



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 19 OF 2017

IN THE MATTER OF ARTICLES 20,22, AND 23 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(4), 3, 10, 27,91,174, 177 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF MARGINALIZED AND MINORITY COMMUNITIES OF UASIN GISHU COUNTY ASSEMBLY

BETWEEN

JACOB KIPSEREM KORIR MASWAI.....1ST PETITIONER

ABDI IBRAHIM.....2ND PETITIONER

CELESTINE JELAGAT TOO.....3RD PETITIONER

SAHRA MOHAMED OSMAN.....4TH PETITIONER

GEORGINA JELIMO KIMAIYO.....5TH PETITIONER

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

SPEAKER, UASIN GISHU COUNTY..... 3RD RESPONDENT

RULING

1. The petitioner herein had filed a petition against the respondents urging that the 2nd and 3rd respondents did not comply with Article 177(1)(c) of the Constitution by ensuring that all the communities were incorporated. The 1st respondent had submitted list of persons for nominations to the 2nd respondent, however upon final publication vide gazette notice no. Vol.CXIX –NO. 124 on 28th August 2017 the genuine persons who were marginalized and also minority were left out. The petitioners sought for the following orders against the respondents:

a. A declaration that the process of Nomination and eventual Gazettement of the persons to Uasin Gishu County Assembly as published in the Kenya Gazette notice number Vol.CXIX of 28th August, 2017, of nomination of the marginalized and gender top up list is contrary to article 27,2,3,10,91(1)(e), 177(1)(c), 248 and 249 of the Constitution of the Republic of Kenya and is therefore null and void.

b. An order be issued by this Honorable court directing the 2nd respondent to degazette the list of the marginalized persons and Gender top-up list as published in the Kenya Gazette no. Vol.CXIX of 28th August, 2017 for Uasin Gishu County Assembly.

c. An order be issued compelling the 3rd respondent to declare the seats vacant of persons nominated as members of County Assembly based on the list of the marginalized special interest groups and minority as captured in the Kenya Gazette No. Vol. CXIX of 28th August, 2017 for Uasin Gishu County Assembly.

2. The parties filed their respective responses.

3. The 3rd respondent was the first to file a notice of preliminary objection dated 6.10.2017 filed on the same day on the following grounds:

(a) This court lacked jurisdiction to hear and determine the petition as provided by Article 88(4)(e) of the Constitution, Section 74(1) of the Elections Act 2011 and Section 39 of the Political Parties Act.

(b) The petitioner's petition is time barred in view of the provisions of Article 87(2) of the Constitution and sections 74,75 and 76 of the Elections Act, 2011.

(c) The petitioner's petition is incompetent and legally untenable in view of the provisions of Article 88(4)(e), section 74(1) of the Elections Act and Regulation 99(2) of the Elections (General) Regulations, 2012 which vests the 1st Respondent with power to settle nomination disputes.

(d) The petitioner's petition is incompetent for lack of security deposit contemplated in section 78 of the Elections Act.

4. The 2nd respondent also filed a notice of preliminary objection dated 10.10.2017 and filed in court on 11.10.2017 stating that this court did not have jurisdiction to entertain these proceedings.

5. The parties filed their respective submissions.

6. The 3rd respondent urged the court to consider the finding in the case of *The Owners of Motor Vessel "Lilian S" v. Caltex Oil Kenya Limited* (1989) KLR 1 in which Nyarangi J. held that jurisdiction was everything and without it a court had no power to make one more step. In *Macharia & Anor v. K.C.B Ltd & 2 Ors*, it was held that a court's jurisdiction flows from either the Constitution or other written law. It cannot allocate to itself jurisdiction exceeding that, which is conferred by law.

7. It was their contention that the Magistrate's court had the power to hear and determine nomination (election) disputes as provided for by Section 75(1)(A) of the Elections Act, 2011 as follows, "A question as to the validity of the Election of a member of a county assembly shall be heard and determined by the Resident Magistrate's court designated by the Chief Justice."

8. The supreme court in *Moses Mwicigi & 4 Ors v. I.E.B.C & 5 Ors (2016) eKLR* the court held that the Elections Act conferred jurisdiction upon the magistrate's court to determine the validity of the election of a Member of the County Assembly. In regard to this, once names had been published by IEBC vide the Gazette Notice any challenge to the names could only be entertained by an election petition and not otherwise.

