



**Ismail v Independent Electoral & Boundaries Commission (IEBC) & 2 others;
Clerk, County Assembly of Kajiado (Interested Party) (Election Petition
Appeal E002 of 2023) [2023] KEHC 18688 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
ELECTION PETITION APPEAL E002 OF 2023**

**FR OLEL, J
JUNE 19, 2023**

BETWEEN

MOHAMMED BASHIR ISMAIL APPELLANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

UNITED DEMOCRATIC ALLIANCE (UDA) 2ND RESPONDENT

ADEN HUSSEIN ALI 3RD RESPONDENT

AND

CLERK, COUNTY ASSEMBLY OF KAJIADO INTERESTED PARTY

*(Being an appeal from the whole of the judgement and decree of
the election court of Kajiado Hon. V. Kachuodho SRM dated and
delivered on 9th February 2023 in the Election Petition no E002/2022)*

RULING

1. This appeal arises from the judgement and decree of Hon V.Kachuodho (S.R.M) dated and delivered on 9th day of February 2023 in Kajiado Election Petition no.E002 of 2022, where she did find that the petition as filed was grounded on a pre-election disputes and thus the court did not have jurisdiction to hear and determine the same. Consequently, the trial magistrate dismissed the petition dated 16th September 2022.



2. Being dissatisfied and aggrieved by the said judgment the appellant did file this appeal and raised 9 grounds of appeal. In response to this appeal, the 3rd Respondent did raise a preliminary objection on points of law. The same was filed on 29th May, 2023 and it was based on the following grounds;
 - a. That the court lacks jurisdiction as all the issues appealed arise from pre-election nomination.
 - b. That the appeal as filed offends the provision of Article 88(4)(E) of the *Constitution* of Kenya 2010, Section 75(1) of the *Election Act, Political parties Act* and the *political parties dispute tribunal (procedure) Regulations* 2017.
 - c. The appeal is misconceived and is an abuse of the court process.
3. All the Respondents and the interested party supported the Preliminary Objection and filed their submissions in support of the same. The appellant did oppose the preliminary objection and filed his submissions on 24th May 2023. Parties took directions and it was agreed that the preliminary objection be heard and determined first.

1st, 2nd and 3rd Respondent & Interested Party Written Submissions

4. The Respondents and Interested Party stated that the question of jurisdiction had been succinctly canvassed by various decision with the most celebrated locus classicus being the citation of *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* 1989 KLR. The court could not arrogate itself jurisdiction nor could the same be assumed. A court's jurisdiction flowed from either the constitution or legislation or both. Reliance was placed on *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited and 2 others* (2012) eKLR and in the matter of Independent Electoral Commission (Applicant) Constitutional application no.2 of 2015.
5. The Respondent's submitted that from the pleadings filed, it was not in doubt that the dispute involved a pre-election dispute. Article 88(4) of the *constitution* of Kenya and Section 74 of the *Elections Act* no.24 of 2011 donated the power to conduct, supervise or arbitrate settlement of electoral disputes relating to or arising from nominations to the 1st Respondent. The dispute herein arose from the nomination of the 3rd Respondent as a member of the County Assembly of Kajiado to the exclusion of the appellant whose name was 3rd in the re-submitted party list published in the special Kenya Gazette no 10712 vol CXXIV – No.186. In the said Gazette notice, the 2nd respondent had been allocated two seats and any disputes arising out of such nomination ought to have been dealt with by the political party and IEBC.
6. The appellant had failed to follow the right procedure and/or failed to exhaust all the laid down mechanism as provided by statute. The court could not usurp the powers of the said offices allowed in law to deal with the said disputes. Reliance was placed on *Speaker of the National Assembly v Karume* Civil Application 92 of 1992 KECA 42 (KLR) 29th May 1992 (Ruling), *Samuel Ndungu Waity v Independent Electoral and Boundaries Commission & 3 others* (2019)eKLR, *Isaiab Gichu Ndirangu & 2 others v Independent Electoral & Boundaries Commission & 4 others* and *Kennedy Moki v Rachael Nyamai, IEBC and another* Kitui Election Petition no. 2 of 2017(2018)eKLR.
7. The Respondent's also relied on the citation of *Republic v the National Alliance Party of Kenya and another Exparte Dr. Billy Elias Nyongo* Nrb Judicial Review 61 of 2013(2013)eKLR, Lenaola J and *Diana Kethi Kilonzo and another v IEBC and others* constitutional and Human Rights Division Petition no.359 of 2013 (2013) eKLR where the High Court addressed the meaning to be attached to Article 88(4)(e) of the *constitution* of Kenya and Section 74(1) of the *Elections Act* respectively. The High Court had reiterated that it is only after the IEBC mechanism had been exhausted, that a party



