



Kariuki & another v Thang’wa & 4 others; Ethics & Anti-Corruption Commission (Interested Party) (Petition E015 of 2022) [2023] KEHC 1963 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
PETITION E015 OF 2022
MM KASANGO, J
MARCH 17, 2023
(FORMERLY CONSTITUTIONAL PETITION NO. E380 OF 2022)**

BETWEEN

CHARLES MAINA KARIUKI 1ST PETITIONER

SAMUEL KAHARA MACHARIA 2ND PETITIONER

AND

PAUL KARUNGO THANG’WA 1ST RESPONDENT

FERDINAND WAITITU BABAYAO 2ND RESPONDENT

UNITED DEMOCRATIC ALLIANCE 3RD RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The two petitioners approached this Court by their petition dated July 22, 2022. The petitioners simultaneously filed the said petition and the notice of motion application of the same date seeking:- The application be certified urgent and be heard *ex parte* at first instance. The court be pleased to certify pursuant to Article 165(4) of the [Constitution](#) this petition raises substantial question of law and should therefore be heard by three judges assigned by Chief Justice. That the judges assigned to hear and determine the petition should exclude Justice A Mrima, DS Majanja, M Thande and R Ngetich.



2. The first respondent, on being served filed a notice of preliminary objection and grounds of opposition. The interested party filed a replying affidavit.
3. The court directed that the notice of motion application and the preliminary objection be heard together.
4. The notice of motion is based on the ground amongst others that:-The matter is urgent because it relates to the country's general election scheduled for August 9, 2022 (now past).The 1st respondent although was removed/dismissed from office as Kiambu County Executive Committee for Youth Affairs, Sports, ICT and Communication by a resolution of the Kiambu County Assembly of 19th November, the said resolution has not been challenged or adjudicated upon by a competent court.The registration of 1st respondent to contest in 2022 General Election of Senatorial seat Kiambu County Constituency is violation of Article 75(3) and 99 of the Constitution view of the unchallenged resolution to impeach him.The petition raises substantial questions on enforcement of chapter 6 of the constitution, the protection under Article 75(3) and 99(3) of the Constitution, whether a Notice of Appeal constitutes an Appeal for purpose of Article 99(3) and the nature and extent of jurisdiction of the High Court between the conclusion of dispute resolution by IEBC under Article 88 and the Constitution and the election day.
5. The 1st respondent's filed preliminary objection on the following grounds:-This Court lacks jurisdiction to determine the issues before court by the aforesaid application and the petition in view of Article 88(4) of the Constitution and Section 74(1) of the Election Act.The application is premature for having invoked this Court's original jurisdiction without first exhausting statutory established mechanisms.The application and petition are res judicata.The petition does not raise substantial question of law.
6. Mr Kibe Muigai on behalf of the petitioners made oral submission in support of the application. He submitted the law is clear under Article 165(4) of the Constitution that a matter that raises substantial issues can be referred to the Chief Justice. In this case, he highlighted that the petition raises a question in respect of Chapter 6 of the Constitution. The second ground raised by petitioners was that the conflict between Article 75(3) and Article 99(3) needs resolution. The third issue was that the court needs to resolve whether filing a notice of appeal constitutes an appeal for the purpose of Article 99(3). The fourth issue was the jurisdictional issue between the High Court and the dispute resolution of IEBC.
7. It is the above issues the petitioners seek to persuade this Court to refer to the Chief Justice for the formation of a bench of judges to determine.
8. The 1st respondent opposed the petitioner's application to refer the matter to the Chief Justice. That opposition is in the form of preliminary objection and the grounds of opposition.
9. 1st respondent's learned counsel Mr Nganga cited the Court of Appeal case of Owners Of The Motor Vessel "lillian S" Vs Caltex Oil (kenya) Ltd (1989) KLR and relied on its holding thus:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has jurisdiction there would be no basis for continuation of proceedings pending other evidence. 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.”
10. Mr Nganga additionally submitted that if this Court determines it has no jurisdiction over this matter, this matter cannot be referred to the Chief Justice.



