



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 17 of 2017**

**IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010**

**AND IN THE MATTER OF : THE BREACHES OF ARTICLES 1, 2, 3, 6, 10, 12, 20, 21, 23, 24, 25, 26, 27, 28, 47, 48, 54, 56, 90, 100, 174, 175, 177 and 259 of the CONSTITUTION OF KENYA 2010**

**B E T W E E N:**

**ATHUMAN MOZE MSAFIRI.....PETITIONER**

**-AND-**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (IEBC).....FIRST RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY.....SECOND RESPONDENT**

**CLERK OF TAITA TAVETA COUNTY ASSEMBLY.....THIRD RESPONDENT**

**CHRISTOPHER MWAMBINGU.....FOURTH RESPONDENT**

**JUDGMENT ON PETITION**

**R U L I N G O N A P P L I C A T I O N**

1. In the Petition the Petitioner, describes himself as a resident of Taveta Sub County, Taita Taveta County. In his Supporting Affidavit he says that he is “a life member of the 2<sup>nd</sup> respondent and infact the Chairman for the Taveta Branch. The Second Respondent described as “the Orange Democratic Movement Party”. The Third Respondent is described thus; “The 3<sup>rd</sup> Respondent is the clerk of the Taita Taveta County Assembly and the Principal Officer charged and mandated to swearing in the County Assembly Members, convening sittings of the County Assembly and presiding over administrative matters of the Assembly”. The 4<sup>th</sup> Respondent is described as “an adult person of sound mind and a resident of Mwatate Sub County, Taita Taveta County within the Republic of Kenya.”.

2. The Respondents named in the Petition are firstly the Independent Electoral & Boundaries Commission which was created under **Article 88 of the Constitution of Kenya 2010 (COK 2010)**, Secondly, the Orange Democratic Movement Party (ODM) which is a registered Political Party under the (**Political Party Act No 11 of 2011**), Thirdly, the Clerk of Taita Taveta County Assembly and the officer responsible for the administration of the County Assembly including the swearing in of Members and convening sittings. Lastly, a Mr Christopher Mwambigu who is described as a resident of Mwatate Sub-County. The Petitioner asks the Court to make the following Orders:

“1. A finding and declaration that the replacing of the petitioner with the 4<sup>th</sup> respondent as nominated MCA Taita Taveta Assembly was illegal, unlawful and unconstitutional.

2. A declaration that the purported special issue of Kenya Gazette VOL. CXIX-NO 142 gazette Notice No. 9391 dated 19<sup>th</sup> September 2017 and published on 26<sup>th</sup> September 2017 is null and void to the extent it deletes the nomination of the petitioner herein and purports to replace him with the 4<sup>th</sup> respondent as the duly nominated MCA Taita Taveta Assembly.

3. An order do issue to the 3<sup>rd</sup> respondent to swear in the petitioner herein as a duly nominated MCA Taita Taveta Assembly.

4. Such or further relief as Hon court deems fit and just to grant in the interest of justice.

5. Cost of this petition be borne by the respondents jointly and severally”.

3. The Petition was filed in the High Court. In making that choice the Petitioner relies on **Article 23 of the Constitution of Kenya (CoK 2010)**. The Petition was filed under a certificate of urgency signed by the Advocate who had conduct at that time. The Petition was filed on 5<sup>th</sup> December 2017. The reason for the urgency given was “THAT the 4<sup>th</sup> respondent has since unlawfully been sworn in and he continues to enjoy and benefit the perks to the detriment of the application who was rightfully nominated.”. The insight gained from that statement is that the Petitioner is more interested in the perks rather than the privilege of representing the people of Taita Taveta County. In addition, the Petitioner filed a Notice of Motion under **Section 3A and 63(e)** of the **Civil Procedure Act** and all enabling provisions of the **Laws of Kenya**. The Orders sought in that Application are:

1. “THAT the application herein be certified urgent and service thereof be dispensed with in the first instance
2. THAT pending the hearing and determination of this petition, the Hon Court do issue orders compelling the 3<sup>rd</sup> respondent to swear in the petitioner herein
3. THAT the Hon court do grant such or further orders it deems fit so grant in the interest of justice (sic)
4. THAT the costs of this application be provided for.

