



**Obino v Speaker of, Kisii County Government & 3 others (Constitutional
Petition E014 of 2023) [2024] KEHC 12082 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION E014 OF 2023**

TA ODERA, J

OCTOBER 1, 2024

**IN THE MATTER OF ARTICLE 2(4), 10, 22, 23, 24, 25, 27, 28, 29,38, 41, 47
48, 75, 88, 236, 258 AND 259(1) OF THE CONSITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 3, 4 & 12 OF FAIR
ADMINISTRATION ACTIONS ACT NO. 4 OF 2015**

AND

**IN THE MATTER OF SECTION 5 OF THE INDIPENDENT
ELECTRAL AND BOUNDARIES COMMISSION ACT**

AND

IN THE MATTER OF SECTION 34, 35, 36 AND 37 OF THE ELECTION CAT NO. 24 OF 2011

AND

**IN THE MATTER OF SECTION 7, 8, 9 & 12 OF THE
COUNTY GOVERNMENT ACTNO. 17 OF 2012**

AND

**IN THE MATTER OF SECTION 7, 8, 9 & 12 OF THE
COUNTY ASSEMBLY SERVICES ACT NO. 24 OF 2012**

AND

IN THE MATTER OF UNLAWFULL STOPAGE OF SALARY FOR THE PETITIONER

BETWEEN

CLARE MORAA OBINO PETITIONER

AND

THE SPEAKER OF, KISII COUNTY GOVERNMENT 1ST RESPONDENT



THE KISII COUNTY GOVERNMENT 2ND RESPONDENT
THE COUNTY ASSEMBLY SERVICE BOARD 3RD RESPONDENT
JUBILEE PARTY 4TH RESPONDENT

JUDGMENT

Introduction

1. Petitioner filed Petition dated 30th October, 2023 seeking a declaration that she was duly nominated by the Jubilee as member of County Assembly in the County Assembly of Kisii. She also sought a declaration that the 1st Respondent directive halting her payment and admittance to the County Assembly chambers to discharge her mandate as member of the County assembly duly nominated was a violation of her constitutional rights especially Articles 177(1) (b) (c) (2) and 185 of the Constitution of Kenya, 2010. She also filed the application dated 30.10.23 together with the petition seeking conservatory orders.
2. In response the 1st, 2nd and 3rd Respondents filed a preliminary objection dated 22nd November, 2023 that was based on grounds that the Application dated 30th October, 2023 and Petition are an abuse of the court process as the issues therein had been decided in an election court whose determination was subsequently upheld by this court and the Court of Appeal. They contended the Petitioner in this Petition wanted this court to overturn its own decision and that of the court of Appeal. They therefore contended that this court lacks Jurisdiction to hear and determine this petition in the circumstances.
3. The 1st to 3rd Respondents in the Preliminary objection equally raised issue that this court lacked Jurisdiction to hear this matter on the account the issues raised in this Petition fall under the employment and labor relation court.
4. This court directed that the preliminary Objection be heard first and be canvassed by way of written submissions. This court notes that the both parties have filed their submissions.

Determination.

5. Having considered the Application by the Applicant, the response by the second Respondent the preliminary objection by the interested parties and their written submissions, I find the sole for determination is whether this court has Jurisdiction to hear and determine this Petition and Application dated 30th October, 2023.
6. It is from my review of the Preliminary objection that the same is challenging the Jurisdiction of this court on two limbs. Firstly, it is on the account that the issues in the petition and the Application have previously been determined by this court sitting as an appellate court in a dispute challenging the nomination of the Petitioner as a member of county assembly in the county Assembly of Kisii. Secondly the Jurisdiction of this court is challenged on grounds that the issues canvassed in the petition relate to employment matters that ought to have determined by the Employment and Labor Relation Court.
7. In the interest of Justice, I have carefully perused the decision that has been rendered regarding the nomination of the Petitioner herein. On 16th September, 2022, a Petitioner by the name Redempta Vera Onkundi filed an election Petition (Kisii chief Magistrate Court Election Petition No. E005 of 2022) challenging the nomination of the Petitioner herein by the Jubilee Party of the county Assembly



of Kisii County assembly and her subsequent gazettement of by IEBC. Redempta in her petition sought for an order of declaration that the nomination of the Petitioner herein was irregular and unfair, null and void and that she (Redempta) was validly nominated by the Jubilee Party. She equally sought an order declaring that the gazettement of the Petitioner herein as member of County Assembly of Kisii is invalid and be cancelled. Redempta further sought for an order directing the jubilee Party to file a party list including the name of Redempta in position 3 as per the Judgment delivered by the Political Parties disputes tribunal complaint number E035 delivered on 8th August, 2022.

