS-

I.E.B.C.....1ST RESPONDENT

THE HON. SPEAKER HOMABAY COUNTY ASSEMBLY....2NDRESPONDENT

THE CLERK HOMABAY COUNTY ASSEMBLY.....3RD RESPONDENT

ESTHER ROSE DWALO.....1ST INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT.....2ND INTERESTED PARTY

RULING

1. Following the demise of two Nominated Members of the County Assembly of Homa Bay County namely **CELESTINE ADHIAMBO OWIDI** and **MONICAH AKEYO AMOLO**, the two positions in the said Assembly fell vacant.
2. Thereafter the Independent Electoral and Boundaries Commission (hereinafter referred to as “**the IEBC**”) nominated and gazetted **RUTH ALUOCH OCHUODHO** and **ESTHER ROSE DWALO** to replace the said two deceased honourable members.
3. **NANCY ANYANGO ORINA**, the Petitioner herein, was aggrieved by the said nominations as her party, the Orange Democratic Party (**hereinafter referred to as “the ODM”**), had formally written to the IEBC that the Petitioner be nominated into one of the positions. She then filed a Petition in the High Court at Homa Bay challenging the nomination of one **ESTHER ROSE DWALO**. That was on 19/10/2015.
4. Alongside with the Petition, the Petitioner filed a Notice of Motion evenly dated under a certificate of urgency seeking *inter alia* orders restraining the Honourable Speaker and the Clerk of Homa Bay County Assembly from administering the oath of office or in any way swearing in **ESTHER ROSE DWALO** to the position of Member of County Assembly, Homa Bay County pending the determination of that application. The Petition was subsequently transferred to this Court upon the recusal of the Presiding Judge of the High Court at Homa Bay.

5. The matter was then placed before this Court and the said application was considered and interim orders issued pending further directions. Hearing of the application *inter partes* was set for 29/10/2015.
6. When the parties appeared before Court on 29/10/2015, they instead opted not to proceed on with the hearing of the application and upon concurrence of this Court, parties agreed to pursue an amicable resolution since the dispute mainly revolved around party issues.
7. It seems that the efforts did not bear any fruits and on 15/02/2016 the then Petitioner's Counsel, Mr. Nyauke from the firm of Messrs Nyauke & Company Advocates, filed an application to formally cease from acting for the Petitioner. That application was allowed on 22/02/2016 where a Counsel, Mr. Kisia although not on record informally informed the Court that he had instructions to come on record for the Petitioner and that he would be filing the requisite papers in due course.
8. The Court then gave directions on the way forward on the matter and since the Respondents had objected to the jurisdiction of the Court, it was directed that the issue of jurisdiction be first dealt with. Counsels for the parties were to file written submissions which were to be highlighted on 08/03/2016.
9. Come the said 08/03/2016 Mr. Kisia appeared and indicated to the Court that contrary to what he had been made to believe by the Petitioner, he actually had not been so retained to appear for the Petitioner. He therefore indicated that he was not able to participate further in the matter. Counsel also indicated to this Court that the Petitioner was well aware of the hearing as she was personally present in Court on 22/02/2016 when the date was fixed. The Court then directed that the highlighting would proceed as scheduled. That resulted to this ruling.
10. Mr. Makori appeared for the 2nd Interested Party, Mr. Kipkogei appeared for the 1st Respondent and Miss Gogi appeared for the 1st Interested Party. In a concerted effort, Counsels urged this Court to find that it lacked the jurisdiction to in anyway deal with the Petition. To that end, they referred to **Section 75 (1A) of the Elections Act (No. 24 of 2011)** as well as various judicial decisions including that of the Court of Appeal in the case of *Jaldesa Tuke Dabelo -vs- Independent Electoral Boundaries Commission and Another (2015) eKLR*, *Mary Wairimu Muraguri & 12 Others -vs- Independent Electoral & Boundaries Commission (IEBC) and 5 others (2015) eKLR*, *Nairobi Petition No. 147 of 2013 The National Gender Equality Commission -vs- Independent Electoral & Boundaries Commission (IEBC) & another, Nairobi Civil Appeal No. 169 of 2013 Rose Wairimu Kamau -vs- IEBC and Others (2014) eKLR*, *Nairobi Election Petition No. 8 of 2013 Kituo Cha Sheria -vs- John Ndirangu Kariuki and Another* and *Alphonse Mulandi Wolile and Another -vs- Mutula Kilonzo Junior and 2 Others, Election Petition No. 13 of 2013 at Machakos High Court*.
11. Counsels jointly argued that pursuant to **Section 75(1A) of the Elections Act** any challenge in respect to the validity of an election of a member of a County Assembly is to be determined by the Resident Magistrate's Court and not the High Court. They further argued that the law was settled to mean that even a nomination of a Member to the County Assembly amounted to an election upon gazettelement. They prayed that the objection be upheld and the Petition together with the Notice of Motion be dismissed with costs.
12. The Petitioner did not participate in the hearing of the jurisdictional issue as she did not make any appearance on the hearing day either by herself or through Counsel.
13. I have carefully and keenly gone through the Petition, the Notice of Motion, the respective parties' responses in form of Grounds of Opposition and Replying Affidavits, the written submissions as well as the Counsels highlights to the written submissions. I have equally revisited the several judicial authorities referred to and presented by the parties.
14. The objection which was raised on the jurisdiction of this Court on election matters, although not formally drafted and filed as such, is in the nature of what is generally referred to as a Preliminary Objection on a Point of Law. I will hence start with a look at the statement of law regarding preliminary objections. Law, J.A. in the much-celebrated case of *Mukisa Biscuits Manufacturing Company*

Limited -vs- West End Distributors (1969) EA 696 had the following to say:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....”

