



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 504 OF 2017

In the matter of: The Constitution of Kenya 2010

IN THE MATTER OF: The Election of the President of the Republic of Kenya after failed repeat Presidential Elections slated for 26 October 2017

IN THE MATTER OF: The Laws applicable to the Presidential Re-run

IN THE MATTER OF: The formation of the Supreme caretaker Government to hold the Country together and midwife electoral reforms 2017

IN THE MATTER OF: The Contempt of the Supreme Court Orders by the Independent Electoral & Boundaries Commission

IN THE MATTER OF: The purported revival of the repeat presidential elections slated for 26 October 2017 which were effectively and irreversibly cancelled by the operation of the law following the withdrawal of the NASA candidates and the alleged desperate retrospective application of the High Court decision in Dr. Ekuru Aukot vs Independent Electoral & Boundaries Commission & 3 Others, Nairobi High Court Petition No. 471 of 2017

BETWEEN

Okiya Omtatah Okoiti.....Petitioner

versus

Independent Electoral & Boundaries Commission.....1stRespondent

The Chairperson, Independent Electoral & Boundaries Commission2ndRespondent

The Hon. Attorney General.....3rd Respondent

H.E. Uhuru Muigai Kenyatta.....4th Respondent

And

Dr. Ekuru Aukot.....1st Interested Party

Jubilee Party.....2nd Interested Party

Orange Democratic Movement.....3th Interested Party

RULING

1. **Mr. Mutinda** appearing for the Hon Attorney General (third Respondent) applied orally for this court to certify this case as raising substantial questions of law and refer the file to the honourable the chief justice under article **165 (4)** of the constitution to constitute a bench of uneven number of Judges of the High Court to hear and determine this case.

2. The application was supported by counsels for **Mr. Kilonzo** for the first Respondent, **Mr. Karori** and **Melly** for the second Respondent, **Mr. Ngatia, SC** for the fourth Respondent, **Mr. Mutuma** for the first Interested Party, **Mr. Kirangu** for the second Interested Party, **Mr. Onyango** for the third Interested Party while **Mr. Omtata** (the petitioner), and **Mr. Ochieng** for the fourth Interested party opposed the application.

3. **Mr. Mutinda** argued that the petition raises substantial points of law in that the petition invites the court to determine issues of great public importance relating to the Presidential elections scheduled for 26th October 2017. He urged the court to examine the reliefs sought in the petition which include orders *inter alia* that the president ceased occupying office upon the nullification of his election by the Supreme Court on 1st September 2017 and an order compelling the president to vacate office by mid-night on 1st November 2017. Also prayed in the petition is an order compelling the IEBC to hold fresh elections within sixty days from 1st November 2017 only to mention but some.

4. **Mr Ngatia** Sc, in support of Mr. Mutinda's application, posed three questions which in his view raise substantial questions of law. These are:- **(i)** if the court were to grant an order for the Hon. The Chief Justice to midwife the electoral process, then, this will out rightly violate the doctrine of separation of powers; **(ii)** that the care taker government sought in the petition will be formed in a manner not contemplated under the law; and **(iii)** the question of what happens if a candidate withdraws from the race.

5. In the course of **Mr. Mutinda's** submissions, this court on its own motion raised the question of jurisdiction and invited the parties to address the subject. Jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court; *a fortiori* the Court *can suo motu* raise it.

6. It is desirable that Preliminary Objection be raised early on the issue of jurisdiction; but once it is apparent to any party that the Court may not have jurisdiction, it can be raised even *viva voce*. It is always in the interest of justice to the raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity.^[1]

7. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*^[2] where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

"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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8. **John Beecroft** in a treatise headed “*Words and Phrases Legally Defined*”^[3] states the following about jurisdiction:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

9. While raising the question of jurisdiction, I had in mind the provisions of Article **163 (3)** of the Constitution provides that:-

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 to hear and determine appeals from-

i. the Court of Appeal; and

ii. any other court or tribunal as prescribed by national legislation.

10. Sub-article **(6)** provides that the Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

11. **Article 165** establishes the High Court and vests in it vast powers *including the power to ‘determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened’ and the jurisdiction ‘to hear any question respecting the interpretation of the Constitution.’* **Article 23(1)** provides that:- *“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”* **Article 165 (6)** provides that *“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.*

12. The limitation of this courts vast powers conferred under article **165** is to be found in sub-article **(5)** which states in mandatory terms that the high court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under the constitution or falling within the jurisdiction of the courts established under article **162 (2)**.

13. Article **163 (7)** provides that all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. This leads to the question whether the Supreme Court has pronounced itself on the issues raised in this petition. This question warrants a close examination of the petition so as to appreciate the crux of the petitioners case.