4. The Application sets out three grounds justifying the orders sought. They are:

- (i) THAT the petitioner was duly nominated as MCA Taita Taveta County Assembly.
- (ii) THAT the 3<sup>rd</sup> respondent refused to swear in the petitioner with others on 6<sup>th</sup> October 2017
- (iii) THAT the refusal was violation of the rights of the petitioner.

5. On 5<sup>th</sup> December 2017, the Petition came before Hon Lady Justice Jacqueline Kamau. She gave directions for the Respondents to be served. That was not done until about 18<sup>th</sup> December 2017. In Court on that day, Counsel for the 4<sup>th</sup> Defendant informed the Court that his Client intended to make an application to strike out the application against him because he was not a necessary party. That was never done. Instead he filed Grounds of Objection. When the matter came back before the same Court on 2<sup>nd</sup> February 2018, the First Respondent had filed and served a Notice of Preliminary Objection dated 29<sup>th</sup> December 2017 and filed on 3<sup>rd</sup> January 2018. The First Respondent’s Replying Affidavit had been filed. The Parties expressed to the Court a wish to file written submissions on the Preliminary Objection. The Court said:

*“I have carefully listened to counsel for all parties and not that they are all agreed that the Preliminary Objection that is dated 29/12/17 and filed on 3/1/18 be heard first. This is as it should be as it has the potential of terminating the matter before court purely on a point of law. The same should then be heard first. On the question of whether or not counsel for the 3<sup>rd</sup> Respondent can participate in the proceedings before filing his response to the Petitioner’s pleadings, as his counsel Mr Bwire rightly pointed out, the Preliminary Objection is a part of law and all he needs to participate in this matter is a Notice of Appointment of Advocates and not substantive pleadings in response to the Petitioner’s Petition as Mr Mwinzi suggested. The arguments by Mr Bwire on who was served on behalf of the 4<sup>th</sup> Respondent and those of Mr Mwinzi were duly noticed by this court. However, as this court is merely giving directions of the Preliminary Objection and service of today’s directions as the filing of submissions, the 4<sup>th</sup> Respondent will suffer no prejudice.”.*

6. The learned judge then went on to give directions for the filing of submissions **as well as responses** to the Notice of Motion. The First Respondent (IEBC) filed its submissions on 26<sup>th</sup> February 2018. The Petitioner filed submissions in response on 12<sup>th</sup> April 2018. In the interim the Petitioner changed his Advocates from Messrs Mwinzi & Associates Advocates to Messrs Otieno Otwere and Associates Advocates. There followed more changes. On 25<sup>th</sup> May 2018, the Third Respondent (Clerk of the County Assembly) filed Grounds of Opposition to the Petition.

7. The First Respondent, in its Notice raises a Preliminary Objection for the Petition to be struck out for the following reasons:

- i. This Honourable court lacks jurisdiction to hear and determine this Petition in view the provisions of Article 88(4)(e) of the Constitution, Section 74(1) of the Elections Act, 2011 and Section 39 of the Political Parties Act.
- ii. The Petitioners petition is time-barred in view of the provisions of Article 87(2) of the Constitution and Section 74, 75 and 76 of the Elections Act 2011.
- iii. The Petitioners Petition is incompetent and legally untenable in view of the provisions of Article 88(4), Section 74(1) of the Elections Act and Regulation 99(2) of the Elections (General) Regulations 2012 which vests the 1<sup>st</sup> Respondent with powers to settle nomination disputes.”

It seems that the PO was only served on the Petitioner in the first instance. At that stage the Petitioner had not served the 4<sup>th</sup> Respondent

effectively. The Second Respondent was served on 12<sup>th</sup> January 2018 but has not participated in the Petition.

