



Nduta v Speaker, County Assembly of Kirinyaga & 2 others (Miscellaneous Civil Application E027 of 2024) [2024] KEHC 15886 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E027 OF 2024
RM MWONGO, J
DECEMBER 16, 2024**

BETWEEN

CHEGE FLASIA NDUTA APPLICANT

AND

THE SPEAKER, COUNTY ASSEMBLY OF KIRINYAGA 1ST RESPONDENT

THE COUNTY ASSEMBLY OF KIRINYAGA 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

RULING

1. The applicant filed notice of motion dated 15th May, 2024 seeking the following orders:
 1. Spent.
 2. That an order be and is hereby issued directing the Chief Executive Officer/Commission Secretary of the 3rd Respondent to publish or cause to be published in the Kenya Gazette a corrigendum to Gazette Notice No.10712 published on 9th September, 2022 in Vol.CXXIV-No.186, re-allocating the Kirinyaga County Assembly Special Seat (Gender Top Up Category) previously held by Kamau Pauline Wairimu to the Applicant herein.
 3. That an order be and is hereby issued directing the 1st Respondent to swear the Applicant herein and take such steps as necessary to enable her assume the office of Member of County Assembly, Kirinyaga County.
 4. That costs and incidentals of this Application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Chege Flasia Nduta in which she makes the following major averments:



1. That vide Gazette Notice No.10712 published on 9th September, 2022 in Vol.CXXIV - No.186, Kamau Pauline Wairimu was declared validly nominated as Member of County Assembly, Kirinyaga County representing the United Democratic Alliance under the Gender Top Up special category.
 2. That vide a letter dated 8th April, 2024, Kamau Pauline Wairimu wrote to the 1st Respondent conveying her decision to decline nomination as a Member of the County Assembly of Kirinyaga.
 3. That following the withdrawal of Kamau Pauline Wairimu as a nominated member under the UDA Gender Top Up list on 9th April, 2024, a vacancy has arisen in the 2nd Respondent.
 4. That a declaration of vacancy has since been made by the 1st Respondent pursuant to the provisions of section 37(1) of the *Elections Act* as read together with Regulation 11(3) of the Elections (General) Regulations, 2012.
 5. That the 1st Respondent has written to the 3rd Respondent requesting their allocation of the special seat formerly held by Kamau Pauline Wairimu to Chege Flasia Nduta
 6. That it is not in dispute that Chege Flasia Nduta ranks next in the United Democratic Alliance Party Gender Top UP special category list.
 7. That the 3rd Respondent through correspondence dated 19th April, 2024 avers that the Independent Electoral and Boundaries Commission is currently not quorate due to lack of Chairperson and Commissioners, and hence may not be legally mandated to act on the notice of declaration of vacancy.
 8. That in light of the foregoing, only this Honourable Court retains lawful jurisdiction to intervene as necessary to avert a constitutional lapse by directing the 3rd Respondent CEO to gazette the Applicant herein and further directing the 1st Respondent to swear in the Applicant as a member of the Kirinyaga County Assembly as well as to facilitate her assumption of office thereto.
3. The 3rd Respondent opposes the application through grounds of opposition as follows:
1. That the Notice of Motion is incompetent and devoid of merit for the following reasons:
 - a. Article 90 of *the Constitution* of Kenya as read with Article 177(1)(b) of *the Constitution* of Kenya provides for elections by party lists.
 - b. Article 90((2) of *the Constitution* of Kenya gives the 3rd respondent the Constitutional mandate to conduct elections by party lists.
 2. That the 3rd respondent is not quorate due to lack of chairperson and commissioners and in its current state may not be legally mandated to act on the Notice of Vacancy (annexure CFN 3 in the Applicant's Supporting Affidavit) in view of Article 88, 90 and 250(1) of *the Constitution* of Kenya as read with Sections 4 and 5 of the *Independent Electoral and Boundaries Commission Act*, Cap 7C.
 3. That the secretariat of the 3rd respondent cannot conduct elections or allocate or reallocate party lists for the following reasons:



