REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELECTION PETITION APPEAL NO. 1 OF 2017

STEPHEN NZUE MWANTHI...APPELLANT

VERSUS

1. PHILIP MUIA AND TWO OTHERS

2. THE INDEPPENDENT ELECTORAL AND BOUNDARIES COMMISSION

3. RETURNING OFFICER MASINGA CONSTITUENCY…...RESPONDENTS

(Being an appeal from ruling of Hon. G. Shikwe in Kithimani SRMC Election Petition No. 1 of 2017 on 17th October, 2017)

JUDGEMENT

1. The 1st Respondent filed the petition on 8th September, 2017. When the matter came up for mention before the trial magistrate on 4th September, 2017, the appellant sought leave to file an application to strike out the petition. Subsequently, the appellant filed a notice of motion dated 4th October, 2017 on the ground that the petition was time barred. It was the appellant's contention that the results were declared on 10th August, 2017 and the petition was therefore to be filed within 28 days which ended on 6th September, 2017. It was further stated that pursuant to rule 19 (2), there is no extension of time for filing an election petition. The 1st respondent's response was in form of another application, a notice of motion dated 6th October, 2017. It was contended that the 1st respondent paid filing fees on 6th September, 2017 yet his petition was stamped 8th September, 2017.

2. The trial magistrate considered the application and disallowed the motion. The basis under which the motion was disallowed was that the petition was hybrid having allegations of corrupt practices as envisaged under section 76 (2) of the Elections Act and also validity of the election on account of the conduct of the presiding officer. That following the Supreme Court decision in **Hassan Ali Joho and another v. Suleiman Said Shahbal and 2 others (2014) eKLR** parliament introduced two types of petitions that can be filed thus, one that questions an election on grounds of corrupt practices envisaged in section 76 (2) and the question of illegal practice under section 76 (3) of the Election Act. That the said sections provide for filing of an election within 28 days from the date of publication of the results in the gazette. That the material petition being hybrid as earlier said, and section 76 (2) being a valid law in the Kenyan Statute, the petition was within time.

3. Due to the foregoing, the appellant has filed this appeal to seek this court's interpretation on the issue of timelines within which a petition ought to be filed. The said petition is particularly based on the following grounds:

i. That the learned magistrate erred in law and in fact in holding that sections 76 (2) and 76 (3) of the Elections Act do not contravene Article 87 (20 of the Constitution.

ii. That the learned magistrate erred in law and in fact by not upholding that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

iii. That the learned magistrate erred in law and in fact by not dismissing the petition.

4. The appeal was canvassed by way of written submissions. It was argued for the appellant that he acted diligently and expeditiously. That the appellant could not jump the gun and file a memorandum, application and record without notifying the court. It was the appellant's contention that section 77 (1) of the Elections Act and Article 87 (2) provide for filing election petitions other than presidential elections within 28 days from the date of declaration and that any law enacted in contravention of the Constitution is null and void on the onset. That whether or not the material petition is founded in section 76 (2) and 76 (3) of the Election Act must first be filed within the Constitutional period of 28 days. That the Election Act is a post Constitution legislation and the effect of inconsistency of any of its provision with the Constitution is expressed in Article 2 (4) of the Constitution. That once the magistrate made a finding on Article 87 as to inconsistency, he could not give legal effect to section 76 (2) and 76 (3) prospectively or retrospectively. It was argued that it was not in vain that the words 'publication of the election results in the Gazette' were not included in Article 87 (2) of the Constitution and that moreover, section 77 (1) of the Election Act restates Article 87 (2).

5. The appellant placed reliance in **Chicot and Chevron, Henchy J at page 313, Wood and Another v. Riley (1867) 3CP 26** (per Keating, J)**,** and Article 2 (4) of the Kenyan Constitution both which resonate that any act or omission in contravention or inconsistent with the Constitution is invalid. He further cited paragraph 85 of the Joho case (supra) where the Supreme Court of Kenya observed:

"The provision of the Constitution are superior to any legislation. As such, when interpreting the provision of any Act of Parliament, the court must always ensure that the same conform to the Constitution and not vice versa. In order to ensure that justice is not sacrificed at the altar of technicality, the court is however, enjoined to invoke its inherent power which interpreting the Constitution and legislation, to preserve the values and principles of the Constitution."

6. The 1st respondent on the other hand submitted on three issues. First on whether or not this court has jurisdiction to hear an interlocutory appeal emanating from an election petition; secondly whether the high court can grant order for stay of proceedings and whether or not section 76 (2) and 76 (3) of the Elections Act contravene Article 87 of the Constitution.

