



Kiti v ODM National Election Board & 3 others (Constitutional Petition E004 of 2022) [2023] KEHC 23711 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION E004 OF 2022
SM GITHINJI, J
OCTOBER 16, 2023**

BETWEEN

LEILA TINGA KITI PETITIONER

AND

ODM NATIONAL ELECTION BOARD 1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY 2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 3RD RESPONDENT

IEBC 4TH RESPONDENT

RULING

1. The Petitioner instituted this Petition on 23rd September 2022 challenging the nomination of persons to serve as members of the Kilifi County Assembly on grounds that the slot for people living with disability was omitted, in contravention of Article 177 (1) (c) of *the Constitution* of Kenya, 2010. The Petitioner therefore seeks the following orders; -
 - a. A declaration that the respondents' act of failing to nominate to the county assembly of Kilifi any single member from the people living with disabilities is a violation of Article 177 (1) (c) of *the Constitution* of Kenya, 2010.
 - b. An order compelling the respondents to nominate to the county assembly and fill the slot of members living with disabilities.
 - c. A declaration that the gazettment of any nominated members to the county assembly of Kilifi in exclusion of the petitioner in the slot of people living with disabilities is null and void.
 - d. Costs to this petition.



2. In response, the 4th Respondent through the firm of Muthee Kihiko Soni and Associates filed a Notice of Preliminary Objection dated 30th November 2022 challenging this court's jurisdiction on the following grounds; -
 1. That this honourable court lacks jurisdiction to hear and determine this petition and application because of the following reasons;
 - i. This honourable court is not an election court and therefore lacks the jurisdiction to hear the issues raised in the petition and the application which related to the election by way of nomination into the county assembly of Kilifi.
 - ii. The orders sought in the petition challenge the validity of the nominations of persons who have been gazetted and the orders if granted would amount to nullification of election of the nominated persons which is the province and jurisdiction of the election courts under section 75(1A) of the *Elections Act*.
 - iii. The true character of the Petitioner's cause, despite being disguised as a constitutional petition, is in fact an election petition, questioning the validity of nomination of elected members of the county assembly of Kilifi who have been gazetted and sworn in and such a challenge can only be commenced in the election court under section 75(1A) of the *Elections Act*.
 - iv. This court does not have jurisdiction to hear and determine nomination dispute.
 2. That the orders sought in both the petition and application will affect the nominated persons who are not parties to this suit.
3. The Notice of Preliminary Objection (P.O) is the subject of this ruling. Parties canvassed the P.O by way of written submissions which I have summarized as below-

The 4th Respondent's Submissions

4. Counsel for the 4th Respondent submitted that nomination is one of the modes of election and that the only way to challenge any election by way of nomination is through an election petition as it was held in *Moses Mwigigi and 14 others v IEBC and 5 others* [2016] eKLR. Counsel argued that under section 75(1A) of the *Elections Act*, an election petition in relation to members of the county assembly is filed in the resident's magistrate's court and not the high court. To buttress this point, counsel cited the case of *National Rainbow Coalition Kenya v IEBC; Tharaka Nithi County Assembly and 5 others (Interested Party) (Petition 1 of 2021) [2022] KESC 6 KLR*; *Dennis Okong'o Juma v ODM National Elections Board and 4 others* (unreported).
5. In relation to the second ground of the PO, counsel argued that the blanket order seeking to nullify the gazettelement of all the nominated members would invalidate the nomination of persons not parties to this suit. Counsel relied on the case of *Philip Mukwe Wasike v James Lusweti Mukwe and 2 other* [2013] eKLR.



The Petitioner's Submissions

6. Counsel for the Petitioner submitted that under Article 165(2) (b) and (d), this court is clothed with the requisite jurisdiction to determine the question whether a right or fundamental freedom has been violated and questions in respect to interpretation of *the Constitution*. To counsel, the present petition does not arise from any election dispute but touches on implementation of *the Constitution*, specifically Article 177 (1) (c).
7. Having considered the PO and arguments raised by both sides, I find that the sole issue for determination is whether this court has jurisdiction to hear and determine the Petition.

Analysis and Determination

8. The law on preliminary objections is well settled. That it consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. An example is an objection to the jurisdiction of the Court. [See *Mukisa Biscuits v West End Distributors Limited* [1969] EA 696]
9. The objection herein touches on this court's jurisdiction based on the provisions of section 75(1A) of the *Elections Act* which provides that; -
 - (1A) A question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.
10. Section 75 (4) of the *Elections Act* further provides that: -
 - "An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—
 - a. filed within thirty days of the decision of the Magistrate's Court; and
 - b. heard and determined within six months from the date of filing of the appeal.
11. It is trite that where a court's jurisdiction is challenged, the court must first interrogate that issue and determine it first before taking any other step. If the finding is that it lacks jurisdiction, the court must immediately down its tools and should not proceed with the matter in the hope that it may find certain facts which may clothe it with jurisdiction. This principle was enunciated in the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where Nyarangi, JA stated that: -
 - "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. 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."
12. The subject of the present petition is the membership of the Kilifi County Assembly. That the list of nominated members does not meet the threshold established under Article 177 of *the Constitution* of Kenya. That provision states as follows: -

Membership of county assembly.



177.

- (1) A county assembly consists of—
 - (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
 - (b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
 - (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
 - (d) ...
 - (2) The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.
 - (3) The filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward.
13. Section 2 of the *Elections Act* also defines an “election court” to mean the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of *the Constitution* and the Resident Magistrate’s Court designated by the Chief Justice in accordance with Section 75 of the *Elections Act*.
14. Looking at the contents of the present Petition, it is evident that what is being challenged is the action by the Respondents of sidelining members of the group identified as persons living with disabilities, contrary to the said Article 177 (1) (c). However, it is now settled by the apex court in this country that a court exercising constitutional or human rights jurisdiction cannot hear and determine disputes arising from political party lists and nomination processes leading to gazettement and assumption of office of a member of a county assembly. The list that is subject of the petition consists of members who have undoubtedly assumed office. The Petitioner want that list to be nullified by this court.
15. The case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [supra] cited to me by the 4th Respondent is apt. In that case, the Supreme 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 gazettement of the nominees’ name by the IEBC, as an integral part of the 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



terminate the returning officer’s mandate, and shifts any issue as the validity of results from the IEBC to the Election Court.

[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 Elections 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...

[120] 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 disputes-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.”

16. What I gather from the above provisions and case law is that once the nominees are gazetted and the election by nomination process is complete, any challenge to the process can only be through an election petition and not through a constitutional petition as argued by the Petitioner herein.
17. It is also evident that once members of a county assembly are elected or nominated and gazetted, they are deemed elected members of that county assembly and any challenge regarding their election or nomination ought to be dealt with by the election court; in this case, a Resident Magistrate’s Court designated by the Chief Justice and only on appeal, do such disputes come to the High Court.
18. In the present case, it is not disputed that the nature of the issues raised are in regard to the nominations to the Kilifi County Assembly. The Petitioner’s main concern is that the law, specifically Article 177 (1) (c) of *the Constitution* was not observed by the Respondents in selecting the nominees for the County Assembly. In the foregoing, I am inclined to agree with the 4th Respondent that this court lacks the requisite jurisdiction to hear and determine the present petition in the first instance as envisaged under section 75 (4) of the *Elections Act*.
19. The outcome is that the Notice of Preliminary Objection is hereby sustained. The Petition is therefore dismissed with no order as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF OCTOBER, 2023.

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S.M. GITHINJI

JUDGE

In the presence; -

Mr Gathu for the 4th Respondent

Other parties absent

