



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.408 OF 2014

BETWEEN

PATRICK MICHUKI.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1st RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....2nd RESPONDENT

MOSES KURIA.....3rd RESPONDENT

JOACHIM KIARIE KAMERE.....4th RESPONDENT

THE ATTORNEY GENERAL.....5th RESPONDENT

JUDGMENT

Factual background

1. On 14th August 2014 the Petitioner filed a Petition seeking the following orders:

“(1) That this Honourable Court declares that the 1st Respondent was negligent in as far the organisation of the Gatundu South Constituency by-elections.(sic)

(2) That this Honourable Court declares the Gatundu South Parliamentary seat to be vacant.

(3) That this Honourable Court do issue an order that the Independent Electoral and Boundaries Commission repeats the Gatundu South by-election.

- (4) That this Honourable Court do issue an order that the Ethics and Anti-Corruption Commission investigates into the conduct of the 3rd Respondent and the 4th Respondent, to determine whether they are fit to hold public office.
- (5) That this Honourable Court do issue an order barring the 4th Respondent from being appointed to any position in the County or National Government.
- (6) That this Honourable Court do declare that the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the people of Gatundu South Constituency was violated.”

2. The background to the above orders as summarised in the Petition is that on 21st May 2014, Hon. Ngugi, a Member of Parliament for the Gatundu South Constituency passed away leaving the seat vacant and thereby necessitating a by-election in the said Constituency. Mr Kiarie Kamere (4th Respondent), a former member of the TNA party but who moved to the New Democrats Party prior to the by-election and Mr Moses Kuria (3rd Respondent) of the TNA Party were the only candidates vying for the vacant position. On 3rd August 2014, four days into the elections, the 4th Respondent withdrew from the race leaving the 3rd Respondent as the only candidate for the contested position and as a result of which the 1st Respondent declared the 3rd Respondent duly elected.
3. Aggrieved by the aforesaid election process, the Petitioner moved this Court for the Prayers reproduced above. On 13th February 2015, this Court struck out Prayers 1, 2 and 3 and, what therefore remains for determination are Prayers 4, 5 and 6 of the Petition.

The Petitioner’s case

4. The Petitioner submits that the withdrawal of the 4th Respondent was a result of a conspiracy between the 3rd and 4th Respondents with the intervention of certain Senior State officials. He further submits that the 1st Respondent ignored obvious facts on the alleged conspiracy which were also well within public knowledge and therefore acted negligently in a bid to shield those allegedly involved. It is the Petitioner’s further submission that the 3rd and 4th Respondents acted in cahoots with the Government and thus conspired to disenfranchise the people of Gatundu Constituency South by paying off the 4th Respondent thus denying them a chance to vote. That the 1st Respondent bears the onus to investigate alleged violations of the right to vote whenever they are reported in the media or to correct such reports if they are not true.
5. As against the 2nd Respondent, the Petitioner submits that it negligently failed to act upon calls by members of the public to act on information that was in the public domain regarding the conspiracy to deny the said electorate any choice in the by-election.
6. On 31st March 2015, the Petitioner filed an affidavit with links to certain video clips on media reports as evidence in support of the above allegations and in his written submissions dated 13th October 2015 filed in response to the 1st Respondent’s submissions, he contended that there was evidence of interference by the powers of the State on the Gatundu South Constituency elections and that the 1st Respondent should have seen these obvious violations. Further, that **Regulations 44, 52 and Section 64** of the **Elections Act** contain a caveat that the 1st Respondent should ensure that the rights of the electorate are not undermined. That the 1st Respondent should have therefore exercised due diligence to ensure that the withdrawal of the 4th Respondent was not improper and fraudulent.
7. Lastly, that the orders sought are warranted and should be granted as prayed.

