



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.408 OF 2014**

**BETWEEN**

**PATRICK MICHUKI.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....1<sup>ST</sup> RESPONDENT**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**MOSES KURIA.....3<sup>RD</sup> RESPONDENT**

**JOACHIM KIARIE KAMERE.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING ON A PRELIMINARY OBJECTION**

1. The Petition dated 14<sup>th</sup> August 2014 seeks the following orders;

*“(1) That this Honourable Court declares that the 1<sup>st</sup> Respondent was negligent in as far as the organization of the Gatundu South Constituency by-elections. (sic)*

*(2) That this Honourable Court declares the Gatundu South Parliamentary seat to be vacant.*

*(3) That this Honourable Court do issue an order that the Independent Electoral and Boundaries Commission repeats the Gatundu South by-election.*

*(4) That this Honourable Court do issue an order that the Ethics and Anti-Corruption Commission investigates into the conduct of the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent, to determine whether they are fit to hold public office.*

*(5) That this Honourable Court do issue an order barring the 4<sup>th</sup> Respondent from being*

*appointed to any position in the County or National Government.*

*(6) That this Honourable Court do declare that the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the people of Gatundu South Constituency was violated.”*

2. The Notice of Preliminary Objection on the other hand reads as follows;

**“NOTICE OF PRELIMINARY OBJECTION**

*TAKE NOTICE that the 1<sup>st</sup> Respondent herein will raise a Preliminary Objection to the Notice of Motion and Petition both dated 14<sup>th</sup> August 2014 filed by the Petitioner on the following grounds;*

*(1) That this honorable Court has no jurisdiction to hear and determine the Petition herein for the following reasons:-*

*(a) That the Petition has been wrongfully filed in this Honourable Court contrary to the provisions of Article 87 of the Constitution as read together with Section 75(1) and other provisions of the Elections Act and Rule 6 of the Elections (Parliamentary and County Elections) Petition rules.*

*(b) That the Petition herein is an election Petition challenging the election of the Member of National Assembly as opposed to a constitutional Petition for violation of constitutional rights.”*

3. In support of the objection, Ms. Omuko relied on the following decisions;

**(i) Waititu vs IEBC [2013] eKLR.**

**(ii) Kones vs R ex parte Wanyoike (2008) 3 KLR (EP) 291.**

**(iii) Parsimei & 2 Others NAP & 4 Others (2012) eKLR.**

4. In all the above cases, the principle espoused is that the election of a person to the National Assembly can only be challenged through an election Petition and not by the filing of any other judicial proceeding. Ms. Omuko’s point was that the present Constitutional Petition is actually an election Petition but which cannot be heard under **Article 38** of the **Constitution** as read with **Section 28** of the **Elections Act**, a position not shared by the Petitioner.

5. The Petitioner’s view is that where a party such as both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents violate the **Elections Act** as well as **Article 38** of the **Constitution**, then this Court can properly intervene and grant the rights secured by that Article.

6. Further, it was his submission that since **Articles 73** and **74** of the **Constitution** were violated during the by-election conducted in respect of Gatundu South Constituency, the High Court can also properly determine any issues arising thereby.

7. For the record, Mr. Mohamed for the 5<sup>th</sup> Respondent supported the Preliminary Objection.

8. The background to the Petition before me is that sometime in 2014, the Member of Parliament for the Gatundu South Constituency passed away thus necessitating a by-election in the said Constituency. The National Alliance Party of Kenya then nominated the 3<sup>rd</sup> Respondent to vie for the vacant position while the 4<sup>th</sup> Respondent, standing on the ticket of another party, was the only other candidate in the by-election. He later stood down a few days before the by-election and the IEBC decided that there would

be no by-election after all and declared the 3<sup>rd</sup> Respondent as having been validly elected. The Petition challenges the whole process leading to that decision hence the prayers elsewhere reproduced above.

9. I have considered the rival submissions made and to my mind, and as I understand the edict of Sir Charles Newsbold in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696**, a proper preliminary objection must be predicated on a point of law and that if it is upheld, the whole case would collapse. In that context, elsewhere above I reproduced the orders sought in the Petition.

10. The objection as framed is the Petition only to the extent that it may be an election Petition disguised as an election Petition. I have read the authorities elsewhere cited above and the principle stated in **Kones (supra)** runs through all of them. That principle is that the only valid way of challenging the outcome of the electoral process "... is through an election Petition as provided in the Constitution ..."

11. In that regard, **Article 105** of the **Constitution** provides that the High Court shall determine any question whether a person has been validly elected to the National Assembly and the procedure is by filing an election Petition to be heard by a Judge specially appointed and gazetted by the Chief Justice. This Court is not such Court and therefore any challenge to the process and resultant outcome of an election in the manner suggested by the Petitioner is irregular. But having said so, it seems to me that not all his prayers fit that general tag. Prayers 4, 5 and 6 are not challenging either the process or the outcome of the electoral process and I find it difficult to strike them out. Prayers 1, 2 and 3 are certainly irregular and cannot stand in view of the principle set out above.

12. In the event, Prayers 1, 2 and 3 of the Petition dated 14<sup>th</sup> August 2014 are struck out. Prayers 4, 5 and 6 shall be determined in the usual manner if the Petitioner is minded to have them so determined.

13. As for costs let the same abide the outcome of the Petition and the Preliminary Objection is determined in the above terms.

14. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court

Miss Omuko for 1<sup>st</sup> Respondent

Mr. Mohamed for 5<sup>th</sup> Respondent

Mr. Ajo for 2<sup>nd</sup> Respondent

No appearance for Petitioner

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**Further order**

Mention on 20/3/2015 . Notice to the Petitioner.

**ISAAC LENAOLA**

**JUDGE**