



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO 71 OF 2014

ROSEMARY NJERI NYAMBURA PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION1ST
RESPONDENT**

KIAMBU COUNTY ASSEMBLY SPEAKER.....2ND RESPONDENT

AND

**LYDIA NAOMI NYAKIOINTERESTED
PARTY**

RULING

Introduction

1. The petitioner, a member of The National Alliance Party (TNA) has filed the present petition dated 12th February 2014 seeking various orders against the respondents for alleged violation of her constitutional rights. The violations allegedly occurred following the nomination of the interested party as a member of the Kiambu County Assembly from the gender top up list.
2. The facts forming the basis of the petition are set out in the petitioner's affidavit in support of the petition. She depones that she was a member of TNA and was actively engaged in its political work and campaigns leading to the General Election held on 4th March 2013. By its letter dated 16th March 2013, TNA submitted to the 1st respondent, the Independent Electrical and Boundaries Commission (IEBC), its party list in which she was in the 22nd position for nomination in the gender top up category. After the elections, TNA submitted to IEBC its party list for the Kiambu County Assembly. By its letter dated 20th September 2013, the 2nd respondent wrote to the 1st defendant and notified it that there had arisen three (3) vacancies with respect to the gender top-up list as two persons who had been gazetted could not be traced for swearing in, while a third had secured nomination under the marginalized list.
3. As a result, following the order of priority on the list, IEBC gazetted one Jedidah Njoki Kiarie to fill one of the vacancies through Gazette Notice No 15434 dated 9th December 2013. It also informed the 2nd respondent by its letter dated 19th December 2013 that it had gazetted the said

Jedidah Njoki Kiarie together with the other nominees. However, by Gazette Notice No. 113 of 2nd January 2014 published in the Kenya Gazette of 3rd January 2014, the IEBC revoked the nomination of the said Jedidah Njoki Kiarie, who it appears was not a member of TNA, and substituted it with that of the interested party, Ms. Lydia Naomi Nyakio.

4. The petitioner avers that the interested party, does not appear anywhere on the TNA nomination list as the list contains a different person, a Ms. Lydia Nyakio. The petitioner avers that the respondent erred in gazetting the interested party whom she refers to as a stranger, as the petitioner was ranked in priority to the interested party in the gender top-up list. She terms the nomination of the interested party unfair, unreasonable, illegal and unconstitutional and a violation of Articles 90 and 177 of the Constitution as read with sections 34 – 37 of the Elections Act, 2011 and seeks the following orders from the court:
 - a. ***A declaration be issued to declare that the 1st respondents decision through the Gazette Notice no 113 of 2nd January 2014 published in the Kenya Gazette dated 3rd January, 2014 contravenes the petitioner's right guaranteed under Articles 27,28 and 47 of the Constitution.***
 - b. ***A declaration be issued to declare that the 1st respondent's decision to by pass the petitioner and nominate the interested party through the Gazette Notice No 113 of 2nd January 2014 published in the Kenya Gazette dated 3rd January 2014 contravenes the petitioner's right guaranteed under Articles 27,28 and 47 of the Constitution.***
 - c. ***An order of certiorari be issued to bring into this court and quash Gazette Notice No 113 published in a special issue of The Kenya Gazette dated 3rd January 2014 to the extent that it purports to nominate the Interested party as a member of the Kiambu County Assembly.***
 - d. ***An order of permanent injunction to restrain the 2nd respondent either by himself, his agents and/or his servants from swearing in or in any other manner acting on the Gazette Notice No 113 published in a special issue of The Kenya Gazette dated 3rd January 2014 to the extent that it purports to nominate the Interested party as a member of the Kiambu County Assembly.***
 - e. ***An order of mandamus be issued directing the 1st respondent to gazette the petitioner as the duly nominated member of Kiambu County Assembly under the Gender to up priority list.***
 - f. ***The costs of this petition be borne by the respondents.***
5. The 2nd respondent opposed the petition and filed a notice of preliminary objection dated 7th March 2014 challenging the jurisdiction of the court to hear and determine the petition. The parties filed submissions which they requested the court to rely on in rendering its ruling on the preliminary objection.
6. In its notice of preliminary objection dated 7th March 2014, the 2nd respondent asks the court to determine *in limine* that it has no jurisdiction to entertain and determine the petition to the extent that it is an election petition which should have been filed in the designated Chief Magistrate's Court as provided by section 75(1)(A) of the Elections Act, No 24 of 2011 and Rule 9(1) of the Elections (Parliamentary and County Assembly Rules), 2013.
7. The 2nd respondent submits that Article 169(2) of the Constitution vests power in Parliament to enact legislation, and that read with section 2 and 75(1A) of the Elections Act with regard to the election of a member of a County Assembly, the High Court has no jurisdiction to hear this petition, its jurisdiction being limited to an appeal under section 75(4) of the Elections Act.
8. The respondent submits that as this is an election petition on the nomination of a Count Assembly member, it should have been filed in the Magistrate's Court. The 2nd respondent has relied on the

