



Kioko v Independent Electoral & Boundaries Commission (IEBC) & 2 others (Election Petition Appeal E001 of 2023) [2023] KEHC 21238 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
ELECTION PETITION APPEAL E001 OF 2023**

MW MUIGAI, J

JULY 24, 2023

BETWEEN

MAINA DARIUS KIOKO APPELLANT

AND

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

JACOB KILONDI MACHEKELE 2ND RESPONDENT

MAINA DARIUS KIOKO 3RD RESPONDENT

(Being an Appeal from the judgment and decree of Hon. M. K. Mutegi (PM) sitting at the PM's Court at Tawa in Election Petition No. 2 of 2022 delivered on 23rd February, 2023)

RULING

Preliminary Objection

Background

1. The Appeal herein emanates from the judgment delivered on the February 23, 2023 in the Tawa Principal Magistrate's Court, Election Petition No 2 of 2022 seeking the following prayers:
 - a. That the Ruling of the lower Court delivered on January 6, 2023 be set aside;
 - b. An order for scrutiny and or recount be issued, as prayed in the application dated September 2, 2022;
 - c. The Ruling of the Lower Court delivered on November 30, 2022, be set aside;
 - d. The judgment of the lower court delivered on February 23, 2023 be set aside;
 - e. The amended Petition dated December 2, 2022 be allowed; and



- f. The Appellant be awarded the costs of this appeal and the costs of the lower Court.

Notice Of Preliminary Objection

2. The 3rd Respondent herein filed a Notice of preliminary objection dated April 4, 2023 based on the ground that Machakos High Court lacks jurisdiction to hear and determine the suit herein as filed by the Appellant.

Written Submissions

3rd Respondent/applicant Submissions

The legal issue for determination herein is whether the Court has jurisdiction to hear and determine the appellant's memorandum of Appeal dated March 21, 2023 as contained in his Record of appeal dated on even date.

3. Section 12 of the *Civil Procedure Act*, cap 21 Laws of Kenya states
12. Suit to be instituted where subject-matter situate Subject to the pecuniary or other limitations prescribed by any law, suits.
4. In the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR the Supreme Court of Kenya outlined the following succinct context of jurisdiction;

“(35) In the above regard, we note that in almost all the legal systems of the world, the term “jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

5. Also in the case of *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (K) Ltd* [1989] eKLR the Court held that;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



6. The subject matter of the Appeal before this Court relates to election of the MCA for Kiteta Kisau ward within Makueni County therefore this court is the wrong forum for its filing, hearing and determination as the Court is situate outside the local limits of the subject matter of the suit.
7. The Appellant herein does not live in Machakos and it is not clear why this dispute is before this Court as the other MCA Appeals within Makueni court have been filed/or heard at the High Court at Makueni which is the competent Court as well as properly constituted.

Appellant/respondent's Submissions:

The legal issue for determination herein is whether the 3rd Respondent's Preliminary Objection has merit.

8. Reliance is made in the case of *East Africa in Mukisa Biscuits Manufacturing Co limited v West End Distributors Limited* [1969] EA 696 and the Appellant submits that a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
9. The allegation by the 3rd Respondent that the Appeal herein which emanates from the judgment over an election dispute in Kiteta Kisau Ward within Makueni Court ought to have been lodged/ heard by the High Court at Makueni as this Court is situate outside the local limits of the subject matter of the Appeal, it is submitted that the authority cited by the 3 Respondent relates to Magistrate's Court geographical jurisdiction which does not apply to High Court.
10. The jurisdiction of the High Court is set out in *the Constitution* and as such can only be limited by *the Constitution* itself. Article 165 which establishes the High Court gives it unlimited original jurisdiction in civil and criminal matters. The only fetter to this jurisdiction is set out in Article 165 (5) which states;-
 - (5) The High Court shall not have jurisdiction in respect of matters-
 - a) Reserved for the exclusive jurisdiction of the Supreme Court under this constitution; or
 - b) Falling within the jurisdiction of the Courts contemplated in Article 162 (2)
11. In the case of *Gideon Mwangangi Wambua & Anor v IEBC & 2 others* [2013] the Court held that, in the absence of the limitation placed upon the High Court under Article 165 of *the Constitution* with respect to the handling of Election Petitions save Petitions arising from Presidential Election Petitions, no limitation can be placed upon the jurisdiction of any High Court Judge to hear and determine Election Petitions whose jurisdiction is conferred upon the High Court to determine.
12. Rule 34 [3] of the *Elections [Parliamentary and County Elections] petition Rules, 2017* the Memorandum of Appeal shall be filed at the nearest High Registry.
13. It is finally submitted that this Court has the requisite jurisdiction to determine the instant Appeal.

Determination

14. I have considered the 3rd Respondent's Notice of Preliminary Objection which is based on the ground that this court lacks the jurisdiction to hear and determine the suit herein as filed by the Appellant. I have also considered the fact that there was no response to the Preliminary Objection.



15. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

16. In the case *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* [2022] eKLR, it was observed at paragraph 20 that:

“20. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

17. Before proceeding to determine the issues raised herein, it is important that this court determines whether it has jurisdiction to hear and determine the issues raised herein.

In *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* [1989] KLR 1, Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...Jurisdiction is everything. 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.”

18. Similarly, the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, observed that:

“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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

19. Further, Sir Udo Udoma, CJ in *Uganda General Trading Co Ltd v N T Patel* Kampala HCCC No 351 of 1964 [1965] EA 149, opined as follows:

“The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand, the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity.”

Jurisdiction

20. Article 165(3) of *the Constitution* provides as follows:

- (3) Subject to clause (5), the High Court shall have—
(a) unlimited original jurisdiction in criminal and civil matters;



-
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

21. Article 165(5)(6) and (7) of *the Constitution*, thereof on the other hand provides:

- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) 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.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

22. In the present case, Counsel for the Respondent submitted that appeals of other Member of County Assemblies and Member of Parliament election petitions have been filed and/ or heard at the High Court at Makueni hence according to the Counsel there is nothing special about this case that warrants its filing in the wrong judicial forum. The Counsel further faulted Regulation 34 (3) of the *Elections (Parliamentary and County Elections) Petitions Rule 2017* which permits a memorandum of Appeal be filed at the nearest High Court registry within 30 days from the date of judgment terming the said provision a nullity for conferring jurisdiction on certain Superior Courts outside their geographical jurisdiction limit. Counsel avers that jurisdiction of a judicial forum is a core issue which must be vigorously scrutinized where an issue is raised as to the lack of it on the part of a court.

23. On the other hand, Counsel for the Appellant submitted that the preliminary objection is frivolous as it does not raise any pure point of law further that the query that this honorable Court lacks the geographical jurisdiction to hear and determine this Appeal is a matter of evidence which cannot be determined by way of a preliminary objection. Counsel for the Appellant submitted further that the argument on distance is a factual consideration which cannot be considered by way of preliminary objection.

24. Having regard to the submissions of both Counsel in this matter and in light of the authorities cited above, I am of the view that this court is properly clothed with sufficient jurisdiction to hear the appeal. Geographical distance alone cannot limit the jurisdiction of this court which limit has not been taken away by *the Constitution* or statute. Geographical limit or distance is a factual issue which this court can deal with and determine at its discretion. An averment by Counsel for the Respondent that Regulation 34 (3) of the *Elections (Parliamentary and County Elections) Petitions Rule 2017* is a nullity and therefore unconstitutional is misconceived as the said Regulation has not been subjected to any court to determine its constitutionality or otherwise. I am in agreement with the Counsel for the Appellant that the query of that this Court lacks the geographical jurisdiction to hear and determine this Appeal is a matter of evidence which cannot be determined by way of a preliminary objection.

25. I am persuaded by *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* [Supra] where it was observed a that:

“For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts



pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

26. The Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [Supra] observed inter alia that:

“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.

27. Rule 34 [3] of the *Elections [Parliamentary and County Elections] Petition Rules, 2017* prescribes that the Memo- randum of appeal be filed at the nearest Registry. However, the mandate is subject to prevailing circumstances of the time.

28. At the time when the Election Petitions were being heard, the Makueni High Court though operational the Court was on official tour of duty and hence logging instructions were varied from Makueni to Machakos High Court to ensure access to justice to all litigants..

29. Whereas the election laws spell out where and when to file the Memorandum of Appeal and provides process and procedures to facilitate hearing and determination of election matters, by virtue of Article 165 of *the Constitution* all High Courts have jurisdiction to hear and determine civil and criminal matters, but administratively certain Courts are earmarked to handle election matters that are time bound as other Courts continue with day to day matters in the Criminal and Civil Courts. Also, Elections Petitions and Appeals may be heard in the High Court but are allocated administratively.

30. Similarly, election matters that ought to be heard in specific High Court areas due to logistical, security and other legitimate concerns that would hinder expeditious disposal are considered, for example North Eastern Election Petitions are heard in Nairobi High Court.

31. In my view and having regard to the circumstances of this case herein, the Respondent will not suffer any prejudice on mere geographical limit. The disposal of the Election appeal is time bound. This Court finds that the preliminary objection fails the test and lacks merit.

32. I am therefore satisfied that the Appeal is properly filed before this Court the order which commends itself to me and which I hereby make is that the objection is dismissed and the appeal will be undertaken by this court the Court being a Court with the jurisdiction to hear and determine the said Appeal and is empowered to grant the reliefs sought therein.

33. Further Mention for Directions on July 31, 2023.

34. Orders accordingly.

RULING DELIVERED DATED& SIGNED AND IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF JULY 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W MUIGAI

JUDGE

DELIVERED IN THE PRESENCE OF:



NO APPEARANCE - FOR THE APPELLANT
NO APPEARANCE - FOR THE RESPONDENTS
PATRICK - COURT ASSISTANT

