

**IN THE COURT OF
APPEAL AT
NYERI**

(CORAM: KARANJA, JAMILA MOHAMMED & KIMARU, JJ. A)

**CIVIL APPEAL NO. 86 OF
2018 BETWEEN**

**CHARLES NJURU KIHARA 1ST APPELLANT
HUMPHREY KIMANI NJUGUNA 2ND
APPELLANT SIMON MWANGI KAMAU
3RD APPELLANT**

AND

**CHRIS KINYANJUI
KAMAU,
CLERK, COUNTY ASSEMBLY OF MURANG'A1ST
RESPONDENT LEONARD NDUATI KARIUKI,
SPEAKER, COUNTY ASSEMBLY
OF MURANG'A 2ND
RESPONDENT COUNTY ASSEMBLY OF MURANG'A
3RD RESPONDENT NATIONAL GENDER AND EQUALITY
COMMISSION..... 4TH
RESPONDENT**

*(Being an appeal from the ruling and order of the High
Court of Kenya at Murang'a (Waweru J.) dated 5th January,
2018*

in

***Constitutional Petition No. 3 & 2 of
2017 (Consolidated)***

JUDGMENT OF THE COURT

1. The appellants filed two separate constitutional petitions dated 13th and 15th September, 2017, before the High Court at

Murang'a alleging violation of their rights as enshrined in **Articles 10, 27, 28, 38, 47, 50, 177** and **178** of the Constitution, with respect to

the election of the 2nd respondent as the speaker of the County Assembly of Murang'a, in the elections held on 4th September, 2017.

2. The appellants' case was that notice was issued by the 1st respondent declaring the office of the speaker of Murang'a County Assembly vacant. It called upon interested qualified persons to apply for the said position. That pursuant to the said notice, the appellants submitted their nomination papers in compliance with the terms of the said notice. That they were informed that they had been cleared as candidates, and that the election of the speaker would take place during the first sitting of the Assembly to be held on 4th September, 2017. The 1st and 2nd appellants state that on the morning of the election, the 1st respondent announced that the 1st and 2nd appellants had been disqualified from contesting for the position the Speaker of the County Assembly of Murang'a, which decision had not been communicated to them prior thereto. They asserted that the decision by the 1st respondent

was made in bad faith, and was a blatant violation of their rights under **Article 38** of the Constitution.

3. The appellants challenged the election of the 2nd respondent as speaker of the County Assembly of Murang'a on grounds that: the county Assembly was not fully constituted when the 2nd respondent was elected as some of the nominated members were not present; the election was conducted in a manner that denied the legitimate members of the county Assembly a right to participate in the process; the members of the county Assembly received threats to violence and undue pressure on the days leading up to the elections, hence the purported elections were not free and fair.

4. The consolidated petitions contained similar prayers namely:

i. An order of certiorari quashing the impugned decision(s) of the clerk and any other consequential orders, proceedings and/or such other act done with the authority of the proceedings of the purported first sitting, be quashed, set aside and declared null and void.

ii. A declaration that the election of the 2nd respondent as speaker of the County Assembly of Murang'a was irregular, in

violation of the law; was not free and fair and thus null and void.

iii. A declaration that the election of the 2nd respondent as speaker of the County Assembly of Murang'a to the exclusion of nominated members of the 3rd respondent was discriminatory.

iv. An order of judicial review quashing the election of the 2nd respondent as speaker of the County Assembly of Murang'a.

v. An order of mandamus compelling the respondents to conduct the election of the county assembly speaker in accordance with the Constitution, the Elections Act 2011 and the 3rd respondent's standing orders.

vi. The honourable court does assess and award compensation and/or general, exemplary, aggravated and punitive damages against the respondents.

vii. Costs and interests on the above and in the alternative an order be made for the 1st and 2nd respondents to personally pay the costs of this petition.

viii. Such further, other and consequential orders as this honourable court may deem fit to make.

5. Before the petitions were heard, the 1st to 3rd respondents raised a preliminary objection dated 22nd September 2017, contending that the High Court lacked jurisdiction to hear a constitutional petition challenging the validity of the election of a speaker of the County Assembly, pursuant to **Section 75(1)**

(A) of the Elections

Act, which bestowed a Resident Magistrate's Court jurisdiction to hear disputes challenging the election of members of a county Assembly. The respondents urged that the appellants were seeking to mask an election petition as a dispute regarding violations of their fundamental rights, thereby attempting to circumvent the electoral laws.

