



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELECTION PETITION NO. 2 OF 2017

HON. MARTHA WANGARI KARUA.....1ST PETITIONER

HON. JOSEPH GACHOKI GITARI.....2ND PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

MR. SEKI LEMPAKA.....2ND RESPONDENT

HON. ANN WAIGURU.....3RD RESPONDENT

HON. PETER NDAMBIRI.....4TH RESPONDENT

RULING

1. The Petitioners, **Hon. Martha Wangari Karua** and **Hon. Joseph Gachoki Gitari** filed an election petition against the **Independent Electoral & Boundaries Commission (I.E.B.C.)**, **Mr. Seki Lempaka**, **Hon. Ann Waiguru** and **Hon. Peter Ndambiri**. The petition is based on the background that in the general election held on 8th August, 2017 Hon. Ann Mumbi Waiguru, the Petitioner, Martha Wangari Karua Bedan Muriithi Kagai, Joseph Ndathi and Macharia Karani were candidates for Governor Kirinyaga County. The Returning Officer Seki Lempaka declared Hon. Anne Mumbi Waiguru as being duly elected as the governor, Kirinyaga County.

2. The Petitioners claim that the election for the position of governor Kirinyaga County was not credible, free, fair or verifiable since there was cheating, intimidation, voter bribery, exclusion of petitioners' agents, use of unauthorized persons to man polling stations, tampering with ballot boxes, forgery of ballot papers and breach of mandatory statutory and/or constitutional requirements in the voting, counting, tallying and transmission of votes across the county.

3. It is the petitioners' contention that the Supreme Court of Kenya in a binding decision on this honourable court in **Election Petition No. 1 of 2017 Raila Amolo Odinga & Others -V- Independent Electoral and Boundaries Commission (I.E.B.C.) and Others** held contemporaneously with the gubernatorial elections of Kirinyaga County and other counties was not conducted in accordance with the **Constitution** and other applicable laws and hence was invalid, null and void. It is the Petitioners' contention that the gubernatorial election for Kirinyaga County was for the reasons given by the Supreme Court also invalid, null and void and this Court must so find. It is her contention that she will seek to argue this as a preliminary point of law.

4. Based on this ground the Petitioners filed an application under a certificate of urgency dated 2nd September, 2017 in which they are seeking for an order that this Court do certify that the petition herein raises substantial questions of law of immense public interest and forthwith refer the petition to his Lordship the Chief Justice for appointment of a bench of uneven number of judges being not less than three (3) pursuant to **Article 165 (4)** of the **Constitution** and determine the specific issues hereunder;

- ***“Whether the determination of the Supreme Court in Petition No. 1 of 2017 Raila Odinga & Another -V- Independent Electoral & Boundaries Commission & Others is binding upon this honourable Court and whether this Petition should not be allowed on the basis of the Supreme Court upon the reasons and grounds that the general election conducted in Kenya on 8th August, 2017 amounted to six elections comprising of one indivisible process that required compliance with the Constitution.***
- ***The declaration by the Supreme Court of non-compliance with the Constitution by the 1st Respondent applies to the gubernatorial election of Kirinyaga County conducted by the 1st Respondent on 8th August, 2017.”***

5. In addition to the ground that the Supreme Court of Kenya made a binding decision on this Court in **Petition No. 1 of 2017**, it is contended that it is not open to this Court to take any further evidence on the non-compliance with the Constitution. That as a consequence to that binding decision of the Supreme Court it is the contention of the Petitioner that the gubernatorial election for Kirinyaga County, was for the reasons given by the Supreme Court also invalid, null and void and this Court must so find. That this is a preliminary point of law of immense public interest warranting the prayers sought.

6. The application is supported by the affidavit of **Gitobu Imanyara**, advocate sworn on 7th September, 2017.

7. The 3rd and 4th Respondents opposed the application and filed the following grounds of opposition dated 14th September, 2017.

(i) The Petitioners’ Application dated 7th September, 2017 discloses no grounds known to law for the certification, as provided by Article 165(4) of the Constitution, of the Petition herein as one that raises a substantial question of law under Article 165(3) (b) and (d) of the Constitution.

(ii) The Petitioners’ Application dated 7th September seeks to apply, in respect of the determination of the Supreme Court of Kenya in Presidential Petition No. 1 of 2017 Raila Odinga and another vs Independent Electoral and Boundaries Commission and others, the constitutional principle of stare decisis unconstitutionally.

(iii) The Petitioners’ Application dated 7th September, 2017 is premature, bad in law, misconceived, unfounded, lacking in merit and an abuse of the Court process.

