



Republic v Independent Electoral & Boundaries Commission (IEBC) & 3 others (Judicial Review Application E013 of 2023) [2025] KEHC 3471 (KLR) (17 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
JUDICIAL REVIEW APPLICATION E013 OF 2023**

**TA ODERA, J
MARCH 17, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

**CEO, INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

KISII COUNTY GOVERNMENT 3RD RESPONDENT

THE SPEAKER, KISII COUNTY GOVERNMENT 4TH RESPONDENT

RULING

- Hon. Motoa Verah Onkundi Redempta the Ex- parte applicant herein filed an election Petition i.e Kisii Chief Magistrate Court Election Petition No. E005 of 2022) challenging the nomination of Hon. Claire Moraa the petitioner therein by the Jubilee Party as a gender top up member of the Kisii County assembly and her subsequent gazettelement of by IEBC. In her said, petition sought for a declaration that the nomination of the Petitioner herein was irregular and unfair, null and void and that she was the one who was validly nominated by the Jubilee Party Under gender top up under Article 27 (8) of *the Constitution*. She equally sought an order declaring that the gazettelement of the Claire herein as member of County Assembly of Kisii was invalid and for cancellation of the same. Redempta further sought for an order directing the Jubilee Party to file a party list including the name of Redempta in position 3 as per the Judgment delivered by the Political Parties disputes tribunal complaint number E035 delivered on 8th August, 2022.
- The Election court upon considering the election Petition by Redempta held that the Petitioner herein was as late as on the date of her nomination she was already a nominated member of the County



- Assembly courtesy the ODM party and therefore the Jubilee Party ought not to have submitted her name to IEBC for nomination as she was not its member. The election court disallowed the petition as prayed and nullified the nomination of the petitioner herein. It directed the Jubilee Party to submit a fresh list as per the order of the political Parties Disputes Tribunal in Complaint No. E035 delivered on 8th August, 2022 within 3 days from the date of the Judgement.
3. The said petitioner was dissatisfied with the judgement and preferred an appeal to the High Court Kisii being Election Petition Appeal No. E002 of 2023 which delivered its judgement was delivered on 30th June, 2023 and dismissed the appeal for lack of merit.
 4. She was also aggrieved by the judgement of the High Court of Kisii, preferred a second appeal to the Court of Appeal Kisumu being Election Petition Appeal No. E015 of 2023 whose judgement was delivered on 24th October, 2023 striking out the appeal for want of jurisdiction.
 5. Redempta has now moved this court by way Notice of motion dated 22.11.23 seeking:
 - a. The Honorable Court be pleased to issue an order of mandamus compelling the 1st and 2nd respondents to swear the applicant Hon. Mtoa Verah Onkundi Redempta as the duly nominated MCA for Kisii County Assembly by the Jubilee party.
 - b. The Honorable Court be pleased to issue any other orders it may deem fit and convenient taking into account all the exceptional circumstances herein.
 - c. Costs of this application to abide by final outcome of this motion.
 6. The application is based on the grounds that the 1st and 2nd respondents have a duty to gazette the Ex-parte applicant as the duly elected MCA under the gender top up list for Jubilee party. That there is a valid decree dated 16.1.222 in favour of the Ex-parte applicant which was upheld by the High Court and a subsequent appeal to the Court of Appeal was dismissed as per copies of the said judgments (“MVOR 1”), that it is in the interest of justice that the Ex-parte applicant be sworn in to promote the rule of law and due process.
 7. The application is also supported by the annexed affidavit of the Ex -parte applicant who deponed that despite holding a valid decree and requesting the 1st and 2nd respondents have failed, refused and or neglected to gazette her and the 3rd and 4th respondents have also failed to swear her in. She annexed copies of her communication with respondents (MVOR 2). She further told this court that she has suffered loss, injustice and prejudice and she stands to suffer irreparable loss unless this application is heard and determined. Also, that the respondents are duty bound to gazette and swear her.
 8. The Ex parte applicant also filed a statement of facts dated 22. 11.23 and cited the public duty of the respondents to act as per the orders sought herein. Also, that the respondent owes the Ex -parte applicant a duty to execute the decree, that there is no other remedy available in this case save for mandamus. Further that the Ex -parte applicant has a duty to fair administrative action under Article 47 of *the constitution* and she had a legitimate expectation the 1st and 2nd respondent would gazette her nomination and the 3rd and 4th would swear her.
 9. The 4th respondent vide his affidavit dated 8.10.24 deponed that though he knows that the Ex-parte applicant was declared to be the nominee of Jubilee party they are yet to receive a certificate from IEBC and that IEBC is not properly constituted and that is the reason why the nomination of the Ex-parte applicant has not been gazette. The 4th respondent urged this court to dismiss the petition for being pre-mature as the requirement for gazette and issuance of certificate have not been complied with has not been complied with. The 1st and 2nd respondents did not file any reply despite being served