was allowed go to the High Court to challenge the process and such a challenge would be through invoking the supervisory jurisdiction of the court under Article 165(6) of the Constitution.

8. The Respondent's further submitted that the appellant ought to have lodged his objection or dispute with IEBC within 7 days after the gazettelement in accordance with Article 88(4)(c) and Section 74(1) of the Election Act and thus forfeited his right to complain, when he did not do so. The dispute was undoubtedly a pre-election dispute which the court was not clothed with jurisdiction to deal with. Further reliance was placed on the case of Mohamed Abdi Mohammed v Ahmed Abdullahi Mohammed and 3 others, Ahmed Ali Muktar (interested party) (2019)eKLR.
9. The Respondent's prayed that this appeal be struck out with costs.

Appellant's submission in response to the preliminary objection

10. The appellant submitted that the trial magistrate erred in law and abdicated her judicial responsibility by wrongly declining jurisdiction to hear and determine the election petition. The trial magistrate misapprehended and misapplied the guiding principles of law as enunciated in the Locus Classicus case of Sammy Ndungu Waity v IEBC & 3 others (2019) eKLR. Further the magistrate had acted in a bias manner by failing to consider and take into account the uncontroverted evidence on record that the process of nomination of the 3rd Respondent was non-compliant with the constitution of Kenya, electoral laws and electoral regulations.
11. Regarding the issue of jurisdiction, the appellant submitted that this court derives its jurisdiction from Section 75(4) of the Election Act and its role was to visit the entire record and not limit itself to settling one matter. This was an appeal from decision of an election court and this court was well clothed with jurisdiction to determine matters of law in election matters. Reference was made to Gatirau Peter Munya v Dickson Mwenda Kithinji & 7 others court petition no.2B of 2014(2014)eKLR. The appellant's grounds of appeal were all hinged on matters of law only and the court therefore had jurisdiction to hear and determine the same.
12. The appellant further submitted that a preliminary point of law must consist of a pure point of law. It should be concise, specific and apparent out of the pleadings. The preliminary points raised were not specific nor were they concise and, thus failed to bring out clearly which point of law the appellant is alleged to have violated. The preliminary objection raised could thus not pass this test and could not be sustained. There was no clear point of law, which the appellant is alleged to have violated for this court to see that it lacked jurisdiction to hear and determine this appeal. Reliance was placed on Mukisa Biscuit Manufacturing & Company LTD v West End Distributors Ltd (1969) EA 696 and Mebbu Gelan Kalil and others v Abdul Kadir Sharrif Abdirahim & others (2015)eKLR .
13. The appellant further submitted that the gist of his grievance before the election court was the validity, eligibility and transparency of the nomination process and subsequent election of the 3rd Respondent to the County Assembly of Kajiado, and the election court wrongly ignored the statutory basis of his grievances and that also formed the basis of this appeal. The statutory regulations ignored were;
 - a. Section 34(6a) and 35 of the Election Act which provides that the 1st Respondent was duly bound to review party list to ensure compliance with the constitution of Kenya and Election Act and the same had to be submitted 45 days before the date of the elections.
 - b. Regulations 54 to 56(b) of Election (general) Regulations of 2012 re-emphasized that party list must be in consensus with the constitution of Kenya, Elections Act and al attendant Regulations and the 1st Respondent was duty bound to reject any party list which did not conform to the law.



