



**REPUBLIC OF KENYA**

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

**PETITION NO. 27 OF 2015**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1, 2, 3,19,20,21,22,23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 88, 90 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ELECTIONS OF MEMBERS OF COUNTY ASSEMBLIES UNDER ARTICLES 75,77,177(1) B & C OF THE CONSTITUTION OF THE KENYA**

**AND IN THE MATTER OF VIOLATION OF S 34 AND 37 OF THE ELECTIONS ACT 2011**

**BETWEEN**

**DAVID OGEKA OYUGI...../.....1ST PETITIONER**

**JARED OSANO ATANCHI.....2ND PETITIONER**

**VERSUS**

**MUSLIM DIDA.....1ST RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .....2ND RESPONDENT**

**ATTORNEY GENERAL.....3RD RESPONDENT**

**JUDGMENT**

**Introduction**

1. Following the promulgation of the Constitution of Kenya 2010, all registered political parties were mandated to prepare and submit party list containing names of party members, each political party anticipated to nominate to the various seats created under the various provisions of the Constitution. Pursuant to the provisions of **Article 97, 98 and 177 of the Constitution 2010** as read together with the **provisions of Section 34 of the Election Act**, the Political Party namely United Democratic Forum, duly submitted a party list. The names of the 1<sup>st</sup> respondent herein Muslim Dida was provided as the number (1) in the cluster of Gender top up (Female). Following the nomination of the 1<sup>st</sup> respondent a dispute

arose as to whether the name of the 1<sup>st</sup> respondent was contained in the party list submitted by the United Democratic Forum. Consequently, the aggrieved person one Beatrice Nyaboke Oisebe (not a party in the instant suit) lodged a complaint with the political parties tribunal for purposes of determination/redress. The complaint was duly heard by the tribunal and dismissed the same. Subsequently the complainant lodged an appeal vide Nairobi HCC Misc. Application No. 215 of 2013 (JR) whereby the appeal was heard and dismissed. The complainant still not satisfied mounted an appeal to the Court of Appeal vide **Nairobi Court of Appeal Civil Appeal No. 179 of 2003**. The said appeal was heard and determined on 11<sup>th</sup> October 2013 and the appeal was similarly dismissed.

### **The pleadings**

2. The petitioners herein David Ogega Oyugi and Jared Osano Atancha in their petition dated 2<sup>nd</sup> July 2015 sought the following prayers;

**(1) A declaration that the nomination of the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent as member of Kisii County Assembly is in flagrant violation of the Constitution of Kenya 2010 and Elections Act, 2011.**

**(2) That the name of the 1<sup>st</sup> respondent be struck out and or her name be degazetted from Gazette Notice Vol. XV No. 105 of 17<sup>th</sup> July 2013 and gazette a deserving candidate as per the protected list published by 2<sup>nd</sup> respondent**

**(3) Costs of the petition.**

3. I note that the petitioners' petition has no supporting affidavit in contravention with Rule 12 and 14 of the Gicheru Rules Rule 14 provides that:

**"if a party wishes to rely on any document, the document shall be annexed to the supporting affidavit."**

4. Hence, in terms of Rule 14 of the said Gicheru Rules, the petition contains allegations without the affidavit evidence intended to accompany the petition to support the allegations I the petition and this makes the petition incompetent.

However, my above findings notwithstanding, this court is still minded to determine the merits of this case considering that the petitioner tendered oral evidence at the hearing. The following facts can be deduced from the body of the petition:-

**- On 14<sup>th</sup> May 2013 the 2<sup>nd</sup> respondent gave notification when publications of the political parties list concerning nominees as submitted by various political parties for purposes of allocation of County Assembly Special Seats were to be published on the Daily Nation of 14, 15 and 16<sup>th</sup> May 2013.**

**- That the 2<sup>nd</sup> respondent published the original party lists and resubmitted on 15<sup>th</sup> and 16<sup>th</sup> May 2013.**

**- That the name of the 1<sup>st</sup> respondent does not appear hence her gazettment is violation of the Constitution and elections Act especially within Section 34 subsection 10.**

