



**Letuiya & another v Independent Electoral Boundaries Commission & 4 others;
Samburu County Government (Interested Party) (Civil Appeal 42 & 43 of 2018
(Consolidated)) [2022] KECA 589 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 589 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 42 & 43 OF 2018 (CONSOLIDATED)
RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA
APRIL 28, 2022**

BETWEEN

JENNIFER LETUIYA APPELLANT

AND

**INDEPENDENT ELECTORAL BOUNDARIES COMMISSION 1ST
RESPONDENT**

PAULINE WANJIKU KIGERA 2ND RESPONDENT

EMILY CHEPKEMOI 3RD RESPONDENT

AND

SAMBURU COUNTY GOVERNMENT INTERESTED PARTY

AS CONSOLIDATED WITH

CIVIL APPEAL 43 OF 2018

BETWEEN

STEFANIA STEIN LANYASUNYA APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

PAULINE WANJIKU KIGERA 2ND RESPONDENT

EMILY CHEPKEMOI 3RD RESPONDENT

AND



SAMBURU COUNTY GOVERNMENT INTERESTED PARTY

(Being an appeal from the Judgement and Decree of the High Court (M. Kasango, J.) delivered on 1st April, 2018 in Nanyuki Judicial Review No. 6 & 5 of 2017)

JUDGMENT

1. The uncontested facts in this appeal are that Jennifer Letuiya and Stefania Stein Lanyasunya (the appellants) individually applied to be nominated by the Jubilee Party and the Democratic Congress Party to represent persons with disability and as gender representatives in the Samburu County Assembly respectively in the 2017 general elections.
2. In compliance with Section 35 of the *Elections Act*, the Jubilee and the Democratic Congress Parties respectively duly submitted party lists to the IEBC who through a Gazette Notice No. 5116, gazetted Jennifer Letuiya and Stefania Stein Lanyasunya, (the appellants) as the duly nominated Members of Samburu County Assembly. The names were also published in the Sunday Nation of 23rd July 2017.
3. On 5th September 2017, Jennifer Letuiya and Stefania Stein Lanyasunya, (the appellants) were sworn in as members of the Samburu County Assembly.
4. On 6th September 2017, IEBC caused to be published gazetted Notice No. 8752 in which it degazetted Jennifer Letuiya and Stefania Stein Lanyasunya, (the appellants) as members of Samburu County Assembly and, in their place, gazetted Pauline Wanjiku Kigera and Emily Chepkemoi (the respondents in the respective appeals) as members of the Samburu County Assembly.
5. Aggrieved by their being degazetted by IEBC, the appellants, Jennifer Letuiya and Stefania Stein Lanyasunya, approached the High Court in Judicial Review Causes No. 5 and 6 of 2017 respectively both erroneously seeking Judicial Review Orders of Certiorari for the Court to call and quash the decision of IEBC published vide Gazette Notice No. 5116 of 6th September, 2017 purportedly by which IEBC replaced their names with those of the 2nd respondents as members of the Samburu County Assembly. We have deliberately used the words “erroneous” and “purportedly” because as will be demonstrated shortly in this judgment, the correct notice that the appellants ought to have sought to have quashed was that vide which IEBC degazetted their appointments and replaced them with those of the 2nd respondents namely Gazette Notice No. 8752.
6. In rebuttal of the judicial review proceedings, the 1st and 2nd respondents, on 3rd October, 2017 filed a notice of preliminary objection to both judicial review causes. The gist of their preliminary objection was that the High Court had no jurisdiction to hear and determine the matter by dint of Article 87,105(1) (b) of *the Constitution*, Section 76 of the *Elections Act*, and Rule 6(3) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017 which vests the jurisdiction to determine the issues in controversy in both judicial review causes in the Elections Court.
7. Upon hearing the rival parties, the High Court (M. Kasango, J.) delivered a Judgment dated 1st February 2018 in Judicial Review No. 6 of 2017 in which the Judge expressed herself as follows:

“36. In my considered view there would not be a basis of side stepping the Constitutional Provision of Article 87, or the *Election Act*, Section 75, to entertain the dispute of the applicant through a Judicial Review.

37. The applicant was ‘stretching’ the law in suggesting that this court can entertain her grievance through Judicial Review process.



38. In this court's view the procedure adapted by the applicant was erroneous (*sic*)”

8. In the Judgment in Judicial Review No.5 of 2017 the same High Court Judge (M. Kasango, J.), expressed herself as follows:

“40. The issue raised in this matter brings to mind the dilemma, which is epitomized, in the ‘chicken and egg’ theory. That is, whether the act of gazetting the applicant (although erroneously as argued by the 2nd respondent) in itself signified the completion of an election. And if so whether the subsequent act of de-gazetting the applicant was an act; not an electoral act, but one which would justify this court to issue judicial review order to quash it. In my view, I E B C by de-gazetting the applicant: that act was also an electoral process act which would require an election court to determine its correctness or otherwise.

