



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
ELECTION PETITION NO. 3 OF 2013

AMBASSADOR ORIE ROGO MANDULI PETITIONER

VERSUS

CATHERINE MUKITE NOBWOLA1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION2ND RESPONDENT

FORUM FOR RESTORATION OF DEMOCRACY – KENYA.....3RD RESPONDENT

THE CLERK TO THE SENATE..... 4TH RESPONDENT

RULING

1. The Petitioner, Ambassador Orie Rogo Manduli filed a petition dated 24/3/2013 seeking the following;

a) A declaration that she is the *bona fide* nominee to the Senate, Trans-Nzoia County on the Forum For Restoration Of Democracy – Kenya party ticket;

b) A mandatory injunction compelling the Independent Electoral and Boundaries Commission (2nd respondent) to cause to be gazette in the official Government of Kenya gazette the Petitioner's name as the nominee to the senate on the 2nd Respondent's party ticket;

c) An injunction restraining the 2nd Respondent from forwarding the name of 1st Respondent to the Clerk and or Speaker of the Senate for swearing in and restraining the said officers from swearing in the 1st Respondent.

2. On 13th May, 2013, the 2nd Respondent filed a Preliminary Objection. The main ground was that this court is not seized with jurisdiction to hear and determine the petition and that the petition is

an abuse of court process.

3. Similarly, the 1st Respondent in his Response to the Petition dated 15th May, 2013 raised the following preliminary objection;

That this Court lacks jurisdiction to entertain the Petition herein, which is improperly before it and was filed in breach of the mandatory provisions of the Constitution, the Elections Act, the Independent Electoral and Boundaries Commission Act and the Political Parties Act and should therefore be dismissed *in limine* for the reason that the Petitioner has not invoked or exhausted the internal dispute resolution machinery of the 3rd respondent, subjected any other or further grievances she may have in relation to the matters in dispute herein to resolution by the 2nd Respondent or the Political Parties Tribunal as required by law before approaching this Honorable Court.

4. This ruling is in relation to both Preliminary Objections.
5. The application came up for hearing on 22th May, 2013. Ms. Lumasi for the 4th Respondent informed the Court that the parties had a consent on record to have the 4th Respondent's name struck out from the proceedings with no orders as to costs. The consent was adopted by the Court.

2ND RESPONDENT'S SUBMISSIONS

6. On behalf of the 2nd Respondent, Mr. Nyarotso, submitted on two main grounds. Firstly, that this court was not seized with jurisdiction to hear and determine the petition. **Article 88 (4) (e)** of the **Constitution** gives the 2nd Respondent the sole mandate and jurisdiction to settle disputes arising from nominations excluding elections petitions. **Article 90 (2)** of the **Constitution** provides that it is the responsibility of the 2nd Respondent to conduct and supervise the nomination of the twelve nominated members of the senate.
7. It was his submission that **Article 105** of the **Constitution** which provides that the High Court shall hear and determine any question as to whether a person has been validly elected as a member of parliament does not contemplate party lists as set out under **Article 90** of the **Constitution**. The use of the word "election" referred to under **Article 90** of the **Constitution** does not have the same meaning as "Election" using universal suffrage. Under **Article 90**; one is deemed to be elected after the conduct of the General Elections; The 2nd Respondent allocates seats to political parties on their strength during the general elections and Political parties uses its internal mechanism to nominate its members. According to Counsel, it then follows that any dispute from the party process can only be resolved through the Political Parties Dispute Tribunal or by the 2nd Respondent under **Article 88 (4) (e)** of the **Constitution**. He relied on the decision in **Francis Gitau Parsimei and 2 Others V. I.E.B.C.** to support this argument.
8. While referring to the decisions in **National Gender and Equality Commission V. IEBC and Others**, Nairobi High Court Petition No. 147 of 2013, **Ferdinand Waititu V. IEBC and Others**, Nairobi High Court Election Petition No. 1 of 2013 and **Speaker of National Assembly V. Njenga Karume**, (2008) 1KLR EP 425 Counsel submitted it was trite law where the Constitution and or statute provides for alternative dispute resolutions, those mechanisms must be exhausted before party can move to court.
9. The second limb of his submissions is that the petition is an abuse of court process; That prayer (a), (b) and (c) in the petition had been overtaken by events because senators had been sworn in and business is ongoing. He also submitted that the Petitioner had not sought for the degazettment of the 1st Respondent. The court therefore had its hands tied and urged it to find the petition a sham and strike it out.