14. From the material facts placed and evidence presented before the election court, there was clear and uncontroverted evidence that the 2nd Respondent submitted its further amended party list to the 1st Respondent on 5th August 2022, which list was officially received on 6th August 2022 (only two days before the conduct of general elections), while also noting that the said 6th August 2022 was the final day of entertaining complaints arising from nominations.
15. The appellant further submitted that the registrar of political parties did not certify the amended party list as required by law nor was the list subjected to public participation, it was not published in the local dailies as required under law nor were minutes of inter party dispute resolution mechanism availed/attached to the amended party list. The 1st and 2nd Respondent had acted in blatant breach and violation of the constitution, the electoral laws and election regulations as highlighted above and the subsequent election of the 3rd Respondent to the County Assembly of Kajiado was unlawful and in the appellants words “constituted a tragedy”.
16. The appellant final submissions were that contrary to the Respondent’s submissions, the Supreme Court case of *Sammy Ndungu Waity* (Supra) did not settle conclusively the jurisdiction of the court to handle the pre-election disputes. The case of *Mohammed Abdi Mohammed v Ahmed Abdullahi Mohammed & 3 others, Ahmed Ali Mukhtar (Interested party)*(2019)eKLR was more apt, where it was held that while determining the validity of an election under Article 105 of the *constitution* or Section 75(1) for the *Election Act*, an election court may look into a pre-election dispute if it determines that such a dispute goes to the root of an election and that the judicial process is never closed, especially in event of the occurrence of certain “tragedies”. The implication of the above finding by the Supreme Court, was that the trial court, “retained judicial residuum” from which the trial court may draw its powers to hear and determine pre-election questions in certain exceptional circumstances.
17. The appellant restated that this honourable court had the special jurisdiction under Section 75(4) of the *Election Act* to hear and determine an appeal triggered by “tragedies” from an election court especially when the fundamental issue involved violation of the constitution, the electoral law and Election Regulations made there under. It would thus be a travesty of Justice if this honourable court were to accept an invitation to abdicate its judicial responsibility by declining the jurisdiction to hear and determine the appeal. The appellant thus prayed that the preliminary objection be dismissed and the appeal be heard on merits.

Analysis and Determination

18. The 3rd Respondent’s preliminary objection in premised on the issue that this honourable court lacked jurisdiction to hear and determine this appeal as all issues raised/appealed from arises from a pre-election nomination dispute and secondly that the appeal as filed offends provision of Article 88(4)(e) of the *Constitution* of Kenya, Section 75(1) of the *election’s Act*, the *political parties Act* and the *Political parties disputes tribunal (procedures) regulations* 2017. This appeal was therefore misconceived and was an abuse of the process of court.
19. The High court of Kenya is established under Article 165(1) of the *Constitution* of Kenya and has original or appellant jurisdiction to hear matters conferred on it by legislation pursuant to Article 165(3)(e). Further under Article 164(b) the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.
20. Section 75(1a) and 4 of the *Election Act* no 24 of 2011 provides that



- (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 court designated by the Chief Justice.”

Further section 74(4) of the [Election Act](#) provides that

“An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be;

- a. Filed within 30 days of the decision of the magistrate’s court; and
- b. Be heard and determined within six months form the date of filing the appeal.

