



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), MURGOR & OTIENO-ODEK, JJA)**

**ELECTION PETITION APPEAL NO. 4 OF 2018**

**BETWEEN**

**KENNEDY MOKI.....APPELLANT**

**AND**

**HON. RACHEL KAKI NYAMAI.....1<sup>st</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL and**

**BOUNDARIES COMMISSION..... 2<sup>ND</sup> RESPONDENT**

**PAMELA AWUOR WANDEO.....3<sup>RD</sup> RESPONDENT**

*(Appeal from the Judgment and Order of the High Court of Kenya*

*at Kitui (L. Mutende, J.), dated 24<sup>th</sup> January 2018*

*in*

*Kitui Election Petition No. 2 of 2017)*

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**JUDGMENT OF THE COURT**

1. On 8<sup>th</sup> August 2017, the people of Kitui South Constituency went to the polls to elect their Member of Parliament. Five candidates contested the elections and the declared results were as follows:

<b>NO.</b>	<b>Name of Candidate</b>	<b>Votes Garnered</b>
1.	BERNARD MUSEMBI KITINDIO	12,837
2.	KENNEDY MOKI	16,217
3.	JOHN MUNYALLO	190

4.	DAVID MBILO MWANIKI	284
5.	RACHEL KAKI NYAMAI	22, 753

2. Dissatisfied with the declared results, the appellant, **Kennedy Moki**, filed an election petition before the High Court at Kitui sitting as an election court. The grounds in the petition were *inter alia*:

- (a) *Pre-election malpractices, gross impunity and breaches of law.*
- (b) *Fraud on the part of the 1<sup>st</sup> Respondent.*
- (c) *Election day malpractices and breaches of the law.*
- (d) *Gross violations of the law on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.*
- (e) *Gross and widespread electoral irregularities or malpractices which impugned the results of the election as declared by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.*
- (f) *Presiding officers of the 2<sup>nd</sup> Respondent at various polling stations failed to provide some Forms 35A and Forms 35B to each of the agents of the petitioner/appellant.*
- (g) *The 2<sup>nd</sup> Respondent failed to verify if indeed the Jubilee Party conducted nominations as ordered by the Court of Appeal in Civil Appeal No. 157 of 2017 and that the 1<sup>st</sup> Respondent was not validly nominated and her candidature was therefore null and void.*

3. Upon hearing the parties, the trial court in a judgment dated 24<sup>th</sup> January 2018 dismissed the appellant's petition and made the following orders:

- "1) That the Petition be and is hereby dismissed.
- 2) That the 1<sup>st</sup> Respondent was validly elected as Member of the National Assembly for Kitui South Constituency in the elections held on 8<sup>th</sup> August 2017.
- 3) That the Respondents are awarded costs thus:
  - a) The 1<sup>st</sup> Respondent shall have the costs capped at Ksh. 1,000,000/=.
  - b) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall have costs capped at Ksh. 1,000,000/=.
- 4) That pursuant to the provisions of Section 86 of the Elections Act, a Certificate as to the validity of the Election Petition shall be issued to I.E.B.C. (2<sup>nd</sup> Respondent) and the Speaker of the National Assembly."

4. Aggrieved by the dismissal of the petition, the appellant lodged the instant appeal citing the following grounds in his Memorandum of Appeal:

- "1) That the learned judge erred in law and fact by holding that the issue as to whether the 1<sup>st</sup> respondent underwent nomination was entirely pre-election dispute which the Court could not determine.**
- 2) The learned judge erred in law and fact by finding that she lacked jurisdiction to determine whether the 1<sup>st</sup> respondent adhered to the provisions of Article 99 (1) of the Constitution and therefore eligible to stand as a candidate to run for election as Member of Parliament for Kitui South.**
- 3) The learned judge erred in law and fact by attaching high probative value to the evidence of the 3<sup>rd</sup> Respondent who could not account or answer to the actions of her juniors and could therefore not confirm if indeed there were electoral malpractices.**
- 4) The learned judge failed to take into account the fact that the Jubilee Party did not comply with the Court of Appeal Order in**

**5) The learned judge failed to take into account the entire body of evidence adduced at the trial.”**

5. The 1<sup>st</sup> Respondent, **Hon. Rachel Kaki Nyamai** filed a Cross-Appeal urging this Court to enhance the costs capped by the trial court from Ksh.1,000,000/= to Ksh.10,000,000/=. The 2<sup>nd</sup> Respondent, **The Independent Electoral and Boundaries Commission (IEBC)** and the 3<sup>rd</sup> Respondents **Pamela Awuor Wandeo** adopted the submission made by the 1<sup>st</sup> Respondent on Cross-Appeal.

6. At the hearing, the appellant was represented by learned counsel Mr. Charles Gomba. The 1<sup>st</sup> respondent was represented by Messrs Nyamu, Ms Mwadumbo and Mr. Ogutu. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were represented by learned counsel Mr. Ochieng Opiyo and Mr. Kabere Chrispus. All parties filed written submissions in the appeal.

7. Counsel for the appellant abandoned Ground 3 of the appeal and all grounds relating to electoral malpractices to wit violence, intimidation and bribery. The reason given for abandonment is that pursuant to **Section 85 A** of the **Elections Act**, the appellate jurisdiction of this Court in electoral matters is restricted to matters of law. The Appellant submitted that Ground 3 in the Memorandum and all issues relating to electoral malpractices are matters of fact that are outside the jurisdiction of this Court.

