



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 514 OF 2017

BETWEEN

HON. JOHN HARUN MWAU.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WAFULA WANYONYI CHEBUKATI.....2ND RESPONDENT

AND

ATTORNEY GENERAL.....1ST INTERESTED PARTY

DR EKURU AUKOT.....2ND INTERESTED PARTY

UHURU KENYATTA.....3RD INTERESTED PARTY

RULING

1. In a petition dated 16th October 2017, Hon. John Harun Mwaui, the petitioner moved this court seeking 10 prayers among them a declaration that nullification of the president elect's election under Article 140 of the constitution by the Supreme Court meant the election to follow is a new presidential election. In prayer (c), the petitioner seeks a declaration that in consideration of Articles 137, 138, 88(4) (d) and (k) and 82(1) (b) of the constitution and section 14 of the Elections Act and other regulations under that Act, nomination is a prerequisite for a candidate to participate in a presidential election. He also sought a declaration that there is a difference between elections under Article 140 and 138(4) and (5) of the constitution. That is election under Article 140 is a new election.

2. The petitioner also sought to have Gazette Notice Nos. 8751 of 5th September 2017 and 9800 of 13th October 2017 declared null and void. There are other prayers but they all relate in one way or another to the fresh presidential election due on 26th October 2017. Of importance, the petitioner seeks to have the election of 26th October 2017 cancelled on grounds that no candidate was validly nominated.

3. After service of the petition, the respondents filed responses to the petition as other parties sought to be

enjoined to this petition. The Attorney General, Dr Ekuru Aukot and President Uhuru Kenyatta were enjoined in these proceedings as 1st, 2nd and 3rd interested parties. Later Mr. Havi sought to have National Supper Alliance also enjoined as an interested party which was granted.

4. Directions were given on filing of responses and the petition was fixed for hearing on 23rd October 2017. On that day most counsel appearing in this matter were also held up before **Mativo J** which forced this matter to be pushed to 24th October 2017 for hearing.

5. When the matter came up for hearing on 24th October 2017, Mr Ngatia learned counsel for the 3rd interested party informed the court that they had filed a Notice of Preliminary objection challenging the jurisdiction of this court to hear the petition and that all parties had agreed that it be heard first given that it had the potential of disposing of the entire petition.

Submissions

6. Mr Ngatia, submitted that the central issue raised in the petition is about nomination of presidential candidates for the fresh election due on 26th October 2017 which he submitted was extensively referred to in the petition. According to learned counsel, the issue of nomination had been pleaded as prerequisite to holding of presidential election. Learned counsel contended that the petitioner had taken the view that there was no nomination for purposes of the presidential election and for that reason, this was a challenge to the presidential election process.

7. Mr Ngatia argued that nomination is central to any electoral process and so critical to the extent that Article 138(1) recognises that where only one candidate is nominated, he is declared elected unopposed and sworn in as president. But if there are more than one candidate the electoral process has to move to actual election in accordance with Article 138(2) of the Constitution.

8. Learned counsel went on to submitted that Article 163(3) of the Constitution gives the Supreme Court exclusive jurisdiction to deal with presidential election dispute, a jurisdiction that is quite distinct from that of the High Court in Article 165(3) (b) of the Constitution which gives the High Court jurisdiction to deal with rights affecting persons including violations. Mr. Ngatia referred to the Supreme Court decision in ***Re The Matter of Geneder Representation in The National Assembly and Senate- Advisory Opinion No 2 of 2012*** particularly paragraphs 100-104 where the Supreme Court stated that it had jurisdiction to deal with disputes relating to presidential elections other than the actual election petitions.

9. Counsel contended that the fresh presidential election was triggered by the annulment of the election of 8th August 2017 by the Supreme Court and subsequent Gazette Notice No 8751 of 5th September 2017 by IEBC setting in motion the fresh presidential election. Counsel also relied on the Supreme cases ***Moses Mucigi & 14 others v The Independent Electoral and Boundaries Commission & 5 others [2016] eKLR*** to demonstrate the importance of nomination in an electoral process. He also referred to the case of ***Africa Centre for Governance (AFRICOG) v Ahmed Isaac Hassan & another [2013]eKLR*** on the jurisdiction of this Court to deal with electoral processes in a presidential election. Referring to the case of ***Harford v Linkey 1989 QB 582*** counsel contended that nomination is an essential part of an election which affects the outcome of the election itself. He therefore submitted that disputes relating to presidential election fall within the jurisdiction of the Supreme Court and not this court. He urged that the petition be struck out with costs.

10. Mr. Wambua Kilonzo, learned Counsel for IEBC agreed with Mr. Ngatia and submitted that the petition is ill intended. Counsel gave the example of prayer (e) in the petition which seeks cancellation of the fresh presidential election. He also pointed at paragraph (h) which contends that there was no nomination, to submit that this matter falls outside the mandate of this Court. According to learned Counsel, the petition is about the election process which was triggered by a declaration of the election. Counsel argued that there is already a presidential electoral process with the declaration of the date and Gazette Notice.

11. Mr. Wambua Kilonzo contended therefore that a critical electoral process having been triggered, only the Supreme Court can hear a dispute on the presidential nomination process or on the cancellation of the election itself. Counsel argued that this is not a proper Constitutional interpretation issue because there is no single identified issue for consideration by the Court. He asked that the petition be dismissed.

12. Mr. Bitta, learned counsel for the 1st interested party, associated himself with submissions by both Mr. Ngatia and Mr. Wambua Kilonzo. However, Counsel added that the Constitution should be interpreted harmoniously. Learned Counsel submitted that Article 163 (3) of the Constitution gives the Supreme Court exclusive jurisdiction on presidential election disputes in terms of Article 140(3) of the Constitution. Counsel referred to prayers (h) and (i) in the petition which he submitted, targeted the fresh election ordered by the Supreme Court pursuant to Article 140 (3). Mr. Bitta contended that the petitioner's grievance was on the presidential election hence this Court lacks jurisdiction to sit over the matter.

13. Mr. Mutuma, learned counsel for the 2nd interested party also agreed with Mr. Ngatia's submissions and added that any party who comes to Court must present his cause before the appropriate Court. Counsel contended that the petition is about nominations of presidential candidates for the election triggered by the invalidation of the first presidential election hence it is for the Supreme Court.

14. In learned counsel's view, Article 163 (7) of the Constitution is clear that decisions of the Supreme Court are binding on all other Courts except the Supreme Court itself. In that regard, counsel submitted that the Supreme Court ordered that elections be held within 60 days which is binding on other Courts. He contended that allowing the petition would contravene the Supreme Court's decision.

15. Mr. Ouma, learned counsel to the petitioner, opposed the preliminary objection submitting that it was not a true preliminary objection. Counsel submitted that the Supreme Court's jurisdiction relates to disputes arising after a presidential election under Article 140 of the Constitution. According to counsel, the petition challenges the way the respondents discharged their mandate under Article 88 of the constitution. He contended that the 1st and 2nd respondents are conducting affairs contrary to the constitution and the law.

16. Learned counsel went on contend that the respondents went on to gazette names of candidates to contest in the fresh presidential election without conducting nominations which violated the constitution and the law. Responding to *Moses Mucigi's* case, counsel submitted that the Supreme Court was clear that after nominations and declaration of results, disputes shift to the election court. He therefore contended that this court has jurisdiction to hear this matter.

17. Mr Havi, learned counsel to the 4th interested party, associated himself with the submissions by Mr Ouma, and contended that both the Supreme Court and High Court have jurisdiction to interpret the Constitution. Counsel submitted that the petition must be seen in light of Article 163(3) vis a vis Article 165(3) of the Constitution on the jurisdiction of both the High Court and the Supreme Court notwithstanding the binding nature of the Supreme Court's opinion in the *Gender representation Case*.

18. Learned counsel contended that this Court has to decide whether the petition raises a question relating to the presidential election under Article 140 of the Constitution and if it finds that it does not and therefore is not about presidential election, the Court should go ahead and hear the petition. According to Counsel, Section 74(I) of the Elections Act defines disputes as those arising after conclusion of elections which is also supported by the Supreme Court Rules 2017. In counsel's view, there is a co- shared jurisdiction between the High Court and Supreme Court and for that reason this Court has jurisdiction to hear this petition. He prayed that the preliminary objection be dismissed.

Determination.

19. I have considered the preliminary objection, submissions by learned counsel for the parties and the authorities relied on. The respondents and 1st to 3rd interested parties have raised a preliminary objection to this court's jurisdiction to hear and determine this petition, arguing that the issues raised in the petition

touch on the presidential election and therefore, fall within the jurisdiction of the Supreme Court. The petitioner's and 4th interested party's counsel hold a contrary view that this court has jurisdiction.

20. A preliminary objection is raised when it is intended to bring the entire suit or petition to a conclusion. In order to fit the description of a preliminary objection, it must meet the principles set out in the oft cited case of **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696**. It must raise a pure point of law and not general grounds in opposition to the suit or claim. As stated by Law JA,

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued successfully as a preliminary point may dispose of the suit.”

21. Examples of preliminary objections include objections to the jurisdiction of a Court or plea of limitation. The preliminary objection raised before me is on the jurisdiction where the respondents and some of the interested parties have argued that this Court lacks jurisdiction to hear this petition.

22. Jurisdiction being the authority reposed on a Court to hear disputes formally referred to it for resolution, is a central and critical question that any Court whose jurisdiction has been challenged must resolve at once. In the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 Nyarangi JA** stated;

“...I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized.... of the matter is then obliged to decide the issue right away on the material before it. 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. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

23. This decision was followed in the case of **Owners and Masters of Motor vessel “Joey” v Owners and Masters Motor Tugs “Barbara” and Steve “B”[2007] eKLR** where the Court of Appeal stated that ***the question of jurisdiction, raised in the circumstances such as those existing in that appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties.***

24. According to the above decisions, a Court cannot hear a matter if it has no jurisdiction, it must down tool the moment it is of the view that it has no jurisdiction and decline to entertain the matter any further.

25. The same question of jurisdiction was picked up by the Supreme Court in the case of **Re The Matter of Interim Independent Electoral and Boundaries Commission, [2011]eKLR** where it stated-

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent... jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours...”

26. The Supreme Court once again warned in the case of **Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012]eKLR** that;

“A Court’s jurisdiction flows from either the constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

27. The Respondents and the 1st to 3rd Interested Parties have contended that this Court has no

jurisdiction to hear this petition because it touches on the presidential electoral process which is a matter for the Supreme Court. They have relied on Articles 163(3)(a) and 140 of the Constitution and Judicial precedents to show that this Court indeed lacks jurisdiction over this matter.

28. At paragraph 4 of the petition, the petitioner states that the petition concerns the simple straight forward issue on whether a fresh or new election can be held without nomination and or based on nomination that has been annulled and whether the 1st and 2nd respondents (Chair of IEBC and IEBC itself) have powers in law to waive, suspend, set aside or disregard nomination of Presidential candidates.

29. The petitioner referred to the orders of the Supreme Court made on 1st September 2017 which annulled the first election and ordered fresh election within Sixty (60) days to justify the petition being in court. The central issue in the petition, therefore, touches on the Presidential election and more so whether or not there should have been fresh nomination after the nullification of the Presidential election of 8th August 2017.

30. I have examined the Prayers in the Petition and surely they all refer to the fresh Presidential election. Picking prayer (c) as an example, it clearly refers to the Prerequisite of nomination before holding of a presidential election. This would mean determining who is or who is not suitable to stand for the Presidential election. Prayer (e) also seeks a declaration that a Presidential election should be cancelled if no candidate is nominated before the period set for presentation of nomination papers by Presidential candidates. Prayer (f) seeks a declaration that a Presidential election is initiated through a Gazette Notice specifying the nomination day for purposes of Presidential election and the date on which the poll will be held. Prayer (g) seeks a declaration that a person qualified under Article 137 of the Constitution is eligible for election as president.

31. More importantly Prayer (h) seeks a declaration that since there is no validly nominated Presidential candidate to contest the Presidential election, schedule for 26th October 2017, such election must be cancelled and a fresh election ordered. The petitioner also seeks in prayer (i), a declaration that Gazette Notice Nos 8751 of 5th September 2017, 9800 of 29th September 2017 and 10152 of 13th October 2017 are null and void in so far as they disregard provisions of Articles 137, 138, 140 and certain provisions of the Elections Act and Regulations made there under with regard to nomination of Candidates for Presidential election.

32. It is clear beyond para-adventure that the basis of this petition is the fresh presidential election which has been set in motion first; by the Supreme Court orders of 1st September 2017 nullifying the presidential election and the order that fresh election be held within sixty (60) days, and second, the subsequent Gazette Notice No 8751 setting the date of election, and publishing names of presidential candidates.

33. The issue as I perceive it therefore is about the process leading to the fresh presidential election as opposed to a challenge on declaration of presidential election results and validity of such election. Article 163(3)(a) of the Constitution gives the Supreme Court exclusive original jurisdiction to hear and determine disputes relating to elections to the office of President arising under Article 140. Article 140 provides for how a presidential election is to be challenged and what to follow should the Supreme Court uphold the petition challenging the presidential election. Article 140(3) provides that where the election is invalidated a fresh election should be held within sixty (60) days. That is what happened in the case of the election held on August 8th, 2017, so what the country is going through now is a process that was triggered under Article 140(3) of the Constitution.

34. This Court has wide jurisdiction under Article 165(3) of the Constitution to deal with many issues because its jurisdiction is unlimited both in criminal and civil matters. It has jurisdiction to deal with questions affecting the Bill of Rights and jurisdiction to interpret the Constitution among others. It can also deal with a question of whether anything said to have been done under the authority of law, was done in accordance with the Constitution or the Law.

35. However, Article 165(5) limits this Court's jurisdiction to deal with matters reserved for the exclusive jurisdiction of the Supreme Court, Employment and Labour Relations and Environment and Land Court. This is an express limitation of this court's jurisdiction.

36. The question that arises here is; does this court have jurisdiction to deal with the petition before it? In my respectful view, the answer must in the negative. I will explain. A presidential election is not a one day event. It is a process that begins with political parties nominating candidates, IEBC Gazetting the date of election and the candidates to participate in that election. Once that is done, this becomes a Presidential electoral process culminating with an election.

37. The election of 8th August 2017 having been annulled, and IEBC ordered to conduct fresh election within sixty days, IEBC complied and issued Gazette Notice No 8751 setting the date of election and the candidates to run in that election. With that single act, the election entered a critical phase of the Presidential electoral process contemplated under Article 138(2) of the Constitution.

38. The question of nomination of presidential candidates would entail determining suitability or unsuitability of a candidate to stand for presidential election under Article 137 of the Constitution. This would in the end have a bearing on the validity of the Presidential election, if the person nominated was or was not qualified for election.

39. The supreme Court considered its jurisdiction under Article 163(3)(a) of the Constitution in ***Re The Matter of the Principle of Gender Representation in the National Assembly and the Senate, (supra)*** and determined that its jurisdiction is not limited to Presidential disputes arising after declaration of Presidential elections results. The Court observed;

"[104] It is our unanimous opinion that the validity of the Presidential election is not for determination only after the administrative pronouncement of the final result; at any stage in the critical steps of the electoral process, the Supreme Court should entertain a dispute as to validity."(emphasis)

40. The import of that opinion is that the Supreme Court can entertain disputes relating the presidential electoral process. That is the validity of the process leading to the presidential election like in the present petition. It is true that there are situations where both the Supreme Court and High Court share jurisdiction on the interpretation of the Constitution, but as the Supreme Court stated in above case, where the Presidential Election has entered a critical stage, it can deal with disputes that have a bearing on the outcome of that election. That is what I find in the present case.

41. I have carefully gone through each of the prayers in this petition. They have the singular aim of bringing the fresh presidential election to a halt. This is more apparent in prayers (h) and (i) which seek to have the fresh election cancelled and Gazette Notices notifying the date of election and candidates quashed for being null and void.

42. Looking at these prayers visa vis the decision of the supreme Court directing IEBC to hold election within sixty (60) days and the text in Article 163(7) which states that decisions of the Supreme Court are binding on all other Courts including this Court. I find and hold that the effect of the Petition is to circumvent the supreme Court decision, a jurisdiction this Court does not have.

43. I must also point out that this petition does not seek to enforce an individual's fundamental rights and freedoms under the Constitution but rather to determine the issue on nomination of Presidential Candidates and the processes leading to that election. It is important that this Court remains faithful to the jurisdiction granted to it by the Constitution. I agree with the observation by LenaolaJ (as he then was) in ***Africa Centre for Governance (AFRICOG) v Ahmed Isaac Hassan & another (supra)*** that:

"The matters arising from the petition before us are matters involve the process leading to the declaration of a successful presidential candidate. As the Supreme Court has stated... the presidential election is not a single event; it is a process from nominations to election petitions

subsequent to declaration of presidential election results. This Court cannot appropriate jurisdiction to entertain this matter however urgent or important it may be to the parties or the public.”

44. In the circumstances therefore, I find and hold that this Court has no jurisdiction to deal with the petition before it as the issues raised in the petition fall within the jurisdiction of the Supreme Court. Consequently, the Preliminary Objection succeeds and the petition dated 16th October 2017 is declined and struck out. Each party will however bear their own costs.

Dated, Signed and Delivered at Nairobi this 25th Day of October 2017

E C MWITA

JUDGE