8. The Election court upon considering the election Petition by Redempta held that the Petitioner herein was as late as on the date of her nomination she was already a nominated member of the County Assembly courtesy the ODM party and therefore the Jubilee party ought not to have submitted her name to IEBC for nomination as she was not it's member. The election court did allow the petition as prayed and nullified the nomination of the petitioner herein. It directed the Jubilee party to submit a fresh list as per the order of the political Parties Disputes Tribunal in Complaint No. E035 delivered on 8th August, 2022 within 3 days from the date of the Judgement.
9. The petitioner herein was dissatisfied with the judgement preferred an appeal to the High Court Kisii being Election Petition Appeal No. E002 of 2023 whose judgement was delivered on 30th June, 2023 dismissing the appeal for lack of merit.
10. She was again aggrieved by the judgement of the High Court of Kisii, preferred a second appeal to the Court of Appeal Kisumu being Election Petition Appeal No. E015 of 2023 whose judgement was delivered on 24th October, 2023 striking out the appeal for want of jurisdiction.
11. Court directed IEBC to within 7 days of receipt the list from the Jubilee Party publish the party list submitted in accordance with the relevant provisions of the *constitution*. Further, it made a declaration that the nomination of the Petitioner as a member of the County Assembly of Kisii was irregular, unlawful, null and invalid. Apart from awarding costs to Redempta amounting to Kshs. 150,000, the election court directed a certificate of its order be served upon the clerk of the county assembly Kisii, pursuant to section 86(1) of the *Election Act*, 2011.
12. The above determination was upheld by this court upon Appeal by the Petitioner. The court of Appeal declined to entertain the Petitioner's further Appeal to it for want of Jurisdiction.
13. In this current petition, the Petitioner still argues that she was duly nominated by the Jubilee party. It is shocking that the Appellant would want this court ignore the clear determination of the election court which was upheld by this court and the Court of Appeal that he was not duly nominated as her nomination was irregular null and void. She hopes that this court ignores that the election court had directed that it's order be served upon the clerk of the County Assembly for action which action they have demonstrated by stopping her payment given that she does not deserve to serve as member of the County Assembly of Kisii given the nullification of her nomination.
14. The Respondents have equally argued that the issues of the Petitioner claims were employment matters which can only be handled by the Employment and Labor Relation Court. I have perused the Petition and what comes out to be the main issue is the Petitioners claim of stoppage of her 5 month salary by the Respondents which she claim to be her entitlement by virtue of her nomination. Aside from nomination that this court as sitting as an appellate court has already found to have been unlawful, the issue of stoppage of her five months' pay is one that can only be settled by the employment and labour relations court.



Whether the issues raised by the Applicant are res judicata

15. The interested party submitted the issues raised by the Appellant are res judicata given the same had been adjudicated by all courts including the lower court, the High Court and Court of Appeal. She contended that Petitioner had failed to disclose the findings of the courts. The interested party submitted further that the adjudication was escalated to the High Court which upheld the decision of the Election court and the court of appeal dismissed the appeal on the grounds that it lack jurisdiction to entertain it.
16. The Applicant neither responded to the preliminary objection nor filed submissions to address the issues advanced by the interested party and as such it goes without saying that the preliminary objection has not been contested. Nevertheless, I have considered the Application herein and have noted that the key documents attached to it are the Judgment of the lower court, the Judgment of the High Court and that of the Court of Appeal.
17. I have equally perused the pleading filed in the Political Parties Tribunal, the Election Court, the appeal to High Court and Court of Appeal and the judgments from the said Tribunal and the 3 court and it has emerged that the party list attached to this Application is the same party list that was at the center of the conflict in the said Tribunal and Courts. The parties in the said cases were also the same as parties herein.
18. Section 7 of the civil procedure provides – “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”. It is clear that the said Section bars courts from determining issues which have already been finally determined by courts of competent jurisdiction.
19. It is trite law that jurisdiction is everything and without it the court must pen down as was held in the celebrated case of *Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd* [1989] KLR. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...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.
20. It is therefore this court lacks jurisdiction to entertain the petition herein as the issues herein have already been determined by the High Court in the Appeal and are thus Resjudicata
21. From the forgoing therefore I find no merit in the Petition and the Application both dated 30th October, 2023 and proceed to dismiss with costs to the 1st to 3rd Respondents.

It is so ordered.

T.A. ODERA

JUDGE

1. 10.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:



Miss Mumo hold brief for Onserio for the respondent

N/A for Petitioner

Court Assistant -Oigo

