



**Osman v Galma & 3 others (Election Petition E001 of 2023)  
[2023] KEHC 22971 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
ELECTION PETITION E001 OF 2023  
JN NJAGI, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**ARARU SADIA OSMAN ..... APPELLANT**

**AND**

**GOLICHA SADIA GALMA ..... 1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**THE UNITED DEMOCRATIC ALLIANCE ..... 3<sup>RD</sup> RESPONDENT**

**THE CLERK OF THE COUNTY ASSEMBLY OF MARSABIT .... 4<sup>TH</sup>  
RESPONDENT**

*(Being an appeal from the ruling and judgment of Christine Wekesa, SPM, in Marsabit PM's Court Election Petition No.E001 of 2023 delivered on 13th December 2022 an 1st March 2023)*

**JUDGMENT**

1. The Appellant herein was on the 9<sup>th</sup> September 2022 gazetted by the 2<sup>nd</sup> Respondent (IEBC) as a duly nominated Member of County Assembly for Marsabit County as per the Party List presented to IEBC by the United Democratic Party (UDA), the 3<sup>rd</sup> Respondent, on the 24<sup>th</sup> August 2022. The nomination was challenged by the 1<sup>st</sup> Respondent through an election petition on the ground that the Appellant was not available for nomination in that her name did not appear in the final Party List submitted to IEBC and published in newspapers on the 27<sup>th</sup> July 2022 and as such she was excluded by law from nomination.
2. The petition was opposed by IEBC, the UDA and the Appellant. The IEBC in addition filed a Preliminary Objection dated 26<sup>th</sup> September 2022 seeking to strike out the petition on the ground that the election court did not have jurisdiction to hear and determine the matter as the Petitioner had not



exhausted other avenues of dispute resolution mechanism provided by the law in respect to party list nominations. The court in its ruling delivered on 13<sup>th</sup> December 2022 found that the Petitioner had indeed not exhausted the available avenues for dispute resolution through IEBC Disputes Resolution Committee and the Political Parties Disputes Tribunal (PPDT). However, that the suit that was before the court was in relation to an election dispute which is a preserve of an election court. The court then held that it had jurisdiction to entertain the matter and dismissed the Preliminary Objection and assumed jurisdiction over the matter.

3. After a full hearing the election court held that the final party list that was published in the newspapers on 27/7/2022 was altered to include the name of the Appellant yet no dispute had been filed with IEBC or PPDT. The court found that the Appellant was not validly nominated and consequently quashed her nomination. The court ordered IEBC to gazette the name of the 1<sup>st</sup> Respondent as the nominee to the County Assembly of Marsabit representing the youth under the 3<sup>rd</sup> Respondent Party, UDA.
4. The Appellant was aggrieved by both the ruling dated 13<sup>th</sup> December 2022 and the final judgment and lodged this appeal. The grounds of appeal are that:

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#### **Case for the Petitioner/1<sup>st</sup> Respondent at the Election Court**

5. It was the case for the Petitioner/1<sup>st</sup> Respondent before the election court that she is a member of the 3<sup>rd</sup> Respondent, UDA. That she applied to her party for nomination as a Member of County Assembly and her name was entered into the party's nomination list at No.1 under the marginalized category representing the interests of the youth. The party list was forwarded to IEBC who published it on its website on the 4<sup>th</sup> July 2022. The said party list was found by IEBC not to be compliant with the law and the party was advised to submit another list. The Party submitted another nomination list that was published by IEBC in the Standard newspaper on the 27<sup>th</sup> July 2022 wherein the Petitioner was still No.1 in the UDA party list. The name of the Appellant herein was not in any of the lists of 4<sup>th</sup> and 27<sup>th</sup> July 2022.
6. It was the averment of the Petitioner that on 24<sup>th</sup> August 2022 which was two weeks after the general election, she learnt that the IEBC had published a party nomination list in its website wherein her name was pushed to No. 5 in the list and the name of the Appellant entered in her place as No.1.
7. The Petitioner lodged a complaint with her party on 24<sup>th</sup> August 2022 demanding for a hearing with the Party's Internal Dispute Resolution Committee but the party never responded to her letter. She wrote another letter on 30<sup>th</sup> August 2022 but there was no response. Th IEBC then published the name of the Appellant in the Kenya Gazette on the 9<sup>th</sup> September 2022 as the party's nominee representing ethnic minorities under the marginalized category.
8. It was the contention of the Petitioner that her name was replaced from the list when there was no dispute lodged with the party against her nor was there a court order for her replacement. Further that the nomination of the Appellant was fraught with illegalities, irregularities and blatant breaches of the constitutional principles under Article 81 and 90 of *the Constitution*. She urged the court to uphold the decision of the election court.

