



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CONSTITUTIONAL AND HUMAN RIGHT DIVISION**

**PETITION NO. 4 OF 2020**

**(FORMERLY NAIROBI PETITION NO. 175 OF 2020)**

**JOSIAH MURIGU & 30 OTHERS.....PETITIONERS**

**VERSUS**

**HONOURABLE CHARLES REUBENSON KIBIRU.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF THE SENATE.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The Petitioners have filed a petition dated 28<sup>th</sup> May 2020 under **Articles 22(1), 105(B) 165, 258 and 259** of the **Constitution of Kenya 2010** in the matter of alleged contravention of **Articles 10 and 73 and Article 103(1) E** of the **Constitution of Kenya 2010**. The Petition is against **Honourable Charles Reuben Kibiru** and the Speaker of the **Senate**.

The petitioners are claiming that they are registered voters in Kirinyaga County where they have been exercising their right to vote as and when the occasion arises.

2. The claim by the Petitioners is that the 1<sup>st</sup> Respondent vied for Kirinyaga Senatorial seat as an independent candidate and emerged the winner after he garnered 147,921 votes. The petitioner aver that the 1<sup>st</sup> respondent was elected based on his manifesto and the strong conviction that he was the right candidate to represent their interest in the senate. They also aver that the electorate chose to vote of the 1<sup>st</sup> respondent to deliver the functions of the said seat as an independent candidate and would not be influenced by any other political party. The Petitioners now aver that the 1<sup>st</sup> Respondent has betrayed the trust and confidence of the people of Kirinyaga based on the events which took place on 11<sup>th</sup> May 2020 where by the 1<sup>st</sup> respondent had participated in the election of Jubilee Party to change their party leadership in the Senate.

That the 1<sup>st</sup> respondent attended a parliamentary group meeting of the Jubilee Party held at State House Nairobi on 12<sup>th</sup> May 2020. They contend that the trust bestowed upon the 1<sup>st</sup> respondent has been watered down by his actions.

They allege that the 2<sup>nd</sup> respondent has failed to adhere to National values and principle of governance which include upholding the rule of law. That he has contravened the Petitioner's right to have a State officer act in a manner that promotes the values, objects and principles of the **Constitution under Article 73**. As a result, the petitioner meets the threshold of the **Constitution under Article 103 (1) (e) (ii)** which now requires the 1<sup>st</sup> respondent's Senatorial position to be declared vacant on account of his actions. The petitioners seek the following declarations:-

(a) A declaration do issue that the 1<sup>st</sup> respondent has contravened the rights under Articles 10, 73(1) and 103(1) (e) (ii) of the Constitution.

(b) A declaration do issue that the 1<sup>st</sup> respondent actions of attending a Political Party's Parliamentary Group Meeting and participating in the election of the Party's leaders in the Senate amounts to joining the political party.

(c) A declaration do issue that the office of the member of Parliament for Kirinyaga County in the Senate has become vacant on account of the 1<sup>st</sup> Respondent having been elected as an Independent Candidate has joined a Political Party.

(d) Any other orders that his Honourable Court deems fit to grant

(e) Costs of the Petition.

Upon being served, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objection which has raised the following grounds:-

1. This High Court does not have jurisdiction to hear and determine the issue pleaded and raised in Constitutional Petition by petitioners as such jurisdiction is donated and exclusively vested in an election court established under the Election Act, 2011.

2. Article 105 of the Constitution of Kenya is mandatory that any question whether the seat of a Member of Parliament has become vacant can only be determined by way of an election petition. Consequently, the orders sought in the petition including a declaration of that office of the Member of Parliament for Kirinyaga County in Senate has become vacant can only be issued by an election court and therefore this honourable court does not have jurisdiction to entertain the Petition dated 21<sup>st</sup> May, 2020.

3. The Petition is an election petition under the guise of a Constitutional Petition and the same should be declare to be incompetent.

4. **Section 2 of the Election Act, 2011** defines a Petition to mean an application to the election court under Constitution or under the Act (the Elections Act, 2011).

3. The court directed that the Pre-liminary Objection be determined first. The parties agreed to canvass the Preliminary Objection by way of written submissions.

