



**Mawira v Independent and Electoral Boundaries Commission & another; Mwaura & another
(Interested Parties) (Petition E006 of 2022) [2023] KEHC 17753 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
PETITION E006 OF 2022**

LW GITARI, J

APRIL 13, 2023

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
1, 2, 10, 19, 20, 22, 23, 27, 28, 41, 47, 48, 50, 90, 88, 177,
232 AND 236 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS**

BETWEEN

ANTONY MAWIRA PETITIONER

AND

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

CLERK THARAKA NITHI COUNTY ASSEMBLY 2ND RESPONDENT

AND

JOEL MWANGI MWAURA INTERESTED PARTY

ZACHARIAH MWANIKI NJAGI INTERESTED PARTY

RULING

1. The Petitioner instituted these proceedings vide a Petition dated October 3, 2022 claiming a violation of his fundamental rights and freedoms. In the said Petition, the Petitioner seeks for the following orders:



- a. A declaration that the Respondents discriminated against the persons with disability shortlisted by political parties that participated in the 2022 general election in Tharaka Nithi County in the published gazette notice no 10712 vol CXXV-No 186.
 - b. The honourable court be pleased to issue an order of certiorari quashing the Respondent's published gazette notice no 10712 vol CXXV-No 186 Schedule 1.
 - c. A declaration that the Respondents violated the persons with disabilities rights to civil and political representation in the County Assembly of Tharaka Nithi.
 - d. That the honourable court be pleased to issue an order compelling the Respondent to include the names of the Petitioner in a republished gazette notice in line with special seats for persons with disabilities.
 - e. Costs be provided for.
2. On October 19, 2022, the 2nd Respondent herein filed a Notice of Preliminary Objection to wit that this Court lacks jurisdiction to hear and determine the subject constitutional petition. In verbose, the Notice of Preliminary Objection by the 2nd Respondent stated:
 - a. That the Honourable Court lacks jurisdiction to hear and determine them as stated by the provisions of Section 40(1)(a) of the *Political Parties Act, 2011*;
 - b. That the Honourable Court lacks jurisdiction to hear and determine them by the provisions of Section 75(1)(A) of the *Elections Act, 2011*; and
 - c. That the Honourable Court lacks jurisdiction to hear and determine them by dint of the Doctrine of Exhaustion.
 3. The Preliminary Objection was canvassed by way of written submissions.
 4. It was the Petitioner's submission that the *Constitution* is the supreme law of the land and it guarantees access to justice for every person. That in interpreting the provisions of Section 75(1)(a) of the *Elections Act*, this Court should not disengage from *the Constitution*. He relied on the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others* [2014] and prayed for the preliminary objection to be dismissed with costs to him.
 5. On the other hand, the 2nd Respondent submitted that this Honourable Court does not have jurisdiction to entertain the instant Petition as it is not the proper election court designated to hear the instant dispute. According to the 2nd Respondent, while the instant petition is portrayed as a constitutional petition, it actually involves elections issues around party nominations. The 2nd Respondent thus submitted that the right forum to determine this present dispute is a Resident Magistrate's Court properly designated as an election court by the Chief Justice. He relied on several cases including *Judith Akinyi Ajwala & Another v Independent Electoral & Boundaries Commission & 4 Others* [2018] eKLR; *Honourable Eng Ephrahim Mwangi Maina v The Honourable Attorney General & 2 Others* Petition No 220 of 2011; *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR; *Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR; and *Rose Wairimu Kamau & 3 Others v IEBC* CA No 169 of 2013. The 2nd Respondent thus submitted that the objection should succeed.
 6. I have considered the Notice of Preliminary Objection dated October 18, 2022 as well as the submissions by the Petitioner and the 2nd Respondent herein. The main issue for determination is whether this Court has jurisdiction to hear and determine the dispute presented in these proceedings.



Analysis

7. In *Mukisa Biscuit Manufacturing Co Ltd -v- West End Distributors Limited* (1969) EA 696 it was held that a preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings.
8. Whenever there is a dispute on the jurisdictional competence of a court, the question of jurisdiction must be determined upfront. In *Owners of the Motor Vessel "Lilian S" -v- Caltex Oil (Kenya) Limited* [1989] KLR 1, it was stated as follows:

“Jurisdiction is everything and 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. The Supreme Court of Kenya has also been emphatic that “a Courts jurisdiction flows from either the Constitution or Legislation or both.....it cannot arrogate jurisdiction exceeding that is conferred upon it by law. See *Samuel Kamau Macharia -vs- Kenya Commercial Bank Limited & 2 Others* 2012 eKLR. Application No 2 of 2011 cited by the respondent.
10. It is not disputed that both the 1st and 2nd Interested Parties were nominated as members of County Assembly for Tharaka Nithi County Assembly vide the Gazette Notice No 10712 Vol CXXIV-No 186 that is dated September 9, 2022. This undisputed fact is central to determination of the present objection as the gazettelement of nominated members is key in determining the correct forum to hear and determine disputes arising from the nomination process. Section 75 of the Elections Act provides as follows:

“A question as to the validity of a County Governor shall be determined by the High Court within the county nearest to the county.

