



REPUBLIC OF KENYA



**Mibei & 5 others v Kirui & 2 others (Election Petition E01 of 2022)
[2022] KEMC 13 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 13 (KLR)

**REPUBLIC OF KENYA
IN THE KERICHO LAW COURTS
ELECTION PETITION E01 OF 2022
BR KIPYEGON, PM
NOVEMBER 28, 2022**

BETWEEN

**RICHARD K MIBEI 1ST PETITIONER
GODFREY KIPLAGAT MUTAI 2ND PETITIONER
KIPYEGON LANGAT 3RD PETITIONER
ROBERT KIPKURUI KORIR 4TH PETITIONER
NELSON RONO 5TH PETITIONER
KENNETH KIPKIRUI RONO 6TH PETITIONER**

AND

**KIPNGENO KIRUI 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 3RD RESPONDENT**

RULING

1. The 1st, 2nd, 3rd, 4th, 5th & 6th Petitioners filed petition No e001 of 2022 dated August 31, 2022 after the General Election of August 9, 2022 as against the 3 Respondents for orders;
 - a. Setting aside of a declaration of the 2nd Respondent as a Member of County Assembly (MCA) of Tebesonik Ward Bureti Sub County within Kericho County in an election held on August 9, 2022.
 - b. Nullifying the election of Tebesonik Ward, Bureti Sub-County within Kericho County in an election held on August 9, 2022.



- c. Costs of this Petition.
 - d. Any such other relief....
2. All the 6 Petitioners also filed Statements as Pleadings in which they all as voters in Chemobei Polling Station alleged that the 2nd Respondent Kipngeno Kirui alias Alfred Kimutai Kirui who was a candidate for MCA position Tebesonik Ward masqueraded as a voter by using two different Identity Cards Nos 39913409 & No 26897888 with 2 different dates of birth as December 30, 1985 and January 1, 1985 respectively. According to them, the 2nd Respondent used forgery while submitting documents to the offices of the 1st Respondent as well those of the Police Clearance for nomination. That the 2nd Respondent therefore is of a questionable character and thus not qualified in his integrity values under Chapter 6 of the Constitution.

The petitioners' case

3. The Petitioners aver that upon due diligence and scrutiny of documents, they realized that the 2nd Respondent regardless of clearance by the 1st Respondent to vie, the 2nd Respondent has 2 National Identity Cards and names i.e. Kipngeno Kirui Identity Card No 39913409 and Alford Kimutai Kirui Identity Card No 26897888. The Petitioners therefore suspect that the Respondent may not be a voter at Tebesonik Ward and that he is of a questionable character without qualification under Chapter 6 of the Constitution of Kenya 2010. The Petitioners thus blame the 1st Respondent for failure to exercise due diligence in clearing the 2nd Respondent to vie, the 2nd Respondent for failure of true disclosure and the 3rd Respondent for failing to advise the agencies of election n matters registration of political candidates.
4. The 1st Respondent in its response to the Petition dated September 19, 2022 and the Affidavit in Reply refuted the allegations made against it and averred that clearance and/or registration of candidates in Tebesonik Ward Bureti Sub-County within Kericho County was conducted in accordance with the laws and legal principles and further that there was no dispute or complaint lodged against any of the registered candidates even after the gazettment of the successful candidates.
5. It is noteworthy again that the 1st Petitioner filed an Affidavit of Verification alone but on behalf of the 2nd to 6th Petitioners in this record. All the Petitioners however filed Statements and documents sought to be relied upon in the Petition are; an online print-out of previous card details of one Kipngeno Kirui ID No 39913409, online print-out of previous card details of one Alfred Kimutai Kirui ID No 26897888, online Police Clearance Certificate of Kipngeno Kirui and 2 DCI Police Clearance Certificates of Kipngeno Kirui dated March 1, 2022 and April 11, 2022.
6. The Petitioners had no written Submissions in the court file as at the conclusion of this Judgment.

The 1st Respondent's case

7. The 1st Respondent in its final written Submissions in argument against the Petition sought to address issues as follows;
8. Whether the elections conducted by the 1st Respondent in Tebesonik Ward on the August 9, 2022 was in accordance with the dictates of the Constitution, the relevant electoral laws and principles. It submitted it complied with all the constitutional and statutory rules and principles to the conduct of elections. According to the 1st Respondent, none of the Petitioners challenged the manner in which the elections were conducted including the outcome thereof as declared and that the Petitioners' only grievance relates to the qualification of the 2nd Respondent herein who successfully vied as an



Independent candidate. On this, it made reference to the High Court decision in Clement Kungu Waibara v Annie Wanjiku Kibeh & another [2018] eKLR where it was observed;

"17. The Supreme Court of Kenya in Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No 1 of 2017 (hereinafter, "Raila Odinga Case 2" interpreted the threshold set by section 83 of the Elections Act as follows: [211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to Prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to Prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election. "