The 1<sup>st</sup> respondent filed submissions dated 6<sup>th</sup> August 2020, through Kamotho Njomo and Company Advocates. It is submitted that the 1<sup>st</sup> respondent is the duly elected Senator of Kirinyaga County having been elected as an independent candidate during the 2017 General Elections and holds the position by virtue of **Article 98(1)** of the **Constitution of Kenya**. He is serving as a senator having been validly elected. That the petitioners are seeking an order that the court declares that the office of the member of Senate for Kirinyaga County in the Senate has become vacant on the basis that the 1<sup>st</sup> respondent has joined a Political Party. The 1<sup>st</sup> respondent has raised the following issues for determination:

**1) Whether the High Court has jurisdiction to hear and determine the issues raised in the Constitutional Petition.**

**2) Whether the question as to whether the seat of a member of Parliament has become vacant can be determined by way of Constitutional Petition.**

4. The 1<sup>st</sup> respondent submits that the nature of the grievance is in the nature of an election dispute and therefore falls within the ambit of the provisions **Elections Act 2011** in which the election court is defined under **Section 2** to mean the Supreme Court in exercise of the jurisdiction conferred upon it by **Article 163(3) (a)** or the High Court in exercise of the jurisdiction conferred upon it by **Article 165(3) (a)** of the Constitution or the Resident Magistrates Court designated by the Chief Justice in accordance with **Section 75 of the Act**. That these regulations made under the Elections (Parliamentary and County Elections) Petition Rules 2017 which define the court as the High Court in the exercise of its jurisdiction conferred upon it by **Article 165(a)** of the **Constitution** or the Resident Magistrate's Court designated by the **Chief Justice** in accordance with **Section 75 of the Act**. He submits that the Elections Act and the Rules made thereunder have provided a detailed procedure on the manner in which a petition challenging the lection of a member of Senate should be presented and the Forum in which such Petition ought to be filed. The 1<sup>st</sup> respondent submits that the counsel for petitioner submitted that the petition is a kin to an election petition and argued that it should be heard and determined within six months.

He submits that High Court does not have jurisdiction to entertain the Petition since it is not an election Court.

5. On the second issue the 1<sup>st</sup> respondent submits that the matter should be filed as an Election Petition and not a Constitutional Petition. The 1<sup>st</sup> respondent relies on the case of *Godfrey Mugambi & 2 Others -v- Philip Abubakar Oluoch and 5 others (2018) eKLR* in the *High Court of Kenya at Meru Constitutional Petition No.10/2017* where a similar Petition was filed and a pre-liminary objection on jurisdiction was raised. **Hon. Justice Mabeya** held that the Petitioners should have filed an election petition before an election court. The 1<sup>st</sup> Respondent has also cited the decision of the Supreme Court in the case of *Moses Mwicigi & 14 Others -V- Independent Electoral and Boundaries Commission & 5 Others (2016) eKLR* where the court held that –

***“It follows such a conception of the electoral process, that any contest to an election whatever its manifestation, is to be by way of Election Petition.***

***To allow an electoral dispute to be transmitted into petition for the vindication of fundamental rights under Article 165(3) of the Constitution, or through judicial review proceedings in our respectful opinion, carries the risk of opening up a parallel electoral dispute resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of Electoral Dispute Resolution Mechanism and not withstanding the vital role of a electoral dispute- settlement in the progressive governance set up of the current Constitution.”***

The 1<sup>st</sup> respondent submits that the Supreme Court decision was followed in the case of *Benson Njuki Kihoro -V- Governor Nyeri County & 4 others (2020) eKLR*, Petition 5 of 2018 where a Constitutional Petition was seeking to have the Deputy Governor of Nyeri County removed from office. The court held that-

**“ The instant petition is an election Petition under the guise of a Constitutional Petition and is found to be incompetent.”**

6. The 1<sup>st</sup> respondent therefore submits that the matter before the court is essentially an election petition seeking to remove him from office as the Senator of Kirinyaga County under the guise of the Constitutional Petition. That it is incompetent and fatally defective and ought to be stuck out.

For the Petitioner, submissions were filed by Waithera Kinuthia & Company Advocates. It is submitted that the Preliminary Objection is misconceived and does not lie and ought to be overruled for the reasons that: The 1<sup>st</sup> respondent has misunderstood the issues raised in the petition.

- The 1<sup>st</sup> respondent has wrongly assumed that that this court does not have jurisdiction to hear the instant petition.
- The election court Act and consequently the election court is divested of jurisdiction to hear the petitioner’s petition.
- That as was held in Supreme Court in **Samuel Kamau Macharia & another -V- Kenya Commercial Bank Limited and 2 Others (2012) eKLR** a court jurisdiction flows either from the Constitution or legislation or both, the Constitution pursuant to **Article 165**, Clothes this court with jurisdiction to hear the instant petition.

The petitioners relying on **Motor Vessel Lilians ‘S’ -V- Caltex Oil Kenya Ltd (1989) KLR** where the Court of Appeal stated that jurisdiction is everything and without it the court has no more power to make one more step.

