



**Sumba v Kenya African National Union (KANU) Party & 3 others; Lutta (Interested Party)  
(Election Petition Appeal E004 of 2023) [2023] KEHC 20650 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20650 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
ELECTION PETITION APPEAL E004 OF 2023**

**PJO OTIENO, J**

**JULY 20, 2023**

**BETWEEN**

**MAJOR SULEIMAN KANYANYA SUMBA ..... APPELLANT**

**AND**

**KENYA AFRICAN NATIONAL UNION (KANU) PARTY ..... 1<sup>ST</sup> RESPONDENT**

**THE CLERK, KAKAMEGA COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**CYNTHIA LIVOLI ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**AMINA HANJIRA LUTTA ..... INTERESTED PARTY**

**JUDGMENT**

1. Before the trial court was an Election Petition lodged by the Appellant and seeking among other orders; a declaration that the 3<sup>rd</sup> Respondent was not qualified to be nominated by the 1<sup>st</sup> Respondent on account of the fact that the Political Parties Disputes Tribunal had determined that the 3<sup>rd</sup> Respondent was wrongly included in the 1<sup>st</sup> Respondent's last nomination list for Kakamega County Assembly and ordered that her name be expunged from the record.
2. A reading of the Petition reveal and show that the trial Court was being called upon to enforce the decision by the Tribunal but in an Election Petition. That notwithstanding, the Petition was founded solely on the decision of the Tribunal without it being disclosed that that decision had in fact been challenged in Kakamega High Court Civil Appeal No E068 of 2022.



3. In response to the Petition, the 4<sup>th</sup> Respondent by an Affidavit sworn on the November 11, 2022 averred and asserted that the complaint leading to the decision relied on was filed so late in the day, on the September 9, 2022, the date the 2<sup>nd</sup> Respondent was poised to publish those deemed elected for the special seats, and determined at 9.30 p.m. and that it was filed only one day after a similar complaint by the Interested Party being Kakamega PPDT Complaint No E22 of 2022 had been dismissed by the same Tribunal. It was thus contended that the Petition was a mischief and vexation for the 3<sup>rd</sup> Respondent having not participated could not be faulted on publishing those who stood elected.
4. On its part the 3<sup>rd</sup> Respondent filed an Affidavit opposing the Petition and contended that by the time the decision of the Tribunal was brought to its attention it had published the names of those elected vide the party lists and that its duty was merely to ensure that the party list complied with the law but not to alter it for that is the prerogative of the Political Party, 1<sup>st</sup> Respondent to come up with the list.
5. For the 2<sup>nd</sup> Respondent the response to the Petition took the position that it had not infringed on any of the Petitioner's rights or provisions of the *Constitution* and that it was never a party before the Political Parties Disputes Tribunal and further that no order from the said Tribunal was ever served upon him adding, in conclusion, that it had no part to play and indeed played no part in the manner the 4<sup>th</sup> Respondent was nominated, gazette and elected hence the Petitioner was said to be non-suited against it. The 1<sup>st</sup> Respondent filed no papers and did not participate at the hearing of the Petition just as it opted not to take part in this Appeal.
6. With the consent of counsel for the parties, the Petition was directed to be canvassed by way of written Submissions upon which the Election Court delivered a Judgment provoking the current Appeal.
7. In the Judgment, the Court having reviewed the materials tendered including submissions by all parties except the 1<sup>st</sup> Respondent, dismissed the Petition for various reasons including the fact that the same had not been proved to its satisfaction.
8. At the relevant portions, the Election Court said:

“...This Court is not superior to the PPDT, and it would be inappropriate for me to say that the PPDT received, entertained and determined the dispute when its jurisdiction had already ended. However, I must be guided by the law and the decisions of the superior courts. The jurisdiction of this court as an election court under S. 75 of the Act is “original”, and its duty is to hear an electoral dispute and render a decision thereon. Where the court finds that the dispute is a pre-election dispute, it is under an obligation to apply the principles enumerated above. As stated in *Sammy Ndung'u Waity v IEBC & 3 Others* (Supra), the only time that this court can entertain a pre-election dispute is, where the Petitioner has satisfied the court that (1) the dispute goes to the root of the election and (2) the petitioner was not aware or could not have been aware of the facts forming the basis of that that dispute before the elections...