3RD RESPONDENT'S SUBMISSIONS

10. Mr. Milimo submitted that this Court has no jurisdiction. **Section 7** of the **Political Parties Act** gives the Registrar of Political Parties jurisdiction to determine disputes between members of a political party; and any appeal on those decisions shall lie in the Political Parties Tribunal under

- Section 5 of the Political Parties Act.** The decision of the tribunal is final.
11. Counsel further submitted that the Petitioner had not complied with provisions of **Section 78 of the Elections Act** as read with **Rule 11(1) of the Elections (Parliamentary and County Election) Petitions Rules** which requires the Petitioner to deposit a security of Kshs. 500,000/= within 10 days of filing petition. The Petitioner also failed to annex the gazette notice confirming the election of the 1st Respondent.

1ST RESPONDENT'S SUBMISSIONS

12. Mr. Nyamunga submitted on behalf of the 1st Respondent. He associated himself with the submissions of Mr. Nyaratso and Mr. Milimo. He submitted that from the prayers sought in the petition, this is not an election petition because it does not question the validity of the election of the 1st Respondent as a member of the senate. Instead, the Petitioner invites the court to examine her qualifications to show that she is the best suited nominee.
13. Counsel further submitted that nomination is a duty undertaken by a political party and in accordance with that political party. The Petitioner had not challenged her party's nominations list neither has she raised any wrongdoing committed by the 3rd Respondent before the gazettment. He argued that any disputes before gazettment lies with the Political Parties Tribunal, the Political Parties and the IEBC. It was learned counsel's submission that an election court can only determine whether the 1st Respondent was validly elected. As there is no such prayer, the petition should be struck out.

PETITIONER'S SUBMISSIONS

14. On behalf of the Petitioner, Mr. Kigamwa submitted that only the 1st Respondent has filed a response to the petition and in the response annexed the gazette notice.
15. According to Mr. Kigamwa the use of the word "elections" under **Article 90 of the Constitution**, presupposes that nominations of party lists members is itself an election. Any dispute can either be resolved prior to gazettment under the **Section 74 of the Elections Act** or after gazettment in accordance with **Article 105 of the Constitution**. Counsel relied on **Ferdinand Waititu V. IEBC and Others**, Nairobi Election Petition No. 1 of 2013 where Mumbi J. defined the word "declaration" to mean the formal Act of gazettment. It was his submission that at the time of gazettment of the 1st respondent, the petitioner could not lodge her disputes with the IEBC.
16. In relying on the decisions of Majanja J. in **The National Alliance and Another V. IEBC**, Nairobi Petition No. 175 of 2013 and a decision of a three judge bench (Lenaola J., Ngugi J. and Majanja J.) in **The National Gender Equality Commission V. IEBC and Others**, Nairobi Petition No. 147 of 2013 Mr. Kigamwa submitted all disputes arising upon gazettment can only be addressed by way of an election petition.
17. On the nature of the petition and the prayers sought. He expressed a desire to amend prayer (a) in the petition. He also invited the court to take judicial notice of any fact contained in the Kenya Gazette.
18. Finally, the learned counsel distinguished this application from **Speaker of National Assembly V. Njenga Karume** (2008) 1KLR EP 425. It was his submission that in the Karume case, it was clear that the Respondent had abused the court process by filing an election petition after he had filed judicial review proceedings. For these reasons the court held that it did not have jurisdiction because of the prayers sought.

REJOINDER BY 2ND RESPONDENT

19. In his response, Mr. Nyaratso submitted that under **Section 74 of the Elections Act** it was the responsibility of IEBC to settle disputes arising from nominations and subsequent to declaration of the elections results.
20. According to Counsel, **The National Gender Equality Commission V. IEBC** case should be read as a whole. He contends that the three judge bench held that it was the responsibility of IEBC to set up mechanism to resolve any disputes concerning lists in accordance with **Article 88 (4) (e) of the Constitution**.

21. Counsel urged the court to be persuaded by the decision of **The National Gender Equality Commission V. IEBC** case because it was a three judge bench and was decided after **The National Alliance and Another V. IEBC** case.
22. Finally, Counsel submitted that the Petitioner's intention to amend prayer (a) in the petition should be ignored because it will not cure the petition.

REJOINDER BY 1ST RESPONDENT

23. In response, Mr. Nyamunga submitted that **Article 74** of the **Constitution** refers to disputes subsequent to declaration of election results. He contends there is no wrong or act of omission which was committed by the 2nd Respondent and therefore no jurisdiction under **Article 105** of the **Constitution**. The Petitioner was not questioning the validity of nomination but merely stating her qualifications as the most deserving candidate for nomination.
24. Mr. Milimo associated himself with the submissions of Mr. Nyaratso.

