



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 6 OF 2017

Formerly Nairobi Milimani Law Courts Misc. Appl. No. 559 of 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS
IN THE MATTER OF ARTICLE 10, 27, 33, 36, 38, 47, 56, 232 AND 249 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE FGAI TR ADMINISTRATIVE ACTION ACT, 2015 AND

IN THE MATTER OF THE ELECTON ACT (NO. 24 OF 2011)

AND

IN THE MATER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF THE ELECTIONS (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 28 OF THE LAWS OF KENYA

IRENE NASWA MUTAKI.....PETITIONER

VERSUS

COUNTY ASSEMBLY OF BUNGOMA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

LUKE OPWORA.....3RD RESPONDENT

R U L I N G .

By chamber summons dated 8th of September 2017 filed in the Nairobi registry on an even date the applicant Irene Naswa Mutaki sought leave of the court to apply for the following Judicial review orders; *an order of certiorari to quash the gazette notice No. 131 published on 6/9/2017 where her names were deleted and that of the 3rd respondent inserted as the duly nominated Member of County Assembly Bungoma for the marginalized group under the Ford Kenya Ticket; an order of prohibition prohibiting the clerk of the 1st respondent from swearing in the 3rd respondent as the duly nominated member of Ford Kenya to the County Assembly in Bungoma; an order of mandamus directing the 2nd respondent to reinstate the name of the applicant back to the gazette notice as the duly nominated member of Ford Kenya in the Bungoma county assembly and a declaration that the 3rd respondent is a stranger to the County Assembly of Bungoma as his gazettelement is an illegality and abuse of the due process of the law.*

Leave was granted by order of Aroni J. on 22nd March, 2018. The ex-parte applicant filed a Notice of Motion dated 10th April, 2018 seeking the following prayers:

- a) **CERTIORARI** to bring into this court for the purpose of quashing and to quash the Kenya Gazette Notice No. 131 published on 6th September, 2017 to the extent that it purports to delete the name of the Applicant herein and insert the name of the 3rd respondent with little regard to the law.
- b) **PROHIBITION** prohibiting the clerk of the 1st respondent from swearing in the 3rd respondent as the duly nominated member of Ford Kenya to the county assembly for being a stranger to the county assembly of Bungoma.
- c) **MANDAMUS** directing the 2nd respondent to reinstate the name of the Applicant back to the Gazette Notice as the duly nominated member of Bungoma county assembly.

The application was supported by the affidavit of the Exparte Applicant Irene Naswa Mutaki sworn on 8th of September, 2017 in which she deposes that she is a life member of Ford Kenya political party registered under the Political Party Act and that she applied to the Ford Kenya party to be considered as a nominee for the Bungoma county assembly. The party approved her application to represent the marginalized and forwarded to the 2nd respondent the IEBC. The 2nd respondent- IEBC- by Gazette No. 8380 of 2017 dated 28/8/2017 gazetted her for nomination to the Bungoma county assembly. She was duly sworn in on 1st of September 2018. Without prior notice and in violation of Article 48 of the Constitution and section 4 of Fair Administrative Action Act by Gazette Notice No. 131 dated 6/9/2017 the 2nd respondent deleted her name and replaced with that of the 3rd respondent. The deletion amounted to violation of legitimate expectation of her family and members of the marginalized group. That once a gazette notice is issued it should not be interfered with at anyone's whims without following due process. Unless the gazette notice 131 of 2017 that was issued on 6/9/2018 is stayed the 3rd respondent will fraudulently be sworn in as a member of the Bungoma county assembly.

The 1st respondent the county assembly of Bungoma filed a replying affidavit by one John Ongwae Mosongo the clerk and chief accounting officer of the county assembly of Bungoma sworn on 10th of June 2018. He deposed that by Gazette Notice number 8380 of 2017 dated 28/8/2017 the ex-parte applicant's name was gazetted as having been nominated as a member of the county assembly of Bungoma. He annexed the copy of the Gazette Notice. On 1st of September 2017. The ex-parte applicant together with other members were sworn in. He annexed the copy of the Hansard to that effect. That subsequent to the Gazette notice nominating the 3rd Respondent Gazette Notice number 8752 was published on 6th September 2017 and the 1st respondent convened another meeting where the 3rd respondent was sworn in. He attached a copy of the Hansard. After the swearing in he was served with a Court order stopping the swearing 3 minutes after the swearing in of the 3rd respondent.

