



IN THE CHIEF MAGISTRATE'S COURT AT NYERI

IN THE MATTER OF ELECTIONS ACT, 2011 AND THE ELECTIONS

RULES 2013

IN THE MATTER OF MEMBERS NOMINATED TO THE NYERI COUNTY

KENYA GAZETTE DATED 29TH NOVEMBER 2013

**NAOMI WANGECHI GITONGA.....1st
PETITIONER**

**ANN NYAMBURA WANG'OMBE.....3rd
PETITIONER**

VERSUS

**THE NATIONAL ALLIANCE PARTY.....2nd
RESPONDENT**

**LUCY NYAGUTHII4th
RESPONDENT**

**JECINTA WAMBUI WAMAE.....6th
RESPONDENT**

**JOSEPH KANYI KINGORI..... 8th
RESPONDENT**

**JOSEPHINE MUTHONI MUREITHI.....10th
RESPONDENT**

**LUCY MUGURE WANYITU.....12th
RESPONDENT**

SALIMA ULEDI.....14th RESPONDENT

RULING

This is a ruling into preliminary objection raised by the 3rd to 15th Respondents herein, challenging the jurisdiction of this court in the handling of this Election Petition. Mr. Ngunjiri Advocate appears for the 7th, 8th and 9th Respondents. Mr. Ndungu Advocate appears for the 3rd – 6th and 10th – 15th Respondents.

The four Petitioners are represented by Mr. Kibe Mungai Advocate. The first Respondent will be referred

to herein as IEBC and they are represented by Ms. Ameyo Advocate. The 2nd Respondent will be referred to as TNA and is represented by Mr. Omboga Advocate.

The grounds of objection for the 7th, 8th and 9th Respondents are inter alia, that:-

a) The petition against them has been filed in blatant violation of Section 75(1)(a) of the Election's Act, 2012, and it was filed outside 28 days of the publication of the Kenya Gazette Notice Number 9794 of 17th July, 2013 and consequently, the petition is statute barred.

b) The Court lacks jurisdiction to grant the declarations sought by the Petitioners and in particular, paragraphs a, b, c, e, f, g, h and j in so far as they require the Court to interpret, execute, implement, interfere, interpret, expound and or explain or second guess the decision of the Court of Appeal and the declarations sought offend the doctrine of stare decisis.

On a without prejudice basis to the above petition paragraphs, the Petitioners clearly mean that the gravamen of the dispute is the contested party nomination list submitted to IEBC by TNA and by virtue of section 74 of the Elections Act 2012.

The grounds advanced by the 3rd – 6th and 10th – 15th Respondents are thus:-

a) Issues raised in the petition relate to the interpretation and or

Implementation of the Court of Appeal decision in the case of

ROSE WAIRIMU KAMAU & OTHERS V THE IEBC – CIVIL APPEAL NO. 169 OR 2013

and this Court is not the proper forum for the said issues.

b) The Petitioners seek a violation of the Court of Appeal decision in No. 169 of 2013 as interfering with a list made and gazetted, pursuant to the said decision, and amounts to violation of the principle of equality in distribution as highlighted therein and further enshrined in the constitution and other applicable laws.

c) Issues raised in the petition are Res judicata.

d) The petition suit is frivolous, and a gross abuse of the Court process.

e) Such other grounds that may be adduced at the hearing hereof.

Those Respondents filed submissions in support of the preliminary objections. Oral submissions were made by Counsels for the respective parties and counsels for the 1st and 2nd Respondents added their voices to the debate.

This Court agrees with the 3rd – 6th and 10th – 15th Respondents regarding preliminary objections relating to want of jurisdiction is that the Court has to determine that point before proceeding to the merits of the matter before it.

In the instant petition, this Court proceeded on a miscalculated belief that the deadline for the determination of this appeal was 23rd May 2014 yet the six months was to end on 23rd June 2013. Based on that predicament and considering that the parties had not prosecuted the preliminary objections earlier than the setting of the hearing date of the main petition, the Court ruled that the hearings had to be simultaneous. At some point the parties had made a similar agreed proposal.

If the preliminary objections herein succeed then the hearing of the main petition will be of no consequence and if they are overruled then the Court would proceed and deal with the merits of the petition.

The fact that all parties including the Court believed that the trial and determination were to be handled in one week, gave the push for the manner the Court felt was reasonable and just to all the parties. For instance it would have made no just sense for the Court to proceed to handle the preliminary issues and if the petition were to be prosecuted, prosecute it halfway before operations of the statute on limitation of time determines it.

It was while setting down to go through the pleadings and evidence that the Court realized that there was still a little more time but the hearings had been concluded.

Mr. Ndungu's arguments relate to the grounds on which the preliminary objection (to be referred to as P.O hereinafter) is based and simply summoned, it has following points.

- This subordinate Court lacks jurisdiction to entertain the petition.
- Issues in the petition are all about the Court of Appeal decision in the **Rose Wairimu Kamau** Appeal.
- The Court of Appeal decision considered the principle of equality and distribution and the petition would violate what was desired, if it interferes with the list which was made and gazetted by the just and real Respondents respectively.
- Issues raised are Res judicata.

In their P.O dated 8th January 2014, the Respondents want the Petition struck out with costs. The arguments for the 7th, 8th and 9th Respondents are based on their P.O. Dated 3rd February, 2014.