#### **Case for the Appellant at the Election Court**

9. It was the case for the Appellant that she is a member of UDA, the 3<sup>rd</sup> Respondent herein. That she applied to her party for nomination as representative of the party in the minority marginalized category. That on the 27<sup>th</sup> July 2022 she learnt that IEBC had published the names of party list nominees



and her name was missing from the list. She then visited the party's regional office at Marsabit and complained to the party's Upper Eastern Chairperson as to why her name was omitted from the list. The chairperson noted the error and forwarded an amended list to the Secretary General of the Party on the 28<sup>th</sup> July 2022. Her name appeared top on the list in the marginalized category whereas the Petitioner's name was 7<sup>th</sup> on the list. That the Secretary General forwarded the names of the nominees to IEBC on the 5<sup>th</sup> August 2022 who published the names in their website on 24<sup>th</sup> August 2022. She did not receive any protest after the publication of her name on 24<sup>th</sup> August 2022.

10. The Appellant contends that she was lawfully nominated to represent a marginalized group. That the Petitioner's nomination was on the category of youth and therefore their nomination was not of similar category.
11. The Petitioner further contended that it was the responsibility of the party to prepare a party list in accordance with the statutes, *the constitution* and in line with its own priority. That political parties have the right under the rules in the event of errors to correct the list and further to review the same in the order of the party's own priority should IEBC reject the list as was the situation in the current case. That publication in the newspapers is a mere shortlisting of nominees that does not amount to the finality of the process as the essence of publication is to invite complaints from nominees or interested parties which might have an implication of altering the party list and the order of priority of a party list.
12. The Appellant contended that the Petitioner did not initiate any proceedings before the Political Parties Tribunal despite of the Tribunal being seized of jurisdiction.

#### **Case for 2<sup>nd</sup> Respondent/IEBC at the election court**

13. The case for IEBC as presented through the affidavit of its Director of Legal Services, Chrispine Owiye, was that it is the mandate of the Commission under Article 90(2) of *the Constitution* to conduct and supervise the elections for seats provided for under Article 90(1) of *the Constitution*. That Section 35 of the *Elections Act* 2011 require political parties to submit Party Lists to IEBC at least 45 days before the general elections. That IEBC received the party list from UDA on the 25<sup>th</sup> June 2022. That the Commission reviewed the list as provided under section 34(6A) and 34(6B) of the *Elections Act*, 2011 as read with Regulation 55(2) of the Election (General) Regulations and made recommendations requiring parties to re-submit the lists. This was communicated to the parties through a press release on 15<sup>th</sup> July 2022. On the 24<sup>th</sup> July 2022 the Commission received re-submitted lists from political parties including a list from UDA.
14. The Commission proceeded to publish the lists in two newspapers of nationwide circulation -The Standard and the Star - on the 27<sup>th</sup> July 2022. The Commission published a notice inviting members of the public to lodge complaints on any of the nominees with either of the two institutions constituted for that purpose – IEBC and PPDT. The timeline for lodging and determination of the disputes was between 28<sup>th</sup> July 2022 to 6<sup>th</sup> August 2022. The Commission's Dispute Resolution Committee did not receive any complaints regarding the publication of the party list from UDA specifically in relation to nomination to the marginalized list of Marsabit County Assembly.
15. After the dispute resolution period ended, affected political parties were required to review their party lists to comply with orders issued by the disputes resolution forums before re-submitting the same to the Commission. That even at this point political parties had the discretion to prepare their party lists and the respondent had no role in the preparation of the party lists. The UDA re-submitted its party list to the Commission who published it on its website without alteration on 24<sup>th</sup> August 2022. The Commission did not receive any complaints regarding the publication of the party list from UDA specifically in relation to its nominee to the marginalized list of Marsabit County Assembly. The



Commission on the 9<sup>th</sup> September 2022 gazetted the nominees as validly nominated. The Commission urged the election court to dismiss the petition.

