



REPUBLIC OF KENYA



**Kibutha & 2 others v Independent Electoral and Boundaries Commission & another
(Petition E020 of 2022) [2023] KEHC 2377 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E020 OF 2022
TW CHERERE, J
MARCH 23, 2023**

BETWEEN

**MICHAEL MUTEMBEI KIBUTHA 1ST PETITIONER
DANIEL MUNYOKI MWANGANGI 2ND PETITIONER
LILIAN KATHAMBI PATRICK 3RD PETITIONER**

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT
THE CLERK MERU COUNTY ASSEMBLY 2ND RESPONDENT**

RULING

1. By Gazette Notice No 10712 dated September 9, 2022, the Independent Electoral and Boundaries Commission (IEBC) published names of various persons nominated to County Assemblies throughout the 47 counties.
2. Petitioners by Petition dated September 29, 2022 supported by an affidavit sworn by Michael Mutembei Kibutha (1st Petitioner), Petitioners complain that persons living with disabilities were left out of the nomination list for Meru County Assembly.
3. Upon being served with the Petition, 1st Respondent did not file any response. 2nd Respondent on the other on October 17, 2022 filed a Preliminary Objection on the ground that this court lacks jurisdiction to hear this Petition by dint of Section 40 (1)(f) of the *Political Parties Act*, 2011 and Section 75 (1) (A) of the *Elections Act*.



4. In *Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others*, Application No 2 of 2011 [2012] eKLR cited by the 2nd Respondent, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:

“(68) A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....”

5. A reading of the Petition discloses that Petitioners are challenging election of members of County Assembly by nomination.

6. Section 75 (1) of the *Election Act* (the Act) provides that:

A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county. (1A) 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

7. Clearly, the dispute is an election petition disguised as a constitutional Petition. In the case of *Bernard Murage vs Fine Serve Africa Ltd & others* (2015) eKLR the Court stated:-

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

8. Concerning alternative remedy in lieu of constitutional remedies, Chacha J *Godfrey Paul Okutoyi & others vs Habil Olaka & Another* (2018) eKLR stated:

Paragraph 65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

9. From the foregoing, I do not find it difficult to agree with the 2nd Respondent that the matter raised in this Petition is an election dispute that ought to be properly filed in the Election Court which is the Magistrate’s Court duly designated by the Chief justice pursuant to Section 75 (1) of the *Act*.

10. From the foregoing analysis, I find and hold that the preliminary objection raised by the 2nd Respondent has merited.



11. It is therefore hereby held.

1. This court lacks the requisite jurisdiction to determine the matter herein
2. The Petition is struck out with costs to the 2nd Respondent.

DATED AT MERU THIS 23rd DAY OF March 2023



WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Petitioners - Mr. Otieno for Otieno C & Co. Advocates

For 1st Respondent - N/A

For 2nd Respondent - Benson Kinyua Ngure Advocate

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