



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL NO. 37 OF 2014**

**BETWEEN**

**JALDESA TUKE DABELO ..... APPELLANT**

**AND**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**HASSAN GUYO SHANO ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Ruling and Order of the High Court of Kenya at Meru*

*(Makau, J.) dated 16<sup>th</sup> May, 2014*

**in**

**H.C Judicial Review 25 of 2014)**

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**JUDGMENT OF THE COURT**

1. The instant appeal raises a fundamental legal question: that is, whether an application for judicial review orders is an alternative procedure to be followed to unseat a gazetted Member of a County Assembly.
2. By a Chamber Summons application dated 5<sup>th</sup> September 2013, the appellant lodged a judicial review application before the High Court seeking an order of *certiorari* to bring up and quash the decision of the Independent Electoral and Boundaries Commission (IEBC) dated 16<sup>th</sup> August, 2013 which placed the 2<sup>nd</sup> respondent, Hassan Guyo Shano, as the nominee for marginalized persons to Isiolo County Assembly. The grounds in support of the application were, that the decision of the 1<sup>st</sup> respondent dated 16<sup>th</sup> August, 2013 was unreasonable, unfair and without basis; the 1<sup>st</sup> respondent did not consider the complaint and evidence tendered by the appellant before gazetting the 2<sup>nd</sup> respondent as the nominee for marginalized persons and as a Member of the Isiolo County Assembly; the 1<sup>st</sup> respondent did not find that the 2<sup>nd</sup> respondent was a Borana and therefore the 2<sup>nd</sup> respondent was not from a marginalized community in Isiolo. The 1<sup>st</sup>

- respondent depicted the appellant as a Somali and not a member of the minority Gabra community in Isiolo. Further, the 1<sup>st</sup> respondent failed to find that the 2<sup>nd</sup> respondent was from United Republican Party (URP) and not Orange Democratic Party (ODM).
3. When the Chamber Summons application came up for hearing, the 1<sup>st</sup> respondent lodged a notice of preliminary objection dated 14<sup>th</sup> November, 2013. The preliminary objection was to the effect that the appellant's application for judicial review was the wrong procedure to remove a gazetted member of a County Assembly; that the proper procedure for determination of the question of whether a person is a member of a County Assembly is by way of election petition and not judicial review. The facts and law in support of the notice of preliminary objection are paraphrased as follows:-
    - i. That the ex-part applicant seeks to have the decision of the 1<sup>st</sup> respondent gazetting the 2<sup>nd</sup> respondent as the marginalized nominee to the Isiolo County Assembly quashed by way of a judicial review application.
    - ii. That the 2<sup>nd</sup> respondent was gazetted as a nominee to the Isiolo County Assembly on 16<sup>th</sup> August, 2013 thereby becoming a member of the Isiolo County Assembly.
    - iii. That according to **Section 75 (1A)** of the **Elections Act 2011**, a question as to the membership to a County Assembly can only be presented to the Resident Magistrate Court designated by the Chief Justice by way of an Election Petition and not by way of Judicial Review.
    - iv. That where statute establishes a dispute resolution procedure, then that procedure must be strictly followed in resolving the dispute.
  4. The appellant in opposing the preliminary objection argued that the 1<sup>st</sup> respondent was exercising a quasi judicial function in its decision to gazette the 2<sup>nd</sup> respondent as the nominee for marginalized communities to the Isiolo County Assembly. Judicial review is a procedure available to challenge quasi-judicial decisions under the provisions of **Sections 8 & 9** of the **Law Reform Act**; the High Court has unlimited jurisdiction as well as a supervisory jurisdiction over a subordinate court and tribunals in their exercise of quasi-judicial powers. The appellant maintained that the IEBC in nominating the 2<sup>nd</sup> respondent acted pursuant to **Section 74 (1)(2)** of the **Elections Act** and was exercising its quasi-judicial powers; the IEBC was unreasonable in the exercise of its powers under **Section 74 (1) (2)** and the only remedy available was judicial review; the appellant exhausted all remedies available under **Article 88 (4) (e)** of the **Constitution**; that **Section 75 (1A)** of the **Elections Act** upon which the preliminary objection is founded deals with election but not nomination. The appellant was challenging the nomination of the 2<sup>nd</sup> respondent and not his election; that an election petition is the procedure to be followed when there is an election, it is not the procedure to challenge nomination.
  5. The learned Judge upon hearing the parties upheld the preliminary objection and dismissed the Chamber Summons application. In the ruling, the learned Judge stated as follows:

***“In the instant application, there is no dispute that IEBC heard the ex-parte applicant’s complaints and found that the law on nomination was followed as well as Section 34 (8) of the Elections Act. There is further no dispute that the 1<sup>st</sup> interested party was gazetted as a member of Isiolo County Assembly on 16<sup>th</sup> August 2013 by virtue of Article 177 (1) and (2) of the Constitution...That upon gazettment of members of the county Assembly they are deemed to be elected members of the county assemblies. See Rose Wairimu Kamau & 3 others – v- IEBC C.A No. 169 of 2013 where the Court of Appeal stated that***