- decision in *The Owners of Motor Vessel "Lillian S" -vs- Caltex Oil Kenya Ltd, [1989] KLR 1* and *Samuel Kamau Macharia vs- Kenya Commercial Bank, Supreme Court Application No 2 of 2011* to submit that this court is not an election court and cannot therefore hear and determine this petition. It has also relied on the case of *Milka Nanyokia Masungu -vs- Robert Wekesa Mwembe & 2 Others Bungoma High Court Election Petition No. 1 of 2013* and *Republic -vs- Returning Officer, Ziwa La Ng'ombe Ward and 2 Others Mombasa High Court Miscellaneous Application No. 15 of 2013* for the proposition that petitions to challenge the election of a County Assembly member must be filed in the Resident Magistrate's Court.
9. It is also the 2nd respondent's submission that the petition has been overtaken by events as the interested party had already been sworn in.
 10. The 1st respondent agrees with the 2nd respondent that the jurisdiction to hear a petition challenging the election of a County Assembly member is vested, by section 75(1) and section 75(1) (A) of the Elections Act, in a Resident Magistrate's Court. Section 75(4) vests appellate jurisdiction, on matters of law only, in the High Court.
 11. The 1st respondent submits further that under the provisions of The Elections (Parliamentary and County Assembly Elections) Rules 2013, only Resident Magistrates designated by the Chief Justice can hear disputes relating to the election of County Assembly members, and the High Court cannot usurp this jurisdiction.
 12. The 1st respondent also agrees with the submissions of the 2nd respondent on the question of jurisdiction and the authorities relied on. It is its case that, as stated by the *Ferdinand Waititu -vs- Interim Independent Electoral Commission & 9 Other, Civil Application No 137 of 2013* and the *High Court in Francis Gitau Parsimei & 2 Others -vs- National Alliance Party & 4 Others pet 356 of 2012 Consolidated with Pet No 359 of 2012* where the Constitution or a statute establishes a dispute resolution procedure, that procedure must be followed. It asks that the petition be dismissed.
 13. In response, the petitioner submits that under Article 22, she has the right to file a petition alleging violation of her constitutional rights, and that under Article 23(3), the High Court has the jurisdiction to issue the orders sought in the petition.
 14. The petitioner agrees with the respondents on the question of jurisdiction and that election disputes are of a special nature for which the law has provided a procedure through election petitions. It is her submission, however, that the contention by the respondents that this is a mere election petition as contemplated under section 75(1) of the Elections Act is misguided; and that it is a misapprehension of the applicable law and the special circumstances of the petition. It is her submission further that the 1st respondent was only performing an administrative act of picking an alternative nominee and had the duty to uphold the Constitution and the law.
 15. The petitioner argues that she alleging violation of her constitutional rights which she is entitled to do under Article 22, and that the High Court has jurisdiction under Article 165(3). It is her submission further that the Elections Act and Rules apply to petitions challenging elections and nominations after a general election. She submits that the provisions of Part VII of the Elections Act do not apply to the present petition, first, because the petitioner was not dissatisfied with the nomination list presented by her party to the 1st respondent, for if she were, she would have filed a petition within 28 days as provided in section 76 of the Elections Act. Secondly, it is her contention that it does not apply as the circumstances of the petition are unique as some of the persons nominated in the gender top up list did not turn up for swearing in, prompting the 2nd respondent to inform the 1st respondent and for the 1st respondent to publish alternative names.
 16. The petitioner further submits that the petition is not overtaken by events as the court had, in *High Court Petition No. 47 of 2014*, issued orders for maintenance of the status quo; that the

