



**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)**

Neutral citation: [2024] KEHC 9012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CONSTITUTIONAL PETITION E003 OF 2024**

**GMA DULU, J
JULY 15, 2024**

BETWEEN

ANN WAMBUI MUKURU PETITIONER

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) RESPONDENT**

AND

THE WIPER DEMOCRATIC MOVEMENT INTERESTED PARTY

THE TAITA TAVETA COUNTY ASSEMBLY INTERESTED PARTY

JUDGMENT

1. Before me is a petition dated 9th April 2024 filed by the petitioner Ann Wambui Mukuru through counsel Mosioma & Company Advocates under Articles 19, 20, 21, 22, 23, 24, 35, 47, 48, 90, 177, 193 and 194 of *the Constitution* of Kenya.
2. The petitioner seeks the following orders:-
 - a. A declaration that the respondent does not require quorum to gazette the petitioner as the same is a result of nomination through a party list.
 - b. A declaration be issued that the petitioner is the nominated member of assembly following the demise of Constance Mwandawiro on the 24th August 2023.
 - c. A declaration that the statutory timelines provided by the *Elections Act* having lapsed the petitioner be deemed as duly nominated and the Speaker of the 2nd Interested Party the County Assembly of Taita Taveta do swear the petitioner as a Member of County Assembly.



- d. An order be issued compelling the IEBC Chief Executive Officer to gazette the petitioner as a Member of County Assembly Taita Taveta under the gender to up list representing the Wiper Democratic Movement within 7 days.
 - e. Failure of the IEBC to comply with (c) above an order be issued compelling the Speaker of the Taita Taveta County Assembly to swear the petitioner as the duly nominated Member of County Assembly.
 - f. Costs of this petition and interest thereto.
3. The petition has grounds on its face that; – Article 47 of *the Constitution* guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That Article 81 provides the principles under which the electoral system in Kenya should comply with and that in terms of the 1st Interested Party’s list of the gender special seats nominees, the petitioner was in slot 3 on the gender top up list; and that Constance Mwandawiro (2nd in the list) now having passed away, under the provisions of Section 19(3) and (4) of the *Elections Act* the County Assembly should issue a notice of the vacancy; and that the IEBC should within 21 days of receipt of the notice transmit the notice to the returning officer and the vacancy filled; and lastly, that as the vacancy related to the gender top up list, no elections were to be held and that the petitioner herein should thus be gazetted and sworn in as MCA.
 4. Filed with the petition was a Notice of Motion for interlocutory orders, which was dismissed by this court in a ruling delivered on 28th May 2024.
 5. The petition was opposed through a replying affidavit filed by the respondent (IEBC), and sworn on 2nd May 2024 by Chrispine Owiye Director of Legal Services, in which it was deponed inter alia that there being no Commissioners in office as required under Article 250(4) of *the Constitution*, the Secretarial of IEBC led by the Chief Executive Officer whose decisions had to be ratified by the Commission constituted of Commissioners, cannot gazette the petitioner as a Member of the County Assembly (MCA) herein.
 6. On their part, the 1st Interested Party filed a replying affidavit sworn on 24th April 2024 by Shakila Abdalla its Secretary General, who supported the petition and deponed that the petitioner should be gazetted and sworn in as an MCA from the party’s gender top up list.
 7. The 2nd Interested Party (Taita Taveta County Assembly) did not file any response to the petition.
 8. The petition was canvassed through written submissions, in which the petitioner and respondent through counsel, relied on submissions filed to the Notice of Motion. The 1st Interested Party supported the submissions filed by the petitioner’s counsel.
 9. In a brief oral highlight also Mr. Mosioma for the petitioner, emphasized that the issue was only one – whether the respondent was duly constituted to gazette the petitioner as nominated MCA. Ms. Omondi for 1st Interested Party on her part, stated that she supported the petitioner’s position.
 10. Indeed, from the pleadings and submissions filed herein, it is not disputed that the petitioner appears in the 3rd slot of the 1st Interested Party’s gender top up list. It is also not disputed that nominated MCA Constance Mwandawiro had passed away.
 11. The issue in dispute as to be agreed by the petitioner’s counsel Mosioma & Company Advocates, the respondent’s counsel Kioko, Munyithya, Ngugi & Company Advocates, and LAK Advocates for the 1st Interested Party, is whether the IEBC, through Chief Executive Officer of the respondent (IEBC), has powers to gazette the petitioner as nominated MCA, when all Commissioners of IEBC have either