6. In a ruling dated 5th January, 2018, the High Court (Waweru J.) upheld the preliminary objection, and struck out the appellants' petitions, with costs to the respondents. The learned Judge observed that the petitions by the appellants were, in essence election petitions, challenging the election of the 2nd respondent as speaker of the county Assembly of Murang'a, that was conducted on 4th September, 2017. The learned Judge determined that by virtue of **Article 177 (1)(d)** of the Constitution, the speaker of a county Assembly, once elected, becomes a member of the county Assembly. Consequently, any dispute regarding the election of a speaker of a county Assembly must be resolved as provided for by **section 75(1) (A)** of the Elections Act, which grants the Resident Magistrate's Court jurisdiction to determine disputes relating to elections of members of the county Assembly.
7. Aggrieved by this decision, the appellants lodged this appeal

premised upon eleven grounds in the memorandum of appeal.

In

summary, the appellants faulted the learned Judge for failing to appreciate that the High Court had jurisdiction to determine the petitions filed by the appellants, as they were premised on violations of their constitutional rights, and in the end struck out the said petitions *in limine* with costs. They took issue with the fact that the learned Judge failed to appreciate that the office of a speaker of a county assembly was unlike that of an elected member of a county Assembly, as it is a *sui generis* office, whose election is not one of those envisaged by **Section 75(1A)** of the Elections Act. They were aggrieved that the learned Judge failed to appreciate that there is no statutory procedure that expressly provided for the challenge of the election of the speaker of the county Assembly. The appellants faulted the learned Judge for failing to appreciate the persuasive decisions relied on by the appellants which related to similar petitions to the ones filed by the appellants. The appellants were aggrieved that the learned Judge struck out their petitions and left them without remedy for the contraventions of their constitutional rights. They urged this Court to allow the appeal, re-appraise the evidence on record, hear and determine the petitions, and enter such judgment or final orders in their favour.

8. The appeal was canvassed by way of written submissions. The Court also heard oral submission made by learned counsel **Mr.**

C.N. Kihara for the appellants and **Mr. Nganga Mbugua** for the 1st to 3rd respondents. At the time of the hearing of the appeal, it was apparent that the term of the 2nd respondent as the speaker of the County Assembly of Murang'a, whose election was being challenged by the appellants, had expired. New members of the County Assembly had been duly elected into office following the General Elections held in August 2022. As such, a substantial part of the prayers sought by the appellants in their consolidated petitions before the High Court had been overtaken by events.

9. The appellants were, however, adamant that they would prosecute the instant appeal. In their supplementary submissions filed on 14th December, 2023, the appellants submitted that prayer number (vi) of the petition, seeking compensation for violation of their fundamental rights, for the lost chance to participate to be elected and serve the office of the speaker of the county Assembly of Murang'a was still viable, and had not been overtaken by events. They further challenged the award of costs granted to the respondents by

the High Court, when it upheld the respondent's preliminary objection.

10. It was the appellants' submission that there is no express procedure provided for in the Constitution or electoral laws with respect to challenge of the election of a speaker of a county Assembly. The appellants urged that the membership of the county Assembly contemplated under **Section 7** of the County Governments Act, only includes members duly elected under **Article 177** of the Constitution, and does not include the speaker of a county Assembly, who is an ex-officio member, elected within the purview of **Article 178** of the Constitution. They maintained that a speaker only becomes a member of the county Assembly after being duly elected.
11. It was the appellants' further submission that the High Court, having been clothed with jurisdiction to hear and determine questions of whether a right or fundamental freedom in the Bill of Rights has been violated or denied, by virtue of **Article 165** of the Constitution, was properly placed to hear and determine their petitions. They asserted that the reliefs sought in their petitions, including judicial review orders and orders of declaration of violation of rights, and compensation thereto, can only be issued by the High Court, and not a Resident Magistrate's court.
12. The appellants asserted that the Elections Act contemplates an

election disputes mechanism arising from elections based on

universal suffrage, and does not expressly provide for a dispute resolution mechanism, where the validity of the election of a speaker of county Assembly is challenged. To this end, the appellants cited the decision of the High Court at Machakos in **Frank Mulisa Makola vs Felix G. Mbiuki & 4 others [2013] eKLR**. They submitted that in the absence of such procedure, and considering the limitations in jurisdiction of a magistrate's court to issue the reliefs sought, the High Court ought to have, in the interest of justice, assumed jurisdiction and determined the appellants' petitions on merit.

13. **Mr. Ng'ang'a**, for the 1st, 2nd and 3rd respondents, in rebuttal, submitted that the speaker of a county Assembly is a member of the said assembly by virtue of the description given under **Article 177** of the Constitution. He emphasized that any disputes arising from such an election would therefore be governed by **Section 75(1A)** of the **Election Act**, as read together with **Rule 6(1)(b)** of the Elections (Parliamentary and County Elections) Petition Rules, 2017. Counsel stated that had there been any need for a distinction with respect to the challenge of the election of a speaker of a county Assembly *vis-a-vis* a member of a county Assembly, the County Governments Act would have outrightly stipulated so.