8. The appellant urged grounds 1, 2, 4 and 5 together collapsing all these grounds into the issue of error of want of jurisdiction on the part of the trial court. The core of the appellant’s appeal is therefore that the trial court erred in finding, holding and making a determination that it did not have jurisdiction to hear and determine pre-election nomination disputes. More specifically, the appellant took issue with the following paragraphs and final determination in the judgment of the trial court:

*17. It is the contention of the petitioner that the 1<sup>st</sup> Respondent was not validly nominated. It was mandatory for the 1<sup>st</sup> Respondent to be nominated. Article 99 (1) (c) of the Constitution of Kenya 2010 provides that:*

*Unless disqualified under Clause (2), a person is eligible for election as a Member of Parliament if the person:*

*(c) is nominated by a political party or is an independent candidate who is supported...*

*19. A political party is required to nominate its candidate in accordance with the Constitution and Nomination Rules within a specific time lines (see Section 13 (1) of the Elections Act).*

*20. The Commission (I.E.B.C.) has the mandate to settle electoral disputes including disputes relating to or arising from nominations (see Section 74 (1) of the Elections Act).*

*29. It has been admitted that no report was made to the 2<sup>nd</sup> Respondent regarding the manner in which the nomination was done. It has not been demonstrated that the mechanisms laid down in law as provided by the Constitution and Statutes were exhausted; therefore, this Court being an election Court cannot descend into the arena and clothe itself with non-existent jurisdiction to determine the matter. (Emphasis supplied)*

9. The trial court in arriving at the determination that it did not have jurisdiction to hear nomination disputes was guided by and cited dicta from the case of **Republic -v- IEBC ex parte Charles Ondari Chebet, Nakuru High Court Judicial Review Application No. 3 of 2013** where it was stated that:

**“... My understanding of Article 88 (4) (e) of the Constitution and Section 74 of the Elections Act (in its entirety) is that any dispute relating to nominations to any electoral post are required to be determined within prescribed times, and those relating to nominations of candidates should be determined before the date of nomination or elections whichever is applicable. Clearly because of the limited time spans for determination of nomination disputes, political party nominations needed to be done well before the nomination dates to the Returning Officer/ Electoral bodies. As this did not happen the aggrieved candidates must live with the choices of their political mandarins...**

**“In summary therefore, I find and hold that where there is clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes this court's jurisdiction is precluded. This court's jurisdiction would only arise after the due exercise by the mandated bodies, the Returning Officer and the Commission of their statutory mandate.” (Emphasis supplied)**

10. The Appellant in urging us to allow the appeal submitted that the trial court erred in law in finding that the court did not have jurisdiction to hear and determine whether the 1<sup>st</sup> respondent had been validly nominated to contest the election for Member of Parliament for Kitui South Constituency. It was submitted that the 1<sup>st</sup> respondent vied and contested for the seat as a candidate for the Jubilee Party yet she was not validly nominated by the Party.

11. In support, on 17<sup>th</sup> May 2017, one **Samuel Kalii Kiminza** lodged a complaint against the 1<sup>st</sup> Respondent in the Political Parties Disputes Tribunal (PPDT) being **Complaint No. 279 of 2017 (Samuel Kalii Kiminza -v- Jubilee Party and Rachel Nyamai)** after he realized that the 1<sup>st</sup> Respondent had been given a direct nomination certificate by Jubilee Party. That the PPDT upheld the complaint and made a

declaration that the direct nomination of the 1<sup>st</sup> Respondent was null and void. That the 1<sup>st</sup> Respondent was aggrieved by the PPDT decision and lodged an appeal before the High Court being **Election Appeal No. 58 of 2017 (Hon. Rachel Nyamai -v- Jubilee Party of Kenya and Hon. Samuel Kalii Kiminza)**. That the High Court on 22nd May 2017 reversed the findings of PPDT holding that the Tribunal lacked jurisdiction to hear the matter. Mr. Kiminza being dissatisfied with the High Court decision moved to the Court of Appeal in **Civil Appeal No. 157 of 2017 (Hon. Samuel Kalii Kiminza -v- Jubilee Party and Rachel Nyamai)**. That the Court of Appeal on 16th June 2017 set aside the High Court order and directed the Jubilee Party to conduct fresh nominations for Member of Parliament for Kitui South Constituency within the next 48 hours.

12. The gravamen in this appeal is the Appellant's contestation that no fresh nominations was conducted by the Jubilee party as ordered by the Court of Appeal. On the other hand, the 1<sup>st</sup> Respondent contends that fresh nomination was conducted as ordered by the Court of Appeal. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that a Certificate of Nomination from the Jubilee Party was submitted to I.E.B.C. certifying that the 1<sup>st</sup> Respondent was duly nominated by the Party.

13. On its part, the trial court held that it had no jurisdiction to determine the nomination dispute because it had not been demonstrated that the mechanisms laid down in law as provided by the Constitution and Statutes were exhausted.

14. The Appellant submitted that there was no dispute that Mr. Samuel Kalii Kiminza had lodged a complaint that the 1<sup>st</sup> respondent was not validly nominated; that the dispute was taken before the PPDT, the High Court and Court of Appeal. It is the appellant's case that there was non-compliance with the orders of the Court of Appeal and hence the clearance of the 1st respondent by the 2nd and 3rd respondents to contest the election was null and void. It is the Appellant's case that all nomination dispute resolution mechanisms as provided by law were exhausted and the trial court erred in finding that procedures for nomination dispute resolution was not exhausted. That the pre-election nomination dispute mechanism was exhausted through the PPDT, the High Court and the Court of Appeal. The Appellant submitted that although he was not a member of the Jubilee Party, he had *locus standi* to challenge the nomination of the 1st respondent as voter.

15. The Appellant concluded by urging us to find that had the trial court determined the pre-election nomination dispute, it would be apparent that the 1<sup>st</sup> Respondent was not eligible to contest and be a candidate in the 8<sup>th</sup> August 2017 elections and accordingly, the 1<sup>st</sup> Respondent was not validly elected as the Member of National Assembly for Kitui South Constituency.

16. The 1<sup>st</sup> Respondent opposed the appeal and urged that the trial court did not err in holding that it did not have jurisdiction to determine pre-election party nomination disputes.

17. Learned Counsel Mr. Nyamu, for the 1<sup>st</sup> Respondent, submitted that upon the Appellant abandoning ground 3 in the Memorandum of Appeal, and with the abandonment of all issues relating to electoral malpractices, the only issue remaining in this appeal is whether fresh nominations were conducted by the Jubilee Party. Juxtaposed to this issue is whether the Order made by the Court of Appeal in **Civil Appeal No. 157 of 2017** was complied with.

18. The 1<sup>st</sup> Respondent submitted that fresh nominations were conducted by the Jubilee Party and the Orders of the Court of Appeal were complied with. It was submitted that the Appellant during his cross-examination referred the trial court to Minutes of Jubilee Party where it is stated that the nominations were done in the form of interviews and that Mr. Kiminza was one of the attendees. We were also referred to page 243 of the Record titled "Minutes of National Election Board Meeting for Nomination of Member of National Assembly for Kitui South Constituency pursuant to a **Civil No. 303 of 2017** of the Court of Appeal issued on 16th June 2017 between Hon. Rachel Nyamai and Hon. Samuel Kiminza held on Saturday 17th June at 11.30 Hrs in Jubilee Party Headquarters, Pangani."

19. The Minutes show that Hon. Samuel Kiminza and Hon. Rachel Nyamai were interviewed and the conclusion was that "Hon. Rachel Nyamai was the winner." The resolutions passed at the Jubilee meeting have never been challenged in any forum, neither Mr. Kiminza, the Appellant nor any other person has challenged the validity and lawfulness of the resolution declaring the 1<sup>st</sup> Respondent as the duly nominated candidate to vie for the seat of Kitui South Member of National Assembly.

20. Pursuant to the Minutes of the Jubilee National Election Board, a Nomination Certificate was issued in the name of Rachel Nyamai as the Jubilee candidate. It is this Nomination Certificate that was submitted by the 1<sup>st</sup> Respondent to IEBC which cleared her to contest the election.

21. On the issue whether the Jubilee Party conducted nomination as pursuant to **Article 99 (1) (c) of the Constitution**, it was submitted that 1<sup>st</sup> Respondent was nominated pursuant to the Constitution of Jubilee Party. That after the 1<sup>st</sup> Respondent was issued with the Nomination Certificate, no complaint by Mr. Kiminza or any other person was lodged with the Jubilee Party or PPDT or in any other competent forum. That as a matter of law, nomination disputes are time bound under **Section 74 (3) of the Elections Act** and such disputes must be determined before the elections.

22. It was submitted that **Article 88 (4)** of the Constitution, **Section 74 (1) and (3)** of the **Elections Act and Section 40 (1) (f)** of the Political Parties Act reserved nomination disputes to be within the jurisdiction of Political Parties Tribunal and IEBC. To this extent, it was submitted that an election court does not have jurisdiction to determine pre-election nomination disputes. That until a party exhausts all mechanisms provided for by statute, an election court cannot invoke its inherent original unlimited jurisdiction to hear and determine nomination disputes. Counsel cited the case of **Richard Kalembe Ndile & Another -v- Patrick Musimba Mweu & 2 others [2013] eKLR** to support his submissions.

23. Both parties cite **Article 88 (4) of the Constitution and Section 74 (3) of the Elections Act. Article 88 (4)** of the Constitution provides:

**“(4) The Commission 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 particular for:**

**(a) .....**

**(b) .....**

**(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;”**

**Section 74 (3)** of the **Elections Act** provides: -

**“74 (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.”**

24. It was further submitted that the Certificate of Nomination issued to the 1<sup>st</sup> Respondent could only be challenged if the Jubilee Party were enjoined in the election petition at the High Court. Since the Jubilee Party was never enjoined in the Petition, it would be a violation of the rule of law to condemn a party who issued the Nomination Certificate without a hearing.

25. In concluding submission on the nomination issue, the 1<sup>st</sup> Respondent urged us to note that the conduct of the election held on 8<sup>th</sup> August 2017 from balloting to the declaration of results has not been faulted. The conduct of the **election itself and the declared results** are not disputed. What is in issue and contested in this appeal is a pre-election nomination dispute

26. Ms. Mwandumbo for the 1<sup>st</sup> Respondent submitted that all the authorities cited by the Appellant support the Respondent’s case. That the cases show that an election court has no business to interfere with nomination process which is under the jurisdiction of the IEBC.

27. Learned counsel Mr. Ogotu appearing with Ms. Mwandumbo and Mr. Nyamu for the 1<sup>st</sup> Respondent made submissions on the Cross-Appeal. He urged this Court to interfere with the discretion of the trial court which capped costs at Ksh. 1,000,000/= and enhance it to Ksh. 10,000,000/=. Counsel recognized that costs are awarded at the discretion of the trial court but such discretion should be exercised judiciously. He submitted that the 1<sup>st</sup> Respondent retained four (4) counsel to research on, prepare and defend the Petition before the trial court; that the four counsel had to travel from Nairobi to Kitui and camp there for two days; that the time taken to study the petition and prepare to defend the same was enormous. That these factors were not considered by the trial court when it capped costs to a mere Ksh. 1,000,000/=. Learned counsel Mr. Nyamu on his part urged us to cap the costs in favor of the 1<sup>st</sup> Respondent at Ksh. 2,500,000/=.

28. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s through learned counsel Mr. Ochieng Opiyo opposed the appeal. On Cross-Appeal, counsel adopted submissions by the 1<sup>st</sup> Respondent. On the main appeal, he submitted that the trial court did not err in finding that the court had no jurisdiction to determine pre-election nomination disputes. That nomination disputes must be settled before the election; that once an election has been conducted, this extinguishes the jurisdiction to determine nomination disputes. Counsel cited **Section 74 (3)** of the Elections Act. It was further submitted that the jurisdiction of the High Court under **Article 88 (4)** of the Constitution is of supervisory nature and not as an election court. That if at all there was non-compliance with the Order of the Court of Appeal that directed fresh nominations to be done, the remedy for non-compliance is contempt of court proceedings and not nullification of an election whose results are not being challenged.

29. We have considered the Memorandum of Appeal, the written submissions by parties and authorities cited and filed by the Parties. We remind ourselves that **Section 85 A of the Election Act** restricts the jurisdiction of this Court to matters of law. We note that the Appellant abandoned ground 3 in the Memo of Appeal and abandoned all contestations on electoral malpractices. We are satisfied that the remaining ground, whether or not the court below had jurisdiction to entertain the dispute, is a matter of law.

30. There are two critical issues for determination in this appeal and cross-appeal, namely: (i) Did the trial court err in law in finding that the court had no jurisdiction to hear and determine the pre-election nomination dispute. (ii) Did the trial court err in exercising its discretion to cap costs at Ksh. 1,000,000/=?

31. **In the Matter of Advisory Opinions of the Court under Article 163 of the Constitution (Constitutional Application No. 2 of 2011 at para. 30)**, the Supreme Court stated:

**“...a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”**

32. In **Samuel Kamau Macharia & Another -v- Kenya commercial Bank & 2 Others**, Application No. 2 of 2011 [2012] eKLR, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:

**“(68) 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.”**

33. The jurisdictional question in this appeal invites us to consider and review case law as to whether an election court can hear and determine a pre-election nomination disputes. In **Karanja Kabage -v- Joseph Kariambegu Nganga & 2 Others**, Election Petition No. 12 of 2013; (2013) eKLR, the High Court observed that “an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner...”

34. In **John Harun Mwau & 2 others -v- IEBC & 2 others**, Consolidated Petitions No. 2 & 4 of 2017, the Supreme Court observed at paragraph 231 of its judgment that nomination process is deeply rooted in the Constitution, which recognizes that an electoral contest must be preceded by the nomination of candidates to vie for elective positions.

35. In **Thande -v- Montgomery (1970) EA 341**, the East African Court of Appeal held that preliminary elections such as nominations to stand for elections was part of the election process and as such, could be challenged after the election by way of an election petition. In **Mwihia & another -v- Ayah & Another [2008] 1 KLR (EP) 450, 456-458** 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.

36. In **Kipkalya Kiprono Kones -vs- The Republic & Another Ex-parte Kimani Wanyoike & 4 Others [2006] eKLR** it was held that an election petition was the only valid means of challenging an election and the court would only be seized with the Petition once the election results have been declared.

37. In **Moi -v- Mwau, [2008] 2 KLR 90** it was held that nomination to stand for presidential election is not only the initial stage, but an integral part of the election process. In this case, after the 1997 General Elections, the Petitioner Hon. Harun Mwau lodged a petition challenging the validity of the 1997 presidential elections. The main ground in the 1997 petition was that the initial steps of the election process, namely the nomination of the then incumbent President Daniel arap Moi as a presidential candidate, had been faulty and thus making the election void. The Court of Appeal expressed that nomination of presidential candidates is an issue of substance provided for in the Constitution that can affect the validity of a presidential election. The Court observed that nomination of a candidate is an issue of substance that can properly be raised and urged in an election petition.

38. In **Wamboko -v- Kibunguchi & another, (2008) 2 KLR 477**, 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. In **Luka Lubwayo & another -v- Gerald Otieno Kajwang & another 2013 eKLR**, it was expressed that the Constitution seems to widen the scope of the court in a petition to determine whether a person has been validly elected as a member of Parliament and the question of validity may encompass the clearance to run.

39. In **Hon. Mohamed Abdi Mohamud -v- Ahmed Abdullahi Mohamad & 3 others**, Nairobi Election Petition Appeal No. 2 of 2018, the Court of Appeal expressed:

**“We are fully persuaded that an election court has jurisdiction to enquire into a question as to the qualification of a candidate which goes to his eligibility to vie.... where the matter has not been dealt with finality by any other body constitutionally or statutorily mandated to do so.”**

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

....

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

40. Comparatively, in **Abdul Baugra Nakendo -v- Patrick Mwendha**, Election Petition Appeal No. 9 of 2007, the Uganda Supreme Court held that the High Court had jurisdiction to determine whether or not a person had the qualifications requisite for election as a member of Parliament – proof that a candidate is not qualified goes to the very root of the electoral process and the subsequent election.

41. Prior to the 2010 constitution, the High Court was the only organ with jurisdiction to deal with electoral nomination disputes.

