



Thanji v Mwangi & 3 others; Clerk of Nyeri County Assembly (Interested Party) (Election Appeal E002 of 2023) [2023] KEHC 21973 (KLR) (1 September 2023) (Judgment)

Neutral citation: [2023] KEHC 21973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
ELECTION APPEAL E002 OF 2023
M MUYA, J
SEPTEMBER 1, 2023**

BETWEEN

MWANGI PRISCILLA THANJI APPELLANT

AND

NANCY NYAMBURA MWANGI 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

COUNTY ASSEMBLY OF NYERI 3RD RESPONDENT

ALLIANCE PARTY 4TH RESPONDENT

AND

CLERK OF NYERI COUNTY ASSEMBLY INTERESTED PARTY

JUDGMENT

Introduction

1. On February 28, 2023 Hon. Mathias Okuche Spm sitting in Nyeri delivered a Judgment in Nyeri Chief Magistrates Court Election Petition No.003 of 2022.

The appellant herein being dissatisfied with that Judgment and decree lodged this appeal which is premised on the following grounds:-

The learned Magistrate erred in Law in overriding mandatory constitutional and legal Provisions and Principles of Law to wit:-

- a. Making a determination to the effect that the Petitioner be sworn in which decision he purported to alter the list submitted under section 34 and



published vide Kenya gazette No. 10712 contrary to the Provisions of Article 177 (1) (b) of the Constitution and Section 34 (10) of the Elections Act No.24 of 2011.

- b. In entertaining and allowing matters which must be determined before the General Elections contrary to Rule 27 (4) of the Elections (Party Primaries and Party list) Regulations 2017 as was held in Cberuto Limo and Another v Independent Electoral and Boundaries commission and another (2018) eKLR
 - c. Upholding and ordering compliance with non-existing list of nomination Contrary to Section 34 and 36 A of 2011.
 - d. Entertaining matters of Nomination Post Election contrary to Rule 27 (3) (a) (b) and (c) of the Elections (Party Primaries and Party list) Regulations 2017 and article 27, 28, 47, and 50 of the Constitution.
 - e. Enforcing electoral and nominations Dispute Tribunal orders against the appellant who was not a Party in the said forums thus, breaching the Appellants right to natural justice.
 - f. Removing and or substituting the name of the 3rd appellant with that of the 1st Respondent from final nomination list submitted on August 6, 2022 Contary to Regulation 27 of the Election (Party Primary and Party list) Regulations 2017 Article 177 (1) (b) of the constitutions and section 34 (10) of the Elections Act No.24 of 2011
 - g. Ordering the 1st Respondent and the interested party to comply with illegality.
2. The learned magistrate erred in law by nullifying the appellants nomination gazetlement, swearing in and certificate contrary to Regulation 56 of the Elections (General) Regulations 2012 Article 177 (1) (b) (c) of the Constitution to wit:-
- a. Under Article 177 (1) (b) of the constitution, the 4th Respondent UDA deserved 8 (eight) nomination slots for gender top –up list to the Nyeri County Assembly
 - b. Under Regulation 56 of the Elections (General) Regulations 2012, the 1st Respondent Selected the first 8 persons in the gender top – up list of which the appellant was number 7
 - c. The Judgment of the court nullifies nomination of the appellant thus provided the appellant, was a head of nominee number 8 in the gender top up list.
3. The learned Magistrate erred in law by upholding the impugned Rulings and orders of the Electoral and nomination Disputes Resolution Committee and Political Parties Dispute Tribunal which were un –enforceable null and void for the following reasons.
- a. The Electoral and nominations Dispute Resolution Committee and Political Parties Dispute Tribunal are prohibited under the Provisions of Article 177 (1) (b) of the Constitution and Section 34 (10) of the Elections Act No.24 of 2011 from amending the final list as they purported to do in the impugned rulings and orders. The impugned decisions were an affront to the constitution and the Law.
 - b. The decision of the Electoral and Nominations Disputes Resolution Committee and Political Parties Dispute Tribunal were in breach of the appellants right not to be condemned unheard and were contrary to the mandatory provisions of Rule 27 (3) (a) (b) and (c) of the Elections



Party Primaries and Party List Regulations 2017 and Article 27, 28, 47 and 50 of the *Constitution*.