9. The 2nd respondent urged that this court did not have jurisdiction to hear issues emerging from political party nominations. The petitioner ought to have exhausted party dispute resolution mechanisms before moving to an election court as provided for by Section 74 of the Elections Act. A public notice was issued on 21.7.2017 informing the public and persons aggrieved with the party lists to lodge complaints with either the 2nd respondent's Dispute Resolution Committee or the Political Parties Dispute Tribunal which the petitioners did not. The court in *Lorna Chemutai & 4 Ors v. I.E.B.C. & 18 Ors [2018] eKLR* where the court found that it did not have jurisdiction as matters raised in the petition should have been raised before the Political Parties Disputes Tribunal or the I.E.B.C's Dispute Resolution Committee was relied on.

10. It was further submitted that the issues on nominations for Member of County Assembly should be determined by the Resident Magistrate's court and not the High Court as was held in the supreme court decision of *Moses Mwicigi & 14 Ors v. I.E.B.C.(supra)*. This is provided by Section 75(1A) & (2) of the Elections Act.

11. In addition to the above, it was averred that Article 87 of the Constitution provides that one had to file a petition within 28 days after declaration of results and the same should be determined within 6 months. The gazette of the nominated members of the County Assembly of Uasin Gishu was done on 28.8.2017 vide gazette notice issue no. 8380, this petition ought to have been filed within the stipulated time. Thus the petition is time barred. The court was urged to dismiss it.

12. The petitioners urged that the petition was purely a constitutional petition as opposed to an election petition, it is seeking a redress for violation of the petitioner's constitutional rights and freedoms. Article 165(3) gave this court the jurisdiction to hear and determine the question whether a right or fundamental freedom in the bill of rights had been denied, violated infringed or threatened as was held in *James Kugocha v. Chief County Officer Department of infrastructure [2018] eKLR*.

13. Further the petitioners had a right to bring the petition in their own interest as members of the marginalized community and in the public interest as provided by Article 22 (2)(b) & (c) of the Constitution. Article 258(1) and 50 also grants every person the right to institute court proceedings. The courts have quashed decisions of public bodies and commissions and compelled them to undo their actions. This court was

urged to dismiss the preliminary objection with costs and the petition be heard.

14. The 2nd respondent raised an issue on time upon which this petition was filed.

15. This court has a duty to first determine the issue raised by the 2nd and 3rd respondents' on whether this court has jurisdiction to determine the petition. As was held in *The Owners of Motor Vessel "Lilian S" v. Caltex Oil Kenya Limited (1989)* (supra) where Nyarangi J. held that,

“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.”

Also the above sentiments were anchored in the Nigerian case in Supreme Court of Nigeria Supreme case no. 11 of 2012, ***Ocheja Emmanuel Dangana v. Hon. Atai Aidoko Aliusman & 4 Ors***, where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows:-

“It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity-dead- and of no legal effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost.”

16. The petitioners contend that the petition is purely on violation of their constitutional rights and freedoms, which this court has jurisdiction to hear and determine as provided for by Article 165(3) of the constitution as follows:-

“Subject to clause (5) , the High court shall have jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.”

This court also by virtue of *Article 23 (1)* has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. The cases cited by the petitioners raised issues on constitutionality and infringement of fundamental human rights and freedom.

17. The 2nd and 3rd respondents however challenges the position and contends that the issues raised by the petitioners arose out of the nominations and thus it was an election petition dispute being disguised as a constitutional petition, thus this court lacks jurisdiction.

18. The petitioners contended that the 2nd respondent had a responsibility to monitor compliance with the legislation on elections as provided by *Article 82 (1)(b)* of the *Constitution*. The Elections Act was enacted into force to provide for law and order in elections. *Section 34* of the *Elections Act* provides for the nomination of party lists members as follows:-

34. Nomination of party lists members

(1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97(1)(c) and 98(1)(b)(c) and (d) and Article 177(1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97(1)(a) and (b) shall submit to the Commission a party list in accordance with Article 97(1)(c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98(1) (a) shall submit to the Commission a party list in accordance with Article 98(1)(b) and (c) of the Constitution.

(4) A political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution.

(4A) In the case of a person nominated pursuant to Article 177(1) (c) of the Constitution, the party list shall include a certification in the manner prescribed by the Commission.

(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.

(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and—

(a) issue the political party with a certificate of compliance; or

(b) require the political party to amend the party list to ensure such compliance failing which the Commission shall

reject the list.

