



Odede v Independent Electoral and Boundaries Commission & 2 others; National Council for Persons With Disabilities & another (Interested Parties) (Constitutional Petition E003 of 2022) [2023] KEHC 136 (KLR) (16 January 2023) (Judgment)

Neutral citation: [2023] KEHC 136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E003 OF 2022
RE ABURILI, J
JANUARY 16, 2023**

BETWEEN

DENNIS OTIENO ODEDE PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

ORANGE DEMOCRATIC MOVEMENT PARTY (ODM) 2ND RESPONDENT

SPEAKER, SIAYA COUNTY ASSEMBLY 3RD RESPONDENT

AND

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES INTERESTED
PARTY**

FREDRICK ODHIAMBO OLOO INTERESTED PARTY

JUDGMENT

1. Vide a Petition dated September 19, 2022 and filed in court on the same day, the Petitioner herein Dennis Otieno Odede seeks from this court the following orders:
 - i. An order for Declaration that the Petitioner’s rights under Articles 27,38,47, 81 (c),90 and 177 have been infringed by the 1st and the 2nd Respondents;
 - ii. An order to compel the 1st Respondent to gazette the Petitioner to represent persons with disabilities in Siaya County Assembly;
 - iii. An order of certiorari quashing the 1st Respondent’s discriminatory omission of failing to gazette any person with disability;



- iv. A declaration that in the interest of regional balance, Rarieda Sub County having not been allocated any nomination slot in the Siaya County assembly is duly entitled to occupy the nomination slot reserved for persons with disabilities through the Petitioner;
 - v. An order of prohibition restraining the 3rd Respondent from swearing in any other person other than the Petitioner to represent persons with disability in Siaya County Assembly.
2. The factual basis for the Petition herein is that the Petitioner is a registered member of the Orange Democratic Movement Party, (ODM) the second Respondent herein and that he applied to the said Party to be considered for nomination to the Siaya County Assembly under the category of the marginalized group as a person with disability hailing from Rarieda Sub County which application was successful and that his name was listed in the party list as number 2.
3. That the said Party List was forwarded to the 1st Respondent IEBC for consideration and gazette but that the 1st Respondent herein rejected the 2nd Interested party Fredrick Odhiambo Oloo as the first nominee in the 2nd Respondent's party list on the basis that he failed to provide a certificate from the 1st Interested Party National Council for persons with disabilities-NCPWD.
4. The petitioner therefore laments that the 1st respondent did not gazette any candidate to represent persons with disability in Siaya County Assembly and that vide letter dated June 22, 2022, the NCPWD wrote to the 1st Respondent confirming that the Petitioner is a member of the Council and that it was in the process of replacing his lost membership card.
5. That therefore the 2nd interested party having been eliminated automatically, the petitioner qualified to be nominated and to be gazette as representing persons with disabilities within Siaya in the Siaya County Assembly hence the 1st respondent had no reason not to gazette the petitioner herein as such rejection is in violation of his constitutional rights.
6. Opposing the Petition, the 1st Respondent filed a replying affidavit and Notice of Preliminary objection dated October 9, 2022 contending that the petition offends the provisions of section 75 of the [Elections Act](#) No 24 of 2011 as read with Article 88 of the [Constitution](#). It was contended that the nomination being part of the process of elections, only an election petition can be filed to challenge that process. It was therefore asserted in submission that this court has no jurisdiction to entertain this petition.
7. Both parties counsel filed written submissions maintaining their respective stances with the petitioner asserting quite vehemently and in detailed submission that he is challenging the violation of the petitioner's rights under Articles 27, 28 and 47 of the [Constitution](#) and that he is qualified to be nominated as a person living with disabilities to the County Assembly of Siaya, which nomination shall be in the interest of justice.
8. Each of the parties relied on several decisions and statutory as well as constitutional provisions to support their respective positions, which I have considered and referred to in the subsequent paragraphs.
9. The question for this court's determination therefore is whether the alleged failure by the IEBC to gazette the petitioner as a duly nominated MCA representing persons with disabilities can be challenged through a constitutional petition/judicial review process or via an election petition process before a court duly gazette to hear and determine election petitions.



10. To answer the above question, I need not reinvent the wheel as superior courts have already settled that issue through judicial pronouncements.
11. It is the 1st Respondent's contention via its preliminary objection that once the nominees' names had been gazetted, any dispute regarding the validity or otherwise of their nomination could only be resolved through an election petition; and consequently, the only recourse open to the petitioner was to file an election petition, challenging the process. The 1st Respondent argues that this is so because once gazetted, a nominee is deemed to have been elected.
12. On the part of the petitioner, it is asserted that he is challenging violation of his rights under the Constitution as a person with disability since the 2nd respondent never submitted the name of any person with disability for gazettement to serve as member of Siaya County Assembly.
13. Matters election and nomination are matters that are governed by the law and the Constitution.
14. The Supreme Court in Hassan Ali Jobo & Another v Suleiman Said Shahbal & 2 Others Sup Ct Petition No 10 of 2014, discussed the moment of jurisdiction between IEBC and the Courts and had this to say at paragraph 65:

“The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer, according to Regulation 83(3), terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer's mandate, thus shifting any issue as to validity, to the election Court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer.”