- resigned, been removed from office, or their terms expired, and there is no single Commissioner in office.
12. The petitioner's counsel has in particular referred to previous decisions of the High Court which are Garissa Election Appeal No. E002 of 2023 as consolidated with Garissa Election Appeal No. 004 of 2023; as well as Eldoret Election Petition Appeal No. E002 of 2023 Wachira James Maina & 12 Others =Versus= Celestine Chepchirchir Mutai, IEBC & Others.
 13. Though counsel for the petitioner claimed to have annexed copies of the court's orders in both, I have only seen what appear to be a compromise consent order in Garissa Election Appeal No. E002 of 2023 consolidated with Election Petition Appeal No. E004 of 2023 arising from Mandera CM Election Petition No. E007 of 2022 as consolidated with Election Petition No. E006 of 2022, signed by the Deputy Registrar.
 14. In that order signed by the Deputy Registrar, it is recorded as follows:-
 1. That the Speaker of Mandera County Assembly having attended to the summons, he is hereby discharged.
 2. That the application dated 28th September 2023 is on the undertaking of the 3rd respondent counsel marked as withdrawn without costs.
 3. That on the basis of that undertaking and submissions by the parties this morning the Chief Executive Officer of IEBC be and is hereby directed to publish a Notice in the Kenya Gazette giving effect to the orders in this court's judgment of 7th August 2023 degazetting two named MCAs and gazetting two new MCAs.
 4. That the same be published this week.
 5. That it is a function performed to effect a court order hence not a policy action.
 6. That summons for Marjan's attendance are hereby extended and will be discharged automatically upon the said notice being published in the Kenya Gazette.
- Further Orders
7. That these orders be extracted and issued to the parties.
 8. That the same be extracted by Mr. Wethow the Advocate for the incoming MCAs.
15. In my view, it is obvious from the above orders, that the said orders of the court above, were from a compromise or consent and not a determination by the court, whether the Chief Executive Officer of IEBC could exercise the function of the Commissioners. Secondly, it is specifically stated therein that the above compromise arose from a previous decision of the Magistrate's court in an election petition, filed when Commissioners were in office, and an appeal to the High Court, and which were now merely being implemented, using the above subsequent court orders.
16. Thus in my view, the above orders do not assist this court in the present petition and the orders sought.
17. Coming now to the petition and prayers sought herein, the burden was on the petitioner to persuade this court that *the Constitution* or the statute law confers on the Chief Executive Officer of IEBC (who was in any case is not a party herein) to gazette the petitioner as an MCA.
18. In my view, the petitioner has not pointed or identified any provision in *the Constitution* or the written law, which confers on the Chief Executive Officer the power to gazette any person to fill a vacant



political post without the actual involvement of the Commissioners. On that account, this petition will fail.

19. I have also to mention that both the petition and prayers sought, refer to the institution IEBC as a party, which is constituted of Commissioners, who were not in office at the time it was filed, and are not in office presently. However, the submissions by counsel have dwelt on the Chief Executive of IEBC, who is not a party herein.
20. In my view, the IEBC, and the Chief Executive Officer are two different entities or offices, though related. The IEBC constitutes of the Commissioners, while the Chief Executive Officer is an employee of the IEBC. Thus in my view, one cannot sue IEBC and then directly obtain orders against the Chief Executive Officer as suggested in the submissions. If one wanted to get orders in this petition directly against the Chief Executive Officer, then that office should have been joined as a party. On that account also the petition will not succeed.
21. To conclude, I find no merits in this petition. I dismiss the petition, and decline to issue any of the orders sought, with costs to the respondent Independent Electoral and Boundaries Commission (IEBC).

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF JULY 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Mosioma for petitioner

Ms. Kemunto holding brief for Mr. Munyithia for respondent

Ms. Ongendi holding brief for Eunice for 1st Interested Party