**- That the 2<sup>nd</sup> respondent cannot justify the legality of the process of nominating the 1<sup>st</sup> respondent as a member of Kisii County Assembly as her name does not appear on the protected list.**

**- That the 2<sup>nd</sup> respondent gazette the 1<sup>st</sup> respondent from the blue and granted her a seat of**

**member of the County Assembly Kisii County to the detriment of the deserving candidates already in the published and protected lists published by the 2<sup>nd</sup> respondent.**

**-That the 2<sup>nd</sup> respondent failed in integrity, transparency and accountability tests in gazetting the 1<sup>st</sup> respondent in flagrant violation of the constitution of Kenya 2010.**

6. The 2<sup>nd</sup> respondent opposed the above petition vides a replying affidavit dated 6<sup>th</sup> November 2015. In the said replying affidavit sworn by Moses Kipkoga a Senior Legal Officer with the 2<sup>nd</sup> respondent's deponed that the 1<sup>st</sup> respondent is a member of the County Assembly and under the provisions of Article 177 (1) (b) and (c) of the Constitution. That consequently, a question as to the validity of her nomination can only be determined by way of an Election Petition and through the mechanisms set out in law hence he termed the instant petition as misconceived and misguided. He further deponed that the 1<sup>st</sup> respondent was a member of the party (UDF) and her name was in the list submitted by the party to the 2<sup>nd</sup> respondent (he attached a copy of the list submitted by UDF and letter which were marked as MK-1. He further deponed that after the 1<sup>st</sup> respondent's nomination after the March 2013 General Election the petitioner failed to move the commission under **Article 88 (4) (e) of the Constitution as read with Section 74 (1) of the Elections Act (Cap 7)** to challenge such nomination. Hence it is the 2<sup>nd</sup> respondent's contention that what is before this honourable court is an Election Petition disguised as a Constitutional Petition the ultimate goal of which is to nullify the election of the 1<sup>st</sup> respondent as a nominated member of the County Assembly of Kisii County.

7. He further deponed that the petition as filed is an attempt to circumvent due process and the vigorous procedure set out in the Elections Act and Elections (Parliamentary and County Election Petition Rules 2010). He further deponed that the procedure by which a member of the County Assembly loses his seat is elaborately set out in the Constitution and the Elections Act therefore the Petition as filed is a mechanism which is unavailable to the petitioner.

8. Lastly, it is the 2<sup>nd</sup> respondent's case that the prayers sought by the petitioner are untenable and cannot be granted by this honourable court.

9. The 1<sup>st</sup> respondent on her part filed Notice of Preliminary Objection dated 2<sup>nd</sup> July 2015 stating that:-

**(1) The petitioners herein lack the requisite locus standi to mount, commence or mountain the instant petition, the petition ought to be struck out.**

**(2) The honourable court herein is devoid and divested of jurisdiction to entertain and adjudicate upon the subject dispute pursuant to and by dint of the provisions of Section 40 of the Political Parties Act, No. 11 of 2011.**

**(3) The instant petition is barred/prohibited by dint of Section 34, 74 and 78 of the Election Act 24 of 2011.**

**(4) In any event the instant petition is contrary to and in contravention of Article 88 (4) (e) of the Constitution 2010.**

**(5) The instant petition is res judicata and hence barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya, in so far as the issues herein have hitherto been addressed and determined vide Court of Appeal, Civil Appeal No. 179 of 2013.**

**(6) Besides, the petition herein is premature, misconceived and bad in law.**

**(7) On the other hand, the petition herein does not disclose and/or capture any reasonable cause of action whatsoever.**

**(8) In the premises the instant petition amounts to and/or constitutes an abuse of the due process of court.**

10. When the above matter came before me on 11<sup>th</sup> November 2015 (before the 1<sup>st</sup> respondent had filed his preliminary objection) the matter proceeded to hearing.

**Oral evidence:**

11. PW1 was the 1<sup>st</sup> petitioner herein David Ogega Ogugi he told the court that upon him reading the 2<sup>nd</sup> respondent published list he found that the name of the 1<sup>st</sup> respondent was not in the published list. He produced the said list dated 14/5/2013 and marked as exhibit 1. That in the said list the serialization at page 2 and 7 does not have UDF party nominees. That 2<sup>nd</sup> list published on 15/5/2013 had UDF published list on page 24 and 28 and the same did not contain the names of 1<sup>st</sup> respondent. The said list was marked as exhibit 2. That exhibit 3 i.e the list of 16/5/2015 did not have the 1<sup>st</sup> respondent's name.