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***“in reaching this conclusion, we are alive to the fact that once nominees to parliament and the county assemblies under Articles 97 (1c) and 177 (2) respectively have been gazetted, ... they are deemed elected members of parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Article 105 of the Constitution or Part VIII of the Elections Act as the case may be”.***

6. **Section 75 (1A)** of the *Elections Act* stipulates:

**“A question as to the validity of election of a member of County Assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”**

In the instant case, the learned Judge in upholding the preliminary objection considered the provisions of **Section 75 (1A)** of the *Elections Act* and observed that the section is couched in a mandatory manner and cannot be circumvented by an application for judicial review before the High Court; that the 2<sup>nd</sup> appellant having been gazetted is deemed to be duly elected member of the Isiolo County Assembly and his election can only be challenged as set out in **Section 75 (1A)** of the *Elections Act* before the Resident Magistrate’s Court designated by the Chief Justice and not by way of a judicial review application.

7. Aggrieved by the ruling upholding the preliminary objection, the appellant lodged this appeal citing five grounds as follows:

- ***The learned Judge erred in law in upholding the preliminary objection and consequently striking out the judicial review application when the said application raised substantive issues of law.***
- ***The learned Judge erred in law in striking out the judicial review application through a preliminary objection without considering the weighty substantive legal issues raised in the application.***
- ***The learned Judge erred in law in failing to properly exercise his discretion in accordance with Article 165 (6) of the Constitution in that he did not consider that the IEBC was exercising quasi-judicial function through a Tribunal known as the Dispute Resolution Committee.***
- ***The learned Judge erred in law in striking out the appellant’s judicial review application when it was clear from the proceedings and record that the appellant was not to blame.***
- ***The learned Judge erred in law in failing to administer justice without undue regard to procedural technicalities.***

8. At the hearing of this appeal, learned counsel, Mr. Wamache Amos represented the appellant while learned counsel, Ms Okimani appeared for the 1<sup>st</sup> appellant and Mr. B.G. Kariuki appeared for the 2<sup>nd</sup> respondent.

9. Counsel for the appellant reiterated the grounds of appeal stating that the appellant was condemned unheard; the issues raised in the application for judicial review have never been canvassed and determined on merit; it is trite law and a rule of natural justice that no party should be condemned unheard. He submitted that his client’s application deserves to be heard on merit; that under **Sections 8 & 9** of the *Law Reform Act*, the High Court had jurisdiction to hear and determine the judicial review application; the 1<sup>st</sup> respondent in gazetting the 2<sup>nd</sup> respondent as a Member of the Isiolo Country Assembly was exercising quasi-judicial powers which was subject to the supervisory jurisdiction of the High Court. Counsel for the appellant cited the cases of ***Republic – v- IEBC & 2 Others Nairobi JR No. 203 of 2013; Imelda Nafula Wanjala – v- IEBC Nairobi HC Petition No. 329 of 2013 and Kimani Muhoro – v- John Waiganjo & another Nyeri Civil Appeal No. 188 of 2010*** in support of the submissions.

10. Counsel for the 1<sup>st</sup> respondent in opposing the appeal, emphasized that it was not disputed that the 2<sup>nd</sup> respondent was gazetted as a Member of Isiolo County Assembly; the appellant’s application for judicial review sought an order of *certiorari* whose effect if granted would be to unseat the 2<sup>nd</sup> respondent as a Member of the Isiolo County Assembly. It was submitted that the **Constitution** and the **Elections Act** provide for a specific procedure and mechanism for determination of the question whether a person is a member of a County Assembly. Counsel submitted that two critical issues arise for determination in this appeal, the first is whether the appellant followed the proper

procedure for the determination of the issue of membership by the 2<sup>nd</sup> appellant to the Isiolo County Assembly; the second is whether the High Court is the proper forum for the determination of membership to County Assemblies. It was submitted for the 1<sup>st</sup> respondent that **Section 75 (1A)** of the **Elections Act** clearly stipulates that the proper forum to determine issues of membership to a County Assembly is the Resident Magistrate's Court. Further, counsel submitted that when statute provides for a clear procedure for the redress of any grievance, that procedure should be followed; that in the instant case, the **Elections Act** is clear that election disputes are resolved by way of Petition; that the procedure for judicial review as adopted by the appellant was erroneous and bad in law. Counsel cited the cases of **National Gender and Equality Commissions – v- IEBC (2013) eKLR; National Alliance Party & Another – v- Lydia Mathia (2013) eKLR; Francis Gitau Parsimei & 2 others – v- National Alliance Party & 4 Others (2012) eKLR and Bernard Samuel Kasinga – v- AG & 7 Others Constitutional Petition No. 402 of 2012.**

