



**Kiome v Independent Electoral & Boundaries Commission; County Assembly of Meru & another (Interested Parties) (Constitutional Petition E008 of 2025) [2025] KEHC 6441 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6441 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E008 OF 2025**

**SM GITHINJI, J**

**MAY 19, 2025**

**IN THE MATTER OF ARTICLES 19(1), 19(2), 19(3), 20, 21(1), 22, 23, 28, 47, 232, 258, 259(1)(A), 259(1)(B), 259(1)(C) AND 259(1)(D) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLES 2, 3, 19(2), 20(2), 21(1), 21(2), 22, 27, 28, 38, 47(1) & (2), 180 AND 182 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 8(1), 32, 32B, 32C AND 32(D)  
OF THE COUNTY GOVERNMENTS ACT NO. 7 OF 2016**

**AND**

**IN THE MATTER OF SECTIONS 4, 5, 6, 7, 9 AND 11 OF THE  
PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS  
4 & 5 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**BETWEEN**

**LINDA GAKII KIOME ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES  
COMMISSION ..... RESPONDENT**



AND

COUNTY ASSEMBLY OF MERU ..... INTERESTED PARTY

COUNTY GOVERNMENT OF MERU ..... INTERESTED PARTY

JUDGMENT

1. By way of a Petition dated 4<sup>th</sup> April, 2025 the Petitioner sought the following orders;
  - a. A Declaration be and is hereby issued that the clearance of a person duly nominated to the position of Deputy Governor upon arising of a vacancy under Section 32D of the *County Governments Act* such as the Petitioner herein, is an administrative action, to be undertaken by the Independent Electoral and Boundaries Commission Secretary/Chief Executive Officer or any such person occupying the said position at the time, and is not dependent on the composition or quorum of the Independent Electoral and Boundaries Commission.
  - b. A Declaration be and is hereby issued that the failure and inaction by the Independent Electoral and Boundaries Commission to gazette a Returning Officer for Meru County for purposes of clearing the Petitioner herein as duly nominated and eligible for approval as Deputy Governor of Meru is contrary to Articles 2, 3, 10, 21, 22, 27, 38, 47, 180 and 258 of *the Constitution* of Kenya, 2010 as read with Section 32C and 32D of the *County Governments Act*, Section 4 and 11 of the *Public Appointments (County Assemblies Approval) Act* and Sections 4 and 5 of the *Fair Administrative Action Act*.
  - c. An order of Mandamus be and is hereby issued compelling the Independent Electoral and Boundaries Commission, through the Secretary/Chief Executive Officer Mr. Marjan Hussei Marjan or any person occupying the said position, to gazette a returning officer for Meru County for purposes of clearing the Petitioner and her gazettement as the Deputy Governor of Meru upon her approval by the relevant constitutional bodies.
  - d. An Order awarding costs of the Petition to the Petitioner especially because this issue has been settled in precedent and the Respondent's refusal to follow established precedent is the only reason the Petitioner has been forced to approach this honorable court.
  - e. Any other further orders, writs and directions that this court considers appropriate and just to grant for purposes of enforcement of the petitioner's fundamental rights and freedoms.
2. The Petitioner averred that on 17/3/2025, the then Deputy Governor of Meru H.E Reverend Mutuma M'Ethingia assumed the office of the Governor pursuant to Article 182(2) of *the Constitution*. Following her nomination to fill the vacancy of Deputy Governor, the Governor sought confirmation and clearance from the Respondent whether she met the eligibility criteria, including compliance with Chapter Six of *the Constitution*, ahead of her vetting scheduled on 7/4/2025. The Respondent has neither cleared her nor gazetted a County Returning Officer for purposes of establishing her eligibility and ultimately gazetting her name as the duly elected Deputy Governor of Meru pursuant to Section 32D of the *County Governments Act*. The failure to obtain the clearance documents from the Respondent inevitably prejudices and/or jeopardises her chances of being approved by the Assembly yet she was legitimately nominated and qualified to hold that office. The Respondent's failure, refusal and/or neglect to clear her have curtailed her constitutional right to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Unless the prayers sought are granted,



she will be unfairly disqualified for want of clearance from the Respondent, which clearance ought not to be unreasonably withheld.