The 2nd respondent IEBC filed their grounds of opposition on 16/5/2018 stating briefly that the court lacks jurisdiction to hear and determine the application in view of section 75(1) (A) of the Elections Act, 2011. The ex-parte applicant's application is time bared in contravention of provisions of Article 87(2) of the constitution and under section 3(1) of the Civil Procedure Act and Order 53 of the Civil Procedure Rules 2010 as it was filed out of 21 days timeframe provided once leave to commence JR is granted. The application is incompetent and legally untenable in view of Article 87 of the Constitution and section 75 (1) (A) of the Elections Act and the Supreme Court decision in **Supreme Court Petition 1 of 2015 Moses Mwicigi & 14 others vs IEBC & 5 Others** that stated that any challenge towards nomination of a member of county assembly is by way of an election petition to the magistrates court in line with section 74 of the Elections Act. The application is overtaken by events since the 3rd respondent has been sworn in as nominated member in Bungoma County Assembly.

The 3rd respondent filed his grounds of opposition on the application dated 10/4/2018. He stated the applicant did not comply with the mandatory provisions of Order 53(3) (1) of the Civil Procedure Rules and hence the entire Notice of motion is defective and abuse of the due process of the court. The court has no jurisdiction in line with the provisions of article 88(4)(e) of the Constitution, section 74(1) of the Election Act, section 4 of the IEBC Act and section 39 of the Political Parties Act. The application has been overtaken by events and the action the applicant is seeking to injunct and restrain from carrying has already been done.

In reply to the applicant's application the 3rd respondent filed a replying affidavit dated 5/6/2018 where he stated that he was the duly nominated member of Ford Kenya party to represent the youth and was duly sworn in on 19/9/2017 to represent the marginalized. On 28/8/2017 he learnt that his name was missing in the list of nominated members. He was called by his party leader Hon. Wetangula and informed of the same and that the error by the 2nd respondent would be rectified immediately. He was No. 6 on the gender, special seats, party list for nomination to the Bungoma county assembly that was published by the 2nd respondent on 23/7/2017 at page 34 of the Daily nation newspaper. The applicant was listed as No. 13. The listing of the applicant was an error on the part of the 2nd respondent. The error was corrected vide special issue of the Kenya gazette on 6/9/2017. It was Ford Kenya that applied for the applicant's name to be deleted. The nomination was above board and in accordance with the Election (party primaries and party list) regulations, 2017.

The applicant submitted on 2 issues:

1. *Whether the judicial review application was filed out of time and the consequences thereto, if at all*
2. *Whether the high court has jurisdiction to hear and determine the application.*

The applicant submitted that judicial review application was filed on 24/4/2018 leave having been granted on 22/3/2018. The substantive motion was filed well within the 21 days as captured under the provisions of section 3(1) of the Civil Procedure Act and Order 53 of the Civil Procedure Rules, 2010. Substantive motion was filed a day shy the prescribed period. That that position finds refuge under section 57 of the Interpretation and General Provisions Act, cap 2 Laws of Kenya. With exception of Sundays and public holiday the substantive motion

was filed with the court well within the time required. That the applicant is not asking about elections but the process of the election and such this application is well within the right forum to be determined. The respondents should not hide under the technicalities to deny the applicant his right for his grievances to be addressed. That court should look at the overall objective which is delivering justice. This court is mandated with the task of ensuring that justice is done and that ouster clauses should pass the test of proportionality.

The 1st respondent submitted that the application was filed out of time. Under Order 53 rule 3(1) of the Civil Procedure Rules, 2010 leave was granted on 22/3/2018 the notice of motion ought to have been filed by 12/4/2018 instead the ex-parte applicant filed the current motion on the 27/4/2018 a period of 15 days outside the statutory required period of 21 days. The ex-parte applicant having filed to seek extension of time after the lapse of 21 days, motion is incompetent and same must be struck out.

The 2nd respondent submitted that court lacked jurisdiction in view of Article 88(4) (e) of the Constitution. Section 75(1)(A) of the Constitution stated that the resident magistrates designated by the Chief Justice to have jurisdiction to determine electoral disputed relating to members of the county assembly. Elections petitions are special proceedings which are *sui generis* in character. They are therefore heard and determined in appreciation of their character by a competent election court. Institution of election proceedings through judicial review proceedings therefore rendered the application dated 10/4/2018 fatally incompetent. The 3rd respondent submitted that the application was filed out of time. Leave was granted on 2/3/2018 and as such the substantive application ought to have been filed on 12/4/2018.

From the pleadings its clear the notice of motion was ready by 10/4/2018 however the same was filed on 27/4/2018, 15 days out of time and hence did not comply with provisions of Order 53 which has been written in mandatory terms. No explanation why it was filed 15 days out of time without seeking leave of court. Application has been overtaken by events. The court lacks jurisdiction since this is a dispute with regard to nomination and the right forum to address it was with IEBC.

The issue this court is to determine is whether this court has jurisdiction to hear and determine this application and whether the application for Judicial review is properly before this court.

The 2nd respondent submitted that court lacked jurisdiction in view of Article 88(4) (e) of the Constitution. Section 75(1)(A) of the Constitution stated that the resident magistrates designated by the chief justice to have jurisdiction to determine electoral disputed relating to members of the county assembly. Elections petitions are special proceedings which are *sui generis* in character. They are therefore heard and determined in appreciation of their character by a competent election court. Institution of election proceedings through judicial review proceedings therefore rendered the application dated 10/4/2018 fatally incompetent.

