



REPUBLIC OF KENYA



**Akinyi v Homa Bay County Assembly & 4 others (Petition E023 of 2024)
[2024] KEELRC 13326 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13326 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E023 OF 2024
CN BAARI, J
DECEMBER 5, 2024**

BETWEEN

SOFIA SALIM AKINYI PETITIONER

AND

HOMA BAY COUNTY ASSEMBLY 1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF HOMA BAY 2ND RESPONDENT

COUNTY ASSEMBLY OF HOMA BAY 3RD RESPONDENT

RAPHAEL ODONGO 4TH RESPONDENT

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD 5TH RESPONDENT

RULING

1. Before Court is the 3rd and 5th Respondents' Notice of Preliminary Objection dated 22nd July, 2024 in opposition to the Petitioner's petition and application dated 10th July, 2024.
2. The Preliminary Objection is premised on the grounds THAT:-
 - i. The Petition and the application are incompetent, misconceived, improper and otherwise an abuse of the due process of this Honourable Court.
 - ii. This Honourable Court lacks the requisite jurisdiction to hear and determine this matter. The institution of the petition and the application both dated 10th July, 2024, is contrary to Section 39 of the *Political Parties Act* that establishes Political Parties Tribunal whose jurisdiction is defined under Section 40 of the same Act.
 - iii. In the circumstance, the petition and the application and the prayers sought therein are a monumental procedural and substantive legal nullity, bad in law, misconceived and is therefore rendered fatally and incurably defective.



- iv. The petition is guised as one for infringement of fundamental rights, but in the real sense it is a dispute between members of a political party.
3. The Objection was canvassed through written submissions. Submissions were received from both parties.

The 3rd and 5th Respondents' Submissions

4. It is the Respondents' submission that the Employment and Labour Relations Court lacks jurisdiction to entertain the petition and the application. They argue that it is well established that jurisdiction is the foundation upon which any court proceeding must be based and that in the Kenyan judicial system, the court must have the requisite jurisdiction to handle a matter; otherwise, any actions taken are null and void. Reliance was had on the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1, to support this assertion.
5. The 3rd and 5th Respondents further placed reliance in the case of Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, for the holding that a court can only exercise jurisdiction as conferred by *the Constitution* or other written law and since the Employment and Labour Relations Court lacks express jurisdiction over political party disputes, it cannot entertain this matter.
6. It is their submission that the Petitioner ought to have first moved the Internal Disputes Resolution Mechanism of the Orange Democratic Movement in the first instance, then the Political Parties Tribunal and finally appeal to the High court under Article 163 (3) (e) of *the Constitution* of Kenya and Section 41b of the *Political Parties Act*.
7. The 3rd and 5th Respondents submit that the procedure aforesaid was not complied with, and so the instant petition is premature. They sought to rely in the cases of Mwangi *& 8 others v Dzuya & 7 others (Petition E004 of 2023)* [2023] KEHC 25041 (KLR) (25 October 2023) (Ruling) cited with approval the case of Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others [2011] eKLR to buttress this position.
8. The Respondents contend that the matter should be handled by the Political Parties Tribunal, as it involves a political dispute between members of a political party. They submit further that Sections 39 and 40 of the *Political Parties Act*, give the Political Parties Tribunal exclusive jurisdiction to handle disputes of this nature, specifically between political party members or parties.
9. It is their position that the petition is a deliberate attempt to bypass the proper forum, which is the Political Parties Tribunal, and disguising the petition as one involving fundamental rights.
10. The Respondents submit that the Petitioner seeks to invoke the jurisdiction of a court that is not suited to address the underlying dispute. They had reliance in the case of Geoffrey Muthinja & Another v. Samuel Muguna Henry & 1756 Others [2015] eKLR, where the Court of Appeal held that parties should avoid abuse of court process by following the specific dispute resolution mechanisms provided by statute, as forum shopping erodes the integrity of the judicial process.
11. The Respondents finally submit that the petition is a legal nullity and is fatally defective due to its procedural impropriety.

