



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: W. KARANJA, KOOME & OTIENO-ODEK, J.J.A)**

**CIVIL APPEAL NO. 26 OF 2018**

**BETWEEN**

**FEISAL SHAIB KHAN.....1<sup>st</sup> APPELLANT**

**WARDA ABDALLA MOHAMED.....2<sup>nd</sup> APPELLANT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION (IEBC).....1<sup>st</sup> RESPONDENT**

**KENYA AFRICAN NATIONAL UNION (KANU).....2<sup>nd</sup> RESPONDENT**

**ZULEKHA MOHAMED MJAHL.....3<sup>rd</sup> RESPONDENT**

**JANE WANJIKU NDUNG'U.....4<sup>th</sup> RESPONDENT**

**SPEAKER OF THE COUNTY ASSEMBLY OF LAMU.....5<sup>th</sup> RESPONDENT**

**THE CLERK TO THE LAMU COUNTY ASSEMBLY.....6<sup>th</sup> RESPONDENT**

*(Being an appeal from the Ruling and Orders of the High Court*

*at Garsen (Ongeri, J.) dated 30<sup>th</sup> November 2017*

in

Constitutional Petition No. 2 of 2017)

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**JUDGMENT OF THE COURT**

1. The legal issue in this appeal and all germane facts relate to nomination of party candidates to membership of the Lamu County Assembly. The dispute relates to selection, identification and nomination of eligible nominees under Political Party List submitted to the Independent Electoral and Boundaries Commission (IEBC).

2. The 2<sup>nd</sup> respondent, the *Kenya African National Union (KANU)* is a political party that fielded candidates for nomination and election during the 2017 general elections. Each political party taking part in the general election is expected and required to submit a Party Nomination List to the 1<sup>st</sup> respondent **IEBC** prior to the elections. The 2<sup>nd</sup> respondent, submitted a Party List to the 1<sup>st</sup> respondent giving names of persons eligible for nomination to the Lamu County Assembly.

3. The 1<sup>st</sup> and 2<sup>nd</sup> appellants (*Feisal Shaib Khan* and *Warda Abdalla Mohamed*) had their names included in the Party List submitted by

KANU to IEBC. Upon submission of the Party List, the appellants found out that their names had not been gazetted by the 1<sup>st</sup> respondent (IEBC) as per the party list submitted by KANU; instead their names had been substituted with the names of the 3<sup>rd</sup> and 4<sup>th</sup> respondents (**Zulekha Mohamed Mjahai** and **Jane Wanjiku Ndung'u**).

4. Aggrieved by the substitution of their names, the appellants lodged a complaint before the **Political Parties Dispute Tribunal (PPDT)** at Milimani in Nairobi against the 2<sup>nd</sup> respondent (**KANU**). The complaints were **Nos. 515 of 2017** and **517 of 2017** respectively. Before the Tribunal, the parties entered into and recorded a consent order in which the 2<sup>nd</sup> respondent was to include the names of the appellants as nominees of **KANU** to the Lamu County Assembly. The said consent was forwarded to **IEBC** for implementation. The appellants contend that despite the consent order, IEBC published a new Gazette Notice on 6<sup>th</sup> September 2017 being Vol. CXIX – No. 131 in which Lamu County was omitted. The practical consequence was that the 3<sup>rd</sup> and 4<sup>th</sup> respondents remained gazetted as Members of the Lamu County Assembly.

5. Further aggrieved, the appellants filed a constitutional petition against the respondents in this matter before the High Court at Garsen being **Constitutional Petition No. 2 of 2017**. One of the prayers in the petition was a declaration that the inclusion and gazetting of the names of the 3<sup>rd</sup> and 4<sup>th</sup> respondents as nominees of KANU to the Lamu County Assembly was illegal, unconstitutional, null and void. The appellants also sought order of mandamus to compel the 1<sup>st</sup> respondent (**IEBC**) to de-gazette the names of the 3<sup>rd</sup> and 4<sup>th</sup> respondents in the special issue of the Kenya Gazette Vol. CIX No. 124 of 28<sup>th</sup> August, 2017 as members of the Lamu County Assembly. A further order prayed for sought to compel the 1<sup>st</sup> respondent to list and gazette the appellants as the bona fide nominees of **KANU** to the Lamu County Assembly. All these orders were sought in the constitutional petition filed before the High Court at Garsen.