9. The 1st Respondent avers that the Petitioners failed to demonstrate any of the grounds contemplated for nullification of an election as above and thus the Petition is without merit and should suffer dismissal.
10. In the second issue, the 1st Respondent addressed itself on whether the registration of the 2^{ct} Respondent to vie as an independent candidate was effected in accordance with the law. It referred to the provisions on qualification for one to vie as a Member of a County Assembly under Article 193 of the Constitution;

"..... unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person- (a) is registered as a voter; (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and (c) is either-(i) nominated by a Political party; or (ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

11. The 1st Respondent rightly observed that as at now, there is no law requiring a candidate for Member of County Assembly to hold any academic qualification as the provision of the law imposing minimum academic qualifications was declared unconstitutional by the High Court in County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated)) [2021] KEHC 304 (KLR) (Constitutional and Human Rights) on (15 October 2021) declared as follows;

"A declaration be and is hereby issued that section 22(1)(b)(ii) of the Elections Act is unconstitutional and in violation of articles 24, 27, 38(3) and 56 of the Constitution., c. An order hereby issues that section 22(1)(b)(ii) of the Elections Act is in operation, of no legal effect and void ab initio. For clarity, the requirement that a person must possess a degree from a university recognized in Kenya to qualify to be a Member of a County Assembly is hereby nullified. "

12. That the 2nd Respondent is duly registered as a voter and did complied with all the requirements of the law to vie as an independent candidate as stipulated under Articles 85 and 193 of the Constitution and all the relevant laws and regulations and also presented clearance from all the relevant Government Bodies pursuant to the Dictates of Chapter Six of the Constitution hence it bore an obligated to clear



the 2nd Respondent to vie as an independent candidate for Member of County Assembly, Tebesonik Ward in furtherance of his constitutional rights under Article 38 of the Constitution and Gazette his name as such. see Timothy S Maneno v Returning Officer, Kibwezi West, Nguu/Masumba Ward & 2 others [2021] eKLR.

13. On whether the Petition is incompetent for it relates to nomination of a candidate (the 2nd Respondent), and not the conduct of the elections, the 1st Respondent argued that the law provides an elaborate mechanism for ventilating nomination disputes before the elections and does not contemplate the challenging of an election outcome premised on issues relating to the nomination of a candidate. Section 74 (3) of the Elections Act provides that Notwithstanding subsection (2), where a dispute under subsection (I) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.
14. The 1st Respondent further referred to the Court of Appeal in the cases, Kennedy Moki v Rachel Kaki Nyamai & 2 others [2018] e KLR, Odoro Okedo -v- Independent Electoral & Boundaries Commission (IEBC) & 3 others [2013] eKLR.
15. On costs, the 1st Respondent adopted the principle that costs should generally follow events and the evident abuse of the Court process by the Petitioners herein, we urge the Court upon dismissing this Petition to grant the 1st Respondent cost of the Petition. The 1st Respondent relies on public funds and any litigant that unnecessary causes the 1st Respondent to incur public funds must be condemned to pay such costs.

The 2nd Respondent's Case

16. The 2nd Respondent filed an Affidavit in Reply to the Petition as lodged in the court record on October 3, 2022. He averred that the same is frivolous, vexatious, incompetent and an abuse of the process of court; that he holds a Kenyan Identity Card No 39913409 with names Kipngeno Kirui and none other and indeed a registered voter in Tebesonik Ward Kericho County where he won the MCA election as an independent candidate.
17. The 2nd Respondent read mischief in the Petition since no issues was raised all through from UDA Party Nominations to the General Election and after he was sworn in as a winner rendering his declaration of the Petition as mere afterthought. According to him, this Petition is only meant to tarnish his reputation through unfounded allegations of crime whereas he has never been charged in any court of law.
18. In its arguments in the written submissions, the 2nd Respondent as well rightly emphasized the provisions of the law in respect qualification or otherwise, of election candidature in section 75 of the Election Act. He also made correct references of the cases of Jacob Juma v Evans Kidero [2016] eKLR and in Silas Make Otuke v AG & 3 others [2014] eKLR. These cases are quite clear in as far as criminal allegations or suspicions arise in an election petition court. The court cannot sit as a criminal court without the input of constitutional criminal players.

The Issues

19. What is the scope of an election petition court in as far as Clearance and Registration of candidates in Political contests are concerned? Is it the duty of this court to interrogate issues or processes of Political candidates' nominations and their identities? Can it address issues of police clearance Certificates? Whether the Petition herein must succeed or fail in the end and at whose costs?"