- c. That the Impugned decisions of the Electoral and nomination Dispute Resolution Committee and Political Parties Dispute Tribunal were made without Jurisdiction and Contrary to Article 88 (4) (e) and Section 74 (1) of *Elections Act* as held in the case of *Jubilee Party of Kenya v Farah Mohamed Manzoor* (2017) eKLR
 - d. By holding that the IEBC is bound by the decisions of Electoral and nominations Dispute Resolution Committee and Political Parties Dispute Tribunal, the learned Magistrate undermined the IEBC oversight authority on the matters presented in the Petition.
 - e. By upholding some existing and non-gazetted list pursuant to the Impugned decisions, the learned Magistrate ignored the Constitution and the Law.
 - f. The learned Magistrate erred in Law in converting the otherwise Election Petition to enforcement suit of the Impugned decisions.
 - g. The learned Magistrate erred in law by relying in and purporting to enforce a decision that was made on 12th September 2022. 20 days after the date of the General Elections whereas by dint of the provision of Rule 27 (4) of the *Elections (Party Primaries and Party list) Regulations* 2017 such a decision would only be lawful if made 90 days before the date of General Elections.
 - h. The learned magistrate erred in law by relying on the rulings that were made *ex parte* without the notification and Participation of Parties affected by the decision.
 - i. The learned Magistrate erred in law by relying on the rulings. When the said tribunal was “*functus officio*” as at the time if rendered the verdict in timelines provided for resolutions of disputes by the *Elections Act* and other subsidiary legislation.
4. The Learned Magistrate erred in law by wrongly upholding the impugned rulings and orders of Electoral and nominations Disputes Resolution Committee and Political Parties Dispute Tribunal thus Contravening Regulations 56 of the *Elections (General) Regulations* 2012, Article 177 (1) (b) (c) of the *constitution* and Section 34 and 36A *Elections Act* no. 24 of 2011 in that:-
- a. The Impugned rulings and orders of Electoral and Nominations Dispute Resolution Committee and Political parties Dispute Tribunal did not direct the removal of the appellant from the gender top up list yet the Impugned Judgment does.
 - b. Applying the Impugned rulings and orders of the Electoral and Nominations Dispute Tribunal that required the reinstatement of the Petitioner in the list, places the Appellant in number 8 of the gender top up list, in affect she was still eligible to be nominated under Regulation 56 of the *Elections (General) Regulations* 2012 Article 177 (1) (b) (c) of the *Constitution*
 - c. The Impugned rulings and orders of Electoral and nominations Dispute Resolution Committee and Political Parties Dispute Tribunal
5. That the Learned Magistrate lacked Jurisdiction to undertake and make determination on the Petition as he did in that:-
- a. The matters raised in the Petition were a preserve of the IEBC Dispute Resolution Committee under Article 88 (4) (e) as held in the case of *David Luseno Karani v Japheth Langat and Another* (2019) eKLR



