



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI, MILINMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 341 OF 2017**

**In the matter of Articles 10, 19, 20, 21, 23 (10 & 165 (3) (b) of the constitution of Kenya 2010**

**and**

**In the matter of Articles 81, 83, 88 (1), (40 & (5) of the 2010 constitution of Kenya as read together with Sections 3, 10 and 12 of the Elections Act (No. 24 of 2011), Laws of Kenya**

**and**

**In the matter of alleged contravention of Rights or fundamental freedoms under Articles 38 (2) and (3) of the 2010 constitution of Kenya**

**and**

**In the matter of Rules 3, 4 (1), 10 & 13 of the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**

**Between**

**Abdi Hussein Abdi.....1<sup>st</sup>Petitioner**

**Yusuf Sheikh Nur**

**Haji.....2<sup>nd</sup>Petitioner**

**Adey Abdi Hussein.....3<sup>rd</sup>Petitioner**

**Habiba Mohamed Ibrahim.....4<sup>th</sup>Petitioner**

**and**

**The Independent Electoral and Boundaries Commission.....Respondent**

**RULING**

1. *The petitioners aver that during the month of May 2017, the Respondent herein embarked on a nation-wide and month-long voter verification exercise. During the exercise various anomalies were detected.*

2. *The petitioners claim that they registered at Abubaka Adaq Primary Polling Station. However, during*

the verification, they were shown to have been registered at Al Fowazan Primary School in Rham Town Polling Station in Mandera County. They reported the anomaly and lodged claim forms with the Respondent as required.

3. They made various trips to the Respondents offices in a bid to have the records rectified including writing to the Respondents to no avail and the Respondent has refused or failed to rectify the voter register and with the general elections scheduled for 8<sup>th</sup> August 2017 fast approaching they became apprehensive that the Respondent would not rectify the register, hence, they filed this petition under certificate of urgency.

4. The history of this matter is relevant and I will as of necessity take it into account as I determine the objection before me. Consequently, I proceed to enumerate it below.

5. This matter came up before me ex parte on 13<sup>th</sup> July 2017. I directed that the Respondent be served and upon service the Respondent files its Response/Reply before 18<sup>th</sup> July 2017. I fixed the matter for mention on 19<sup>th</sup> July 2017 for further directions. The affidavit of service filed in court clearly shows that service was effected on 14<sup>th</sup> July 2017.

6. On 19<sup>th</sup> July 2017, **Mr. Imende** for the Respondent informed the court that he was instructed the previous day and asked for 7 days to file a reply. By consent of the parties, I ordered that the Respondent files its Response by Monday 24<sup>th</sup> July 2017 and further directed that the parties do file their submissions before then.

7. On 24<sup>th</sup> July 2017 when the matter came up again before me, no response had been filed and **Mr. Mwangi** appeared for the Respondents and asked for two days promising to come up with a confirmation that the issue had been resolved. By consent of the parties, and with a prospect of a settlement, I fixed the matter for mention on 26<sup>th</sup> July 2017.

8. But on 26<sup>th</sup> July 2017, no settlement had been arrived at and **Mr. Mwangi** stated that he was in the process of filing a preliminary objection. I placed the file aside at the request of the counsels and when I mentioned the matter later at or after 11.30 am a preliminary objection had been filed and served upon the petitioners counsel in court.

9. The preliminary objection is premised on two grounds which both counsels argued before me namely, by virtue of section 12 of the Elections Act<sup>[1]</sup> reproduced below and Regulation 21 and 22 of the Elections (Registration of voters) Regulations, 2012, this court lacks jurisdiction. The second objection was against the interlocutory application, but to me this was irrelevant since at this point we were dealing with the petition not the application, so counsel abandoned it after this was pointed out by the court.

10. Section 12 of the Elections Act<sup>[2]</sup> provides that:-

### **Claims**

1. A person who has duly applied to be registered and whose name is not included in the register of voters may submit a claim for the name to be included in the register to the registration officer in the prescribed form and manner and within the prescribed time.

2. Subject to the Constitution, a claim under subsection (1) shall be determined by the registration officer in the prescribed manner, and an appeal shall lie in the prescribed manner, to the Principal Magistrates Court on matters of fact and law and to the High Court on matters of law

11. The opening words of subsection 2 are clear. The provisions of the act are subject to the constitution. All law must conform to the Constitutional edifice.

12. Article **165 (3) (d) (i) & (ii)** of the Constitution vests power to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of, the constitution. I find nothing in the cited provisions that can oust the vast powers of the High Court.

13. The Right to vote is constitutionally guaranteed and denial of the Right to vote would in my view be out rightly unconstitutional. The objection under consideration must be weighed against the provisions of the constitution that guarantee the Right to vote.

14. In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the allegations in light of the provisions of the Constitution. When the constitutionality of an action is challenged on grounds that it infringes a fundamental right, what the court has to consider is the “*direct and inevitable effect*” (if any) of such actions. This would help the court in arriving at a more objective and justifiable approach bearing in mind that Human rights enjoy a *prima facie*, presumptive inviolability, and can only be limited as provided under the constitution.

15. Thus, the limitation in question must fall within the provisions of Article 24 of the constitution to pass the constitutional muster.

16. Thus, a preliminary objection whose outcome will be perceived even in the slightest manner to violate a fundamental Right cannot be allowed cannot pass the constitutional muster.

17. The Constitution must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government<sup>[3]</sup>and its organs.

18. This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purposes. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.<sup>[4]</sup>

19. In deciding whether a citizens' constitutional right not to be deprived of his rights except by due process of law, it is the legal system as a whole which must be looked at, not merely one part of it.<sup>[5]</sup> The fundamental human right, as Lord Diplock said, is to a ‘legal system that is fair.’<sup>[6]</sup> Thus, the provisions cited and the objection before me, must not be used to perpetuate an unconstitutional act.

20. Article 20 (3) of the constitution commands the court when applying a provision of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom; and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom and further, in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlay an open and democratic society based on human dignity, equality and freedom and the spirit, purport and objects of the Bill of Rights. I do not agree that I would be up holding the constitutional values by allowing the Respondent to use the provisions cited as a shield to deny citizens their right to vote.

21. Courts to play a crucial role in giving content and meaning to the fundamental rights enshrined in the Bill of Rights. Therefore the courts are the guardians of the Constitution and the values it espouses. In interpreting the law the courts have to infuse it with values of the Constitution. Courts should never shirk the constitutional responsibility. Given the importance which the Constitution places the citizens right to vote, this court finds and holds that it would be abrogating from its constitutional mandate to decline jurisdiction to entertain this matter.

22. In peremptory terms, the constitution imposes an obligation on all courts to promote 'the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*<sup>[7]</sup> the S.A. constitutional court observed: ?

*"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law". In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."*

23. In line with the dictates of the constitution, this court will reject the narrow, literal reading of the above provisions and opt for a construction that promotes wider access to right to vote.

24. As was appreciated by the majority ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***:<sup>[8]</sup>

*"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."*

25. The Court simply cannot countenance a denial of a fundamental right, which is the cornerstone of our legal system. It is the Court's primary duty to protect the basic rights of the people vis-à-vis government actions. The Court cannot just turn a blind eye and simply let it pass. It will continue to uphold the Constitution and its enshrined principles.

26. The third wave<sup>[9]</sup> of democratization in the developing world has created opportunities for development and reconstruction of many nations. This has affected not only on infrastructure and economies, but democratic imperatives have also demanded a rethink of the relationship between those in power and those who voted for them. **Alexander Hamilton** said:-

*"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on government; but experience has taught mankind the necessity of auxiliary precautions."*<sup>[10]</sup>

27. These "auxiliary precautions" referred to by Hamilton included courts and organs of state, as well as a constitutional legal framework established to support these relationships. Alas, we are not angels and we therefore need these "auxiliary precautions" in order to protect the democratic order. National constitutions need to protect civil and political rights and promote realization of social and economic rights.

28. At evidently demonstrated by the history of this matter enumerated above, the objection was raised after several attendances and promises to resolve the matter bringing into sharp focus the manner in which the Respondents have conducted this matter. It is trite law, that matters relating to jurisdiction ought to be raised at the earliest opportunity possible.

29. *Consequently, I find and hold that the preliminary objection before me if upheld will defeat fundamental rights of the citizen petitioners to vote. This court will be the last to uphold a decision that will go against the spirit and letter of the constitution.*

30. The effect is that the Respondents preliminary on objection is dismissed. In view of the urgency of this matter, this Petition shall proceed for hearing on 31 July 2017.

31. Consequently I order as follows:-

*i. That the Respondent is hereby directed to file their Response to the petition (if they so wish) by close of business today, that is 27<sup>th</sup> July 2017.*

*ii. Both parties are directed to file and exchange their Respective submissions by close of business tomorrow, i.e. 28<sup>th</sup> July 2017.*

*iii. Hearing shall proceed by way of affidavits/submissions.*

*Mention for further directions on delivery of judgment on 31<sup>st</sup> July 2017.*

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 27<sup>th</sup> day of July 2017

**John M. Mativo**

**Judge**

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[1] Act No. 24 of 2011

[2] Act No. 24 of 2011

[3] The Namibian Supreme Court in Government of the Republic of Namibia & Anor v Cultura 2000 & Anor, 1994 (1) SA 407 (Nm SC) at 418 F-G, Mahomed CJ

[4] Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, GUBBAY CJ

[5] Independent Publishing Co Limited {2004} 65 WIR 338

[6] {2004} 65 WIR 338 at paragraph 88

[7] {2006} ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[8] Sup. Ct. Advisory Opinion Appl. No. 2 of 2012 at para 54

[9] According to Jones and Stokke (2005) the “third wave refers to a series of democratic transitions in Southern Europe in the 1970s, in Latin America in the 1980s, in Eastern and Central Europe and former Soviet Union from the late 1980s, and in parts of Africa in the 1990s”

[\[10\]](#) Hamilton, A. quoted in President Thabo Mbeki's Address to a Judicial Symposium held in Johannesburg, South Africa, 2003