10. Mandamus is a writ issued by the Court directed to a person, a tribunal or a government agency compelling it to perform its duty which it has refused or neglected to do.

11. The threshold for granting the writ of mandamus was laid down in the case of *v Port of London Authority ex-parte Kynock Ltd* {1918} 1KB 176 where it was held that

“a writ of mandamus is in essence a prerogative writ to command a tribunal, authority, person and Government to do something which it has omitted or refused to do in pursuant or execution or intended execution as stipulated in the Act.”

12. In the case of *County Government of Kisii & 2 others v Independent Electoral and Boundaries Commission; Monda (Interested Party)* [2024] KEHC 8477 (KLR) this court held that

Article 23 (3) of *the Constitution* of Kenya, 2010 grants this Court the powers to craft such appropriate reliefs to ensure the ends of justice are met. It provides that: In any proceedings brought under Article 22, a court may grant appropriate relief, including –

- a. A declaration of rights;
- b. An injunction;
- c. A conservatory order; A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. An order for compensation; and f. An order of judicial review.

.....Also that 39. “By parity of reasoning, I also note that there is no mandatory provision to the effect of the gazettelement of a nominated deputy governor and, as I have noted, none has been cited by the parties before this Court. Just like in the case of the Members of the County Assembly, the gazettelement, as a matter of practice, only serves to inform the public of the successful aspirants/nominees thereby marking the close an election process. In the instant case, neither the Respondent nor the Interested Party have contested or raised a doubt that Mr. Elijah Obebo would have been gazetted should the Independent Electoral and Boundaries Commission have been properly constituted.”

13. In the said Kisii County case, this court also cited the case *Wachira James Maina & 12 Others vs Celestine Chepchirchir Mutai and Others; Eldoret High Court Election Petition Appeal No. E002 of 2023*, with approval in that case the Court, while dealing with the issue of gazettelement by IEBC held as follows; “The provisions of Article 259 require *the Constitution* to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights fundamental freedoms and that permits the development of law and good governance. In the present circumstances, IEBC has not been properly constituted. Any further delays would then mean that the Applicants’ rights will be put on hold until such a time when the commission will be constituted. Will such an approach breathe life into *the Constitution*, being a living document? In my view, when parties suffer a constitutional violation, they quite naturally turn to the courts for relief. The function of the courts then is to assist in fashioning a legal system which is effective and responsive to individual demands for an orderly and expeditious resolution of issues. Therefore, while this court appreciates the fact that *the Constitution* of Kenya 2010, did not envisage such a lacuna where there are no IEBC Commissioners, thereby holding all its functions in abeyance, the court is also aware of its mandate



to fashion appropriate remedies to the aggrieved party. To this end, the court cannot then sit back and watch the applicant suffer a glaring prejudice for reasons that a properly constituted commission doesn't exist. Why Gazette? Is it mandatory legal requirement? While I appreciate the importance of Gazettement in the election process, I insist on realizing the Applicants' constitutional rights who equally have a legitimate expectation to be sworn in as Members of the County Assembly having exhausted the available avenues in pursuing their cause....From the foregoing cited provisions, it is safe to conclude that a gazette notice is evidence, at face value, of the existence of a law or a notice that has been duly formulated. It then implies that a Gazette notice is an official communication or a formal expression of the existence of the notice or law....The 4th Respondent's reasons as put forth by the applicants that it is unable to comply with the court's orders for lack of a quorate commission, is therefore untenable and an attempt to take advantage of the lacuna created by the absence of the Commissioners, an issue that is out of control of the Applicant. My reading and understanding of the above provisions is that once members of the County Assembly are nominated and/or elected, it is the IEBC's role to publish their names in the Kenya Gazette to inform the public of the prospective office holders. It is noteworthy that there is no mandatory provision to the effect that an MCA can only be sworn in after Gazettement. Gazettement only serves as an avenue to formally inform the public of the successful candidates and as such closing the election process. In the exercise of discretion, the rule of law dictates that like cases are treated alike. "