15. The Supreme Court at paragraph 101 in the case of Moses Mwicigi & 13 others v IEBC & 4 others posed and answered the following question regarding nomination of candidates to the County Assembly:

“101. At what point in time does the Court become clothed with jurisdiction to determine disputes relating to the nomination of members of a County Assembly, by virtue of Article 177(2)(b) and (c) of the Constitution? Is it after the issuance of Gazette Notice by the IEBC, or at the close of elections when the nomination process begins?”

16. In answering the above question as posed by the Supreme Court, right from paragraph 102, the Apex Court stated as follows:

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“102. Article 90(2) of the Constitution provides that the IEBC shall be responsible for the conduct and supervision of elections, in respect of seats provided for under clause (1). Seats in this category include the special seats provided for under Article 177 (1) (b) and (c) of the Constitution. And these seats, by Article 90(3), “shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.”



[103] Section 36(4) of the Elections Act provides that “within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.”

[104] Section 36 (7) (8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:

“(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.”

[105] It is clear from the foregoing provisions that the allocation of nomination-seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party.

On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazetting of the nominees’ names by the IEBC, as an integral part of the election process.[emphasis added]

[106] The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court. [emphasis added].

[107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.[emphasis added]

[108] We have taken note of the argument by counsel for the 3rd, 5th and 6th respondents, that what was before the Court of Appeal (and the High Court), was not an “election petition”, but a constitutional petition seeking to prevent the violation of the rights of the respondents. Counsel for the 3rd respondent urged us to distinguish between an “election petition” and a contestation over the “validity of a political-party list”. On this question, however, the broader



spectacle is compelling: the electoral-process is dominant; and it allows no separation between Article 90 (which deals with party-list seats) and Article 177 (which deals with membership of County Assemblies).[emphasis added]

[109] The respondents had sought a declaration that the list of nominees for Nyandarua County Assembly published by the IEBC, had violated Articles 90, 98, 174 and 177 of the Constitution, as it purported to exclude Ndaragwa, O’l Kalau and O’Jororok Constituencies. Indeed, one of the respondents’ contentions in the Court of Appeal was that the High Court erred by failing to consider the diversity of Nyandarua County, in the formulation of TNA’s party list. Is it conceivable that such a petition had nothing to do with elections, and was only concerned with constitutional questions? Not in our view: this was a petition contesting the nomination of the appellants’ nomination which we hold to have been an integral part of the electoral process, in the terms of the Constitution and the electoral law.[emphasis added]

[110] It follows that only an Election Court had the powers to disturb the status quo. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the Elections Act. The High Court had declined jurisdiction on the perception that this dispute ought to have originated at the Political Parties Disputes Tribunal. The Appellate Court, however, assumed jurisdiction, and issued Orders as follows:

“(a) An order of certiorari to issue to quash the decision of the IEBC’s Nominations Dispute Resolutions Committee.

(b) The two TNA nominee party lists published on 15th and 16th May, 2013 revoked, and TNA ordered and directed to submit within 7 days two distinct and valid lists of nominees to the IEBC (pursuant to Section 36(1)(e) and (f) of the Elections Act and Articles 90(1)(e) and 177(1)(b) and (c) of the Constitution).

(c) The IEBC directed to qualify and select qualified persons from the resubmitted lists within 7 days of the resubmission.”

(111) The foregoing Orders, it is to be noted, were the very ones sought by the 3rd respondent, in their memorandum of appeal to the Court of Appeal, in Civil Appeal No. 224 of 2013 dated 28th August, 2013. These Orders had the effect of annulling the appointment of the applicants, whose names had been gazetted, and who had taken the oath of office as the TNA-nominated members of Nyandarua County Assembly.[emphasis added]

(112) The Constitution, in Article 87, thus provides:

“(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”

Pursuant to Article 88 (4) (e) of the Constitution:



- (113) The role of the Independent Electoral and Boundaries Commission (1st respondent) is provided for in Article 88(4) of the Constitution, as follows:
- “The Commission is responsible 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 election results....”
- (114) By virtue of legislation as envisaged under Article 87 of the Constitution, the Election Court is recognized as the Judiciary’s forum of resolution of electoral disputes. “Election Court” is defined in the Elections Act as: the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a); or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3)(a) of The Constitution}}, and the Resident Magistrate’s Court as designated by the Chief Justice in accordance with Section 75 of the Act. Appeals from the High Court on election matters lie to the Court of Appeal, by virtue of Section 85 A of the Elections Act; while appeals therefrom lie to the Supreme Court, if admitted by the latter, pursuant to Article 163 (4) (a) or (b).[emphasis added]
- (115) The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the Act provides that:
- “A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”
- (116) The Act, in addition, provides for the appropriate remedies that Courts may grant, in the following terms (Section 75):
- “(3) In any proceeding brought under this section, a court may grant appropriate relief, including—
- (a) a declaration of whether or not the candidate whose election is questioned was validly elected;
- (b) a declaration of which candidate was validly elected;
or
- (c) an order as to whether a fresh election will be held or not.”
- (117) It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.[emphasis added]
- (118) On such a foundation of principle, we hold it to be the case that whereas the Court of Appeal exercised jurisdiction as an appellate electoral Court, it had not been moved as such, in accordance with Section 85 A of the Elections Act, and relevant provisions of the Constitution. The respondents



had moved the Appellate Court on the basis that they were aggrieved by the High Court's decision in judicial review proceedings, in which that Court had declined jurisdiction. This in our view, would have been a proper case for the Appellate Court to refer the matter back to the High Court, with appropriate directions."

