



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI- MILIMANI

CONSTITUTIONAL PETITION NO. 255 OF 2017

ABUKAR G MOHAMED.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

JUDGEMENT

1. In this petition, the petitioner herein seeks the following orders:

a. The revocation of the appointment of Abdikadir Abdullahi Ahmed as the Constituency Returning Officer for Wajir South Constituency by revoking and or amending Gazette Notice No. 4410 of 5th May 2017 specifically as regards his appointment.

b. A declaration that the respondent, by maintain the appointment of Abdikadir Abdullahi Ahmed as the Constituency Returning Officer for Wajir South Constituency has, in the circumstances of this case, violated the petitioner's right to freely exercise his sovereign authority, to exercise his political rights, and has violated the national values and the constitutional principles for electoral system for the 2017 general elections.

c. Costs and interest.

2. According to the petitioner, the respondent appointed **Mr Abdikadir Abdullahi Ahmed** as the Constituency Returning Officer for Wajir South Constituency without the participation of the people of Wajir South, whether directly or through their representatives, in violation of the constituents' sovereign power. In addition, the afore mentioned Constituency Returning Officer was accused of having exhibited bias and a partial interest in the outcome of the constituency's elections which he has been tasked with managing, so much so that the petitioner and the constituents of Wajir South Constituency have no faith in the electoral process that shall culminate in the general elections of 2017.

3. On 22nd June, 2017 this Court recorded a consent in Judicial Review Case No. 238 of 2017 in the following terms:

1. That the respondent to avail to all duly registered Political Parties and eligible independent candidates a list of Returning Officers and Deputy Returning Officers for the purposed General Elections scheduled for August 2017 pursuant to [Regulation 3 of the Elections (General) Regulations. The said list to be provided by the close of business day on 24th June 2017.

2. That the publication of the said list of Returning Officers and Deputy Returning Officers shall be disseminated by way of:

i. A Notice of the Respondents website and;

ii. A Notice on the link to be published in at least 2 Newspapers with National circulation.

iii. The link will contain a pre-drafted format by the IEBC through which Political Parties and Independent candidates will make their representations.

3. That the Political Parties and Independent candidates will make their presentations in writing regarding the aforesaid list of Officers by 9th July 2017.

4. That the Respondent is to give its feedback to the parties and Independent candidates by 12th July, 2017 and subsequently thereafter to take further action regarding the exercise in compliance with Regulation 3 of the Elections (General) Regulations.

5. That on the basis of the foregoing the matter be marked as settled with no orders as to costs.

6. That the process set out in this consent shall not affect any of the activities that have been carried out in preparation of the General Elections to be conducted on 8th August 2017.

4. In my view, the fate of this petition depends on the nature of the orders recorded in the said application. The general rule is that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995, Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95, The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997 and Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995.

5. Similarly, in Gitau & 2 Others vs. Wandai & 5 Others [1989] KLR 231, Tanui, J held that:

“The plaintiffs in this suit were not party to the suit in which the consent judgement was entered and consequently they are not bound by a compromise made between the advocate who acted for the second, third, fourth, fifth and sixth defendants on one part and the advocates for the first defendant on the other.”

6. However, there are other orders or judgements which bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. In *Conflict of Laws* (7th Edn. 1974) at page 98 by R H Graveson it is stated:

“An action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam*.” See *Black's Law Dictionary*, 9th Edn. Page 862.

7. With respect to a decision *in rem* it was held in Kamunyu And Others vs. Attorney General & Others [2007] 1 EA 116:

“In a suit seeking judgement *in rem*, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in

the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

8. Therefore the mere fact that the applicant was neither a party to the petition nor a party on whose behalf the petition was instituted does not deprive it of the benefit of the said order as long as the same was a decision *in rem*. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Marteenms & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

“Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement *in rem*. A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant.”

9. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

“It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement *in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

10. I am also alive to the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51** in which reliance was sought from *Jowitt’s Dictionary of English Law* (2nd Edn.) p. 1025-6 to the effect that:

“A judgement *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement *in rem*.”

11. In my considered view, the issue of the appointments of the Returning Officers for the forthcoming general elections was settled by the said consent. That decision was a decision *in rem* which are defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely. See **Koech vs. African Highlands and Produce Limited and Another [2006] 2 EA 148**.

12. I therefore associate myself with the reasoning of **Pigeon, J** in **Emms vs. The Queen (1979) 102 DLR (3d) 193** that:

“If a formal declaration of invalidity of an administrative regulation is not considered effective towards all those who are subject thereto, it may mean that all other persons concerned with the application of the regulation, including subordinate administrative agencies, have to keep on giving effect to what has been declared a nullity. It is obviously for the purpose of avoiding this undesirable consequence that, in municipal law, the quashing of a by-law is held to be effective *in rem*.”

13. It is therefore my view that these proceedings which were commenced on 26th May, 2017 were subsumed in the said consent and unless and until the same is set aside or varied, it must bind the

petitioner herein.

14. In the result it is my view and I so hold that this petition has been compromised.

15. There will be no order as to costs.

16. It is so ordered.

Dated at Nairobi this 4th day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ombwayo for the Petitioner.

Mr Sisule for the Respondent.

CA Mwangi