Jurisprudence before 2010 confirms that an election court had jurisdiction to deal with nomination disputes. After the 2010 Constitution other organs have specifically been vested with jurisdiction to consider and determine nomination disputes. **Article 88 (4) (e)** vests jurisdiction on the IEBC to settle disputes relating to or arising from nominations. The Political Parties Disputes Tribunal (PPDT) also has a statutory mandate to determine nomination disputes.

42. In contrast to the pre-2010 decisions, there are dicta from other cases which state that an election court has no jurisdiction to hear and determine pre-election nomination disputes. Both **Article 88(4)(e)** of the Constitution and section **74(1)** of the Elections Act provide that:

**“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” are the responsibility of the Commission”**

43. In **Republic -vs- The Independent Electoral and Boundaries Commission Exparte Charles Ondari Chebet (Nakuru High Court Judicial Review Application No. 3 of 2013)**, it was held that:-

**“where there is clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes this court's jurisdiction is precluded. This court's jurisdiction would only arise after the due exercise by the mandated bodies, the Returning Officer and the Commission of their statutory mandate.”**

44. In both **Republic -v- The National Alliance Party of Kenya and Another Ex-Parte Dr. Billy Elias Nyonge [2012] eKLR** and **Diana Kethi Kilonzo and Another -v- IEBC and Others [2013] eKLR** the High Court discussed the meaning to be attached to **Article 88 (4) (e)** and **section 74 (1)** of the Elections Act and concluded that it is only the Commission that has exclusive mandate to resolve any dispute in relation to the electoral nomination exercise; that it is only after that IEBC mechanism has been exhausted that a party may go to the High Court to challenge the process; and such challenge would be through invoking the supervisory jurisdiction of the Court under **Article 165(6)** of the Constitution.

45. In **Jared Odoyo Okello -v- Independent Electoral & Boundaries Commission (IEBC) & 3 others [2013] eKLR**, the trial court held as follows:

**“In the instant case, the Commission's Dispute Resolution Committee heard the petitioner's challenge and dismissed it. The Committee was established under section 109 of the Act and the Rules of Procedure of Settlement of Disputes made thereunder and published vide Legal Notice No.139 of 3rd December 2012. The petitioner did not move to the High Court to challenge the determination by the Committee. This court is an election court which is not sitting to supervise the decision of the Committee. It is sitting to determine the validity of the election that was conducted on 4/3/13. The petitioner lost the opportunity to challenge the decision and cannot be heard to raise the issue here. In short, he cannot contest the validity of the nomination in this petition.”**

46. In **Isaiah Gichu Ndirangu & 2 others -v- Independent Electoral and Boundaries Commission & 4 others [2016] eKLR**, the petition revolved around the legality or otherwise of the nomination made in regard to the 3<sup>rd</sup> Respondent as member of the Nandi County Assembly. The Petitioners challenged the nomination process alleging breaches of the Constitution and various electoral laws. The Respondents maintained that an election court lacked jurisdiction to entertain the matter owing to the availability of the IEBC Disputes Resolution Committee and the Political Parties Disputes Tribunal. They cited decisions in **Dr. Billy Elias Nyonje -vs- The National Alliance Party of Kenya and 2 Others, Judicial Review No 61 of 2013**; **Anthony Salau and Another -vs- Independent Electoral and Boundaries Commission and 2 Others**; and **Republic -v- Independent Electoral and Boundaries Commission and Another, Judicial Review No 223 of 2013** for that proposition. The trial court in **Isaiah Gichu Ndirangu & 2 others** (supra) held that an election court is not the appropriate forum for addressing nomination disputes.

47. In the case of **International Centre for Policy and Conflict & 5 Others -v-Attorney General and 5 others (2013) eKLR** the court stated that:

**“Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.”**

48. In the case of **Francis Gitau Parsimei & 2 Others -vs- National Alliance Party & 4 Others (2012) eKLR** Majanja, J. observed thus:

**“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 it has been demonstrated that the process has failed.”**

49. Judicial decisions illustrate dichotomy in case law on the question whether an election court can hear and determine a pre-election

nomination dispute. There are authorities, as we have demonstrated, that hold an election court is not the proper forum to consider pre-election nomination disputes and there are judicial authorities to the contrary.

50. With the foregoing in mind, we reiterate that the gravamen in this appeal is whether the trial judge erred in holding that she did not have jurisdiction to hear and determine a pre-election nomination dispute.

51. In **Moses Mwicigi & Others -v- the Independent Electoral & Boundaries Commission**, Sup. Ct. Petition No. 1 of 2015, the Supreme Court expressed at paragraphs 106, 107 and 110 of its judgment that:

**“It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts.”**

**“It follows that only an Election Court had the powers to disturb the status quo. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the Elections Act.”**

52. Upfront, we wish to point out that the jurisdiction of the High Court in Electoral Disputes Resolution is a special jurisdiction conferred by the Constitution and the Elections Act. This special jurisdiction should not be confused with the High Court's unlimited jurisdiction in civil and criminal matters or the High Court's supervisory jurisdiction over inferior bodies and tribunals. This position was affirmed by the Supreme Court at Paragraphs 82 of its judgment in **Lemanken Aramat -v- Harun Meitamei Lempaka & 2 others** [2014] eKLR where it was stated:

**"[82] The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3) (a) of the Constitution, is unlimited. In addition, the High Court has a special jurisdiction in electoral matters, conferred by the Constitution, and given effect under the Elections Act: this is the jurisdiction to determine any question as to whether a person has been validly elected as a Member of Parliament (Article 105(1) (a) of the Constitution). This jurisdiction is activated upon a declaration by the authorized electoral body (IEBC) that a particular person has been returned as Member of Parliament, when there is a challenge to that electoral declaration (Article 87(2) of the Constitution).**