...The PPDT has the powers to enforce its own decisions, including invoking the power to punish for contempt. The conflict arises, as in this case, where the PPDT makes orders that are incapable of being implemented, and the complainant thereafter files an election petition, seeking orders for enforcement of the same orders. That an appeal from that judgment is also pending at the High Court further complicates the position of this court. A party who is dissatisfied with the decision of the PPDT has a right to appeal against that decision in the High Court, under S.41(2) of the *PPA*. As was pointed out by the 4<sup>th</sup> Respondent, this court would find itself in a very embarrassing position were it to interfere



with the election by nomination of the 4<sup>th</sup> Respondent from the 1<sup>st</sup> Respondent's party list on the basis of the judgment, only for the High Court to thereafter reverse that judgment.

I now turn to the prayers in the petition. With regard to the 1<sup>st</sup> prayer, the Petitioner has not placed before the court any material to suggest that the 3<sup>rd</sup> Respondent breached any Constitutional, statutory or regulatory provision by issuing the Gazette Notice. This being the case, there is no ground upon which the court can declare the Gazette Notice void ab initio to the extent of including the name of the 4<sup>th</sup> Respondent as a nominated member of the County Assembly, from the 1<sup>st</sup> Respondent's party list.

With regard to the second prayer, the Supreme Court in *Moses Mwigigi & 14 others v IEBC & 5 others* (Supra) was categorical that once the 3<sup>rd</sup> Respondent issued the Gazette Notice, its mandate ended, and the election by nomination of the 4<sup>th</sup> Respondent from the 1<sup>st</sup> Respondent's party list could only be declared either valid or invalid through an election petition, pursuant to S. 75 of the Elections Act. Therefore, by the time the 3<sup>rd</sup> Respondent was served with the judgment and decree of the PPDT arising from the Complaint, it had no capacity to comply with the orders therein. It follows that this court cannot now make a declaration that the 3<sup>rd</sup> Respondent had the responsibility to ensure that the Gazette Notice complied with that judgment and decree, when the law is clear that the 3<sup>rd</sup> Respondent had no such responsibility.

This court, being an election court, can only grant the reliefs listed in S75(3) of the *Act*, that is, one, a declaration whether or not the 4<sup>th</sup> Respondent was validly elected, or two, a declaration as to who between the Petitioner and the Interested Party was validly elected, or three, an order whether or not the 1<sup>st</sup> Respondent's party list ought to be altered by removing the name of the 4<sup>th</sup> Respondent and replacing the same with the name of the Interested Party, and thus altering the election by nomination from the 1<sup>st</sup> Respondent's party list in favour of the Interested Party. To be able to do so, the Petitioner was required to place before the court such evidence as would persuade the court that the election of the 4<sup>th</sup> Respondent from the 1<sup>st</sup> Respondent's party list was tainted with illegalities and/or irregularities. The Petitioner has not done so, and in the absence of such evidence, this court is not persuaded to make any of the declarations sought in prayer 3 and 4 of the Petition. Consequently, the court cannot also grant the order sought in prayer 5, having not been persuaded that it is the Interested Party who was validly elected from the 1<sup>st</sup> Respondent's party list..."

9. It is the said pronouncements and the rendition that has led to this Appeal in which the Appellant raised a whopping twelve (12) grounds. In the submissions filed however, the issue for determination is only identified as one. To the court, a reading of those many grounds beg answers to the following questions:
- i) Whether the trial Court exceeded jurisdiction by holding that the decision by the Political Parties Disputes Tribunal was irregular.
  - ii) What was the judicial power and force of the decision of the Political Parties Disputes Tribunal (grounds 2 & 8).
  - iii) Whether the Election Court was right in its interpretation of the effective date of the gazette notice.
  - iv) Whether the 3<sup>rd</sup> Respondent had notice of the Judgment of the Political Parties Disputes Tribunal so to be expected to comply with it.



