



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E043 OF 2021

GLADYS OMATO.....PETITIONER

-versus-

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT

RULING NO. 1

1. *Gladys Omat*, the Petitioner herein, is a Kenyan citizen with political ambition. She hails from Kisii County and aspired to contest the position of Member of County Assembly for Kiomakama Ward that fell vacant upon the demise of its incumbent, Hon. Kennedy Mainya.
2. It is her case that she offered her candidature through her political party, *The Frontier Alliance Party* (hereinafter '**The Party**') upon complying with requirements set by *the Independent Electoral and Boundaries Commission*, the Respondent herein.
3. However, when she presented her nomination papers to the Constituency Returning Officer, they were marked '*invalid*' on the basis that her name had not been submitted by the Party to the Respondent. As such, she could not vie in the by-election.
4. Aggrieved, she lodged a complaint before the Respondent's Dispute Resolution Committee (hereinafter '**The Committee**') claiming that she was unfairly barred from participating in the by-election. It was also her case that the Party sent her nomination to the Respondent but due to transmission error could not reach the Respondent.
5. In a joint decision, the Committee dismissed her complaint. It stated that her failure to comply with *Regulation 14 of the Elections (General) Regulations, 2012*, that gave political parties timelines for submission of nominated persons, barred her from vying.
6. The Committee further stated that the failure by The Party to present the Petitioner's name on or before 11th January 2021 effectively barred her from subsequently getting registered as a candidate by the Returning Officer on 18th and 19th January 2021.
7. Dissatisfied with the foregoing turn of events, the Petitioner lodged the instant Petition and a Notice of Motion application. Both are dated 3rd March, 2021.
8. The Petitioner's claim in the Petition is that the Respondent's failure to accept her nomination infringed her constitutional rights guaranteed under *Article 20(3)(d), 22(3)(d), 24, 38(3), 47(1) and 159(a) & (c)* of the Constitution.
9. In the main, the Petition prays for the following: -
 1. A Temporary injunction do issue compelling the Respondent to accept the petitioner/Applicants' nomination papers and issue her with a clearance certificate for her to contest the Kiamokama member of Country Assembly seat on Frontier Alliance Party ticket on the 4th March, 2021 by-election
 2. A Temporary injunction do issue compelling the Respondent to accept and incorporate the Petitioners name in the list of candidates in the ballot papers as a Frontier Alliance Party Candidate for Kiamokama Ward seat in the 4th March, 2021 by-election.

3. A Temporary Injunction do issue against the Respondent to halt the printing of ballot papers for the Kiamokama Ward seat pending the hearing and determination of this application.

4. Costs of this petition.

10. The application filed alongside the Petition prays for some conservatory orders.

11. In response to the Petition and the application the Respondent filed a Preliminary Objection dated 10th February, 2021. It opposed the Petitioner's case on the following grounds: -

1. THAT the complaint No. 1 of 2021 lodged by the Applicant with the Respondent's Dispute Resolutions Committee was dismissed vide the ruling dated the 26th day of January 2021.

2. THAT this Honourable Court lacks jurisdiction to entertain the suit as it is not a challenge against the decision of the Respondent's Dispute Resolution Committee.

3. THAT the Application and the Petition is incompetent, an abuse of the Court process and should be struck out with costs to the Respondent.

12. On this Court's directions, the objection was heard by way of oral submissions.

13. Since the issue of jurisdiction is raised by way of a preliminary objection, I will, first, deal with the law on the subject.

14. Law, J.A. in **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say: -

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

15. In **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR**, the Court held that: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

16. Ojwang, J (as he then was) in **Oraro -vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that: -

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

17. In **Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177**, it was opined that, while Courts are cautioned against the purported use of contested facts in determining preliminary objections, they are at liberty to look at the pleadings and other relevant in documents on the record. It was observed thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....

18. By juxtaposing the issues raised in the preliminary objection against the contents of the Petition and the law on preliminary objections, I find that the preliminary objection has attained the required threshold and is well founded on a point of law. The objection, if successful, is

capable of determining the Petition at once.

19. The objection is to the effect that this Court lacks jurisdiction over the dispute. A contest on jurisdiction must be addressed at the earliest opportunity since it goes to the root of the Court's competence in the matter.

20. In **Nairobi High Court Petition No. E282 of 2020 David Ndi and & 4 Others -vs- The Attorney General & Others**, this Court discussed the issue of jurisdiction at length and as follows: -

21. *Jurisdiction* is defined in *Halsbury's Laws of England* (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". *Black's Law Dictionary*, 9th Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

22. In *Words and Phrases Legally Defined* Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

23. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA*, in **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1** expressed himself as follows on the issue of jurisdiction: -

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...

24. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in **Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR** stated as follows: -

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in **Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577**, as follows;*

1)

2) *The jurisdiction either exists or does not ab initio ...*

3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

25. On the centrality of jurisdiction, the Court of Appeal in **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

26. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in **Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR** held that: -

29. *Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent*

27. Later, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR** Supreme Court stated as follows: -

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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. 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. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

28. **And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR**, the Court of Appeal further stated: -

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

29. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or a settled judicial precedent.