12. The 1<sup>st</sup> petitioner contended that the name of the 1<sup>st</sup> respondent is not in any of the lists but the same was gazette to represent UDF party hence it is strange how 1<sup>st</sup> respondent's name was gazette unless there was foreplay somewhere.

13. That the 1<sup>st</sup> respondent was gazette in the Kenya gazette published on 17/7/2013 at page 35 at Vol. CXV No. 105. The said gazette notice was produced as exhibit 4.

14. It is thus the petitioners case that the 1<sup>st</sup> respondent's nomination was not done according to the constitution and Elections Act hence he prays that this court declares that the name of the 1<sup>st</sup> respondent be struck out and her name be degazetted from the Kenya Gazette Vol. CXV – 105 of 17/7/2013 a gazette a deserving candidate as per the protected list published by the 2<sup>nd</sup> respondent.

15. On cross-examination by Mr. Lawi counsel for the 2<sup>nd</sup> respondent the 1<sup>st</sup> petitioner contended that he knew that the 2<sup>nd</sup> respondent has the mandate to resolve disputes arising out of nomination.

16. On examination by the court the 1<sup>st</sup> petitioner contended that his case is that the 2<sup>nd</sup> respondent picked the 1<sup>st</sup> respondent out of the blue as she was not nominated by UDF and her name was therefore not in the published list. This marked the close of petitioner's case.

17. Mr. Lawi counsel for the 2<sup>nd</sup> respondent did not call any witnesses but submitted orally in court and stated that the constitution and Elections Act gives the procedure for such petitions with time lines. He referred to Article 90 of the Constitution and submitted that no distinction is drawn between a nominated member and an elected member thus he is deemed elected and the same procedure applies. He further submitted that the Elections Act prescribes an election court which deals with such petitions and any member aggrieved can use Article 84 of the Constitution.

18. It is thus the 2<sup>nd</sup> respondent's submission that the petitioner has failed to exploit that avenue and is bringing a petition 3 years down the line after the election. He further submitted that the list that was gazette was presented to the 2<sup>nd</sup> respondent by UDF and the said letter is annexed to the relying affidavit and is marked "MK1". It is thus the 2<sup>nd</sup> respondent's case that this is actually an election petition disguised as a constitutional petition.

19. Lastly, he submitted that this court as constituted does not have the jurisdiction to hear and determine this matter being an election petition hence this is an attempt to circumvent the vigorous procedure set out in the Election Act and Elections Parliamentary and County Elections Rules. All the respective advocates in this case then proceeded to file their written submissions.

20. Before considering the merits of the petitioners case, I note that the 1<sup>st</sup> respondent has raised a

preliminary objection against the petitioner's petition. I will therefore first deal with the preliminary objection raised by the 1<sup>st</sup> respondent as it is trite law that a preliminary objection should be argued and dispensed with first.

21. The law as regards preliminary objection is well settled by case law. The case of **Mukisa Biscuits Co. Ltd –vs- West End Distributors Ltd [1969] E. A 696** is regarded as the locus classica on the issue in our legal system. It states:-

**“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurr. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

22. This position was subsequently amplified in **Hassan Nyanje Charo –vs- Khalib Mwashetani & 3 Others, Supreme Court Application No. 23 of 2014** and **Aviation & Allied Workers Union Kenya –vs- Kenyan Airways Ltd & 3 Others, Application No. 50 of 2014 eKLR [2015]** where it was stated at paragraph 15:-

**“Thus a preliminary objection may only be raised in a “pure question of law” to discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record”.**

23. In **Justice Kalpana H. Rawal v Judicial Service Commission & 5 Others [2016] eKLR** the court held:

**" A preliminary objection should be argued and dispensed with first given its peculiar nature as it may do either of two things. Firstly, a preliminary objection touching on jurisdiction of successful raised, may dispose of the matter. This point was well stated in Ochea Emanuel Dangana –vs- Hon. Atai Aidoko Aliusman & 4 Others. SC 11 of 2012 (The Dangana Case) Judge Bode Rhodes Vivour JSC said thus:-**