- b. The revocations of gazette nullification of nominations revocation of swearing and vacation of constitution of nomination of constitutional office by the Appellant are prerogative orders beyond the scope of the Magistrates Court. The power to make such orders is only donated to the High Court by the Constitution, the fair Administrative Action Act and order 53 of the Civil Procedure rules.
 - c. Under the provisions of section 79 (a) of the Elections Act, the Primary Court was not Electoral court for the dispute herein having not been created and gazette by the Chief Justice under provisions of Rule 6 (3) of the Elections (Parliamentary and County Election) Petition Rules.
 - d. A nomination dispute is not one of the disputes envisaged under the Elections Act to be determined by an Election Court.
 - e. Election courts are specifically created and appointed by the Chief Justice upon the filing of a valid Election Petition or dispute. No such Court has been created to resolve this conflict under the provisions of the Law.
 - f. The Petitioner was seeking Judicial Review of the Nomination process which can only be determined by the High Court as the Respondent seeks prerogative orders declarations, revocations of gazette and nullification of nominations and swearing and vacation of constitutional offices which powers are only donated to the High Court by the Constitutions, the fair Administrative Action Act and order 53 of the civil procedure Rules.
6. The learned Magistrate erred in law in upholding time barred Petition Contrary to Article 87 (2), Article 88 (4) € of the Constitution of Kenya 2010 and Section 74 and 75 of the Elections Act 2011.
 7. The learned Magistrate erred in Law in disregarding the Principle of the incidence of burden and standard of proof stipulated in the Supreme Court decision in the case on Raila Odinga and Others v IEBC and others (2013) eKLR and occasioned a miscarriage of Justice on the appellant, by misrepresenting and misapplying the relevant laws and procedures.
 8. The learned Magistrate erred in law overriding the mandatory provision of the constitution and the law by :-
 - a. Ordering immediate swearing in of the Petitioner as nominated member, of County Assembly without her being first nominated, gazetted and issued with certificate.
 - b. Ordering swearing in of the 1st Respondent in a manner not provided for under the constitution.
 - c. Ordering swearing in of Judicially nominated member of County Assembly Contrary to Electoral Laws,
 - d. Nullifying list submitted for purposes of section 34 (2) (3) (4) and (5) of the Elections Act.
 9. The Learned Magistrate erred in law in ordering costs be paid despite of him not finding fault by the Appellant.
 10. The learned Magistrate erred in Law in selectively determining issues but failing to determine pertinent issues presented before him for consideration *inter alia*:-
 - (a) Failing to determine whether the list submitted on 6 August 2022 is amendable.



- (b) Failing to consider the applicability and legality of the decisions of the Electoral and nominations Dispute Resolution Committee and Political Parties Dispute Tribunal on the matter.
11. The learned Magistrate erred in Law in failing to determine issues raised by the appellant and electing to only deal with the issues raised by the 1st Respondent further in failing to consider the appellants submissions.
12. The learned Magistrate erred in Law in considering extraneous matters. That were not relevant to the issues for determination and in failing to consider relevant matters facts and documents presented.
13. The learned Magistrate erred in Law in delivering Judgment which was against the weight of the evidence adduced.
14. The learned Magistrate erred in Law in being overly biased against the Appellant. The Appellant seeks orders for the appeal to be allowed the Judgment and decrees by the lower court be wholly set aside and the dismissal of the 1st Respondents Petition.
2. In the alternative the Election Petition be remitted back for trial before another Magistrate
3. Costs of the Petition and the Appeal be awarded to the Appellant.

Appellants Submissions

15. It is the contention by the appellant that the Judgment by the lower court is not in Sync with the constitution and the Electoral Laws and that the final list cannot be amended during the term of parliament and the County Assembly.

Reliance is placed on section 34, 35, 36 and 37 of the *Elections Act* No.24 of 2011, Article 90 Regulation 54, 55 and 56 of the *Elections (General) Regulations* 2012.

That these Provisions envisage that the final party list for special seats must be submitted to the IEBC before the General Elections and issues arising therefrom must be resolved before the General Elections. In the present case it is argued that the issues were raised after the General Elections. It is further contended that UDA did confirm to the court that the final list was submitted to the IEBC on 6th August 2022 but this final list was ignored by the lower court instead the court ordered the IEBC to use the initial list submitted to the IEBC on July 24, 2022 which order affected parties not included in the Petition.

Reliance is placed in the case *Lynet Nabula Mutula and 2 others v Independent Electoral and Boundaries commission & 7 others* (2018) eKLR

16. The list submitted on July 24, 2022 was published in newspapers giving the public the opportunity to invoke disputes resolution processes as provided for under Article 88 (4) (4) of the *constitution* as read with section 78 of the *Elections Act*. This was the list that the appellant argues was subject to amendment. It is submitted that the IEBC does not have jurisdiction to address nomination issues after the General Election. Similarly the nominating Party and Political Parties Dispute Tribunal do not have Jurisdiction to entertain Election Petitions or disputes subsequent to the declaration of Election results.

