



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL PETITION NO 490 OF 2017

HON. DAVID PKOSING.....PETITIONER

VERSUS

NATIONAL SUPER ALLIANCE.....1ST RESPONDENT

ORANGE DEMIOCRATIC MOVEMENT.....2ND RESPONDENT

WIPER DEMOCRATIC MOVEMENT – KENYA.....3RD RESPONDENT

FORD – KENYA PARTY.....4TH RESPONDENT

AMANI NATIONAL CONGRESS.....5TH RESPONDENT

HON. RAILA AMOLO ODINGA.....6TH RESPONDENT

HON. STEPHEN KALONZO MUSYOKA.....7TH RESPONDENT

HON. WYCLIFFE MUSALIA MUDAVADI.....8TH RESPONDENT

HON. MOSES MAIKA WETANGULA.....9TH RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION(IEBC).....10TH RESPONDENT

WAFULA CHABUKATI.....11TH RESPONDENT

REGISTRAR OF POLITICAL PARTIES12TH RESPONDENT

THE HON. ATTORNEY GENERAL.....13TH RESPONDENT

JUBILEE PARTYINTERESTED PARTY

JUDGMENT

Introduction

1. On 1st September 2017, the Supreme Court annulled presidential election held on 8th August 2017 on grounds that the said election had not complied with the Constitution and Election Laws. It ordered that fresh election be conducted by the Independent Electoral and Boundaries Commission, IEBC the 10th respondent, within sixty (60) days. Subsequently, IEBC declared 17th October 2017 to be the date for the fresh election through Gazette Notice No 8751. of 5th September 2017, but later changed the date to 26th October 2017, In that gazette Notice, IEBC named President Uhuru Muigai Kenyatta, his running mate William Samoe Ruto and Raila Amollo Odinga and his running mate Stephen Kalonzo Musyoka the candidates for purposes of that election. Following these developments, the country was once again back in the electioneering period.

2. Further developments ensued with one side of the competitors demanding some reforms within IEBC while the other began the process of amending electoral laws. The two sides sharply differ on what to do or not to do before the fresh presidential election. Meanwhile, campaigns are in full gear on one side while the other has threatened to boycott the election and is currently engaged in protest to push for changes within the IEBC.

The petition

3. In a Petition dated 2nd October 2017, Hon David Pkosing, the current member of National Assembly for Pokot South has sued National Super Alliance, Orange Democratic Movement, Wiper Democratic Movement – Kenya. Ford Kenya Party and Amani National Congress, Political parties and Members of the 1st respondent. Also sued are Hon. Raila Amollo Odinga, Hon. Stephen Kalonzo Musyoka, Hon. Wycliffe Musalia Mudavadi and Hon. Moses Masika Wetagula, the 6th to 9th respondents, The Independent Electoral and Boundaries Commission (IEBC), Wafula Chebukati, Registrar of Political Parties and Hon Attorney General as the 10th to 13th respondents respectively.

4. The 6th and 7th respondents were presidential candidate and running mate in the Presidential election held on 8th August 2017, and Presidential candidate and running mate in the fresh presidential election due on 26th October 2017. The 8th and 9th respondents are co-Principles within NASA Coalition, the 1st respondent. The 10th respondent (IEBC) is responsible for conducting elections while the 11th respondent in chair of the 10th respondent, the 12th respondent is responsible for registering political parties and the custodian of information on membership of political parties. The 13th respondent is the Attorney General of the Republic of Kenya and Principal legal adviser to the national government and defender of public interest.

5. The petitioner avers and depose in his petition and the supporting affidavit that in the wake of the Supreme Court decision of 1st September 2017 annulling the presidential election held on 8th August 2017, the 1st to 9th respondents and other leaders of NASA and its affiliates have publicly threatened to prevent, impede, subvert or otherwise ensure that fresh elections will not be held on 26th October 2017 unless some electoral reforms are effected.

6. The petitioner avers that if the presidential election is not held for whatever reason, the country is likely to plunge into a Constitutional crisis since there is a legal lacuna on how to conduct elections thereafter. The petitioner states that in view of the prohibition in Article 3(2) of the Constitution outlawing establishment of a government otherwise than in accordance with the Constitution, any willful actions and decisions of the 1st – 9th respondents to impede or subvert fresh elections scheduled for 26th October 2017 will amount to violation of Article 3(2) of the Constitution.