41. In my considered view there would not be a basis of ‘side stepping’ the Constitutional Provision of Article 87, or Section 75 *Election Act*, to proceed to entertain the dispute of the applicant through a judicial review.

42. The applicant was ‘stretching’ the argument in submitting that the election petition would only be the route to a determination of a dispute if the I E B C action were supported under the law. If one was to take that argument to its logical conclusion, then it hardly looks likely that there would be any reason to file any action in an election court.

The implication of that argument is that the I E B C’s action would have been legal and not disputable for one to be justified to file an election petition. (*sic*)

9. Aggrieved by the above-mentioned judgment, the appellants filed separate appeals. Jennifer Letuiya filed Civil Appeal No. 42 of 2018 raising five (5) grounds of appeal while Stefania Stein Lanyasunya filed Civil Appeal No. 43 of 2018 raising four (4) grounds of appeal. These were subsequently condensed into two grounds of appeal in the appellant’s written submissions dated 3rd August, 2018 namely, whether:

1) The 1st respondent had jurisdiction to degazette the name of the appellants as the nominated members of the County Assembly of Samburu and replace them with the names of the 2nd respondent.

2) The matters ought to have been determined by way of an election petition or by way of judicial review.

10. Both appeals were consolidated by the order of this Court made on 28th July, 2018 with Appeal No. 42 being designated as the pilot file.

11. The appeals came up for virtual hearing before this Court on 3rd November, 2021. When called out, only learned counsel Mr. Anyoka was in attendance. Mr. Anyoka informed the Court that the advocates for the respective parties herein had filed a consent dated 14th July, 2020 and filed on 9th July, 2020 consenting that the respective consolidated appeals be canvassed through written submissions filed with no oral highlighting and that the Court do proceed to render a judgment virtually upon notice to the respective parties.

12. Supporting both appeals, the appellants rely on the case of *Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others* [2014] eKLR; *Steven Kariuki v George Mike Wanjobi & 2 Others* [2014] eKLR; and *Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR, and submit that in the instant appeal, since the nomination process was concluded and the names of the successful candidates published in the Kenya Gazette, IEBC’s mandate to deal



- with the matter beyond what has been alluded to above became spent. Any dispute arising from that process fell for consideration before an election court. It was therefore erroneous for IEBC to publish another gazette notice deleting the names of the appellants and replacing them with those of the 2nd respondents. Any party aggrieved by the IEBC's degazettement of the appellants as nominees to Samburu County Assembly ought to have invoked the procedure outlined in the above case law which explicitly indicates that section 75 of the *Elections Act* donates power to the Resident Magistrate to determine the validity of elections of members of a County Assembly. They therefore contend that, in the circumstances complained of above, IEBC acted outside its mandate when it degazetted them.
13. They rely on the *locus classicus* case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR for the proposition that jurisdiction is everything and that once an inferior body lacks jurisdiction, anything that flows therefrom is a nullity, and submits that, in the instant appeal, IEBC took upon itself the mandate to resolve a dispute between the appellants and the 2nd respondents without mandate, and that the only proper forum to declare IEBC's action null and void was the judicial review court.
 14. In rebuttal of the consolidated appeals, the 1st respondent submits that Article 87 of *the Constitution* provides for the mechanism for resolution of electoral disputes, and that nominated members of a County Assemblies are a product of a process involving political parties and their members. Political parties are required to prepare party lists and submit them to IEBC pursuant to Articles 90 and 177 of *the Constitution* and sections 34, 35, 36 and 37 of the *Elections Act* (No. 24 of 2011). Section 36 of the *Elections Act* provides that the allocation of seats by the commission under Article 177(1) (b) and (c) of *the Constitution* shall be proportional to the number of seats won by the party under Article 177(1) (a) of *the Constitution*. Section 75(1A) of the *Elections Act* provides that 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, while Article 90 of *the Constitution* clearly refers to elections for members of a County Assembly under Article 177(1) (b). It is, therefore, IEBC's position that in light of the above exposition of the undisputed legal position on the issue as to whether anyone who is nominated pursuant to a party list is therefore considered to have been elected, and that the only way to challenge such nomination or failure to be nominated can only be through an election petition.
 15. To buttress the above submissions, IEBC relies on the decision of the Supreme Court of Kenya in *Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR in which the Supreme Court was explicit that publication of a Gazette Notice signifies the completion of the election through nomination, and that, therefore, finalizes the process of constituting the Assembly in question, which in essence marks the end of the mandate of IEBC regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts.
 16. The Supreme Court went further and added the following as further guidelines:

"To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of *the Constitution*, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution."
 17. In light of the above exposition, IEBC invites this Court to adopt the position taken above by the Supreme Court and fault the appellants for invoking the judicial review jurisdiction of the High Court



in what was clearly an election dispute, and which should have been filed in a Resident Magistrate's Court as provided for under section 75 of the Elections Act, 2011.

