



REPUBLIC OF KENYA



**Ahmed v Deye & 2 others (Election Petition 1 of 2022)  
[2022] KEMC 14 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEMC 14 (KLR)

**REPUBLIC OF KENYA  
IN THE GARSEN LAW COURTS  
ELECTION PETITION 1 OF 2022  
LN WASIGE, PM  
DECEMBER 6, 2022**

**BETWEEN**

**DAHIR DAUD AHMED ..... PETITIONER**

**AND**

**IDD HAMISI DEYE ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**SIYAT MAHAT SABUL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**(1<sup>st</sup> Respondent's Preliminary Objection dated 1.11.2022)**

1. The 1<sup>st</sup> respondent filed a preliminary objection (PO) on November 1, 2022. The preliminary objection has been raised for reasons that the hon court lacks jurisdiction to hear and determine the petition and prays for it to be struck out with costs.
2. A brief overview of the instant case is that the petitioner filed his petition on August 23, 2022. In the petition, he avers that the 2<sup>nd</sup> respondent declared and certified the 1<sup>st</sup> respondent the winner of the Member of County Assembly, Chewani ward having garnered the highest number of votes cast. That the 1<sup>st</sup> respondent was ineligible to vie and be elected as the MCA for Chewani ward in the general election held on August 9, 2022 because he did not resign within the times stipulated under section 43(5) of the *Elections Act*, 2011. That the 1<sup>st</sup> respondent was an administration police officer with the National Police Service at the time he offered himself as a candidate but had not resigned within the time stipulated under the Law.



3. The petitioner also averred that the 3<sup>rd</sup> respondent by itself, through its chairman and commissioners committed an election offence by allowing an ineligible person they knew or had reasonable cause to believe was ineligible to vie. The petitioner prayed for the following orders: -
  - a) It be determined and ordered that the election of the 1<sup>st</sup> respondent as MCA Chewani ward was in any event null and void and he was, therefore not duly elected.
  - b) An order that fresh elections for MCA, Chewani ward, Tana River County be conducted by the 3<sup>rd</sup> respondent in strict compliance with the Constitution and electoral laws.
  - c) The respondents be condemned to pay the costs of the petition.
4. The 1<sup>st</sup> respondent is represented by Miss Hajila Advocate holding brief for Mungatana while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are represented by Miss Muriranja Advocate. The petitioner is representing himself after his advocate withdrew from acting.
5. On November 7, 2022, parties consented to dispose off the 1<sup>st</sup> respondent's preliminary objection vide submissions. However, the petitioner did not respond to the 1<sup>st</sup> respondent's preliminary objection neither did he file submissions to oppose the preliminary objection. In essence the 1<sup>st</sup> respondent's preliminary objection is unopposed. Nevertheless, the court will look into the merit or otherwise of the preliminary objection.

#### **1<sup>st</sup> Respondent's Submissions**

6. The 1<sup>st</sup> respondent submits that the court lacks jurisdiction to hear and determine the petition. It has been submitted that the petition does not seek to challenge the results of the election on ground of election malpractice or irregularities but touches on the resignation of the 1<sup>st</sup> respondent which falls under the category of pre-election nomination issues that are under the umbrella of the IEBC mandate in article 88(4) of the Constitution. That the petitioner had the liberty to invoke the necessary dispute resolution mechanisms to have the matter settled but did not exhaust the mechanisms offered by the IEBC to address the pre-nomination complaint before the election.
7. The 1<sup>st</sup> respondent relied on the cases of William Kabogo Gitau v Ferdinard Ndungu Waititu(2016) ekLR and Josiah Taraiya Kipelion Ole Kores v Dr David Ole Nkediemye & 3 others(2013) ekLR to buttress their position.
8. The 1<sup>st</sup> respondent urged the court to find that the petition is unmerited, misconceived and an abuse of the court process and be dismissed with costs to the respondents.