8. The Presiding Judge was then transferred to Nairobi. The Court was re-constituted as present with effect from 1<sup>st</sup> May 2018 with hearings commencing on 22<sup>nd</sup> May 2018. The Grounds of Opposition filed on behalf of the Third Respondent are dated 30<sup>th</sup> January 2018 but were not filed until 25<sup>th</sup> May 2018. The Third Respondent's Opposition is based on the following Grounds:

- “1. The Application and Petition have no merit and is based on a misconception of the law, vexatious and an abuse of court process.*
- 2. The Application and the Petition as taken out drawn and filed is a non-started incurably defective and unsustainable.*
- 3. The Honourable court lacks jurisdiction to entertain this matter since the matter in issue is contestation of election of the 4<sup>th</sup> Respondent.*
- 4. By virtue of Sections 34(10) and 37(4) of the Election Act, the Petitioner's Claim does not lie against the Third Respondent.*
- 5. The prayers sought as against the 3<sup>rd</sup> respondent cannot issue for reasons that:*
  - (a) Rectification and/or alteration of the party list is a preserve of the 2<sup>nd</sup> Respondent before its submission to the 1<sup>st</sup> Respondent.*
  - (b) The 3<sup>rd</sup> Respondent has no role in generation of the party list.*
  - (c) During the swearing in of the 4<sup>th</sup> Respondent, the 3<sup>rd</sup> Respondent in the circumstances was discharging his statutory duties and is not to be held liable should any error occur with the party list.”.*

9. The Matter first came before the Court as currently constituted on 11<sup>th</sup> June 2018. On that day there was still confusion as to which parties had been served and which as well as whether the filing of submissions ordered by Hon Jacqueline Kamau J had been done. The Court gave directions on that day. On the 3<sup>rd</sup> October 2018, the Court directed that the Ruling would be delivered the following month, however, after consideration of the file the Judge decided that highlighting of submissions was necessary. That Order was made on 3<sup>rd</sup> July 2019. The Petitioner was directed to serve the Order upon the Respondents and for the Parties to agree a date. It appears that he did not. At the same time the Petitioner filed an Application seeking reconstruction of the file. That Application was not necessary and misconceived. On 2<sup>nd</sup> September 2019 when the Matter was Listed, the Respondents were not present and so it went on.

10. Nonetheless, this Court is now satisfied that each one of the Parties has been served and had ample opportunity to respond to and submit upon the Petition.

11. The First Respondent filed a Replying Affidavit on 23<sup>rd</sup> January 2018. It is deponed by a Salome Oyugi who describes herself as the Manager Political Parties & Campaign Financing at the IEBC (First Respondent). She expresses the view that the Petition is an Election Petition disguised as a Constitutional Petition. The Affidavit explains that the nomination of members of a particular party for special seats is a function of the political party and must be done within the law. The First Respondent accepts that it caused to be published a list of nominees as alleged in the Petition and also corrected that list after being informed by the Second Respondent – the Political Party in question. In correcting the nomination, it published a corrigenda gazette notice. From the Exhibits it is clear that the Gazette Notice No 9391 replaced the Petitioner with the Fourth Respondent as its special interest nominee. The Gazette Notice is dated 19<sup>th</sup> September 2017 and was published on 26<sup>th</sup> September 2017. The Notice states clearly and concisely that, “The deleted nominee stands disqualified as the County Assembly Representative of the respective County Assembly.”. The Petitioner alleges that the instructions for the publication of that GN did not emanate from the IEBC but from the Fourth Defendant. Clearly, that is contradicted and there is no substantiation pleaded. Clearly, by the Affidavit he is contradicted by the IEBC. He also says he was not aware of it but accepts in his Submissions that he was.