The Petitioner's Submissions

12. The Petitioner submits that according to Standing Order No. 61 of the Homa Bay County Assembly Standing Orders, procedures for removal from office of the County Assembly Service Board do not



- involve any political party or tribunal. She submits that the procedures strictly outline the internal mechanisms within the County Assembly and mandate adherence to due process.
13. It is her submission that under Section 22 of the County Assemblies Service Act, grounds for removal do not confer any power or jurisdiction to a political party or tribunal. She submits further, that the grounds and procedures are clearly delineated, and no involvement of external political party apparatus is provided within the statutory framework.
 14. The Petitioner submits that Section 40 of the *Political Parties Act* limits the jurisdiction of the Political Parties Tribunal to specific disputes related to political parties, and that this case does not fit within those parameters, as it involves the Homa Bay County Assembly and its officials, who are not acting under any political party mandate.
 15. It is the Petitioner's submission that the preliminary objection herein, involves contested facts, such as the authenticity of a disputed ODM resolution, requiring evidential evaluation. She submits further that the objection is not based purely on law, but on issues necessitating a full trial.
 16. In emphasising the foregoing argument, the Petitioner placed reliance in the case of *Oraro v Mbaja (2005) 1 KLR 141*, for the holding that raising preliminary objections on matters involving contested facts violates procedural stipulations that require a pure point of law.
 17. The Petitioner urges that the Objection be dismissed in favor of hearing the substantial merits of the case.

Determination

18. I have considered the grounds of the Objection together with the rival submissions. The singular issue for my determination is whether this Court has jurisdiction to hear and determine the Petitioner's petition and the application filed therewith.
19. Section 10 of the *County Assembly Services Act*, provides thus on appointment and removal of Member of Board of County Assembly: -
 1. A person who is appointed as a member of the Board under section 12(3)(d) of the *County Governments Act* may be removed from office on any of the following grounds-
 - a. violation of *the Constitution*;
 - b. inability to discharge duties for any reason;
 - c. bankruptcy; or
 - d. if convicted of any offence with a sentence of more than six months imprisonment.
 2. Any person may petition the county assembly for the removal of the member of the Board on the grounds specified under subsection (1).
 3. The procedure for the removal of a member of the Board under this section shall be as prescribed in the Standing Orders of the county assembly."
20. Further, Section 12 (3) of the County Government Act, provides thus on the composition of the County Assembly Service Board:

“The county assembly service board shall consist of—

 - a. the Speaker of the county assembly as the chairperson;



- b. the leader of the majority party or a member of the county assembly deputed by him or her, as the vice-chairperson;
 - c. the leader of the minority party or a member of the county assembly deputed by him or her; and
 - d. one person resident in the county, appointed by the county assembly from among persons who have knowledge and experience in public affairs, but who is not a member of the county assembly.”
21. The Gazette notice No.11938, under which the Petitioner was appointed, indicates that her appointment was pursuant to Section 12(3) (c) of the County Government Act, 2012. I note that an appointment under this Section, is in regard to the leader of a minority party, while the Petitioner is said to represent the majority party in the Board.
22. Section 12 (5) proceeds to state:
- “A member of the county assembly service board shall vacate office—
- a. if the person is a member of the county assembly—
 - i. at the end of the term of the county assembly; or
 - ii. if the person ceases to be a member of the county assembly; or
 - b. if the person is an appointed member, on revocation of the person’s appointment by the county assembly; or
 - c. if the person is the Speaker, leader of majority party or leader of minority party when the person ceases to be such Speaker, leader of majority party or leader of minority party.
23. By this provision, whether the Petitioner represented the majority or minority party in the Board, the law envisages that once she ceases holding that position, she by extension ceases to be a Member of the County Assembly Service Board.
24. There is however nothing showing that the Petitioner ceased to hold the political position pursuant to which her nomination and subsequent appointment to the Board was made. All there is before court, is a communication by the political party indicating revocation of her nomination.
25. Under Section 10 of the [County Assembly Services Act](#), it is clear that the law does not envisage that a person nominated by a political party and duly appointed to the position of Member of County Assembly Service Board, can be removed by the nominating political party as to require the intervention of the Political Parties’ Tribunal. The process of removal under the law is that enshrined in Section 10 read with the Standing Orders of the county assembly.
26. As correctly submitted by the 3rd and 5th Respondents, the appointment of Members of the County Assembly Service Board is a political process. Removal from office on the other hand, is as guided by Section 10 of the [County Assembly Services Act](#).
27. The removal of the Petitioner in my view, cannot be said to be a function that falls within the mandate of the Political Parties Tribunal.
28. In the premise, I find and hold that this Court has jurisdiction to hear and determine the petition herein. The Preliminary Objection is dismissed with costs to the Petitioner.



29. The file be forwarded to the Employment and Labour Court at Kisumu for hearing and final determination of the petition.

30. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 5TH DAY OF DECEMBER, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Abuya h/b for Ms. Otunga for the Petitioner

Mr. Nyamweya present for the 1st & 2nd Respondents

Mr. Ayieko present for the 3rd & 5th Respondents

Ms. Esther S – C/A