**84] The very basis of the High Court's jurisdiction in respect of Parliamentary-election disputes, lies in Articles 87(2) and 105(1)(a) of the Constitution..."**

53. Further, in **Frederick Otieno Outa -v- Jared Odoyo Okello & 4 others** [2014] eKLR, the Supreme Court expressed:

**“[63] Similar to Article 87(1) is Article 105 (3), which confers upon Parliament a mandate to enact separate and special legislation giving it full effect. As noted above, Article 105 (1) makes the High Court the first-instance forum for resolving electoral disputes, where any challenge to the election of a Member of Parliament should be directed. Article 105(2) prescribes the timeline within which such a dispute must be resolved. By Article 105(3) the Constitution, Parliament was mandated to design and enact a special legislative mechanism, to enable the realization of two objects: the judicial duty of the High Court to hear and determine causes of action in electoral contests, in the first instance, and, where required, provide an avenue of appeal to the Court of Appeal; and secondly, the specification of jurisdiction and timelines.”**

54. Bearing in mind the foregoing, whether or not a candidate has been nominated is a question of fact. Whether the nomination itself and the process leading to the nomination is valid is a question of law. Equally whether a court has jurisdiction in any matter is a matter of law. The Record in the instant appeal shows that a Certificate of Nomination was issued to the 1st Respondent by Jubilee Party. The validity of this Certificate has never been challenged before the Jubilee Party National Election Board or the Political Parties Dispute Tribunal or the High Court or any other competent forum. Further, the Jubilee Party that issued the Nomination has never been enjoined in any proceedings where the validity of the Certificate has been in issue. This is not to say that there can be no remedy for non-joinder of a political party. It would be improper to jump ship and come before the Court of Appeal to determine the validity of the Nomination Certificate issued to the 1st Respondent when the contestation involves issues of fact outside the jurisdiction of this Court. To this extent, we affirm the principle that where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.

55. We bear in mind that an election court is a court with special jurisdiction and availability of alternative remedies and procedures under general law should not be a bar to remedies and procedures under the electoral law. Where the Constitution provides for two or three methods of resolving disputes none can exclude the other. In such cases, the decision of the forum that has constitutional finality in resolving the dispute and cause of action prevails. In electoral disputes, it is the electoral law that applies and any electoral dispute must be resolved by way of an election petition and not through judicial review process.

56. Notwithstanding the foregoing, we are alive to dicta which state 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 -v- 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 -v- 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.

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

58. In our view, the provisions of **Article 88 (4) (e)** of the Constitution and **Section 74 (1)** of the Constitution are not clauses that oust the jurisdiction of an election court. **Article 88 (4) (e)** confers jurisdiction of the Electoral Commission in settling of nomination disputes. The said Article does not confer jurisdiction on the Commission to hear election petitions. The Article reserves the jurisdiction of an election court to determine election petitions. A nomination dispute that goes to the root of the electoral process, or one that determines qualification and eligibility of a candidate to vie, is an issue of substance that goes to the root of the election, and an election court has jurisdiction to hear and determine the dispute.

59. In this regard, we are persuaded by dicta from the case of Jared Mariga Akoro & another – v- Richard Kwach & 5 others (2007) eKLR where Khamoni, J. stated:

**“In order for a case emanating from a dispute in selection or nomination among members of a political party or between such a member and officials of the party to be in a court of law other than an election court, that suit has to be instituted, prosecuted and determined before the Electoral Commission of Kenya sets the process of the anticipated Presidential and Parliamentary elections in motion”**

60. In the instant case, we note that the dispute relating to nomination of the Jubilee candidate for Kitui South Constituency had been subject of determination by the PPDT, the High Court and Court of Appeal. These are competent constitutional and statutory organs with jurisdiction to handle the nomination disputes. The decisions of each of these bodies initiated legal and constitutional processes that led not only to the nomination of the 1st Respondent as Jubilee Party candidate for the seat of Kitui South Constituency, but also led to the IEBC clearing the 1st Respondent to vie for the said seat. This vital constitutional process has never been challenged.

61. In the instant case, following the clearance of the 1<sup>st</sup> Respondent by IEBC to vie and contest the seat of Kitui South member of National Assembly, several constitutional processes have been concluded, and others ensued. For example, the 1st respondent was duly gazetted as the candidate for Jubilee Party; the general elections were held on 8th August 2017; the 1st respondent was gazetted as the duly elected member of the National Assembly for Kitui South constituency. All these are concluded constitutional processes.

62. With this background in mind, we note that the Supreme Court in Chris Munga N. Bichage -v- Richard Nyagaka Tong’i & 2 Others Sup. Ct. Petition No. 17 of 2014 (Bichage Case) observed thus (at paragraph at 53):

**“With the green light from the Court of Appeal, the IEBC went ahead and organized for a by-election, in accordance with its constitutional mandate. Arising from that by-election, the 1<sup>st</sup> respondent was declared and sworn in as the Member of the National Assembly for Nyaribari Chache Constituency.”**

63. Further, the Supreme court in IEBC -v- Jane Cheperenger & 2 others, SC Petition No. 5 of 2016, expressed that:

**“[40] Previously before that, in the Mary Wambui Munene v. Peter Gichuki King’ara & 2 Others Sup. Ct. Petition No. 7 of 2014; [2014] eKLR (Mary Wambui Case), we had envisaged a situation where, as a result of Court’s directions, some constitutional process may have ensued making it difficult to revert to the original process. Particularly, at paragraph 90, we observed that:**

**“We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action....”**

**[41] Consequently, in determining the remedies to issue in the Bichage case, we applied the principles derived from Mary Wambui and held that (paragraph 55):**

“ We would affirm the exceptional ratio expressed in the *Mary Wambui*, case and hold that a constitutional process had been concluded, followed by another, in the form of the by-election held on 30<sup>th</sup> December, 2013; and this Court is disinclined, in the circumstances, to make any Order which would invalidate the subsequent electoral process.”

