



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 97 of 2013**

**IN THE MATTER OF : ARTICLES 22, 23, 48, 50 AND 165 (3) (b) OF THE CONSTITUTION  
REPUBLIC OF KENYA 2010.**

**AND**

**IN THE MATTER OF : CONTRAVENTION OF ARTICLES 38(3) (c), 47, 10 (2), 73, 81 (d) (e)  
(iii) (iv) (v) and 91 (1)(d)(f)(g)(h) , 23, 48, 50 AND 165 (3) (b) OF THE CONSTITUTION  
REPUBLIC OF KENYA 2010**

**AND**

**IN THE MATTER OF : THE ELECTORAL CONDUCT OF CONDUCT MADE PURSUANT  
TO ARTICLE 91 OF THE CONSTITUTION OF KENYA, 2010 AND THE ELECTIONS ACT,  
2011.**

**AND**

**IN THE MATTER OF : WIPER DEMOCRATIC MOVEMENT –KENYA NOMINATIONS  
HELD IN MWALA CONSTITUENCY BETWEEN 17<sup>TH</sup> JANUARY 2013 FOR THE  
CANDIDATE OF THE MEMBER OF THE NATIONAL ASSEMBLY**

**BETWEEN**

**BENJAMIN MUNYWOKI MUSAU.....  
....PETITIONER**

**AND**

**DANIEL MUTUA MUOKI.....1<sup>ST</sup> RESPONDENT**

**WIPER DEMOCRATIC MOVEMENT - KENYA.....2<sup>ND</sup>  
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. The Petitioner, Benjamin Munywoki Musau, is a registered member of the 2<sup>nd</sup> Respondent, the Wiper Democratic Party under membership number WDM-K 223798, and was a candidate for the Member of the National Assembly for Mwala Constituency in the 2<sup>nd</sup> Respondents Nomination exercise held on 17<sup>th</sup> January, 2013. In his Petition dated 8<sup>th</sup> February 2013, the Petitioner seeks a number of orders and declarations which are contained in the face of the Petition. The Petition is supported by an affidavit sworn by him on 8<sup>th</sup> February 2013. The Petitioner further filed an application by way of a Notice of Motion dated 8<sup>th</sup> February 2013 largely seeking the same orders as in the petition, but that are to be made pending the hearing and determination of his petition. The same is supported by the Petitioner's Affidavit and Supplementary Affidavit sworn on 8<sup>th</sup> February and 13<sup>th</sup> February, 2013, respectively.

2. Before the application could be heard, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection to the application and the entire Petition to the effect that this Court has no jurisdiction to determine the Petition as it arises from an election dispute in the 2<sup>nd</sup> Respondents nomination exercise. This Court directed that the parties do submit on the issue of jurisdiction through written submissions which were to be hi-lighted yesterday 14<sup>th</sup> February, 2012. Although all the parties promptly filed their submissions, they failed to appear and hi-light the same. This ruling is therefore based on the written submissions filed by the parties.

3. The thrust of the 1<sup>st</sup> Respondent's arguments is that by virtue of Article 88(4) (e) of the Constitution of Kenya, 2010 as read together with Sections 2 and 74 (1) of the Elections Act, 2011 and Section 4(d) and (e) of the Independent Elections and Boundaries Act, 2011 the nomination of candidates in their respective political parties are subject to the constitutional and legislative procedures which ought to be followed. It is the contention of the 1<sup>st</sup> Respondent that the application before this Court, including the Petition itself, seeks to ignore or attempt to go around the clear provisions of the law by the mere allegation of the Petitioner's infringement and violation of human rights and freedoms under Chapter 3 of the Constitution. It was further contended that the Petitioner's rights have not been violated. Accordingly, the 1<sup>st</sup> Respondent submitted that Article 88 of the Constitution was clear and stands on an equal footing with the rest of the Articles. The same confers jurisdiction to the Interim Independent Boundaries Commission ("the Commission") to regulate the nomination process of political parties and to settle electoral disputes, including disputes relating to or arising from such nominations. The 1<sup>st</sup> Respondent further argues that even though the High Court has unlimited and original jurisdiction in civil and criminal matters under Article 165 of the Constitution, this does not mean that certain procedures prescribed by law should be ignored. The 1<sup>st</sup> Respondent relied on the cases of MICHAEL WACHIRAI NDERITY & 3 OTHERS –vs-MARY WAMBUI MUNENE (2003) eKLR , SPEAKER OF THE NATIONAL ASSEMBLY –vs-KARUME 1KLR 1425 (EP), KONES –VS-REPUBLIC & ANOTHER ex-parte KIMANI WAS NYOIKE & 4 OTHERS (2008) 3 KLR 291 (EP) in support of its arguments on the jurisdiction of this Court vis-à-vis the protection of human rights .

