

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION NO. 4 OF 2011

NASHON AROKO M. SEME.....PETITIONER

VERSUS

JOHN OSUMBA OLUM.....RESPONDENT

J U D G M E N T

1. The petitioner is a registered voter of Kisumu East Constituency, Kisumu County. His grievance is that the Respondent one John Osumba Olum was elected as member of County Assembly for Kolwa East ward whilst still a civil servant in blatant violation of Section 43(5) of the Elections Act and as such his election as member of County Assembly should be nullified. The petitioner avers that unless the respondent's election is nullified, then the Constitution and the Election Act 2011, will continue to be violated to the detriment of the citizens of Kenya.

2. The petition is supported by the petitioner's affidavit sworn on 22nd January, 2015 which reiterates the matters in the petition. In addition, the petitioner has annexed minutes of a meeting held on 28th November 2012 at the council chamber in which the respondent was a participant.

3. The petition was opposed. The respondent filed grounds of opposition dated 7th of March, 2015 and a notice of preliminary objection. It was the case for the respondent that this court lacks jurisdiction to entertain the petition and that the petition in its entirety was a flagrant abuse of this court's process and a waste of time. Further that the petition offends the provisions of the Constitution and the Elections Act as it is predicated upon wrong provisions of the law. It was the respondent's further case, that the petition offends the rules of procedure laid down in law as regards resolution of disputes arising from nominations within political parties. He asked the court to dismiss the petition with costs.

4. The Respondent filed written submission whereas no submissions were filed for the petitioner. The respondent submitted that this honourable court lacks jurisdiction to entertain the petition as it involves the nomination of a candidate by a political party. He pegged his argument on Article 88(4)(e) of the Constitution, Section 4(e) of the IEBC Act and Section 74(1) of the Elections Act. The respondent also raised the issue of res judicata. It was his case that the petitioner has previously filed KSM HC PETITION NO.3 OF 2013, Nashon Aroko M. Sewe vs.- John Osumba Olum & 2others, in which petition he raised similar issues to this petition. He submitted further that the said petition was dismissed and that although the petitioner had a right of appeal he did not exercise it. The respondent concluded by urging this honourable court to find in his favour and dismiss the petitioners petition with costs.

5. Having considered the parties pleadings, submissions and the several authorities provided, it is my considered view that the first issue that this court should consider is that of jurisdiction. Should it find that it has jurisdiction to entertain this matter then it should proceed to determine the petition in light of the prayers sought in the petition. I say so because, though the issue of res judicata was raised in the respondent's submissions, the same was not pleaded. It is a general rule that a court cannot found its judgment on an un-pleaded issue and that an issue should be raised in the pleadings to give the other party an opportunity to respond to it. see **Girdhari Lal Vidyarthi v. Ram Rakha (1957) EA 527 C.A.**

6. The respondent has argued that this court is not the proper forum for the petitioner to agitate his grievances. His argument is pegged on Article 88(4)(e) of the Constitution which provides that the IEBC is responsible for the settlement of electoral disputes, including nominations but excluding election petitions and disputes subsequent to the declaration of the election results. Section 74(1) of the Elections

Act reiterates the contents of Article 88(4)(e) of the Constitution.

7. It is now a well established principle of law as was laid down in **The Owners Of Motor Vessel “Lillian S” vs Caltex Oil Kenya Ltd [1989] KLR 1** that where the court has no jurisdiction the only option is to down its tools. The court stated thus:

“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

8. From Article 88(4)(e) of the Constitution, the words of the Constitution, taken in their ordinary meaning are clear. Jurisdiction of the IEBC is only limited to disputes arising before the declaration of elections results. Going back to the case in hand the petition was filed way after the declaration of the election results and it therefore follows that this court and not the IEBC is the right forum for the petitioner to agitate his grievance .

9. The petitioner wants the respondent's election as MCA nullified for reasons that he failed to resign as a civil servant as required under Section 43(5) of the Elections Act. To support his case the petitioner has annexed minutes held 28th November 2012 in which the respondent name is listed to be considered for payment of some bonuses for an exercise he had earlier participated in. The petitioner has also annexed Kenya Gazette vol. CXV-No. 45 showing that the respondent was gazetted as having been duly elected as MCA. The documents annexed and more so the minutes of 28th November 2012 are from before the election was held. Nothing has been exhibited to show that the respondent is still in active civil service or that he was still in active civil service 6 months prior to the general election in March 2013. The fact that the respondent was listed as among those who would benefit for the exercise carried out does not mean that he was still in employment of the Municipal Council of Kisumu.

10. It is therefore my finding that the petitioner has failed to prove his case and the petition should fail.

The same is dismissed with costs.

Dated, signed and delivered this 27th day of April 2016

H. K. CHEMITEI

J U D G E