



Inukeni Walemavu Kijiwetanga Self Help Group & 5 others v Independent Electoral & Boundaries Commission & 3 others (Constitutional Petition 6B of 2022) [2024] KEHC 2833 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION 6B OF 2022
SM GITHINJI, J
MARCH 14, 2024**

BETWEEN

**INUKENI WALEMAVU KIJIWETANGA SELF HELP GROUP . 1ST PETITIONER
FEDERATION OF DEAF WOMEN EMPOWERMENT - GROUP (FEDWEN-
K) 2ND PETITIONER
TAKAYE ADIMAYE PHYSICAL DISABLED SELF-HELP GROUP ... 3RD
PETITIONER
INSTITUTE OF PARTICIPATORY DEVELOPMENT (IPD) 4TH PETITIONER
MWANGATANI LAMUKENI SELF-HELP GROUP MAGARINI 5TH
PETITIONER
REPOSSIBLE CITIZENRY MALINDI (RECI-MALINDI) 6TH PETITIONER**

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT
THE COUNTY ASSEMBLY OF KILIFI 2ND RESPONDENT
ORANGE DEMOCRATIC MOVEMENT (ODM) 3RD RESPONDENT
PAMOJA AFRICAN ALLIANCE (PAA) 4TH RESPONDENT**

JUDGMENT

1. The Petitioners vide an amended Petition dated 7th May 2023 moved the court seeking the following;



1. That this matter be certified as extremely urgent and therefore be determined at first instance since Persons with Disabilities continues to be left out in a decision making organ that greatly affects them and already are marginalized population. (sic).
 2. That this honourable court be pleased to issue injunctive orders of all operations, activities and roles of the County Assemblies under Article 185 constitution of Kenya 2010 and Section 8 and 9 of the County Government Act to the speaker, clerk and officers of the 4th Respondent by themselves, agents, employees and/or any other person acting on their instructions until Article 177 (1) (c) of *the Constitution* of Kenya is complied with.
 3. That if found the rights of persons with disabilities were violated infringed or threatened and were irregularly left out that this honourable be pleased to issue orders directing the 1st respondent to gazette the two (2) Persons with disabilities that appeared on the list of nominees on party list dated 27th July 2022 by the 1st Respondent as representative of persons with disabilities in the 4th Respondent.
 4. That if found to have been irregularly left out of nomination by the 1st respondent, that this honourable court be pleased to issue orders to the 1st respondent to gazette applicant number 7 of the party list dated 27th July 2022 for gender top-up.
 5. That this honourable court finds this petition valid to the extent of protecting and recognizing persons with disabilities (PWDs) and inclusiveness in our constitution which all Kenyans fought so hard to ensure equality to all and consider it as a priority.
 6. That this honourable court be pleased to issue declaration of invalidity of Section 27 (3) and (4) of the Election Act since we are on the clock such stipulated in Section 37 (3) and (4) of the Election Act that; where in three (3) Months a vacant position has not been filled then it shall remain so for the remaining part of five (5) years.
 7. Or such other orders that this honourable court shall deem just.
2. The Petition is premised on the grounds set out on its face and the supporting affidavit of Willy Kuria Mwangi a member of Civil Societies Organization with the authority of the other petitioners who deponed that the 4th respondent has 32 male and three female elected members, twelve members nominated for gender top-up, 2 male and 2 female nominated as marginalized. That of the nominated members, there is not even a single representative of persons with disabilities as required under Article 177 (1) (c) and Article 56 (a) of *the constitution*, Section 7 (1) (a) of the County Government Act and 36 (3) Of the Election Act. Mr. Willy Mwangi also deponed that two persons with disabilities applicants for party list nomination were, unlawfully denied the chance by the 1st, 2nd and 3rd Respondents even when they had fulfilled every requirement. Further, the only candidate from Magarini was discriminated upon by not being allocated seats on priority.
 3. The 1st Respondent opposed the petition vide the grounds of opposition dated 13th October 2023 raised on the following grounds;
 - a. That the amended petition is fatally defective and incompetent and ought to be struck out due to want of authority.
 - b. That this court lacks jurisdiction to hear and determine a nomination dispute which dispute lies with an election court.
 - c. That the petitioners' cause of action is overtaken by events.