The appeal was canvassed by way of written submissions.

### **Submissions for the Appellant**

16. The advocates for the Appellant, Maingi Kamau & Co. Advocates, submitted that the election court found that the 1<sup>st</sup> Respondent had not satisfied the doctrine of exhaustion. They wondered how the court after holding so arrogated jurisdiction unto itself to accommodate the petition. The advocates cited the case of *The Speaker of the National Assembly v Karume* (Civil Application No.92 of 1912) KECA 42 (KLR) where it was held that where the law requires an act to be done by another organ or body other than the court, then that process should be exhausted before parties move to a court of law.
17. It was submitted that the election court shifted the burden of proof to the Appellant in demanding that the Appellant should have provided a court order issued by PPDT as proof that they pursued internal dispute resolution mechanism yet the 2<sup>nd</sup> Respondent had filed an affidavit to the effect that it had pursued all legally acceptable avenues to render the changes desired by the 3<sup>rd</sup> Respondent.
18. The Appellant submitted that the list published by IEBC on 27<sup>th</sup> July 2022 had obvious errors of typology apparent on the face of the document as the gender attributes were interchanged. That the Appellant found her name missing on the list and lodged a complaint with her party. The IEBC then accepted a revised list. That the revision did not oust the 1<sup>st</sup> Respondent from the party but only re-organized the party's preference of priority following non-compliance as directed by IEBC. It was submitted that the 1<sup>st</sup> Respondent in the amended list of 24<sup>th</sup> August 2022 still remained in the party list. That the party followed the law in preparing the party list. That the trial court erred in making a finding that the Appellant inserted herself in the final publication of 24<sup>th</sup> August 2022.
19. The Appellant submitted that the trial court misdirected itself in holding that the list published on 27<sup>th</sup> July 2022 was the final list incapable of amendment. That this cannot be the case as the Commission on the following day invited aggrieved parties to file disputes with either PPDT or IEBC. That the final publication was the one of 24<sup>th</sup> August 2022.
20. It was submitted that the trial court misdirected itself in directing the 1<sup>st</sup> Respondent be gazetted as the responsibility of the commission is to follow the next name in the list in accordance with the female-male format.

### **Submissions by the 1<sup>st</sup> Respondent/Petitioner**

21. The advocates for the 1<sup>st</sup> Respondent, Wangira Okoba & Co. Advocates, submitted that the name of the 1<sup>st</sup> Respondent was entered in the original party list forwarded to IEBC that was published on 27/7/2022. That the 1<sup>st</sup> Respondent was placed as number 1 in that list. That the Appellant's name was not in the list. That the 1<sup>st</sup> Respondent had no dispute with anybody or the party so as to lodge a claim. Therefore, that the matter on non-exhaustion of local remedies could thus not arise. Counsel submitted that the election court was correct in assuming jurisdiction over the matter.
22. It was submitted that a fresh party list was submitted to the Commission yet there was no dispute with DRC, IPPDT nor was there an order from court amending the party list published in the newspaper on 27/7/2022. The 1<sup>st</sup> Respondent relied on the case of *Abdow Bishar Maalim v IEBC & others* (GarissaHC Election Petition Appeal Nos.E002, E004& E005 of 2023 where Prof.(Dr) Sifuna J. held that:



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The court further held that:

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### **Submissions for 2<sup>nd</sup> Respondent/IEBC**