- a. The functions of the 3rd respondent's secretariat under the provisions of Section 11 and 11A of the IEBC Act do not include conduct of elections or the allocation or re-allocation of special seats.
 - b. The functions of the secretary to the 3rd respondent (who is its chief executive officer), under Section 10(7) of the IEBC Act does not include conduct of elections or the allocation or reallocation of special seats.
- 4.
- i) Sections 34,35,36 and 37 of the [Elections Act](#) provides the procedure for allocation and re-allocation of special seats. The 1st respondent herein has no mandate under the said provisions to suggest and/or propose a person who should be allocated or re-allocated a special seat.
 - ii. The mandate of the 1st respondent herein is only to declare a vacancy under Section 19(3) of the [Elections Act](#) as read with regulation 11(3) of the Elections (General) Regulations, 2012.
5. That the duty of the 3rd respondent to allocate and reallocate party lists is not perfunctory as it would have to comply with the [Elections Act](#) and Regulations which requires verification of whether the next nominee on the party list is still a member of the nominating party.
5. That the Application before Court is incompetent as the orders sought can only be applied for vide an election Petition filed Under Section 74 or 75 of the [Elections Act](#) as read with Rules 3,6(1)(b),7 and 8 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

Applicant's Submissions

4. The applicant's submissions were premised on three issues:

a) Whether the court has jurisdiction to grant the orders sought

5. On this issue, the applicant submitted that Article 165(3) of [the Constitution](#) confers this Honourable court with unlimited original jurisdiction both in criminal and civil matters. Article 165(3) provides as follows:

- “(3) Subject to clause (5), the High Court shall have;
- (a) Unlimited original jurisdiction in criminal and civil matters;
 - (b) ...;
 - (c);
 - (d) Jurisdiction to hear any question respecting the interpretation of this Constitution.”

6. The applicant submit that the miscellaneous Application herein is in the nature of an enforcement Application in which this Honourable court has jurisdiction to issue the orders sought therein pursuant to the aforementioned provision of [the Constitution](#). The applicant relied on the Supreme Court case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others



(2012) eKLR, Application No.2 of 2011, where the Court stated as follows under paragraph 68 as regards to a court's jurisdiction:

“(68) A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”

7. The provisions of section 74 and 75 of the *Elections Act* as read with Rules 3,6(1)(b),7 and 8 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 are not applicable to the matter herein as the issues at hand do not concern whether or not a candidate in question was validly elected but rather the issue of enforcement of a particular action by the court and which action is not in dispute.

8. On the contrary, they invite this Honourable court to rely on section 37(1) of the *Elections Act* which is the proper legal provision that applies in the instant suit as opposed to the aforesaid provision cited in the preceding paragraph. Section 37(1) of the *Elections Act* provides as follows;

“(1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.”

9. They submit that this is not a dispute which requires the Chief Justice to designate a judge or resident magistrate to handle it but which solely seeks for enforcement of a particular action by the courts to avoid instances of a constitutional lacuna created by inaction on the part of State organs including independent commissions.

b) Whether the application is merited

10. On the question whether the publishing of names of a candidate in a gazette notice while effecting a reallocation of a special seat does not require the 3rd Respondent to be fully constituted.

11. *The Constitution* under article 177(b) provides for the membership of county assembly and particularly states as follows;

“(1) a county assembly consists of -

(a);

(b) the number of special seat members necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender;”

12. The applicant asserts that the above provision ought to be complied with by the 3rd Respondent since the party already presented its gender top up nomination list which is not in dispute as to the candidate to be reallocated the said position.

18. Section 7(3) of the IEBC Act provides as follows;

“(3) The Commission shall be properly constituted notwithstanding a vacancy in its membership.”



However, regardless of the above cited provision, this is not a matter that requires the 3rd Respondent to be properly constituted since it only concerns a reallocation of a nomination slot and not a by-election.

13. Furthermore, the applicant states that the constitutional question raised in this Application has been resolved by this Honourable court in several other similar matters and therefore the contention of whether the 3rd Respondent can issue a gazette notice ought to be put at rest. In the case of *Bett Anne Jepleting vs Independent Electoral and Boundaries Commission & 3 Others (2023)* this Honourable court (Mrima J) whilst compelling the 1st Respondent's Commission Secretary/Chief Executive Officer in the matter to effect a corrigendum in the Kenya Gazette rendered itself as follows:

“(32) The 1st Respondent, therefore needed to publish a corrigendum in terms of the above order to enable compliance. However, the 1st Respondent contended that it, instead, required a decision of the Commissioners to run the publication.”