ISSUES FOR DETERMINATION

25. After hearing the submissions of all Counsels this court finds five issues for determination which are;
 - i. Preliminary objection
 - ii. Jurisdiction of this court to hear the Petition
 - iii. Competency of the Petition
 - iv. Striking out the Petition
 - v. Costs

ANALYSIS

1. The first issue is whether the Preliminary Objection raised by the Respondents meets the threshold as set out in the leading case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd** (1969) EA 696 where Law, J.A made the following observation;

“.....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. Examples are an objection to the jurisdiction of the court.....”

27. Other observations were made to the effect that;

“.....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 has to be ascertained.....”

28. This court notes that the Preliminary Objection relating to a point of law on this court's jurisdiction has been raised and pleaded in the 1st Respondent's response.
29. Upon reading the Petition and the prayers sought by the Petitioner in particular prayer (a) it reads as follows;

“(a) A declaration that she is the bona fide nominee to the Senate, Trans Nzoia County on the Forum For Restoration Of Democracy- Kenya party ticket”

30. The use of the words by the Petitioner **“...declared the bona fide nominee to the Senate Trans Nzoia County....”** in her prayer, is clear and explicit and does not need evidence to be called to establish that the petition refers to a nomination process and does not question the validity of an election.
31. The court finds that the words are a clear pointer to a contentious issue relating to a party nomination process and finds that a valid point of law on jurisdiction has been raised by all the Respondents that the dispute relates to a political party dispute on a party list which the

Respondents submit that this court has no jurisdiction to entertain. Though it was submitted by Counsel for the Petitioner that there was a typographical error, it is trite law that litigants are bound by whatever is pleaded in their pleadings.

32. The second issue is on Jurisdiction, which is a vital issue and must be dealt with because without jurisdiction the proceedings before the court are a nullity. Refer to **The Owners of Motor Vessel "Lillian S" V. Caltex Oil Kenya Ltd**, (1989) KLR 14 where it was held that;

“.....jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending 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.....”

33. In the case of **Boniface Waweru V. Mary Njeri and Anor** Misc. Appl. No. 639 of 2005 Ojwang J (as he then was) held that;

“.....jurisdiction is the first test in the legal authority of a court or a tribunal and its absence disqualifies the court or tribunal”

34. **Article 165 (3)** of the **Constitution** sets out the jurisdiction of the High Court and it provides as follows;

- “165. (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 determination of-**
- i).....**
 - ii).....**
 - iii)**
 - iv)**
- e) Any other jurisdiction, original or appellate, conferred on it by legislation.**

35. The jurisdiction of this court as contemplated from the above provisions of **Article 165 (3) (e)** is derived from other legislation. The other legislation being the **Elections Act. Section 2 and 75** of this act bestows upon this court jurisdiction to hear Election disputes.

36. **Section 2** defines an *“Election Court”* to mean:

“the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution.”

36. **Section 75** of the **Elections Act** provides as follows;

“A question as to the validity of an election shall be determined by the High Court.....”

37. These Sections should be read in tandem with Part IV of the Elections Petition Rules in particular Rule 10(4) which provides for the appropriate reliefs to be sought by the Petitioner.

38. This being an Election Court this court is seized of jurisdiction to hear and determine questions arising as to whether a person has been validly elected as a Governor, Senator, Women’s Representative and Member of Parliament.

39. This court concurs with the submissions of the Respondents that the matters arising from the petition relate to a party list and amounts to political party dispute. From the reading of the Petition, the Petitioner avers that the Trans Nzoia County nominated the Petitioner but the authorized body of the 3rd Respondent did not forward her name to the 2nd Respondent. This court opines that the criteria used by the 3rd Respondent in the selection process of the nominee, if the Petitioner is dissatisfied with the choice, is a matter to be addressed and determined elsewhere.

40. The 2nd Respondent allocates seats to political parties dependent on their strength after the General Elections and the political parties use their internal mechanisms to nominate its members. All the Respondents submitted that it would therefore follow that any dispute arising from the party process should have been resolved as provided by the Political Parties Act. Counsel for the 3rd Respondent made an erroneous reference to **Section 5** and **7** of the **Political Parties Act**. However, the correct reference is **Section 40** of the **Political Parties Act**. This court opines that another dispute resolution exists through the political parties internal mechanisms as set out in **Section 40 (2)** of the **Political Parties Act** and in their respective constitutions.