12. The First Respondent states that such replacement/correction was done within the timelines was done in compliance with the **Constitution, Election Act No 24 of 2011** and Regulations thereunder. The Petitioner has not challenged that. However, the General Election took place on 8<sup>th</sup> August 2017. The Petitioner expected to be sworn in on 6<sup>th</sup> September 2017. However, in his Submissions in response to the Preliminary Objection he says that the swearing in took place on 6<sup>th</sup> October 2017 and therefore after the Gazette Notice No 9391. That means the gazette notice was published after the first scheduled swearing in ceremony but before the actually swearing in. How then could a reasonable man expect that anyone other than the one in the gazette notice would be sworn in?

13. In order to demonstrate the timelines the First Respondent's Affidavit exhibited as SO-1 is a copy of the list submitted by the Second Respondent under cover of a letter dated 19<sup>th</sup> July 2017. The Letter is entitled “Submission of Final Revised Party List”. That suggests that the preparation and submission of the lists was a process and not a single act as stated by the Petitioner. Exhibit SO-3 gives the Court some insight into the reason for the disqualification of the Petitioner. It is a Letter dated 6<sup>th</sup> September 2018 and is entitled “Request for Review of the ODM List of Nominated Members to Various County Assemblies”. At point 7 it states clearly that; “7. In respect of Taita Taveta County Marginalized List, we wish to point out that when the Commission published the list in the daily press on 23<sup>rd</sup> July 2017, out members from Taita Taveta County presented a formal complaint against Athman Moze Msafiri whose name had been published as an ethnic minority. The Party resolved that the position should be taken by Christopher M. Mwambingu ID No 25\*\*\*\*\* (withheld) as per our List submitted to the Commission on 10<sup>th</sup> August 2017.”. The Letter addresses 22 points in relation to various nominations around the Country. That Letter, the instructions it contains and the outcome, is completely at odds and the Petitioner's evidence and claims of secretive processes

and surprises at the last minute. From that Letter it is also clear that the decision to replace the Petitioner was made as early as 10<sup>th</sup> August 2017. In the circumstances, the question must be asked did the Petitioner truly believe that on 6<sup>th</sup> October 2017 “*all the members of the Taita Taveta County Assembly were secretly sworn in and he was excluded*”. If so, on what grounds. It is not explained anywhere save for the Gazette Notice how that information was communicated to the Petitioner contemporaneously with the decision. However, even after the GN and the swearing in, from the evidence before the Court it is clear that the Petitioner took no reasonable steps to question and/or challenge that decision at the time. He did not complain about it to the Party. He did not complain to the Registrar of Political Parties claiming a breach of the code of conduct. He did not take the matter before the Political Parties Dispute Tribunal. He did not file an election petition within 28 days of the election of the nominated MCA (6<sup>th</sup> October 2017).

14. On the basis of that evidence and process the First Respondent filed a Preliminary Objection. The Preliminary Objection is firmly founded on the absence of jurisdiction in the High Court to deal with the issues raised. However, it seems to this Court that does not deal with all the issues raised. There are two issues, the jurisdiction to hear the dispute as well as the power to make the orders sought.

15. At paragraph 4 of the Replying Affidavit the Ms Salome Oyugi states “*THAT the nomination of the party members to the special seats was done in accordance with the law and the law requires the respective political party to present the list of nominated members to the 1<sup>st</sup> Respondent*”. She cannot give evidence on the internal workings of a political party. However she is entitled to assume that proper proceeds were followed when she receives formal communication. As officer of the IEBC, the deponent can only give evidence on the operations of that organisation. However, the IEBC List that is exhibited at SO-1 (page 67 of 102) lists 22 individuals who were nominated under the Special Interest Category “Gender Top Up”. A further list provides the names of the individuals nominated under the “Ethnic Minority” category and therefore does not substantiate what is said in the body of the Affidavit. However, from the published Gazette Notice of 28<sup>th</sup> August 2017, it is clear that of the 20 or so names suggested only 4 went forward to be gazetted. For the Category of Marginalized/Ethnic Minority, there were only two names gazette. According to the Replying Affidavit, following the election there would be a formula which decided how many of those named would actually be nominated. In the case of the list gazette on 28<sup>th</sup> August 2017, neither were. An election is a competition. In this case the Petitioner did not win on any analysis.

