



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**ELECTION APPEAL NO. 2 OF 2018**

**MOHAMED ABASS SHEIKH.....APPELLANT**

**VERSUS**

**INDEPENDENT ELECTORAL BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ESTHER KARIMI NJERU.....2<sup>ND</sup> RESPONDENT**

**KINOTI ROBERT KINYUA.....3<sup>RD</sup> RESPONDENT**

**(Appeal from the judgment and decree of the Chief Magistrates Court**

**at Meru (Hon. Mrs. L. Ambasi) delivered on 15<sup>th</sup> February, 2018)**

**In**

**ELECTION PETITION NO. 2 OF 2017**

**J U D G M E N T**

1. The Appellant, **Mohamed Abass Sheikh**, filed a petition in the Magistrates' Court in Meru challenging the nomination of minority members into the County Assembly of Meru. The 1<sup>st</sup> Respondent had gazetted the nomination of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as representing minorities.
2. On 15<sup>th</sup> February, 2018, the trial court delivered judgment and dismissed the petition on the grounds that the petition had not been filed in the right forum as a result of which, the court downed its tools.
3. Being aggrieved by the said judgment, the appellant lodged this appeal setting out eight grounds which may be collapsed into one which is to the effect that the learned Magistrate erred in both fact and law in holding that she did not have jurisdiction to hear and determine the petition before her for she failed to observe and uphold constitutional and statutory provisions and rules.
4. The appeal was argued by way of written submissions which were ably hi-lighted by Learned Counsel. It was submitted on behalf of the appellant that the application before the Political Parties Dispute Tribunal (PPDT) did not and could not have concerned itself with whether the nominations of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents met the constitutional threshold and the requisite requirements; that the issues that were before that tribunal were primarily concerned with the description of the personal data and ranking of the appellant in the party list that was published in the Sunday Nation of 23<sup>rd</sup> July 2017 by the 1<sup>st</sup> Respondent.
5. It was submitted that the appellant was described as belonging to the Meru tribe instead of Murulle and his age as being 47 instead of 34 years old. He sought from the tribunal to have his details corrected and prayed that he be placed in the priority list. The tribunal delivered judgment partly in his favour.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were gazetted as nominees to the County Assembly of Meru as representatives of ethnic minorities. Aggrieved by the decision to nominate the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the ethnic minority category, the appellant filed the election petition challenging the said nomination to the Meru County Assembly citing illegalities and violation of express constitutional and statutory

provisions. The appellant alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are from the predominant Meru ethnic community and on that basis they would have qualified for 'majority' and cannot be equated to 'minority'.

7. Learned Counsel for the appellant submitted that the issues brought before the Election Court was; whether the nomination and/or election of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent satisfied the requirements of **Articles 90, 100, 177 and 260 of the Constitution**. He submitted that the trial deliberately avoided addressing the primary issue before yet the specific orders sought were that the nomination of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be declared null and void for contravening the letter and spirit of the provisions of the Constitution.

8. That once the 1<sup>st</sup> Respondent gazetted the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the gazette, it marked the end of the nomination process and any challenge thereto could only be by way of an election petition. It was therefore argued that the trial court had jurisdiction.

9. Counsel relied on the cases of **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 other [2016]eKLR; Rahma Issak Ibrahim v Independent Electoral & Boundary Commission & 2 others [2017] eKLR; Rose Wairimu Kamau & 3 others vs. IEBC C.A. No. 169 of 2013 (unreported); Jaldesa Tuke Deballo vs. Independent Electoral and Boundaries Commission and Another (2015) eKLR, CA (unreported) and Lydia Mathia v Naisula Lesuuda & another [2013] eKLR** in support of his submissions.

10. Counsel concluded that it is trite law that the issues raised in the petition could not fall under those disputes that are dealt with by the tribunal under **Section 40 of the Political Parties Act**. That only the Resident Magistrate's Court as an Election Court could deal with those issues. He urged that the appeal be allowed and costs for both the appeal and trial court be awarded to the appellant.

11. The Respondents opposed the appeal. In its submission, the 1<sup>st</sup> Respondent contended that its role is limited to checking compliance guided by Constitutional provisions and ultimately allocating seats to political parties by selecting nominees in the order of priority as they are listed. On the issue of jurisdiction, the 1<sup>st</sup> Respondent reiterated that the trial court lacked jurisdiction as the issue of nomination is purely a preserve of the political parties. That under the **Political Parties Act No. 11 of 2011**, the procedure of settling disputes under **Section 39** is reserved to the Political Parties Disputes Tribunal ("PPDT"). That further, the IEBC Dispute Resolution Committee is established under **Article 88(4)(e) of the Constitution** which mandates the IEBC to intervene and settle disputes relating to or arising from nomination.