11. 1st respondent relied on the holding of the Supreme Court in the case of *Sammy Ndungu Waity V. Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR where guidance was given on the jurisdiction to hear pre-election disputes.
12. 1st respondent also referred the court to the case *Okoti & 15 Others Vs Attorney General & 7 Others; Commission On Administrative Justice & 15 Others (Interested Parties)* Constitutional Petition No EO90, E168, E221, E230, E234, E017, E109 & E010 of 2022 (Consolidated)(2022) KEHC 3209 (KLR). In that case 1st respondent submitted his suitability for elective position was questioned and the bench of 3 judges held that the petitioners were required to approach IEBC to resolve pre-election dispute. Having not referred their dispute to IEBC 1st respondent argued that it was futile for the petitioners to seek referral of this matter to the Chief Justice.
13. The 1st respondent also referred to the case *Republic Vs Independent Electoral & Boundaries Commission Dispute Resolution Committee & Another; Thang'wa (Ex-parte); Party (Interested Party)* Judicial Review Application No 2 of 2020) 2022 KEHC 10043 (KLR). He submitted that the court in that case dealt with Article 75 and 99 in overturning the decision of the IEBC and that the petitioners and if they were dissatisfied with that determination they ought to have appealed. 1st respondent therefore stated that this action in view of those determinations is res judicata.
14. On behalf of the 3rd respondent, Mr Kamotho advocate associated himself with 1st respondent's submissions by stating that the petitioners had failed to approach the appropriate forum with this matter. He also submitted the issue raised by the petitioners is not novel, nor is there substantial question in law to be determined since the issue that has been subjected to two previous court actions and therefore to subject 1st respondent to this action on his qualification would be tantamount to overturn decisions of courts of concurrent jurisdictions.
15. Mr Ochieng, advocate for the 4th respondent submitted that because jurisdiction is everything, on it being raised, the court is duty bound to pronounce itself without further ado. In that regard, learned counsel referred to the case of *Sammy Ndungu Waity VS IEBC* (supra) and stated that the petitioners failed to file a complaint before IEBC and that accordingly, this Court has no jurisdiction over this case.

Analysis

16. I will begin by reiterating what was submitted by the respondents; that once a jurisdictional issue is raised, jurisprudence dictates that the court has to determine that issue first and foremost. This is what was resolutely pronounced in the case of *The Owners Of Motor Vessel "lilians" V Caltex Oil* (supra). To restate that holding, jurisdiction is everything and without it the court has no power. The 1st respondent filed preliminary objection objecting to the notice of motion application and the main petition. It is conceded by all the parties that, the issue raised in the petition which the petitioners seek it be referred to the Chief Justice for the empanelment of bench of judges, is a pre-election dispute. In view of the jurisprudence on challenge on jurisdiction, I will first consider whether this Court has jurisdiction before embarking on the application.
17. Article 88(4) of the *Constitution* provides:-
 - "4. The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, 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;”
18. That Article and Section 74(1) of the *Election Act* mirror each other in their provisions. They relate to the resolution of pre-election dispute and including disputes relating to or arising from nomination. The above provisions are to the effect that those disputes are resolved by IEBC through the Committee on Dispute Resolution. The Supreme Court in the case *Sammy Ndung’u Waity Vs Independent Electoral & Boundaries Commission & 3 Others* (supra) stated that where the Constitution or any other law establishes an organ with clear mandate for the resolution of the given genre of disputes, no other body can lawfully usurp such power.
19. The dispute the petitioners seek to have resolved by this petition is that of nomination of the 1st respondent to vie for senatorial position in Kiambu County. The petitioners seek an order of declaration amongst others, that the 1st respondent is disqualified from holding the office of Senator in view of the Resolution of Kiambu County Assembly of November 19, 2019, dismissing 1st respondent from his then position as County Executive Committee for Youth Affairs, Sports, ICT and Communication.
20. The Supreme Court has had more than one occasion pronounced itself on the issue of jurisdiction over pre-election disputes.
21. The Supreme Court in the case of *Sammy Ndung’u Waity Vs Independent Electoral & Boundaries Commission & 3 Others* stated thus:-
- “(61) That an election is a process, a continuum, which begins from the registration of voters right up to the declaration of results, is a truism. But this fact is not in itself capable of conferring jurisdiction on an Election Court, to inquire into the entire electoral process. Again, while we agree with the assertion that an election is a process, in the context of dispute resolution, it must be a structured process. That is why, the framers of the 2010 Constitution, were mindful of the need, for a clear roadmap for the resolution of disputes along this continuum. Hence those disputes that arise before an election are to be resolved by the organs established for that purpose. By the same token, those that arise, during and after the elections, are reserved for the Election Court. Indeed, the “Election Court” itself, comes into real existence, after the elections proper. . .
- (62) We are also in total agreement with the assertion that disputes relating to nominations or eligibility go to the root of an election. However, as we have observed elsewhere, this fact does not confer jurisdiction on an Election Court to determine “nomination related” disputes, precisely because, “these disputes” are reserved for the IEBC by Article 88 (4) (e) of the Constitution. An Election Court ought not to trample upon the electoral process like a colossus, in the face of clear and unambiguous provisions of the Constitution regarding its jurisdiction.
- (63) Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter.”