16. The Written Submissions were not filed as originally directed. It seems that is largely due to the Petitioner’s dilatory approach to service. In its Written Submissions the First Respondent relies on the authority of *Moses Mwicigi & 14 Others v I.E.B.C. & 5 Others [2016] EKLK* where at paragraphs 106-107 the Supreme Court said:

*“The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court....*

*It is therefore clear 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 Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly”.*

17. The First Respondent is a corporate body established by **Article 88(1) of the CoK 2010**. **Article 88(4)** provides that “*The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular....(e) 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....*”.

18. Ground 1 of the Preliminary Objection is that the Court lacks jurisdiction. The First Respondent reminds the Court of the renowned case of the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) 1989 KLR 1* where the Court of Appeal said, “*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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...*”.

19. In response the Petitioner repeats the facts contained in his Petition and affidavit. He repeats that “*After going through the process the petitioner was only waiting to be sworn as such nominated member of the Taita Taveta County Assembly in a ceremony which was slated for 6<sup>th</sup> September 2017.*”.

20. It is correct that the Court must down tools once it decides that it does not have jurisdiction, however, the manner in which this Petition is pleaded gives rise, firstly, to the question of locus. The Petitioner, on the basis of the Letter dated 6<sup>th</sup> September 2017 from the Second Respondent to the First Respondent, it is clear that the Petitioner could have had no expectation whatsoever that he would be sworn in on 6<sup>th</sup> September 2017. The General Election took place on 8<sup>th</sup> August 2017. Even if the Petitioner had failed to appreciate the context and decisions of the Second Respondent’s meeting and its decision, he could not have failed to understand the terminology of the Gazette Notice of 26<sup>th</sup> September 2017. That correction was published almost one month after the event, even at that stage the Petitioner should have understood he had been “disqualified”. At that stage the reasons did not matter. He did not react like an aggrieved person. He did not start any formal complaints process whatsoever.

21. The Petitioner relies on an invitation to the ceremony, however, that is not unequivocal proof that it was an invitation to be sworn in. There are many explanations for a chairman of a Sub-Branch of any political party to be invited to a political or electoral event. In this case, it seems the event was postponed for a month. What is interesting, is that the Petitioner being as alarmed and aggrieved as he now claims, decided to do nothing for two more months. Visiting offices and talking to unnamed people does not qualify as a complaint.

22. It is therefore necessary to analyse the Petition and Notice of Motion in that context. In relation to the Second Prayer in the Notice of Motion namely “*THAT pending hearing and determination of this petition, the Hon Court do issue orders compelling the 3<sup>rd</sup> respondent*

swear in the petitioner herein”.(sic). On the hearing of a constitutional petition, the High Court is empowered to make certain orders to preserve the subject matter pending the hearing and determination of the Petition. An order for the swearing in of a member of the County Assembly is the intended final outcome of the Petitioner. It cannot be called a holding measure by a final resolution. The grounds relied upon were:

- i) That the petitioner was duly nominated as a MCA Taita Taveta County Assembly
- ii) THAT the 3<sup>rd</sup> respondent refused to swear in the petitioner with others on 6<sup>th</sup> October 2017
- iii) THAT the refusal was violation of the rights of the petitioner.”.

23. In relation to orders against the Clerk of the County Assembly. It is clear that the Clerk of the Assembly is a functionary in the sense that he is a person who acts on the directions of others mainly the executive, including but not limited to the Speaker, the Governor and the Deputy Governor.