petitioner had applied to be enjoined as an interested party in that petition, and that the said petition was withdrawn as the petitioner in the matter could not maintain it as she had been wrongly included in the TNA list, and that the court could not have issued orders for the maintenance of the status quo in the said **Petition No. 47 of 2014** which raised issues similar to those in the present petition if it was of the opinion that the petition was inadmissible and the court had no jurisdiction. The petitioner has not indicated who the parties in the said petition were, or annexed a copy of the orders she alleges had been issued by the court.

17. She has relied on the decision of the court in **Nyeri High Court Petition No. 3 of 2014-County Government of Nyeri-vs- The Cabinet Secretary, Ministry of Education, Science and Technology** where the High Court dismissed a preliminary objection holding that it was only the High Court which could determine whether or not a right had been violated, and **Nairobi High Court Petition No. 44 of 2014 John Githongo & Others -vs- Harun Mwau** for the finding of the court that the petition involved proceedings for the enforcement of fundamental rights and freedoms and that Article 22 required that the court should adopt a wide and liberal interpretation. She distinguishes the cases relied on by the respondents, arguing that the court has jurisdiction to enforce rights and fundamental freedoms in appropriate circumstances and where the violations have been occasioned by a public body exercising administrative authority.

Determination

18. I have considered the respective submissions of the parties on the preliminary objection to the court's jurisdiction in this matter. The petitioner has conceded the central place of the question of jurisdiction as enunciated in *The Owners of Motor Vessel "Lillian S"* (*supra*)

"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."

19. In the case of **Samuel Kamau Macharia –vs- Kenya Commercial Bank** (*supra*), the Supreme Court held as follows:

(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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

20. In **Francis Gitau Parsimei & 2 Others vs National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012**, the court reiterated the principle, established in a number of cases such as **The Speaker of The National Assembly -vs- The Hon James Njenga Karume, Civil**

Application No 92 of 1992 (Unreported), Kipkalya Kiprono Kones -vs- Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291, -vs- Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43, that where the Constitution or a statute establishes a dispute resolution procedure, that procedure should be followed.

21. The petitioner has also conceded that election disputes are of a special nature for which the law has provided a procedure through election petitions. With regard to County Assembly members, that procedure requires that petitions challenging the election of a member be heard and determined by a Resident Magistrate gazetted as an election court by the Chief Justice. The High Court has jurisdiction to hear appeals from decisions of the Magistrate on such petitions. As Gikonyo J observed in the case of **Milka Nanyokia Masungu –vs- Robert Wekesa Mwembe & 2 Others** (supra):

[17] In accordance with section 75(1A) of the Elections Act and rule 6(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013, 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.”

22. At paragraph 32, the Court noted that it is only the Chief Justice who is mandated by the Elections Act to constitute an election court to hear and determine an election petition on the validity of the election of a member of a County Assembly. He was, however, of the view that the High Court had the mandate to transfer such a petition to the proper court, and that the administrative process for designating a Magistrate’s Court to hear the petition can then follow.

23. In the present case, the petitioner maintains that her petition is properly before the Court, and so the question of transfer does not arise. She also maintains that the circumstances of her case are peculiar and so the provisions of the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2013 do not apply. The question is whether her position on this point is correct.