## Responses

3. The Respondent opposed the Petition through a replying affidavit sworn on 11/4/2025 by Ruth Makuthu, its Ag. Manager Legal Reforms, Political Parties Liaison and Campaign Financing. She deponed that the Respondent's powers to clear candidates, is circumscribed by legal framework which, inter alia, vests the clearances in the full and properly constituted Commission and not in any individual officer. The Respondent's inaction is not the product of arbitrariness or neglect but is rather a manifestation of adherence to the legal prescribed procedures. The Commission Secretary/Chief Executive Officer is not a member of the Commission as defined under section 5 of the Independent Electoral and Boundaries Commission, hence he cannot appoint a County Returning Officer for purposes of clearance of candidates and conduct elections, and cited *Mukuru v Independent Electoral and Boundaries Commission (IEBC); Wiper Democratic Movement & another (Interested Parties) (Constitutional Petition E003 of 2024) [2024] KEHC 9012 (KLR) (15 July 2024) (Judgment)*. The orders sought against the Commission Secretary/Chief Executive Officer, who is not a party in this matter, are unenforceable, and as such, the petition is defective, devoid of merit and an abuse of the court process which ought to be dismissed with costs. The Respondent's actions have been lawful, proper and in strict adherence to constitutional and statutory provisions, and cited *Re Speaker, County Assembly of Embu (Reference 1 of 2015) [2018] KESC 49 (KLR) (Civ) (9 March 2018) (Advisory Opinion)*.
4. The 1<sup>st</sup> Interested Party filed a replying affidavit sworn on 7/4/2025 by Jacob Kirari, its Clerk, in support of the Petition. He deponed that during its sitting of 1/4/2025, the 1<sup>st</sup> Interested Party was duly notified of the Petitioner's nomination, which nomination was committed to the County Assembly's Select Committee on Appointments for purposes of vetting in line with the relevant provisions of the law. The Select Committee settled on 7/4/2025 as the date for the approval hearing of the nominee and an advert to that effect was made to her and the public. As a consequence of the directions of this court issued on 7/4/2025, the Select Committee on Appointments resolved to postpone the scheduled approval hearing awaiting further orders of the court. The Respondent's inaction in clearing the nominee has occasioned unnecessary delay and prejudice to the nominee, and further delayed the exercise of a statutory mandated function of the County Assembly, and unless the court intervenes and grants the orders sought in the Petition, the Petitioner risks being automatically approved without the input of the County Assembly by operation of section 32 (D) (3) (b) of the *County Governments Act*.
5. The 2<sup>nd</sup> Interested Party filed a replying affidavit sworn on 14/4/2025 by Dr. Kiambi JT Atheru, its County Secretary, in support of the Petition. He deponed that the Respondent's refusal to clear the Petitioner as required by law has jeopardized the operations of the 2<sup>nd</sup> Interested Party, and it is in the interest of the people of Meru that the orders sought in the Petition are issued.

## Submissions

6. On whether the Respondent ought to clear the Petitioner, Counsel relied on County Government of Kisii *& 2 others v Independent Electoral and Boundaries Commission; Monda (Interested Party) (Constitutional Petition E006 of 2024) [2024] KEHC 8477 (KLR) (4 July 2024) (Judgment)* and *Maina & 12 others v The Independent Electoral and Boundaries Commission & 2 others; Mutai & 2 others (Petitioner) (Election Petition Appeal E002 of 2023) [2024] KEHC 208 (KLR) (23 January 2024)*. Counsel submitted that the failure to join the Secretary and/or Chief Executive Officer of the Respondent to these proceedings was curable under Rule 5 (b) of *the Constitution* of Kenya (Protection



of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Counsel prayed for the Petition to be allowed with costs because the same had been necessitated by the Respondent's failure to adhere to established precedent.

7. The Respondent submitted that the statutory timelines referenced in the Petition, including the 14 day deadline under Section 32D of the County Governments Act, must be observed within the context of lawfully mandated procedures, and relied on Hon. Lemanken Aramat v Harun Meitemei Lempaka & 2 Others (2014) eKLR and Mukuru v Independent Electoral and Boundaries Commission (Supra). It was submitted that the Commission's corporate identity and its plenary functions are non-delegable and can only be discharged by a quorate Commission, and cited Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR, Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 4 others (2017) eKLR, Omwoyo v Independent Electoral & Boundaries Commission & another [2023] KEHC 24521 (KLR) and Council of Governors v Attorney General & 4 Others (2017) eKLR. Counsel submitted that the Petition lacked specificity, was defective and unmeritorious, and urged the court to take judicial notice of the existing operational challenges the Respondent was facing due to lack of Commissioners.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties submitted that the continued delay in clearing the Petitioner was an affront of her rights under Articles 38 and 47 of the Constitution, and cited County Government of Kisii & 2 others v Independent Electoral and Boundaries Commission (Supra), In the Matter of Speaker, County Assembly of Embu (Supra), Maina & 12 others v The Independent Electoral and Boundaries Commission (Supra) and Republic v Independent Electoral and Boundaries Commission and CEO, Independent Electoral and Boundaries Commission (IEBC) and 2 Others HCJR/E013/2023 (KLR). They urged the court to give effect to Article 180 of the Constitution and Section 32D of the County Governments Act, by allowing the Petition.

