



**Ongiro v Independent Electoral & Boundaries Commissioner (IEBC) & another; Orange Democratic Movement Party (Interested Party) (Election Petition 2 of 2022) [2022] KEMC 10 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 10 (KLR)

**REPUBLIC OF KENYA  
IN THE OYUGIS LAW COURTS  
ELECTION PETITION 2 OF 2022  
BO OMWANSA, SPM  
NOVEMBER 23, 2022  
AND  
IN THE MATTER OF DECLARATION OF MR. ONGONDO ZAKAYO OKUMU AS THE  
MEMBER OF COUNTY ASSEMBLY FOR SOUTH KASIPUL WARD, IN KASIPUL  
CONSTITUENCY WITHIN HOMABAY COUNTY**

**BETWEEN**

**NAOMI AUMA ONGIRO ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSIONER  
(IEBC) ..... 1<sup>ST</sup> RESPONDENT**

**ONGONDO ZAKAYO OKUMA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT PARTY ..... INTERESTED PARTY**

**RULING**

1. This ruling flows from a notice of preliminary objection dated September 8, 2022 raised by the second Respondent as well as a Notice of motion by the first Respondent dated October 11, 2022. When the matter came up for hearing, the parties in conjunction with the court agreed to collapse the Notice of motion and the preliminary objection and therefrom framed the following issues for determination:
  1. Whether the court has the jurisdiction to hear and determine this petition.
  2. Whether the principle of res judicata visa vis estoppel subsist to an extent of barring this court from hearing and determining this petition.



## Whether the court has the jurisdiction to hear and determine this petition.

2. The issue of jurisdiction in any matter is key. If the court is not seized with the jurisdiction, it thus, has no business to deal with such a matter. This is a settled principle as it is in the Court of Appeal decision in *Owners of Motor Vessel Lilians' v Caltex Oil Kenya Limited [1989] KLR* where the court held thus:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. without it, a court has no power to make one more step.”

3. It is from this understanding and/or background the second Respondent raises the issue of the jurisdiction of this court. it is the counsel's submission that this court has no jurisdiction to hear a pre-election matter as provided under section 75(1A) of the *Elections Act*. He therefrom urges court to find so and drop this matter like a hot potato with costs.
4. Whereas the petitioner submits that electoral laws are sui generis. They are peculiar to the resolution of the electoral disputes alone. He further argues that the jurisdiction of this court is provided for, under section 75(1A) of the *Elections Act*. He therefrom urges the court to find that it has the jurisdiction and proceed to determine the matter. He further submits that at the fullness of time, if granted chance, he will demonstrate the invalidity and/or the illegibility of the 2<sup>nd</sup> Respondent's election as the South Kasipul Ward member of County Assembly.
5. He contends that once an election is done and a winner of the said election is declared, then any subsequent dispute on the said election shifts to the election court which is clothed with the necessary powers to disturb the status quo.
6. Nevertheless, it would appear from the submissions of Mr Odera who has raised a preliminary objection as to the jurisdiction of the court that pre- election disputes do not make part of the election petition as defined by section 75(1A). According to him, anything before the August 9, 2022 is not within the purview of this court to handle, that is, the election court. The counsel, further argues that election dispute in the strict senses commences as from anything or dispute commencing as from August 9, 2022 and onwards.
7. However, the counsel for the Petitioner thinks otherwise. He submits by saying that this question has been resolved in various election petitions. He argues that this court has the jurisdiction to hear disputes emanating from Pre-election time such as this petition. He therefrom cites the Raila 2 that is, *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017]* where the Supreme Court rendered itself as follows:

“An election is an elaborate process that begins with the registration of the voters, nomination of a candidate to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by gazettelement. in determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results..... The voting concept of free and fair elections is expressed not only on the voting day but throughout the election process.....Any noncompliance with the law regulating these processes would affect the validity of the election of the member of parliament and/or member of County Assembly. Emphasis supplied.