14. Counsel explained that courts have previously held that judicial review is not the statutory procedure for challenging membership in a county Assembly. He submitted that the appellants' consolidated petitions, despite being disguised as constitutional petitions, was in fact an election petition, challenging the validity of the election of the 2nd respondent, as a speaker of the County Assembly of Murang'a. Counsel further pointed out that the appellants had simultaneously filed

Murang'a Chief

Magistrate's Court Election Petition No. 3 of 2017,
contesting

the election of the 2nd respondent as a speaker to the County Assembly of Murang'a. It was the respondents' submission that the petitions filed by the appellants before the High Court were an attempt by the appellants at opening a parallel electoral dispute resolution regime, and amounted to an abuse of the court process. They urged this Court to dismiss the appeal and uphold the ruling of the High Court. The 4th respondent did not put in any written submissions in response thereto.

15. Having re-evaluated the record of appeal, as well as submissions by parties to the appeal, it is our considered view that this appeal turns on whether the superior court had jurisdiction to hear and determine the consolidated petitions

filed by the appellants.

16. The Supreme Court in **Kalpana H Rawal & 2 others v Judicial Service Commission & 2 others [2016] eKLR** quoted with approval a decision of the Supreme Court of Nigeria in **Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others,** where the Court had this to say about the jurisdiction of a court:

“It is settled law that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity-dead- and of no legal effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost.”

17. This Court in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR** expressed itself as follows on the issue of jurisdiction:

“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 should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. The Supreme Court of Kenya in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others** **(2012)**

eKLR stated as follows with respect to the source of a court's

jurisdiction:

“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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

19. During the hearing of this appeal, the appellants informed the Court that they had abandoned all the prayers they had sought in their petitions before the High court save for the prayer for

compensation and the award of costs. **Mr. C.N. Kihara** for
the
appellants, when asked by the Court whether the appeal had
been

overtaken by events noting that by the time the appeal was heard by this Court, the term of the County Assembly of Muranga which was elected in August, 2017 had expired and a new county Assembly had been elected in August, 2022, insisted that the Court must give its decision on the question whether the speaker of the County Assembly of Muranga was properly elected and whether the appellants' right to offer themselves as candidates for the said position of the speaker were infringed when they were not allowed to participate in the elections.

20. In essence the appellants were saying that the High Court erred when it struck out their petitions because their petitions raise issues of breach of their rights and fundamental freedoms under the Constitution and it was not therefore purely a matter of the election of a speaker of a county Assembly.
21. On their part, the respondents agreed with the decision of the High Court that the petitions brought by the appellants seeking to challenge the election of the speaker of the County Assembly of Muranga by way of constitutional petitions and Judicial review was a disguise for the challenge of the election of the speaker of the county Assembly which should have been filed before the Resident Magistrate's court as envisaged under the Elections Act.

22. Having considered the rival arguments made by the parties to this appeal, firstly, we hold that the issues that the appellants sought to canvass before this Court on appeal i.e the election of the speaker of the County Assembly of Murang'a, had indeed been overtaken by events. The term of the speaker of the County Assembly and the County Assembly which the appellants sought to challenge expired upon dissolution of that County Assembly prior to the election of the new County Assembly in August, 2022.

23. Secondly, as was held in **National Rainbow Coalition Kenya (NARC Kenya) v. Independent Electoral & Boundaries Commission, Tharaka Nithi County Assembly & 5 others (interested Parties) Petition 1 of 2021** [2022] KESC 6(KLR), in

a case where the Supreme Court was considering a petition challenging the validity of the nomination of elected members of the county Assembly who had been gazetted by nominating political parties, it was held that the only path that such elections could be challenged is in election petition commenced in an Election court under **section 75 (1A)** of the Elections Act and not by filing a constitutional petitions. The Supreme Court in **Moses Mwicigi & 14 others v. IEBC & 5**

Others [2016] eKLR held that

the only path the election of a member of the County Assembly,
whether elected by nomination or by an election through
universal

suffrage is in an election petition as provided under the Elections Act and not any other mechanisms such as constitutional petitions or judicial review.