The petitioners have also cited the Supreme Court of Kenya decision in **Samuel Kamau Macharia & Another -V- Kenya Commercial Bank Limited & 2 Others** where it was stated-

***(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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. 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.”***

The petitioners submit that the court has to determine whether it has jurisdiction based on the nature of the petition which is two fold. That is to say, it is under **Article 103 (1) (e) (ii)** which provides that the office of a member of parliament becomes vacant if – **“as an independent candidate the member joins a political party.”**

The petitioner submits that **Article 105 of the Constitution** gives this court jurisdiction to hear and determine two issues that is- whether a person has been validly elected as a member of Parliament and whether the seat of a member of Parliament has become vacant. That article under sub-article 2 provides that Parliament shall enact legislation to give effect to the said Article. To this end Parliament enacted the **Elections Act No.24/2011**. The Petitioners have referred the court to the Supreme Court decision in **Silverse Lisamula -V- Independent Electoral & Boundaries Commissions & 2 Others (2019) eKLR** where the Court held that it is only the High Court as an election court which is mandated to determine the validity of elections and not the issue raised in the Petitioner’s Petition. It is submitted that **Article 165(3) (d) (i)** of the Constitution gives the court jurisdiction to hear any question in respect to the interpretation of the constitution including the determination of the question whether any law is inconsistency with or in contravention of the Constitution.

The petitioners urge the court to interpret **Article 103(1) (e) (ii)** then determine whether or not it will grant the reliefs. They submit that the 1<sup>st</sup> respondent has wrongly misunderstood the nature of the Petitioners’ petition. It is their prayer that the Preliminary Objection be dismissed with costs.

7. I have considered the Preliminary Objection and the submissions. The issue which arises for determination is whether this court has jurisdiction to entertain the Petition. As it has been stated, jurisdiction is everything and without it a court of law downs its tools. See **Motor Vessel Lilian ‘S’ -V- Caltex Oil (Supra)**. The court stated that;-

***“ I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 is without jurisdiction.”***

When the question as to whether the court has jurisdiction is raised it has to be dealt at the earliest stage for the court to determine whether or not to proceed with the dispute before it. When the court finds that it has no jurisdiction it should lay down its tools. The *locus classicus* on the subject of Preliminary Objection is the Court of Appeal decision in the case of **Mukisa Biscuits Manufacturing Ltd -v- West End Distributors Ltd 1969 E.A 677** where the court stated as follows:

**“ A Preliminary Objection is in the nature of what used to be 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 facts are to be ascertained or if that is sought is the exercise of judicial discretion.”**

The law is settled that court jurisdiction flows from the constitution or the legislation or both. This was what the Supreme Court held in the case of Samuel Kamau Macharia -V- Kenya Commercial Bank Ltd & 2 Others (Supra) where it states that;

**“ 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.”**

It is also trite that the Preliminary Objection must arise and has to be discerned from the pleadings which the parties have filed in Court.

The petitioners are seeking a substantive prayer that the court makes a declaration that the office of the member of parliament of Kirinyaga County in the Senate has become vacant on account of allegation that the 1<sup>st</sup> respondent as an independent candidate has joined a Political Party. The petitioners have stated that the petition is brought under Article 103 (1) (e) (ii) of the Constitution. This Article provides that:

**“ The office of a Member of Parliament becomes vacant-**

**if having been elected to Parliament as an independent candidate the member joins a Political Party.”**

**Article 105 of the Constitution** deals with the question of membership.

It states:-

**“(1) The High Court shall hear and determine any question whether-**

**(a) A person has been validly elected as a Member of Parliament; or**

**(b) The seat of a member has become vacant**

**(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the Petition.**

**(3) Parliament shall enact legislation to give full effect to this Article.”**

The legislation which Parliament has passed under the Article is the Election Act of 2011. Which under **Section 2** defines Election court as Supreme Court in exercise of jurisdiction conferred on it by **Article 163(3) (a)** or the High Court in exercise of the Jurisdiction conferred upon it by **Article 165 (3) (a) of the Constitution** or the Resident Magistrates’ Court designated by the Chief Justice in accordance with **Section 75 of the Act**.

Article 165(3) (a) states:

**“There is established the High Court which –**

**3) Subject to (5) the High Court shall have-**

**Unlimited original jurisdiction in criminal and civil matter.”**

Article 105 of the Constitution gives High Court jurisdiction to determine the question as to whether the seat of a member has become vacant. This determination has to be done under the legislation passed by parliament to give full effect to **Article 105 of the Constitution**.

The petitioners under paragraph 13 of the submissions have admitted that parliament has enacted The Elections Act to give effect to Article 105 of the Constitution.