24. As stated above, the Petitioner relies on **Article 23 CoK 2010** which provides “*the High court shall have the jurisdiction in accordance with Article 165 to hear and determine application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights*”. Even before the Court decides whether it has jurisdiction, the Petitioner must identify the right which he is claiming. From his pleadings the right he claims against the 4<sup>th</sup> Respondent is for his election to be nullified or in some way reversed. He then builds upon that by saying that the Court should then impose him upon the Assembly and his Party by installing him as a Member of the County Assembly of Taita Taveta. Against the Third Respondent, the Petition demands that, he be forced by the Court to swear in the Petitioner. Against the First Respondent he seeks a declaration that Gazette Notice No 9391 dated 19<sup>th</sup> September 2017 published in Vol CXIX-No 142 on 26<sup>th</sup> September 2017 is null and void. His argument for that nullity appears at paragraph 36 where is it pleaded “That the petitioner states that the nominated seats within any County Assembly as per **Article 90** and **Article 177** of the constitution was to be done in a way that equality and proportional representation is accorded to the less disadvantaged group in the society comprising of the ethnics minority, marginalized, etc which categories the petitioner fits perfectly as from minority group.”. At paragraph 37 he then goes on to say; “*That upon scrutiny of the alleged Kenya Gazette No 9391 of 26<sup>th</sup> September 2017, one would find that the 4<sup>th</sup> respondent allegedly replaced the petitioner herein as a youth when in fact the 4<sup>th</sup> respondent herein was not a youth in the first place.*”. (sic)

25. This Court takes Judicial Notice of the fact that Taita Taveta is a very cosmopolitan county and therefore those allegations (of minority) would have to be proved as a matter of fact. It seems to this Court that the most appropriate venue for that would be the election court.

26. At paragraph 38 he says “*That the process if any of replacing the petitioner was un-procedural, illegal, illegitimate and that the petitioner was not accorded any opportunity to be heard contrary to the constitution and the law.*”. The Petitioner says in his affidavit that he is/was a lifelong member of the Second Respondent which is a political party. A political party is an association or organization which is an integral part of the multi-party system. As a member of the Second Respondent, the Petitioner must have agreed to be bound by the internal regulation mechanism of that entity whether it is the constitution, the executive decision making or any other operation. Under the Political Parties Act those functions must be exercised ethically, democratically and in accordance with the spirit and ethos of the **CoK 2010** in particular **Articles 91-92..** A political party has a legal personality and therefore can sue and be sued in its own name. At paragraph 38 of the Petition the Petitioner alleges “*That the process if any of replacing the petitioner was un-procedural, illegal and illegitimate and that the petitioner was not accorded any opportunity to be heard contrary to the constitution and the law.*”. Again, those are factual allegations that must be proved. In his Affidavit the Petitioner relies upon a **Gazette Notice 8380** from **Vol CXX No 124** of 28<sup>th</sup> August as well as publication of the list in the Standard Newspapers. However, that is not proof of a process but rather the proof of the outcome. Gazette Notice No 124 (8390) cannot be good evidence because it was expressly withdrawn meaning it became a nullity ab initio. Those publications as well as the invitation were not something that was instigated by the First Respondent or the County Clerk, they were instigated by the Party (the Second Respondent). The clue lies in the fact of nomination. The only body that could nominate the Petitioner was his political party. If it changed its mind and he was dissatisfied that is an internal dispute. The correct venue for that dispute is the Political Parties Dispute Tribunal (**Section 40 Political Parties Act No 11 of 2011**). From the evidence before the Court it seems that the Petitioner did not follow that route to resolve the dispute even as long ago as 26<sup>th</sup> September 2017 when he is deemed to have been notified of the fact that he was **disqualified**. Disqualification falls within the internal party decision making process. Any dispute in that respect cannot be brought to the High Court **in the first instance**. The Petitioner subscribes to the Party, the Party has a mechanism. The mechanism made certain decisions in a certain way. The Petitioner was not satisfied. He is entitled to be aggrieved however, he is not entitled to bring that dispute to the High Court without exhausting the statutory remedies available. He has attempted to do so by his Petition.