23. The advocates for the 2<sup>nd</sup> Respondent (IEBC), Abdul Hakim & Co. Advocates, submitted that an election court's jurisdiction is limited to post-election disputes and does not have jurisdiction to entertain pre-election disputes. They submitted that the marker that separates pre- and post-election disputes is the declaration of election results by IEBC.
24. The advocates set out the process for election through party lists to be as follows:  
.....
25. It was thus submitted that disputes on the nomination of members on the party list by political parties would be a pre-election dispute as it arises way before the IEBC declares the results through gazettment. Therefore, that the subject dispute before the subordinate court was manifestly a pre-election dispute and as such ousted from an election court's jurisdiction.
26. For the proposition that an election court has no jurisdiction to hear pre-election disputes, the advocates cited the Supreme Court decision in Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others; Ahmed Muktar (Interested Party) (2019) eKLR where the court set out the manner of settling pre-election disputes 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.

27. It was submitted that 1<sup>st</sup> Respondent lodged two complaints with the 3<sup>rd</sup> Respondent (UDA) on the 24<sup>th</sup> and 30<sup>th</sup> August 2022 declaring its dispute on the party list nominations and requesting for an Internal Dispute Resolution hearing. It was submitted that this prior knowledge ousted the jurisdiction of the trial court as an election court. The 2<sup>nd</sup> Respondent in this respect relied on the decision in *Lorna Chemutai & 4 others v Independent Electoral and Boundaries Commission & 18 others* (2018) eKLR where Lady Justice Mumbi Ngugi upheld the judgment of the election court where the petitioners failed to raise their complaints during the nomination process with their political party, IEBC Disputes Tribunal or Political Parties Disputes Tribunal and it was hence held that the election court had no jurisdiction over the matter.

28. It was submitted that jurisdiction is a legal question that can be resolved by a trial court at any time even through its final judgment as well as an appellate court on an appeal. The 2<sup>nd</sup> Respondent urged the court to find that the trial court erred in law and fact in finding that it had jurisdiction as an election court in the subject dispute as the grievance was a pre-election dispute that was known to the petitioner prior to the declaration of results by IEBC.

### **3<sup>rd</sup> Respondent's/UDA submissions**

29. The 3<sup>rd</sup> Respondent informed the court that they were taking a neutral position in the appeal and they were therefore not going to file any submissions. They however proceeded to file submissions. I do not see the need to consider their submissions as they were categorical to the court that they were taking no sides in the appeal.

### **Analysis and Determination**

30. I have considered the grounds of appeal, the grounds in opposition thereto, the record of the election court and its judgment and the rival submissions by the advocates on record for the parties. The issues for determination are:

- (1) Whether the election court had jurisdiction to entertain the election petition for failure by the 1<sup>st</sup> Respondent to exhaust the dispute resolution mechanism set up by *the Constitution* and the election laws.
- (2) Whether the Appellant was available for nomination by virtue of her name not appearing in the Party list published by IEBC on the 27<sup>th</sup> July 2022.



## Jurisdiction

31. Jurisdiction goes to the root of every decision made by a judicial authority. A judicial body is therefore required to ensure that it has jurisdiction to entertain a matter before embarking to hear it. In the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR it was held that:-

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

32. In the same vein, it was held in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR that:

A Court’s jurisdiction flows from either *the Constitution* or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..... 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*.”

33. It was the contention of the Appellant and the 2<sup>nd</sup> Respondent/IEBC that the trial court did not have jurisdiction to entertain the election petition for failure by the 1<sup>st</sup> Respondent to exhaust the dispute resolution mechanisms set up by the election laws for resolution of election disputes before they are escalated to the courts of law. That under doctrine of exhaustion, the jurisdiction of the election court was ousted in entertaining the matter. The doctrine was re-stated by the Court of Appeal in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others(2015) eKLR in the following words:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

34. Under Article 88(4)(e) of *the Constitution*, as read with section 74 of the *Elections Act*, 2011, the IEBC has the mandate to settle electoral disputes including disputes relating to or arising out of nominations excluding election disputes subsequent to the declaration of election results.