8. It was further stated in the matter *Hon Mohammed Abdi Mobamud v Ahmed Abdullabi Mobamad & Others* where the court held thus:

“We are fully persuaded that an election court has jurisdiction to inquire into a question as to the qualification of a candidate which goes to his eligibility to vie.....where the matter has been dealt with finality by any other body constitutionally or statutory mandated to do so.

Qualifications are a valid contested point outside the framework of the events on the election date but which may yet be legitimately enquired into by an election court.....

There is a substantial body of law that is quite categorical and authority that election is a process and not an event and that being so, the High Court, as an election court is possessed of the jurisdiction to enquire into matters nomination.”

9. Dealing with the same issue of jurisdiction the Court of Appeal in the case *Anne Wanjiku Kibeh v Clement Kungu Waibara & Another* the court held thus:

“.... Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional timelines of the jurisdiction of other competent organs, an election court has jurisdiction to hear and determine pre-election nomination dispute if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate.”

10. The petitioner’s counsel therefrom urges court to find that it has jurisdiction to determine a pre-election dispute which may be filed after the general election has been executed.

11. I have given the submissions of both counsels a serious thought. The jurisdiction of the election court is derived from the *Constitution* as well as the statute law. This jurisdiction is founded on the *Judicature Act* at section 3(1) as follows:

(1) The jurisdiction..... of all subordinate courts shall be exercised in conformity with—

- (a) The *Constitution*;
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
- (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the August 12, 1897, and the procedure and practice observed in courts of justice in England at that date:



12. It is thus the imperatives of Article 87 of the 2010 Constitution which gives life to various electoral laws: however, of worthy to note as in respect to the current petition is Section 75 (1A) of the Election Act which from an election court siphons and/or derives further jurisdiction. It provides as follows:
 

“ 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.”
13. For this court to seize the conduct of this matter, the Chief justice complied with the imperatives of the election law vide gazette notice Vol CXXIV-No 190 dated September 16, 2022 whereof this court was gazetted to hear and determine this petition. However, the question of hearing a pre- election dispute, it would appear that there is no mention of such jurisdiction accorded to this court so vividly by the Constitution and/or the statutes. It would seem to be an election law lacuna. Be that as it may, the next source of law, where the statute and the Constitution as sources of law create a lacuna, according to my understanding as in respect of the sources of law, such a gap is filled by the other sources of law, such as, precedents from the superior courts.
14. When the supreme court was dealing with this issue in the Raila 2 (2017). The court defined an election as a process but not a single day event. Further this appears to be the ratio which can be derived from Court of Appeal decision of Anne Wanjiku Kibeh v Clement Kungu Waibara & Another.
15. In view of the foregoing, I thus, find that this court is seized with necessary jurisdiction to hear and determine this petition. The petition is rightly brought before this court for determination.

**Whether the principle of res judicata visa vis estoppel subsist to an extent of barring this court from hearing and determining this petition.**

16. The 2<sup>nd</sup> Respondent submits on this issue that the issues for determination before this court are the same issues which were before the ODM Tribunal Appeal No 21 of 2022, PPD/TTTC/ E012/2022, High Court Civil Appeal No E 30/2022 in Kisumu and High Court Civil Appeal No E 001 of 2022 which involved the nomination exercise of the 2<sup>nd</sup> Respondent. He further submits that the climax of it all was on the August 8, 2022 when the High Court at Homabay dismissed the application for one Geoffrey Otieno Opiyo. Further still argues that though the petition is filed by one Naomi Auma Ongiro, it is supported with the affidavit of one Geoffrey Otieno Opiyo. He therefrom urges the court to lift the veil and find the Petitioner herein to be Geoffrey Otieno Opiyo.
17. Whereas the 1<sup>st</sup> Respondent submits that there is no proper petition before this court. For as much as the petition as it is before this court, it is founded on a pre- election nomination dispute. The dispute has already been determined conclusively by the relevant tribunals, the High court of Kenya as well as the Court of Appeal of Kenya. He further submits that the petition is bad in law by virtue of the doctrine of estoppel. He therefrom urges the court to so find and dismiss the matter with costs.
18. On the other hand, the Petitioner submits that, the issues before this court for determination are exceptionally different from the ones decided at the High Court, PPD and the ODM appeals Tribunal. He further submits that none of the orders and judgments were implemented by the interested party. He further submits that the only way to legitimize the 2<sup>nd</sup> Respondent’s election is by conducting nominations first then to the general election. He therefrom urges the court to find that the doctrine of Res judicata is inapplicable.
19. I have considered the arguments of the counsels on this issue. However, both the Petitioner and the 2<sup>nd</sup> Respondent appear to be mute on the estoppel principle. This principle is pegged on section 120 of the Evidence Act. When the superior courts had a bite on this section 120 in the Civil suit No 20 of