27. However, the Petitioner in paragraph 13-16 of his Supporting Affidavit depones that he was he was informed that neither the First Respondent (IEBC) nor the Second Respondent (his Party) were aware of the Corrigenda Gazette Notice of 26<sup>th</sup> September 2017. His Affidavit fails to name any natural person who is alleged to have made those statements about the publication of **GN 9391**. In light of the fact that the publication exists, and is still available, that allegation seems extremely implausible. In its Replying Affidavit, the First Respondent exhibits the correspondence whereby it was directed by the Party who it had nominated – firstly the Petitioner and subsequently the Fourth Respondent. The allegation that the Government Printer colluded with the Fourth Respondent is completely unbelievable in that context. However, even if it were true, the Petitioner’s remedy would lie against his Party to provide an explanation. He did not take that route.

28. However, once the Fourth Respondent was sworn in, the Petitioner’s complaint becomes “*that should be me not him*”. The First Respondent in its submissions argues that amounts to an election dispute. In the view of this Court, the analysis is slightly more refined. In so far as the dispute is not an intra-party dispute, it is an election dispute where the Fourth Respondent would be the Respondent. That dispute arose either on 26<sup>th</sup> September 2017 or at the latest, upon the swearing in of the Fourth Respondent on 6<sup>th</sup> October 2017. Thereafter the Petitioner had the right to file an election petition in the relevant magistrates’ court. He did not do so. Instead, he sat on any rights he might have had until December – 2 months later. As a consequence that opportunity has lapsed.

29. The Court understands that the Petitioner may feel let down and/or aggrieved by his political party but that does not necessarily give rise to grounds for a constitutional petition. For the reasons set out above, the Petitioner has failed to demonstrate that any of the rights he had (or was entitled to) have been breached.

30. The Petitioner also complains that his Party (of which he is a life member) failed to follow proper procedure or failed to abide by the Code of Conduct enshrined in the **Public Parties Act No 11 of 2011** and the **CoK 2010**. An accusation of breach of any code of conduct is a serious allegation. It should not be entertained without a full investigation of the **true** facts and a right to the respondent to see and respond to the accusation. Even at this late stage, the Petitioner has singularly failed to particularise that allegation.

31. Despite feeling that such a huge injustice had been visited upon him he, in fact, did nothing. He did not make a formal complaint to trigger the internal dispute resolution processes of the Party. He did bring his Party before the Political Parties Dispute Tribunal. He did not go to the Registrar of Political Parties. He simply did nothing for three months except dreaming about “the perks” he was missing out on.

32. It is not an appropriate use of a constitutional petition to by-pass statutory time-lines set by subject specific dispute resolution frameworks. That is an abuse of process. In the circumstances, in his Petition the Petitioner has failed to demonstrate (a) that his rights have been interfered with and (b) that he has exhausted all other avenues of resolution and/or remedy.

33. **Order:** The Preliminary Objection is justified and upheld – in so far as it relates to the complaint that the Petitioner filed an Election Petition in the guise of a constitutional petition. The Petition dismissed with no order as to costs. The Notice of Motion Application dated 4<sup>th</sup> December 2017 is also dismissed for lacking locus. Although the Petition is clearly an abuse of process, this Court deems that this is not an appropriate case for the unsuccessful petitioner to pay costs because each of the Respondents are public bodies and/or individuals, arguably with a responsibility to aid the understanding of the Petitioner in their interactions with them. Had they done that they may have avoided this dispute.

Order accordingly,

**Farah S. M. Amin**

**JUDGE**

**Dated 15<sup>th</sup> July 2020**

**Signed and Delivered in Voi this the 16<sup>th</sup> day of July 2020**

**In the Presence of**

Court Assistant: [Josephat Mavu]

Petitioner/Applicant: Mr Wameyo

Respondents

First Respondent: Ms Mwinzi

Second Respondent: No Appearance

Third Respondent: Mr Nyange

Fourth Respondent: No Appearance