15. Our brother Mwita, J. in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in more clearer terms when he stated that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

16. Before I leave this discourse, my attention has been drawn to the words of Hon. Ojwang, J (*as he then was*) in the case of **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the **Mukisa Biscuits case (supra)** went on to stay that: -

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a Preliminary point... ”

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

17. Jurisdiction is everything and without it a Court cannot make any more single legal step. Once the jurisdiction of a Court is challenged, that Court must first determine that question at once, and should it hold the opinion that it lacks jurisdiction, it should down its tools. In the famous case of **The Owners of Motor Vessel “LILIAN “S” -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** Nyarangi, JA. stated at page 14 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 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. The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** 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.”

19. The issue of whether the High Court is the proper forum to consider and determine the question of membership in the County Assembly is a jurisdictional issue. **Section 75(1A)** of the Election Act

provides as follows:-

“75 (1A) A question as to the validity of a member of a County Assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

20. However I venture to analyse the above provision in light of this matter, it is incumbent that I briefly revisit the issue of the status of elected and nominated Members of County Assemblies. The election law in this County has become relatively settled since the promulgation of the Constitution in 2010 and the conduct of the general elections thereafter. Counts have had an opportunity to interrogate the issue on the status of both the elected and nominated members of County Assemblies upon gazettelement.

21. In the case of ***Rose Wairimu Kamau and 3 Others -vs- IEBC, C.A. NO. 169 of 2013*** the Court of Appeal in addressing that very issue clearly stated as follows:-

“...In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 97(1C) 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 Article 105 of the Constitution or Part VIII of the Elections Act as the case may be.”

22. Further the Court of Appeal differently constituted in the case of ***Jaldesa Tuke Deballo -vs- Independent Electoral and Boundaries Commission and Another (2015) eKLR*** added its firm voice on the same issue and in the following manner:-

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

23. According to the record before Court, the IEBC gazetted the nomination of ESTHER ROSE DWALO to replace the late Celestine Adhiambo Omidi on 13/10/2015 vide Gazette Notice No. 7716. That Gazette Notice still stands as no evidence has been brought to the attention of the Court that it was either revoked or stayed. From the foregone guidance on the law, the said nominee ESTHER ROSE DWALO therefore became an elected member of the County Assembly of Homa Bay as from the 13/10/2015. The position still stands to date.

24. Having found so, it now remains upon the Court to address the issue of how such an election may be challenged in law. I have reproduced the provision of Section 75(1A) of the Elections Act which clearly and openly speaks for itself. In interpreting and applying the said Section 75(1A) of the Elections Act, it is this Court’s firm finding that the High Court does not have any original jurisdiction when it comes to challenging the election of a Member of a County Assembly. **Section 75(4)(a)** of the Elections Act creates the jurisdiction of the High Court as follows:-

“75(4) An appeal under Subsection (1A) shall lie to the High Court on matters of law only and shall be -

(a) filed within thirty days of the decision of the Magistrate’s Court; and

(b) heard and determined within six months from the date of filing of the appeal.”

25. The foregone position was restated by the Court of Appeal in the case of ***Jaldesa (supra)*** where in expressed itself as follows:-

“14.....Applying the foregone dicta and principles of law to the instant case, Section 75(1A) of the Elections Act expressly indicates that the jurisdiction to consider, hear and determine the question as to the validity of election of member of County Assembly is vested with the Resident Magistrate’s Court designated by the Chief Justice.

The proper and original forum to determine the question of whether the 2nd respondent was validly nominated and gazetted as representative of the marginalized communities in Isiolo County Assembly is the Resident's Magistrate Court. The learned Judge did not err in interpreting and applying Section 75(1A) of the Elections Act. We state that the High Court has no original jurisdiction to determine questions of membership to County Assemblies.”

26. The matter was therefore improperly filed in the High Court for it is crystal clear that the High Court has no original jurisdiction in this matter. Applying the foregone settled principles of law to the instant case and in the words of the Court of Appeal in the case of **Lilian 'S' (supra)**, this Court having satisfied itself that it lacks the jurisdiction to deal with the matter as laid before it hereby downs its tools.

27. Consequently this Court makes the following orders:-

(a) This Honourable Court lacks the jurisdiction to in anyway deal with the Petition as well as the Notice of Motion filed herein;

(b) The Petition as well as the Notice of Motion both evenly dated 19/10/2015 be and are hereby struck out;

(c) The interim orders in force are hereby vacated and/or discharged and for avoidance of doubt the Second and Third Respondents herein are at liberty to administer the oath of office upon ESTHER ROSE DWALO as a Member of the County Assembly of Homa Bay County;

(d) The Petitioner shall bear the costs of the matter.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 31ST day of MARCH 2016

A. C. MRIMA

JUDGE