A question as to the validity of 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.”

11. It is clear from this provision that the court with jurisdiction arising from an election dispute is the Magistrate’s Court which has been duly designated by the Chief Justice.
12. On the other hand, The Political Parties Act which was established as an Act of Parliament to provide legislation, regulation and financing of political parties and for connected purposes. Section 40 establishes a Tribunal whose mandate is to determine disputes among the members of a political party. It provides as follows at Section 40(1)

"The Tribunal shall determine:-

- a. disputes between the members of a political party;
- b. disputes between a member of a political party and a political party;
- c. disputes between political parties;
- d. disputes between an independent candidate and a political party;
- e. disputes between coalition partners; and



- f. appeals from decisions of the Registrar under this Act;"
13. The Petitioner has contended that he was barred or denied the opportunity of contesting the position of the Speaker of the County Assembly of Tharaka Nithi County. This shows that the issue raised is based on the dispute between the member and the Political Party. Under section 40(2) of the *Political Parties Act* it is the Tribunal which has the mandate to determine such disputes provided that a party adduces evidence that it made attempts to subject the dispute to the internal dispute resolution mechanism.
 14. It follows that the Tribunal is mandated to hear disputes if the Political Party has refused or failed to apply the internal dispute resolution mechanism.
 15. This means that the first stop shop is for the member to refer the dispute to the Political Party and where the Political Party fails or neglects to resolve the dispute using its internal mechanism, the jurisdiction of the Tribunal is triggered. The Petitioner has not demonstrated that he referred the dispute to the Political Party before filing this petition. The Court of Appeal in the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR; cited by the 2nd Respondent, held that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, the procedure should be strictly followed.
 16. The Petitioner has not demonstrated that he followed the procedures for redress with the Political Party and ultimately in the Tribunal. In the circumstances in view of the nature of the dispute, the parties involved and the reliefs sought, it is my view that this court has no jurisdiction to entertain the petition.
 17. In *Orange Democratic Movement -v- Yusuf Ali Mohamed & 5 Others* [2018] eKLR the Court of Appeal found that:

“Gazettment of duly nominated or elected members of a County Assembly has consequences in terms of determining the forum that has jurisdictional competence to hear and determine disputes ensuing from the nomination or election process.”
 18. The Gazette Notice signifies the completion of the election through nomination and finalizes the process of constitution the respective assembly.
 19. The Court of Appeal in *Orange Democratic Movement -v- Yusuf Ali Mohamed & 5 others* (supra) went on to hold as follows in regard to the jurisdiction of High Court in determining a nomination dispute relating to membership to a county assembly:

“55. In the instance appeal, the issue at hand is whether the trial court had jurisdiction to hear and determine a nomination dispute relating to membership of the Lodwar County Assembly. In our considered view, the High Court had no jurisdiction for the following reasons:

 - a. Party nomination disputes after gazettment by the IEBC can only be heard and determined by way of an election petition. Neither a judicial review application nor a constitutional petition can resolve or initiate electoral dispute resolution after gazettment of nomination or election results.
 - b. As regards membership to the County Assembly, jurisdiction to hear an election petition is vested upon the Magistrates Court and not the High Court. In the instant case, the petition filed



by the 1st and 2nd respondent at the High Court in Lodwar were not election petitions before an election court presided over by a Magistrate duly gazetted by the Chief Justice.

- c. In addition, the prayers sought by the 1st and 2nd respondents in the Petitions before the High Court include prayer for de-gazettment of the 4th and 5th respondents who had already been gazetted as Members of the Lodwar County Assembly. The jurisdiction to deal with any such disputes after gazettment lies with the Magistrates Court which can only be moved by way of an election petition.
- d. The 1st and 2nd respondents cannot through draftsmanship and legal craftsmanship through pleadings in Petition Nos 2 and 3 of 2017 confer jurisdiction upon the High Court.”

20. Guided by the above authority which is binding on this Court, it follows that this Court lacks jurisdiction to determine disputes which arise on the issue of membership of the County Assembly. The test for a preliminary objection is whether it has the ability to dispose off the suit. The case-law which I have cited from the Supreme Court to the High Court shows clearly that there is a consensus that the High Court lacks jurisdiction to entertain the petition. In the circumstances, I find that the preliminary objection meets this threshold. The petition is not properly before this court. I order that:-

1. The preliminary objection is allowed.
2. The petition is struck out for want of jurisdiction.
3. Costs to the 2nd respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF APRIL 2023.

L.W. GITARI

JUDGE