Mr. Ngunjiri's arguments can be summed upon following points;-

(a) The Respondents serve under the marginalized category and they have not been challenged in serving the Nyeri County Assembly in that category.

(b) These respondents were not parties to the High Court and Court of Appeal cases from which the petition is derived.

(c) This Court which is subordinate in the hierarchy of Courts cannot make any findings relative to the Court of Appeal decision and doctrine of stare decisions knocks out its jurisdiction.

(d) The respondents will be prejudiced as they were never parties to the High Court and Court of Appeal cases.

(e) Under Section 75 of the Election Act, if anybody was unhappy about their Gazettement, should have petitioned within 28 days but that did not happen.

On a without prejudice basis the learned Counsel argues that the provided mechanisms provided for the Alternative Dispute Resolution within the establishment of the first and second Respondents were not attempted. Counsel cites the case of Mr. Kibe Mungai in his response made the following points:-

(a) Some issues raised by the respondents are matters of evidence and not law, like the question of whether or not the Court of Appeal in the case of **Rose Wairimu Kamau** nullified or set aside the TNA nominations.

(b) Under section 75 of the Election Act, disputes relating to County Representatives are triable by subordinate Courts.

(c) The question of which orders this Court can give is a matter of merit and not law.

(d) The decision of the Court of Appeal is a legal fact but it is the background of this matter. That the Nominations down after the Court of Appeal decision gave rise to this Petition.

That the acts and omissions of the second Respondent which can be taken as having been driven by the Court of Appeal decision, led to this case.

(e) Article 10 of the Constitution empowers state officers to apply and interpret any law and in the instant case this Court is expected to interpret and enforce the law which may include Court decisions.

(f) The question of whether there was a violation of the Principle of equality is a fact which requires a hearing.

(g) The Petitioners have never had a similar suit and what they now seek cannot make their suit Res judicata.

(h) Whether the suit amounts to a frivolous claim and a gross abuse of the Court process is a matter of evidence one has to look for the facts of it.

(i) The issue of whether or not the suit was not preferred within 28 days of the Gazettement of nominees is a matter of fact.

(j) There are some prayers in the petition which are not included in those the objections raised against and for those, this Court should have jurisdiction, like (d) and (c).

(k) The doctrine of stare decision is not an ouster of jurisdiction in this case.

(l) Whether the Petition was filed beyond the period of limitation is a matter of evidence and depends on the side, on which the party lies.

(m) For the Court to do substantive justice the Petition has to be heard. Under Section 74 of the Elections Act and Article 88 (4) the present dispute cannot go for arbitration by the second Respondent.

Mr. Ndungu reiterates that the Court is not seized of this matter. Mr. Ngunjiri argues that the Petitioners did not comprehend the Court of Appeal decisions and want this Court to substantiate for them. The Petitioners should have gone back to Court of Appeal for interpretation. Learned Counsel insists that jurisdiction is everything and lacks herein.

The Court has noted the authorities the learned Counsels relied on in their arguments. The other Respondent had also cited the issue of jurisdiction.

Having considered the arguments raised it is clear that this petition arose out of the nominations conducted in November 2013 and the 28 days stipulated under the Law can only run from 29/11/13 when Gazettement was done and not 17/7/13 when there was no cause of action. That ground fails.

On the doctrine of stare decisions, this was a dispute which has arisen in a fresh situation altogether. This Court was not mandated by the Court of Appeal to execute its judgment. That Court could not have for seen that an election dispute would arise from the nominations. The Court respects the doctrine of stare decisionse but why this petition is so intertwined with orders of the Court of Appeal is that they ordered some acts to be done. The matter was in the arena of IEBC and TNA to do the proper thing. The petitioners were aggrieved and come to Court as a result of the redone process. Act on whether the process was proper or not is a matter of evidence and cannot be disposed off through a preliminary objection and this ground cannot succeed.

This Court is not interpreting or implementing the Court of Appeal decision. The implementation of the orders was to be handled by TNA and IEBC. What is before me is a fresh course of action and if the Court downed tools and it is the one holding the jurisdiction to handle petitions arising out of nominations to the County Assembly, it will be abdicating its responsibility.

The Court of Appeal directed that a list be drawn, it did not say how, because there is law governing that.

If the Court were to delve into the accuracy or otherwise of the party list submitted it will be treading on evidence.

The matter raised in this petition are not res judicata. The matter before the Court of Appeal was very different from this matter. The Petitioners and others may have been notified to attend the Court of Appeal and make representations but they did not provide their pleadings, they were not enjoined in the matter. Their petition today contains a different complaint from what was in the Court of Appeal.

This Court is not able to strike out this petition on the preliminary objections raised, because the points lead to issues of evidence and are not purely based on law and if based on law, it does not apply in the circumstances.

The Court therefore overrules the, preliminary objections raised herein and directs that this Court has the jurisdiction and will proceed to prepare the judgment in the main petition. The P.O.s are dismissed with costs to the petitioners.

W.A. JUMA

CM

5/6/17

COURT - Ruling read in open court in the presence of Mr. Kibe Mungai for Petitioners. Mr. Omboga for 2nd Respondents and holding brief for Ms. Ameyo for 1st Respondent, Mr. Ndungu for 3rd – 6th and 10th – 15th Respondents and holding brief for Ngunjiri for 7th, 8th and 9th Respondents.

W.A. JUMA

CM

5/6/14