It is further submitted that the dispute was initiated after the General elections through a complaint to the UDA Electoral and nomination Dispute Resolution on August 25, 2022 which was then adopted by the PPDT.



Reliance is placed on Regulation 27 of the *Election (party Primaries and party list) Regulations* 2017 which provides that a Party Internal Dispute Resolution Mechanism in relation to Party Primaries and Party list to be determined within 90 days before the date of the General Election. The lower court Judgment seeks to implement Party internal dispute resolution made after the General Elections.

17. It is submitted that under Regulation 56 of the *Election (General) Regulations* 2012 Article 177 (1) (b) (c) of the *constitution* the 4th Respondent UDA deserved 8 nomination slots for gender top – up list to Nyeri County Assembly. The reinstatement of the 1st Respondent to her position in the Gender top – up list would only push the appellant to position 8 on priority and have still be eligible for nomination and gazettelement. That the Judgment that nullified and cancelled gazettelement of the Appellant contravened Regulation 56 of the *Elections (General) Regulations* 2012, Article 177 (1) (b) (c) of the *constitution* for removing an eligible nominee from the gender top – up list.
18. It is the contention by the appellant that Article 87 (2) 88 (4) ((e) of the constitution and Section 74 and 75 of the *Elections Act* 2011 provide that petitions concerning an election other than a presidential election shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

It is submitted that the Petitioner alleged in the Petition that she became aware that her name was missing in the final published list on 23rd August 2022. The Petition was filed on 20th September 2022 which was more than 40 days after the IEBC published the final lists for special seats and declared results of the general election. The learned Magistrate entertained the Petition and allowed it. This, it is argued was outside the constitutional and legal timelines. The learned trial Magistrate proceeded to allow the filing of an amended Petition on 23rd November 2022. Thus the Petition and the amended one were filed outside the timeframe provided for by the law.

19. It is further submitted that Section 75 (1A) of the *Elections Act* confers Jurisdiction to hear an Election Petition in regard to the County Assembly on the Resident Magistrates court designated by the Chief Justice. It is the contention by the appellant that the trial court was not designated by the chief Justice as an Election Court was not designated by the Chief Justice as an election court. Under Section 79 (a) of the *Elections Act*.

Submissions by the 1st Respondent

20. It is the 1st Respondents submission that the matter before the court purely rests on the determination of one key issue

A. Whether The Petitioners Name Was On The List Submitted By The 4th Respondent

That Article 90 of the *constitution* requires that political parties like the 4th Respondent to nominate persons into special seats in both houses of parliament that the 1st Respondent submitted her application for nomination in the gender top up Category. She was selected as part of the nominees of the 4th Respondent. The name was published in the standard newspaper on 27th July 2022. The 2nd Respondent asked for any complaints on the composition of the 4th Respondents list. The 2nd Respondent indicated that on 1st August it received a letter from the 4th Respondent to the effect that it had received many complaints on the party list and had dealt with the same internally and an amended list was submitted on 6th August 2022 by the 4th Respondent. The 2nd Respondent alleged that the omission of the 1st Respondents name from the 4th Respondents list was by virtue of amendment to the Party list. The question that arose was why was the 1st Respondents name



omitted and replaced with that of the appellant in the gazette notice dated 9th September 2022 and published by the 2nd Respondent.

Whether UDA Electoral and Nomination Dispute Resolution Committee and the Political Parties Disputes Resolution

21. Tribunal had Jurisdiction over the complaints.

It is submitted that Regulation 27 of the *Elections (Party Primaries and Party lists) Regulations* 2017 Mandated Parties to have internal dispute resolution mechanisms to deal with disputes in relation to party primaries and Party lists.

The 1st Respondent approached the 4th Respondents Electoral and Nomination Dispute Resolution Committee before moving on to the PPDT both of which confirmed her nomination and directed that the 1st Respondents name be reinstated in the 4th Respondents party list.

The 1st Respondent does not dispute that the Regulations provide that the disputes have to be concluded 90 days before elections but the 1st Respondent contention is that a dispute can only be referred to the committee once it arises. The 2nd Respondent published the 4th Respondents list on 9th September 2022 which was the day of Elections it was therefore not possible to adhere to the timelines.

It is further contended that the rulings of the 4th Respondents Electoral and Nomination Dispute Resolution Committee and the Political Parties Dispute Tribunal directed the 4th Respondent's list as published in the standard newspaper be utilized. The decisions were transmitted to the 2nd Respondent who had the obligation to enforce them.

That the 2nd Respondent became functus officio after gazettelement of the Party list and the only recourse was to the court to correct the Party list and reinstate her name in the 4th Respondents Party list.

22. Analyses and Conclusion

Issues For Determination by the Court.

(i) Whether the lower court had Jurisdiction to entertain the Petition as presented?

In the celebrated case of *owners of the motor vessel Lillians v Caltex Oil Kenya Ltd* (1989) KLR Nyarangi J.A observed:-

“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 any 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”

23. Article 87 (2) of the *constitution* provides:-

“Petitions concerning an election Petition other than a presidential election shall be filed within twenty eight days after the declaration of the Election results by the Independent Electoral and Boundaries Commission”



Article 88 (4) (e) of the Constitution provides that IEBC is established:-

“for the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of Election results”

The petitioner concedes to have become aware of her missing name in the final published list on 23rd August, 2022. The Petition was filed on 20th September 2022. It was challenging the UDA final list submitted on 6th August 2022, Election petitions must be filed within 28 days after the declaration of results by the IEBC. This is more than 40 days after the IEBC published the final lists for special seats and or declared results of the General Election.

Furthermore, the learned Magistrate went ahead and allowed the filing of an amended petition dated 23rd November 2022.

24. The Supreme Court in the case on *Anami Silvester Lisamula v IEBC & 3 others* (2014) eKLR while on the 28 day timelines had this to observe:-

“It is clear to us that the main issue this court was called upon to determine is the Mary Wambui case, is the one we are now asked to determine which is whether the Petition filed in the High outside the 28 days prescribed by article 87 (2) of the constitution is a nullity. We find that the decision in the *Joho case* directly applies in the instant matter and so does that Jurisprudence in the *Mary Wambui case*”

25. By reason of the foregoing, the petition before the lower court was a nullity having been filed outside the timelines provided for under Article 87(2) of the constitution.

Having come to the conclusion that the lower court had no Jurisdiction to entertain the petition filed before it, I would have stopped there but I find it opportune to point out that the dispute subject matter of the Petition before the lower court was brought into life after the General elections through a complaint to the UDA electoral and Nomination Dispute Resolution Committee on 25th August 2022. It was adopted by PPDT. Regulation 27 of the Elections (Party Primaries and Party List) Regulations 2017 provides a party internal dispute resolution Mechanism in relation to party primaries and party list to be determined within 90 days before the date of the general Elections. The Judgment by the lower court adopted and sought to implement the party internal dispute resolution which was clearly made after the General Elections. Article 88 (4) (e) of the Constitution Contemplates IEBCs power to settle electoral disputes including a disputes relating to or arising from nominations but excludes election Petitions and disputes subsequent to the declaration of election results.

It is abundantly clear therefore that the Party Internal Dispute Resolution Committee and PPDT do not have Jurisdiction to determine matters of nomination lists after the General Election.

The learned Magistrates was clearly wrong to purport to rely and adopt their decisions which were without Jurisdiction.

Conclusion

The Petition filed before the lower court was null and void for failure to adhere to the timelines as provided for under the Constitution and the electoral Laws. This appeal has merit. It is allowed and the Judgment and decree of the lower court are accordingly wholly set aside. Costs of Appeal and the petition to the appellant payable by the 1st and 4th Respondents



**JUDGMENT READ AND DELIVERED IN OPEN COURT AT NYERI THIS 1ST DAY OF
SEPTEMBER 2023.**

.....

HON. JUSTICE M. MUYA

JUDGE

In the presence of

Mirie for the Appellant

Kehonji for the 1st Respondent

Issa for 2nd Respondent

Miss Swaka for the 3rd Respondent

Miss Kurgat for 4th Respondent

Court Assistant: Kinyua

30 days R/A

