



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 19 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 27, 28, 38, 50, 73, 80, 81, 86, 88, 90, 91, 99, 177, 193, 258 AND 260 OF THE CONSTITUTION OF KENYA AND INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, NO. 9 OF 2011**

**AND**

**IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011**

**AND**

**IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATION (L.N 128 OF 2012 AND L. N 2012)**

**BETWEEN**

**GODFREY MUGAMBI.....1<sup>ST</sup> PETITIONER**

**JOSEPH MAORE NKUNJA.....2<sup>ND</sup> PETITIONER**

**LILLIAN NKATHA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**PHILLIP ABUBAKAR OLUOCH.....1<sup>ST</sup> RESPONDENT**

**LUCY WAITHERA MUHU.....2<sup>ND</sup> RESPONDENT**

**JANE WAMBUI GATI.....3<sup>RD</sup> RESPONDENT**

**IEBC.....4<sup>TH</sup> RESPONDENT**

**KENYA PATRIOTS PARTY.....5<sup>TH</sup> RESPONDENT**

**CLERK, COUNTY ASSEMBLY OF MERU.6<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me is a Notice of Preliminary Objection dated 20<sup>th</sup> November, 2017 by the 4<sup>th</sup> respondent. The point of law taken is that this court lacks the requisite jurisdiction to hear and determine the petition herein. This is because the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have already been gazetted and sworn in as members of the County Assembly of Meru, which marked the end of the mandate of the 4<sup>th</sup> respondent regarding the nomination of party representatives and shifted any consequential dispute to the election courts.

2. That in the premises, any question with regards to the validity of the nomination and/or election of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the County Assembly of Meru could only be resolved by way of an Election Petition filed in accordance with **Articles 87, 105 (1) (b) of the Constitution as read with Sections 75 and 76 of the Elections Act.**

3. The Objection was canvassed by way of written submissions.

4. It was submitted for the 4<sup>th</sup> Respondent that the petitioners had circumvented the port of first call, which is the Resident Magistrate's Court designated by the Chief Justice under **Section 75 (1A) and (4) of the Elections Act**. That this court could only be approached in the exercise of its appellate jurisdiction on points of law only. That in the premises, the petitioners were in the wrong forum and this court has no jurisdiction to make a determination on any factual and/or core matter in the petition.

5. In their submissions, the petitioners submitted that **Article 165** gives the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied. That Constitution and electoral laws envisage the entire process of nomination of the special seats including the act of gazette of nominees' names by the IEBC as an integral part of the election process.

6. That the upshot is that, the 4<sup>th</sup> respondent had failed to ensure or supervise the party's nomination to ensure the protection of the petitioner's fundamental rights and freedoms under the bill of rights. That it was wrong to gazette the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents as nominated members of the County Assembly of Meru while they are not even registered voters of Meru. The petitioners therefore asserted that they had filed the petition in the right forum as per **Article 165 of the Constitution** since the 4<sup>th</sup> respondent acted outside its mandate and violated the Constitution and the Elections Act.

7. I have considered the Petition and the submissions of Learned Counsel. The issue for determination is whether or not this court has jurisdiction to determine the dispute contained in the petition.

8. The essence of a preliminary objection was declared by Law J. A in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** as follows:-

*“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”*

Sir Charles Hewbold P added as follows page 701:-

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion”.*

9. When the court finds out that it has no jurisdiction it should lay down its tools. However, if a court finds that it has jurisdiction it should not hesitate to discharge its obligation.

10. In the case of **Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd KLR 1**, the Court of Appeal held that an issue of jurisdiction when raised must be determined at the earliest for the court to determine whether to proceed with determining the dispute before it or not. In **Re the Matter of the Interim Independent Electoral Commission (2011) eKLR**, the Supreme Court of Kenya held:-

*“The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution”.*

11. In **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** the Supreme Court stated:-

*“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.”*

12. The background to the Objection is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were nominated by the Kenya Patriots Party (5<sup>th</sup> respondent) as members of the County Assembly of Meru under the categories of marginalized and gender top up members. The 4<sup>th</sup> respondent approved and gazetted their names on 28<sup>th</sup> August, 2017.

13. Pursuant thereto, the petitioners lodged a petition in this court on 5<sup>th</sup> September, 2017 alleging, inter alia, that the 4<sup>th</sup> respondent had failed to have due regard of the 5<sup>th</sup> respondent's party list. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent were not registered as voters or residents within Meru County and that they were not on the 5<sup>th</sup> respondents' nomination party list.

14. **Article 177** of the Constitution provides for the membership of the county assembly. **Article 90** provides for the specific duties the 4<sup>th</sup> respondent is supposed to undertake in the conduct and supervision of election for nomination seats. **Section 74 of the Elections Act** provides:-

*“(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.”**

15. In the case of **Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** paragraphs 95 to 107 the Supreme Court of Kenya delivered itself thus:-

**“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.**

**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.”**

16. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were gazetted on 28<sup>th</sup> August, 2017. That signified the completion of the electoral process through nomination. The 4<sup>th</sup> respondent had discharged its duties and the validity of the results from that process shifted to the election courts. In the **Mwigigi Case (supra)** the Supreme Court observed:-

**“It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from 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 transmuted into a 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 mechanisms, and notwithstanding the vital role of electoral dispute settlement in the progressive governance set-up of the current Constitution.”**

17. When the petitioners first came to court in September, 2017 to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to be sworn in as members of the County Assembly for Meru, this court had made a similar observation when declining to grant the orders sought. The petitioners should have then taken action and file a compliant election petition before an election court. This they failed to do.

18. From the foregoing, I am satisfied that the dispute embolded in the Petition herein is about the election of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent to the County Assembly of Meru. That being the case, the complaint cannot be allowed to mutate from an election dispute to a Constitutional Petition for breach of fundamental rights. Under Article 165 of the Constitution of Kenya.

19. I therefore find the Objection to be meritorious and I uphold the same. The petition is hereby struck out.

20. As to costs, the petition raised very pertinent and novel issues. It was geared towards enforcing the provisions of the Constitution albeit in the wrong forum. For that reason, I will order each party to shoulder own costs.

**DATED and DELIVERED at Meru this 7<sup>th</sup> day of June, 2018.**

**A. MABEYA**

**JUDGE**