



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**IEBC NOMINATION DISPUTE**  
**TRIBUNAL APPEAL NO. 72 OF 2013**

**BENJAMIN M. MWAKOMA .....APPELLANT**

**V E R S U S**

**1. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**

**2. ORANGE DEMOCRATIC MOVEMENT ..... RESPONDENTS**

**AND**

**FRANCIS TERERE ..... INTERESTED PARTY**

**RULING**

1. **Benjamin Mwakoma** the Appellant herein is a member of the Orange Democratic Movement. He was unsuccessful before the Independent Electoral and Boundaries Commission Dispute Resolution Tribunal (IEBC Tribunal). Before that Tribunal he challenged the final list submitted and published by the 1st Respondent in respect of nominees of the County Assembly Representatives of Taita Taveta. The final list excluded the Appellant's name. The IEBC Tribunal delivered its decision on the Appellants dispute on 7<sup>th</sup> June 2013. This appeal is directed towards that decision.
2. The Appellant's case before the IEBC Tribunal was that the 1st Respondent ignored the list submitted to it by the 2nd Respondent and instead nominated a person who was far lower in priority in the said list.
3. The 1st Respondent has filed a Preliminary Objection directed towards the Appellant's appeal and towards Appellants Interlocutory application. The Appellant by that interlocutory application seeks to restrain the 1st Respondent from gazetting the names of the Interested Parties. It was submitted on behalf of the 1st Respondent that gazzetment had already been done.
4. The Preliminary Objection filed by the 1st Respondent is in the following terms-

***“TAKE NOTICE that the Respondent shall raise a Preliminary Objection at the hearing hereof seeking to have the Appellant’s Notice of Motion application dated 26<sup>th</sup> June, 2013 dismissed with costs for reasons thus:-***

1. ***THAT the 1<sup>st</sup> Respondent has published the name of the Interested Party in Gazette Notice No. 9794 of 17<sup>th</sup> July, 2013. Accordingly, the Interested Party is an elected Member of Taita Taveta County Assembly.***
2. ***THAT the Honourable High Court substantially lacks jurisdiction to entertain proceedings challenging the outcome of a County Election by way of a Notice of Motion application.***
3. ***THAT the application violates rule 3(b) and 6 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.***
4. ***THAT the application is gravely incompetent, fatally defective and an abuse of the Honourable Court's process and only lies for dismissal with costs.***
5. The power to hear and determine complaints relating to nominations is donated to the IEBC by Article 88(4)(e) of the Constitution, Sections 74 and 109 of the Elections Act, 2011 and Regulation 99 of the Elections (General) Regulations, 2012 (hereinafter '**the Regulations**').

Article 88(4) (e) of the Constitution provides as follows:-

***“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 results.”***

Section 74(1) of the Elections Act, 2011 is borrowed directly from Article 88(4) of the Constitution and provides as follows-

***“74(1) Pursuant to Article 88(4) (e) of the Constitution, the Commission shall be responsible for 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.”***

Regulation 99 of the Regulations provides as follows-

***“99(1) For the purposes of Article 88(4) of the Constitution,***

***the Commission shall develop, and publish in the Gazette, rules of procedure, including timelines applicable, for the settlement of electoral disputes under the Constitution, the Act or these Regulations.***

2. ***All disputes emanating from political party nominations shall be resolved by the Commission at least seven days to the day designated for submission to the Commission by political parties of the names of their respective candidates.***
3. ***Any rule made pursuant to this Regulation shall be published in the Gazette and in at least one newspaper of national circulation at least three months before the election to which the rules are intended to apply.”***
6. In compliance with Section 109 of the Elections Act and Regulation 99 of the Regulations, IEBC gazetted the Rules of Procedure on Settlement of Disputes (“**the Rules**”) which provides the procedure for settlement of electoral disputes by the Committee. The Rules were published vide

Legal Notice No. 139 of 3<sup>rd</sup> December, 2012. It is pursuant to the above cited provisions that the IEBC Tribunal acted when it heard and determined the Appellant's complaint and rendered the impugned decision.

7. The Preliminary Objection touches on this Court's jurisdiction to hear and determine the application. It is now well settled that where the jurisdiction of a Court is brought to question, the Court must first determine whether in deed it has jurisdiction before entertaining any proceedings. The Supreme Court emphasized the significance of jurisdiction in the case of **Samuel Kamau Macharia & Another –V- Kenya Commercial Bank & 2 Others [2012]eKLR** where it was stated at paragraph 68 that-

*“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.”*

The High Court in the case of **Diana Kethi Kilonzo & Another –V- Independent Electoral & Boundaries Commission (IEBC) & 10 Others [2013]eKLR** agreed with the above quoted decision of the Supreme Court and stated at paragraph 67 as follows on jurisdiction-

*“We entirely agree with the Supreme Court. Jurisdiction is indeed comparable to a driving licence, for no motorist can lawfully embark on a journey without a valid driving licence. Once a judicial body establishes that it has no jurisdiction to handle a dispute, then it has no business proceeding further with the matter.”*