11. Counsel for the 2<sup>nd</sup> respondent concurred with and adopted the submissions made by counsel for the 1<sup>st</sup> respondent. He restated that once the 2<sup>nd</sup> appellant was gazetted he could only be removed by way of an election petition and not through judicial review.
12. We have considered the grounds of appeal and submissions by learned counsel in this matter. To determine whether the learned Judge erred in law in upholding the preliminary objection, two issues are pertinent in this appeal. First, whether the High Court has jurisdiction to hear and determine the question as to membership to the County Assemblies; second, whether a judicial review application is an alternative procedure that can be invoked to determine the question of membership to a County Assembly.
13. The issue of whether the High Court is the proper forum to consider and determine the question of membership to the County Assembly is a jurisdictional issue. **Section 75 (1A)** of the **Elections Act** stipulates that the question as to the validity of election of a member of County Assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice. The Supreme Court in the cases of **In Re The Matter of the Interim Independent Electoral Commission, S.C., Constitutional Application No. 2 of 2011; [2011] eKLR**, and in **Samuel Kamau Macharia & Another .v. Kenya Commercial Bank Limited & 2 Others, S.C. Application No. 2 of 2012; [2012] eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the **Constitution**, statute law, and judicial precedent. It was stated:

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Such 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 wording of legislation is clear and there is no ambiguity”.**

In the case of **Lillian 'S' [1989] KLR 1**, this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:

**“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

14. We are cognizant of the principle that upon gazettment of members of the County Assembly, they are deemed to be elected members of the County Assembly. Applying the foregoing dicta and principles of law to the instant case, **Section 75 (1A)** of the **Elections Act** expressly indicates that the jurisdiction to consider, hear and determine the question as to the validity of election of a member of County Assembly is vested with the Resident Magistrate's Court designated by the Chief Justice. The proper and original forum to determine the question of whether the 2<sup>nd</sup> respondent was validly nominated and gazetted as representative of the marginalized communities in Isiolo County Assembly is the Resident Magistrate's Court. The learned Judge did not err in interpreting and applying **Section 75 (1A)** of the **Elections Act**. We state that the High Court has no original jurisdiction to determine questions of membership to County Assemblies.
15. The appellant in his application for judicial review sought to invoke the supervisory jurisdiction of the High Court in election matters. We are of the considered view that the jurisdiction of the High

Court in electoral matters is a special jurisdiction governed by the **Constitution** and the **Elections Act**. The supervisory jurisdiction of the High Court is inapplicable to electoral matters for the reason that the procedure to follow is set out.

16. In the instant case, the 2<sup>nd</sup> respondent was gazetted as a member of the Isiolo County Assembly. We adopt and reiterate the decision of this Court in **Rose Wairimu Kamau & 3 others – v- IEBC C.A. No. 169 of 2013** where it was stated that any challenge to membership to the County Assembly has to be by way of election petition. The learned Judge did not err in striking out the appellant’s judicial review application as judicial review is not the statutory procedure for challenging membership to the County Assembly.
17. Finally, the appellant contends that he was condemned unheard; that the merits of his application have not been determined; that **Article 159** of the **Constitution** requires that justice should be delivered without undue regard to technicalities.
18. It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. (See **National Assembly, In the Matter of James Njenga Karume Civil Application No. Nai. 92 of 1962** . In the instant case, the **Elections Act** stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on **Article 159** of the **Constitution**. **Article 159** was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition.
19. The order of *certiorari* sought by the appellant sought to litigate the process in which the 2<sup>nd</sup> respondent was nominated and gazetted as a member of the Isiolo County Assembly. In essence, the judicial review application aimed at determining the question of membership of the 2<sup>nd</sup> respondent to the Isiolo County Assembly. A judicial review application cannot be allowed to circumvent the statutory procedure of instituting an election petition to determine the question of membership to a County Assembly; this strategy, we observe, constitutes a mischief that this Court should forestall to prevent a party from using an institutional detour to litigate an issue by seeking a remedy from the High Court in the first instance (which is a different and improper forum) rather than through the Resident Magistrate’s Court which is the designated forum under **Section 75 (1A)** of the **Elections Act**.
20. It is our considered view that the jurisdictional competence of a court and the statutory procedure for commencing a cause of action are aimed at facilitating and enabling a party to be heard. A litigant cannot ignore the jurisdictional competence of a court or the procedure for commencing a cause of action and then aver that he has not been heard. **Article 159** of the **Constitution** or the Overriding Objective principles are not blanket provisions that shelter a party who disregards the proper forum or jurisdictional competence of a court or fails to follow the procedure for commencing a cause of action. In totality, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.

***Dated and delivered at Nyeri this 21<sup>st</sup> day of January, 2015.***

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA 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**