18. To buttress the above submissions, IEBC relies on the Supreme Court of Kenya case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR and the Court of Appeal at Kisumu case of Isaac Oerri Abiri v Samuel Nyang'au Nyanchama Civil Appeal No. 25 of 2014 [UR] both on the crystallized principle enunciated in the locus classicus case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, that jurisdiction flows from either the Constitution or legislation or both; that a court of law can only exercise jurisdiction as conferred upon it by the Constitution or other written law; that it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law; and that where there is a challenge to a court's jurisdiction, it has to be considered first as without jurisdiction, a court of law must down tools. IEBC therefore urges this Court to affirm the approach the trial court took to determine the issue of want of jurisdiction raised by them.
19. IEBC also submits that the correct Gazette Notice that the appellants ought to have sought to quash should have been Gazette Notice Number 8752. In the absence of any amendment of pleadings with regard to the above glaring error, allowing the appeal in the appellants' favour will be an exercise in futility.
20. On the issue of costs, IEBC relies on the High Court case of Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR, and submits that costs are not only within the discretion of the court seized of the matter, but that these usually follow the event. Accordingly, the trial Judge cannot be faulted for awarding costs upon the dismissal of the petition.
21. The 2nd respondents who basically supports the position taken above by IEBC relies on the following authorities: the Supreme Court of Kenya decision in the case of Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [supra] and reiterates the 1st respondent's position highlighted above that the proper forum to redress the appellants' grievances was an election court;
National Alliance Party & Another v Independent Electoral and Boundaries Commission [2013] eKLR and the case of Adan Noor v IEBC & 3 Others [2017] eKLR in which the decision of the Supreme Court in the Moses Mwigigi & 14 Other [supra] was approved and submits that issue as to whether IEBC's conduct of deleting the appellants' names as nominees was warranted went to the merits of the decision making process of IEBC and did not, therefore, fall for consideration by a judicial review process whose mandate is limited to examining the procedural nature of the decision making process; National Gender and Equality Commission vs. IEBC & Another [2013] eKLR in which there is observation that upon Gazettement of any person as a member of the County Assembly, and that any challenge to his or her membership to the County Assembly must be in accordance with the provisions of Part VII of the Elections Act, 2011. It is therefore their position as that of IEBC that since Gazette Notice No. 8752 of 2017 nominated the 2nd respondents as members of Samburu County Assembly, any challenge to the said nominations was by way of election petitions. The trial court cannot, therefore, be faulted for declining jurisdiction in the circumstances; Kisumu Civil Appeal No. 25 of 2014 Isaac Oerri Abiri v Samuel Nyang'au Nyanchama and Others [supra] and submits that the trial court cannot be faulted for downing tools on want of jurisdiction as there was sufficient demonstration before it that indeed the said court had no jurisdiction to entertain and pronounce itself on the merits of the grievances that the appellants had presented before it.
22. On costs, the 2nd respondents take the position taken above by IEBC.



23. This is a first appeal. Our mandate as a first appellate court is to re-evaluate and re-analyze the evidence so as to draw our own inferences of fact and to arrive at our own independent conclusions thereon as explicitly provided for in Rule 29(1) of the *Court of Appeal Rules*. In so doing, however, we are reminded by the applicable principles that we should be cognizant of the fact that, unlike the trial court, we did not have the benefit of hearing and seeing the witnesses testify, and that we should therefore give due consideration and defer to the learned trial Judge’s factual findings, and only to depart from them where there is demonstration that they are either based on no evidence, or that there is demonstrably on the record evidence of a misapprehension of the evidence, or where the findings of the Judge are not supported by the evidence. See *Selle v Associated Motor Boat Co Ltd & Others* [1968] E.A. 123.
24. We have considered the record in light of the above mandate. Only one issue falls for our consideration, namely, whether the trial Judge fell into error when she declined jurisdiction to entertain the appellants’ judicial review applications for the reasons given in the impugned judgments. The approach we take in determining this sole issue is that set by this Court in the often cited case of the *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [supra] that whenever an issue of want of jurisdiction or otherwise is raised before a court of law, it has to be determined first. It is evident from the record that the 1st and 2nd respondents raised preliminary objections on want of jurisdiction in the trial court both to hear and pronounce itself on the merits of both judicial review applications.
25. The gist of the preliminary objections were cumulatively that the genesis of the appellants’ judicial review applications having been anchored on section 35 of the *Elections Act*, those matters fell for consideration before an election court and not a judicial review court. Section 35 of the *Elections Act* provides as follows:
- “(1) A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of *the Constitution*.”
- The Act further provides under Section 36(1) that:
- “....
- (e) Article 177 (1) (b) of *the Constitution* shall include a list of the number of candidates reflecting the number of wards in the county.”
26. The basis for the appellants’ action of moving to the trial court to seek redress and which we find no need to rehash, but simply adopt, is as demonstrated by the background information as already highlighted. The approach the trial Judge was obligated to take in resolving the preliminary objection the Court was confronted with and which we approve is that taken by Lenaola, J. (as he then was) in the case of *Isaiab Gichu Ndirangu & 2 Others v Independent Electoral & Boundaries Commission & 4 Others* [2016] eKLR in which the Judge expressed himself, inter alia, that “it is not right for a litigant to ignore with abandon a dispute resolution mechanism provided for in the Statute and rush to the High Court under the guise of a constitutional petition for alleged breach of constitutional rights under the Bill of Rights.”
27. The trial Judge was, in the circumstances, entitled to inquire as to whether, on the content of the record as laid before the trial court, the issues in controversy fell for consideration by a judicial review process or an electoral process. The record assessed above leaves no doubt in our minds that it was upon due consideration of the rival positions before the court in light of the rival argument on the preliminary objections that the Judge arrived at the impugned conclusions the appellants have invited this Court