12. It was the 1<sup>st</sup> respondents contention that, **Section 74(1) of the Elections Act** and **Section 4 of the Independent Electoral and Boundaries Commission Act** make it explicit that the Commission shall be responsible for settling disputes arising from or related to nominations. Therefore, where any person has a dispute relating to or arising from any nomination, as the Appellant in the instant case, the port of first call is in the IEBC Dispute Resolution Committee of the Political Parties Dispute Tribunal. That the appellant had not utilized that route.

13. The cases of **Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya (1989) KLR** and **Isaiah Gichu Ndirangu & 2 Others vs IEBC & 4 Others [2016] eKLR** were relied on in support of those contentions.

14. On the issue of *res judicata*, it was submitted that the appellant had failed to disclose to the trial court that he had filed Complaint No. 499/2017, at the PPDT about the nomination of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and that the same had been dismissed. He never appealed the decision as provide for under **Section 41(2) of the Political Parties Act, 2011**. That his failure to appeal against that decision rendered the entire position *res judicata*. The court was urged to dismiss with costs to the 1<sup>st</sup> respondent.

15. The 2<sup>nd</sup> respondent submitted that the appellant was guilty of non-disclosure with regard to the determination of the PPTD until it was introduced by the respondents. That the said forum had dismissed his claim that his name be moved from position No. 8 to No.1. That these were the same grievances the appellant replicated in the election petition.

16. It was further submitted that the appellant ignored **Section 41 (2) of the Political Parties Act** that sets out the remedies for parties aggrieved by the decision of the tribunal. That in the premises, the Election Court lacked jurisdiction to adjudicate on this dispute. The cases of **Moses Mwicigi & Others vs. IEBC & Others Petition No.1 of 2015, Isaiah Gichu & Others vs. IEBC & Others Constitutional Petition No. 83 of 2015, Harord Kimuge Kipchumba vs IEBC & Another Election Petition No. 25 of 2017, Anthony Salau & another vs IEBC & Another Constitutional Petition No. 321 of 2013** and **Claudia Chabet & Others vs. Jubilee Party & Others Election Petition No. 8 of 2017** were relied on in support of those submissions.

17. Finally, the 2<sup>nd</sup> respondent contended that the matter was *res judicata* as it had been addressed by the P.P.D.T and judgment given thereon. That the appellant opted not to appeal to the High Court but mischaracterized the same as an election petition and filed it in the subordinate court. That the appeal should therefore be dismissed with costs to the 2<sup>nd</sup> respondent.

18. The 3<sup>rd</sup> respondent submitted that nomination is purely a preserve of political parties. The role of the 1<sup>st</sup> respondent is only to publish and gazette names as presented and that the dispute therein is between a member of the political party and his party. It was further submitted on his behalf that the petition was defective as there was no evidence tendered to proof that the appellant's permanent residence was in Igembe East or being registered as voter at Igembe or being a fully paid up or registered member of Jubilee. The cases of **Isaiah Gichu Ndirangu (Supra)** and **Moses Mwicigi Ndirangu (Supra)** were relied on in support of those submissions. He likewise urged that the appeal be dismissed with costs.

19. Having considered the entire record and the submissions of learned Counsel, the issue for determination is whether the trial court erred in concluding that it did not have jurisdiction to determine the petition before it.

20. The first thing any court has to establish in any dispute before it, is whether it has jurisdiction to entertain a matter before it. If a court has no jurisdiction, it ought to down its tools for it has no power or mandate to further entertain the matter further. In **Samuel Kamau Macharia**

**& another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** the Supreme Court observed:-

**“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.”**

21. The petition before the trial court was with regard to the nomination of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to the County Assembly of Meru as representatives of the minorities. The two, together with the appellant are said to be from the same political party. However, the respondents were at the top of the party list while the appellant was a bit far down.

