



REPUBLIC OF KENYA



**Ochieng v Ojango & 5 others (Election Petition E003 of 2022)  
[2022] KEMC 9 (KLR) (7 September 2022) (Ruling)**

Neutral citation: [2022] KEMC 9 (KLR)

**REPUBLIC OF KENYA  
IN THE OYUGIS LAW COURTS  
ELECTION PETITION E003 OF 2022  
CA OKORE, PM  
SEPTEMBER 7, 2022**

**BETWEEN**

**KASERA KENNEDY OCHIENG ..... PETITIONER**

**AND**

**ONYANGO LAZARUS OJANGO ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY RETURNING OFFICER KARACHUONYO CONSTITUENCY .... 2<sup>ND</sup>  
RESPONDENT**

**DEPUTY PRESIDING OFFICER - KITAL PRIMARY SCHOOL .... 3<sup>RD</sup>  
RESPONDENT**

**DEPUTY PRESIDING OFFICER - PAUL MBOYA VOCATIONAL TRAINING  
CENTRE ..... 4<sup>TH</sup> RESPONDENT**

**PRESIDING OFFICER - SIMBI PRIMARY SCHOOL ..... 5<sup>TH</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 6<sup>TH</sup>  
RESPONDENT**

**RULING**

- 1 This Ruling has been prompted by two interlocutory applications herein that the court is called upon to make a determination .
- 2 Firstly the notice of motion dated 31/08/2022 and filed by the petitioner/applicant seeking orders as follows:-
  1. Spent.
  2. Spent.



3. 8 orders seeking preservation and scrutiny of all election material and recount of votes in the polling stations at :Kital Primary School Paul Mboya Vocational Training Centre Simbi Primary School Yala primary school Achuth primary school
  4. costs of the application.
- 3 Secondly, the preliminary objection dated 18/9/2022, raised by the 1<sup>st</sup> respondent/applicant as against the petition on the following grounds:
1. The instant petition contravenes the mandatory provisions of sections 76 and 77 (1) of the Elections Act 2011. Which requires all election petitions other than the presidential election, to be filed within 28 days of the declaration of results by IEBC.  
Whereas the election results herein were declared on 10/8/2022, the limitation period of 28 days effectively lapsed on 7/9/22 and the instant petition was filed out of time.
  2. The court has no jurisdiction in law to countenance the instant petition as the same has been filed out of time.
  3. Polling stations are effectively managed under the charge of the presiding officers who have the exclusive legal mandate to account for the elections in those polling stations.  
The instant petition is legally incompetent and fatally defective in so far as it is instituted as against deputy presiding officers instead of the very presiding officers who were actively in charge of polling stations and who have the exclusive legal competence to account for elections in their respective polling stations.
  4. The 2<sup>nd</sup> respondent is neither a person nor an office known in law as there is no such office as the County Returning Officer Karachuonyo Constituency.
  5. The petitioner has intentionally and designedly failed to effect proper service on all respondents within the adequate time in order to deny them a fair and equitable chance to respond to the same and therefore compromise the integrity and fairness of the same's hearing and determination.
- 4 The two applications were properly served on all the counsels representing all the parties herein and when the matter was mentioned before court on 21/9/22 whereby directions were given.
- 5 On 21/9/22 virtual mention of the case was done, the 3 counsels representing parties herein, being Mr. Aoko Advocate for the Petitioner, Mr. H. Bunde Advocate for the 1<sup>st</sup> Respondent and Mr. Ayieko Advocate for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents were all present and the court directed that the parties do file their responses to the two applications, and that they be canvassed by way of written submissions.
- 6 By consent of all the counsels this matter was fixed for mention on 30/9/22 to confirm filing of the requisite documents and to issue a Ruling date for the same.
- 7 On 30/9/22, since the trial magistrate was attending an Election bench training at Naivasha, the matter was mentioned in the registry and fixed for a further mention on 6/10/22 before the court.
- 8 On 30/10/22 in the presence of all counsels for all parties herein, the court confirmed that parties had complied with the court's directions and had filed the requisite documents and/or responses as noted herein. The Ruling date for 7/10/22 was fixed.
- 9 In response to the Preliminary Objection the petitioner filed grounds of opposition.