**“A successful preliminary objection terminates the hearing of the appeal .....jurisdiction has always been a threshold issue. It must be decided once it is raised and quickly too. A trial or a hearing conducted without jurisdiction amounts to a wasted effort, a complete nullity no matter how well the matter was decided. That explains why the issue of jurisdiction can be raised at any time, in the trial court, on appeal, or in the Supreme Court for the first time.”**

**Secondly a preliminary objection may substantially affect the proceedings even if it does not dispose it off. This is because it may impact the proceedings by leading to striking out or wiping away some aspect of the proceedings. Some causes of action may be struck off out while others may have to be amended it could also reduce the prayers sought, hence impacting the proceedings."**

24. In the instant case, the 1<sup>st</sup> respondent has raised the issue that this court lacks jurisdiction to hear the above petition. It is an undisputed fact that the instant petition raises issues of nomination and appointment from a party list which was submitted by the United Democratic Party Forum Party (UDF) in accordance with the **provisions of Article 177 of the Constitution 2010** as read together with **section 34 of the Elections Act, 2011**.

25. Having been nominated in line with the provisions of Section 34 of the Elections Act, any person aggrieved/dissatisfied with the said nomination was obliged to raise with the political parties tribunal, for purposes of determination of the dispute as provided for under **Section 40 of the Political Party's Act,**

2011. Sections 34 and 40 of the Elections Act provide as follows:

**“34. (1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.**

**(2) A political party which nominates a candidate for election under Article 97 (1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97 (1) (c) of the Constitution.**

**(3) A political party which nominates a candidate for election under Article 98 (1) (a) shall submit to the Commission a party list in accordance with Article 98 (1) (b) and (c) of the Constitution.**

**(4) A political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (1) (b) and (c) of the Constitution.**

**(5) The party lists under subsection (2), (3) and (4) shall be submitted in order of priority.**

**(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.**

**(7) The party lists submitted to the Commission shall be valid for the term of Parliament.**

**(8) A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.**

**(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.**

**(10) A party list submitted for purposes of subsection (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county.**

**40. The Commission shall, in performing its duties under Article 88 (4) (g) of the constitution establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum.”**

26. In addition to this, Article 88 (4) (e) of the Constitution, 2010 provides:

**“(e) The settlement of electoral disputes including disputes relating to or arising from nominations, but excluding Election Petitions and dispute subsequent to the declaration of election results.”**

27. From the above provisions of the law, it is evident that the 2<sup>nd</sup> respondent is conferred with jurisdiction to entertain and determine disputes arising out of nominations. In speaker of the **National Assembly –vs- James Njenga Karume, Court of Appeal, Civil Application Number 92 of 1992 [1992] eKLR** the Court of Appeal held:-

**“In our view there is a considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution and an Act of Parliament that procedure be strictly followed.”**

28. In **Francis Gitau Palsimei –vs- The National Alliance Party, Nairobi HCCC Petition Number**

356 of 2012 [2012] eKLR whereby the honourable court observed as hereunder:-

**“It is also my view that Article 88 (4) of the Constitution 2010 and Section 74 (1) of the Elections act 2011, provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked.”**

29. Furthermore, the constitution has provided a timeline within which to lodge any Election Petition. Election Petitions include such petitions which challenge the outcome of the electoral process and in my humble view nominating members to the national assembly (County Assembly) is also part of the electoral process. In the case of **Republic –vs- County Returning Officer, Taita Taveta & 2 Others Nairobi HCCC No. 96 of 2013 (JR)** at page 13 the honourable court held:-

**“...we have said enough, we think to show that the procedure of judicial review like that of the plaint or any such other procedure, is and was not available to the parties aggrieved by the acts and/or omissions of the commission, we reassert as we previously did, that the only valid way of challenging the outcome of the electoral process and for that purpose nominating member of the National Assembly, is part of the Electoral process through an election petition, as provided in the Constitution and the National Assembly and Presidential Elections Act.”**

