



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 7 OF 2017

JULIUS MASIVA OBUGA.....PETITIONER

Vs

ORANGE DEMOCRATIC PARTY.....1ST RESPONDENT

JOHN MBADI.....2ND RESPONDENT

JUBILEE PARTY.....3RD RESPONDENT

NELSON DZAYU.....4TH RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....5TH RESPONDENT

THE REGISTRAR OF

POLITICAL PARTIES.....6TH RESPONDENT

THE ATTORNEY GENERAL.....7TH RESPONDENT

KENYA AFRICAN

NATIONAL UNION.....1ST INTERESTED PARTY

GIDEON MOI.....2ND INTERESTED PARTY

RULING

Introduction

1. **JULIUS MASIVA OBUGA** (the petitioner) filed a petition dated 29.5.2017 under the **Constitution, the Political Party Act 2011. The Election Act No. 11 of 2011, the Procurement 7 Disposal Act and the Civil Procedure Act chap 21**. He seeks for this court to order that:

a) **THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION(IEBC)** (5th respondent) refrain from preparing, printing and publishing election materials depicting the gazetted candidates who were a product of shambolic and unconstitutional nominations,

b) The nominations for the **County Assembly, National Assembly and the Senate** were null and void and the Registrar be ordered to ensure all political parties had branches nation-wide.

c) Costs of the petition and interest be provided for

2. Upon the petition being served on the respondents, the 5th respondent filed a notice of preliminary objection dated 6.6.2017 which raised the following:

I. The petition is res-judicata in view of determination in Eldoret High Court Petition no. 3 of 2013 Julius Masiva Obuga v. Independent Electoral & Boundaries Commission & 6 Ors.

II. This court lacks jurisdiction to hear and determine this petition in view of the provisions of Article 88(4) (d) and (e) of the Constitution and sections 39 and 40 of the Political Parties Act which vests jurisdiction on the 5th respondent's Dispute Resolution Committee to hear and determine disputes arising from nominations of candidates for elections.

III. The petitioner lacks locus standi to institute this petition in view of the provisions of section 13 of the elections Act, 2011 as nomination of candidates for elections is an internal party affair which can only be dealt with by internal party dispute resolution mechanisms or the political parties dispute tribunal.

3. It is pointed out that, what the petitioner seeks to challenge the nomination of candidates for County Assembly, National Assembly, and Senate by the political parties, yet these matters constitute pre-election disputes which ought to have been dealt with by other bodies, and not the court. That in any case, the orders sought have been overtaken by events after the general elections held on **8.8.2017**. In support of the argument that this court lacks jurisdiction, the 5th Respondent's submits that this court ought to be guided by the decision in *Owners of Motor Vessel "Lillian S v. Caltex Oil Kenya Limited (1989) KLR 1* where the court held that jurisdiction is everything, and without it the court has no power to make one step. Further, that in *Macharia & Anor v. K.C.B Ltd & 2 Ors Civil applic. No.2 of 2011* the court held that a court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. That nomination disputes being pre-election disputes fell within the jurisdiction of IEBC as provided under **Article 88 (4) of the Constitution of Kenya and section 74 of the Elections Act**

4. In addition, the instant petition is said to be res-judicata since the same issue had been determined in **Election Petition no. 3 of 2013 JULIUS MASIVA OBUGA v IEBC AND 6 OTHERS** on nomination of presidential candidates for the elections held on **4.3.2013**. This court's attention is drawn to the holding by **Githua (J)** that nomination of any candidate to vie for various political offices was a step in the electoral dispute and **Article 88 of the Constitution mandates the I.E.B.C to regulate the process. Section 13(2A) of the Act** provides that a political party dispute arising from political party nominations within 60 days. Further, the **Political Parties Dispute Tribunal** was formed under **section 39 of the Political Parties Act No. 11 of 2011** and it provides for the jurisdiction to hear and determine:

- a) Disputes between members of a political party
- b) Disputes between a member of a political party and s political party.
- c) Disputes between political parties.
- d) Disputes between an independent candidate and a political party.
- e) Disputes between coalition partners.
- f) Appeals from the decisions of the Registrar under the Act.
- g) Disputes arising out of party primaries