- 10 The counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents opted to associate and/or align himself with the submissions of the 1<sup>st</sup> Respondent to the Preliminary Objection.
- 11 I have perused the pleadings and/or filed herein, together with the exhibits attached thereto, alongside the authorities relied upon by parties for and against both applications.
- 12 As regards the 1<sup>st</sup> application (dated 31/8/2022) I wish to deal with it at the tail end of this Ruling, since the issues raised in the Preliminary Objection are weighty and must be given priority in this case.
- 13 With regard to the Preliminary Objection, it digs deep into the petition herein and therefore attracting the court's attention to the same. The court has perused the petition herein:-
- a. And the court finds that it is clear that it is dated 31/8/22, filed and received in court on 12/9/2022.
- The petition was presented to court on 12/9/22.
- And that is where we draw the line.
- b. It is also clear that the results in the election herein was declared on 10/8/2022.
- It is of benefit to note that the time frame for filing of a petition by a dissatisfied party in this case is 28 days from the date of the declaration of the results.
- Evidence on the declaration of results is explicit on the 1<sup>st</sup> annexure to the 1<sup>st</sup> Respondent's Replying Affidavit ...."LOO1" ( The Certificate Of The Elected Member Of County Assembly) issued in the name of the 1<sup>st</sup> respondent by Independent Electoral and Boundaries Commission, which shows that the 1<sup>st</sup> Respondent was declared as duly elected on 10/8/2022.
- The computation of time for presentation of the petition started thereafter and not the gazette date.
- c. In addition to that there is no doubt that the petition is questioning the validity of the elections herein, and seeks a declaration of fresh elections for the member of the County Assembly for Central ward, Karachuonyo Constituency.
- That is evident in the prayers © and (e) of the petition filed herein.
- 14 The law is clear on the presentation of a petition of this nature before court, and the time frames, as it is entrenched in the statutes and provided for under Article 87 (2) of the [constitution of Kenya](#) which states that .....
- 15 Article 87 (2) of the [constitution of Kenya](#) .....”Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the by the Independent Electoral and Boundaries Commission.”
- And .....
- 16 Section 76 (1) of the [Election Act](#) No. 24 of 2011 which states that,....a petition-
- (a) to question the validity of an election shall be filled within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation.
- (b) to seek a declaration that a seat in parliament or county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of vacancy by the relevant speaker



- c to seek a declaration that a seat in parliament or county assembly has become vacant may be presented at any time.”
- 17 In the present petition it is clear the above provisions of the law were not complied with and since the said provisions are crafted in mandatory terms, they must be applied as is, this court’s hands are therefore tied. To the extent that the court is deprived of the jurisdiction to deal and/or determine this case.
- 18 To add on that the superior courts have delved into this kind of situation before, and decided that the declaration of results is done at the polling station by the returning officer and issuance of the relevant declaratory instrument containing the election result and that the computation of time starts then. And not the date of publication in the Kenya Gazette .
- 19 Gazettement is simply a process of informing the public about the declaration made at the polling station.
- 20 The Supreme Court made this clarification on the computation of time in the case of *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* (2014) e KLR where it was held that .....” As we have depicted in the analysis, these officers declare the election results at various stages of the election. For purposes of computation of time in respect of the filing of the election petition, we hold that the final declaration presents the instrument of declaration in accordance with article 87 (2) of the *constitution of Kenya* .....The process of election culminates in the issuance of a Certificate which squarely falls within the said definition of the instrument.”
- 21 In the petition herein, the instrument mentioned above is the certificate of elected member of county assembly issued to the 1<sup>st</sup> respondent herein on 10/8/2022. The limitation period in this case ended on 8/9/2022.
- 22 This court cannot extend and/or waive the said time however much it may be persuaded to do so.
- 23 And on this aspect of ignoring the said time this court wishes to be guided by the decision of the Court of Appeal in the case of *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* (2013) e KLR, the court held that .....However for avoidance of doubts I would like to clarify that , had the cross-appeal failed, I would have allowed the appeal and set aside the impugned orders of the High Court as the 28 days limitation period stipulated by articles 87 (2) and section 76 (1) (a) of the Act are both constitutional and statutory and cannot be legally extended, waived or ignored as the High Court implicitly and essence purported to do. They are cast on stone.”
- 24 Even if this court was to close one eye and retain the petition on the basis of delivering justice without undue regard to procedural technicalities, the High Court has again denied this court that chance, in its pronouncement in the case of:-
- Clement Kungu Waibara & another v Francis Kigo Njenga 7 3 others (2013) e KLR, in which it held.....