41. **Article 88 (4) (e)** of the **Constitution** also mandates the IEBC with the responsibility of settlement of electoral disputes relating to or arising from nominations. Such a dispute would have arisen where the petitioner's name was forwarded to the 2nd respondent by her political party but the 2nd respondent failed to select and gazette her name. However, as the petition stands, the Petitioner's name was not forwarded to the 2nd respondent by the 3rd respondent and therefore no wrongdoing can be imputed to the 2nd respondent. This court finds there is no cause of action against the 2nd respondent and this court also finds that there was no dispute for the 2nd respondent to resolve as provided by the **Article 88 (4)(e)**.

42. It is trite law that where the Constitution or statute provides for alternative dispute resolution mechanisms these must in the first instance be fully exhausted before the aggrieved party moves to the High Court. Refer to **The Speaker of the National Assembly V. Karume** (2008) 1KLR 426

43. The Petitioner has not made any averments as to having used the political parties internal mechanisms nor having moved to the Political Parties Tribunal before having filed the Petition. This court finds that this is not an Election Dispute as envisaged by **Article 105** of the **Constitution** as the matters arose from political party nominations which were done prior and before gazette and that the Petitioner has not exhausted the dispute mechanisms provided for by legislation. I am persuaded by the decision in **Francis Gitau Parsimei V. The National Alliance Party**, (2012) eKLR.

44. This court finds that it has no jurisdiction to hear and determine matters arising from political party nominations and therefore lacks the jurisdiction to entertain the Petition.

45. Alternatively and on the third issue of competency of the Petition this court makes reference to the submissions of Counsel for the Petitioner that Article 90 presupposes that nominations to party lists of members to be in itself an election. Therefore any dispute after gazette can be resolved in accordance with **Article 105** of the **Constitution** by the High Court.

46. Reliance was made on the case of **Ferdinand Waititu V. IEBC and Others**, Nairobi Election Petition No.1 of 2013 where Mumbi J defined the word “*declaration*” to mean the formal act of gazettment. This authority with respect does not lend credence to the Petitioners case because even if this court were to find that it had jurisdiction the Petitioner failed to annex the Gazette Notice to her Petition.

47. The Gazette Notice contains the results that are to be challenged. It is trite law that a court can only act with that which is lawfully placed before it and it was the duty of the Petitioner to avail to the court the Gazette Notice which she did not do. Such an omission can be likened to a situation where an appellant fails to include a decree in the Memorandum of Appeal or where an applicant seeking for orders of *certiorari*, omits to include the administrative order sought to be quashed or where an applicant seeking for an order for review, does not append the order to the application. The examples are plenty.(orbiter).

48. A Preliminary Objection was raised by the 3rd Respondent as to this omission, that is the failure to annex a copy of the Gazette Notice and the court concurs that the omission is fatal and renders the Petition incompetent.

49. Further the court notes that the Petitioner does not challenge her party’s nomination list nor does the Petitioner raise any issues of wrongdoing by the 2nd Respondent nor the 3rd respondent in the body of the Petition. Nor does she question the validity of the election of the 1st Respondent as a woman member to the Senate.

50. The Petitioner instead invites the court to examine her qualifications to show she is the best suited nominee.

51. This court finds the prayers as set out in the Petition to be untenable in law and inappropriate (Refer to Rule 10 Elections Petition Rules) and cannot be granted by this court in any event, as was correctly submitted, there is no prayer for de-gazettment in the Petition.

52. The 1st Respondent filed a Response to the Petition and therefore is entitled to full costs. The 2nd and 3rd Respondent did not file any responses to the petition and in line with **Rule 4** of the **Election Petition Rules** with particular emphasis to the words “.....*proportionate and affordable resolution.....*” this court will only grant them costs of the Preliminary Objection.

CONCLUSION

53. For these reasons the court reiterates that it has no jurisdiction to hear and determine the Petition. The Petition as it stands is found to be incompetent in its entirety. This court makes the following orders;

(i) The Preliminary Objection is hereby upheld.

(ii) The Petition is found to be incompetent in all aspects and is hereby struck out with costs to the Respondents.

(iii) The Respondents shall tax their respective Bills and the Bills shall be forwarded to this court for verification and approval. Taxed

(iv) Certificate to issue under provisions of **Section 86(1)**.

It is so Ordered.

Dated, Signed and Delivered at Kitale this 19th day of June, 2013.

A. MSHILA

JUDGE

19/6/2013

Before A. Mshila, Judge

Court clerk, Kassachoon

Legal Researcher, Stephen Karuga

Ayuma holding brief for Kigamwa for petitioner

Chanzu holding brief for Gumbo for 2nd respondent

Chanzu holding brief for Milimo for 3rd respondent

N/A for 1st respondent

Court:

Ruling read in open court. Preliminary Objection up-held. Petition struck out with costs. Leave granted to appeal.

A. MSHILA

JUDGE

19/6/2013