It is argued that nomination of party primaries was preserved for determination by the political parties dispute tribunal as provided under **section 40(2) of the Political Parties Act** as follows:

notwithstanding subsection (1), the tribunal shall not hear or determine a dispute under paragraph (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political parties dispute resolution mechanisms

5. In addition, election petitions are special proceedings which were *sui-generis* in character, institution of an election proceedings through a constitutional petition was not permissible. Reference is made to the case of **Moses Mwigigi & 14 Ors v. I.E.B.C (2016) eKLR** the court held that:

“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 not withstanding the vital role electoral dispute settlement in the progressive governance set up of the current Constitution.”

That this was reiterated in also **Isaiah Gichu Ndirangu v. I.E.B.C, Nairobi Constitutional Petition no.83/2015.**

6. In response the petitioner stated that the parties are not the same; the cause of action in this matter took place in 2017 whereas the constitutional petition no. 3 of 2013 relates to events which took place in 2013. Further that the 5th respondent did not follow the law. The petitioner could not file this claim before the dispute committee since he is not a member to any political party and neither was he an independent candidate. Section 39 and 40 of the Political Parties Act dealt with disputes between political parties, a party member or an independent candidate. Section 13 gives guidelines on nominations.

Analysis

7. The issue in contention is whether this court has jurisdiction to hear and determine the petition, the 5th respondent avers that the petition is an election dispute. The issue for determination is whether this court has jurisdiction to hear and determine this petition, and if so has the issues been determined previously before in another case and if the petitioner has *locus standi* to present the petition.

8. This court derives its jurisdiction from **Article 165(3) of the Constitution**. Article 165(3) provides as, **Subject to clause (5), the High Court shall have-**

a) *Unlimited original jurisdiction in criminal and civil matters*

b) *Jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened*

c) *Jurisdiction to hear an appeal from a decision of a tribunal appointed under this constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144,*

d) *Jurisdiction to hear to hear any question respecting the interpretation of this constitution including determination of-*

I. The question whether any law is inconsistent with or in contravention of this Constitution

II. The question whether anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of this constitution

III. Any matter relating to Constitutional powers of state organs in respect of County governments and any matter relating to the constitutional relationship between the levels of government

IV. A question relating to conflict of laws under Article 191

e). *any other jurisdiction, original or appellate, conferred on it by legislation.*

9. As was held in *The Owners of Motor Vessel "Lilian S" v. Caltex Oil Kenya Ltd (supra)* that, "jurisdiction *is everything, without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and court and a court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction"*

10. The same position above was restated **in the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution- Constitutional Application No. 2 of 2011: -**

"The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.

11. The 5th respondent cited many authorities in relation to the issues raised. The petitioner's contention was that there had been unconstitutional nominations of candidates for **County Assembly, National Assembly and Senate** be declared null and void and the 5th respondent be restrained from printing out election materials. The petitioner at paragraph 20 mentioned names of nominees who some are now sitting in office.

12. **Article 88(4)** of the Constitution outlines the mandate of **IEBC** which is responsible for conducting or supervising referenda and elections to any elective body or office particular sub-clause (e) which states:

the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results

The clause above is in relation to electoral disputes. In this case the respondent is none of the people who has been elected rather it is the political parties and their chairmen and the 5th respondent who is the overseer of elections in the country. The petitioner had mentioned names but has not made them a party. Those are the people who had been nominated by their respective parties, thus the issue at hand falls under nominations.

13. In view of the above then the 5th respondent has been given the mandate to solve issues relating to nominations. **Section 39(1) of the Political Parties Act** establishes a tribunal which is referred as **the Political Parties Disputes Tribunal** whose jurisdiction under **section 40** is as follows:

a) *Disputes between members of a political party*

b) *Disputes between a member of a political party and s political party.*

c) *Disputes between political parties.*

d) *Disputes between an independent candidate and a political party.*

e) *Disputes between coalition partners.*

f) *Appeals from the decisions of the Registrar under the Act.*

g) *Disputes arising out of party primaries*

However, for disputes under clause, b, c or e the dispute has to be resolved by the political party itself before the same is addressed by the 5th respondent.

