



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: THE ELECTIONS ACT, 2012, THE INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION ACT, 2011**

AND

**IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS, AND THE
ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS, 2012, THE ELECTIONS
(PARLIAMENTARY AND COUNTY ASSEMBLY ELECTIONS) PETITION RULES, 2017, THE
ELECTION (TECHNOLOGY) REGULATIONS, 2017**

AND

IN THE MATTER OF: THE ELECTION OF GOVERNOR, HOMA BAY COUNTY

BETWEEN

1. HON. JOSEPH OYUGI MAGWANGA

2. HON. JOSHUA ORERO.....PETITIONERS

VS

1. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. THE RETURNING OFFICER, HOMA BAY COUNTY

3. HON. CYPRIAN AWITI

4. HON. HAMILTON ORATA.....RESPONDENTS

RULING NO. 1

1. The Petitioners herein, **HON. JOSEPH OYUGI MAGWANGA** and **HON. JOSHUA ORERO**, filed a Petition challenging the election of the Governor of the Homa Bay County. That was on 02/09/2017. Contemporaneously with the filing of the Petition the Petitioners filed a Notice of Motion dated 06/09/2017 under Certificate of Urgency seeking some interim conservatory orders.

2. The application was placed before me on 07/09/2017 as the Duty Judge. I then certified the application as urgent and directed that the same be served for hearing on 14/09/2017.

3. When the application came up for hearing Counsel for the Third and Fourth Respondents, while ready to proceed on with the hearing, raised a jurisdictional issue that this Court is not properly seized of the matter until it is designated as the Election Court and its name duly published in the Gazette pursuant to **Rule 6 of the Elections (Parliamentary and County) Petition Rules, 2017** (hereinafter referred to as '**the Rules**'). Counsel for the First and Second Respondent echoed the foregone position.

4. The Counsel for the Petitioner was of the contrary position. He submitted that the High Court as created under **Article 165 of the Constitution** has unlimited jurisdiction in matters including election matters and that the requirement of publishing the name of the Judge in the Gazette does not bar this Court from issuing interim conservatory orders so as to preserve the substratum in this Petition. He prayed that the objection on jurisdiction be dismissed and this Court proceeds to issue interim conservatory orders as sought in the application pending the *inter partes* hearing. This Court then retired for this ruling.

5. I have carefully considered the objection on the jurisdiction of this Court. I will first fully associate myself with the holding of **Ibrahim, JSC** in **Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others** when in demystifying jurisdiction quoted from the decision in **Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where **Walter Samuel Nkanu Onnoghen, JSC** expressed himself as follows: -

'...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...'

6. In the famous Court of Appeal case of **The Owners of Motor Vessel "LILIAN "S" -vs- Caltex Oil Kenya Ltd (1989) 1 KLR 1** Nyarangi, JA. stated at page 14 that: -

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

7. The Court of Appeal more recently in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction: -

"So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

8. Turning back to the matter at hand suffice to say that **Article 165 of the Constitution** establishes the High Court with unlimited original jurisdiction in criminal and civil matters save for matters exclusively reserved for the Supreme Court or those falling within the jurisdiction of the now Environment and Land Court and the Employment and Labour Relations Court.

9. On the jurisdiction of the High Court in handling election matters, the Supreme Court of Kenya in the case of **Lemanken Aramat v. Harun Maitaml Lempaka & 2 others (2014) eKLR (Petition No. 5 of 2014)** held as follows: -

‘[82] The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3)(a) of the Constitution, is unlimited. In addition, the High Court has a special jurisdiction in electoral matters, conferred by the Constitution, and given effect under the Elections Act: this is the jurisdiction to determine any question as to whether a person has been validly elected as a Member of Parliament (Article 105(1)(a) of the Constitution). This jurisdiction is activated upon a declaration by the authorized electoral body (IEBC) that a particular person has been returned as Member of Parliament, when there is a challenge to that electoral declaration (Article 87(2) of the Constitution).’ (emphasis added).

10. The High Court therefore exercises a special jurisdiction (which is neither civil nor criminal in nature) when dealing with electoral matters. That special jurisdiction is conferred by the **Article 105(1)(a)** of the **Constitution**. However, under **Article 105(3)** that special jurisdiction is given effect by the legislation now known as the **Elections Act**, (hereinafter referred to as **‘the Act’**) which is an Act of Parliament to provide *inter alia* for the resolution of election disputes.

11. Pursuant to **Section 96** of the **Act** the Rules Committee made the Rules whose overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of petitions under the Constitution and the Act. **Rule 6** is on **the constitution of an election court**. The Rule provides as follows: -

‘6.(1) An election court shall be properly constituted, for purpose of hearing –

(a) a petition in respect of an election to Parliament or to the office of governor, if it is composed of one High Court Judge; or

(b) a petition in respect of an election to a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under section 75 of the Act.

(2) The Chief Justice may –

(a) in consultation with the Principal Judge of the High Court, designate such judges; and

(b) designate such magistrates as are necessary for expeditious disposal of petitions.

(3) The Chief Justice shall publish the name of the Judge or Magistrate designated under sub-rule (2) in the Gazette and in at least one newspaper of national circulation.

12. From the reading of the said **Rule 6** it is clear that an election court is properly constituted for purposes of hearing a petition of an election of a County Governor, including any interlocutory application, upon the designation of a particular High Court Judge by the Hon. Chief Justice and upon publishing the name of that Judge in the Gazette and in at least one newspaper of national circulation. Before that happens an election court cannot be said to be properly constituted and therefore a Judge has no jurisdiction to carry himself or herself out as an election court. That means **any proceedings undertaken in an election petition prior to the proper constitution** of the election court are a nullity for want of jurisdiction. The objection by the Respondents is hence upheld.

13. From the foregone analysis, this Court now makes the following orders: -

(a) This Court (Mrima, J.) did not have the jurisdiction to in any way deal with this Election Petition prior to the designation of the said Judge by the Honourable the Chief Justice as the Election Court and the publication of his name in the Gazette and in at least one newspaper of national circulation.

(b) The proceedings undertaken up to 14/09/2017 are declared a nullity and are hereby expunged from the record.

(c) This matter shall await appropriate directions from the duly designated election court.

(d) Costs shall be in course.

Orders accordingly.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, DELIVERED and COUNTERSIGNED at HOMA BAY this 18th day of September 2017.

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JUDGE