64. The nomination of the 1st Respondent by the Jubilee Party and her subsequent clearance by IEBC to vie for the election initiated and concluded a constitutional process leading to the conduct of the elections held on 8<sup>th</sup> August 2017. Taking cue and guided by the Supreme Court dicta, it is our position that in electoral disputes, parties cannot reopen concluded causes of action.

65. In our final determination, we are persuaded and guided by the decisions of the High Court, Court of Appeal and the Ruling of the Supreme Court all delivered in *Mable Muruli -v-Wycliffe Ambetsa Oparanya & 3 others* [2016] eKLR. The case is approximately in all fours with the facts of this case. The Supreme Court in *extenso* summarized the facts in *Mable Muruli Case* as follows:

“[2] The appellant intended to vie for the position of Governor of Kakamega County. She presented her nomination papers to the returning officer for that County, but these were rejected. She appealed to the Independent Electoral and Boundaries Commission (IEBC) Tribunal, but her appeal was dismissed. She filed a petition, *Mable Muruli v. Independent Electoral & Boundaries Commission & Another*, Nairobi High Court Petition No. 93 of 2013, seeking: *a declaration that she was a degree-holder within the meaning of Section 22 (2) of the Election Act, 2012, entitled to vie for the position of County Governor; a mandatory injunction compelling the Commission to accept her nomination papers and issue her with a clearance certificate to contest for the seat in question; a mandatory injunction compelling the Commission to include her name in the list of candidates and ballot papers, as an independent candidate for the gubernatorial seat.*

[3] In a Ruling delivered on 13<sup>th</sup> February, 2013, *Ogola J* ordered that the appellant, who was qualified for candidature, be included on the ballot paper. However, the 4<sup>th</sup> respondent failed to take action upon the Court’s directive. The appellant instituted contempt proceedings; and the 4<sup>th</sup> respondent for its part, filed a Notice of Motion asking the Court to review its Ruling dated 13<sup>th</sup> February, 2013, on the ground that the Court had issued Orders without full facts. Before the two applications could be heard, both parties entered into a consent Judgment, on 20<sup>th</sup> February, 2013, to this effect: *the petition be marked as settled; right of the appellant under Section 75 of the Elections Act reserved; appellant be paid costs; application for leave to cite officers of the IEBC for contempt of Court, be marked as spent; application by the IEBC for review of the said Judgment, also be marked as spent.*

[4] The appellant, however, did not participate in the elections as a candidate. The elections were completed, and the results for the Kakamega gubernatorial seat declared on 6<sup>th</sup> March, 2013. The appellant, who was dissatisfied with the election outcome, lodged an Election Petition, *Mable Muruli v. Hon. Wycliffe Ambetsa Oparanya & 3 Others*, Pet. No.5 of 2013 at the High Court in Kakamega, on 8th April, 2013.

[5] She sought a declaration that: *her fundamental rights and freedoms, as enshrined in the Constitution, were violated and compromised by the 3rd and 4th respondents; the election of 1<sup>st</sup> and 2<sup>nd</sup> respondents as a Governor and Deputy Governor be declared null and void, and fresh elections be ordered and held in Kakamega County; a determination be made to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not validly elected, due to failure on the part of the 3<sup>rd</sup> and 4<sup>th</sup> respondents to hold free, fair and credible nominations on 31<sup>st</sup> January, 2013; the 3rd and 4th respondents be condemned to pay costs of this petition, and other incidental costs.*

[6] *Chitembwe J*, on 13<sup>th</sup> September, 2013 dismissed the petition, and found that the appellant had not provided sufficient evidence to warrant the nullification of the election. He determined that the election was free and fair.

*(b) Proceedings in the Court of Appeal*

[7] Dissatisfied with the High Court’s decision, the appellant sought redress in the Court of Appeal, which considered 11 separate grounds urged by the appellant....

[8] The Appellate Court, in its decision of 14<sup>th</sup> March, 2014, observed that the appellant had voluntarily settled the petition, with Judgement being pronounced in her favour in the High Court. Thus, in the perception of that Court, this was a typical case of the appellant craving for a second bite at the cherry. The Appellate Court determined that the doctrines of *estoppel* and *res judicata* should apply in this case; the appellant should not claim that there had been a contravention of her constitutional rights. The Appellate Court found the appellant’s complaints regarding bribery to be groundless; and it held the appeal to be devoid of merit, mulcting the appellant in costs.

*(c) Proceedings in the Supreme Court*

[9] Aggrieved by the said Judgment, the appellant, on 22<sup>nd</sup> April, 2014 filed a petition of appeal, founded upon Article 163 (4) (a) of the Constitution, Section 15 of the Supreme Court Act, and Rules 9 and 33 of the Supreme Court Rules.”

66. The Supreme Court in its final orders stated that it lacked jurisdiction to entertain the appeal, as it was grounded on a High Court Petition filed contrary to the terms of **Article 87(2)** of the Constitution.