17. In fortifying the Supreme Courts' pronouncement in paragraph 119 above, the apex Court revisited its earlier decision in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR Sup Ct Pt No 14 of 2014 as consolidated with Petition No 14A of 2014, 14B of 2014 and 14C of 2014^{3/4} in which the Court considered interpretive theory, in respect of *Kenya's Constitution of 2010* and observed that had the interpretative approach that the Supreme Court proposed in that decision been taken into account by other Superior Courts, and by the Magistrates Courts, this may have provided a solution to the Court of Appeal's task of interpretation. That the proposed theory would have been of service to the Court of Appeal, by focusing that Court's attention upon the constitutional, statutory, and regulatory texts within the history of Kenya's Constitution-making, besides other non-legal phenomena.
18. the Supreme Court further observed quite authoritatively that one of the objectives of our Constitution is the establishment of firm institutions, that have a pivotal role in its implementation. that our electoral dispute- resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC, which institutions have to comply with the *Constitution* and the electoral laws and regulations.
19. The above exposition by the Supreme Court settles the issues raised in the 1st Respondent's Preliminary Objection dated October 9, 2022 to the extent that I have no doubt in my mind that the present Petition offends Section 75 of the *Elections Act*, No 24 of 2011 as read with Article 88 of the *Constitution of Kenya*. This is because in the petition, the Petitioner seeks the compulsion of the 1st respondent to gazette the petitioner to represent persons with disabilities to the Siaya County Assembly, after the 1st respondent had already gazette persons duly nominated by the 2nd respondent following the 1st respondent's rejection of the nomination of the 2nd Interested Party as he did not produce a certificate of disability from the 1st interested party, the National Council for persons with disabilities so as to represent persons with disabilities.
20. In other words, the Petitioner essentially is contesting the failure to nominate any other person to the Siaya County Assembly to represent persons with disabilities. From the above detailed judicial pronouncements from the Supreme Court which I have deliberately reproduced in this judgment, I find that this being a process that is part of elections, an election petition would have been the only recourse for the present Petitioner. The other available alternative avenue for the petitioner would have been approaching the 2nd Respondent's internal dispute resolution mechanisms, the IEBC, Dispute Resolution Committee or the Political Parties Tribunal to challenge the decision of the ODM party not to nominate any person to the Siaya County Assembly to represent persons with disabilities. It is not for this court to prescribe to the petitioner which way he should have gone but what is clear is that after nominations and gazette, the petitioner has remedies available in law to challenge the decisions of IEBC or his political Party and a Constitutional Petition like this one claiming for remedies including violation of his rights is not one of those avenues for ventilating disputes of this nature.



21. The above observation notwithstanding, Section 75 of the [Elections Act](#), No 24 of 2011 provides that:
- “A question as to the Election of a Member of the County Assembly shall be heard and determined by the Resident Magistrate’s court designated by the Chief Justice.”
22. The importance of jurisdiction is well settled under our Kenyan law. In the *locus classicus* that is [Owners of Motor Vessel ‘Lilian S’ v Caltex Oil \(Kenya\) Limited](#) [1989] KLR 1 the court stated that:
- “...Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”
23. Courts and tribunals derive their jurisdiction from statute and the [Constitution](#). The Supreme Court in Constitutional Application No 2 of 2011, [Re the Matter of the Interim Independent Electoral Commission](#) [2011] eKLR, (Par 29) held that:
- “Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution; by statute law, and by principles laid out in judicial precedent.”
24. In [Shadrack Mutua Kitili v Independent Electoral and Boundaries Commission & 17 Others](#) [2018] eKLR, (Par 30) it was held that:
- “The written law is very clear on this matter. The court seized of jurisdiction to determine the dispute that arose in the instant case is the Resident Magistrate’s Court. This court would be seized of jurisdiction to determine an appeal emanating from the decision of the Magistrate’s Court (see section 75 (4) of the Elections Act).”
25. The Supreme Court in the case of [Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others](#) (*supra*) held that:
- “[117]. It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’...
- [119] To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.”
26. For the above reasons, I find and hold that the 1st Respondent’s contention and submission that the Petition is improperly before this Honorable Court as the Petitioner ought to have filed an election petition in the Resident Magistrate’s court as stipulated under section 75 of the [Elections Act](#), No 24



of 2011 is valid. I uphold the preliminary objection and dismiss the petition herein as filed as this court is not seized of jurisdiction to hear and determine it.

27. I order that each party do bear their own costs of the petition.

28. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF JANUARY 2023

R.E. ABURILI

JUDGE