30. In the instant case and considering the above case law I have cited, I agree with the 1<sup>st</sup> respondent’s submissions that this court lacks jurisdiction to entertain the instant petition which aims at nullifying the 1<sup>st</sup> respondent nomination to the Kisii County Assembly. In the instant case of **Owners of the Motor Vessel “Lilians” –vs- Caltex Oil (Kenya) Ltd KLR 1** where Nyarangi JA held as follows:

**"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion the moment I holds the opinion that it is without jurisdiction."**

31. I am therefore in complete agreement with the 1<sup>st</sup> respondent’s submission that this court lacks jurisdiction to hear this matter and it is at this point that I need to down my tools. However, before I sign off, the 1<sup>st</sup> respondent has also raised the issue of *res judicata*. According to the 1<sup>st</sup> respondent, another person raised a complaint over the nomination of the 1<sup>st</sup> respondent to the County Assembly of Kisii on grounds that the 1<sup>st</sup> respondent name was not contained in the UDF party list. This issue was taken to the Political Dispute Tribunal and upon hearing the said complaint the Political Parties Tribunal found no merit in the same. The issue was then taken to the High Court vide Nairobi **HCCC No. 215 of 2013 (JR)** and thereafter to the Court of Appeal vide **Court of Appeal Number 179 of 2013** in respect of which both, the honourable courts held that the 1<sup>st</sup> respondent’s nomination was valid and legitimate.

32. I have perused the decision in **Civil Appeal No. 179 of 2013 Beatrice Nyaboke Oisebe –vs- The Independent Electoral Boundaries Commission & Another** the court held:

**“...but when one slot was given to that county for gender top up, it was given to the 2<sup>nd</sup> respondent, who had been recommended by UDF for such nomination. From the foregoing, we were satisfied that UDF availed a list to IEBC for purposes of nomination with the 2<sup>nd</sup> respondent for gender top up. She was thus duly and validly nominated. These two grounds therefore fail. But before we leave them, we refer to the High Court statements that UDF had the core mandate to prepare list for party nominations.”**

33. In my humble view given that the instant petition touches/on the same subject matter of nomination of

the 1<sup>st</sup> respondent, the instant suit is **res judicata**. Section 7 of the Civil Procedure Act provides:-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

34. The test of determining whether or not a matter is res judicata was stated in the case of **Benard Mugo Ndegwa vs James Nderitu Githae & 2 others [2010] eKLR** as follows:

**(1) The matter in issue is identical in both suits**

**(2) The parties in the suit are the same.**

**(3) Sameness of the title/claim**

**(4) Finality of the previous decision.**

35. Upon comparing the previous decisions and suits over the same subject matter with the instant petition, I come to the conclusion that there is a striking similarity and indeed, sameness in the claim in the sense that both challenge the nomination of the 1<sup>st</sup> respondent.

36. I find that a final determination had been made by the court of appeal in **Beatrice Nyaboke Oisebe case (supra)** upholding the nomination of the 1<sup>st</sup> respondent. All the issues raised in this petition are exactly the same issues that were raised in the previous suits.

37. In **ET- VS Attorney General & Another**, it was held that the court must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court.

38. My humble view is this is one such case where the court must guard against the evasion of the res judicata doctrine by filing a petition that raises issues that had already been substantially raised, heard and finally decided upon by courts of concurrent and higher jurisdiction being the High Court in **HCCC NO. 215 of 2013 JR** and **Court of appeal in Beatrice Nyaboke Oisebe case (supra)**.

39. In the circumstances, I will uphold the 1<sup>st</sup> respondent's preliminary objection. Having found that this court lacks jurisdiction to entertain this case and taking into account the fact that the subject matter of the petition is res judicata, the order that commends itself to me is the order to dismiss the instant petition dated 2<sup>nd</sup> July 2015 with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

**Dated, signed and delivered in open court this 15<sup>th</sup> day of August, 2016**

**HON. W. A.OKWANY**

**JUDGE**

**In the presence of:**

- Abobo for the Petitioner
- Oguttu for the 1<sup>st</sup> Respondent
- M/s Nyantune for the 2<sup>nd</sup> Respondent
- Omwoyo court clerk