1st Respondent's case

8. In its written submissions filed on 9 June 2015, the 1st Respondent framed the main issue for determination between itself and the Petitioner as the question whether there was a violation of the Petitioner's right and that of the people of Gatundu South Constituency to free, fair and regular elections and that such a question is hinged on the 4th Respondent's withdrawal from the by-elections. It is also the 1st Respondent's submission that the 4th Respondent was within his rights to withdraw his candidature as provided by **Regulations 44 and 52 of the Election (General) Regulations**. In that context, it submitted that because there was only one candidate by the date of the by-election, it had to declare him duly elected in terms of **Regulation 53** thereof.
9. It is the 1st Respondent's further submission that the right to vote under **Article 38(3)** of the **Constitution** is not absolute and may be limited in accordance with the provisions of **Article 24** of the **Constitution**. In that context, it submits that **Articles 138(1)** and **180(3)** of the **Constitution** limit the right to vote where one candidate is nominated because such a candidate will be declared duly elected without the people exercising their right to vote. That the right to vote is therefore dependent on the availability of vying candidates and where there are no available contending candidates, the right to vote is justifiably limited.
10. The 1st Respondent further submits that the Petitioner's case is based on mere media reports which lack probative value and the Petitioner provided no other supporting evidence to substantiate the allegations raised. Further, that the strict timelines required to fill any seat in an election do not allow a re-election and doing so would be unconstitutional, illegal and contrary to the provisions of the **Constitution** and **Elections Act**.
11. Lastly, the 1st Respondent submits that it has in place the Electoral Code of Conduct Enforcement Committee for receiving reports and complaints and that the Petitioner had failed to lodge any such report or complaint in good time for the 1st Respondent to have acted on such a complaint.

2nd Respondent's case

12. On 10th June 2015, the 2nd Respondent filed written submissions and submitted that the Petitioner did not avail himself of the remedies provided for under the **Ethics and Anti-Corruption Act** and added that under **Section 25** of the **Anti-Corruption and Economic Crimes Act, 2003** the 2nd Respondent has the mandate to investigate all reports and complaints of alleged corruption and to give reasons where no investigation had taken place. That the Petitioner failed to invoke the mechanism provided under the said Acts and has not provided any evidence that he lodged any complaints with it. In that context, the 2nd Respondent submitted that where there exists sufficient and adequate mechanisms to investigate allegations of corruption and economic crimes and the enforcement of **Chapter Six** of the **Constitution**, a party is barred from moving the Court without first exhausting those available mechanisms.
13. It was the 2nd Respondent's further submission that the orders sought by the Petitioner fall outside its mandate and Prayer 4 in particular is inconsistent with what this court can grant an aggrieved party under the **Ethics and Anti-Corruption Act** and also under the **Leadership and Integrity Act 2012**. The 2nd Respondent also contended that the Petitioner had failed to plead violation of his rights with reasonable precision as spelt out in **Anarita Karimi Njeru vs The Republic (1976-1980) 1 KLR 1272** and in any event, that the orders sought by the Petitioner have the effect of interfering with its independence.
14. The 2nd Respondent also submitted that the implication of the orders sought is that the Petitioner is invoking the Constitution when there are specifically provided procedures to address the same issue. Lastly, it submitted that the Petitioner had failed to provide a factual or legal basis on which the dispute is based and is non-suited and that this Court should direct him to lodge a complaint

with the Commission. In that context, it submitted that the Petition lacks merit, is therefore an abuse of the Court process and should be dismissed.