67. In the instant case, the nomination certificate issued to the 1<sup>st</sup> Respondent by the Jubilee Party was not challenged in any proceedings prior to the elections held on 8<sup>th</sup> August 2017. We are persuaded by the decision in **Jared Odoyo Okello -v- Independent Electoral & Boundaries Commission (IEBC) & 3 others [2013] eKLR**, where on a similar issue the trial court held that election court does not sit to supervise the decision of nomination dispute resolution bodies but to sit to determine validity of the elections. The High Court correctly held that if petitioner loses an opportunity to challenge the decision of a nominating body, such a petitioner cannot be heard to raise the issue in an election court. Further, in the instant case, whether or not fresh nomination was conducted is a question of fact outside the jurisdiction of this Court as an appellate court.

68. Of significance and pivotal to this appeal, the conduct of elections held on 8<sup>th</sup> August 2017 and the declared results thereof are neither challenged nor contested in this appeal. The appellant is not questioning the declaration that the 1<sup>st</sup> Respondent was the winner of the election for Kitui South Member of National Assembly. Since the declaration of results is not contested, we see no reason to interfere with the declared results that are not in dispute. It follows that this appeal has no merit.

69. On Cross-Appeal relating to costs, the Cross-Appellant correctly submitted that award of costs is a matter for the discretion of the trial court. In **Mbogo & Another -v- Shah, [1968] EA 93**, it was held that:

**“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”**

70. The 1<sup>st</sup> Respondent urged us to interfere with the discretion of the trial court in capping the costs at Ksh.1,000,000/= and enhance the sum of Ksh. 10,000,000/=. The 1<sup>st</sup> Respondent revised the figure and urged us to cap the costs at Ksh.2,500,000/=.

71. We have considered other cases where the High Court has capped costs. In **Ismail Suleman and Others -v- Returning Officer, Isiolo County and Others Meru EP No. 2 of 2011 (Unreported)** and in **Mohamed Ali Mursal V Saadia Mohamed & 2 others [2013] eKLR**, the amount was capped at Kshs. 2 million and Kshs. 1 million for each respondent respectively. Both cases involved the Gubernatorial elections which covers a more extensive area than a constituency. In **Rishad Hamid Ahmed Amana v IEBC and Others Malindi EP No. 6 of 2013 (Unreported)**, the maximum capped costs was Ksh.2.5 million.

72. In **Esposito Franco v Amason Kingi Jeffah & 2 Others [2014] eKLR** the court held that:

**“Although this observation is obiter, the new electoral dispute regime has introduced a mechanism for capping of costs in election petitions. This was certainly intended to keep costs at a manageable level so as not to limit access to justice by litigants of moderate incomes. In many petitions filed after the 2013 General Elections that went into full hearing, costs were capped by courts at between shs.1.5 to shs.2m.”**

73. In **Mable Muruli -v- Wycliffe Oparanya & 3 others [2013] eKLR**, costs were capped at Kshs.5 million shillings to be shared between the petitioner, 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent. Those awarded to the 1<sup>st</sup> respondent were capped at Kshs.2.8 million while those to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly capped at Kshs.2.2 million.

74. In **Ferdinand Ndungu Waititu -v- Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR** the court capped the total costs at Kshs.5 million, capping the costs payable to the 1<sup>st</sup> to 3<sup>rd</sup> respondents jointly at Kshs.2,500,000/= and to both the 4<sup>th</sup> and 5<sup>th</sup> respondents jointly at Kshs.2,500,000/=.

75. In **Jackson Ranguma -v- IEBC & others [2017]** the court awarded the 1<sup>st</sup> and 2<sup>nd</sup> respondents Kshs.2.5 million in costs while the 3<sup>rd</sup> respondent was awarded Kshs.2.5 million. In **Mercy Kirito Mutegi -v- Beatrice Nkatha Nyaga & 2 others [2013] eKLR**, the Court of Appeal capped the total costs at Kshs.2.6 million.

76. This Court in **Martha Wangari Karua -v- Independent Electoral & Boundaries Commission & 3 others [2018] eKLR**, capped costs for gubernatorial elections at Ksh. 2 million. We observe that this matter had not gone to full hearing on the merits.

77. In the instant appeal, we note that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file a cross-appeal on costs. Despite their oral submissions, failing to file a cross-appeal means that the capping of their costs at Kshs.1,000,000/= by the trial court has not been challenged. Accordingly, we affirm and uphold the trial court capping of costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents at Kshs.1,000,000/=.

78. Having examined comparative judicial decisions emanating from the 2013 and 2017 election petitions, it is our view that the capping of costs at Ksh. 1,000,000/= by the trial court for the 1<sup>st</sup> Respondent is on the lower side. We hereby interfere with the order for costs made by the trial court and order that the costs for the 1<sup>st</sup> Respondent at the High Court be and is hereby capped at Kshs. 2,500,000/=. We find that the Cross-Appeal has merit.

79. The final Orders of this Court are as follows:

- 1. This appeal has no merit and is hereby dismissed.**
- 2. The Cross-Appeal has merit. The High Court order on costs for the 1<sup>st</sup> Respondent be and is hereby set aside. It is hereby ordered that the Appellant shall pay costs to the 1<sup>st</sup> Respondent in the High Court capped at Ksh. 2,500,000/=.**
- 3. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cost capped at Ksh.1,000,000/= by the trial court be and is hereby upheld.**
- 4. Save as to the costs, the High Court judgment in Kitui Election Petition No. 2 of 2017 be and is hereby affirmed and upheld.**
- 5. The Appellant shall bear the costs in this appeal.**

Dated and delivered at Nairobi this 8<sup>th</sup> day of June, 2018

W. OUKO (P)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

**DEPUTY REGISTRAR**