14. The above implies that when a person feels aggrieved by a decision of his political party, the issue is first raised to the party to solve before it proceeds to the 5th respondent. The petitioner did not show that he had raised the issue on nomination of the named persons at paragraph 20 of the petition to the respective political parties. **Article 165 (3)** above has clearly elaborated the functions of this court.

15. In the addendum submissions filed by the petitioner he raises an issue that the 5th respondent is not properly constituted since it has only 2 commissioners yet Article 250(1) provides that each commission shall consist of at least three, but not more than nine members. This issue on the constitutionality of the 5th respondent was determined in **Isaiah Biwott Kangwony v. I.E.B.C & Anor [2018] eKLR** where the court held as follows:

40. As a starting point, I note that the IEBC Act is a creature of the Constitution. Articles 88 of the Constitution establishes the IEBC and provides under Clause 5 that the Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation, in which case the legislation in question is the IEBC Act among other laws governing elections. In my humble opinion the provision under Article 250(1) for a minimum of three members of the commission and a maximum of nine members shows that the framers of the Constitution gave the appointing authority the latitude to appoint number of commissioners as long as they did not exceed nine or go below three members.

41. In this case, the number of the commissioners was reduced following resignations and as I have already found in this judgment, the mere fact that some commissioners have resigned does not invalidate the composition of the commission. All that the reduction of the numbers does is to limit the operations of the commission especially in respect to raising the quorum required for the meetings.

42. Turning to the issue of the quorum of the commission as stated in Paragraph 5 of the second schedule of the IEBC Act, it is noteworthy that the issue of the quorum of the commission only arises during the conduct of the business of the commission. My humble view is that the issue of the quorum of the commission, even though tied to the commission's membership, is not per se an issue that should lead to a declaration that the commission is improperly constituted as quorum will can only be the subject of a challenge if the policy decisions of the commission are made without the requisite quorum."

43. In the instant case, the petitioner prays, inter alia, for a declaration that the commission is illegal and constitutional for lack of quorum as a result of the resignations. As I have already found in this judgment, the issue of the alleged resignation of the four commissioner was an issue that was neither here nor there and was not proved by any tangible evidence.

16. This court shall not delve more into this issue as raised by the petitioner and the court has noted the authorities cited by the 5th respondent to show that they are not properly constituted. This court is guided by various decisions that have explained the issue on jurisdiction and the functions of the tribunal to solve political disputes. **In Peter Ochara Anam & 3 Ors v. Constituencies Development Fund Board & 4 Ors, Kisii High Court Petition no. 3 of 2010** as follows:

"jurisdiction we all know is everything and once raised it must be confronted from the onset and if successful, the court must down its tools." The court further stated that, "I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights."

17. The petitioner in the previous petition no.3 of 2013 was challenging the nominations of the presidential candidate which had been made in breach of the provisions of the Constitution and the Law which the court found that it did not have jurisdiction as provided by Article 163(3) of the Constitution and Rule 12 of the Supreme Court (Presidential Election Petition) Rules of 2013.

18. I further draw from the pronouncements of the Court of Appeal decision in **Isaiah Gichu Ndirangu & 2 Ors v. I.E.B.C & 4 Ors** where it was held as follows:

"In our view, the appellants have not rationalized the transmutation of the issue from an ordinary nomination matter to a constitutional one to warrant the same to be heard by the High court sitting as constitutional court. As we have demonstrated earlier the constitution has created autonomous structures/organs charged with electoral dispute resolution, and the courts need to safeguard the autonomous exercise of their respective jurisdiction. It would be perverse for the High court or this court to ignore those tribunals and hijack their jurisdiction"

19. The petitioner did not tell this court whether he was a registered member of any political party in order to raise his concerns with it. It is on this basis that the 5th respondent urges that the petitioner lacks **locus standi**. Further the events being sought in this petition has been overtaken by events.

From the foregoing, I hold and find that the preliminary objection has merit and is sustained. The petition has no leg on which to stand and is dismissed with costs to the respondent

Delivered, Signed and Dated this 28th day of August 2019 at Eldoret

H. A. OMONDI

JUDGE