4. Further, the 1<sup>st</sup> Respondent contends that upon being aggrieved by the nomination process of the 2<sup>nd</sup> Respondent, the Petitioner chose to pursue a remedy to his alleged nomination and electoral grievances by filing a Complaint with the Political Parties Dispute Tribunal under the Political Parties Act 2011 ("the Act"). Accordingly, the 1<sup>st</sup> Respondent submitted that the Petitioner having elected this particular cause of action is under an obligation to pursue the dispute resolution mechanisms envisioned by the Act. It is contended that as Section 43 of the Act provides that a decision of the tribunal shall be enforced in the same manner as a decision of a Magistrate Court, the Order of the Tribunal ought first to be made an order or decree of a Magistrates Court and then enforced in the name of the particular Magistrates Court. That the document exhibited by the Petitioner as "BMM 17" which is described as a decree is in the strict sense not a decree. It was further contended that the Petitioner has come to the wrong Court for enforcement of the decree as opposed to the Magistrates Court as provided for by the Act. According to the 1<sup>st</sup> respondent, this in essence renders the Petitioner's application and petition an abuse of the court process and should therefore be struck out with costs to the 1<sup>st</sup> Respondent.

5. On its part, the 3<sup>rd</sup> Respondent also opposed the Petition and Application herein on the grounds that this Court lacks jurisdiction to determine the Petition as the same is in the nature of an Appeal from the

decision of the Political Parties Tribunal of 8<sup>th</sup> February 2013. It is contended that even though the Tribunal found that the certificate issued to the 1<sup>st</sup> Respondent was invalid, it stated that that it does not have the power to supervise the Commission. It was therefore contended that the Petitioner's remedy lay with the Commission under Article 88(4) (e) of the Constitution and section 74 of the Elections Act 2011. Further, the 3<sup>rd</sup> respondent contended that by requesting this Court to compel the 3<sup>rd</sup> Respondent to accept the Petitioner's nomination papers, the petitioner is appealing the decision of the Tribunal. It was further contended that the Commission is an independent body under the Constitution and that the Petitioner has not presented any allegations that it has failed or refused to perform its duties or contravened or threatened to contravene the Constitution. It was also noted that the Petitioner is also challenging the decision of the Returning Officer in clearing the 1<sup>st</sup> Respondent to contest as the 2<sup>nd</sup> Respondent's candidate for Mwala parliamentary seat. It is therefore contended that the Commissions has made rules, more specifically **Rule 11** of the *Election Rules of procedure on Settlement Disputes 2012, L.N. 139/2012* requiring the Returning officer to decide on any dispute arising from the nomination of a candidate. Should one be dissatisfied with such a determination, Rule 13 prescribes an appeal to the Commission. The 3<sup>rd</sup> Respondent further submitted that before the Courts exercises its inherent jurisdiction, it is vital for it to exercise judicial restraint and allow the relevant Constitutional bodies to determine the matter as per the Constitution or relevant legislation. The Court should only intervene when such bodies have contravened the provisions of the Constitution or failed to perform their respective duties. It is in light of this that the 3<sup>rd</sup> Respondent argues that the Court should strike out the Petition with Costs.

6. The Petitioner on his part, opposes the Preliminary Objection on the grounds that this Court has jurisdiction under Article 165 (3) and (6) of the Constitution. He further submitted that the High Court has supervisory jurisdiction over the subordinate courts and any other person, body or authority exercising a judicial or quasi-judicial authority. As such, the 3<sup>rd</sup> Respondent is under the supervisory jurisdiction of the High Court. Counsel for the Petitioner further submitted that Article 88 (4) of the Constitution does not oust the jurisdiction of the High Court, as nothing bars the resolution of electoral disputes by other entities and legally established institutions. The said Article does not therefore oust the jurisdiction of the High Court to intervene at any stage. Further, the Petitioner submitted that the dispute on the legality of the nomination certificate issued by the 2<sup>nd</sup> Defendant has already been determined by the Political Parties Disputes Tribunal and the Orders emanating therein have been served on the 3<sup>rd</sup> Respondent who refused to comply with the said orders. It is this non-compliance that necessitated the current Petition in order to compel the third respondent to execute the orders of the Tribunal. It was argued that it is the duty of this Court in its supervisory role to direct the Commission to act properly in light of the Tribunal's decision. The Petitioner relies on the Cases of **ROBERT AKUMU ASEMBO –v- POLITICAL PARTIES TRIBUNAL & 2 OTHERS ( MISC. CIVIL APPLICATION NO. 61 OF 2013)** in which the Commission was ordered to comply with the decision of the Political Parties Disputes Tribunal on the proper nomination of a candidate. The Petitioner also cited the case of **MUSA TIPAPE NAINI –v-TOM MBOYA & 3 OTHERS (PETITION No. 65 of 2013)** where the Court held that the High Court in a proper case has authority to intervene in decisions of the returning officer as he is subject to the High Court's supervisory jurisdiction. The petitioner therefore urged the court to dismiss the preliminary objection and to proceed to hear the matter expeditiously.