“(33) One may be compelled to pose these questions: Which decision will the Commissioners be called upon to make? Could it be a decision to on whether to comply with a Court order or not?”

“(34) The 1st Respondent, has been compelled by this Court to give effect to a court order. The court order was duly extracted and served upon it. That is not in dispute. The action which the 1st Respondent is required to undertake is a simple administrative one; placing a notice communicating the decision of this Court. Period.”

14. Furthermore, this Honourable Court (Sifuna J) in the case of *Abdow Bishar Maalim v Abdiwelly Haji Bukura & Others (2023)* (As consolidated with Garissa High Court Election Petition Appeals Nos. E004 of 2023 and E005 of 2023) in directing the IEBC to gazette the names of the respective candidates and issuing a certificate under section 86(1) of the Election Act categorically held and ordered as follows;

“That mention on 11/10/2023 to confirm if the Notice will have been published, as this being nomination slots and not by-election, they do not need the commission to be fully constituted. It is a function performed to effect a court order hence not a policy action.”

3rd Respondent Submissions

15. The 3rd respondent submissions were argued under two prongs as follows:

a) Whether the Current Application is incompetent and bad in law

16. The 3rd Respondent submit that the current application is incompetent as the orders sought can only be applied for vide an Election Petition filed under Section 74 and 75 of the *Elections Act*.

Section 74 concerns Settlement of certain disputes and provides as follows:

“(1) Pursuant to Article 88 (4)(e) of *the Constitution*, the Commission shall be responsible 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.



- (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.
- (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

Section 75 concerns County election petitions and provides as follows:

- “(1) A question as to validity of a election of a county governor shall be determined by High Court within the county or nearest to the county.
- (1A) A question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.
- (2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.
- (3) In any proceeding brought under this section, a court may grant appropriate relief, including—
- (a) a declaration of whether or not the candidate whose election is questioned was validly elected;
 - (b) a declaration of which candidate was validly elected; or
 - (c) an order as to whether a fresh election will be held or not.”

17. Rules 7 and 8 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provide for the commencement of petitions for determination of election disputes.
18. The 3rd respondent submits that the current application refers to an election dispute since it questions the process of “Nomination” of a County Assembly Member and the same can only be determined as provided for under the provisions of Section 75 of the Election Act and Rules 7 and 8 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.
19. They refer to the case of *Mwigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* (Petition I of 2015)120161 KESC 2(KLR) (26 April 2016) (Judgment) where the Supreme Court held that *the Constitution* and the electoral law envisage the entire process of nomination for the special seats, including the act of gazette ment of the nominees’ names by the IEBC, as an integral part of the election process. The Court further noted that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Court subsequently determined that only the Election Court had the powers to disturb the status quo. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the *Elections Act*.
20. The 3rd Respondent therefore submits that this application is incompetent and bad in law as it is not anchored on the provisions of the Election Laws.



b) Whether the 3rd Respondent is legally mandated to gazette the Petitioner as the United Democratic Alliance Party Gender Top UP Nominee as per the Party List Submitted.

21. The 3rd Respondent further submits that the current application seeks gazette of Chege Flasia Nduta as the United Democratic Alliance Party Gender Top UP Nominee in the County Assembly of Kirinyaga. They submit that this is an electoral process and not an administrative function and rely on the case of *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR where the Court of Appeal held that upon gazette of members of the County Assembly, they are deemed to be elected Members of the County Assembly. It is therefore trite that Gazette produces an election result.
22. The 3rd Respondents further submission is that the *Independent Electoral and Boundaries Commission Act* Cap 7C under Section 4 stipulates that conducting elections is the function of the 3rd Respondent. The Section provides:

“4. Functions of the Commission

As provided for by Article 88(4) of *the Constitution*, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by *the Constitution*, and any other elections as prescribed by an Act of Parliament and, in particular, for—

