



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**PETITION NO. 8 OF 2018**

**DAVID LUSENO KARANI.....PETITIONER**

**VERSUS**

**JAPHETH LAGAT (RETURNING OFFICER).....1<sup>ST</sup> RESPONDENT**

**IEBC..... 2<sup>ND</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> respondent raised a preliminary objection to the petition seeking dismissal of the petition for being incompetently before the court

**APPLICANT'S CASE**

The 2<sup>nd</sup> respondent submitted that the preliminary objection is based on Articles 87(2) and 88(4)(e) of the Constitution and Section 74(1), 76 and 78 of the Elections Act.

The applicant referred to the case of *Diana Kethi Kilonzo & Anor v IEBC & 10 others* (2013) eKLR and stated that the petition seeks the following reliefs;

- a) a declaration against the respondents for violating his right to participate as a candidate for the position of MCA for Mautuma ward, Lugari constituency
- b) As a result of the petitioner's denial to participate as a candidate for the position of MCA he seeks compensation from the respondents.

Article 88(4) provides for a dispute resolution committee established by the 2<sup>nd</sup> respondent. The dispute before this court falls within the ambit for the reliefs sought by the petitioners in prayers 2(b) and (c) of the petition.

The petitioner presented grievances to the 2<sup>nd</sup> respondent's dispute resolution committee but failed to follow up the case to its logical conclusion. This court cannot assume jurisdiction unless the said committee has fully completed its mandate.

The applicants cited the cases of *Isaiah Gichu Ndirangu & 2 others v IEBC & 2 others* (2016) eKLR and *Stanley Otieno Okello v Daniel Okindo Majiwa & 2 others* eKLR.

The applicants submitted that the petition is purely an election petition and should have been filed within 28 days after the declaration of results. The petition was filed 10 months after the election results were released. The applicant relied on *Article 87(2)* of the *Constitution* and *Section 76* of the *Election Act* and submitted that the petitioner is mainly questioning the role played by the respondents in denying his participation in the elections as a candidate of Matuma ward.

The petition being an election dispute is governed by the Election Act. Section 78 makes it mandatory for the deposit of security of KShs. 100,000/-. He submitted that the petitioner failed to deposit security for costs and for this reason the court should invoke its power under *Section 78(3)* of the *Act* and dismiss the petition with costs to the respondents.

The petitioner presented complaints to the 2<sup>nd</sup> respondents' dispute resolution committee and pursuant to the letter dated 1<sup>st</sup> June 2017 wrote to the respondent and presented his grievances on the issue of his nomination. The 2<sup>nd</sup> respondent vide a letter dated 21<sup>st</sup> November 2017 responded to the petitioner's letter informing him that he failed to annex form 18. The petitioner instead of heeding to the respondent's clear timelines took 3 weeks and wrote to the 2<sup>nd</sup> respondent threatening to take legal action through his advocate on record.

The applicant submitted that:-

- a) The petitioner was afforded an opportunity to present his grievances by following due process and procedure.
- b) The petitioner failed to adduce to the dispute resolution committee the requisite form 18 in the time as the committee is mandated to hear disputes within 10 days from presentation.
- c) The petitioners waited for 3 weeks and thereafter responded to the committee after they had concluded their sitting.
- d) The failure by the petitioner to heed to the due process and procedure by the committee on settling nomination disputes does not give this court jurisdiction to handle the matter.
- e) The petition under the guise of infringement of his constitutional rights or unfair administrative action clearly does not hold water due to failure to abide to due process.

In the premises the petitioner has no locus standi to present this petition before this honourable court.

## **RESPONDENT'S CASE**

The respondent submitted that he seeks a declaration that his rights were violated. He does not in any way raise issues or irregularities or electoral misconduct against the respondents nor does he question the electoral process and the results thereof. The petition cannot in any way be an election petition as alleged.

The court has jurisdiction under *Articles 23 and 165* of the *Constitution* to entertain matters relating to the enforcement of the bill of rights. He further relied on the case of **Samuel Kamau Macharia & Anor v Kenya Commercial Bank Ltd & others (2012) eKLR**.

The petition is grounded on illegal and unfair administrative action and the violation of rights under *Article 47(1) and (2)* of the *Constitution*. *Section 4* of the *Fair Administrative Action Act* gives the petitioner a right to fair administrative action including being given written reasons for any administrative action taken that is likely to be adverse to him.

The respondent cited *Article 87(2)* of the *Constitution of Kenya* and submitted that the petition accrued before the declaration of the results thus *Article 87(2)* does not apply to the petition. *Section 76(1)* of the *Election Act* also does not apply. The respondent cited the case of **Silas Mate Otuke v Attorney General & 3 others (2014) eKLR** and submitted that the petition does not question the declaration and validity of the results. It is about the infringement of rights constitutionally accorded to the petitioner herein.

The respondent further submitted that given that the petition gains roots in being a petition for breach of constitutional rights and is not an election petition security for costs is not a prerequisite. He further submitted that security is a procedural issue and not substantive in nature and that in the event that it was an election petition the court ought to take into account all the circumstances of the case before it could strike out the petition for a curable procedural technicality.