14. Similar views were held by Hon. lady Justice Okwany J in Nyamira Constitutional Petition No. E005 of 2023; Michelle Kemuma *Omwoyo vs Independent Electoral & Boundaries Commission & another (Petition E005 of 2023)* [2023] KEHC 24521 (KLR) (31 October 2023) (Ruling) where the Court held that: "

" 67. The reasoning by the Supreme Court was that the substantive process of electing or nominating an MCA is what may be challenged in a court of law and that gazettement only serves the purposes of notifying the public of the outcome of the nomination. It my view that the process of gazettement is merely an administrative task arising from an already concluded legal process. I find that gazettement cannot vitiate the status of a person who has been duly elected or nominated during an election process. This is the position that was adopted by Odunga J. (as he then was) in Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Another (supra), when he held thus: - "... In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazettment, the gazettment is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment."

15. In the case of EWA and 2 Others vs Director of Immigration and Registration of Persons & another [2018] eKLR the court defined "appropriate relief" as a relief that is required to protect and enforce *the Constitution* thus: "... a declaration of rights, an interdict, mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced"

16. The same position was held in the South African case of Fose vs Minister of Safety and Security (CCT 14/96) 1997, ZACC 6, 1997 thus: "[Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.....In our context an appropriate remedy must mean an effective remedy"



17. The Supreme Court in *Re Speaker, County Assembly of Embu*, (Supra) underscored as much when it held as follows:(56)Does *the Constitution* contemplate a situation in which the office of Deputy County Governor would remain vacant indefinitely, as suggested by learned counsel, Mr. Onyiso? From the position that *the Constitution* accords priority to the Deputy County Governor as the candidate to assume the office of Governor, in the event of a vacancy in the Governor's office, would the same Constitution be contemplating a vacuum in such a vital office in the governance structure of County Government?(57)Under the provisions of Article 179(1), (4) and (5) of *the Constitution*, as read together with Section 32 of the County Government Act, the Deputy County Governor is the Deputy Chief Executive of the County; is a member of the County Executive Committee; and acts as the County Governor, in the absence of the Governor. So crucial are these roles to the operations of County Government, it is inconceivable that, constitutionally, they could remain fallow until the next cycle of a general election. We are, therefore, of the definite opinion that the office of Deputy County Governor ought not to remain vacant until the next general election as submitted by Mr. Onyiso. A differing interpretation, in our perception would be inconsistent with the vital objects of *the Constitution*, which we have to uphold.
18. I am duly guided by the above cited authorities and in the exercise of discretion pursuant to Article 23 (3) of *the Constitution* of Kenya, 2010, the rule of law dictates that like cases are treated alike and underscoring the need for adhering to precedent and predictability, the Court cannot shut its eyes to a looming continuing constitutional crisis arising from the vacancy in the Independent Electoral and Boundaries Commission.
19. The withholding of gazette of the Ex-parte applicant as a nominated member of the County assembly denies the people of Kisii the right to equality Under Article 27 (8) of *the Constitution* of Kenya and the legitimate expectation to be represented and to have a fully-fledged county assembly under *the constitution*.
20. The application is merited and I allow the same on the following terms:
- a. Order of Mandamus do and is hereby issued compelling the Independent Electoral and Boundaries Commission, through the Secretary/Chief Executive Officer or any person occupying the said position, gazette to gazette Hon. Motoa Verah Onkundi Redempta as the duly nominated MCA for Kisii County Assembly by the Jubilee party (Gender top up under Article 27(8) of *the Constitution*) within Seven (10) days, from the date of this Judgment.
 - b. Upon compliance with the said order 3rd and 4th respondents shall immediately swear in the ex-parte applicant into office as a nominated member of the Kisii County Assembly.
 - c. Each party shall bear its own costs since the issue of lack of quorum in IEBC was not deliberate on the part of the respondents.

T.A ODERA

JUDGE

17.3.25

Delivered Virtually In The Presence of:

Mr. Ondieki for the Exparte applicant

Miss Nyamwaya holding brief for Mr. Onserio Ondimu for the 4th respondent.

Court Assistant - Oigo



Ondieki: We seek a copy of the Judgment to be posted on CTS

Order: Same will be posted by 18.3.25.