22. The election process is usually a long one and issues do arise with regard to its validity. As a result, the law has created various stages for dispute resolution mechanisms. In this regard, there are various entities such as the P.P.D.T, the IEBC Dispute Resolution Committee and the election court which have been established by both the Constitution and statutes as dispute resolution forums. Each of these entities has been tasked with its own mandate with regard to the nature of the dispute to entertain and the particular stage so as to avoid interference with each other’s jurisdiction.

23. When it comes to the P.P.D.T, **Section 40 of the Political Parties Act No.11 of 2011** stipulates the jurisdiction of the tribunal as follows:-

**“(1) The Tribunal shall determine—**

- (a) disputes between the members of a political party;**
- (b) disputes between a member of a political party and a political party;**
- (c) disputes between political parties;**
- (d) disputes between an independent candidate and a political party;**
- (e) disputes between coalition partners; and**
- (f) appeals from decisions of the Registrar under this Act;**
- (g) disputes arising out of party primaries.**

**(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”**

24. It is clear therefore that the disputes to be resolved by the P.P.D.T relate to disagreements within political parties. In the present case, the appellant had a problem with the list that was presented to IEBC by his party. He brought the dispute before the tribunal which determined that rectification be made on his age and ethnicity which had been entered wrongly. But on the issue of his name being moved from position 8 to 1 on the list, PPDT held that there was no evidence to show that the appellant’s name was initially in position 1.

25. Under **Section 41(2) of the Political Parties Act** any party who is dissatisfied with the decision of that tribunal is required to appeal to the High Court. In the present case, the appellant did not appeal the tribunal’s judgment.

26. **Article 88 (4) (e) of the Constitution** provides:-

**“(4) 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;**

...”

26. **Section 74 of the Election 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.** [Emphasis added]

27. On the other hand, **Section 4 of the Independent Electoral and Boundaries Commission** replicates the provisions of **Article 88 (4) of the Constitution**. In this regard, the dispute resolution mechanism provided for IEBC has to do with disputes that arise before the date of election or nomination.

28. On the other hand, **Section 75 (1A) of the Elections Act** grants the Resident Magistrate's Court power to determine any question with regard to validity of an election of a member of a county assembly. The section provides:-

**“(1A) 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.”**

29. Having established the various entities, forums and the nature of disputes they are mandated to determine, at what stage does the court's jurisdiction commence in the determination of disputes relating to nomination of members of a county assembly?

30. This arose in the case of **Moses Mwiggi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** wherein the Supreme Court of Kenya it delivered itself as follows:-

**“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.**

**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.**

**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 15<sup>th</sup> and 16<sup>th</sup> May, 2013. Thereafter, on 17<sup>th</sup> July, 2013, IEBC gazetted the appellants, by Gazette Notice No. 9794, Volume XCV 105, as the TNA list for Nyandarua County.**

**Article 90(2) of the Constitution provides that the IEBC shall be responsible for the conduct and supervision of elections, in respect of seats provided for under clause (1). Seats in this category include the special seats provided for under Article 177 (1) (b) and (c) of the Constitution. And these seats, by Article 90(3), “shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election”.**

**Section 36(4) of the Elections Act provides that “within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation”**

**Section 36 (7) (8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:**

**“(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.**

**“(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.**

**“(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution”.**

**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.”* [Emphasis added]

31. It is clear from the foregoing that once an election has been undertaken, everything else shifts to the Election Court. In the present case, the IEBC published in the Gazette notice, the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as “elected” to the Meru County Assembly thereby signifying the end of IEBC’s mandate. In his regard, since the petition before the trial court was challenging this ‘election’ of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to the County Assembly of Meru, jurisdiction lay with the Election Court and not any other entity.

32. Accordingly, the trial court had jurisdiction to hear and determine the petition before it. The Appeal therefore succeeds.

33. Since the trial court dismissed the petition on the ground of want of jurisdiction, it did not consider the alleged issues of *res judicata* and defectiveness of petition that were raised by the parties. This court will therefore not determine those issues that were not adjudicated by the trial court.

34. Accordingly, I allow the appeal and hereby set aside the judgment delivered on 12<sup>th</sup> March, 2018. The petition is hereby remitted back to the Election Court for determination on merit. This is in terms of the Court of Appeal decision in *Martha Wangari Karua v Independent Election & Boundaries Commission & 3 Others [2018] eKLR*. The costs of the appeal are awarded to the appellant.

It is so decreed.

**DATED and DELIVERED at Meru this 10<sup>th</sup> day of September, 2018.**

**A. MABEYA**

**JUDGE**