(iv) The Petitioners’ Application dated 7th September 2017 offends Article 165 (5) (a) of the Constitution.

The 1st and 2nd Respondents filed grounds of opposition dated 15th September, 2017 stating:

- They further contend that, the application is bad in law, misconceived, has no merit and is an abuse of court process.
- That the application ought to have been filed after the parties made their respective responses.
- That the application ought to be dismissed.

8. In his submissions, counsel for the Petitioners Mr. Imanyara, urged the Court that the application involves the exercise of the discretion of this Court. That the matter arises out of the decision of the

Supreme Court in **Petition No. 1 of 2017**. That **Article 163 (7)** of the **Constitution** provides that all the Courts are bound by the decision of the Supreme Court and that the decision of the Supreme Court in **Petition No. 1 of 2017** binds this Court. It was further argued that the same institution, i.e. Independent Electoral and Boundaries Commission conducted and supervised the presidential elections which were held simultaneously with the elections of the Senators, Governors, Members of County Assembly and Members of Parliament.

- That the same clerks were and other officers were the same in those elections.
- That the determination by the Supreme Court on substantive issues of non-compliance with the law and the irregularities, nullification binds this Court.
- That this is a substantial issue of law meriting consideration by more than one judicial mind.
- That considering the number of petitions filed, it is a matter of immense public interest.
- That it is a matter fit and proper for Court to exercise its judicial discretion to enable the matter be determined substantively for all the matters which are pending throughout the country.

9. He referred the Court to **Article 259** of the **Constitution** which sets out the manner in which the Constitution is to be interpreted.

10. **Mr. Joe Kathungu** in his submissions on behalf of the 1st and 2nd Respondent submitted that the Supreme Court had not given its reasoned judgment (at time of hearing of this application).

- That the Supreme Court was dealing with a presidential election petition and not gubernatorial election petition.
- That the Court has not been told that the non-compliance applied to the gubernatorial elections in Kirinyaga County.
- That the Court will at the end of the day decide whether the election was conducted in accordance with the Constitution and the elections law.
- That the Respondents' time to reply was not over and that they will prove that the elections were in accordance with the Constitution and the relevant electoral laws.

It is then that the Court will decide to apply the decision of the Supreme Court.

11. He further submitted that the applicants have not established grounds to warrant the Court to refer the matter to the Chief Justice. He cited the case of **Katiba Institute -V- Independent Electoral and Boundaries Commission Petition No. 19 of 2017 (2017) eKLR**.

- That what is before Court is an ordinary election petition which does not necessitate the Chief Justice to constitute a three-judge bench.
- That this Court is competent to make a determination on all the issues raised.

12. For the 3rd and 4th Respondents it was submitted that the question is whether a substantial issue of law has been raised.

- That there has to be a factual foundation.
- That the issue is whether the election held on 8th August, 2017 comprises one indivisible process. The **Constitution** under **Articles 101, 180**, provides for various elections to be held including one under **Article 136 and others**. Six elections happened the same day. The **Elections Act** provides for regimes for those elections. There is no requirement for transmissions of other results. That one can find fault in one election and not the other.

13. It was further submitted that there are absurdities in the application. He contends that **Article 163 (7)** of the **Constitution** introduces the concept of the common law principles of '*Stare decisis*'. He raised the following as absurdities;

- The decision of Supreme Court (by then) had not been rendered. The Court is not able to

- make a decision in the absence of the reasons.
- That the decision of the Supreme Court has to apply without further inquiry.
- That the outcome of presidential elections Petition determines all other petitions.

14. That there were decisions of the Supreme Court in the case **Joho -V- Independent Electoral & Boundaries Commission** which was applied by the Courts but that there was no summary declarations. A summary declaration would affect **Article 50** of the **Constitution**. Allowing the application would occasion delay. That an election petition is to be heard by a judge under **Rule 6 (1) Election Petition Rules**.

15. It was further submitted that for a matter to be certified as raising a substantial issue of law the first consideration is whether it is complex, whether it raises a novel point of law and whether it requires a substantial amount of time. Further that whether it has been settled by the Supreme Court. What is the effect and what is the public interest?

16. It was submitted that the matter is of great public interest. It is not a complex issue. The issue of 'stare decisis' is clear. It does not raise a novel issue. It is the reasoning which applies to the proceedings. It does not require substantial amount of time.

17. I have considered the application, the supporting affidavit, grounds of opposition and the submissions by counsels for the parties.

18. The issues which arise for determination are:

(a) Whether the determination of the Supreme Court in **Petition No. 1 of 2017** is binding upon this Court and whether this Petition should not be allowed on the basis of the Supreme Court decision.

(b) Whether the general election amounted to six elections comprising of one indivisible process that required compliance with the Constitution.

(c) The declaration by the Supreme Court on non-compliance by the 1st Respondent applies to gubernatorial election of Kirinyaga County.

19. In determining these issues consideration must be made to the following substantial question of law. Under **Article 165 (4)** of the **Constitution** it is provided:

“Any matter certified as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an even number of judges being not less than 3 assigned by the Chief Justice.”

Article 165 (3)(b) and (d) provides:-

“Subject to clause (5), the High Court shall have –

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the 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 of 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; and

(iv) A question in relation to conflict of laws under Article 191.

20. The provision, i.e. **Article 165 (4)** of the **Constitution** does not define what amounts to substantial question of law. It is left to the courts to determine what amounts to substantial question of law. It leaves the court to exercise its discretion.

21. This issue has been addressed by the Courts in various decisions and have settled the law as to what amounts to substantial question of law. In the case of **Katiba Institute -V- Independent Electoral and Boundaries Commission H.C. Nairobi Petition No. 19 of 2017 E.C. Muita J.**, stated:

“It can therefore be said that a substantial question of law is one that raises a question of that which has not been fully settled that has a significant impact to the public and is likely to persist and not fully and finally settled.”

It is a question which calls upon the Court to exercise discretion. Such exercise must be done judicially. The Court has to consider whether the matter is of great public interest. Is the matter complex and novel requiring determination interpretation by more than one judge? Does it require substantial amount of time?

22. I am agreeable with the submission by counsel for 3rd and 4th Respondents that matters of election are of great public interest. There are various petitions which have been filed after the declaration of outcome in the general elections which were held on 8th August, 2017. The Petitioners have gone to Court based on facts which are peculiar to their case. This application assumes that in all the petitions they have the same grounds. A petitioner must be allowed to ventilate his case. This is the right to fair trial. **Article 50 (1)** of the **Constitution** provides:

“Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or if appropriate another independent and impartial tribunal or body.”

This is the principle of fair hearing. It is one of the rights under the **Constitution** which are inalienable. **Article 25 (c)** states:

“Despite any other provision in this Constitution the following rights and fundamental freedoms shall not be limited:-

(a)

(b)

(c) the right to a fair trial.

A determination that would affect others who are not parties to the dispute before this Court would amount to violation of the right of those persons to fair hearing. The **Constitution** gives the High Court jurisdiction to hear and determine election disputes. High Court is a court of original jurisdiction and has to determine election disputes in the usual way. What is before this Court is an election dispute. **Article 87 (1)** of the **Constitution** states:

“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

Under **Article 165 (3)** High Court has unlimited original jurisdiction in criminal and civil matters. Parliament enacted legislation which is the **Elections Act. Section 75** provides that:

“A question as to the validity of an election of a county governor shall be determined by High Court within the County or nearest to the County.”

The jurisdiction of the High Court to hear and determine election disputes is stated to be a special jurisdiction conferred by the **Constitution & Election Disputes Laws**. In the cases of **Gideon Mwangangi Wambua and another -V- I.E.B.C. and 2 others Election Petition (Mombasa) No. 4 of 2013**, **Lamankeu Aramat -V- Harun Mectamei Lempaka and 2 Others, Supreme Court Petition 5 of 2014**. This special jurisdiction is not contemporaneous. The consequence of this jurisdiction is ‘*inter alia*’ that an electoral dispute cannot be handled by or remitted to a judge other than the one designated and gazetted to hear and determine it under **Rule 6 (3)** of the **Elections (Parliamentary and County Elections) Petitions Rules 2017**. This Court has jurisdiction to determine all the issues that are pleaded in this petition.

23. This Court has jurisdiction to determine the election petition filed in this Court. The grounds raised are not novel and complex. It is to be heard within a given time frame. The singular issue of the Supreme Court decision is not a substantial issue. There has to be a factual foundation for the Court to apply the decision. This happened after the determination of the Supreme Court in the case of **Joho -V- Independent Electoral & Boundaries Commission**. Various courts applied the decision unlike the decision in **Raila Odinga -V- Independent Electoral & Boundaries Commission and Others in Petition No. 1 of 2013**. Each case must be determined based on its own facts. The determination of the petition has time lines. The overriding objective of the rules is that the election petitions must be heard and disposed off expeditiously. Certifying matter for the Chief Justice to appoint a bench of three would work to defeat this objective. **Rule 6 (1)** of the **Elections Rules (supra)** provides that an election petition shall be heard by one judge.

24. In **R -V- I.E.B.C. and Another Ex Parte Gladwell Otieno eKLR JR Misc. Application No. 447 of 2017** it was held:

“The general rule in these sort of matters was laid down by the Court of Appeal in Peter Nganga Muiruri -V- Credit Bank Limited & Another in Civil Appeal No. 203 of 2006 in which the Court held that any single Judge of the High Court in this Country has jurisdiction and power to handle a constitutional question. Therefore the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion, that power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes.”

As pointed out above an election petition is to be heard by a single Judge.

In **Philip K. Tunoi and Another -V- Judicial Service Commission (2015) eKLR High Court Petition No. 244 of 2014** it was stated:

“I have considered the foregoing. In my view the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of parties. Judicial resources in terms of judicial officers in this county are very scarce.”

I am of the view that to refer the matter to a bench of three (3) would be against the spirit of **Article 159** of the **Constitution** and the rules under the **Elections Act** which calls for expeditious disposal of cases. I see no good ground to exercise discretion in favour of the Applicant.

25. The second consideration is whether the decision of the Supreme Court in **Election Petition No. 1 2017** is binding upon this Court. It is conceded that in view of the provisions of **Article 163 (7)** of the **Constitution** which provides:-

“All courts other than the Supreme Court are bound by the decision of the Supreme Court.”

This ensures that arbitrary exercise of discretion by lower courts resulting in jurisprudential incoherence is avoided. It is a doctrine of precedent which liberates courts from considering every disputable issue as if it were being raised for the first time. It also ensures that the law is predictable and lower courts should not upset what has been determined by the superior court. The application of the provision does not require interpretation by a bench of three judges.

26. The interpretation by the Petitioners to borrow from the submission by the Respondents' counsel is absurd. It is a wrong application of the doctrine of 'stare decisis' to say that the Courts should have a blanket application of the Supreme Court to all petitions filed as a result of declaration of results of the election held on 8th August, 2017.

27. It should be appreciated that there were six indivisible elections held on 8th August, 2017 as already stated earlier. What the petitioner is saying is that the result in **Election Petition No. 1 of 2017 Raila Amolo Odinga and Another -V- Independent Electoral and Boundaries Commission and 2 others** must determine all other petitions as Courts below are bound by the decision. This is already a wrong interpretation or understanding of the provision. A similar determination was made in the Presidential Election in 2013. It did not follow that all the petitions were dismissed. The same is the case in this **Petition No. 1 of 2017**. All the petitions should not be dismissed. In applying the decision of the Supreme Court in **Petition No. 1 of 2017** the Petitioner must lay a factual foundation. Once that is established then the Court has to apply the principle of 'Stare decisis' under **Article 163 (7) of the Constitution**. The Supreme Court has now given reasons for the determination in **Petition No. 1 of 2017**. I am of the view that the Court is bound by the decision in **Election Petition No. 1 of 2017** in determining whether the election was conducted according to the principles laid down in the **Constitution**. The reasoning applies to the proceedings.

In **Election Petition No. 1 of 2017 Raila Amolo Odinga & another -V- IEBC & 2 others**, the main issues for determination were;

(1) Whether the 2nd respondent declared the results of the presidential election before he had received all the results tabulated on Forms 34A from the polling stations.

(2) Whether all the Forms 34A had been electronically transmitted from the polling stations to the National Tallying Centre, which is provided for under Section 39(1C) of the Elections Act stating as follows;

For purposes of a presidential election the Commission shall –

(a) Electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) Tally and verify the results received at the national tallying centre; and

(c) Publish the polling result forms on an online public portal maintained by the Commission.

The Supreme Court in rendering its decision held that;

.....the petitioners herein have discharged the legal burden of proving that the 2nd respondent, declared the final results for the election of the president, before the 1st respondent had received all the results from Forms 34A from all the 40,883 polling stations contrary to the Constitution and the applicable electoral law. We also find and hold that, the 2nd respondent, declared, the said results solely, on the basis of Forms 34B, some of which were of dubious authenticity. We further find that the 1st respondent in disregard of the provisions of Section 39 (1C), of the Elections Act, either failed, or neglected to electronically transmit, in the prescribed form, the tabulated results of an election of the president, from many polling stations to the

National Tallying Centre.

The Supreme Court relied heavily on the decision of the Court of Appeal in Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitui, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy [2017] eKLR which stated;

We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections,.....

Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of any electoral contest. Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.....

Ultimately we find no fault in the determination of the High Court that to the extent that section 39 (2) and (3) of the Act and regulation 87(2)(c) provide that the results declared by the returning officer are provisional, and to the extent that regulation 83 (2) provides that the results of the returning officer are subject to confirmation by the appellant, these provisions are inconsistent with the Constitution and therefore null and void.

This Court is therefore bound by the decision in Election Petition No. 1 of 2017 in determining whether the election was conducted according to the principles laid down in the Constitution and the laws relating to elections.

28. The other consideration is whether the declaration by the Supreme Court of non-compliance by the 1st Respondent applies to gubernatorial election of Kirinyaga County.

The Petition in this case relates to the election of Kirinyaga County Governor. The Petitioner has to discharge the legal burden of proof of the grounds raised in the petition. In **Raila Odinga and 5 others - V- Independent Electoral and Boundaries Commission and 3 others [2013] eKLR**, the Supreme Court stated as follows on burden of proof in election petitions;

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary.....

While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting...

The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.”

29. The Supreme Court in the case of Hassan Ali Joho and Another -V- Suleiman Said Shahbal & 2 others [2014]eKLR stated as follows in regard to elections of County Governor:

“After considering the relevant provisions of the law, as well as the submissions made before us, and after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared at the county level by the County Returning Officer

who issues the presumptive winner with a certificate in Form 38”.

The declaration by the Supreme Court of non-compliance by the 1st respondent in Election Petition No. 1 of 2017 was in regard to Forms 34A and its electronically transmission thereof to the National Tallying Centre. It does not therefore apply to gubernatorial election of Kirinyaga County as provided for under **Section 39 (1B)** of the **Elections Act**.

The Supreme Court decision in **Election Petition No. 1 of 2017** was in a presidential election. This Court will consider the reasoning which binds this Court as the petition before this Court relates to gubernatorial election of Kirinyaga County as provided for under **Section 39 (1) B** of the **Elections Act**. In addition the petition herein is governed by **Subsidiary Elections (Parliamentary and County Elections) Petitions Rules** whose objective is to facilitate the just, expeditious proportionate and affordable resolution of election petitions. The determination will apply as precedent in the petition herein with regard to issues which will be raised in this petition and are similar to issues which were before the Supreme Court. It is not a whole sale application of the petitions filed arising from the General Election.

30. In conclusion, I am of the view that the High Court in various decisions some which I have cited above, has settled the law as to what constitutes a substantial question of law. The issue raised by the Petitioner is not complex or novel. This Court exercises special jurisdiction when dealing with election petitions. The **Elections (Parliamentary and County Elections) Rules at Rule 6 (1) (a)** states;

“An election Court shall be properly constituted to hear and determine –

A petition in respect of an election of a member of parliament or to the office of governor, if it is composed of one High Court Judge.”

The rule is couched in mandatory terms. **Rule 6 (2) (a)** thereof states:

“The Chief Justice may in consultation with the Principal Judge of the High Court, designate judges for the purposes of sub-rule (1) (a).

Rule 6 (2):

“The Chief Justice shall publish the name of the Judges and magistrates designated under sub-rule (2) in the gazette and at least one newspaper of national circulation.”

The Chief Justice published the names of judges and magistrates to handle the election petitions in Gazette Notice No. 9060 of 15th September, 2017. The rules are clear and mandatory that the petitions shall be heard by one Judge. I am of the view that the issues raised by the Petitioners will be properly addressed by this Court. The decisions of Supreme Court have previously been relied on in decisions made by Court of Appeal and High Court. The issue raised does not raise a substantial question of law. **Article 163 (7)** of the **Constitution** is clear. The Court will not certify the matter for the Chief Justice to constitute a bench as this is a matter the Chief Justice has constituted a court to handle the dispute. The Court would not be exercising its discretion judicially in the circumstances. I am of the view that the application is without merits and I dismiss it with costs.

Dated and delivered at Kerugoya this 28th day of September, 2017.

L. W. GITARI

JUDGE

28.09.2017

Ruling read out in open Court in the presence of Wanja Naomi and Njiru Ndegwa for the Petitioners, Joe

Kathungu for the 1st and 2nd Respondents, Kamotho Waiganjo and Andrew Karani for the 3rd and 4th Respondents, Naomi Murage court assistant and legal researcher J. Wanini this 28th day of September, 2017.

L. W. GITARI

JUDGE

28.9.2017