22. The Supreme Court once again in the case *Mohamed Abdi Mahamud V Ahmed Abdullabi Mobamad & 3 Others; Ahmed Ali Muktar (Interested Party)* [2019] eKLR restated its jurisprudence as follows:-

“(68) So as to ensure that Article 88 (4) (e) of the Constitution is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election Court under Article 105 of the Constitution, the Court developed the following principles:-

- (i) All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
- (ii) Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court;
- (iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;
- (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court;
- (v) The action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition;
- (vi) In determining the validity of an election under Article 105 of the Constitution, or Section 75 (1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.”

23. This Court finds and holds that the dispute in this petition falls within the disputes that should have been resolved through the forum set out in Article 88(4)(e) of the *Constitution*; that is by IEBC.

24. Additionally, it is this Court’s finding that the issue of qualification to vie for electoral position by 1st respondent was also indeed the subject of determination by Independent Electoral & Boundaries Commission Dispute Resolution Committee and the subsequent determination of that committee, disqualifying the 1st respondent from contesting an elective position was challenged by 1st respondent



in Kiambu High Court Judicial Review No 2 of 2022. The IEBC's determination was quashed by the court in that action by the court's judgment of July 7, 2022.

25. To proceed with this petition in the light of that determination by Kiambu High Court would be tantamount to sitting as an appeal court to a determination of a judge of coordinate jurisdiction. That would be a grave error.
26. I do also, as submitted by the respondents find that this petition is res judicata to the determination of the Kiambu High Court Judicial Review No 2 of 2022.

Disposition

27. Having considered the preliminary objection dated August 4, 2022 by the 1st respondent, I find and hold the same succeeds.
28. The orders of the court therefore are:-
 - a. The preliminary objection dated August 4, 2022 is upheld on grounds 1,2 and 3.
 - b. The petition for that reason is struck out with costs to all the respondents.

RULING, SIGNED DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of :-

Coram:

Court Assistant: Mourice/Julia

Kinoti & Kibe Advocates for petition: Ms. Wairimu HB Mr. Kibe Mungai

Mbugua Ng'ang'a advocates for 1st Respondent: Mr. Isahi HB Mr. Nganga

Purissima Wambugu Advocate for Interested Party: Ms. Wambugu

For UDA 3rd Respondent: N/A

For IEBC 4th respondent: N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE

