



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.182 OF 2018

IN THE MATTER OF ARTICLES 1, 2, 3, 22, 23, 38, 40, 47, 50, 74, 75, 77, 79, 81, 88, 99, 137, 138, 139, 140, 146, 163, 165, 226, 248, 249, 250, 252, 253, 259 AND 260 OF THE CONSTITUTION

IN THE MATTER OF SECTION 74 OF THE ELECTIONS ACT

IN THE MATTER OF SECTIONS 6 AND 17 OF THE ELECTION OFFENCES ACT, 2016

IN THE MATTER OF SECTION 5 OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WAFULA WANYONYI CHEBUKATI.....2ND RESPONDENT

CONSOLATA NKATHA MAINA.....3RD RESPONDENT

ROSELYN KWAMBOKA AKOMBE.....4TH RESPONDENT

ABDI YAKUB GULIYE.....5TH RESPONDENT

MARGARET WANJALA MWACHANYA.....6TH RESPONDENT

PAUL KIBIWOTT KURGAT.....7TH RESPONDENT

BOYA MOLU.....8TH RESPONDENT

RULING

1. The petitioner herein through a petition dated 7th May 2018 seek several orders being as follows:-

a) A declaration that the 1st Respondent has contravened order (iii) of the Supreme Court in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** by denying the Petitioner his right to fair administrative action under Article 47(1) of the Constitution and his right to fair hearing under Article 50(1), by failing to settle his presidential election complaints lodged with it on 6 September 2017 and on 12 October 2017 under the terms of Article 88(4)(e) and section 74(2) of the Elections Act requiring the determination of electoral disputes within ten days of the lodging of such disputes with the 1st Respondent.

b) An order for compensatory damages, payable into the Consolidated Fund, covering the total cost of holding a fresh presidential

election after the one held on 8 August 2017, to be retrieved by or on behalf of the 1st Respondent from its culpable public officers, including but not limited to the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents, pursuant to Article 226(5) of the Constitution and other applicable laws, to occasion no net loss of public funds.

c) An order for compensatory damages covering the total costs of the instant petition, to be retrieved by or on behalf of the 1st Respondent from its culpable commissioners, the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents, pursuant to Article 226(5) of the Constitution and other applicable laws, to occasion no net loss of public funds.

d) An order for vindicatory damages of an amount to be determined by the court, to be retrieved by or on behalf of the 1st Respondent from its culpable commissioners, the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents, pursuant to Article 226(5) of the Constitution and other applicable laws, to occasion no net loss of public funds.

e) An order for exemplary damages against the 1st Respondent of between Shs 7,000,000/- and Shs 70,000,000/-, assessed at Shs 1,000,000/- to Shs 10,000,000/- for each culpable person, to be retrieved by or on behalf of the 1st Respondent from its culpable commissioners, the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents, pursuant to Article 226(5) of the Constitution and other applicable laws, to occasion no net loss of public funds.

2) The 3rd, 6th and 7th Respondents filed a preliminary objection to the petition dated 23rd July 2018 and written submissions in support of the preliminary objection. The petitioner was served with the submissions and insisted that he did not need time to prepare written submissions and insisted on proceeding orally with his submissions.

3) I have very carefully considered the petition, the preliminary objection, reply to preliminary objection, written submissions by the Respondents, as well as parties oral submissions. The issues for consideration are as laid down in the preliminary objection.

4) The 3rd, 6th and 7th Respondents were Commissioners of the 1st Respondent, **IEBC**, which is charged with the responsibility as remunerated under **section 4 of the Independent Electoral and Boundaries Commission Act and Article 88 (4) of the Constitution of Kenya**.

5) More specifically **Article 88(4) (e) to (e) of the Constitution** provides:-

"The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

a)

b)

c)

d)

e) **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."**

6. **Section 74(1) and (2) of Independent Electoral and Boundaries Commission Act** provides:-

"(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for 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.

(2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission."

7) The starting point in considering the Respondents preliminary objection is the constitutional status of the 1st Respondent which is found under **Article 253 of the constitution of Kenya 2010** which provides:-

"Each commission and each independent office—

(a) Is a body corporate with perpetual succession and a seal; and

(b) Is capable of suing and being sued in its corporate name."

8) Under **Article 250(9) of the Constitution of Kenya 2010**, the constitution insulates commission and holders of independent offices from personal liability for actions and decisions taken in good faith in the course of that function. It is provided thereunder as follows:-

"(9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office."

9) The 1st Respondent, **IEBC**, is established under **Article 88 of the Constitution** and operationalized by the Independent Electoral and Boundaries Commission, and run by Commission, which commission is operated by commissioners appointed pursuant to the provisions of **section 5 of the Independent Electoral and Boundaries Commission Act**. The business of the commission is run by the appointed commission. **Section 13 of the Independent Electoral and Boundaries Commission Act** provides legal personality of the commission as follows:-

"1) The Commission shall be a body corporate with perpetual succession and a common seal and shall be capable, in its own name, of:-

- a) Acquiring, holding and disposing of movable and immovable property;**
- b) Suing and being sued; and**
- c) Doing or performing all such acts and things as a body corporate may by law do or perform."**

10) Under **Article 88(4)(e) of the Constitution of Kenya 2010** the commission is responsible for conducting or supervising referendum and elections to any elective body or office established by the constitution, and any other elections as prescribed by an Act of Parliament and particular, for;

"(e) 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."

10. The protection of commissioners from personal liability is provided for under **Section 15 of Independent Electoral and Boundaries Commission Act** which states:-

"Nothing done by a member of the Commission or by an electoral officer shall, if done in good faith for the purpose of executing the powers, functions or duties of the Commission under the Constitution or this Act, render such member or officer personally liable for any action, claim or demand."

11. The petitioner in his reply to the preliminary objection relies on his replying affidavit dated 16th October 2018 which seems to lack commissioner's stamp, nevertheless I will consider the same. He has referred to **section 16 of IEBC Act** which alludes to protect members of the commission from personal liability for any action, claim or demand in execution of their powers, functions or duties as commissioners under the constitution or this Act. Similarly he relies on section 15; and Articles 248, 226(5), 236, 250(a), and 260 of the Constitution of Kenya and urges, that any member of the commission who directs or approves, the use of public funds contrary to law, is liable for any loss arising from that use and shall make good the loss, whether the member remains the holder of the office or not.

12. The burden of proof lies on he who asserts as per **Section 107 (1) & (2) of the Evidence Act** which provides:-

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

13. The petitioner in his reply to the preliminary objection has filed un commissioned affidavit, to which, no much weight can be attached, apart from, that he has not demonstrated the Respondents were in breach of any of the Articles or statute and in what manner. The petitioner quotes the relevant Articles and section of **IEBC Act** but failed to link the Respondents action with breach of the statute. The petitioner has failed to demonstrate that the Respondents herein whilst in office and in discharging their obligations under **section 74 of the Election Act**, the 3rd, 6th and 7th Respondents did not discharge their duties in good faith. It therefore follows the commissioners are not liable to action done in their capacity as commissioners of the 1st Respondent and in discharge of their duties as it has not been established that they did not discharge their duties in good faith. The actions complained of in the petition against 3rd, 6th and 7th Respondents were not shown not to have been done in discharge of their constitutional duties nor has it been demonstrated they acted in bad faith and not in good faith. I find if any claim lies in favour of the petitioner it ought to be pursued by the petitioner without involving the commissioners in their individual capacity. I find no basis of the 3rd, 6th and 7th Respondents being enjoined in this petition.

14. The upshot is that the preliminary objection by 3rd, 6th and 7th Respondents is meritorious. The names of the 3rd, 6th and 7th Respondents are struck out from the petition. The petition against 3rd, 6th and 7th Respondents is struck out.

This matter is a matter brought forth in public interest and as such I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 26th day of September, 2019.

.....

J .A. MAKAU

JUDGE