The 3rd respondent submitted that the court lacks jurisdiction since this is a dispute with regard to nomination and the right forum to address it was with IEBC.

The counsel for the ex-parte applicant submitted that this court has jurisdiction as it is clothed with jurisdiction to ensure that the executive action is exercised the way parliament intended and the high court has the responsibility to oversee executive actions that threaten either human rights or rule of law.

The 2nd Respondent raised the issue of Jurisdiction as preliminary objection? The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

"So far as I'm 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 may dispose of the suit."

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

Does this court have jurisdiction to deal with the ex-parte applicant's application for review?

The 2nd and 3rd respondent and the interested party argue that this court has no jurisdiction to deal with this matter. Their contention is that the issue in this application should have been dealt with by an election court but counsel for the applicant submits that this court is well clothed with jurisdiction as the application is challenging the legality of the 2nd respondent- IEBC- actions to de-gazette the ex-parte applicant name after she had been lawfully gazetted and even sworn in as a member of Bungoma county assembly.

It is trite law that jurisdiction is everything and without it court down tools. See the case of **THE OWNERS OF MOTOR VESSEL "LILLIAN S" vs. CALTEX OIL KENYA LIMITED (1989) KLR 1653 (C.A)** where the Court of Appeal stated as follows: -

"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. 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". Underlining mine.

In the case of *Samuel Kamau Macharia v Kenya Commercial Bank Ltd and Another*, [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 on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the constitution exhaustively provides for the jurisdiction of a court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

The jurisdiction of this court is granted by **Article 165 (3)** of the Constitution which provides-

3) “Subject to clause (5), the High Court shall have—

a) unlimited original jurisdiction in criminal and civil matters;

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

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

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(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;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and a question relating to conflict of laws under Article 191; and

e) any other jurisdiction, original or appellate, conferred on it by legislation.

4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. (emphasis).

The court must when issue of jurisdiction is raised, dispose of it first. In *Air Alfaras Ltd. Vs Paytheon Air Crafty 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 case 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 overarching 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.

Central to this application for judicial review is the legality or otherwise of the 2nd Respondent to IEBC to gazette the exparte applicant as a nominated Member of County Assembly Bungoma and degazetting her and gazetting the 3rd Respondent as nominated Member of County Assembly. The prayers sought of certiorari, prohibition and mandamus all relate to the actions of the 2nd Respondent in the process of gazetting of nominated members of County Assembly. In particular the Exparte application seeks an order of Mandamus to regazette the exparte applicant as a nominated member of County Assembly. These are prayers which are related to the process of an Election and an

integral part of an election process. The Supreme Court in *Moses Mwicigi & 14 others* [2016] eKLR (*supra*) extensively expressed itself in relation to the judicial review proceedings (or for that matter, constitutional petitions) as mechanisms for challenging nominations to membership to the National or County Assembly after gazettment by the IEBC. The Court expressed as follows:

[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 gazettment 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. (Emphasis supplied)

[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. (Emphasis supplied)

[115] The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the Act provides that:

“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.”

[117] 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’.

[119] 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.” (Emphasis supplied)

On the same issue the Court of Appeal in ODM -Vs- Yusuf Ali Mohamed & Others 2018 KLR observed; On the question whether there is a specific constitutional or statutory bar to the High Court to entertain a constitutional petition on settlement of electoral disputes in relation to Membership to a County Assembly we answer in the affirmative. There is an express statutory bar to the original jurisdiction of the High Court to handle post-gazettment nomination or electoral disputes relating to Membership to the County Assembly. The original jurisdiction to hear and determine post-gazettment electoral disputes relating to membership to a County Assembly is vested upon the Magistrates Court. The High Court has appellate jurisdiction in respect of disputes relating to post-gazettment of Members to a County Assembly. The express statutory bar is Section 75 (1A) of the Elections Act. The Section provides:

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.

From the fore-going it is evident that the issues in this application and the prayers sought are all election related. They concern nomination of a Member of County Assembly. The dispute being election or nomination related and an off-shoot of the electoral process can only be properly adjudicated by an election court, in this case the Resident Magistrate Court. This court can only entertain appeals from that court and therefore has no original jurisdiction to sit as an election court in respect of the member of the County Assembly.

In the result, I find that this court has no jurisdiction to entertain and hear and determine these Judicial review proceedings whose substance is an election dispute and this court is not the proper court to handle election disputes, whether brought plainly or couched as Judicial review proceedings.

This application is therefore dismissed. Each party to bear his/her own costs.

Dated and Signed at Bungoma 6th day of November, 2018.

S.N. RIECHI

JUDGE