4. The 4th Respondent filed a replying affidavit sworn by Michael Bidii Ngala, the Clerk County Assembly of Kilifi who stated that the 4th Respondent has no role in the election and nomination of members to the assembly as it is within the purview of the 1st to 3rd Respondents including the top up seats of people living with disability. He stated that the 4th Respondent has analyzed the various gazette notices regarding the matter in issue and found discrepancies and illegalities that cannot be wished away or explained by the 1st Respondent indication that the entire process was opaque and shambolic. He added that Articles 90,177 (1) (a) & (c) and 185 of *the Constitution* of Kenya creates special seats in the county assemblies which are allocated to special interest groups which are allocated by the 1st Respondent within 30 days of a general election.

Disposition

5. The petition was disposed of by way of written submissions. I have taken into account the submissions by the parties herein as well as the authorities relied upon. The issues arising for determination are; whether the court has the jurisdiction to hear and determine the petition and whether the petition meets the threshold of a constitutional petition.

Jurisdiction

6. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

“...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.”

The 1st Respondent has questioned the jurisdiction of this court through its grounds of opposition. In its view, the dispute herein is an election dispute which is a preserve of the Election court.

Article 165(3) and (6) elaborately sets out the jurisdiction of the High Court as follows:

- (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
 - e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.
7. The Petitioners' case though not well crafted, rests on non-inclusion of People Living with Disabilities into the County Assembly. They basically seek the interpretation of Article 177 of *the Constitution*. As aforesaid, it is the duty of this court to address constitutional interpretation issue where there is doubt. That said, it is my finding that this court has the jurisdiction to hear and determine this matter.
 8. Now onto the competence of the petition. Before I proceed, I must point out that this petition was brought by a lay man who may not be so well conversant of both procedural and substantive law and I shall endeavor to wade through the orders they seek in their petition which have not been clearly brought out.
 9. The petitioners allege violation of a host of rights under the Article 27 (1) and (2), 28, 47 (1) and (2), 56 (a) and 177 (c) of *the constitution*.
 10. Article 27 clothes equality and freedom from discrimination while Article 28 provides for human dignity. Article 47 deals with fair administrative action while Article 56 provides for minorities and marginalized communities. Article 177 (c) provides for inclusion of special interest group to the County Assembly.
 11. It is the Petitioners' case that people living with disability were not nominated to the county assembly despite some having been nominated by the Political Parties.
 12. It is adept that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This was succinctly enunciated in the case of Anarita Karimi Njeru v The Republic [1976-1980] KLR 1272 where the court stated: -

“Constitutional violations must be pleaded with a reasonable degree of precision.”



13. The Articles of *the Constitution* which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation, with the violations being particularized in a precise manner. Additionally, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence, based on the pleadings.
14. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR provided the standard of proof in Constitutional Petitions.

The Court of Appeal judges stated; -

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

15. The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

Lenaola J. while referring to the *Anarita Karimi* and *Mumo Matemu* Cases in *Dr. Rev. Timothy Njoya v The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division* Petition No. 479 of 2013 stated: -

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which *the Constitution* has been violated by whom and even state the Article of *the Constitution* that has been violated and the manner in which it has been violated.”



16. I find the Dr. Timothy Njoya case (Supra) by Lenaola J. persuasive while that of Mumo Matemu (Supra) being a Court of Appeal decision binding on this court.
17. Looking at the Petitioners' pleadings, the evidence as well as the submissions of the parties, I am of the view that the Petitioners have not met the requirements of a Constitutional Petition. Although the Petitioners have pleaded provisions of *the Constitution*, they have not demonstrated to the required standard how individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. They have not adduced any evidence to demonstrate the alleged violations.
18. Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be based on an evidentiary foundation. In finding so, I rely on the case Leonard Otieno v Airtel Kenya Limited [2018] where Mativo J. held that: -

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

19. The Petitioners did not avail documentary evidence to support that indeed People Living with disabilities are not represented.
20. As I conclude, I must point out that as a secondary issue, the petitioners in their petition did not describe the parties herein nor demonstrate on whose behalf they brought the petition. Though it is trite under Article 258 that one may institute a Constitutional petition in the interest of the public, this is not one of such case. The Petitioners ought to have described with precision where they draw their locus standi.
21. That said, I find that the petition does not meet the threshold of a constitutional petition and the same fails for want of merit. The Petition dated 8th May 2023 is hereby dismissed with no orders as to costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 14TH DAY OF MARCH, 2024.

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S.M. GITHINJI

JUDGE

In the Presence/absence of:

- 1. Gathu for the Respondent**
- 2. Ms Ngigi holding brief for Mr Apollo Muende for the 4th Respondent**
- 3. Mr Willy Kuria (by person) for the Petitioners**