8. The 1<sup>st</sup> Respondent's case is that this Court has no jurisdiction because the Interested Party has been gazetted as a Member of the Taita Taveta County Assembly and as such, the only avenue available for challenge to that process is by filing an election petition. The Appellant says that the 1<sup>st</sup> Respondent acted in contravention of the Court order restraining it from gazetting the Interested Party and as such the issue of gazettment cannot be used to defeat this appeal. I have looked at the order issued by the Honourable Justice M. Muya on 26<sup>th</sup> June 2013. The same does not have any orders restraining the 1<sup>st</sup> Respondent from gazetting the Interested Party. I therefore do not agree with the Appellant that the 1<sup>st</sup> Respondent acted in violation of the said Court order.
9. While I agree with the 1<sup>st</sup> Respondent that once any person has been gazetted 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, as was rightly pointed out by the High Court in the case of the **National Gender and Equality Commission –V- IEBC & 4 Others (Nairobi High Court Petition No. 147 of 2013)** at paragraph 86, I do not think that the Appellant is challenging the gazettment of the Interested Party at this moment. What is before Court is an appeal against the impugned decision of the IEBC Tribunal. In other words, the Appellant is before Court, not to challenge the gazettment of the Interested Party as a member of the Taita Taveta County Assembly but, to overturn the decision of the IEBC Tribunal in which the Appellant's complaint regarding nomination was dismissed. Ordinarily the end result of either challenging the said gazettment or overturning the impugned decision of the IEBC Tribunal would be the same – to nullify the gazettment of the Interested Party as a member of the Taita Taveta County Assembly. However, what is before Court is an appeal.

10. As such, it is my opinion that this Court should not concern itself with

the question of whether it is proper to challenge the said gazettment through an application instead of through an election petition but rather whether the appeal is properly before this Court.

11. I will therefore proceed to consider whether this appeal is properly

before Court. I have already outlined the constitutional and statutory provisions from which the IEBC Tribunal derived its mandate to render its subject decision. None of those provisions envisages an appeal against the decision of IEBC Tribunal to the High Court.

12. The High Court derives its jurisdiction from both the Constitution and

Statute. Article 165(3) grants jurisdiction to this Court in the following terms-

**“(3) Subject to Clause (5), the High Court shall have-**

- a. **unlimited original jurisdiction in Criminal and Civil matters;**
- b. **jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
- c. **jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
- d. **jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-**
  - i. **the question whether any law is inconsistent with or in contravention of this Constitution.**
  - ii. **The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution.**
  - iii. **Any matter relating to constitutional powers of State organs in respect of County governments and any matter relating to the Constitutional relationship between the levels of government; and**
  - iv. **A question relating to conflict of laws under Article 191; and**
  - v. **Any other jurisdiction, original or appellate, conferred on it by legislation.”**

13. While considering the above provisions of the Constitution, the High

Court in the **Diana Kethi Kilonzo** case (supra) stated at paragraph 69 that the High Court has both original and supervisory jurisdiction and went on to state at paragraphs 70 and 71 as follows-

**“70. It is imperative that the Court takes charge where the Constitution allows it to do so. The Court must exercise its jurisdiction to the full limit allowed by the Constitution in order to ensure that the Constitution is obeyed and respected by tribunals and other bodies under its supervisory jurisdiction. It must be noted that the IEBC – and by extension the Committee and the Returning Officer – is commanded by Article 88(5) to exercise its powers and perform its functions in accordance with the Constitution and National Legislation. This is also underlined in Article 249 which provides among the objects of the IEBC just like other Commissions and independent offices as being to, “secure the observance by all State organs of democratic values and principles” and to “promote constitutionalism.” Article 249(2) further provides that such commissions, (a) are subject only to this Constitutional and the law; and (b) are independent and not subject to direction or control by any person or authority.**

**71. In exercising its supervisory jurisdiction over the Respondents, the Court must ensure that the Respondents have complied with the spirit and letter of the law. In our view, where the Respondents fail to do that which is demanded of them by the Constitution, this Court will step in, at the request of an aggrieved party, to provide appropriate relief as required by Article 23(3).”**

14. This Court can interfere with the decision of IEBC Tribunal regarding

nominations only in exercise of its supervisory jurisdiction, and not in exercise of its appellate jurisdiction. It must be shown by the aggrieved party that the IEBC Tribunal acted in breach of

the Constitution and/or statute or that it acted unfairly or in breach of the rules of natural justice. That can only be achieved if the aggrieved party approaches this Court by way of a Constitutional Petition or a judicial review application. None of these is before Court.

15. It is my considered opinion that this Court cannot review or overturn

the decision of the IEBC Tribunal regarding nominations disputes by way of an appeal. If appeal was envisaged, nothing would have been easier than making an express provision for the same. There are several instances where appeals from decisions of statutory tribunals are expressly provided for in the Statute. That is the case with the decisions of National Environment Tribunal where Section 130 of the Environmental Management and Co-ordination Act, 1999 makes express provision for appeal against the decisions of the said Tribunal to the High Court. It is also the case with the Business Premises Rent Tribunal (BPRT) where Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 provides for appeal against the decisions of the BPRT to the High Court, among other similar instances. In my opinion, the lack of express provision either in the Constitution or in the Elections Act allowing for appeal against the decision of the IEBC Tribunal to the High Court clearly means that the Legislature did not have an intention of making provision for appeal to this Court as concerns nomination disputes.

16. In the end I make the following orders-

- a. **It therefore follows that this appeal is not properly before Court as the same is not provided for in law. The appeal must and does fail together with the Notice of Motion application. The appeal is hereby struck out.**
- b. **The costs of the appeal are awarded to the 1<sup>st</sup> Respondent to be paid by the Appellant.**

**Dated and delivered at Mombasa this 17<sup>th</sup> day of October, 2013.**

**MARY KASANGO**

**JUDGE**