7. The petitioner further states that by dint of Article 3(1) of the Constitution the 1st – 9th respondents are bound to obey the Supreme Court order that fresh elections be held within 60 days. The petitioner avers that the 1st to 9th respondents are likely to resort to unlawful actions to ensure that fresh presidential election will not be held as scheduled which violates the code of conduct for political parties. He beseeches this Court to uphold the rule of law and prevent a constitutional crisis by granting his twelve

prayers as follows;

- a) ***THAT a declaration be issued to declare that pursuant to Article 140(3) of the Constitution and the 10th Respondent's Gazette Notice No.8751 dated 5th September, 2017 candidates nominated to contest the fresh presidential elections are bound by the order of the Supreme Court of Kenya made on 1st September, 2017 to participate in the said election.***
- b) ***THAT a declaration be issued to declare that any decision, action or omission by the 6th and 7th Respondents by themselves and their supporters or jointly with the 1st – 5th and 8th- 9th Respondents to boycott, subvert, impede, cause or otherwise ensure that the fresh presidential elections scheduled to be held on 26th October, 2017 is not conducted is unlawful by dint of Articles 3, 38 and 140(3) of the Constitution read with IEBC's Gazette Notice No.8751 dated 5th September, 2017 and treasonous within the meaning of section 40 of the Penal Code Cap 63 Laws of Kenya.***
- c) ***THAT a declaration be issued to declare that any decision, attempts, threats, action or omission by the 2nd, 6th and 7th Respondent's namely ODM Party, Hon. Raila Amollo Odinga and Hon. Stephen Kalonzo Musyoka to boycott, subvert, impede, cause or otherwise ensure that the fresh presidential elections scheduled to be held on 26th October, 2017 is not conducted amounts to contempt of the order of the Supreme Court of Kenya made on 1st September, 2017.***
- d) ***THAT a declaration be issued to declare that under Articles 138 and 140(3) of the Constitution any decisions, actions or omissions by the 1st -9th Respondents calculated or intended to and/or causing the boycott, subversion or failure to conduct the fresh presidential election on 26th October, 2017 in all or some of Kenya's 290 Constituencies and 47 Counties shall not negate, affect or otherwise compromise the validity of fresh presidential elections.***
- e) ***THAT a declaration be issued to declare that any decision, actions or omissions by the 6th and 7th Respondents to boycott, subvert or otherwise ensure the fresh presidential elections will not be conducted on 26th October, 2017 pursuant to Article 140(3) of the Constitution and the orders of the Supreme Court of Kenya made on 1st September, 2017 constitute illegality and treason within the meaning of Articles 3, 38 and 138(2) of the Constitution and section 40 of the Penal Code and shall automatically render the nomination of the 6th and 7th Respondents under the 10th Respondents Gazette Notice No.8751 dated 5th September, 2017 null and void ab initio.***
- f) ***THAT on account of the 2nd, 6th and 7th Respondents' contempt of the Order of the Supreme Court of Kenya made on 1st September, 2017 and violation of Articles 3, 138 and 140 of the Constitution, an order of certiorari be issued to quash the 10th Respondent's Gazette Notice No. 8751 dated 5th September, 2017 to the extent that it specifies that Hon. Raila Amollo Odinga and Hon. Stephen Kalonzo Musyoka are presidential and running mate candidates in the fresh presidential election scheduled to be held on 26th October, 2017 as ordered by the Supreme Court of Kenya pursuant to Article 140(3) of the Constitution.***
- g) ***THAT a declaration be issued to declare that the 10th Respondent-the Independent Electoral and Boundaries Commission is enjoined to determine at the close of the campaign period for the fresh presidential election scheduled for 26th October 2017 whether the two nominated candidates under Gazette Notice No. 8751 dated 5th September 2017 have abandoned their respective quest for the seat of president and act accordingly under Article 138 of the Constitution.***
- h) ***THAT an order of mandatory injunction be issued to compel the 10th Respondent-the Independent Electoral and Boundaries Commission-to determine at the end of the campaign***

period for the fresh presidential election scheduled to be held on 26th October 2017 whether the 6th and 7th respondents have repudiated, renounced or otherwise withdrawn their nomination under Gazette Notice No.8751 dated 5th September, 2017 and act accordingly under Article 138 of the Constitution.