23

I am also unable to appreciate Dr. Khaminwa’s argument that Article 87 of the *constitution of Kenya* is a mere procedural of technical provision, which would fall afoul of Article 159 (1) (d) that requires the courts to administer justice without undue regard to procedural technicalities. Both are Constitutional provisions, and none has inherent supersession over



the other. I am not aware of any principle of constitutional interpretation that requires the court to subjugate Article 87 (2) to article 159 (2) (d)..."

26 It is worth stating that the constitution of Kenya is the Supreme law of the land and no one, not even this court can go against its directions. This is clearly indicated in Article 2(3) of the constitution of Kenya ...which states

The validity or legality of this Constitution is not subject to challenge by or before any court or other state organ.

27 From the above superior courts pronouncements and the provisions of the law cited therein, it is clear the petition herein has offended the said laws and the court therefore lacks the jurisdiction to proceed with it.

28 It is sad that this petition has to go in this manner but this court has no power whatsoever to ignore the dictates of the law especially the provisions of the constitution of Kenya on the issue of jurisdiction.

29 Even the Supreme court in the Martha Karua case at paragraph 55 (b) laid the following principle: - .....”55. (b) Unless for want of jurisdiction or in any other deserving circumstance, a trial court should exercise restraint in striking out a petition or a response, where such an action is likely to summarily dispose of the matter.”

30 Lastly as regards the other issues raised in the Preliminary objection (2-5) which in essence are pointing out the defective nature of the petition from its face value. They are as follows:-

31 The 2<sup>nd</sup> respondent is an office that does not exist, it is appalling that the petitioner/applicant has chosen to sue a non-existent party as defined in legal realms of elections.

32 The petitioner is suing Deputy presiding officers as 3<sup>rd</sup> and 4<sup>th</sup> respondents instead of the Presiding officers who are legally mandated to account for elections in polling stations.

33 This court would have considered and looked at them differently, but since the issue of jurisdiction discussed above will not allow this court to hear and determine this petition, I do not find a reason to proceed to determine them, it will not change the course of this case.

34 Last but not least, going back to the Notice of Motion dated 31/8/2022, the same is pegged on the petition herein, which has already been declared defective, un-lawful, un-constitutional and fatally invalid.

35 So the prayers sought in the application even if granted by the court will not serve any purpose in this case. This court will be exercising alien and invalid powers unknown in law, if it canvasses any proceeding arising from the instant petition.

36 It thus follows that the application dated 31/8/22 stands dismissed with no order as to costs.

37 No valid reasons have been advanced by the petitioner to mitigate the technicalities cited above. The reasons given by the petitioner in the grounds of opposition in response to the Preliminary Objection herein are not convincing enough to persuade the court otherwise. They lack specificity and remain mere, they are general allegations with no legal and/or factual basis.

38 Besides, it is my considered opinion that the court has been denied the jurisdiction to deal with this matter based on the limitations stated above, and without jurisdiction, this court cannot proceed and must down its tools at this point.



39 In the circumstances I find the petition herein fatally defective, invalid and incompetent, and for lack of jurisdiction to determine the issues raised therein, the same is hereby dismissed in its entirety.

Each party shall bear its own costs.

Orders accordingly.

.....  
**CELESA OKORE**

**PRINCIPAL MAGISTRATE**

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THE 7<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**In the presence of :**

**Court assistant.....Eveline Anyango**

**Petitioner/applicant.....N/A**

**Respondents.....N/A**

**Advocates.....Mr. Aoko Advocate for the petitioner.....present**

**Mr. H. Bunde Advocate for the 1<sup>st</sup> resp....present**

**Mr. Ayieko Advocate for 2,3,4,5,6<sup>th</sup> Resp...present.**

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