### Determination of the Petition

9. After dully considering the Petition and the issue for determination, I have to decide whether the orders sought therein should issue.
10. Before delving into the merits of the Petition, I wish to address the concern whether the failure to join the IEBC Secretary or Chief Executive Officer rendered the orders sought unenforceable and the Petition defective. Order 1 Rule 9 of the Civil Procedure Rules is categorical that no suit should be defeated by reason of the misjoinder or non-joinder of parties.
11. The Constitution ought to be invoked in the clearest of cases where it has been established that there is no other recourse available to the Petitioner. I draw guidance from John Harun Mwau v Peter Gastrow & 3 Others [2014] eKLR where the court expressed itself in the following terms; "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 some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked 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."
12. Section 32D of the County Governments Act provides that;
  - “(1) Where a vacancy arises in the office of a deputy Governor as provided for under section 32C, the Governor shall—
    - (a) within fourteen days, nominate the deputy Governor; and



- (b) with the approval of the county assembly, appoint a deputy Governor.
  - (2) A person nominated for appointment as deputy Governor under subsection (1) shall be a person eligible for election as Governor.
  - (3) The county assembly shall—
    - (a) consider a motion for approval for the appointment of the deputy Governor, within fourteen days, and resolve whether to approve the motion; and
    - (b) be deemed to have approved the motion for the appointment of the deputy Governor upon the lapse of fourteen days and having failed to make a resolution.
  - (4) A motion for the approval for appointment of a deputy Governor shall be supported by a majority of the members of a county assembly.
  - (5) A person appointed as deputy Governor under subsection (1) shall, for purposes of Article 180(7) of *the Constitution*, be deemed—
    - (a) to have served a full term as county deputy Governor if, at the date on which the person is appointed, more than two and a half years remain before the date of the next regularly scheduled election under Article 180(1) of *the Constitution*; or
    - (b) not to have served a term of office as county deputy Governor, in any other case.”
13. Following the assumption of H.E Reverend Mutuma M’Ethingia into the office of Governor of Meru County, he promptly nominated the Petitioner to occupy the office of Deputy Governor, by dint of Section 32D of the *County Governments Act*, and duly notified the 1<sup>st</sup> Interested Party and the Respondent. The Petitioner was then expected to appear before the 1<sup>st</sup> Interested Party’s Select Committee on Appointments for vetting on 7/4/2025. That process did not however commence as anticipated because the Respondent, vide its letter dated 4/4/2025 arbitrarily neglected to appoint a County Returning Officer to clear the Petitioner, citing an improperly constituted Commission. In its said letter, the Respondent outlined the procedure to be followed right from Notification to oath taking as follows; “1. Notification to the Commission: The Office of the Governor/the Party is required to write to the Commission forwarding the name of the nominee together with full particulars. 2. Clearance of the Proposed Nominee: Upon receipt of the letter, the Commission is required to appoint through a Gazette Notice, the County Returning Officer to clear the proposed nominee pursuant to the constitutional and statutory qualifications being the same as that of a Governor. The Deputy Governor Nominee is then required to appear before the County Returning Officer for clearance on a scheduled date whereupon he/she is expected to bring along all requisite Constitutional and statutory qualification documents for the position. 3. Issuance of a nomination certificate: If satisfied that the nominee meets the constitutional/statutory requirements, the County Returning Officer issues a nomination certificate to the nominee after which the Commission shall inform the County Governor that the nominee is qualified. The Governor shall then forward the Nomination Certificate to the County Assembly to kick start the process of approval of the nominee in terms of the provisions of Section 32D of the *County Governments Act*. 4. Transmission of the Approval to the Commission: Once the nominee is approved, the Speaker to the Assembly shall forward to the Commission in writing the resolution of the Assembly with recommendations approving the nominee to the office of the Deputy County Governor. 5. Publication of the Nominee as the Deputy Governor: Upon receipt of the Assembly’s resolution, the Commission shall publish in the Kenya Gazette the appointment of the Deputy Governor. 6. Oath of Office: Upon Gazettement, the Speaker shall take necessary steps to facilitate the new Deputy Governor to take oath of office.”