to upset and the 1st and 2nd respondents to affirm. The guiding legal principle the trial court was obligated to take into consideration at the trial, and now this Court on appeal, and which we fully adopt is that crystallized by the Supreme Court in the case of Moses Mwigigi & 14 Others [supra].

28. We have accordingly applied that threshold to the rival positions herein and, therefore, find and hold that the Magistrates Court, having been vested with the mandate by the Elections Act, was the proper forum for addressing and resolving the appellants' grievances as was aptly put by the Supreme Court in Peter Ngoge v Francis Ole Kaparo and Five Others, Sup. Ct. Petition No. 2 of 2012, [2012] eKLR, wherein it was stated that:

“In the interpretation of any law....., the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law....”

29. See also this Court in the case of Kennedy Moki v Rachel Kaki Nyamai & 2 Others [2018] eKLR, in which the Court expressed itself as follows:

“56 Notwithstanding the foregoing, we are alive to dicta which states that an election court is the proper forum at which to challenge by way of petition nomination disputes. On our part, having reviewed the case law, we are persuaded that the dicta in Kipkalya Kiprono Kones -vs- The Republic & Another Ex-parte Kimani Wanyoike & 4 Others [2006] eKLR is good law where it was held that an election petition was the only valid means of challenging an election. All other proceedings before PPDT or Judicial Review are not proceedings challenging the declared results of an election and such proceedings cannot vitiate or validate the declared results of an election. We are also persuaded with dicta in Mwihia & another vs. Ayah & another [2008] 1 KLR (EP) 450 where it was held that nominations to stand for elections are part of the election process and as such, they could only be challenged after the elections by way of an election petition. We are further convinced that the decision in Wamboko vs. Kibunguchi & another, (2008) 2 KLR 477, is good law where it was held that an election court has jurisdiction to hear and determine a petition where one of the issues is nomination of a candidate - as nomination is a process of election.”

30. On the totality of the above assessment and reasoning, we find and hold as follows:

(a) Party nomination disputes after gazettelement by the IEBC can only be heard and determined by way of an election petition. Neither a judicial review application nor a constitutional petition can resolve or vitiate electoral dispute after gazettelement of nomination or election results.

(b) In the instant appeal, the Judicial Review proceedings filed by the appellants at the High Court in Nanyuki were not election petitions before an election court presided over by a Magistrate duly gazetted by the Chief Justice. They were rightly rejected by the trial court.

(c) The prayers sought by the appellants in the Judicial Review proceedings before the High Court included a prayer for de-gazettelement of Pauline Wanjiku Kigera and Emily Chepkemioi (the respondents) who had already been gazetted as Members of the Samburu County



Assembly. The jurisdiction to deal with any such disputes after gazettelement lies with the Magistrates Court, which can only be moved by way of an election petition.

(d) The appellants could not therefore through legal craftsmanship by means of pleadings in Judicial Review No.5 and 6 of 2017 confer jurisdiction upon the High Court.

31. In the result, we are satisfied that the trial court was correct in declining jurisdiction to entertain and pronounce itself on the merits of the Judicial Review proceedings filed before it by the appellants. These consolidated appeals are, therefore, devoid of merit and are accordingly dismissed with costs to the 1st and 2nd respondents.

DATED and DELIVERED at NAIROBI this 28TH day of APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