2020 at Nakuru High Court in the matter of *Carol Construction Engineers Ltd & Another v National Bank of Kenya [2020] eKLR* the Court states as follows:

20. When the court was scanning the law on estoppel; brought out the following considerations:
  - i. Representation: there must be a presentation by the representor in words or by acts or conduct.
  - ii. Reasonableness: the person relying must satisfy the court that it was reasonable for them to rely on the representation  
Reliance: the victim must demonstrate that he was induced by the representation and in such reliance acted on it.
  - iv. Detriment: the victim must show that in acting in reliance of the representation he suffered some detriment or changed his position and
21. Unconscionability: the victim must demonstrate that it would be unconscionable to permit the representor to resile from.
22. Further still we can borrow from the diaspora as to what other courts are saying about this principle of estoppel. In the Indian Case *Cbbaganlal Mehta v Haribhai patel [ (1982) 1 S C C 223]* the supreme Court of India laid down the conditions which must be demonstrated before court so as one to benefit from this principle as follows:
  - i. There must have been a representation by a person (or his authorized agent) to another person. Such a representation may be in any form – a declaration or an act or an omission.
  - ii. Such representation must have been of the existence of a fact and not future promises or intention.
  - iii. The representation must have been meant to have been relied upon.
  - iv. There must have been belief on the part of the other party in its truth.
  - v. There must have been some action on the faith of that declaration, act or omission. Such a declaration act or omission must have actually caused the other person to act on the faith of it, and to alter his position to his prejudice or detriment.
  - vi. The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice.
23. The person claiming the benefit of estoppel must show that he was not aware of the true state of things. There can be no estoppel if such a person was aware of the true state of affairs or if he had means of such knowledge.
24. Only the person to whom the presentation was made or for whom it is designed, can avail of the doctrine.
25. Having considered the 1<sup>st</sup> Respondent's submissions visa vis the conditions which are to be met by the party trying to benefit out of the estoppel principal, I come to an irresistible conclusion that the 1<sup>st</sup> Respondent has not demonstrated that this principle applies against the Petitioner but it will avail between 1<sup>st</sup> Respondent and the Interested party and the 2<sup>nd</sup> Respondent. The interested party is not party to this petition. The trio have no dispute amongst them. No wonder the 2<sup>nd</sup> Respondent is quiet on this principle.



26. Again, it would appear that the Petitioner has not acted in a manner suggesting that the battle has end and/or is he satisfied with the outcomes of the various court decision so is the reason for this petition. It is on this basis I find that the estoppel principle does not avail as against the Petitioner.
27. Nevertheless, as regarding the doctrine of Res judicata, parties appear to be on the same wavelength. However, the points of departure are as to the question as to who is the petitioner in this matter and whether the issues for determination before the court were already determined.
28. The doctrine of res judicata is spelt out at section 7 of the *Civil Procedure Act* as follows:
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
29. The 1st and 2<sup>nd</sup> Respondent submits that similar claim was filed in various forums including the right of appeal exercised to the superior courts. Therefrom, the court is urged to find that the petition before this court was substantially determined. They further submit that Naomi who is the Petitioner herein is being used by the former Petitioner to defeat justice.
30. In response to these allegations the Petitioner’s counsel submits that the petition in this court is very different from the matter which was dealt with in the various forums. He further submits that a voter has a right to move the court.
31. I have considered these submissions of both sides. The court deciphers from the petition, that it was filed, by one Naomi Auma Ongiro. Besides, one of her witnesses who has sworn a supporting affidavit is one Geoffrey Otieno Opiyo. He swore the said affidavit on the September 2, 2022. Therein he describes himself at paragraph 1 & 2 as follows:

I am a male adult of sound mind the complainant herein hence competent to swear this affidavit.