The Analysis

20. As alluded to by the 1st Respondent, there was initially a controversy on whether an election court may determine issues arising from pre election events such as whether the 2nd Respondent herein was properly registered and or legally cleared to vie for an MCA position in Kericho County Tebesonik Ward.
21. The position has since been settled though, in the Supreme Court decision in *Si/verse Lisamula Anami v Independent Electoral & Boundaries Commission & 2 others [2019] eKLR* as rendered on February 8, 2019. The supreme Court held;

We have already established that the High Court, as an election Court, has been given the mandate to examine a question whether a person has been validly elected and in essence, adjudicate over an election petition. If for example a person is not qualified for election, would such a person be validly elected" Indeed, if a person does not meet the set-qualifications such as being a registered voter, or being of certain educational standards or being nominated by a political party or an independent candidate and such a person is "elected", then that cannot be said to be a valid election. In fact, the election would be a nullity. When the election Court is there/ore given the mandate to examine the validity of an election, it necessarily means that the said Court would have the power to investigate the legitimacy of that election including on issues of eligibility to contest in an election. In that context, and according to Article 105(1)(a), the election Court stands as the custodian of the Constitution in matters of elections with the ultimate mandate of investigating the legitimacy of an election."

"54. How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts" Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and of the Constitution. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the Constitution.

22. The Petitioners seem to have deliberately failed or ignored service upon the Attorney General as 3rd Respondent despite court directions for service on October 3, 2022 and thus no responses exist in the record by the AG right from start to end of the trial and neither an Affidavit in return is evident, thus the case against it, ends at this juncture!
23. In the present case, the court is invited to look into the validity of the 2nd Respondent's clearance, nomination to vie and his success in the General election on August 9, 2022 as an independent candidate. It is also that the Petitioners never raised an issue with the IEBC nor PPDT hence this court has power to examine the same where need may arise i.e. in examining the validity of the election of the 2nd Respondent.
24. So did the Petitioners prove their case to the required standard in election petitions?



25. Section 83 of the Elections Act specifies the measure within which an election can be invalidated. The said section applies to this appeal as provided before the 2017 amendment and states;

“83. Nullification of an election (I) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that- (a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and (b) the non-compliance did not substantially affect the result of the election. 36 [Rev 2022] Elections No 24 of 2011 (2) Pursuant to section 72 of the Interpretation and General Provisions Act (Cap 2), a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead. ”

26. In Raila 2017 it was the Supreme Court held that;

“ [132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law ”

27. The Petitioners alleged negligence on the part of the 1st Respondent mainly for failure to exercise due diligence to discover that the 2nd Respondent bore two identity Cards with different numbers and clearing him to vie yet it knew that he was a class 3 drop-out. The Petitioners exhibited copies of online Citizen print-out of previous card details of 2 different names and 2 different identity numbers. This court cannot ascertain if the names or numbers thereto refer to one and the same individual more so, with nil input of the Registrar of Persons in this Petition. Particularly when the 2nd Respondent remains categorical that he holds only one identity card as a citizen of this country.

28. Secondly, it is true that the High Court of Kenya in the case of County Assembly Forum & 6 others (supra), it its declarations left the bare minimum requirements under Article 193 of the Constitution (supra) as all that a candidate for MCA position needs to vie for a political position.

29. As to the criminality alleged against the 2nd Respondent, 2 DCI Clearance Certificates; one showing no offence as at April 11, 2022 and one showing an offence of stealing with no results of the trial as at March 1, 2022. Again, as to which one is genuine and which is not, this court cannot tell without the input of the DCI/DPP in this Petition. Furthermore, the existence of a court case without the outcome yet, cannot be used against the 2nd Respondent who must be constitutionally presumed innocent till proven otherwise the criminal process.

30. The Petitioners as well did NOT all back-up the Petition for having not unequivocally consented in the institution of the same with 3 out of 6 demonstrated a split right from the word go. See proceedings



of court on the October 4, 2022; it is difficult therefore to believe that that the 1st Petitioner as an individual consensually imported the 3 other "Petitioners 2nd 5th & 6th" ! Not even the fact that the 1st Petitioner swore the Affidavit in Support of the Petition on their behalf can salvage the split in the record. Despite that, Counsels on record for them deliberately saw no reason to drop them from the Petition or at the very least, cease acting for these particular 3.

31. This split of the Petitioners again gave rise to lack of Affidavits to support the Petition leading to a fatality in law which never is a technicality in law. See [Lesirma Simeon Simanga v IEBC & 2 others \[2018\] eKLR](#).
32. To this end and in keen consideration of the evidence and case law as contained in the parties' written Affidavits and Submissions, I inevitably, find that the Petition is without merit and it is only ripe for dismissal with costs to the 1st and 2nd Respondents. The costs will be borne by Petitioners 1s t, 3rd and 4th only. I agree with 2nd , 5th & 6th that it is unfair to subject them to costs whereas it is clear in the record that they clearly did not intend to petition or did not know what they did all along being simple laymen in the proceedings.
33. Orders accordingly.

DATED AND DELIVERED AT KERICHO THIS 28TH DAY OF NOVEMBER 2022

HON B R KIPYEGON - PM