(6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

19. The county also had a role to play by choosing its representatives. Article 177 provides on how the membership of county assembly is constituted.

“(1) A county assembly consists of—

(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

(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;

(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

(d) the Speaker, who is an ex officio member.

(2) The members contemplated in clause (1)(b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.

(3) The filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward.

(4) A county assembly is elected for a term of five years.

20. The political parties had played its role and submitted names to the 2nd respondent as provided by the law. This court is guided by the sentiments held by the Supreme court in **Moses Mwicigi & 14 Ors v. I.E.B.C & 5 Ors (supra)** as follows:-

“[82] This provision is the source of the political parties mandate to nominate members to the County Assembly. The object of the provision is clear to guarantee that no more than two-thirds of the memberships of the Assembly belong to the same gender and to safeguard and ensure the representation from the marginalized groups, more specifically, persons with disabilities and the youth.

[83] In addition the said provision recognizes that the conduct of the nominations is to be proportionately matched to the number of seats won in a county by each political party. Thus allocation can only be done after the declaration of the outcome of the electoral process.”

21. The 1st respondent had been sued and it did not file a response to this petition. For the 2nd respondent to have issued a gazette notice for the names of the nominated persons representing marginalized and gender groups, it gives an impression that it fully complied with the above law. If there had been an issue at this stage, the Commission had the mandate to address it as provided by Section 74 of the Elections Act, that:-

“(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.”

22. The above section indicates that the 2nd respondent could only solve disputes arising from nominations. In addition to this the Commission could reject any party list that did not comply with the requirements of the Constitution, the Act or the regulations as provided by Regulation 55(2) of the Elections (General) Regulations which sets out the rules governing the nomination of candidates to the County Assembly.

23. The names of the nominated persons had already been gazetted, the 2nd respondent contends that the petitioners did not use the right chance they had to bring forth issues but instead they let time lapse and then came to file this petition. At what point does the role of the I.E.B.C end in election nominations? Article 88(4) of the Constitution provides for the responsibilities of the Commission

“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, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (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;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.

24. From the above it is clear that the 2nd respondent is barred by the Constitution and the Elections Act from resolving disputes relating to elections or disputes after an election. The disputes now becomes matters that should be solved by the court. Section 2 of the Act defines an Election Court as

“The means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution or the Resident Magistrate’s Court designated by the Chief Justice in accordance with section 75 of this Act”

25. The Elections Act confers jurisdiction upon the magistrate’s courts to determine the validity of the election of a member of the County Assembly. Section 75(1A) provides as follows,

“ a question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s court designated by the Chief Justice.”

26. The supreme court in Moses Mwicigi & 14 Ors v. I.E.B.C & 5 Ors (supra) answered the question, ‘at what point did the appellants become, “elected” MCAs for Nyandarua County and at what point in time does the court become clothed with jurisdiction to determine disputes relating to the nomination of members of a County Assembly, by virtue of Article 177(2) (b) of the Constitution. The court further held:-

“[94] Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations. This position has been aptly remarked in the case of National Gender and Equality Commission, where the High Court thus observed (paragraph 50):

“Section 34(6) of the Elections Act, 2011 specifically provides that, ‘The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.’ This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under Section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances” [emphasis supplied].

[95] The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.

[96] A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps

to finalize the “elections” for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.

[97] In the instant case, the IEBC after receiving the party list, and in conformity with the High Court decision in the **National Gender and Equality Commission Case**, proceeded to publish it on 15th and 16th May, 2013. Thereafter, on 17th July, 2013, IEBC gazetted the appellants, by Gazette Notice No. 9794, Volume XCV 105, as the TNA list for Nyandarua County.

[105] It is clear from the foregoing provisions that the allocation of nomination- seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazetting of the nominees’ names by the IEBC, as an integral part of the election process.

[106] 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.

[107] 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.”

27. In view of the above this court finds that once the names were published vide the gazette notice no. Vol.1 CXIX of 28th August 2017, the persons became elected members and any person who had a dispute with the same needed to go to an election court, which in this case is the magistrate’s court. This court therefore lacks jurisdiction. The preliminary objection is merited and is hereby allowed with costs to the applicants.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 20th day of May, 2019.

In the presence of:-

Miss Omuya holding brief for Mr. Maritim for the petitioner

And in absence of the respondent and their advocates

Ms Sarah - Court Assistant