I was an aspirant vying for the position of a member of County Assembly for South Kasipul ward within Kasipul Constituency under the Orange Democratic party.”

32. The two paragraphs tell it all, as in respect to who is seeking for the court’s intervention. Yes. The veil is there. It is unimaginable for Madam Naomi Auma Ongiro who filed the petition to purport to divorce Mr Geoffrey Otieno Opiyo from it. The court has been urged by the Respondents to lift the veil. For this agree with the Respondents, that Mr Geoffrey Otieno Opiyo is disguising himself and/or it is him who camouflages in the name of Naomi Auma Ongiro who is a voter. I thus, find that Mr Geoffrey Otieno Opiyo has made it clear, by describing himself in the two paragraphs of his affidavit as the complainant in this matter.
33. In respect to the issues which were determined in the various forums there is no doubt that they all entail to the nomination of the ODM candidate. The process was questioned and rightly so, and the decisions were given by the various forums. Be that as it may, the Petitioner appears to submit at paragraph 29, 31 and 33 as hereunder:

that the issues before this honourable court for determination are exceptionally different from the ones decided in the High Court PPDT and ODM Appeals Tribunal. Instead, the main issue surrounding the fact that none of the orders and judgments were implemented



by the interested party. As a result, the nomination of the 2<sup>nd</sup> Respondent by the interested party and the 1<sup>st</sup> Respondent was impugned by the court.”

“.....the chair of ODM National election Board was held in contempt of the orders of the court made on the May 2, 2022// *directing the Interested Party to conduct a fresh nomination in respect of South Kasipul Ward. Instead, the interested Party proceeded to nominate the 2<sup>nd</sup> Respondent despite the directions to conduct fresh nomination.*”

34. PPDT rendered its judgement through PPDT No E012 of 2022 on the May 3, 2022 nullifying the direct nomination of the 2<sup>nd</sup> Respondent and directing the interested party to conduct fresh nomination. The interested party had no choice but to comply with the orders lest the election of the 2<sup>nd</sup> Respondent in the General election be declared illegal and unprocedural.
35. I have considered these submissions, it will seem to come out clear, that nomination issues were dealt with at various forums. However, it would appear that the parties did not comply with the orders issued thereof. It is too little too late, for this court cannot purport to have the competence to undo or has capacity to enforce or execute the orders issued by the various forums at various levels. It will not only be improper and total disregard of the legal system in the country but unlawful as well as going against the legal grains.
36. The mischief which section 7 of the Civil Procedure Act, intends to cure, is making sure that, a legal animal once it is slain, there is no chance of it getting resurrected. For such a resurrected animal, will never be allowed to breathe, if it does, it must be forcibly and legally killed. It may appear as an overkill but there is no other safe way than killing it once and for all. Disallowing this preliminary objection under section 7 will be resurrecting the matter which has been dealt with in various competent forums.
37. It follows therefore, the preliminary objection on the issue of res judicata is sustained. Consequently, the entire petition is dismissed.
38. It is trite law that once a matter is dismissed, cost is to follow suit. However, this court is alive to the fact that this petition is filed by a voter, notwithstanding the court’s lifting of the veil. I find thus, the most appropriate orders though may seem not popular to make, in this like circumstances, is to direct each party to bear on costs.
39. It is so ruled.

**RULING DATED SIGNED AND DELIVERED IN THE OPEN COURT IN THE PRESENCE.**

.....Court Assistant

.....Advocate for Petitioner

..... Advocate for 1<sup>st</sup> Respondent

.....Advocate for 2<sup>nd</sup> Respondent

**HON B O OMWANSA**

**SENIOR PRINCIPAL MAGISTRATE OYUGIS**

**November 23, 2022**