- v) Whose mandate was it to hear the Appellant’s complaint determined by the Political Parties Disputes Tribunal?
  - vi) Whether the evaluation of the evidence as applied to the law applicable was properly done by the trial Court (grounds 9, 10 and 11).
  - vii) Whether in ordering the release of the deposited security for costs the Election Court properly appreciated the law under Regulation 31(3) *Election (Parliamentary and County Election) Petition Rules 2017*.
10. It is however noteworthy that in his Submissions the Appellant collapses the grounds into one and isolates the issue for determination by the Court to be whether the Appeal is merited to be allowed. It is further note that in the said Submissions the Appellant’s Counsel deems it sufficient that the only issue is whether the decision by the 3<sup>rd</sup> Respondent in gazetting the 4<sup>th</sup> Respondent was a nullity is enough to dispose the Appeal. While the Court appreciates the approach by the Appellant to condense its case in the said fashion, the Court takes the view that on its mandate of proceeding by way of a retrial, it has to look at the record afresh and entirely.
  11. Being a first Appeal, the duty and mandate of the Court is to re-appraise and re-examine the entire evidence afresh with a view to coming to own conclusions, but while being mindful that it lacks the benefit the Election Court enjoyed in hearing and seeing the witnesses testify. In discharging its mandate towards determining the Appeal the Court will seek to answer the isolated questions, even if not sequentially and seriatim, but in a manner that concludes whether or not the trial Court can be faulted in its ultimate decision dismissing the Petition.
  12. Before delving into the mandate of the Court on a first appeal and into the merits of the appeal, it is important to point out that other than this Appeal, there was filed an Appeal challenging the decision of the PPDT. It is Kakamega High Court Civil Appeal No E068 of 2022 – Cynthia Livoli v Suleiman Kanyanya Sumba and another. I have perused the file and noted that it is yet to be set for hearing because even the Record of Appeal is yet to be filled.
  13. At the Case Conference in this Appeal, the Court asked the parties why the two Appeals could not be consolidated, but the Appellant took the view that such an order would prejudice his case. As a consequence, the Court acceded to the two being heard separately but the Court had the benefit of perusing that file.
  14. Doing the best it can, the Court will only make necessary comments about that decision, as far as it is necessary, while taking care not to make any comments that may prejudice the Appeal when it comes to determination before the other Judge. Even this early, it must be declared that a comment will have to be made on whether by the time the Political Parties Disputes Tribunal made its decision the 3<sup>rd</sup> Respondent was made aware, had the time and opportunity to comply.
  15. As said earlier, the propriety of the decision of PPDT is the subject of a separate appeal which is yet to be argued before a different Judge. The Court while exercise restraint so as not to prejudice the pending appeal, notes that the Appellant here fault the trial Court for having faulted that same decision without jurisdiction. To answer the first question, one must read the Judgment and establish what pronouncements were made by the trial Court.
  16. The only part of the Judgment that commented on the decision by the PPDT forms part of the excerpt of the Judgment pronounced above. In it there is no definite finding faulting the Tribunal by the Election Court. All the Election Court did was to highlight the confusion that arises by parallel consideration of election dispute, both pre and post-election, without delimitation of the timelines



when pre-election disputes give way for the post elections disputes. The Court finds that to have been a genuine concern and the election Court was entitled to make the comments it did while holding its caution not to delve into the merits of the decision. It is the finding and holding of the Court therefore that there was no attempt at finding fault with the decision of the PPDT.

### **What was the judicial power and force of the decision of the Political Parties Disputes Tribunal (grounds 2 & 8)?**

17. It is no doubt that the PPDT is a Tribunal standing in concurrent status with the Magistrates Court. Its decision therefore carries the usual and sacrosanct authority any other court order carries. As observed by the Election Court, it was not within its mandate to find, as it had been asked, that the PPDT entertained the matter when its mandate had expired. However, being an order by a Court of equal status, that decision was not necessary binding but would be received as evidence in terms of Part VIII of the *Evidence Act*. The Act at sections 44 and 45 obligates the Court to admit in evidence such Judgment provided the same is final and determines the matter finally.
18. In terms of the law, the trial Court was under obligation to accept the determination of the PPDT as final on the legibility of the 4<sup>th</sup> Respondent and the entitlement of the Interested Party save that, in the instant case the Judgment having been subjected to an Appeal which is still pending, was not final. Being not final the Court was within its right to abstain and restrain from feeling bound by the determination.
19. This Court finds nothing untoward in the manner the Election Court dealt with the evidence of the decision by the PPDT in Kakamega No E22 of 2022 so as to justify the interference with the decision of the trial court.
20. Up to this juncture, it could be sufficient to pen off and say that the only evidence placed before the Court to mount the Petition was an inconclusive evidence which was not sufficient to justify nullification of the election, but there are yet more crucial questions for consideration. The first is, what was the effective date for declaration of those elected for the Special Seats?
21. Various institutions and adjudication organs are created under the law and vested with jurisdiction to handle disputes. Ideally, each ought to have its time and sphere of operation and must remain within such a sphere to respect the all-important normative that jurisdiction is everything without which a judicial body must down its tools.
22. As said earlier, the only foundation of the petition before the Election Court was that the nomination of the 4<sup>th</sup> Respondent had been nullified by the PPDT to which a complaint was lodged on the September 9, 2022 and determined the same day at about 9.30 pm By that date the 3<sup>rd</sup> Respondent had compiled a list pursuant to articles 90 as read with 177.
23. That the 3<sup>rd</sup> Respondent gazette the 4<sup>th</sup> Respondent as duly elected has not been in contest. The contest appears to be whether on that effective date of that determination was the date of the gazette or the date of its publication.
24. Because the publication of the names of nominated members of County Assembly is mandated by the Elections Act, the gazette notice, in this case No 10712 of September 9, 2022, is a statutory instrument under the *Statutory Instruments Act*, No 23 of 2013. By dint of section 23 of that statute the effective date of the instrument is the date assigned by it and not necessarily the date of the publication of the gazette notice.