Determination

15. I have had the benefit of reading the pleadings and the rival submissions on record and in my view the issues for determination are narrow and the fundamental question is whether, based on the evidence relied on by the Petitioner, it can be said that the 1st and 2nd Respondents acted negligently in overlooking the alleged conspiracy between the 3rd and 4th Respondents to disenfranchise the people of Gatundu South Constituency. In that regard, **Article 88(1)** of the **Constitution** establishes the 1st Respondent and bestows it with the mandate to settle electoral disputes, including disputes relating or arising from nominations in terms of **Articles 88(1)(e)**. This Article is operationalised by **Section 4** of the **Independent Election and Boundaries Commission Act 9 of 2011** which provides for the functions of the Commission and among these include the regulation of the process through which political parties nominate candidates for elections.
16. The 1st Respondent is also given the powers in terms of **Section 4(l)** of the **Act** to investigate and prosecute candidates and political parties or their agents for committing electoral offences. Logic therefore dictates that complaints must be lodged with 1st Respondent for it to successfully carry out its mandate as provided by the aforesaid legislative framework. In this case the Petitioner has failed to show that he laid a complaint with the 1st Respondent which remains unresolved.
17. It is also not open for him to move this Court to make a determination on the conduct or otherwise of the 3rd and 4th Respondents without first giving the 1nd Respondent the opportunity to carry out its mandate as this will render the aforesaid provisions nugatory. This is line with the courts' practice that where the Legislature or the Constitution provide for certain mechanisms for dispute resolution, the same should be exhausted before the courts are approached? See **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] e KLR** and **Kenya Youth Parliament & 2 others vs Attorney General & 2 Others [2012] eKLR**. This is because Courts lack both the expertise and resources to carry out investigative functions which the Constitution entrusted to these Independent Institutions. It is my view in that regard that Courts should not be deprived of the wisdom of these institutions unnecessarily as in the present case.
18. It is the Petitioner's further prayer that this Court should order the 2nd Respondent to investigate the allegations raised in this Petition but **Article 252(1)(a)** of the **Constitution** entrusts the 2nd Respondent with the power to conduct investigations on its own initiative or on a complaint made by a member of the public. **Section 11 (1)(c) and (d)** of the **Ethics and Anti-Corruption Act** also entrusts the 2nd Respondent with the mandate to receive complaints on the breach of the code of ethics by public officers and to investigate and recommend to the **Director of Public Prosecution** any acts of corruption and violation of the code of ethics or any matter under **Chapter six** of the **Constitution**. Further, **Section 25** of the **Anti-Corruption and Economic Crimes Act** gives the 2nd Respondent the powers to receive and investigate complaints on corruption and to give reasons for failing to do so.
19. The Petitioner has failed to demonstrate that he has lodged a complaint with the 2nd Respondent on the alleged violations in accordance with the above provisions. Therefore, to now move this Court for an order directing the 2nd Respondent to make investigations on the allegations as if a prior complaint was made and unreasonably declined would amount to usurpation of the 2nd Respondent's powers and unjustifiable interference with its independence. To make such an order would also not be consonant with the jurisprudence of the courts as stated above.
20. Suppose I am wrong and the above principles do not bar the Petitioner from approaching this Court. Even then, the Petitioner would still have to surmount another hurdle. He has simply led

insufficient evidence to support the allegations of conspiracy or any foul play by the Respondents. As against the 3rd and 4th Respondents there is no evidence that they conspired in a bid to pave way for the 3rd Respondent to win the by-elections as alleged. The media video clips relied on, which say nothing about conspiracy, cannot be the basis of a finding that there was such conspiracy.

21. Furthermore, the Petitioner failed to demonstrate how his right to vote was violated. In that context, it is not enough to cite constitutional provisions allegedly violated and the general conduct of the Respondents without demonstrating how such conduct violated the said rights. The law as elsewhere set out above clearly envisage a situation where there is only one candidate in an election and that in such a situation it would be absurd to expect that a vote would have to be taken.

22. In any event, how can anyone, including the 4th Respondent, be forced to vie for an elective seat so as to give the Petitioner and others in Gatundu South the opportunity to exercise their right to vote? The answer to that question is obvious.

23. From my findings above, it is evident that none of the Prayers in the Petition can be granted

Conclusion

24. I am satisfied that the need to ensure that Independent Institutions like the 1st and 2nd Respondents carry out their constitutionally bestowed functions without undue interference, and the paucity of evidence to support the allegations raised, favour the dismissal of the Petition.

25. It would however be remiss of this Court not to state that even with the Petition being doomed for dismissal, in our nascent constitutional dispensation, it is encouraging to see litigants like the Petitioner taking up the challenge to question and to bring for determination instances of alleged violations of the Constitution.

26. Warriors of constitutionalism are few but the need to strengthen them cannot be gainsaid. I digress. The matter is at an end.

Disposition

27. The Petition dated 14 August 2014 is hereby dismissed but each Party shall bear its own costs.

28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence:

Muriuki – Court clerk

M/s. Jemutai for 2nd Respondent

Miss Ndong' for 1st Respondent

No appearance for Petitioner

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

19/2/2016