35. The *Political Parties Act* in Section 38 creates the Political Parties Disputes Tribunal. Section 40 of the Act provides the jurisdiction of the Tribunal to be as follows:

- “(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;
- (fa) disputes arising out of party primaries.”

Section 40(2) of the Act provides:

“(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

36. It is also worthwhile to note that under Section 9 of the Act as read with paragraph 23 of the 2<sup>nd</sup> Schedule to the Act, it is a mandatory statutory requirement that every political party must have provision in its constitution and rules for “internal party dispute resolution mechanism in accordance with Article 47 and 50 of *the Constitution*.”
37. It is not in dispute in this matter that both the Appellant and the 1<sup>st</sup> Respondent are members of the 3<sup>rd</sup> Respondent, UDA. It is not in dispute that the party has an internal dispute resolution mechanism. The 1<sup>st</sup> Respondent contends that the party presented her name as number 1 in the party list forwarded to IEBC and her name was published in newspapers on the 27<sup>th</sup> July, 2022. That the name of the Appellant did not appear in the list and therefore that she was not available for nomination.
38. The Appellant on the other hand argues that she complained to her party when her name did not appear in the party list of 27<sup>th</sup> July 2022 whereupon the party amended the list and she was placed at No.1 on the list published by IEBC on the 24<sup>th</sup> August 2022. She contended that the 1<sup>st</sup> Respondent did not challenge the amended list through the party’s internal dispute resolution mechanism. She argued that the party had the power to amend the list.
39. Counsel for the 1<sup>st</sup> Respondent argued that the 1<sup>st</sup> Respondent had no dispute with anybody or the party over the party list published on 27<sup>th</sup> July 2022 so as to lodge a claim. That a fresh party list was submitted to the Commission yet there was no dispute with DRC, IPPDT nor was there an order from court amending the said party list. The question then is whether there was a dispute established between the Appellant and the 1<sup>st</sup> Respondent that could be lodged with the party’s internal dispute resolution mechanism or PPDT.
40. It is instructive to note that upon learning of the publication of the new list of 24<sup>th</sup> August 2022, counsel for 1<sup>st</sup> Respondent wrote a letter of even date to the 3<sup>rd</sup> Respondent, UDA, complaining that the list was unilaterally generated and his client was removed from the new list without her being consulted. The 1<sup>st</sup> Respondent requested the party to initiate Internal Dispute Resolution Mechanism (IDRM) to address the dispute. It is then apparent from this letter that the 1<sup>st</sup> Respondent acknowledged that there was a dispute between her and her party that needed to be resolved by the party’s IDRM. The 1<sup>st</sup> Respondent cannot now turn around and allege that there was no dispute. Whether the 1<sup>st</sup> Respondent was lawfully or unlawfully removed from the nomination list was a matter that fell within the jurisdiction of her party’s IDRM as a first call of dispute resolution.



41. The 1<sup>st</sup> Respondent complained that her two letters to her party did not get any response. In my view, that was no bar to the 1<sup>st</sup> Respondent enforcing her rights. Section 40(2) of the *Political Parties Act* gives a leeway to a complainant to move to the PPDT where a party has ignored or declined to initiate an internal dispute resolution mechanism to hear a complaint. The section provides that:
- “Notwithstanding subsection (1) the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanism.”
42. In the case of *George Okode & Others vs orange Democratic Movement & Others* Petition No. 294 of 2011, Majanja J. interpreted the provisions of the above section as follows::
- “To my mind, the provisions of Section 40(2) of the *Political parties Act* must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute.
43. I agree with this proposition. The refusal by the party in this case to initiate IDRМ permitted the 1<sup>st</sup> Appellant to lodge her claim with the PPDT which she did not do. It was therefore no excuse for the 1<sup>st</sup> Respondent to by pass the PPDT and move directly to the election court.
44. It is clear from the above that the *Political Parties Act* creates mechanisms for resolving party nomination disputes outside the realms of courts of law by providing for IDRМ and through the PPDT. There is ample authority for the proposition that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be followed - see *Speaker of the National Assembly vs. Hon. James Njenga Karume* (supra). In *Gabriel Bukachi Chapia v Orange Democratic Movement & another* [2017] eKLR, where the Appellant filed his complaint with the PPDT thereby by passing the party’s IDRМ, the Court of Appeal held that the High Court was right in upholding the decision of the PPDT that the complaint before the PPDT was premature.
45. I think that the issue that courts of law have no jurisdiction to entertain pre-election disputes is now settled as the Supreme Court has pronounced itself on the matter on several occasions. In *Silverse Lisamula* [supra], where the question as to whether the 3<sup>rd</sup> respondent therein was a registered voter in Shinyalu Constituency had been determined by the IEBC Dispute Resolution Committee and as no appeal was preferred to the High Court, the Supreme held that the matter was a pre-election dispute and could not be revived at the election Court.
46. Similarly, in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)* [2019] eKLR, which was heavily relied on by the 2<sup>nd</sup> Respondent, the Supreme Court in a matter where the 2<sup>nd</sup> Respondent chose not to challenge the Appellant’s academic qualifications before the IEBC and only came to raise the issue in an election petition, the Supreme



