



Gachunga v Independent Electoral Boundaries Commission (Petition E028 of 2021) [2022] KEHC 12685 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E028 OF 2021
HK CHEMITEI, J
JULY 28, 2022**

BETWEEN

BONIFACE MWAI GACHUNGA PETITIONER

AND

INDEPENDENT ELECTORAL BOUNDARIES COMMISSION ... RESPONDENT

Failure to include an option of ‘none of the above’ in ballot papers did not infringe on the electoral rights of Kenyans

The case underscored the principle of separation of powers by finding that the High Court did not have the power to direct independent constitutional bodies on how to conduct their affairs.

Reported by John Ribia

Constitutional Law – separation of powers – powers of the High Court vis-à-vis powers of independent constitutional commissions - whether the High Court had the power to give directions to the IEBC, an independent constitutional commission, on how to conduct its functions –

Electoral Law – Independent Electoral and Boundaries Commission – role of IEBC to design and include the options available in a ballot paper for each elective position – claim that failure to include an option of ‘none of the above’ in ballot papers infringed the rights of Kenyans - whether failure by the IEBC to include the option of ‘none of the above’ on ballot papers infringed on the electoral rights of voters.

Brief facts

The petition before the court sought orders for the court to compel the respondent (IEBC) to include “None of the above” option on the ballot papers to allow voters who do not wish to vote for any of the candidates to exercise their right to reject without violation of the secrecy of their decision. The objective among others was to enable voters who came to the polling booth and decide not to vote for any of the candidate in the tray, to exercise their right by voting on the ballot paper section indicated as “none of the above” while maintaining their right of secrecy.



Issues

- i. Whether the option of ‘none of the above’ not being an option in the ballot box in the general elections violated the petitioner’s rights.
- ii. Whether the High Court had the power to give directions to the IEBC, an Independent Constitutional Commission, on how to conduct its functions.

Held

1. The powers and functions of the Independent Electoral Boundaries Commission (IEBC) were enshrined under article 88(4) of the Constitution of the Kenya. Under article 248(2) the respondent was listed as an Independent Commission amongst other commissions. The High Court could not purport to give to the respondent directions on exactly how to carry out its powers and functions. Further, the courts ought not to be drawn into determining how the people of Kenya should exercise their voting rights. That was the preserve of the Legislature.
2. The applicant was asking the court to include a fundamental input to Kenya’s election laws which needed the public to participate in the usual manner. Public participation would be an integral part of such an addition or amendment.
3. Article 82(d) of the Constitution of Kenya, 2010 provided that Parliament was to enact legislation on election on the conduct of elections and referenda and its regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections. If the petitioner held the view that there was a need to have the ‘none of the above’ option to be included in the ballot paper, it was open to him to lobby the legislative arm of government to do the needful.
4. The court did not find any reason to allow the petition noting that there was no evidence that not including “none of the above” had breached the petitioner’s right or the general public. No evidence had been demonstrated to show that the public who would wish to exercise such right had been disenfranchised. There was no evidence that the respondent had breached any provisions of the Constitution or any laws that would compel the court to allow the application.
5. The better way was for the applicant and those of his brethren to agitate through memoranda to Parliament to carry out an amendment to the laws to accommodate such of their interest.

Application dismissed.

Orders

No order as to costs.

Citations

Cases

1. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Mentioned
2. David Mathu Kimingi v SMEC International PTY Limited (Petition E034 of 2020; [2021] KEELRC 2122 (KLR)) — Mentioned
3. Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs and Others — Mentioned
4. Kahindi Lekalhaile & 4 Others v Inspector General National Police Service & 3 Others (Petition 25 of 2013; [2013] eKLR) — Mentioned
5. Kituo Cha Sheria v Independent Electoral and Boundaries Commission & Anothe (Petition 574 of 2012; [2013] KEHC 4788 (KLR)) — Mentioned
6. Lily Thomas (Ms), Advocate vs Speaker, Lok Sabha and Ors — Mentioned
7. Peoples Union for Civil Liberties v Union of India — Mentioned

Statutes

1. Constitution of Kenya, 2010 — Article 1(1); 2; 3; 10; 50; 82(d); 88(4); 248(2) — Interpreted
2. Elections Act, 2011 (Act No 24 of 2011) — Section 2; 3(1) — Interpreted