24. In the case of **Republic –vs- Independent Electoral & Boundaries Commission ex parte Imani Fumao Redo Judicial Review Case No. 201 of 2013**, the court, in declining to review its decision in the matter, observed as follows:

“The evidence on record shows that the name of the ex-parte Applicant was published as duly nominated as a member of the County Assembly of the Tana River vide the Special Issue of the Kenya Gazette Notice No. 9794 Vol. CXV No.105 of 17th July, 2013. Through the gazetting, the rules of the game completely changed so that the ex-parte Applicant could only be removed through an election petition filed as per the Constitution and the Elections Act, 2011.”

25. This finding was informed by the decision in **National Gender & Equality Commission -vs- The IEBC & Others, High Court Petition No. 147 of 2013**, in which the court held that once the nominees to Parliament and County Assemblies under Articles 97(1) (c) and 177 (2) respectively have been gazetted, they are deemed to be elected members of Parliament or 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 VII of the Elections Act. The three judge bench in that case (Lenaola, Ngugi and Majanja JJ) expressed itself as follows:

“[84] Although the principles we have set out above apply equally to parliamentary seats, our position regarding these seats was clearly spelt out in our ruling of 25th March 2013. Members of the Senate and National Assembly nominated under Articles 97(c), 98(1) (b), (c) and (d) of the Constitution were Gazetted on 20th 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. **Article 105** provides as follows;

Determination of questions of membership

105. (1) *The High Court shall hear and determine any question whether*

—

(a) *A person has been validly elected as a Member of Parliament; or*

(b) *The seat of a member has become vacant.*

(2) *A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.*

(3) *Parliament shall enact legislation to give full effect to this Article.*

[85] *We expressed the view that the provisions of **Article 105** are mandatory and any challenge to persons duly gazetted as members of the National Assembly and Senate must now be in accordance with the procedures provided in the **Elections Act, 2011** and the **Elections (Parliamentary and County Elections) Petition Rules, 2013**. These Rules provide that any person may file a petition to challenge the election of a member of Parliament (**Kones -vs- Republic and Another ex-parte Kimani wa Nyoike and Others (2008) 3 KLR EP 29, Ferdinand Waititu -vs- Independent Electoral and Boundaries Commission and Others Nairobi Election Petition No. 1 of 2013 [2013] eKLR**).*

[86] *Likewise, upon Gazettement of any person as a member of the County Assembly, any challenge to his or her membership to the County Assembly must be in accordance with the provisions of **Part VII** of the **Elections Act, 2011**.*”(Emphasis added)

26. That being the case, I am constrained to agree with the respondents that the present petition has been filed before the wrong forum. As all the parties agree, elections disputes are special in nature and a specific procedure has been provided for their adjudication. While the Court has wide jurisdiction to hear matters relating to alleged violation of constitutional rights, not every claim must be raised as a constitutional petition. I am guided in this regard by the position of the court in **High Court Petition No. 187 of 2012 Hon. Uhuru Muigai Kenyatta-vs- The Nairobi Star Publications Limited** in which the court cited with approval the decision in **NM & Others -vs- Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A. 250 (CC)**:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

27. The court also relied on the decision in **Minister of Home Affairs -vs- Bickle & Others (1985) L.R.C. Cost.755** in which Georges CJ held as follows:

“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is

necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22). The judge went on to add that: "Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."

28. There is already a clear process under the Elections Act for the petitioner, and this is the process that she ought to have followed. The invocation of the Constitution does not assist her. Once the interested party was gazetted as a member of the Kiambu County Assembly, she could only be removed by way of an election petition lodged in accordance with the provisions of section 75(1A) of the Elections Act and rule 6(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

29. In the circumstances, the preliminary objection succeeds. This petition is therefore struck out, but with no order as to costs.

Dated Delivered and Signed at Nairobi this 16th day of January 2015

MUMBI NGUGI

JUDGE

Mr Njagi instructed by the firm of Kinyua Njagi & Co. Advocates for the petitioner

Mr Sigei instructed by the firm of Sigei & Associates Advocates for the 1st respondent

Mr. Mbeya instructed by the firm of Mugoye & Associates Advocates for 2nd respondent

Mr Onindo instructed by the firm of Onindo Onindo & Associates Advocates for the interested party