7. I have carefully considered all the pleadings on record, the submissions of Counsel and the authorities relied on. The central question for determination is whether this Court has jurisdiction to entertain this petition. I shall therefore restrict my decision to matters that are strictly necessary for the just determination of the preliminary objection. Jurisdiction is a paramount question that should be dealt with at the earliest as held in the case of **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1**, where it was held;

***“..... 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.”***

8. Further, a preliminary Objection is argued on the basis that the facts pleaded are true. See the case of

**Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696.** These facts are that, the Petitioner and the 1<sup>st</sup> Respondent participated as candidates in the Mwala National Assembly Nominations exercise on 17<sup>th</sup> January 2013, conducted by the 2<sup>nd</sup> Respondent, a political party. The Petitioner being dissatisfied with the manner in which the nomination exercise was carried out, filed an appeal before the 2<sup>nd</sup> Respondent’s Appeals Board. However, that Appeals Board failed to hear the Petitioner’s appeal and the 2<sup>nd</sup> Respondent proceeded to issue a nomination certificate to the 1<sup>st</sup> Respondent. This prompted the Petitioner to file a complaint, namely Complaint No. 8 of 2013 before the Political Parties Dispute Tribunal (hereinafter “Political Parties Tribunal”) which was heard and determined. Among the orders given were that the certificate issued to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent was invalid. Accordingly, the Petitioner was thereby declared the winner and the duly nominated candidate of the National Assembly for the 2<sup>nd</sup> Respondent party in respect of Mwala Constituency. The 2<sup>nd</sup> Respondent was thereupon directed to issue a Nomination Certificate. The 2<sup>nd</sup> Respondent however forwarded the name of the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent as its nominee for the general elections. Service of the Order of the tribunal was effected upon the 3<sup>rd</sup> Respondent through its officers but the 3<sup>rd</sup> Respondent has since issued the 1<sup>st</sup> Respondent with a nomination certificate.

9. It is against this backdrop that the Petitioner contends that his constitutional rights were violated. In the case of **FRANCIS GITAU PARSIMEI & 2 OTHERS v NATIONAL ALLIANCE PARTY & 4 OTHERS [2012] eKLR** Hon. Majanja J, held:-

***“At the core is whether this court should intervene to stop the electoral process so that a party who claims that his or her rights have been infringed can agitate his rights before the court. To determine this issue, the Constitution must be read a whole. On the one hand there is the Bill of Rights which protects, inter alia, the political rights of the petitioners. These rights are enforceable under the provisions of Article 22. Article 22 offers the petitioners direct access to the High Court to enforce fundamental rights and freedoms. There is also Article 258 which entitles any person to move the court where the Constitution is contravened or is threatened with contravention. The petitioners have exercised the option to invoke these provisions to move the court. On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for under the provisions of Chapter Seven of the Constitution titled, “Representation of the People.” These provisions are operationalized by the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 and the Political Parties Act, 2011. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions. It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. Within the rubric of the electoral process, this principle has been emphasized time and again in a long line of cases” (Emphasis supplied)***

10. The question that arise is whether the Petitioner has followed the procedure set out by law in his effort to secure his perceived rights following the dispute regarding the nomination exercise carried out by the 2<sup>nd</sup> Respondent. The Petitioner began by lodging a complaint with the 2<sup>nd</sup> Respondent’s Appeals Board, then with the Political Parties Disputes Tribunal. The latter issued certain orders which are yet to be complied with. There is therefore a question as to the enforcement of those orders. The 1<sup>st</sup> respondent contended that the Petitioner had not exhausted the mechanism for dispute resolution provided under the Political Parties Act, 2011. The Petitioner contends that the order has been served upon the 3<sup>rd</sup> Respondent who has failed and/or refused to comply therewith. My understanding of the law is that once a tribunal makes a decision, such a decision cannot be enforced unless it is first made an order or decree of a court then enforced in the normal manner.