The respondent submitted that he had made all attempts to have the dispute resolved by the 2<sup>nd</sup> respondents' dispute resolution committee as required under *Article 88(4)* of the *Constitution*. Being dissatisfied with the response and the manner in which the committee handled the matter the petitioner filed the instant petition. The respondents clerk did not include the petitioner's name in the Kenya Gazette Notices and the ballot papers and gave no written reasons. This was in breach of his rights.

The petitioner submitted that *Article 88(4)* of the *Constitution* demands that nominations ought to conform to the constitution, be fair, just and in tandem, with the natural rules of justice. The IEBC dispute resolution committee does not have jurisdiction to hear and determine the issues raised as they failed to act legally and fairly.

The timelines accorded to the 2<sup>nd</sup> respondent's dispute resolution committee have lapsed and the issues raised herein cannot be adequately adjudicated by the 2<sup>nd</sup> respondent as it initially failed in its duty.

The petitioner maintained that the court has jurisdiction to determine the dispute herein.

## **ISSUES FOR DETERMINATION**

- a) Whether the court has jurisdiction to entertain the petition

## **WHETHER THE COURT HAS JURISDICTION TO ENTERTAIN THIS APPEAL**

The crux of the objection is that the court does not have the jurisdiction to entertain this petition. To settle this, we must first determine whether it is an election petition.

The petitioner's main contention is that the 2<sup>nd</sup> respondents' dispute resolution committee failed to fairly and justly handle the dispute as to his nomination and as a result his constitutional rights were violated. The applicant's position is that the court does not have jurisdiction to entertain this matter as the dispute was not determined to its conclusion at the point of the dispute resolution committee.

Article 88(4)(e) which established the IEBC dispute resolution committee provides: -

**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—**

**(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;**

The issue in the petition is whether there were violations of rights by the 2<sup>nd</sup> respondent in the process of dispute resolution with regards to the committee and how it conducted the process.

In the case of *Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others* [2016] eKLR the court held;

**I am inclined to agree with the Respondents' submissions that this Court is not the appropriate forum for addressing the issues raised in the Petition. My reasoning is firmly grounded on the nature of the case and the matters raised herein because it is not in dispute that the dispute is in regard to nominations to a County Assembly. The Petitioners' main concern is that the law was not observed by the Respondents in regard to the conduct and the final selection of the nominee. This in my mind is one such dispute in regard to nominations that the Legislature contemplated and thus created a dispute resolution body as the first port of call.**

If indeed the petitioner had presented his grievances and followed up the case to its logical conclusion and was dissatisfied with the decision of the committee, Judicial Review would have been sufficient remedy. Further, the petitioner has not provided any proof that the dispute was followed up after notifying the respondents of his displeasure. After he was notified that he was required to attach form 18 on 21<sup>st</sup> June 2017, he clearly responded on 19<sup>th</sup> July 2017, more than three weeks later, well outside the timelines as per *Section 74(2)* of the *Elections Act* which provides;

**An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.**

In the case of the *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR the Court of appeal stated: -

**“... Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed....”**

In the absence of a decision of the committee this court is not clothed with jurisdiction to handle the petition. In *Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others* (*supra*) the court further held;

**I have deliberately set out the above decisions with a view to highlighting the approach the courts have taken, which I believe is the correct one, in addressing disputes in regard to nominations pertaining to election matters. In the above cited decisions, I note that the parties alleged violation (s) of the Constitution and the various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission's Dispute Resolution Committee. Being dissatisfied with decision of the Committee, they thereafter approached the Courts. It is thus clear that the parties did not bypass the Commission's dispute resolution avenue as the Petitioners have now done.**

The court also observed;

**I also do not agree with the contentions by the Petitioners that this Court should characterize the instant Petition as a constitutional dispute instead of a nomination/election dispute. In my view, such characterization would go against the electoral laws and the Constitution which was tailored in such a manner that it intended to have a special dispute resolution mechanism for electoral disputes, nominations being one of them.**

In *Stanley Otieno Okello v Daniel Okindo Majiwa 2 others* [2017] eKLR the court held;

**In my view, the petitioner ought to have utilized the mechanism provided under the above provisions before approaching the high court. I find backing in the above cited provisions of the law, the cited cases and also in the decision rendered in *Boniface Mwangi vs Resident Magistrates Court, Milimani & 2 Others* [23] where it was held that to convert every issue into a constitutional issue is to undermine the importance of the process.**

As a result, this court lacks jurisdiction and must down its tools and cannot address the other issues raised. The preliminary objection therefore succeeds with cost to the applicant.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3<sup>rd</sup> day of July, 2019.

In the presence of:-

Mr. Oburu for the Petitioner

Ms. Jemeli holding brief for Mr. Chemoyai for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Ms Sarah - Court Assistant

**Petitioner** :- We request for typed proceedings and a copy of the ruling.

**COURT:-**

Application is allowed.

**SIGNED**

**S.M GITHINJI**

**JUDGE**