30. In this matter, Counsel for the Respondent made elaborate submissions to the effect that the law ousts the jurisdiction of this Court since a party dissatisfied by the decision of the Committee has the option of either filing a Judicial Review application or preferring an appeal, but not filing a Constitutional Petition.

31. In buttressing the argument, the Respondent relied on several decisions. They include the Supreme Court in ***Petition No. 7 of 2018, Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)* [2019] eKLR** and ***Supreme Court Petition No. 30 of 2018 Silverse Lisamula Anami v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR**.

32. In ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others*** case (supra), the Respondent laid emphasis on the following excerpt: -

[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.

33. Reference was further made to the decision in ***Silverse Lisamula Anami v Independent Electoral & Boundaries Commission & 2 others*** case (supra) where the Court in paragraph 41 observed as hereunder: -

41. Thus, the election Court held that where any party is dissatisfied with the decision of either the PPDT or the IEBC Dispute Resolution Committee, such a party should file either an appeal or a review of the said decision. As such, it held that since the decision of the IEBC Dispute Resolution Committee was not appealed, the Petitioner could not raise that same issue before it. It therefore found that an election Court has no jurisdiction to determine such a pre-election dispute.

34. Counsel further submitted that the Petition is incompetent, in the wrong forum and ought to be struck out with costs.

35. The rival position as regards this Court's jurisdiction is rather simple. The Petitioner claims that the refusal by the Respondent to accept the nomination papers violated her constitutional rights under *Article 20(3)(d), 22(3)(d), 24, 38(3), 47(1) and 159(a) & (c)* of the Constitution and as such the Petitioner is entitled to approach this Court for redress.

36. Counsel for the Petitioner submitted that the decisions relied upon by the Respondent are distinguishable on the ground that the said decisions dealt with pre-elections disputes where the parties did not comply with the law. He stated that the position here is different as the Petitioner seeks to assert her rights.

37. To further distinguish their case, Counsel for the Petitioner referred to the Court of Appeal decision in ***Fredrick Odhiambo Oyugi -vs- Orange Democratic Movement & Others (2017) eKLR*** where the Appellate Judges excluded decisions of IEBC from being appealed against.

38. This Court has had the benefit of going through the entire Supreme Court decision in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others*** case (supra). Accordingly, the purported use of the excerpt by the Respondent to oust this Court's jurisdiction is misleading. The excerpt was not a finding of the Court neither was it an *obiter*. The Supreme Court was simply making reference to the finding of the High Court and the Court of Appeal regarding **Articles 88(4)(e) and 105(1) and (3)** on the question whether an election Court has jurisdiction to adjudicate over a pre-election dispute, that is; whether a person was validly nominated and whether he qualified to be nominated as a candidate.

39. Accordingly, the Supreme Court finding on the foregoing was as follows: -

Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, 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. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the Constitution.

40. The law on pre-election disputes is squarely settled by the Supreme Court. In this case, however, the question for determination has taken a different trajectory. The Petitioner is not contesting the decision of the Committee *per se*. Instead, the Petitioner challenges the constitutionality of the refusal by the Respondent to accept her nomination papers. The Petitioner asserts that her rights were variously infringed by the actions of the Respondent. The Supreme Court decision is, hence, distinguishable in the unique circumstances of this case.

41. The Petitioner has the right under Article 22 of the Constitution to approach this Court on claims of violation of her constitutionally guaranteed rights and fundamental freedoms. Likewise, this Court has jurisdiction under Article 165 of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

42. The Respondent's preliminary objection is, hence, misconceived. What the objection seeks to challenge is not what is before Court.

43. I must, however, point out an important issue. It is on how the prayers in the Petition are tailored. Whereas the Petition in paragraph 10 alleges infringement of the Petitioner's rights and fundamental freedoms and the Counsel for the Petitioner correctly distinguished the present dispute from a pre-election dispute, surprisingly, the Petition makes no mention on how such rights and fundamental freedoms shall be vindicated. Due to the nature of this matter, there is need for the Petitioner to consider some further input on the Petition especially on the prayers sought.

44. Having said so, it has also come to the Court's attention that the actions challenged in this Petition took place within Kisii County. It is only imperative that the dispute be dealt with where the cause of action arose.

45. In the end, this Court makes the following orders: -

- (a) The Preliminary Objection dated 10th February, 2021 is hereby dismissed.**
- (b) This matter is hereby transferred to the High Court at Kisii for further dealing.**
- (c) The Deputy Registrar of this Court shall forthwith transmit the Court file to the High Court at Kisii.**
- (d) The matter shall be fixed for directions before the High Court at Kisii on 23rd March, 2021.**
- (e) Costs in cause.**

46. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2021.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Nyaberi, Learned Counsel for the Petitioner.

Miss Jemator, Learned Counsel for the Respondent.