i) THAT a declaration be issued to declare that upon the 10th Respondent- the Independent Electoral and Boundaries Commission-determining that the 6th and 7th Respondents have renounced, repudiated, withdrawn or otherwise abandoned their nomination under Gazette Notice No. 8751 dated 5th September, 2017 the fresh presidential election scheduled to be held on 26th October, 2017 shall not be held and Hon. Uhuru Muigai Kenyatta shall be declared as having been elected President pursuant to Article 138(1) of the Constitution.

j) THAT a declaration be issued to declare that the Petitioner's political rights protected by Articles 27, 38, 138 and 140(3) of the Constitution have been violated by the political scheme by the 1st -9th Respondents to subvert, boycott, impede or otherwise ensure the fresh presidential election ordered by the Supreme Court of Kenya pursuant to Article 140 (3) of the Constitution is not held as scheduled on 26th October, 2017.

k) THAT an order of mandatory injunction be issued to compel the Registrar of Political Parties to deregister the 1st- 5th Respondents herein under Section 21 of the Political Parties Act, 2011 on account of violation of Article 91 of the Constitution in relation to the fresh presidential election scheduled to be conducted by IEBC by 30th (sic) October, 2017.

l) THAT the Costs of this Petition be borne by the Respondents in any event.

Responses

8. The 1st – 9th respondents' Advocates Messrs. A.T. Oluoch & Company Advocates filed a Notice of Appointment on 3rd October 2017, but never filed a response to the petition. The 10th and 11th respondents on their part filed a replying affidavit through the 11th respondent sworn on 16th October 2017. The 11th respondent deposed that the 10th respondent has mandate under Article 88(4) of the Constitution to supervise elections, that the 10th respondent conducted elections on 8th August 2017 and declared results which were challenged by the 6th and 7th respondents in petition no 1 of 2017 and the Supreme Court annulled the election which had been won by President Uhuru Kenyatta and his running mate William Ruto.

9. The 11th respondent deposed that the Supreme Court ordered that a fresh presidential election be held under Article 140(3) of the Constitution, and in compliance, the 10th respondent published Gazette Notice Number 8751 of 5th September 2017 for the fresh election. It was also deposed that on 11th October 2017, the High Court (**Mativo J**) issued an order compelling the 10th respondent to include Dr Ekuru Aukot as a presidential candidate and the 10th respondent duly complied by issuing a corrigenda to that effect. According to the 10th respondent, it was also resolved to include all other presidential candidates who had participated in the presidential election of 8th August 2017. The 10th respondent deposed therefore, that in the 11th respondent's view, any candidate who wished to withdraw from the fresh election was free to do so by notifying the 10th respondent.

10. Responding to prayer (a) in the petition, the 11th respondent stated that the Supreme Court judgment did not oblige any candidate to run in the fresh election, and even that while complying with the Supreme Court judgment, IEBC cannot lawfully compel any candidate to participate in the election, and the candidates whose names are in the Gazette Notice are at liberty to choose whether or not to participate in that election.

11. Regarding prayer (f) it was deposed that the Supreme Court judgment did not make it mandatory for candidates to participate in the fresh election and that the 10th respondent is not aware of contempt of a Court order by the 6th and 7th respondents. On prayers (g), (h) and (i) the 10th respondent deposed that those prayers have been overtaken by events given the judgment of **Mativo J** of 11th October 2017 allowing other candidates to participate in the fresh election. In particular, the 10th respondent deposed that in so far as there are other candidates it would not be necessary for the Court to issue declarations and injunctions against the 10th and 11th respondents.

12. The 12th and 13th respondents did not file responses to the petition but their respective counsel filed written submissions, attended Court and highlighted them.

Submissions

13. Mr. Kibe Mungai, learned counsel for the petitioner while highlighting their written submissions, abandoned prayers (h), (i) and (k) in the petition leaving nine (9) prayers. Prayers (h) and (i) had sought orders against the 11th respondent while prayer (k) was directed at the Registrar of political parties, the 12th respondent to deregister some of the respondent political parties.

14. Learned counsel submitted that the presidential election held on 8th August 2017 was annulled by the Supreme Court on 1st September 2017 on the petition by the 6th and 7th respondents and a fresh election ordered within 60 days under Article 140(3) of the Constitution. Counsel submitted that the petition is not seeking to compel any candidate to participate in the fresh election but is based on the fact that the August 8th election was nullified because of a petition filed by the 6th and 7th respondents. Counsel contended that since the 6th and 7th respondents won at the Supreme Court, they are obliged to run in the fresh election. According to learned counsel, a litigant who wins in Court is bound by the reliefs sought and granted by that Court.

15. Mr. Kibe Mungai went on to submit that in the context of the **2013 Supreme Court decision** and that of Hon **Mr. Justice Mativo**, the 6th and 7th respondents are bound to run in the fresh elections, Counsel contended that under Article 4(2) of the Constitution, Kenya is a multiparty democratic state which means the state is structured around political parties.

16. Referring to Article 138 of the Constitution, counsel submitted that a presidential election must be held in each constituency. Counsel contended that due to the unwillingness of the 6th and 7th respondents to submit to the election as ordered by the Supreme Court, there is genuine apprehension that election may not be held in accordance with Article 138 of the Constitution. He referred to the case of ***Kipkalya Kiprono Kones v Republic & Another Ex parte Kimani Wanyoike & 4 others*** (2006) eKLR on the principles of democracy, submitting that it would be better to have a defective election than having no election at all.

17. Learned counsel urged grant of prayers (a) and (c) contending that the 6th and 7th respondents are bound to run for election and that if threats prevent holding of the election, that would amount to contempt of the Supreme Court decision. Counsel in particular argued that parties cannot be allowed to choose and pick what they want to comply with in a judgment.

18. In urging for grant of prayer (b) learned counsel submitted that boycotting or preventing the fresh presidential election in an unlawful and treasonable act because holding the election as ordered by the Supreme Court is the only way of having a lawful government in terms of Article 3(2) of the Constitution. Counsel contended that under Article 38(3) of the Constitution, citizens have a right for free and fair election, and any act that prevents holding of elections under Article 140(3) cannot be allowed. Mr. Mungai further argued that it would be treasonable if elections were not held on 26th October 2017. On prayers (d) and (e) Counsel submitted that if the election was not to be completed for any other reason caused by the 1st to 9th respondents, the Court has a duty to ensure that the threats are appropriately addressed through grant of the prayers sought.

19. Mr. Mungai relied on the decision in the case of *Gusii Mwalimu investments co Ltd v Mwalimu Hotel Kisii Ltd* [1996] eKLR to support his contention that if the 1st to 9th respondents succeed wholly or partly in preventing the fresh presidential election in some constituencies, it will not be available to the respondents to claim that proper election had not been held in according to Article 138(3) of the Constitution. Counsel also relied on the case of *Kinyanjui v Kinyanjui* EALR(1995-1998) 1 EA146 (HKC) on the principle that disobedience of a Court order cannot go unpunished.

20. Counsel went on to contend that under Article 138 of the Constitution, the petitioner is entitled to have presidential election as ordered by the Supreme Court and, therefore, wants the Court to order that there be obedience to the constitution. He cited Article 23 of the Constitution submitting that the Court is enjoined to give effective remedies where a petitioner has proved his case.

10th And 11th Respondents' Submissions

21. Mr. Wambua Kilonzo, learned counsel for the 10th and 11th respondents agreed with Mr. Kibe Mungai on the need to have elections held as schedule. He also agreed that any attempt to have a government formed otherwise than as provided for by the constitution is treasonable. However Learned counsel opposed grant of prayer (f) in the petition. According to counsel, a party cannot be compelled to run or participate in an election since entry and withdrawal from election is governed by law and other legal instruments.

22. Learned counsel further contended, that whether or not presidential election will be held in all constituencies is a matter for conjecture and if that does happen, it will be a matter for the Supreme Court. Mr. Kilonzo also submitted that the Court cannot interfere with security matters since that is matter for the police. He submitted that the 10th respondent had put in place mechanisms for holding elections and urged the Court to exercise caution in the kind of prayers to grant in this matter.

13th Respondent's submissions

13. Miss Gitiri, learned counsel for the 13th respondent, on her part submitted that Article 140(3) is couched in mandatory terms. Counsel submitted referring to paragraph 73 in petition No 471 of 2017 *Dr, Ekuru Aukot v Independent Electoral and Boundaries Commission*, that the Court had made it clear that those who participated in the election of 8th August 2017 were eligible to stand for election of 26th October 2017 and as a consequence the other candidate were included.

24. On whether a candidate can withdraw from an election, counsel submitted that this can only be done by following the laid down procedure. Counsel submitted that the 10th respondent has the mandate to conduct election and that section 14 of the elections Act provides for what it has to do and further that under section 38, after Gazette Notice, returning officers are required to hold elections.

25. According to learned counsel, under Article 38(2) of the Constitution a citizen has a right to participate in free and fair election. Counsel submitted that since the date of the fresh election is known as well as the candidates, elections should proceed and everybody is required to act in accordance with the constitution.'

Interested Party's submissions

26. Mr. Macharia, learned counsel for the interested Party, submitted that what underlies the prayers in the petition is the principles of the rule of law under Article 10 of the constitution. Counsel submitted that a party cannot engage in a conduct meant to impede free and fair election. Counsel referred to Articles 38(3), 81(e)(ii) 91(2)(b) of the Constitution and section 13(i)(c) of the Elections Offences Act to submit that they prohibit violence or any other conduct that would impede holding of free and fair election.

27. Next, counsel submitted that a party cannot found a cause of action on an illegality to which he is

party. He referred to the case of **Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others 2012 eKLR** to contend that election should be held on the set date and failure to do so would be unconstitutional. Counsel also referred to the case of **Prof Anyang' Nyong'o and others v Attorney General of Kenya and others Reference No. 1 of 2006 (East African Court of Justice)** where the word “election” was defined to mean making a decision and that an election can be contested or uncontested and further that election could also mean selection. According to counsel, government cannot exist outside the law. He contended that a party has a right to choose to participate or not to participate in an election but cannot impede other peoples’ right.

Determination

28. I have considered the pleadings herein, submissions by counsel and the authorities relied on. The petitioner has sought a number of declarations and orders from this Court ostensibly to enforce the Constitution. On the one hand, the petitioner urges the Court to declare that candidates gazetted by the 10th respondent following the annulment of presidential election are bound to run in the fresh election due on 26th October 2017, that failure to run for president and threats to boycott the fresh election amounts to treason and that acts of the 2nd, 6th and 7th respondents to impede the election is contempt of the judgment of the Supreme Court, The other orders sought include declarations that conduct of the 1st to 9th respondents which may impede the election of 26th October 2017 shall not affect the validity of the presidential election and that the conduct of the 6th and 7th respondents to boycott and or otherwise subvert that election pursuant to order of the Supreme Court shall constitute an illegality and treason and shall render nomination of the 6th and 7th respondents null and void.

29. The petitioner sought other declarations and orders including certiorari to quash the name of the 6th and 7th respondents from Gazette Notice No. 8751 of 5th September 2017 as candidates in the fresh election in view of their alleged conduct. In particular the petitioner seeks a declaration that the petitioner’s political rights under Articles 27, 38, 138 and 140(3) of the Constitution have been violated by the 1st to 9th respondents whose acts of intention to subvert or impede the election are not tenable.

30. Counsel for the petitioner submitted at length both in his written and oral submissions on why the Court should allow the petition and grant the prayers. However counsel abandoned prayers (g) and (i) against IEBC, and prayers (k) against the Registrar of Political Parties, the 11th and 12th respondents respectively.

31. This petition raises issues touching on the presidential election following the annulment of the presidential election and subsequent declaration by IEBC that fresh presidential election be held on 26th October 2017 and published a Gazette Notice to that effect.

32. When the Supreme Court heard the election petition **Raila Odinga v Independent Electoral and Boundaries Commission and others**, Petition No. 1 of 2017, it determined that the election was null and void and ordered fresh election to be conducted by IEBC within 60 days. This was on 1st September 2017. On 5th of September, IEBC published a Gazette Notice fixing the fresh election on 17th October 2017, but later changed the date to 26th October 2017.

33. Later, one of the candidates who had taken part in the original presidential election, Dr. Ekuru Aukot went back to the Supreme Court seeking to have his name included as one of the presidential candidates. The Supreme Court declined to hear the matter and referred it to this Court for hearing and determination. That petition No. 471 of 2017, **Dr. Ekuru Aukot v Independent Electoral and Boundaries Commission and 3 Others** was heard by my esteemed brother, **Mativo J** and in his judgment delivered on 11th October 2017, directed IEBC to include Dr. Aukot as a candidate in the fresh Presidential poll. Not only was Dr. Aukot included by virtue of that direction, but also all those other candidates who had participated in the annulled presidential election. That perhaps informed the petitioner’s decision to abandon prayers (h) and (i).

34. The current presidential election, therefore, stems from the annulment of the first election of 8th August 2017 under Article 140(3) of the constitution. Article 140 provides how a presidential election should be challenged and what follows in case of a successful challenge. The Article provides;

“[140] (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.”(emphasis)

35. Following the successful challenge to the presidential election and a fresh election ordered, IEBC proceeded and set a date for that election, the 26th October 2017. This petition therefore touches on that presidential election.

36. Mr. Kibe Mungai, learned counsel for the petitioner, submitted at length on the necessity to have the election on the due date and that the 6th and 7th respondents could not stop the election through boycott or otherwise. Although learned counsel contended that he wanted to disabuse the notion created that this petition had sought to compel the 6th and 7th respondents to run in the fresh presidential election scheduled for 26th October 2017, he did not succeed in doing so. This is because reading through the petition, the prayers sought as well as submissions, they speak otherwise.

37. One of the prayers sought is to find contempt and the submission is that a party who succeeds in Court is bound by the decree of the Court. In that regard, the petitioner seeks an order to the effect that pursuant to Article 140(3) of the Constitution, and the 10th respondent’s Gazette Notice no 8751 of 5th September 2017 the candidates named to contest the fresh presidential election are bound by the order of the Supreme Court of 1st September 2017 and the subsequent Gazette Notice to participate in the said election.

38. The import of Mr. Kibe Mungai’s submission is that where a party goes to Court and eventually obtains a decree in his favour, that party is bound by the decree. This submission was made to justify why the 6th and 7th respondents should run in the fresh presidential election.

39. I find this to be an appropriate point to pause and observe that I have agonized over this petition, and in particular whether indeed this is an appropriate matter for this Court’s determination, and more importantly the import of the prayers sought were they to be granted. First, this petition arises from the nullification of the presidential election and the Supreme Court’s order that fresh elections be held within 60 days. The issues raised in this petition therefore, touch on that fresh presidential election. The 10th respondent did gazette the date of the fresh election and candidates to take part in that fresh election thus triggering the presidential election process within the meaning of Article 138 of the Constitution. That raises the question of jurisdiction of this court to sit over this petition.

40. It is strite law that when a dispute is presented to a Court, the Court has a duty to determine whether it has jurisdiction to hear that dispute. The question of jurisdiction can be raised by parties or on the Court’s own motion. This is so because jurisdiction is the starting point to justify a Court’s decision to take over a matter and render a determination on it.

41. In the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 Nyarangi JA stated that;

“a question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is

scanty or limited. Scanty or limited facts constitute the evidence before the Court.”

42. None of the parties raised the issue of jurisdiction despite the fact that the matter touches on the presidential election and orders of the Supreme Court regarding that election. Despite this and as was stated by the Court of Appeal in ***Rafiki Enterprises Limited v Kingsway Tyres and Automart Limited*** [1996] eKLR, ***every Court has a duty to determine whether or not it has jurisdiction over a particular matter.*** It is therefore important for this Court to first determine whether it has jurisdiction to render itself on this matter.

43. Mr. Wambua Kilonzo, learned counsel for IEBC did caution that some of the prayers sought may not be appropriate for this Court to grant since they belong to the Supreme Court, but did not go beyond that to argue that this Court did not have jurisdiction to determine the petition. It therefore becomes necessary for this Court to look at the issue.

44. With jurisdiction is meant the authority given to a Court to determine disputes formally presented before it for resolution. In the famous case of ***Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (supra) Nyarangi JA*** discussed at length the question of jurisdiction. It suffices however to quote only part of his address thus;

“...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...”

In ***Re The Matter of Interim Independent Electoral and Boundaries Commission***, [2011]eKLR the Supreme Court emphasized on jurisdiction and 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...”

45. The Supreme Court followed it up again in the case of ***Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others***, [2012] eKLR where it stated;

“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...”

46. Jurisdiction of this Court is granted by the Constitution. Article 165(3) provides;

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

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

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this 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 relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

47. From the Constitutional text, this Court has unlimited original jurisdiction in criminal and civil matters, jurisdiction to determine issues of fundamental rights in the Bill of Rights and jurisdiction on the interpretation of the constitution under Article 165(3) (d). However, the Court's jurisdiction is also limited by the same Constitution in Article 65(5) where it provides that the High Court shall not have jurisdiction on matters reserved for the exclusive jurisdiction of the Supreme Court or those falling within the jurisdiction of Courts contemplated under Article 162(2). These are The Employment and Labour Relations Court and Environment and Land Court (ELRC and ELC) respectively.

48. On the other hand, the jurisdiction of the Supreme Court is provided for under Article 163(3) which states;

“(3) The Supreme Court shall have—

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and

(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from-

(i) the Court of Appeal; and

(ii) any other Court or tribunal as prescribed by national legislation”(emphasis)

49. Thus the Supreme Court's jurisdiction to hear disputes from presidential elections is exclusive and not shared. The Constitution also makes it clear that disputes relating to elections to the office of president arising under Article 140 of the Constitution fall under original jurisdiction of the Supreme Court. Article 140 gives the Supreme Court jurisdiction to determine questions on the validity of presidential elections pursuant to Articles 136, 137, 138 and 139.

50. The reading of both Articles 163(3) and 140 would seem to suggest that the Supreme Court's jurisdiction is activated only after the declaration of presidential election results. That is however not entirely correct. In the case of **Re The Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory opinion No. 2 of 2012**, the Supreme Court stated that its exclusive jurisdiction on presidential election disputes is not limited to disputes arising after conclusion of the presidential election but also extends to other disputes that may arise before and during the conduct of presidential elections.

51. In that regard the Court stated;

“[100] It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for “qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election.”

52. The Court then proceeded to state;

“[101] Does the entire question concerning Presidential elections belong to the Supreme Court’s jurisdiction” Or is the Supreme Court’s power limited by the express language of Article 140 of the Constitution.....[102] Besides, a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon all such disputes as would arise from the Presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising after the election – while excluding those disputes which might arise during the conduct of election.

[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)

53. The above observation is plain that the Supreme Court can deal with disputes relating to presidential election at the critical stage of the presidential election process. In that context therefore, the jurisdiction of the Supreme Court is not limited to disputes arising after actual declaration of presidential election results, but is triggered once there is active presidential electoral process. In such circumstances a dispute on the presidential election like the one before me would belong to the Supreme Court.

54. In the Re ***The Matter of Interim Independent Electoral and Boundaries Commission*** [2011]eKLR, which dealt with interpretation on the date of the first election under the 2010 Constitution, the Supreme Court deferred the matter to the High Court though stating that ***quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction;*** The significance of the Supreme Court’s statement in the ***Gender Representation case***, is that it has wider jurisdiction than the impression created from a literal reading of Articles 163(3) and 140 of the Constitution.

55. I must admit however, that this Court has power to enforce decisions of the Supreme Court. Section 27 of the Supreme Court Act (No 7) of 2011 provides that ***a judgment, decree, or order of the Supreme Court may be enforced by the High Court as if it had been given or made by the High Court.*** For this to happen, there must be a judgment or decree capable of being enforced if this Court were to call into operation section 27 of the Supreme Court Act.

53. On the other hand, section 28 of the same Act provides that ***the Supreme Court shall have the same power and authority as the High Court to punish any person for contempt of Court in any case to which subsection (1) does not apply.*** Subsection (1) deals with contempt committed in the face of the Court. That means the Supreme Court can deal with any issues of contempt of its decisions or orders.

54. As it stands, there is at the moment, an active and critical presidential electoral process going on in the country. The prayers sought in the petition target that electoral process and if the orders sought are granted they will to some great extent, determine the question of validity of that presidential election. Although prayer (a) is couched as if it were for enforcement of the order of the Supreme Court, there is

nothing really to enforce because IEBC has done what the Supreme Court directed it to do. If there be contempt, the Supreme Court can deal with the issue. Prayer (c) asks this Court to find that the 6th and 7th respondents have committed contempt of the Supreme Court decision of 1st September 2017. This will not be in accord with section 28 of the Supreme Court Act which gives the Supreme Court power to deal with contempt committed in disobedience of its orders. Further still Prayer (d) seeks from this Court a presumptive declaration that whatever happens before and or during the fresh presidential election of 26th October 2017 notwithstanding, that election should be deemed to be valid. This prayer seeks orders that only the Supreme Court can make regarding the conduct of the fresh presidential election.

55. On the other hand, Prayer (b) is, in a manner of speaking, couched so as to find the 1st -9th respondents to have committed unlawful acts which amount to electoral offences under the Election offences Act or worse still treasonable acts under the penal code. That would amount to trying people for criminal offences other than in the manner prescribed by law. In other words the petition seeks to have this Court to convert its process into a criminal trial and ultimately return a conviction against some of the respondents. Prayer (e) also urges that this Court makes a finding of commission of illegal and treasonable acts should the fresh presidential election not be held due to the conduct of some of the respondents and further that the nomination of the 6th and 7th respondents be deemed to have become null and void and void due to their conduct and actions.