23. It is urged that Section 10(7), 11 and 11A of the *Independent Electoral and Boundaries Commission Act* Cap 7C under Section 4 do not cloth the Secretary of the Commission and the Secretariat with the power or mandate to conduct elections. The mandate of the Secretary of the Commission and the Secretariat is limited to executing the decisions of the 3rd Respondent. Section 10 (7) provides:

“(7) The secretary shall be—

- (a) the chief executive officer of the Commission;
- (b) head of the secretariat;
- (c) the accounting officer of the Commission;
- (d) custodian of all Commission's records;
- (e) responsible for—
 - (i) executing decisions of the Commission;
 - (ii) assignment of duties and supervision of all employees of the Commission;
 - (iii) facilitating, co-ordinating and ensuring execution or Commission's mandate;
 - (iv) ensuring staff compliance with public ethics and values; and
 - (v) the performance or such other duties as may be assigned by the law and Commission.”



24. Further, it is submitted that Article 250 (1) of *the Constitution* and Section 5 of the *Independent Electoral and Boundaries Commission Act* Cap 7C stipulates the composition of the IEBC as follows:

“ 250.

- (1) Each commission shall consist of at least three, but not more than nine, members.”

25. Further, the Respondents submit that the IEBC lacks the requisite quorum to enable it conduct its mandate under the provisions of *the Constitution* and the *Elections Act* following a gazette notice dated 14th February, 2023 in which the President declared 5 positions in the Commission vacant. The IEBC currently has only one remaining commissioner following the resignation of 3 commissioners and the completion of tenure of the IEBC chairman and 2 other commissioners.

26. They rely on the case of Attorney-General & 2 Others v Ndii & 79 others; Dixon & 7 Others (Amicus Curiae) (Petition 12, II & 13 of 2021 (Consolidated)) [2022]KESC 8(KLR) where the court held that the quorum required for IEBC to fulfil its constitutional mandate is at least 3 Commissioners in office. The Court noted that key among the constitutionally mandated roles of the IEBC is the role of conducting elections, irrespective of how the vacancy arose. The court relied on the Provisions of Article 88 (4), Article 250 (1) of *the Constitution* and Section 5(1) of the Independent and Electoral Boundaries Commission Act.

Issues for Determination

27. The issues for determination are as follows:

1. Whether the current application is incompetent and bad in law.
2. Whether the 2nd Respondent is legally mandated to gazette the Applicant as the United Democratic Alliance Party Gender Top UP Nominee as per the Party List Submitted.

Analysis and Determination

28. The applicant seeks an order directing the 3rd Respondent to gazette the Applicant herein re-allocating the Kirinyaga County Special Seat (Gender Top UP category) to her. She also seeks an order further directing the 1st Respondent to swear in the Applicant as a member of the Kirinyaga County Assembly and facilitate her assumption of office thereto.

Whether the current application is incompetent and bad in law

29. The first issue is whether the applicant’s application is bad in law. On her part, the applicant asserts that the miscellaneous Application herein is in the nature of an enforcement Application in which this Honourable court has jurisdiction to issue the orders sought therein pursuant to provisions of *the Constitution*.

30. In the Supreme Court case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR, Application No.2 of 2011, the Apex Court stated as follows as regards to a court’s jurisdiction:

- “(68) 68) A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by



the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”

In other words, a court can only do what it is lawfully entitled to do.

31. In the present case, the applicant relies on Section 37(1) of the Elections Act which provides as follows;

“(1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.” (Emphasis added)

The applicant submits that the gazettelement of the applicant can be enforced by a court of law.

32. The 3rd Respondent’s case is that the current application is incompetent as the orders sought can only be applied for through an Election Petition filed under Section 74 and 75 of the Elections Act. They refer to the case of Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (Petition I of 2015)120161 KESC 2(KLR) (26April 2016) (Judgment) where the Supreme Court held that:

“The Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettelement of the nominees’ names by the IEBC, as an integral part of the election process.” (Emphasis added)

33. The Apex Court further noted that the publication of the Gazette Notice marks the end of the mandate of the IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Apex Court subsequently determined that only the Election Court had the powers to disturb the status quo. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the Elections Act.