7. Citing a number of cases among them **Ferdinand Ndungu Waititu v. Independent Electoral and Boundaries Commission (IEBC) and eight others (2013) eKLR** and **Judicial Service Commission & Secretary, Judicial Service Commission v. Kalpana H. Rawal (2015) e KLR**, it was argued that this court lacks the jurisdiction to hear an interlocutory appeal in an election petition. The courts in the latter decisions were of the view that limitation to the right of appeal with regard to interlocutory applications was to assist the expeditious hearing and conclusion of election petitions.

8. The issue of the need to expeditiously conclude election matters was again raised on the second issue. The 1st respondent submitted that section 75 (2) of the Elections Act provided for 6 months period within which petitions should be heard and determined and staying proceedings would therefore go against the said provision. The 1st respondent in this regard cited **Muiya v. Nyaga & others (2002) 2 E.A. 616**. Lastly, the 1st respondent submitted that the Supreme Court in Joho case only pronounced itself as to the legality of section 76 (1) (a) of the Elections Act. That sections 76 (2) and 76 (3) are on aspects of corrupt practice and illegal practice, specifically alleging payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent. That the said sections allow a petitioner to file a petition in court at any time within twenty-eight days after the publication of the election results in the Gazette. That

however, the petitioners in the material petition, have demonstrated that there were acts of voter bribery and other corrupt practices thereby the magistrate was right to hold that section 76 (2) and 76 (3) of the Elections Act allows for filing of a petition within 28 days in his finding.

9. The 2nd and 3rd Respondent's submission were essentially a reiteration of the appellant's submissions. They further submitted that Article 87 (2) of the Constitution only talks of a petition concerning an election which must mean that a petition can concern an election on any ground that the petitioner may choose for himself. That it is therefore superfluous for parliament to have included section 76 (2) and (3) given that the issue of strict timelines in solving electoral disputes was at the core of the enactment of Article 87 (2) of the Constitution. It was submitted that it could not be argued that since section 76(3) has not been declared unconstitutional, the magistrate had no discretion but to enforce it because it is a nullity. To echo the latter submission, the 2nd and 3rd respondents relied on **Suleiman Said Shabhal v. IEBC & 3 others (2014) eKLR** where the Court of Appeal while dealing with whether a section of the law not declared unconstitutional could stand the light of the day found that the section was simply a nullity and not simply irregular.

10. I have given due consideration to this appeal and the submissions tendered herein. I am in agreement with the 1st respondent that the issues for determination are:

> ***i. Whether or not this court has jurisdiction to hear an interlocutory appeal emanating from an election petition;***
>
> ***ii. Whether or not the high court can grant order for stay of proceedings.***
>
> ***iii. Whether or not section 76 (2) and 76 (3) of the Elections Act contravene Article 87 of the Constitution.***

11. Addressing the issues seriatim. Appeals against interlocutory decisions must await final judgment of that court. However, if such an appeal is against a decision allowing an interlocutory application seeking to strike out a petition, then an appellate court shall have jurisdiction to hear such an Appeal. Such was the holding of the Court of Appeal in **Bashir Haji Abdullahi =Vs= Adan Mohamed Noor & 3 others [2014] eKLR** where it was held:

> ***"However, in our view, if an appeal is against a decision of the High Court, allowing an interlocutory application seeking striking out a petition then this court would have jurisdiction to hear it for an order striking out a petition is a final decision on the petition and an appeal from it is no longer interlocutory appeal but an appeal on a final decision." This, in our view is only where application for striking out the petition is allowed and the petition is struck out."***

12. It is worth noting that the court in the **Ferdinand Waititu** and **Judicial Service Commission v. Kalpana H. Rawal [supra]** case, were not dealing with interlocutory applications/appeals that would dispense the petition or rather lead to its conclusion unlike in this particular case. However, from the latter case, it is apparent that appeals shall only be allowed in the event an application for striking out is allowed. It is also worth noting that the Supreme Court has not pronounced itself on whether or not such an appeal can be heard by an appellate court. Here, the Application to strike out was dismissed by the trial court. Had the Application been allowed for the striking out of the Petition, then this court would perfectly have been seized with jurisdiction to entertain the Appeal. In the circumstances, I am inclined to agree with the 1st Respondent's Counsel's submission that this court lacks jurisdiction to hear and entertain the Appeal. Consequently this court must down its tools. Having arrived at this conclusion I find there is no point in addressing my mind to the remaining two issues. Hence I find no merit in this appeal and order that the same be dismissed with costs to the 1st Respondent.

It is so ordered.

Dated and signed at Machakos this 21st day of December, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Hassan for Chaillu - for the Appellant

Langalanga for Ombati - for the 1st Respondent

Hassan for Kivuva - for the 2nd and 3rd Respondents

Kituva - Court Assistant