Advocates

None mentioned

JUDGMENT

1. The petitioner herein moved the court through an amended petition dated November 9, 2021 against the respondent seeking orders as follows: -
 - a) This honourable court do compel the respondent to include “None of the above” option on the ballot papers to allow voters who do not wish to vote for any of the candidates to exercise their right to reject without violation of the secrecy of their decision.
 - b) That the respondent bear the costs of this petition.
 - c) Any other relief that this honourable court may deem just and fair to order.
2. The petitioner claims to have filed the present petition on his own behalf and in the public interest as whose basic fundamental rights under the bill of rights thereof has been violated and/or are threatened of violation by the electoral body.
3. The petitioner in his petition wishes to have ‘None of the above’ option on the ballot papers to enable voters to express their dissatisfaction with options available. That further, the said option on a ballot allowed a voter not to vote for any of the running candidate in the ballot papers. Additionally, that the main objective of the ‘None of the above’ option was to enable voters who do not wish to vote for any of the candidates to exercise their right to reject without violation of the secrecy of their decision. It is also the petitioner’s case that the vote must be eligible vote of rejection if they feel that the contesting candidates do not deserve to be voted for.
4. The petitioner stated that petition was brought under the provisions of articles 1(1), 2, 3, 10, and 50 of the *Constitution of the Republic of Kenya*.
5. The petition was supported by an affidavit sworn by the petitioner which reiterated the contents of the petition.
6. The respondent filed a replying affidavit in response to the petition dated January 11, 2021. It averred that the prayers by the petitioner specifically seeking to have the option of ‘None of the above’ included in the ballot was not founded on any law in Kenya. That the same was a strange concept in our jurisdiction. That further, the same should be founded on legislation as there were no formal procedures in place that would address situations where the ‘none of the above’ received plurality of the votes and so winning the elections.
7. It is averred further, that other countries with the ‘none of the above’ option, India for example, in the event of a ‘none of the above’ ‘wins’, the candidate or party polling the next highest number of votes would be allowed to take office regardless as the ‘None of the above’ win would indicate that more voters actively rejected all the available candidates than endorsed any one of them. That it would therefore make no sense for the next placed candidate or party to be elected.
8. The respondent averred that any of the options particularized in paragraph 21 of its affidavit would have far reaching consequences in a fragile democracy as Kenya. That the petitioner was asking the honourable court to legislate on behalf of parliament and had therefore approached the wrong avenue. That further, for such a right to be incorporated in the ballot, there must be public participation as all the election laws were products of public participation.



9. In addition, that under the present laws there was no right of negative voting which enabled a voter to refuse the vote for a particular candidate or to cast his vote against all candidates under the Kenya *Elections Act*. That a properly cast ballot must record a single vote for single candidate listed on the ballot and anything else is rejected. That further, the ‘none of the above’ demonstrated a rejection of all candidates standing for elections as a form of political expression, but the election laws in place do not actually prevent the petitioner herein from writing ‘none of the above’ in his ballot. That the laws only prevent people from knowing about it.
10. It is the respondent’s case that the *Constitution of Kenya, 2010* does not order that all citizens must vote, but gives every eligible adult to vote and that those who do not wish to participate have the right to refrain. That it was curious how the petitioner would suffer undue and irreparable harm, should the order to give him the right he seeks are not issued. That further, the petitioner had not demonstrated that the petition had any chances of success at all or that he had been denied the right to vote. Additionally, that what the petitioner was seeking was essentially abstaining from voting which is an available right in the current system.
11. According to respondent, it was in the best interest of justice, public interest, law and order that the petition be dismissed with costs.
12. When the matter came up for directions the court ordered the same to be determined by way of written submissions which the parties have complied and they can be summarized as hereunder.

Petitioner’s Submissions

13. The petitioner in his submissions identified four issues for determination. The first issue is what is the need of ‘none of the above’ in the ballot. The petitioner submitted that the said option will be a proper mechanism for the citizenry to register their disapproval and withhold consent for candidates who had integrity issues. That the same will cultivate and develop a democratic attitude and culture. That further, not providing the ‘none of the above’ during elections was equivalent to gagging a voter or suppressing a voter’s voice. In addition, that when issues and concerns are compressed, pressure builds up and eventually blows up hence jeopardizing national unity, peace, cohesion and untimely security.
14. On the second issue, whether the ‘none of the above’ option can be allowed in the Kenyan voting system he placed reliance on the case of *Peoples Union for Civil Liberties v Union of India* where the Supreme Court directed the Election Commission to provide necessary provision in the ballot papers and that another button called ‘none of the above’ (NOTA) may be provided also in EVMs so that the voters who come to the polling booth and decide not to vote for any of the candidate. That the same enabled one to exercise their right not to vote while maintaining their right of secrecy.
15. The petitioner went on to submit that in the Unites States, NOTA exist in the state of Nevada as ‘None of these candidates’ and the option had won on numerous occasions but it does not affect the outcome. The candidate with the second highest number of votes simply wins.
16. In addition, that the European Consortium for Political Research NOTA conducted investigations on who would vote if this were available on the ballot papers using original data from 8 European Countries. That the findings were namely; having NOTA on the ballot would reduce invalid balloting more than abstention and much more than protest party voting. Secondly, that NOTA was related to socio-economic status, political interest, political knowledge and distrust in political institution and authorities, but not to broadly undemocratic attributes.
17. On the third issue, as to what the ‘none of the above’ provision intended to achieve, he submitted that in a vibrant democracy the voter must be given an opportunity to choose the said provision. That for



the said democracy to survive, it was essential that the best available men should be chosen as people's representatives. That further, the said provision will increase voter turnout by allowing citizens to vote for an option contrary to the existing options rather than declining to participate entirely. Additionally, that the said provision enabled measurement of voter dissatisfaction with candidates running for election.