Court held that an election court could not assume jurisdiction on such a dispute as it should have been raised with IEBC. The court thereupon held that:

“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.”

47. In the present matter, the 1<sup>st</sup> Respondent was aware of facts forming the basis of a pre-election dispute with her party and the Appellant herein and in fact wrote to her party to initiate an internal dispute resolution mechanism to determine the dispute. After the party failed to respond to her request she chose not to present the dispute with PPDT but instead waited until after the nomination process was complete and filed an election petition. As the 1<sup>st</sup> Respondent chose not to present the dispute before the PPDT the issue, in my considered view, could not be a ground in a petition to the election Court.
48. The guidelines for settlement of pre-election disputes have been formulated by the by the Supreme Court in the case of Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others; Ahmed Muktar (Interested Party) (supra) as indicated above. The 1<sup>st</sup> Respondent has not demonstrated that she came within the exemptions stated in the guidelines. She was thus obligated to comply with procedure set by the law for resolution of pre-election disputes.
49. In the final end, it is my finding that the election court did not have jurisdiction to entertain the petition as it was a matter that involved a pre-election dispute that should have been handled by institutions set up by the *Political Parties Act* for resolution of pre-election disputes. I wish to adopt the words of Mumbi Ngugi J.(as she then was in the case of Francis Mutuku vs Wiper Democratic Movement - Kenya & Others [2015] eKLR, where she held thus:

“The law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point; where there are specialised procedures provided by law or *the Constitution* for the resolution of disputes they should be followed. See in this regard the case of Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Other (2008)3 KLR (EP); Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP); Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP) 425 and Alphonse Mwangemi Munga & 10 Others vs African Safari Club Ltd Petition No. 564 of 2004. ....

The circumstances of this case dictate that this Court, despite its wide jurisdiction under *the Constitution*, does not assume such jurisdiction. The dispute is clearly a dispute that falls within the mandate of the institutions in which the *Political Parties Act* vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right to appeal to the High Court. It would be to undermine and defeat the mechanism and institutions provided by law, which are underpinned by *the Constitution*, to hold otherwise.”

50. It is trite law that a court of law downs its tools where it has no jurisdiction in a matter, as famously stated by Nyarangi JA in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (supra). The trial court in the election petition that is the subject of this appeal should have downed its tools for lack of jurisdiction. Since the trial court had no jurisdiction over the matter I do not deem it necessary to consider the other grounds raised in the appeal



51. The upshot is that I find the appeal to be merited and the same is allowed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, both in the appeal and in the trial court.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20<sup>TH</sup> SEPTEMBER 2023**

**J. N. NJAGI**

**JUDGE**

In the presence of:

.....for Appellant

.....for 1<sup>st</sup> Respondent

.....for 2<sup>nd</sup> Respondent

.....for 3<sup>rd</sup> Respondent

Court Assistants – Barako and Godana

30 days R/A.