34. Clearly, according to the Apex Court the gazettelement of the previous nominee’s name was integral part of the concluded electoral process, making the end of the IEBC’s mandate. Any charges would only be made on the Election Court by way of election petition. No such petition has been filed. The present miscellaneous constitutional application is therefore not an apt or competent process to effect the applicant’s desire.

Whether the 2nd Respondent is legally mandated to gazette the Applicant as the United Democratic Alliance Party Gender Top UP Nominee as per the Party List Submitted.

35. The applicant’s case is that the publishing of names of a candidate in a gazette notice while effecting a reallocation of a special seat does not require the 3rd Respondent to be fully constituted. She states that the Constitution under Article 177(b) provides for the membership of county assembly and particularly states as follows:

“(1) a county assembly consists of -
(a);
(b) the number of special seat members necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender;”



- The applicant thus submits that this is not a matter that requires the 3rd Respondent to be properly constituted since it only concerns a reallocation of a nomination slot and not a by-election.
36. The 3rd respondent case is that this is an electoral process and not an administrative function and rely on the case of *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR where the Court of Appeal held that upon gazette of members of the County Assembly, they are deemed to be elected Members of the County Assembly. It is therefore trite that Gazette produces an election result.
37. Further, they submit that the IEBC lacks the requisite quorum to enable it conduct its mandate under the provisions of *the Constitution* and the *Elections Act* following a gazette notice dated 14th February, 2023 in which the President declared 5 positions in the Commission vacant. The IEBC currently has only one remaining commissioner following the resignation of 3 commissioners and the completion of tenure of the IEBC chairman and 2 other commissioners.
38. In the case of *Abdow Bishar Maalim v Abdiwelly Haji Bukura & Others* (2023) (As consolidated with Garissa High Court Election Petition Appeals Nos. E004 of 2023 and E005 of 2023). This court in directing the IEBC to gazette the names of the respective candidates and issuing a certificate under section 86(1) of the Election Act categorically held and ordered as follows:
- “That mention on 11/10/2023 to confirm if the Notice will have been published, as this being nomination slots and not by-election, they do not need the commission to be fully constituted. It is a function performed to effect a court order hence not a policy action.”
39. In *Omwoyo v Independent Electoral & Boundaries Commission & another (Petition E005 of 2023)* [2023] KEHC 24521 (KLR), Okwany J, considered circumstances that the parties find themselves in where, for some unexplained reason, there is no properly constituted IEBC, and draws reference from the maxim of equity which states that: “Equity sees as done that which ought to have been done”. In that case, the applicant sought for an order to compel the 1st Respondent’s Chief Executive Officer to gazette the Petitioner as a Member of the Nyamira County Assembly under the Gender Top Up List representing Jubilee Party within 7 days.
40. . There, Okwany J, stated:
- “My view is that, in the peculiar circumstances of this case, the issue of gazette should not be invoked so as to create a hurdle that ultimately prevents the Applicant from taking up her rightful position as an MCA of Nyamira County. I reiterate that gazette is merely a formality that serves as a notice to the general public of the Applicant’s nomination. In this case, one can say that the existence of court orders upholding the Applicant’s nomination is itself sufficient notice to the public of such nomination.”
41. However, in the present case there is no court order compelling the 3rd Respondent to gazette the applicant reallocating the Kirinyaga County Assembly special seat. The exercise will require the involvement of a quorate IEBC as it is an integral part of the electoral process.
42. . As earlier noted, In *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR, the Court of Appeal held that upon gazette of members of the County Assembly, they are deemed to be elected Members of the County Assembly. It is therefore trite that Gazette produces an election result, a process which the IEBC is not in apposition to effect at the present time.



43. Accordingly, in my considered view the applicant's application cannot succeed. It hereby fails in its entirety, and is hereby dismissed.

Orders accordingly.

DATED AT KERUGOYA THIS 16TH DAY OF DECEMBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Lerionka - holding brief for Kamotho for Applicant
2. Maina Ms - for 1st & 2nd Respondents
3. Magee for 3rd Respondent
4. Court Assistant, Murag