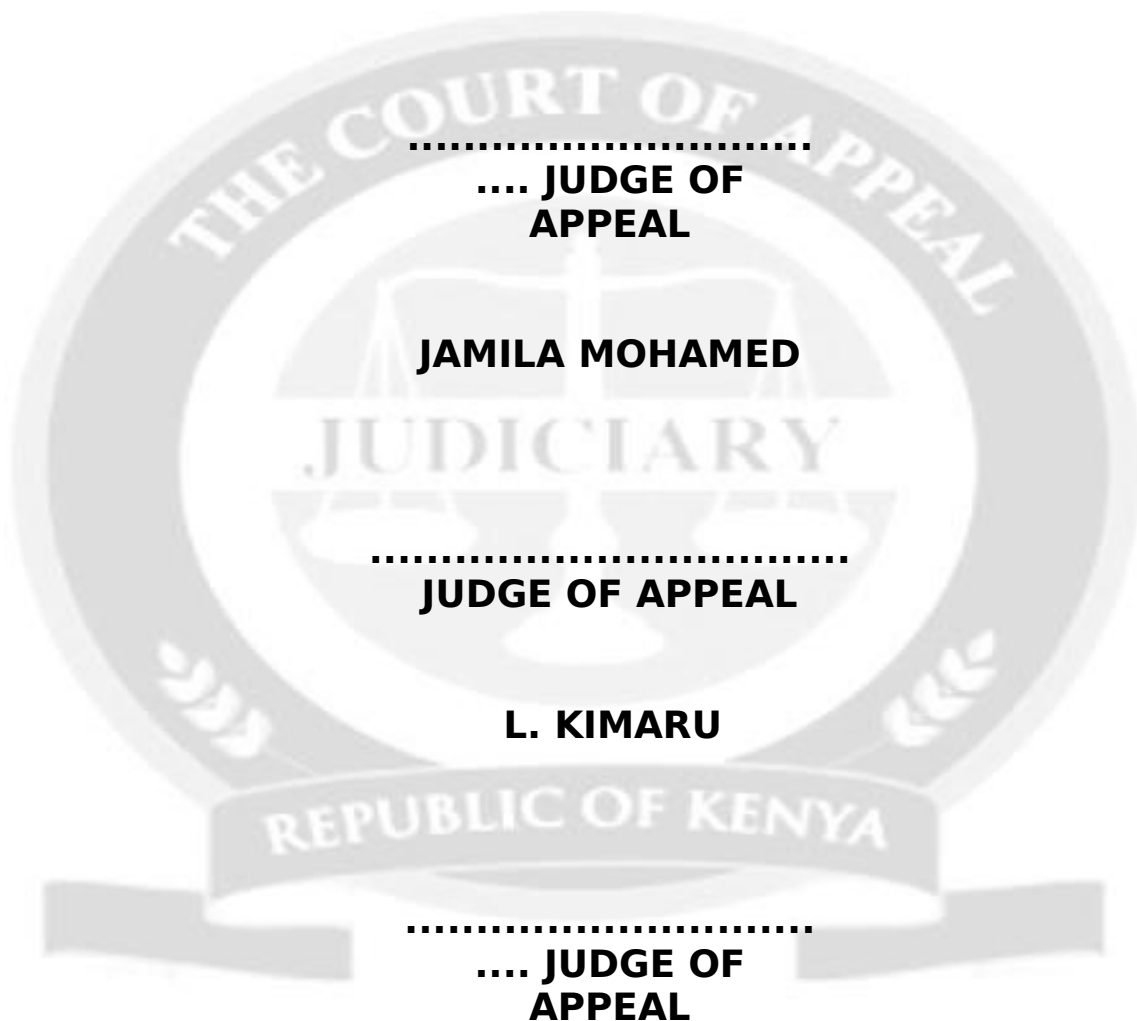
24. It is apparent from the foregoing that the trial court was correct in striking out the appellants' petitions as it was a disguise challenge to the election of the speaker of the county Assembly of Murang'a without following the procedure contemplated under the Elections Act. We do not agree with the submissions made by the appellants to the effect that their petitions raised *sui generis* constitutional matters that are of public importance that would entitle the appellants to short-circuit the procedure laid down by the Elections Act and the rules made thereunder for challenging the election of the speaker of the county Assembly.
25. The election of the speaker of the county Assembly cannot result in the breach of rights and fundamental freedoms of a person intending to contest an elective position as provided by the Bill of Rights in the Constitution. The appellants' remedy for their grievance lay with filing a petition for the nullification of the election of speaker of the county Assembly as provided under **section 75 (1A)** of the Elections Act. There is no other procedure contemplated by the law. The High Court was right

to lay down its tools as it lacked jurisdiction to entertain the petitions.

26. It is clear from the foregoing that the appellants' appeal lacks merit and is hereby dismissed with costs to the 1st, 2nd and 3rd respondents.

Dated and delivered at Nyeri this 3rd day of October, 2025.

W. KARANJA



*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR