



**Wangui & 2 others v Mwaura & 6 others (Election Appeal 1 & 4 of 2023
(Consolidated)) [2023] KEHC 21976 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
ELECTION APPEAL 1 & 4 OF 2023 (CONSOLIDATED)**

**M MUYA, J
SEPTEMBER 1, 2023**

BETWEEN

NDERITU FIDELIS WANGUI 1ST APPELLANT

KAMURU JANET MUTHONI 2ND APPELLANT

AND

MARGARET NJERI MWAURA 1ST RESPONDENT

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

THE UNITED DEMOCRATIC ALLIANCE PARTY 3RD RESPONDENT

THE COUNTY ASSEMBLY OF NYERI 4TH RESPONDENT

**AS CONSOLIDATED WITH
ELECTION APPEAL 4 OF 2023**

BETWEEN

**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION APPELLANT**

AND

MARGARET NJERI MWAURA 1ST RESPONDENT

THE COUNTY ASSEMBLY OF NYERI 2ND RESPONDENT

NDERITU FIDELIS WANGUI 3RD RESPONDENT

KAMURU JANET MUTHONI 4TH RESPONDENT

THE UNITED DEMOCRATIC ALLIANCE PARTY 5TH RESPONDENT



JUDGMENT

Background

1. The 1st respondent Margaret Njeri Mwaura filed a complaint against the appellants seeking their nullifications as the nominated members of the County of Nyeri and the declaration that she was validly nominated by the 3rd respondent (UDA) to the position of the members of County Assembly of Nyeri. Her complaint was based on the 3rd respondents list published on the 27th July 2022 in the Standard News Paper where the 1st respondent alleged that she was one of the 3rd respondents nominees to the County Assembly of Nyeri at number 7. The 1st respondent stated that her name was missing when the 2nd respondent published the list of nominees in the Kenya Gazette notice no.10712 and instead included the appellants at position No.5 and 7. This Gazette notice was the one used to nominate the appellants to the 4th respondent. The 1st respondent alleged that her rights were violated due to the illegal deletion and irregular amendment of her name from the Party List that was substituted by the 3rd respondent (UDA).
2. On March 3, 2023 Hon. Mathias Okuche in Nyeri Election Petition No E004 of 2022/delivered a Judgment to the effect that the election of 3rd and 4th respondent was illegal and unlawful and granted the prayers sought in the petition dated 20th September 2022 and directed the 4th respondent to effect the orders by swearing in of the 1st respondent.
3. Being aggrieved of the orders contained in that Judgement the two appellants decided to lodge this appeal on the following grounds:-
 1. The learned Magistrate erred in law by failing to appreciate the laid down Principles of Law in determining whether the appellants were duly nominated by the 3rd respondent in accordance with the Elections Act.
 2. The Learned Magistrate erred in Law by taking into account the ruling of the 3rd respondents internal Disputes Resolution Committee whereby he considered the decision therein binding on the 2nd respondents, to the detriment of the interests of the appellants as a result violating their rights which are guaranteed under article 47, 48 and 50 of *the Constitution* of Kenya.
 3. That the learned Magistrate erred in Law in failing to find that the 1st respondent had not pleaded that she had instituted a dispute to the 3rd respondent's internal Dispute Resolution Committee which concerned the appellants thereby denying the appellants chance to address the issue which is a cornerstone of fair hearing.
 4. That the Learned Magistrate erred in Law in disregarding the evidence that the appellants were also nominated by the 3rd respondent thereby arriving at wrong conclusion.
 5. That the Learned Magistrate erred in Law in failing to appreciate that there was no evidence that the Ruling delivered by the 3rd respondents Internal Dispute Resolution Committee was served upon the 2nd respondent before the gazettelement of the notice nominating the appellants.
 6. The Learned Magistrate erred in law in finding that the appellants nomination was illegal and unfair without proof that the appellants had contributed to the 3rd respondent's failure to nominate the 1st respondent to the County Assembly of Nyeri as published in the 2nd respondents Gazette Notice.



7. The Learned Magistrate erred in law by failing to appreciate that the appellants were not joined as Parties in the 1st respondents dispute at the 3rd respondents internal Dispute Resolution Committee and thereby no orders affecting their interests could be made without their participation.
 8. That the Learned Magistrate erred in Law by failing to take into account submissions by the appellants.
4. The two appellants seek for the appeal to be allowed and the Judgment of the lower court and the decree to be quashed and set aside. The other consolidated appeal which was No E004 of 2023 was consolidated with E001 of 2023. The appellant therein is the Independent Electoral and Boundaries Commission. It arises from the Judgment of Hon Okuche SPM in Nyeri Election Petition No E004 of 2022

The grounds are as follows:-

1. The Learned Magistrate erred in Law and fact by allowing the Election Petition against the weight of evidence adduced.
2. The Honourable the Learned Magistrate erred in Law and in facts by failing to find that the 1st respondent in the petition had not pleaded that there was a ruling of 5th respondents Internal Disputes Committee thus denying the appellant and opportunity to respond.
3. That the learned Magistrate failed to consider that all Party lists must be submitted 45 days to the date of Elections.
4. That the Learned Magistrate erred in Law and fact in finding that the appellant had rejected the 1st respondents name yet there was no evidence to support that finding.
5. That the Learned Magistrate erred in Law and in fact in failing to consider the evidence that the nominations were done to the party lists submitted by the 5th respondent prior to the election.
6. That the Honourable Magistrate erred in Law and fact in finding that the appellant had been served with the ruling of 5th respondent's Internal Disputes Resolution Committee and an amended Party list when there was no proof of service.
7. That the Learned Magistrate erred in Law and fact by failing to find that the Ruling and the amendment to the Party list was done after nominations had been done and the list gone for gazettelement.
8. That The Honourable Magistrate erred in Law and fact in Condemning the appellant to pay cost yet it was not its fault that the 5th respondent's Party list as submitted did not comply with the Disputes Committee Ruling.
9. The Learned Magistrate erred in law and in fact in failing to find that the appellant can only rely on a party list submitted before the election.
10. That the Learned Magistrate erred in Law and fact in failing to consider the appellants submissions.



Appellants Submissions

9. It is the appellants' contention that the Learned Magistrate did not address the issue of whether the appellants were entitled to be members of the County Assembly of Nyeri in light of the fact that there was overwhelming evidence that they had duly applied to be considered in the Gender Top – up category. They were duly registered voters, members of the 3rd respondent, they had duly paid the necessary fees.

That the 1st respondent had not contested the nomination of the appellants on educational moral and ethical grounds or on the grounds enumerated in section 25(2) of the *Elections Act*.

That contrary to the Learned Magistrate assertion and or finding at page 21 of its Judgment it was not true that the 1st respondent had adduced evidence to prove that she had applied for nomination on the Gender Top – up Category to the Nyeri County Assembly.

10. It is the contention by the appellants that there is need by this court to revisit the decision by the Party's Electoral and Nomination Dispute Resolution Committee and evaluate whether in light of the evidence on record the 3rd respondent was entitled to replace the 2nd appellants name with the 1st respondent.

Further that none of the appellant who stood to be affected were parties to the alleged dispute before the tribunal.

1st Respondents Submissions

11. The respondent submits that the law on nomination is set out in article 90 of *the Constitution* of Kenya and the *Election Act* of 2011 which empower political Parties to nominate persons into special seats in both houses of Parliament.

It is in line with these provisions that it is said the 1st respondent submitted her application for nomination in the Gender Top – up category. She was a bona fide life member of the 3rd respondent, she had met all constitutional and Legal requirements to be elected into the office of member of the 4th respondent. Her name was listed as number 7. In the list published in the Standard Newspaper on July 27, 2022.

12. That in the Newspaper notice the 2nd respondent asked for any complaints on the eligibility and suitability of the Composition of the 3rd respondents Party list for nomination as members of the 4th respondent before the Elections were held. At this juncture there was no complaint or order against the proposed nomination of the 1st respondent as a member of the 4th respondent. The IEBC published the submitted Party lists as they were in the Standard Newspaper on the 27th of July 2022.

That on the 30th day of August 2022 the Petitioner lodged a complaint against UDA with the interested Party Internal Dispute Resolution Committee Complaining that her name had been excluded from the list she had come across.

Issues for determination

- i. Whether the final list can be amended during the terms of the Parliament and the County Assembly
- ii. Whether the Learned Magistrate had Jurisdiction to entertain and determine the petition owing to timelines in election petitions?



i. Whether the final list can be amended during the term of Parliament and the County Assembly.

- 13 The process of nominations under the Party list is provided for in sections 34, 35, 36 and 37 of the Elections' Act No 24 of 2011 and article 177 article 90 and regulation 54, 55 and 56 of the [Elections \(General\) Regulations](#) 2012.

The final list was submitted on August 6, 2022. The Petitioners complaint was that her name was omitted in the final published list submitted to the IEBC on August 6, 2022. Section 34(10) of the [Elections Act](#).

- 14 It was the Party which was to determine the members to be included in their Party list and their order and priority.

The 1st respondents submission that the omission of her name from the final Gazetted list contrary to this ruling and the initial list submitted by the 3rd respondent to the 2nd respondent was illegal and an infringement to her rights. The 1st respondent prayer is that the appeals be dismissed with costs.

Analysis and Conclusion

15. The Deputy Executive Director of UDA did swear an affidavit dated the 28th day of November 2022 in which he depones that through a press release dated June 27, 2022, the IEBC did indicate that political Parties were required to submit Party lists in accordance with [the constitution](#) and their respective nomination rules.

That in compliance with the IEBC directive as well as article 177 of [the Constitution](#), the interested Party UDA submitted its Gender Top-up list and marginalized list to the 1st respondent as per the provisions of section 34(4) of the Elections Act.

That the UDA submitted its first party list on 4th July 2022. IEBC rejected it stating that it was non-compliant and directed that another Party list be re-submitted. That as directed by the IEBC in the press release of 15th July 2022, the interested party UDA reviewed its Party lists once again and uploaded the reviewed lists within the seven days stipulated in the press release. Section 34(10) of the Election Act provides that a party list submitted for purposes of nominating a candidate for Election to the National Assembly, Senate and County Assemblies shall not be amended during the term of Parliament or County Assembly as the case may be for which candidates are elected.

The term of the County Assembly under section 34(10) Commences when the Party list is gazetted.

The list submitted on July 24, 2022 and published in the Newspapers was the one subject to amendments. It was not final owing to the fact that it was subject to amendments.

Under article 88(4)(e) of [the constitution](#) IEBC is responsible for conducting and Supervising and Settlement of Electoral Disputes, including dispute relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results. It is abundantly clear that IEBC, political Parties, PPDT do not have Jurisdiction to entertain election petitions or disputes subsequent to the declaration of results.

The Learned Magistrate therefore could not fault IEBC for not implementing decisions of PPDT and the UDA Committee which decisions were made without the necessary Jurisdiction.



ii. Whether the Learned Magistrate had Jurisdiction to entertain and determine the petition owing to timelines in election petitions?

16 In the Celebrated case of owner of the Motor Vessel “Lillian S” Versus 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 obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has 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”.

Article 87(2) of the constitution provides:-

“Petitions concerning an election other than a presidential election shall be filed within twenty eight days after the declaration of the electoral and boundaries commission”.

The petition was challenging the UDA final list submitted on August 6, 2022. The petition was filed on September 20, 2022 this was clearly not within the stipulated twenty eight days after the IEBC published the final lists for special seats and or declared results of the General Election. Further the learned Magistrate did proceed to allow an amendment to the petition dated November 23, 2022. The Petition was filed outside the timelines provided for by article 87(2) of the constitution.

17. The Supreme court in the case of Anami Silverse Lisamula Versus Independent Electoral and Boundaries Commission and 3 others (2014) e KLR held:-

“It is clear to us that the main issue this court was called upon to determine in the Mary Wambui’s case, it the one we are now asked to determine, which is whether the petition filed in the High Court 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”

By reason of the forgoing the petition before the lower court was fatally defective and incompetent for having been filed outside the timelines provided for under article 87(2) of the Constitution. The upshot is that the appeal by the 1st and 2nd appellant succeeds and its allowed.

The Judgment and decree thereto is hereby quashed and set aside with costs payable by the 1st and 3rd respondent to the appellants. In respect of Election Appeal No E004 Consolidated with E001 of 2023, the Judgment and decree in Election Petition No E004 of 2022 is hereby set aside.

The petition is dismissed as against the appellant costs of this Appeal and the Lower Court Petition are awarded to the appellants.

JUDGMENT DELIVERED, SIGNED AND DATED AT NYERI THIS 1ST DAY OF SEPTEMBER 2023.

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HON. JUSTICE M. MUYA

JUDGE