56. Without going through each and every prayer in the petition, I think I have done enough to demonstrate that the common denominator in all the prayers is that the petitioner has sought orders that will in one way or another affect the fresh presidential election. Clearly some prayers can only be granted by the Supreme Court while others would require a different trial process other than by this Court.

57. I have taken trouble to enumerate at least in summary, the prayers as sought in the petition just to show how much the issues raised therein fall outside the mandate of this Court. They fall within the jurisdiction of the Supreme Court and other Courts. They do not, in my view, fall within this Court's jurisdiction of interpreting the Constitution and enforcing the Bill of Rights under Article 165(3)(d), unless of course this Court is engaged in a creative and or innovative interpretive manoeuvre

58. In the course of his submissions, learned Counsel Mr. Kibe Mungai while relying on the decision in **Kipkalya Kiprono Kones v Republic & another exparte Kimani wa Nyoike & 4 others**[2004]eKLR contended that it would be better to have a defective election than there being no election at all. In that regard, learned counsel submitted that the petitioner, being mindful of Article 3(1) of the Constitution to respect, uphold and defend the Constitution, sought the orders in the petition for that purpose. On that basis learned Counsel submitted in their written submissions thus;

“Given the fact that the High Court is the only Court vested with unlimited original jurisdiction in criminal and civil matters and considering the High Court jurisdiction under Article 165(3) of the Constitution, the petitioner is convinced that in the face of the peculiar Constitutional challenges unfolding in Kenya, it is the business of this Honourable Court to protect the prevailing Constitutional order which in the first instance requires it to ensure that the fresh presidential election scheduled to be held on 26th October 2017 will go on and results declared notwithstanding challenges wrought by willful acts of sabotage and criminality.”(emphasis)

59. As I have pointed out, it is precisely because of the kind of submissions made and the prayers sought that bring to the fore the question of the jurisdiction of this Court to determine the petition and grant the prayers. It must be clear that this Court is not in charge of presidential election and cannot therefore say anything about the legality, validity or otherwise of the fresh presidential election at this stage or thereafter without appearing to encroach on the jurisdiction of the Supreme Court. This Court is bound by the Constitution and judicial precedents and must therefore play within its theatre of operation.

60. I perfectly understand the petitioner's concerns as captured in his petition and from submissions by his Counsel. They paint a picture of uncertainty and desperation not sure of what will happen on 26th October 2017. However, this Court can only exercise jurisdiction as conferred on it by the Constitution

and the law and only when it is properly seized of a matter can it render itself on it. That is perhaps why Mr. Wambua Kilonzo, learned counsel for IEBC, in his submissions, correctly cautioned that this Court should be cautious on the kind of prayers to grant pointing out that the prayers in the petition were based on conjecture. He also contended that some of the prayers sought belonged to the Supreme Court.

61. I entirely agree with learned counsel that the issues in this petition do not belong to this Court. This Court has a wide jurisdiction to deal with constitutional issues but they must be real constitutional issues falling within the jurisdiction of the Court. It cannot extend its jurisdiction through the craft of interpretation.

62. Finally I must point out that during the hearing of the petition even in the absence of the 1st to 9th respondents, all counsel present from Mr. Kibe Mungai, Mr. Wambua Kilonzo, Miss Gitiri to Mr. Macharia were unanimous that no one can be forced to run in an election. With that concession I do not know how this Court, even if it were to assume jurisdiction, could have forced the 6th and 7th respondents to comply with the judgment of the Supreme Court even though they were the successful parties before that Court by running in the fresh election. To my mind no Court can force a citizen, or a person for that matter, to exercise his or her rights and fundamental freedoms.

63. In the same breath, Article 38 of the Constitution grants citizens the right to make political choices. Under sub Article (3) (c), an adult citizen has a right to be a candidate for a public office or office within a political party and if elected to hold that office. That is a political choice to be made by the citizen. It is his basic right and fundamental freedom that can only be enjoyed and exercised by the individual, and no one, not even by an order of this Court can force or coerce one to exercise the right. That would in itself be a violation of the person's right to make a choice.

64. In conclusion therefore, having given due consideration to this matter, I am not satisfied that it meets the threshold of a constitutional petition. The issues raised in therein though couched as constitutional questions fall outside the mandate of this Court. The upshot is that the petition dated 2nd October 2017 falls by the wayside and is dismissed with no order as to costs.

Dated Signed and Delivered at Nairobi this 24th day of October 2017

E C MWITA

JUDGE