14. At this juncture, I find it appropriate to comment on the function and purpose of good pleadings by recalling the words of an Australian Court^[4] where Vickery J said this of the principles of good pleading:-

"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

... Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.^[5] (Emphasis supplied)

15. My analysis of the petition before me leads me to the irresistible conclusion that the crux of this petition is the question "what happens after a presidential candidate withdraws from the race after the Gazettement of the candidates." Put differently, does the withdrawal of the Hon. Raila Amolo Odinga and his running mate from the presidential race render the presidential election scheduled for 26th October 2017 fatal?

16. Also, among the orders sought by the petitioner are (a) quashing the Gazette Notice No. 10152 dated 13th October 2017. The fundamental question that requires an answer is whether or not the foregoing issues have a bearing on the conduct of Presidential elections and if so, whether they are matters for determination by this court or the Supreme Court.

17. While raising the question of jurisdiction, I drew the parties attention to the Supreme Court of Kenya Advisory opinion number 2 of 2012 where the Supreme Court addressed the question whether the entire question concerning presidential elections belong to the Supreme Court's jurisdiction or whether its power is limited by the express language of Article 140 of the constitution. Addressing the said question the Supreme Court rendered itself as follows:-

Para 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, ..., is not lodged in a **single event**; it is, in effect, a process set in a plurality of stages. ... 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.***

Para 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". ..

On a literal construction, it may be stated that the foregoing reference to "**the elections** to office of President" suggests the draftspersons contemplated that **several** rounds of election may be involved, before the emergence of a duly elected President.

Para 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"*

18. The petitioner Mr. Omtatah argued that this court has jurisdiction under article **165**. He also relied on paragraph **100** of the Supreme Court Advisory Opinion cited above which reads:-

"This opinion, on the second question raised by the Attorney General, gives an indication of the course of practice, in the absence of any relevant constitutional change, or new legislation on the subject."

19. In Mr. Omtata's view, the relevant legislation is now in place in the form of legal notice no.7 of 2011, that is *The Supreme Court (Presidential Election Petition Rules), 2017*. In my humble view, these are Rules of procedure enacted to govern conduct of Presidential Petitions at the Supreme Court, hence, they cannot be said to be the legislation the Supreme Court referred to in paragraph **100** relied upon by Mr. Omtatah.

20. **Mr Ochieng** for the fourth Interested Party also submitted that this court has jurisdiction to entertain this matter by virtue of Article **165** of the constitution. He nevertheless admitted that some of the reliefs sought in the petition cannot be granted owing to the fact that they touch on future events which have not crystallized in causes of action.

21. The other issues raised in the petition which can safely be said to be within the jurisdiction of this court touch on events that have not taken place, and this raises a question of the fundamental doctrine or ripeness.

22. I have carefully studied the Supreme Court opinion referred to above, and I have no doubt that the core issues raised in this petition are matters that the Supreme Court carefully addressed in the said opinion. The Supreme Court opined *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. ... 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**.*

23. The issues arising in this petition in my view have a bearing on the presidential elections scheduled for 26th October 2017 and fall within the opinion rendered by the Supreme Court. Whereas Article 138 (8) addresses the question of what would happen in the event of death of a candidate or where no candidate is nominated, the question of withdrawal of a candidate after nominations and or Gazettement has not been addressed in the constitution.

24. In my view, since the election is a process as correctly pointed out by the Supreme Court, where a candidate withdraws in the course of the process which is clearly an issue that has a bearing on the process, then it is my view that such a dispute falls within the jurisdiction of the Supreme Court.

25. The Supreme Court also addressed the question "*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". .. On a literal construction, it may be stated that the foregoing reference to "**the elections** to office of President" suggests the draftspersons contemplated that*

several rounds of election may be involved, before the emergence of a duly elected President.

26. On the face of the clear provisions of Article **163 (3), (7)** and the Supreme Advisory Opinion number **2** of 2012, and in particular the paragraphs reproduced above, I am constrained to find and hold that the substantial issues raised in this petition are outside the jurisdiction of this court.

27. The other issues raised in the petition which would have fallen within the jurisdiction of this court are not ripe for determination.

28. Accordingly, I am constrained as I hereby do, to dismiss this petition with no orders as to costs.

29. No orders as to costs

Orders accordingly.

Dated at Nairobi this **24th** day of **October**, 2017

John M. Mativo

Judge

[1] Belgore J.S.C. See Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd, (1992) 5 NWLR (Pt. 244) 675 at 693

[2] {1989} KLR 1

[3] Volume 3:1-N, at Page 113

[4] In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6]

[5] See also Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].