25. That question presented itself for determination by the Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal and two others* [2014] eKLR, and the Appex Court determined and held:
- “...The purpose of the gazetted notice in view of the process detailed in this Judgment, cannot be termed as the instrument of declaration of the election results.”
26. The disputes before the Supreme court in the cited case was declaration of results of general elections and it was authoritatively rested that the act of declaration takes place before the publication of the gazette.
27. When applied to the facts in this case, the declaration by the 3<sup>rd</sup> Respondent is done when the process of designation of special seats was done on the 9.9.2023. I choose to stop at this point without going further for I take the view that the effect and appreciation of the effective date must await the determination of the appeal against the political. However, as there is exist a ground of appeal challenging the Election Court’s interpretation of the effective date, I do answer the question and declare that the trial Court was apt to the point of law in its determination.
28. At page 327 of the record (page 27) of the Judgment, the Election Court held:
- “...by the time the 3<sup>rd</sup> Respondent was served with Judgment and decree of the PPDT arising from the complaint, it had no capacity to comply with the orders therein.”
29. That decision on its face was merely flowing the binding decisions of the superior Courts that once a declaration is made, the 3<sup>rd</sup> Respondent has no jurisdiction to change the outcome and only the Court may intervene.
30. The foregoing determination also answers the next question whether the 3<sup>rd</sup> Respondent was served on time to be in a position to comply with the determination of the PPDT. The answer is that there was no time on the side of the 3<sup>rd</sup> Respondent to comply with the orders issued in the night on a day it had made its declaration.
31. As noted earlier, in offering Submissions on this appeal, the Appellant chose to be global and address the appeal as capable of determination of the question of whether the presence and existence of the Judgment by the PPDT made all steps taken thereafter as null and void and of no legal consequence. The Court’s appraisal of the determination by the Election Court is that the analysis of the evidence when applied to the factors pleaded is beyond reproach. Being beyond reproach, I do find no basis to interfere with the determination reached.
32. The last point concerning costs is determinable by going back to the principle of law that costs are at the discretion of the Court and ordinarily follow the event unless the Court decides otherwise for special reasons to be recorded. In the Judgment now challenged in the appeal, the Court said:
- “In the interest of fostering party unity, we order each party to bear its own costs.”
33. That decision to this Court as a first appellate Court addressed the relevant consideration that befalls a trial Court for determination. The law allows the Court to cap costs and in doing so



to appreciate the extent of time spent by parties and the general importance of the matter to the parties. That is all I see the trial Court to have done.

34. The law under Regulation 31(1) & (3) of the *Election (Parliamentary and County Election) Petition Rules, 2017*, permit the Court to order the refund or disposal of the deposit to the person entitled to receive it. In ordering that the deposit be shared between the 4<sup>th</sup> Respondents equally pending taxation, the Court merely complied with the command of the law for which it deserves no interference.
35. Lastly, this appeal presents the challenge posed by the multifaceted dispute resolution fora and the different treatment of appeals by the High Court depending on whether the same comes for determination of the PPDT or the Magistrates Court as an Election Court.
36. Because Kenyans are unanimous, by the stipulation in the Constitution and *Elections Act*, that election disputes be determined with a definite timeline there is no reason why appeals from the PPDT are treated like they are never election disputes with no timelines. It is time the legislative authority reconsidered the provisions of Section 41 *Political Parties Act*, so that it aligns with the general norm that election appeals to the High Court be determined with the six (6) months period.
37. Equally it becomes untidy that on the very last date election to the special seats was being done there was still a window for the PPDT to receive and determine pre-election disputes. That window now presents the puzzle where the High Court is made to handle both pre and post-election dispute appeals at the same time. The Court's view that the time boundaries set by the Supreme Court in *Moses Mukayi & 14 others v IEBC & 5 others* if not well settled in the mind of all concerned need be broken down into short sentenced regulations and in plain terms.
38. In the end, the appeal is determined to lack merits and is dismissed with costs to the Respondents, the Court caps the said costs at Kshs 300,000/=.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF JULY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of: -**

**Mr Cohen Amanywa with Ms. Wangui and Mr. Osore for the Appellants**

**Mr Mulama for the 3<sup>rd</sup> Respondent**

**Mr Waweru for the 4<sup>th</sup> Respondent**

**N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**N/A for the Interested Party**

**Court Assistant: Polycarp**