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Submissions**

9. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submit that the dispute presented by the petitioner is a pre-election dispute and hence the court has no jurisdiction to determine the petition. That throughout the petition, the petitioner does not challenge the results of the election or the manner in which the election was carried out but his disagreement is purely based on the ground that the petitioner did not resign on time.
10. It was submitted that as part of the process required in law, the 3<sup>rd</sup> respondent duly gazetted the 1<sup>st</sup> respondent and the petitioner among the candidates to vie for the MCA seat in Chewani ward and the petitioner was therefore well aware that the 1<sup>st</sup> respondent had been nominated to vie in the subject elections. Further, that the petitioner being one of the candidates vying for the seat of MCA in Chewani Ward was well aware of his competitors and ought to have known or enquired if they were qualified and validly nominated to vie. That the issue of whether the 1<sup>st</sup> respondent



was qualified to vie was not challenged before the IEBC Committee on dispute resolution which is responsible for the settlement of pre-election dispute including disputes arising from nominations. It was further submitted that article 88 (4) (e) of the Constitution that the commission is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petition and disputes subsequent to the declaration of the results.

11. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent relied on the following cases;
  - a) Sammy Ndung'u Waity v IEBC and 3 others(2019) ekLR
  - b) Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad and 3 others(2019) ekLR.
12. It was submitted that in the Sammy Ndung'u Waity case, the Supreme Court extensively reviewed the decision of the High Court and Court of Appeal regarding the question of pre-election disputes. That the Court emphasized the fact that the Constitution has to be interpreted holistically and purposively, and laid down the principles to be considered by courts while dealing with a pre-election question.
13. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents urged the court to down its tools and steer away from the dispute presented by the petitioner and to strike out the petition for want of jurisdiction with costs to the respondent.

### **Issues for Determination**

- i) Whether this court has jurisdiction to hear and determine the petition.
- ii) Whether the petition should be struck out.

### **Analysis and Determination**

14. I have duly considered the 1<sup>st</sup> respondent's preliminary objection and the submissions and authorities by the respondents.
15. In the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West Distributors (1969) EA, it was held as follows;

“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 or a plea of limitation... A preliminary objection is in the nature of what used to be a demurrer. 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 or if what is sought is the exercise of judicial discretion.”

16. Similarly in the case of Hassan Nyanje Charo v Khatib Mwashetani & 2 others (2014) ekLR, the High Court held that;

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law”.

17. I take cognizance of the above holdings with respect to preliminary objections.
18. Thus, for the 1<sup>st</sup> respondents preliminary objection to have merit, it should be founded on a point of law.



19. It is the respondents contention that the court has no jurisdiction to hear and determine the petition since the petition is not challenging the results of the election or the manner in which the election was conducted but is rather challenging the resignation by the 1<sup>st</sup> respondent on time. It was further contended that the issue of whether the 1<sup>st</sup> respondent was qualified to vie as a candidate is a pre-election dispute which ought to have been challenged before the IEBC committee.
20. I have perused the petition and indeed note that the petitioner is not challenging the results of the election held on August 9, 2022 and neither is he challenging the manner in which the election was conducted. The petitioner's contention from paragraphs 8 to 14 of his petition is that the 1<sup>st</sup> respondent was ineligible to vie and be elected as MCA for Chewani Ward because he was an administration police officer with the National Police Service who did not resign within the time stipulated under the law.
21. The question to be addressed is whether the eligibility by the 1<sup>st</sup> respondent as a candidate to vie as an MCA for Chewani ward is a pre-election dispute.
22. A pre-election dispute is a dispute arising before the declaration of election results. Since the petitioner is challenging the 1<sup>st</sup> respondent's eligibility to vie as a MCA candidate, it is my finding that the dispute is a pre-election dispute.
23. How then are pre-election disputes determined?  
Article 88(4) (e) of the Constitution provides as follows;
- (4) The IEBC is responsible for conducting or supervising referenda and any elections to any elective body or office established by this Constitution and any other elections as prescribed by an act of parliament, and, in particular for;
- (e) the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and dispute subsequent to the declaration of election results.
- Section 74(1) of the Election Act, 2011 provides as follows: -
- Pursuant to article 88(4) (e) of the Constitution, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
- Section 4(e) of the Independent Electoral and Boundaries Commission(IEBC) Act 2011 provides as follows as functions of the commission:
- (e) the settlement of electoral disputes including disputes relating to or arising from nominations, but excluding petitions and disputes subsequent to the declaration of election results.
24. It is therefore clear, to this court that a pre-election dispute should be handled by the IEBC at the first instance and not the election court.
25. The settlement of pre-election disputes is predicated on the principle of exhaustion of internal and other available administrative mechanisms for electoral dispute resolution before approaching the courts.



26. In the case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others, Ahmed Ali Muktar (Interested Party)* 2019 eKLR, the Supreme Court *inter alia* held as follows:

“So as to ensure that article 88(4) (e) of the Constitution is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election court under article 105 of the Constitution, the court developed the following principles:

- (i) all pre-election disputes, including those relating to or arising from nominations should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
- (ii) Where a pre-election dispute has been conclusively resolved 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 (6) of the Constitution, such dispute shall not be a ground in a petition to the election court.
- (iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution. The High Court shall hear and determine the dispute before the elections and in accordance with the constitutional timelines.
- (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court.
- (v) The action or inaction in (4) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution, even after the determination of an election petition.
- (vi) In determining the validity of an election under article 105 of the Constitution or section 75(1) of the Elections Act, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election”.

27. I am guided by the principles therein. The first and fourth guidelines above are applicable to this case.

28. Having found that the petitioner’s contention concerning the 1<sup>st</sup> respondent’s eligibility as a candidate is a pre-election dispute, it is my further finding that the petitioner ought to have brought it for resolution to the IEBC in the first instance. Unfortunately, that was not done. The petitioner knew the facts forming the basis of the pre-election dispute but failed to have it resolved as provided for by the Constitution and the written law by complaining to the IEBC.

29. It is trite law that where a statute establishes a dispute resolution procedure, then the procedure must be strictly followed in resolving the dispute.



30. In the case of *Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others* (2012) ekLR, Hon. Justice Majanja held as follows:

“Individuals political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions. It is against this background that the Court of Appeal established the principle that where the constitution and/or statute establish a dispute resolution, procedure then that must be used.

31. It was therefore prudent of the petitioner to have challenged the 1<sup>st</sup> respondent’s eligibility as a candidate before the IEBC for resolution. The petitioner cannot now circumvent the procedure as it has been established by the Constitution as well as by statute; by trying to challenge the 1<sup>st</sup> respondent’s eligibility in the election court. This is because this court as an election court has no jurisdiction to hear and determine a pre-election dispute.

32. In the case of *Samuel Kamau Macharia & another v KCB Ltd & 2 others* (2012) ekLR, the Supreme Court held that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. As such, a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity”.

33. I am guided by the above holding.

34. As an election court, this court will not arrogate to itself jurisdiction to handle the pre-election dispute by the petitioner challenging the 1<sup>st</sup> respondent’s eligibility as a candidate to have vied for the position of MCA, Chewani ward. As I have found earlier, the petitioner ought to have challenged the 1<sup>st</sup> respondent’s eligibility to the IEBC for resolution.

35. Consequently, I concur with the respondents that this court has no jurisdiction to hear and determine the petition.

36. Since the court has no jurisdiction, it must proceed to down its tool. As was held in the classic case of *The Owner of the Motor Vessel “Lillian S” v Caltex Oil(Kenya) Ltd*(1989) KLR1.

“Jurisdiction is everything. Without it, a court has no power to make one more step. 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”.

37. The upshot of all the foregoing is I find that the 1<sup>st</sup> respondent’s preliminary objection dated November 1, 2022 is merited.

38. The petitioner’s petition dated August 24, 2022 and filed in court on August 25, 2022 is hereby struck out for want of jurisdiction with costs to the respondents.

## **Disposition**

39. The orders of this court are as follows:



- a) That the petition dated August 24, 2022 and its supporting affidavit are hereby struck out with costs.
- b) Costs of the struck out petition are awarded to the 1<sup>st</sup> respondent and are assessed at Ksh 200,000/-.
- c) Costs of the struck out petition are awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and are assessed at Ksh 200,000/-.

It is so ordered.

**RULING READ AND DELIVERED IN THIS COURT ON THIS 6<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON L.N WASIGE(MRS)**

**PRINCIPAL MAGISTRATE**

**GARSEN LAW COURT**

In the presence of:

The petitioner

Miss Hajila Advocate Holding brief for Mungatana for 1<sup>st</sup> respondent

Miss Muriranja Advocate for 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Court Clerk – Boy