The Supreme Court in the case of Silverse Lisamula Ananu -V- Independent & Electoral Boundaries Commission & 2 Others (2019) eKLR stated that:-

**“The Legislation established by Parliament as ordained by the constitution is the Elections Act, 2011, the High Court has two distinct jurisdiction under Article 105 of the Constitution.”**

**Article 105 (1) (a) of the Constitution** lays down the jurisdiction of the High Court sitting as an election court. There is a further jurisdiction under **Article 105 (1) (b) of the Constitution** which is concerned with determination of the membership to parliament. The former is concerned with determination as to whether a person has been validly elected as a member of parliament while the later deals with determination as to whether the seat of a member has become vacant.

The Petitioners are invoking the jurisdiction of this Court under **Article 105(1) (b)** of the Constitution on the determination as to membership of Parliament.

The contention that the petitioners can only come to this court by way of an election petition is to miss the point. The constitution has not provided that once a person has been elected and the time for filing the election petition has lapsed the petitioners have no way to challenge the membership of their members of parliament.

In the case of ***Attorney General -v- Andrew Kiplimo Sang Muge & 2 Others (2017) eKLR*** it was stated

***“No one person in possession of an office has a constitutional rights to remain therein for the full term of which he has been elected.”***

**Article 105 (1) (b)** must be viewed as serving a legitimate purpose of enforcing **Article 103 (1) (e) (ii) of the Constitution**. **Article 105 (1) (b)** of the Constitution gives High Court a special jurisdiction which can be invoked at anytime during the life of Parliament and this is distinct from the general jurisdiction under **Article 165 of the Constitution**.

The **Election Act No. 24 of 2011 at Section 76(1)** (c) provides for presentation of petitions. It states;-

***“ A petition to seek a declaration that a seat in Parliament or a County Assembly has become vacant may be presented at any time.”***

The petition filed by the Petitioners falls under this provision. It is not a petition questioning the validity of an election. Under **Article 105(1)(a)** a petition challenging the validity of an election has timelines with regard to filing and determination. The Petition on membership of Parliament can be filed at any time as provided under **Section 76(1) (c) of the Elections Act (Supra)**.

The petition cannot therefore be deemed to be an election petition. under **Article 105** it is the High court which has jurisdiction to determine petitions filed under **Article 103 (1) (ii) of the Constitution**. The cases filed by the 1<sup>st</sup> respondent in support of their contention that this court lacks jurisdiction, that is ***Benson Njuki Kihoro -V- Governor Nyeri County & 4 Others 2020 eKLR***.

***Godfrey Mugambi & 2 Others -V- Philip Abubakar Oluoch and 5 Others (2018) eKLR (Supra)***, are not relevant as the issues raised in the cases are different from those raised in the present case.

They are persuasive decisions which are not binding on this court. My view is that Article 105 gives this court jurisdiction as I have explained above.

8. The Court of Appeal has interpreted the import of **Article 105 (1) (b) of the Constitution**.

In Petition No. 210/2020 (Formerly Kiambu H.C Petition No.8B of 2019.) ***Hon Clement Kungu Waibara -V- Hon Anne Wanjiku Kibe and The Independent Electoral and boundaries Commission (IEBC) (2020) eKLR***, Hon. Justice Korir.

The Court stated that “the power of this court to hear and determine any question whether a seat of a member has become vacant during the term of Parliament was confirmed by Court of Appeal in ***Nairobi C.A No.431/2019 Hon. Clement Kungu Waibara -V- Hon Anne Wanjiku Kibe & Another (2019) eKLR*** when it held that:

***“Our understanding is that the appeal borders on determining whether the High Court should have invoked its original jurisdiction under Article 105(i) (b) of the Constitution as read with Section 76(1) (c) of the Election Act. To our mind Article 105 (1) (b) of the Constitution as read with Section 76(1) of the Elections Act is not coincidental at all. It serves a legitimate purpose within a democratic Society to determine whether a seat of the member of parliament has become vacant whether immediately upon resumption of office or during the term of five years. The jurisdiction can be invoked at any time during the life of parliament and that Petition must be heard and determined within six months in accordance with Article 105 (2) of the Constitution.”*** Emphasis mine.

The High Court went on to state that in exercise of the power granted to it under Article 105(b) of the Constitution, ***“ I declare and hold the seat of the Member of the National Assembly for Gatundu North Constituency has become vacant by operation of Article 103 (1) (g) of the Constitution.”***

The matter was filed in the High Court as a Constitutional Petition and not an election petition. As such a party seeking to move the High Court to make a declaration under **Article 103 (e) (ii)** has a right to file a Petition in the High Court. In view of the foregoing, I have no doubt in my mind that the petition filed in this court is properly before this court.

The court is clothed with jurisdiction to entertain petitions seeking declarations that a seat of a member of Parliament has become vacant.

9. In conclusion I find that the Pre-liminary Objection has no merits and as is dismissed with costs.

**Dated, signed and delivered at Kerugoya this 10<sup>th</sup> day of November 2020.**

**L.W. GITARI**

**JUDGE**