



REPUBLIC OF KENYA

IN THE RESIDENT MAGISTRATE'S COURT AT NAIROBI

ELECTION PETITION NO. 14 OF 2017

**IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1(2),
22, 23(2) & 87 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE CONTRAVENTION AND THREATENED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 38 OF THE CONSTITUTION
OF KENYA 2010**

AND

**IN THE MATTER OF: THE ELECTION ACT, CAP 7 LAWS OF KENYA AND ELECTION
LAWS (AMENDMENT) ACT 2017**

IN THE MATTER OF: THE MAKADARA PARLIAMENTARY CONSTITUENCY (*sic*)

AND

IN THE MATTER OF: THE PETITION OF ALHAD ADAM AHMED

BETWEEN

ALHAD ADAM AHMED.....PETITIONER

VERSUS

SOLOMON ODANGA MAGEMBE alias SOLOMON.....1ST RESPONDENT

BEATRICE SAKI MULI.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMM.....3RD RESPONDENT

AND

ORANGE DEMOCRATIC PARTY.....1ST INTERESTED PARTY

PARTY OF DEMOCRATIC UNITY.....2ND INTERESTED PARTY

RULING

The petitioner Mr. Alhad Adam Ahmed (herein after referred to as the Petitioner) filed this petition on the 6/9/17 seeking for the following reliefs or orders:

- (a) That the nomination of the 1st Respondent by the Party of Democratic Unity, the 1st Interested Party herein, was irregular and contrary to Section 28 of the Election Act, as amended by Section 10 of the Election Laws (Amendment) Act, 2017;
- (b) That the election of the 1st Respondent as Member of County Assembly for Makina Ward in Nairobi County is null and void; he was therefore not duly elected.
- (c) That the Respondents be condemned to pay the costs of this Petition.
- (d) Such further or other relief or orders be made as may be just.

The petition is supported by the affidavit of the Petitioner sworn on 5th September 2017 as well as that of Mr. Munir Ibrahim Juma also sworn on the 5th September 2017.

I have keenly looked at the petition and it is my considered view that it can be summarised on the following twelve grounds which are contained in the body of the petition:

1. That the Petitioner and the 1st Respondent contested for ODM party nomination and upon the 1st Respondent being unsuccessful he defected to PDU through which he successfully vied for Makina MCA seat.
2. That before the election, a complaint was filed at the IEBC Dispute Resolution Committee
3. That on 16/05/2017 before the Dispute Resolution Tribunal rendered its final verdict on the nominations; the 1st Respondent filed an application seeking to be enjoined in Complaint No. 185 of 2017 as an Interested Party and separately seeking to set aside a Consent Order entered into between the Petitioner and the 1st Interested Party herein;
4. Further that within the aforementioned application, the 1st Respondent sought to restrain the 1st Interested Party from presenting the name of the Petitioner to the 3rd Respondent, as the duly nominated Member of County Assembly candidate for Makina Ward.
5. That the 1st Respondent has attached certificates and documents, indicating that: -
 - (i) He had been duly nominated by the 1st Interested Party;
 - (ii) He had been issued with a Provisional Nomination Certificate by the 1st Interested Party;
 - (iii) His name had been forwarded to the 2nd Respondent and placed in its register but the same was later withdrawn.
6. That Political Parties Dispute Tribunal Compliant No. 185 of 2017 was disposed of on 25/05/2017 by upholding the nomination of the Petitioner and thereby dismissed the applications made by the 1st Respondent herein.
7. That a request from the Registrar of Political Parties on the party membership of the 1st Respondent on 09/06/2017 confirmed that the 1st Respondent had been a member of the 2nd Interested Party since 27/05/2017 one day after Cause No. 185 of 2017 had been determined.
8. That the 1st Respondent campaigned rigorously as a member of the 2nd Interested Party and

while holding out himself, and the 2nd Interested Party, as affiliate members of the National Super Alliance Coalition, by prominently displaying and giving out electorates campaign materials bearing the National Super Alliance emblem/logo; and also, campaign posters bearing the imposing photograph of Hon. Raila Amollo Odinga and thereby unlawfully influencing the elections outcome.

9. The Petitioner's contention is that the nomination of the 1st Respondent and his subsequent participation in the elections held on 08/08/2017 was riddled with serious statutory irregularities/illegalities and therefore his election should not be allowed to stand.

10. That throughout the 1st Interest Party's party primaries and during the prosecution of the Petitioner's Complaint before the Political Parties Dispute Tribunal (Complaint No. 185 of 2017) the 1st Respondent remained consistent and by way of sworn statements, and their attendant exhibits, contended that he was a member of the Orange Democratic Party (ODM), the 1st Interested Party herein.

11. That the 1st Respondent defected from the 1st Interested Party, to the 2nd Interested Party 97 days to the election date of 8.8.17 against the Law barring party hopping outside the statutory 120 days before elections. The 1st Respondent therefore ought not to have been on the ballot on 08/08/2017 as a member of any political party except to vie as an Independent Candidate.

12. The Petitioner has also pleaded electoral offences and malpractice against the 1st Respondent.

The 2nd and 3rd Respondent have been blamed for clearing the candidature of the 1st Respondent un-procedurally and illegally. However no allegations have been directly levelled directly touching on the conduct of the 2nd Respondent during nominations that can be deduced from the petition.

The petition was opposed by the three Respondents, 1st, 2nd, 3rd Respondents (herein after referred to as the Respondents) as well as the 2nd Interested Party who entered appearance and filed their responses to the petition. They also each filed notices of preliminary objections to the petition, in addition to that the 1st Respondent filed a notice of motion dated 16/10/17 seeking to strike out the petition. The application is supported by the affidavit of the 1st Respondent sworn on 16th October 2017. The application is seeking for orders inter alia that:

1. The application be heard and determined expeditiously and in priority to the Petition.
2. This Honourable Court be pleased to order the striking out and expunging from the Court records the Petition and/or Affidavits together with the Annexures therein as filed by the Petitioner herein in this Court for want of service within the statutory prescribed time.
3. This Honourable Court be pleased to strike out the Petition as it is not an Election Petition since it does not challenge the fact that the election was free, fair, transparent and accountable, plus the cost and other suitable reliefs the court may deem fit.

This application was supported by the affidavit of the 1st Respondent sworn on 16/10/17, it is grounded on the following 6 grounds which are set out in the application that:

1. Given the urgency of electoral disputes, the legislature through the various enactments prescribed time frames within which such electoral disputes are to be heard and determined which includes timelines within which parties are to file their various pleadings.
2. The petition herein was lodged on 6th September 2017 within the time set by law.

3. Any response to the Petition and/or replying affidavit ought to have been filed and served upon the Respondents within 7 days of service.

4. That the orders sought have been overtaken by events as the 1st Respondent has already been elected, declared the winner, gazette and sworn in as a member of the county assembly Makina Ward.

5. The actions by the Petitioner are prejudicial to the Applicant herein and an affront to his rights under Articles 27 (1), 48, and 50 of the Constitution.

6. It is in the interest of justice that the orders sought herein are granted so as to enable the Applicant and his supporters exercise the constitutional right to enforcing the fundamental right to elections that were free, fair, transparent, verifiable and accountable as stipulated under Articles 1, 2, 3, 10, 38, 81 and 86 of the Constitution and to enable him to access his right to justice, free and fair trial without any such prejudice.

During the hearing of the application the 2nd and 3rd Respondents as well as the 2nd Interested Party did not oppose the 1st Respondent's application, they fully supported the application and urged this court to allow it as prayed.

The Petitioner who is the main respondent to the application did not file any opposition to the application, he did not file a replying affidavit or grounds of opposition, this honourable court allowed and gave the liberty to the advocate, Mr Ogoti, the lawyer for the Petitioner leave to oppose the application orally on points of law.

On account of the urgency of the matter while taking into account the timelines set for the disposal of this petition. This honourable court directed that the hearing of the application dated 16/10/17 to be at the same time with all the preliminary objections raised by the Respondents and the 2nd Interested Party for the reasons that they are seeking similar orders which is to strike out the petition. This court will therefore determine all preliminary issues in this ruling.

The preliminary objections raised by the Respondents and the 2nd Interested Party are based on one main ground that is want of jurisdiction.

This being a joint ruling on all the preliminary issues set out herein, I have also taken into account the fact that the prayers being sought will determine the course of the entire petition as to whether it will proceed to full trial or to be resolved at this stage. After considering the application, preliminary objections raised and listening to the submissions of all counsel for the parties this honourable court will consider the following six issues for determination:

- (i) The preliminary objections raised.
- (ii) Whether this court has the jurisdiction to hear and determine the petition.
- (iii) The service of the petition.
- (iv) Whether or not to strike out the petition.
- (v) The application dated 16/10/17
- (vi) The orders as to costs.

The first issue is the preliminary objections; The Respondents and the 2nd Interested Party raised various points of objection which they separately filed and are summarised on these five grounds;

1. This court lacks jurisdiction to hear the petition as issues related to the Elections Code of Conduct were clearly within the jurisdiction of the 3rd Respondent via the Electoral Code of Conduct Enforcement Committee or the High Court, according to the Electoral Code of Conduct.
2. This petition has been overtaken by events as the 1st Respondent herein has already been elected.
3. This court as currently constituted lacks jurisdiction to hear and determine matters that have been rejected/thrown out by the IEBC Disputes Resolution Committee/tribunal.
4. This court lacks jurisdiction to hear this petition for the reasons that the issues raised and prayers sought are in the nature of nomination disputes, having arose during nomination and campaign periods that are within the exclusive jurisdiction of the IEBC Disputes Resolution Committee as provided for under Article 88 (4) (e) of the Constitution of Kenya, Section 4 of the IEBC Act and Section 74(1) of the Elections Act, 2011.
5. This petition is hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reason inter alia, that the Petitioner has not exhausted the Independent Electoral and Boundaries Commission (IEBC) mechanisms.

The petitioner's Advocate Mr. Ogoti urged the court to dismiss the preliminary objections and termed it a waste of time. He submitted that the preliminary objections raised herein do not meet the threshold set for preliminary objections by the superior courts.

He cited the authority of the Court of Appeal, **Civil Appeal No. 9 of 1969 Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd** in which Sir. Charles Newbold P. stated:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts produced 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. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and on occasion, confuse the issues. This improper practice should stop".

The preliminary objections grounds raised can be summed up basically to be on two critical grounds mainly:

- (1) That this honourable court lacks jurisdiction to handle this petition.
- (2) That the petition is frivolous, vexatious and an abuse of the court process.

The first preliminary objection raised by the Respondents and the 2nd Interested Party is based on Article 88 (4) (e) of the Constitution which provides that:

"The Commission (IEBC) is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution and any other elections as prescribed by an Act of Parliament and in Parliament for:

(a) 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."

The same provisions of the law is underscored under Section 4 (e) of the IEBC Act and Section 74 (1) and the Elections Act 2011. Section 74(3) provides the timelines within which the disputes ought to be resolved.

The Advocates for the Respondents as well as for the 2nd Interested Party submitted that the main concern by the Petitioner is that the law was not observed by the Respondents in regard to the conduct and the final selection of the nominee. They further submitted that such dispute regards to nominations, the legislature contemplated and thus created a dispute resolution body as the first port of call.

They summed up their submission that the Petitioner ought to have complained to the 3rd Respondent's Dispute Resolution Commission at that time as a pre-requisite before approaching this court.

Mr. Ogoti the advocate for the Petitioner urged the court to dismiss the preliminary objections as the Petitioner has raised several facts which the Respondents and the 2nd Interested Party have contested in their response to the petition.

The Respondents and the 2nd Interested Parties have based their preliminary objection on the basis that this honourable court does not have the requisite jurisdiction to hear and determine the petition, they have cited several authorities.

The Petitioner stated that an election is not an event but a process. A process commencing from the party primaries to the declaration of the winner. That the process leading to the election of the 1st Respondent was flawed and that is the basis of this petition, the following three irregularities were set out by the petitioner against the Respondents and the Interested Parties.

1. The petitioner alleged that the 2nd and 3rd Respondents abdicated their duties under Article 38, 81 and 88 of the Constitution in blatantly refusing to intervene and stop the illegality of the 1st Respondent contesting on the ticket of the 2nd Interested Party.

2. The alleged Electoral Offences and Malpractices by the 1st Respondent by himself and/or through his agents acting under his discretion are that:-

- a) The 1st Respondent unlawfully juxtaposed his photograph with the National Super Alliance emblem/logo and the photograph of Hon. Raila Amollo Odinga, in his posters and campaign materials, contrary to Section 9 (1) (b) of the Election Offences Act No. 37 of 2016.

- b) That pursuant to Section 10 (1) (a) of the Election Offences Act, Act No. 37 of 2016 the 1st Respondent used tricks and deception to induce the Makina Ward electorates to vote for him, by invoking the name of the National Super Alliance Coalition and the Hon. Raila Amollo Odinga.

- c) That further pursuant to S. 13 (a) of the Election Offences Act No. 37 of 2016 the 1st Respondent published and disseminated unlawful campaign and promotional material with the intent to unlawfully influence the process and outcome of the genuine elections.

- d) That under S. 13 (a) of the Election Offences Act No. 37 of 2016 the 1st Respondent published and disseminated forged campaign and promotional material with the intent to influence the process and outcome of the germane elections

- e) Pursuant to S. 13 (a) of the Election Offences Act NO. 37 of 2016 the printing, publishing, distributing, posting up and causing to be printed, published, distributed and posted posters without disclosing on the face thereof the name and addresses of its printers or publishers; and

- f) By making or publishing, before or during the parliamentary election, for the purposes of affecting the return of his candidature, false statements or fact in relation to his party membership and nomination.

3. The 2nd and 3rd Respondents by themselves and/or through officers and agents acting under them or under their direction committed an election offence by breaching their official duties and Code of Conduct in the following manner: -

(a) Failing to serve impartially and independently and perform their duties in good faith;

(b) Pursuant to S. 6(j) and (k) of the Election Offences, Act No. 37 of 2016, the 2nd and 3rd Respondents under Article 88 (4)(e) and Section 74 of the Election Act, 2011 blatantly dismissed one Mr. Munir who had complained that the 1st Respondent ought not to have been allowed to contest on the 2nd Interested Party's ticket. The 2nd and 3rd Respondents abdicated their statutory duty as envisaged in the Election Act, 2011 as read together with the Elections (General) Regulations, 2012; by refusing to intervene and declaring that they were *functus officio*.

The Respondents and the 2nd Interested Party in support of their respective arguments on jurisdiction cited the authority of **The owners of Motor Vessel Lillian 'S' Vs Caltex Oil Kenya Ltd 1989 (KLR), the late Justice Nyarangi made the observation that:**

“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 continuation of proceedings pending other evidence. 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”

The issue now for the court's determination is whether this court has the requisite jurisdiction to enable it to proceed with the hearing and determination of the petition or to down its tools at this stage.

The Petitioner has raised key and pertinent issues on electoral offences and alleged malpractices prior to the election. The complaint was raised by a voter to IEBC on the same and a letter from IEBC indicated that IEBC having determined and given a decision on the matter hence the tribunal was *functus officio*.

The petitioner appears to have suffered a wrong he ought to have a remedy, the question is where the relief or the remedy lies.

This court has looked at the cited authority of **Macharia and Another, Vs KCB Ltd and 2 others civil application 2/2011 (2012)eKLR The Supreme Court held;**

“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 counsel for the first and second respondents in his submissions that the issues 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”

Ms Metto Advocate of Messrs Keengwe Advocates submitted that the court lacked jurisdiction to hear the issues raised and prayers sought are in the nature of nomination disputes having arisen during nomination and campaign period that are within the exclusive jurisdiction of the IEBC Dispute Resolution Committee she also cited authority of Justice Nyarangi as well as the case of **High court petition number 83 of 2015, Isaiah Gichu Ndirangu and 2 others v IEBC and 4 others (2016) eKLR** in which

Justice Lenaola held:

“I must also at this juncture point out that this is not the appropriate forum to address the questions raised herein in regard to alleged extortions and forgeries and as such, this court shall not accept the invitations by the pirates to address those issues. Those are the matters that are well within the mandate of other organs of the state such as the Inspector General of the Police and the

office of the Director of Public Prosecutions”

Judge Lenaola further held in the same authority that:

“...that the legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. Section 74(1) of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act as reproduced above makes it explicit that the commission shall be reasonable for settling disputes arising from or relating to nominations. it therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the commission... I note that the parties alleged violation(s) of the constitution and the various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission’s Dispute Resolution Committee...”

The Judge went ahead and dismissed the petition on the ground that the court had no jurisdiction to entertain disputes appertaining to nominations.

In another authority of Dr Billy Elias Nyonje(supra) Judge Lenaola held that:

“...I must also state that under the provisions of Article 88(4)(b) of the Constitution the IEBC has the mandate to resolve any disputes arising from the nomination process. It is only after IEBC mechanism has been exhausted that a party may come to this Court to challenge the process and only on matters on procedure and not the merit of each dispute...”

Mr. Wetaba Advocate for the 2nd Interested Party submitted that the petition is based on issues touching on nomination which this honourable court has no jurisdiction to handle.

He submitted that the 1st Respondent formally resigned from ODM party on 27/3/17 and that the resignation was filed at the office of the Registrar of Political Parties on 22/3/17. That subsequently the 1st Respondent successfully made an application to join the 2nd Interested Party. That on 19/4/17 the 2nd Interested Party communicated to the 3rd Respondent that they had nominated the 1st Respondent as the MCA candidate for Makina Ward.

Mr. Wetaba Advocate cited the authority of **Dr Billy Elias Nyonje Vs National Alliance Party of Kenya and Another. (2013) eKLR in which Justice Lenalola held;**

“I must also state that under the provisions of article 88(4) (e) of the Constitution the IEBC has the mandate to resolve any dispute arising from the nomination process. It is only after IEBC Mechanisms has been exhausted that a party will come to this court to challenge the process and only on methods and procedure that then merit of each dispute.”

Lenaola J. as he was then made reference to Appeals from IEBC tribunal to the High Court.

This honourable court draws its mandate under Section 75 (1)(a) which provided:

“That question as to the validity of election of a Member of County Assembly should be heard and determined by the Resident Magistrates’ Court designed by the Chief Justice” .

Section 75(2) provided that:

“The question under Sub Section (1) shall be heard and determined within six months of the date of lodging the petition.”

The scope of the issues to be determined is provided for under section 75 (3):

Any proceeding brought under this section, a court may grant appropriate relief including:

(a) A declaration of whether or not the candidate whose election is questioned was validly elected.

(b) A declaration of which candidate was validly elected.

(c) An answer as to whether fresh election will be held or not.

Mr. Gilbert Advocate for the 1st Respondent in his submission stated;

(a) That the alleged dispute existed more than two months before the general election.

(b) That the alleged irregularities/illegalities and un-procedural acts complained about were known and existed before the general elections.

(c) That the Petitioner was aware that the jurisdiction of determining the alleged acts/disputes was what the 2nd and 3rd respondents, which they approached on 12/6/17.

(d) That the Petitioner through his supplementary applied the right jurisdiction and raised the matter, but were not satisfied with the response/outcome.

(e) That no action was taken by the Petitioner in relation to dissatisfaction with the decision/response of the 2nd and 3rd Respondent.

(f) That no complaint was filed by the Petitioner to IEBC as per Rule 8 of the Rules and Procedure of settlement of disputes.

On the issue of service the Applicant (1st Respondent) sought for the application to be struck out on the two grounds;

(i) Want for service.

(ii) It does not challenge the fact that the elections were free, fair, transparent and accountable.

On service the time and service stipulated in the Election Act is 15 days from the date of filing the petition. The petitioner did file the petition but did not serve the petition.

This honourable court *suo moto* issued a mention notice on 6/10/17 on realizing that there was no activity on the file one month after it was filed. It turned out that on the mention date none of the parties had been served by the Advocate for the Petitioner. The court in the interest of justice extended in the time of service and ordered the parties present be served with the petition on the same day but this was not done. That the Applicant was served on 11/10/17.

The submission by Mr. Gilbert Advocate for the 1st respondent was basically on the failure by the petition to effect service of the petition as enshrined in Article 87 (3) of the Constitution and Section 77 of the Election Act as provided as follows:

‘Article 87 (3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

Section 77(2) A petition may be served personally upon the respondent or by advertisement in a newspaper with national circulation.

Counsel for the 1st Respondent cited various authorities which this honourable court has duly considered and taken into account. The 2nd and 3rd Respondents as well as the 2nd Interested Party had no objection to the application, they supported the application and urged the court to grant the orders being sought by the applicant.

The Petitioner in response to the application urged this honourable court to dismiss the application and to allow the petition to be heard and determined on merit.

Mr. Gilbert Advocate filed written submissions in support of the application to strike out the petition. His submissions is that the petition was not served within the stipulated time and that the service was not effected within the time extended by this honourable court, that the 1st Respondent was served 35 days after the petition was filed.

There is no contention that the Petitioner did not effect service of the petition on the Respondents and the Interested Parties. This honourable court *Suo moto* invited parties for a mention for pre-trial proceedings. All the parties, except the 1st respondent did attend court.

The parties who attended the pretrial mentions were subsequently served. It is worth to note that on record there is no evidence that the 1st Respondent has been served by the Petitioner despite the court extending time for service. The Petitioner initiated the matter by filing the petition against the parties therefore the onus is upon the Petitioner to ensure that each and every party to the petition is served with the pleadings and notified on the hearing or mention dates. The Petitioner in this case has not filed any affidavit to proof service if at all and when the 1st Interested Party was served.

The law on the timelines for service of Election Petitions is well set out in **section 76 (1) (a)** of the **Elections Act, 2011** which provides as follows

“(1) A petition—

(a) to question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation...”

The Elections (Parliamentary and County Elections) Petitions Rules, 2017 make provision for both time and mode of service. **Rule 10(1)** provides that within fifteen days after the filing of Petition, the Petitioner shall serve the petition on the Respondent by either direct service or an advertisement that is published in a newspaper of national circulation.

Service is not a mere procedural technicality, it is an integral element of the fundamental right to a fair hearing which is underpinned by the well-known rule of procedure, as set out in the authority Lady justice C. Githua held in ***Mohamed Odha Mora v The County Returning Officer, Tana River & Others***, Malindi Election Petition No. 15 of 2013 enumerated the purpose of service to include:

“ To give notice to the Respondents or persons affected by the Petition that the Petition had been filed challenging the outcome of the elections and the grounds upon which the challenge had been instituted to enable them prepare their responses and to defend their respective positions, regarding the conduct of the contested elections; Further, it gives the Respondent a reasonable opportunity to know the basis of the allegations, against them; and it provides the Respondent with an opportunity to be heard and goes to the root of all important tenets of the principle of fair trial and good administration of justice.”

The issue of whether an election court has jurisdiction to extend constitutional and statutory timelines such as the timeline for filing and service of an election petitions has been settled over time, the High Court at one time held that an election court lacked such power.

The Court of Appeal in **Charles Kamuren v. Grace Jelagat Kipchom & 2 Others [2013] eKLR** held that an election Court lacked the power to extend the time for serving of an election petition. The Court stated:

“We now turn to the gravamen of this appeal and that is, whether the learned judge erred in law in holding that the High Court had no power to extend the time for serving an election petition and

proceeding to strike out the petition for late service. What is the lawful period of serving an election petition that is seeking determination as to whether a person was validly elected as a member of parliament? The answer to that question is found in Section 76 (1) (a) which we have already cited. The section stipulates that the period is “within fifteen days of presentation” of the petition... The time frames stipulated under Section 76 (1) (a) of the Election Act are peremptory and an election court has no power to vary them. A petition must be filed within twenty-eight days after the date of publication of the results and should also be served within fifteen days of presentation of the petition”

The Judges in the supra authority continue to hold that;

*“We agree with the learned trial judge that **rule 20** only provides for extension of time for matters whose time is prescribed by the Rules or by the court but not those prescribed by the Act... This Court rejects the invitation by the petitioner’s counsel to hold that by dint of the provisions of **Article 159 (2) (d)** of the **Constitution** which requires that justice be administered without undue regard to procedural technicalities, failure to serve the petition within the statutory period ought to have been treated as a procedural lapse and extend time of service as sought... We must emphasize that the time frame for hearing and determining a petition such as the one that was before the trial court is fixed by **Article 105 (2)** of the **Constitution**. Further, **Article 87 (1)** of the **Constitution** mandated Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes, hence, the **Elections Act No. 24 of 2011**. Consequently, parties to such disputes must ensure that they comply with the statutory time frames set by the Elections Act and the Rules made thereunder.”*

In **Mary Emaase Otucho v Geoffrey Omuse & another [2017] eKLR** the Court pronounced that the court may expand time for filing a response but not the petition or the time within which to hear and determine a petition.

In **Michael Gichuru v Rigathi Gachagua & 2 others [2017] eKLR** the Court in reference to the holding of the Court of Appeal in **Charles Kamuren** Supra stated

“...the service in question was in respect of the petition itself whose service schedule has been set by the Act and not by Rules (see section76(1)(a)). Thus, the timeline set for service of a petition is not only statutory, but it is also mandatory as well and it is in that context that the court held service was not matter of procedural technicality. On the contrary, the service we are concerned with here is the service of the response whose timeline is fixed by the rules which go further to clothe the Election Court with the discretion to extend time.”

In this case this honourable court exercised its jurisdiction in favour of the Petitioner and expanded the time for service the petition on all the parties herein, while being guided by the above authorities I am of the considered view that, the failure to effect is not sufficient ground for this honourable court to strike out this petition.

This honourable court has already analysed the background of this petition which in summary is as follows:

- That on 30/4/17 the 1st interested party held his party nomination in respect to the position of Member of County Assembly for Makina Ward.
- That the petitioner and the 1st respondent who were members of the 1st interested party were among the candidates who contested the nominations among the candidates and that the petitioner won the nominations to contest for the County Assembly seat under the Orange Democratic Party (ODM) party (the 1st interested party)
- That the party primaries were challenged at the County Appeals Tribunal and the tribunal found in favour of the petitioner’s nomination which was endorsed by the political party’s tribunal. After the 1st respondent failed to clinch the ODM ticket he withdrew his membership for ODM party and joined PDU party under which he successfully contested in

the national elections held on 8/8/17.

The Petitioner having been aggrieved by the outcome of the election of 8/8/17 in which the 1st Respondent was declared to have attained 9,096 while the Petitioner garnered 4,822 did file this petition in which he is challenging the process of nomination, the campaign strategy engaged by the 1st Respondent.

The Petitioner alleges that the 1st Respondent withdrew from ODM party and joined PDU party outside the 120 days allowed by the law that the 1st Respondent did during the campaigns used the photograph of the NASA's presidential candidate Hon. Raila Amollo Odinga, that he also was holding himself out as an affiliate member of NASA by prominently displaying and giving to electorate's campaign materials having the NASA emblem logo thereby unlawfully influencing the election outcome.

The Petitioner alleged that Hon. Raila Odinga and NASA had fanatical following in Kibera constituency and Nairobi County hence the 1st Respondent tricked the electorate by deception to influence them to vote for him as a NASA allied candidate.

On jurisdiction the petition relied on geographical jurisdiction by virtue of the Petitioner being a registered voter and contestant of Makina MCA Ward.

However, Articles 23(1) (2) which have been cited by the petitioner relate to the High Court as such the provisions of Article 23 relates to the jurisdiction of the High Court.

The Respondents and the 2nd Interested Party denied all the allegations by the petitioner and maintained that the 1st Respondent was a member of the 2nd Interested Party and was voted as PDU member.

The contention by the Respondents and the 2nd Interested Party is that this honourable court lacks jurisdiction to determine nomination issues and the alleged election malpractices that were raised by the Petitioner as the basis of the petition are under the ambit of the IEBC Dispute Resolution Tribunal.

This honourable court has considered the facts of the case as raised by the Petitioner, the Respondents and the 2nd interested party it has also re-evaluated the same.

The Petitioner alleges that nomination of the 1st Respondent and the subsequent participation in elections held on 8/8/17 was riddled with several statutory irregularities.

That the 1st Respondent was barred from party hoping as the 120-statutory period had elapsed, that his clearance as a PDU candidate by the 2nd and 3rd Respondents was un-procedural, illegal and a subversion of the people's will to elect their representatives at the County Assembly.

The Petitioner stated that the 1st Respondent committed election offences and malpractices which involved the 2nd and 3rd Respondents in breach of the code of conduct.

The Petitioner blamed the 2nd and 3rd Respondents for failing to serve impartially and independently perform their mandate in good faith in allowing the 1st respondent to contest in the election against the law (Section 28 of the Election Act).

The 1st Respondent admits that he was initially a member of Orange Democratic Party that he subsequently resigned from ODM membership and joined PDU, party which nominated him to contest for Makina Ward Member of County Assembly which he won, he has attached his resignation from ODM party, and his nomination as PDU nominee which were duly filed and served to the registrar of political parties on 28/3/17. The resignation by the 1st Respondent from ODM party is allegedly dated on 27/3/17.

There is therefore no dispute that the 1st Respondent contested and won the Makina MCA seat through PDU political party. The complaint by the Petitioner is that PDU was not among the NASA affiliate parties. He attached the power sharing agreement dated 26/4/17 between 5 political parties namely, Amani National Congress (ANC), Chama Cha Mashinani (CCM), Forum for Restoration of Democracy of Kenya (FORD-KENYA), Orange Democratic Movement (ODM) and Wiper Democratic Movement of Kenya (WDM-K) to demonstrate that PDU was not among the NASA Umbrella or a political party affiliated to it.

The further issue raised by the Petitioner is that the 1st Respondent misled the voters by using posters that the portrait of the NASA presidential candidate. Enabling him to obtain 9,096 votes while the Petitioner got 4,822 votes. The petitioner submitted that the win by the 1st Respondent was propelled by unlawfully influence the process and the outcome of the elections. He (the petitioner) mainly challenges the process of nomination of the 1st Respondent, that it was outside the constitutional and statutory period of 120 days alleging that he (1st Respondent) was barred from party hopping.

Section 74 of The Elections Act provides timelines for the settlement of certain disputes

(1) “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.

(2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

The gravity of a question as to the jurisdiction of a Court to hear a matter was well set out in the case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd(supra)** where the Court of Appeal held

“I think 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In **Aden Noor Ali v Independent Electoral & Boundaries Commission & 3 others [2017]** eKLR Justice Mativo stated the following regarding Jurisdiction; *“A Court’s jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in the matter of the Interim Independent Electoral Commission, at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner; “ Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by 13 {1989} KLR 1 14 Volume 3:1-N, at Page 113 15 Constitutional Application No. 2 of 2011 (unreported) 9 principles laid out in judicial precedent Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws...”*

Jurisdiction on the Resident Magistrates Court to hear and determine a question as to the validity of the election of a member of a county assembly is bestowed by statute that is **Section 75 (1A) of the Elections Act, 2011.**

A reading of **section 76** of the Act gives a clear indication of the general grounds under which an election petition may be presented that is; to question the validity of an election; to question a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done; to question a return or an election upon an allegation of an illegal practice; or an

allegation of an election offence. The section provides;

- 1) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the *Gazette*.
- 2) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eight days after the publication of the election results in the *Gazette*.
- 3) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

The supreme court defined the nature of the claims, reliefs and prayers to be sought in an election petition as broken down in **Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR** The Supreme Court stated

“The description of election petitions as causes sui generis, is in every respect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factors. Such petitions rest on private, political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.”

In the instant case the parties have raised a Preliminary Objection on jurisdiction on the grounds that the petition is based on alleged irregularities during nomination and or malpractice allegedly committed during the campaign period. The argument is that these were pre-election issues on nomination and use of campaign material which may or may not have had an impact on the election results.

In my considered view the jurisdiction of an election court is invoked on issues touching on the processes during the voting, vote counting, tallying and declaration of the results and not the pre-nomination and pre-election issues.

This position has been set out in **Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** the Supreme Court determined that upon declaration of results by the returning officer any questions as to the validity of the results can only be raised before an election Court. The Court stated; The *Gazette Notice* in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand,

*“an election by registered voters”, as was held in the **Joho Case**, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.”*

The allegation of the use of Hon. Raila Odinga’s poster would be construed as use of undue influence which would amount to an electoral malpractice of a criminal nature. **Section 87** of the **Elections Act, 2011** empowers the election court to make a determination that an electoral malpractice of a criminal nature occurred, it however is not seized with jurisdiction to determine an election offence. Sec 87 provides as follows;

(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.

(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.

(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —

(a) direct an investigation to be carried out by such State agency as it considers appropriate; and

(b) based on the outcome of the investigations, commence prosecution or close the matter.

From the decisions from the superior courts, I am guided that the proceedings before an election Court have been held to be sui generis. They are neither criminal, nor civil. This is clear from the very wording of section 87 (1) where the Court will reach a finding that a malpractice of a criminal nature occurred have to look into the elements of the malpractice complained of which elements can only be found in the Election Offences Act no. 37 of 2016. The Court may also nullify an election as per the grounds set out in section 76 of the Election Act, 2011 including the Court reaching a determination that the will of the voters was interfered with by a corrupt or illegal practice.

The Black's Law Dictionary defines undue influence as the improper use of power or trust in a way that deprives a person of free will and substitutes another's objective.

The Court of Appeal in **Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua & 3 others [2014] eKLR** paragraph 39 held that undue influence does not only occur in circumstances when a person influences the results of an election through duress or intimidation. Rather, it can also arise from fraudulent device, trick or deception for the purpose of inducing or impeding the free electoral choice of the voter.

In **Mary Wangari Mwangi v John Omondi Ogutu & 2 others [2013] eKLR**, the court states that undue influence occurs when a person interferes with the free electoral right of another through any of the acts set out in the Section 62. The court also considered the ruling of the Supreme Court in India in **Shiv Kripal Singh Vs Giri, AIR 1970 SC 2097** which stated as follows:

“.... free exercise of electoral right does not mean that the voter is not to be influenced. This expression has to be read in the context of an election in a democratic society, and the candidates and their supporters must naturally be allowed to canvass support by all legitimate and legal means. This exercise of the right by a candidate does not interfere or attempt to interfere with the free exercise of the electoral right by the voter. What amounts to interference with the exercise of an electoral right is “tyranny over the mind...”

The Indian decision has acknowledged the fact that during the campaign period the candidates and the supports are naturally to be allowed to canvass support by all legitimate and legal means in event that illegitimate and illegal means are used the legislature had created mechanisms within the parties and the IEBC to resolve the same before approaching the courts of law.

In **Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR** the Supreme Court held as follows;

“...After considering the merits of such positions, we have come to the position that the nature of the relevant proceedings should be borne in mind: proceedings in an election petition. In such proceedings, what is at stake is the sanctity of a people's expression of their sovereign will. Consequently, all the findings seek in the first place, to establish whether the election was

uncompromised by mischief or corrupt action. Election offences have the tendency to undermine the popular will that is the foundation of the governance system declared in the Constitution. The Court, as guardian of the solemn rights of that charter, is duty-bound to set its face firmly against any violation of the Constitution. Within the framework of the electoral law, the proper course of action has been prescribed; but as regards the operation of the ordinary criminal law, it falls to the Director of Public Prosecutions to move the Courts appropriately. The election Court's contribution in that regard is that it is a source of relevant information for a possible criminal trial; but whether or not such trial takes place, falls to the prosecutorial discretion of the Director of Public Prosecutions..."

The Bench Book on Electoral Dispute Resolution provides at page 11 as follows

"Jurisdictional challenges, however, can be raised at any stage of the litigation process... It is a fundamental rule of EDR and litigation in general, that courts and tribunals only exercise the jurisdiction conferred on them by the constitution and the laws of the land" as held in the authority of the late Justice Nyarangi (supra)

This honourable court has noted omissions and mistakes on the pleadings herein notably on the citation the petitioner makes reference to the Makadara Parliamentary constituency instead of Makina ward, the submissions filed by Messrs. Keengwe and Company advocates is not signed, the offending poster was also not annexed by the Petitioner. These are technical omissions and this court will not make any adverse inference to them.

The alleged malpractice and irregularity is said to have taken place during the nomination and the campaign period before the election period, there is no evidence to indicate that the Petitioner reported the offences to the relevant authority, the Petitioner is still at liberty to approach the law enforcement agency tasked with prosecution of criminal matters for further investigations and possible prosecution. The Petitioner is seeking redress from a wrong forum.

Justice Lenaola in *Isaiah Gichu Ndirangu* case (supra) stated that:

"... The violations regarding the nominations the first port of call was the Commission's Dispute Resolution Committee. Being dissatisfied with decision of the Committee, they thereafter approached the Courts. It is thus clear that the parties did not bypass the Commission's dispute resolution avenue as the petitioners have now done..."

Similarly **Justice D. Majanja in *Francis Parsimei Gitau v National Alliance Party and another*** in which the Judge held that:

"It is also my view that Article 88(4)(e) and section 74(1) of the elections act, 2011 provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed"

The same holding was made by Judge W. Okwany in *Homabay HC, JR, MISC APP NO. 36 OF 2017* the judge stated that:

"... taking a cue from the above cited authorities, I find that the circumstances of this case dictate that the Court, despite its wide jurisdiction under the Constitution, does not assume such jurisdiction. The dispute is clearly a dispute that falls within mandate of the commission in which the constitution and the Elections Act vests jurisdiction. It involves a dispute emanating from the nomination process for which Section 74 of the Elections Act and article 88(4)(e) of the Constitution state shall be handled by the commission. The commission has an internal dispute resolution mechanism which the law requires the applicant to exhaust before reverting to the court process if he is dissatisfied with the outcome. I find that to hold otherwise would undermine and defeat the mechanisms and institutions provided by law, which are underpinned by the

constitution...”

There is no dispute that both the Petitioner and the 1st Respondent garnered the votes 4,822 and 9,096 respectively. There is also consensus that both were members of Orange Democratic Party. They parted ways after nomination, when the Petitioner got the ODM ticket. They went separate ways and the 1st Respondent got nomination to vie for the same seat through PDU while the petitioner vied through ODM ticket lost to the 1st Respondent. The questions that have been raised now relate to complains of nomination and campaign period. There is no complaint on the process on election day and the process of declaring the results. Throughout the entire petition there is no issue emanating or appertaining to the manner which the 2nd Respondent conducted the general elections held on the 8th August 2017 and the subsequent declaration of the results. The issues raised are outside her (the 2nd Respondent's) mandate as the case against the 2nd Respondent in particular must fail.

The Judges of the superior court cited above in their holding in the authorities have confirmed the position in law as provided in article 88 of the Constitution as well as Section 74 of the Election Act.

The preliminary objections raised by the Respondents and the 2nd Interested Party can be clearly distinguished from the Muikisa Biscuits authority cited by the Petitioner. The preliminary objections herein have saved the parties the costs of further litigation on a matter that the court lacks jurisdiction. This Honourable court lacks jurisdiction to determine issues touching on nomination and election offences it must therefore down its tools. The authorities of the superior courts are binding in this court and I am satisfied that jurisdiction is everything, without which this court will labour in vain.

Consequently, the application is allowed as prayed in terms of prayer 4 and the preliminary objections raised by the Respondents and the 1st Interested Party are found to have merit and are accordingly upheld. The petitioner has suffered wrongs, but his remedies lied elsewhere and within the appropriate time set by Section 76 of the Elections Act, it is now late in the day. Whether he was barred from approaching the tribunal as was alleged, he still had a recourse to approach the High Court to reinforce his right by way of Appeal from the tribunal, constitutional petition or Judicial Review but not by way of an election petition.

The petition is hereby struck out as prayed for, for want of JURISDICTION, this honourable court proceeds to find and DECLARE that, SOLOMON ODANGA MAGEMBE was validly elected the Member of County Assembly for Makina Ward in the general elections held on 8th of August 2017

Each party to bear its own costs.

The right of appeal to be exercised within 30 days from the date hereof.

Dated this 24th day of November, 2017.

HON.E. JUMA

SENIOR PRINCIPAL MAGISTRATE

KIBERA LAW COURTS

In the presence of:

Petitioner: No Appearance (The Advocate had notice)

1st respondent: Mr Gilbert Advocate- Present

2nd respondent: Miss Metto Advocate- Present

3rd respondent: Miss Metto Advocate- Present

1st Interested party: Absent- *Not served*

2nd Interested party: Miss Were Advocate- Present

This 24th Day of November 2017