My view therefore is, once the Political Parties Tribunal made its judgment, the Petitioner should have

had the same registered with a Magistrate's Court, extract the resultant decree and thereupon require the 3<sup>rd</sup> Respondent to comply. Compliance would have been in the nature of requiring the Returning Officer of the 3<sup>rd</sup> Respondent not to accept the Nomination Certificate of the 1<sup>st</sup> Respondent. If compliance was not forthcoming then, the Petitioner would have pursued the matter with the 3<sup>rd</sup> Respondent under Regulation 13 of the Elections Regulations or in my view, this court would in such circumstances properly exercise its supervisory jurisdiction under the constitution over the Returning Officer's actions. See **Musa Tipape Nainin –vs- Tom Mboya & 3 others - Petition No. 65 of 2013 (UR)**. In choosing to come directly to this court without following the steps I have enumerated above, I doubt whether the Petitioner's complaint is justiciable.

11. On the issue of whether this court has jurisdiction, I have already set out above the parties' positions. I agree with the Petitioner that this Court has supervisory role over the 3<sup>rd</sup> Respondent. However, in exercising that jurisdiction, this court is enjoined to uphold the provisions of the Constitution and the law as established. The Petitioner contended that Article 88 (4) (e) does not oust that supervisory role of the High Court. The relevant part of the Article provides:-

***“4. 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 –***

***(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.”***

It is clear from the foregoing, that the body charged with the responsibility of determining disputes relating to the electoral process before elections is the 3<sup>rd</sup> Respondent. That body is a Constitutional body with its mandate clearly set out in the Constitution. My view is, this court can only exercise its supervisory role over the 3<sup>rd</sup> Respondent if the 3<sup>rd</sup> Respondent fails to carry out its constitutional mandate or it carries out such mandate in an irregular or unacceptable manner.

12. It should be noted that Article 88 of Constitution falls under Chapter 7 of the Constitution that deals with - **“REPRESENTATION OF THE PEOPLE – Electoral Systems and Processes”**. Parliament has enacted laws to give effect to these processes. These are, inter alia, the IEBC Act and the Elections Act. Under the Elections Act, the Elections (General) Regulations Legal Notice No. 139 of 2012 were promulgated. Under those regulations, electoral disputes before elections (including nominations) are to be settled by the Returning Officer from whom a right of appeal lies to the 3<sup>rd</sup> Respondent. See Regulations 11, 12 and 13. It is only upon the 3<sup>rd</sup> Respondent making its decision that a party is to approach this court for a remedy. The case of **Michael Wachira Nderitu & 3 others –vs- Mary Wambui Munene (2013) e KLR** examined a litany of cases and the legal basis for this position. In this regard, I am of the view that although the High Court has original and unlimited jurisdiction, that jurisdiction is to be exercised with due consideration being given to the functions of other Constitutional or Statutory bodies. That jurisdiction must not be exercised in a manner that will make those bodies superfluous or irrelevant.

13. In this regard, I am satisfied that whilst the petitioner has a genuine Complaint, he did not lodge his complaint in the proper manner. He should have dealt with the Returning officer for Mwala Constituency first, pursue his claim with the 3<sup>rd</sup> Respondent by way of an appeal before coming to this court. Whilst I am in agreement with the petitioner regarding the rotten nature of the Certificate of Nomination granted to the 1<sup>st</sup> Respondent by the 3<sup>rd</sup> Respondent ( the certificate by the 2<sup>nd</sup> Respondent having been validly nullified by the Political Parties Tribunal), my hands are tied. I cannot pluck the fruits of the Poisonous tree as the petitioner did not approach this court through the front door.

14. Under Articles 22 and 258 of the Constitution of Kenya 2010, every person has a right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed or is threatened. Ordinarily, the court cannot shut its eyes to alleged violation of person's fundamental rights as underpinned in the Constitution. But when a petitioner decides to approach the court in a manner not

authorized by law, I think the court has no otherwise but to down its tools. This is not to say that the petition before me does not raise weighty issues. Indeed the conduct of the 2<sup>nd</sup> Respondent is unacceptable. Firstly, it refused to hear and determine the Petitioner's Appeal, then it proceeded to issue the 1<sup>st</sup> Respondent with a Certificate of Nomination and forwarded his name to the 3<sup>rd</sup> Respondent notwithstanding the decision of the Political Parties Tribunal. It is but an epitome of impunity and the undemocratic nature that are the Political Parties in this country. The lesser I talk about it the better.

15. The upshot of the matter is that I uphold the Preliminary Objection. The application dated 8<sup>th</sup> February, 2013 and the Petition are hereby struck out. There shall be no order as to costs.

DATED and DELIVERED at Nairobi this 15<sup>th</sup> day of February, 2013

**A. MABEYA**  
**JUDGE**