



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CONSTITUTIONAL PETITION NO. 4 OF 2017.

BETWEEN.

1. ALI MACHANI MUTOKA)

2. MAJIMBO OKUMU).....PETITIONERS

AND

1. THE SPEAKER OF THE COUNTY

ASSEMBLY OF BUNGOMA)

2. THE CLERK OF THE COUNTY

ASSEMBLY OF BUNGOMA).....RESPONDENTS

RULING.

The petitioners Ali Machani Mutoka and Majimbo Okumu filed this Petition enjoining the Speaker of County Assembly of Bungoma alleging violation to the Article 1(3) (2) (4) Article 73(1)a 1(2) (b) Article 174 (a) (i) Article 175 (c) 185 (1) (2) (3) of the Constitution of Kenya. The violation have been committed;

1. To the extend that the Respondents have purported to create a Committee on selection that does not respect the 2/3 gender Rule, and includes members that do not come from Assembly parties, outside the scope of their constitutional mandate, in Article 27(8) of the Constitution has been violated.

2. To the extend that the Respondent has failed to adhere to the national values and principles of governance good governance, integrity, rule of law, non discrimination, protection of the marginalized, in populating the various committees with more numbers that the Law allows Article 10 of the Constitution has been violated.

The petitioners therefore pray to this court for two orders;

1. A declaration that, the **Constitution of the Committee on Selection** is **unconstitutional** and all its **consequential acts, decisions, resolutions, recommendations, processes and outcomes** and more particularly, the **Report on the Nomination of Members to Committees** and **Balance of Committee memberships**, the **County Assembly Proceedings** touching thereon on **4th October, 5th October 2017** and any other further date, are null void and invalid.

2. A Declaration that all **Standing and Sectoral Committees** of the County Assembly constituted pursuant to the Report of the Committee on Section dated the 4th October and referred to in the Hansard on 4th October and referred to in the Hansard on 4th October and 5th October are null and void.

3. **The Committee of Selection of the County Assembly of Bungoma** be re Constituted in strict accordance with the Constitution of Kenya, The County Governments Act and the Standing Orders of the County Assembly of Bungoma.

Upon being served with the Petition the Respondent filed a notice of Preliminary Objection dated 19th October, 2017 premised on the following grounds;

1. *This Honourable court lacks jurisdiction to entertain this petition pursuant to Section 39 read together with 40 of the political parties Act No. 11 of 2011.*

2. *The failure to enjoin the necessary parties to wit, the County Assembly of Bungoma, leader of majority, chairpersons of sectoral or standing committees from whom relief is also claimed is fatal to the petitioners' case.*

3. *That the Honourable court lacks jurisdiction under Article 1(1), 177 and 188 of the Constitution 2010 to grant the orders sought.*

By Consent the Preliminary Objection was canvassed by way of written submissions. Mr. Bw' Onchiri for the Respondent in his written submission contended that this court does not have jurisdiction to entertain this petition as the issues raised in the petition are disputes provided for Sec. 39 and 40 of the Political Parties Act and which have to be handled by the Political Parties Tribunal established under Sec. 39(1) of the Act. Counsel Submits that allegation of non compliance to standing orders on selection of members of Committees based on party strength is not an issue for this court but for the Political Parties Tribunal. Counsel referred this court to the Ruling in Hon. John Musikali Vs. Speaker of the County Assembly of Bungoma & Others Bungoma Petition No. 11/2015.

Mr. Wamalwa learned Counsel for the Petitioners submitted that under Article 165 (3)(a) of the Constitution, this court the High Court has unlimited Jurisdiction in Criminal and Civil matters. He further submits that Article 23(1) empowers this court to hear and determine application for denial, violation or infringement of rights or threat to a right or fundamental freedom in the Bill of rights and grant relief provided for under Article 23(3) of the Constitution. Counsel urged the Court to be guided by the persuasive authority of **Aroni J** in *Teresa Nakhungu Barasa -Vs- County Assembly of Bungoma* HC. Petition No. 2/2015 /2016 ELC. He also urged the court to be guided by High Court decision in **NBI JR 129/2015 Rep -Vs- National Assembly Exparte Namamba and Samson Vali Musembi -Vs- Makeni County Assembly 2014 ECLR** learned Counsel submits that the County Assembly in Election of 11 Members of the Committee on Selection only elected 2 female members thereby violating the 1/3 gender rule in any elective or appointing bodies as required under Article 27(8) of the Constitution. The centrality of the issue of jurisdiction in the Judicial process was well stated in the decision in owners of **M.V. Lillians -Vs- Caltex Oil Kenya Ltd. [1989] KLR 1**, where Nyarangi J.A stated;

“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 and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The court therefore when pointed out must dispose of the issue of jurisdiction to when it is raised as a preliminary objection as in this case. In **Air Alfaras Ltd. -Vs- Paytheon Air Craft Credit Corporation & Another [2000] KLR 62** it was held;

“Any issue regarding jurisdiction ought to be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the

merits of the application would be futile.”

And in the case of **Kakuta Maimai Hamisi -Vs- Peris Tubiko & 2 Others [2013] eKLR** the Court of Appeal said:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a desideration imposed on courts out of decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in rain.”

The Respondents has raised a preliminary objection to this Petition. A preliminary objection must be one such that if it is upheld it disposes of the suit or Petition entirely and must be premised on undisputed facts in the pleadings in **Mukisa Bisquiti’s Manufacturing Co. Ltd Vs. West End Distributors [1969] EA 696 where Law J.A.** had the following to say:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

Echoing the same position, Ojwang, J (as he then was), deciding in the case of **Oraro Vs Mbaja [2005] KLR 141** and after quoting the statement of Law, **J.A. in Mukisa Bisquits (supra)** continued:

“A Preliminary Objection, correctly understood is now well defined as and declared to be, a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a Preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....”

What then are the issues that Petitioner has raised in this Petition? From the statements the Petitioner is challenging violation of the Article 27(8) in the selection of Committee on selection in respect to the 2/3 gender rule in the that out of the 11 members nominated only 3 are female. The 2nd issue is that Committee on selection as constituted has discrimination against Assembly Parties of ODM and Jubilee Party by including members who do not meet the threshold of Assembly Parties as defined standing order No. 2 of the County Assembly.

These two issues raised in the petition to relate to whether there was compliance with the Constitutional provisions of Article 27(8) of the Constitution by the County Assembly. The challenge of any action said to be done under the provisions of the constitution is in my view an issue for determination by the High Court pursuant to Article 165(d) which provides;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

What is being challenged in this Petition is the acts of the County Assembly in the nomination of the members of the committee on selection on the issue of the 2/3 gender rule. The subsidiary issue is

whether there was discrimination of the membership on the basis of assembly parties. These are the issues central in this petition. Article 165(d) of the Constitution clothes this court with jurisdiction to determine these questions.

In view of this express provision of the Constitution I find that the issues raised in this petition are not the ones envisaged for determination by the political parties tribunal established under Sec. 39 of the Political Parties Act. I hereby find no merit in this Preliminary Objection and dismiss the same with costs.

Signed and Dated at Bungoma this 10th day of September, 2018.

S.N. RIECHI

JUDGE.