21. It is therefore clear that pursuant to the above provision of the [constitution](#) of Kenya 2010 and the [Election Act](#) this court has jurisdiction to hear and determine this appeal but only on issues of law.
22. The 3rd Respondent averred that this court lacked jurisdiction to hear and determined this appeal and the basis that all issues appealed from are pre-election dispute and that an election court is not clothed with jurisdiction to determined pre-election disputes including nomination of candidates. This was supported by the other Respondent’s/ interested party and they relied on several legal citation to buttress this position especially the Supreme Court case of [Sammy Ndungu Waity v Independent Electoral and Boundaries commission and 3 others](#) (2019)eKLR.
23. The Respondent on the other hand submitted that his petition challenged the validity, eligibility and transparency of the nomination process and subsequent election of the 3rd Respondent to the County Assembly of Kajiado. That, where by facts of the case it could be shown that there had been “tragedies” and blatant breach and violation of the constitution of Kenya, Electoral Laws and Regulations even if they related to pre-election disputes, the election court could intervene and look at the same especially if such disputes went into the root of the election. Reliance as placed in Supreme court case of [Mohammed Abdi Mohammed v Ahmed Abdullahi Mohammed and 3 others, Ahmed Ali Mukhtar \(Interested party\)](#) (2019)eKLR.
24. As already established by dint of provision of section 74(4) of the [Election Act](#) no. 24 of 2011 this court has jurisdiction to hear appeals arising out of decision of the electoral courts involving election of Members of the county Assembly. The said section as read together with Section 165(3)(c) does not limit the court jurisdiction, so long as the appeal is premised on issues of law.
25. The grounds of appeal relied on are hinged on matter’s of law and therefore properly before this court for determination. See [Gatirau Peter Munya v Dickson Mwenda Kithinji and 7 others](#) Supreme court petition no.26 of 2014(2014)eKLR.
26. Secondly the issue of pre-election dispute was the main sub substratum and the basis upon which the finding and determination by the honourable trial magistrate Hon. V. Kachuodho (SRM) was made and which is subject of this appeal. It would be absurd to shut out the appellant from the seat of justice and not hear his appeal on merit, on the basis of a preliminary objection based on the same grounds. To determine the nature of pre-election disputes and whether or not the trial court was right or wrong to so hold, would require that his court delve into facts surrounding the nomination process and as long as the preliminary objection has to be determined by also considering the facts, then it ceases to be a pure point of law.
27. The 3rd Respondent also submitted that this appeal offends provision of Article 88(4) of the [Constitution](#) of Kenya, Section 75(1) of the [Election Act](#), [Political Parties Act](#) and [political parties’ dispute tribunal \(procedure\) regulations](#) 2017.



28. Provision of Article 88(4) of the *constitution* of Kenya 2011 confer power to IEBC to settle electoral disputes including disputes relating to or arising from nomination, but excluding election petition and disputes subsequent to declaration of election results, while section 75(1) of the *Election Act* provides that electoral disputes involving Members of county Assembly shall be determined by Resident Magistrate courts as gazetted by the chief Justice.
29. This ground directly relates to ground one raised above, which dealt with jurisdiction and for which I have already found that this court is properly clothed with jurisdiction to handle this appeal. Therefore, the aforesaid provision of law do not bar this court from hearing and determining an appeal arising from a decision of an election court sitting to hear and determine dispute arising from nomination or election of a Member of the county Assembly as long as the appeal is purely based on legal points.
30. I do therefore find that the preliminary objection is misconceived as the issues raised therein are the substantive issues a determination was made, and are subject of this appeal. To purport to lock out the appellant on the same grounds without hearing the appeal on merit would cause a travesty of justice and undoubtedly deny the appellant his constitutional right to be heard.
31. I do find that the preliminary objection dated 12th April 2023 lacks merit and the same is dismissed with costs to the appellant.
32. I do also further give the following directions.
 - a. The appellant is given leave to file and serve further written submission in support of his appeal within the next 7 days. The same has to be filed and served by close of business 26.6.2023
 - b. Upon being served the Respondent's and Interested Party too are granted 7 days within which to file and serve further submission in opposition to his appeal. The same must be filed and served by close of business on 03.07.2023
 - c. Mention for further directions on 04.07.2023
33. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 19TH DAY OF JUNE, 2023.

In the presence of;

.....for Appellant
for 1st Respondent
for 2nd Respondent
for 3rd Respondent
for Interested Party
Court Assistant