6. Upon being served with the constitutional petition, the 1<sup>st</sup> respondent filed a notice of preliminary objection dated 27<sup>th</sup> October, 2017. The objection was to the effect that the appellants' petition was misconceived, incurably defective, incompetent, frivolous, vexatious and an abuse of the court process; that the High Court lacked jurisdiction to hear and determine the petition; that any question regarding the validity of the nomination and or election of the 3<sup>rd</sup> and 4<sup>th</sup> respondents to the County Assembly of Lamu could only be resolved by way of an Election Petition filed in accordance with **Articles 87, 105 (1) (b)** of the **Constitution** as read with **Sections 75 and 76** of the **Elections Act**.

7. The 3<sup>rd</sup> and 4<sup>th</sup> respondents also filed a notice of preliminary objection *to wit* that the trial court lacked jurisdiction to hear the petition in that the issues raised, and the prayers sought, were nomination disputes within the exclusive jurisdiction of the **IEBC** dispute resolution committee as provided for under **Articles 88 (4) (e)** of the **Constitution** and **Section 4** of the **IEBC Act** as read with **Section 74 (11)** of the **Elections Act**.

8. Upon hearing the parties and considering their written submissions, the trial court upheld the preliminary objection and delivered a ruling dated 30<sup>th</sup> November, 2018 striking out the appellants' constitutional petition with no order as to costs. The ruling is the subject of this appeal. In striking out the petition, the trial court expressed that it was guided by the Supreme Court decision in **Moses Mwigigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others** [2016] eKLR[117] where the apex Court pronounced that a Gazette notice shifts any issue as to the validity of nomination or election results to the Election court. The trial court held that it had no jurisdiction to hear and determine the dispute and the issues raised *vide* the constitutional petition.

9. Aggrieved, the appellants filed the instant appeal. In their memorandum of appeal, a total of twenty-five (25) grounds have been urged which can be compressed as follows *to wit* that:

**“(i) that the learned judge erred in law in allowing the preliminary objection;**

**(ii) there is no bar to going to a constitutional court;**

**(iii) the judge erred in failing to find that the issues raised were constitutional in nature and not an election petition;**

**(iv) the judge erred in failing to find that a constitutional petition under Articles 10, 22, and 23 of the Constitution cannot be struck out;**

**(v) that in striking out the petition, the trial court violated the constitutional rights of the appellants who were the true nominees of KANU.”**

10. At the hearing of this appeal, learned counsel **Mr. Mihya** holding brief for **Mr. Ali** represented the appellants. Learned counsel **Mr. Mwachia** holding brief for **Mr. Munyithia** appeared for the 1<sup>st</sup> respondent while learned counsel **Mr. Wetaba** appeared for the 3<sup>rd</sup> and 4<sup>th</sup> respondents. All counsel filed written submissions and list of authorities in the matter.

11. Counsel for the appellant reiterated that the main issue in this appeal is whether the trial court had jurisdiction to hear and determine a constitutional petition before it; that the trial court erred in finding it did not have jurisdiction because the dispute in the petition was not an election petition dispute but a constitutional petition grounded on violation of the appellants constitutional rights; that the core issue was violation of the consent order made before the **PPDT** and that the **PPDT** order was not complied with by the IEBC; that non-compliance with the consent order by KANU and IEBC amounted to an illegality and contempt of the Tribunal. To support the contention that the High Court had jurisdiction, counsel cited **Article 163** of the **Constitution** that vests upon the High court unlimited original jurisdiction in civil matters; it was submitted that in striking out the petition, the trial court denied the appellants a right to fair trial.

12. Mr. Mwachia for the 1<sup>st</sup> respondent submitted that the trial court did not err in upholding the preliminary objection and finding that it had no jurisdiction; that the **IEBC** followed the Party List submitted to it by **KANU**. Counsel cited and relied upon the cases of **Aden Noor**

**Ali vs. Independent Electoral and Boundaries Commission & Others (2017) eKLR** and the Supreme Court decision in *Moses Mwigigi & 14 Others* (supra).

13. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, Mr. Wetaba, associated himself with submissions made by counsel for the 1<sup>st</sup> respondent. He adopted the written submissions filed on record and urged us to find that the trial court did not have jurisdiction to hear and determine the petition filed before it. He urged that once a Party List has been submitted to the IEBC, it is valid for the term of Parliament; that a Party List once submitted to the IEBC may not be changed, amended or altered during the term of Parliament or County Assembly.

14. In *Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1*, it was stated as follows:

**“Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

15. We have considered the grounds of appeal, submissions by counsel and the authorities cited. **Section 35 of the Elections Act**, under the rubric “*nomination of party list members*” is relevant. It 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.”**

16. The fundamental question in this appeal is whether a constitutional petition or judicial review proceedings before the High court can be invoked to initiate an election related or party nomination dispute subsequent to gazettelement of nominated candidates. This question goes to the root of the jurisdictional competence of the High Court to hear and determine election or nomination disputes by way of judicial review or constitutional petition.

17. The Supreme Court in *Moses Mwigigi & 14 others* (supra) extensively expressed itself as follows in relation to the judicial review proceedings as a mechanism for challenging nominations to membership to the National or County Assembly after gazettelement by the IEBC. The Court expressed as follows:

**“[105] It is clear from the foregoing provisions that the allocation of nomination- seats by the IEBC is a *time bound process*, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting *from the list provided by the political party*. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettelement of the nominees’ names by the IEBC, as an integral part of the *election process*.”**

**[106] The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the *Joho Case*, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.** (Emphasis supplied)

**[107] 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. The *Gazette Notice* also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.** (Emphasis supplied)

**[115] The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the 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.”**

**[117] It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of *nomination*, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.**

**[119] 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.**”(Emphasis supplied)

18. We have also considered dicta in **Thande vs. Montgomery (1970) EA 341**, in which the East African Court of Appeal held that nominations to stand for elections is part of the election process and as such, can only be challenged after the election by way of an election petition. In **Mwihia & another vs. 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. 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.

19. Guided by the foregoing judicial decisions, this Court in **Kennedy Moki vs. Rachel Kaki Nyamai & 2 others [2018] eKLR**, expressed itself as follows:

**“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 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.”**

20. In the instant appeal, the issue at hand is whether the trial court had jurisdiction to hear and determine a nomination dispute relating to membership of the Lamu County Assembly. In our considered view, the High Court had no jurisdiction for the following reasons:

*(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 initiate electoral dispute resolution after gazettelement of nomination or election results.*

*(b) As regards membership to the County Assembly, jurisdiction to hear an election petition is vested upon the Magistrate’s Court and not the High Court. In the instant case, the petition filed by the appellants at the High Court was not an election petition before an election court presided over by a Magistrate duly gazetted by the Chief Justice.*

*(c) In addition, the prayers sought by the appellants in the Petition before the High Court was de-gazettelement of the 3<sup>rd</sup> and 4<sup>th</sup> respondents who had already been gazetted as Members of the Lamu County Assembly. The jurisdiction to deal with any such disputes after gazettelement lies with the Magistrate’s court which can only be moved by way of an election petition.*

21. In arriving at our decision that the trial court had no jurisdiction to hear the petition filed before it, we are cognizant of the decision by this Court in **Hamdia Taroi Sheikh Nuri vs. Faith Tumaini Kombe & 2 Others, Election Petition Appeal No. 27 of 2018** where it was held that this Court lacks jurisdiction to hear appeals relating to membership to the County Assembly. In holding that this Court has no jurisdiction, it was expressed that **“it would seem that election appeals by members of the County Assembly to this Court were neither contemplated nor permitted”**.

22. In our decision in the instant matter, we are guided and bound by the Supreme Court decision in **Moses Mwicigi & 14 others (supra)** where the Court stated that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’. Guided the judicial authorities cited and bound by the Supreme Court, we find that this appeal has no merit.

23. For reasons stated above, we are satisfied that the trial court did not err in upholding the Preliminary Objection. In view of the jurisdictional determination we have made in this appeal, we are satisfied that the other numerous grounds of appeal enumerated in the memorandum must *ipso facto* collapse. The appeal has no merit and we hereby dismiss it with costs.

**Dated and delivered at Mombasa this 8<sup>th</sup> day of November, 2018**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**