14. The Petitioner and the Interested Parties contend that the Respondent’s blatant failure to act is a violation of her constitutional rights, while the Respondent insists that it followed the law to the letter, and its alleged inaction to gazette a County Returning Officer for purposes of clearing the Petitioner was warranted for want of a quorate Commission.
15. The Petitioner has established that her nomination to hold the office of Deputy Governor met the Constitutional and Statutory requirements, and the completion of the approval process was unlawfully stalled by the Respondent’s refusal to act. The court cannot declare itself powerless in the face of an obvious injustice, because it is enjoined by the provisions of Article 23 of *the Constitution* to fashion appropriate reliefs to safeguard fundamental constitutional rights and freedoms.
16. I am persuaded by Matuli & another *v Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E001 of 2022)* [2024] KEHC 210 (KLR) (23 January 2024) (Ruling); That while the court appreciated the fact that *the Constitution* of Kenya 2010, did not envisage such a Lacuna where there were no IEBC Commissioners, thereby holding all its functions in abeyance, the court was also aware of its mandate to fashion appropriate remedies to the aggrieved party. The court could not then sit back and watch the applicant suffer a glaring prejudice for reasons that a properly constituted commission did not exist.

The argument that IEBC was unable to publish a gazette notice for lack of a quorate commission was untenable and an attempt to take advantage of the lacuna created by the absence of the Commissioners, an issue that was out of control of the applicant.

17. Similarly in *Omwoyo v Independent Electoral & Boundaries Commission & another (Petition E005 of 2023)* [2023] KEHC 24521 (KLR) (31 October 2023) (Ruling), the Court espoused that:

“I have, in the same vein, considered the fact that as a court of equity, this Court should consider the peculiarity of the circumstances that the parties find themselves in where, for some unexplained reason, there is no properly constituted IEBC, and draw reference from the equity maxim which states that; “Equity sees as done that which ought to have been done”. The Respondents herein have not disputed that the Applicant would have been gazetted if the 1<sup>st</sup> Respondent was properly constituted. Indeed, the Applicant would have been gazetted immediately upon the determination of the suit in the Chief Magistrate’s Court on 11<sup>th</sup> January 2023 in which the nomination of Dolphine Nyang’ara was nullified. The lower court’s decision was upheld on appeal. I therefore find that there is no impediment or barrier to the Applicant’s swearing in and assumption of office. This Court takes the view that, in the interest of justice and in circumstances of this case, the issue of gazettement, which is not a legal prerequisite but an administrative formality/directive, may be by-passed or be deemed to have been done. I find that nothing should further stand in the way of the Applicant, who has been vigilant in pursuing her cause, from assuming her rightful place in office as an MCA.”

18. Both the Respondent and the Interested Parties do not dispute that the Petitioner would have been validly appointed as the Deputy Governor and ultimately sworn into office had the Respondent been properly constituted. I find that the persistent refusal by the Respondent to gazette a County Returning Officer to clear the Petitioner is tantamount to a violation of her rights under Articles 19, 20, 22, 27, 38, 47, 180 and 258 of *the Constitution*. The Petitioner’s legitimate expectation to serve the people of Meru County as their Deputy Governor was irrationally curtailed by the unlawful actions of the Respondent.



19. The law does not contemplate a vacuum in any public office and therefore, public interest demands that the people of Meru County enjoy uninterrupted governance, service delivery and political stability, as the ramifications of the delayed filling of the office of Deputy Governor are far reaching and catastrophic.
20. I thus find that on the test of *Anarita Karimi Njeru v Republic* (1979) eKLR, the Petitioner is entitled to grant of the orders sought, because equity will not suffer a wrong without a remedy. The Petitioner's aforesaid constitutional breaches must be aptly remedied.
21. For the foregoing reasons, the Petition is merited and it is allowed in terms of prayers b and c thereof. Each party shall bear their own costs.
22. In the event of failure by the Respondent to comply with prayer c hereinabove granted within 7 days, the Petitioner shall be deemed to have been duly cleared and the approval process by the 1<sup>st</sup> Interested Party shall proceed from where it had reached.

**DATED, SIGNED AND DELIVERED THIS 19<sup>th</sup> DAY OF MAY, 2025.**

**S.M. GITHINJI**

**JUDGE**

APPEARANCES:-

Mr. Muriuki holding brief for Miss Kimani for the petitioner.

Mr. Benson Kinyua for the 1<sup>st</sup> Interested Party.

Mr. Mwongera and Ms. Sarah Talaso.

Mr. Mwereru holding brief Ms. Keter for the 2<sup>nd</sup> Interested Party.