18. Lastly, on who was liable to pay the costs of the suit, the petitioner submitted that costs follow events and that the successful party in litigation which was likely to be him was entitled to the fruits of litigations the same being costs.

Respondent's Submissions

19. The respondent in its submission raised three issues for determination namely; whether the honourable court should compel the respondent to include 'none of the above' option on the ballot papers. The respondent submitted that the petitioner had not stated under which provisions of the *Constitution of Kenya, 2010* that the right not to vote for any candidate demanded one to cast a vote against all the candidates. That what the petitioner was seeking was to have the said option included in the ballot and the same was not founded in law in Kenya.
20. The respondent while placing reliance in two Indian cases of *People's Union For Civil v Union of India & another* on September 7, 2013 and *Lily Thomas (Ms), Advocate v Speaker, Lok Sabha and ors.* on August 24, 1999, submitted that the right of 'none of the above' was statutorily enshrined unlike in Kenya where no such right existed. That the petitioner had not pointed out any article of the Constitution or legislation where such a right had been contemplated. That further, under section 2, 3(1) of the *Election Act*, 2011 and regulation 69 and 70 of The *Elections (General) Regulations, 2012* a person was able to cast a vote and it had no scope for negative voting.
21. The respondent submitted further that the right to secrecy had been extended only to those voters who had exercised their right to vote and in no manner can it be extended to those who had not voted at all. That the petitioner had not laid any basis upon which the petition was premised, that the constitutional right violations must be particular. In addition, a person had to be very clear on which rights had been violated and/or threatened and the petitioner had failed to do so. It drew the court's attention to the cases of *Anarita Karimi Njeru v Republic* [1979] eKLR and *David Mathu Kimingi v SMEC International PTY Limited* [2021] eKLR.
22. The respondent went on to submit that there were no formal procedures in place that would address situations where the 'none of the above' received plurality of the votes and so winning the elections. That in countries like India with such a provision, the candidate or party polling the next highest number of votes would be allowed to take office regardless. That further, in the event the said option wins the same would have far reaching consequences. Additionally, the petitioner was asking the court to legislate on behalf of parliament. It placed reliance on the cases of *Kabindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others* [2013] eKLR and *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & another* [2013] eKLR which cited with approval the unreported case of *Jeffer Issak Kaur v Ministry of Justice, National Cohesion and Constitutional Affairs & others.*
23. In conclusion, the respondent submitted that in the Indian cases it had cited the court's decision was not because the commission supported the proposal but also because the 'none of the above' provision was founded in their statutes and in Kenya there was no such statutory provision. It urged the court to dismiss the petition with costs.



Analysis and Determination

24. Upon analyzing the facts of the case, affidavits and the submissions tendered by the parties, it is apparent that this petition is novel and the applicant is generally telling this court to consider tampering with our election laws and procedures. The objective among others is to enable voters who came to the polling booth and decide not to vote for any of the candidate in the Tray, to exercise their right by voting on the ballot paper section indicated as “none of the above” while maintaining their right of secrecy.
25. The powers and functions of the respondent herein are enshrined under article 88(4) of the *Constitution of the Kenya*. Further, under article 248(2) the respondent herein is listed as an Independent Commission amongst other commissions. Therefore, in my view, this court cannot purport to give to the respondent directions on exactly how to carry out its powers and functions. Further, the courts ought not to be drawn into determining how the people of Kenya should exercise their voting rights. That is the preserve of the legislature as rightly submitted by the respondent.
26. Further what the applicant is asking is a fundamental input to our election laws which needs the public to participate in the usual manner.in other words public participation would be an integral part of such an addition or amendment.
27. Article 82(d) of the *Constitution of Kenya, 2010* provides for legislation on election and parliament is to enact legislation on the conduct of elections and referenda and its regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections. Therefore, if the petitioner holds the view that there was a need to have the ‘none of the above’ option to be included in the ballot paper, it is open to him to lobby the legislative arm of government to do the needful.
28. For now, this court does not find any reason to allow the petition noting for instance that there is no evidence that not including “none of the above” has breached the petitioner’s right or the general public. No evidence has been demonstrated to show that the public who would wish to exercise such right have been disenfranchised or at all. Put another way, there is no evidence that the respondent has breached any provisions of the constitution or any laws that would compel the court to allow this application.
29. The better way is for the applicant and those of his brethren to agitate through memoranda to parliament to carry out an amendment to the laws to accommodate such of their interest.
30. In the premises, the court does not find the petition meritorious. Being a public interest litigation, it is always necessary not to award any costs to any party.
31. The petition is otherwise dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 28TH DAY OF JULY 2022.

H. K.CHEMITEI.

JUDGE

