



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

PETITION NO. 3 OF 2013

JULIUS MASIVA OMBUGA.....PETITIONER

VERSUS

RAILA AMOLO ODINGA.....1ST RESPONDENT

UHURU MUIGAI KENYATTA.....2ND RESPONDENT

THE ORANGE DEMOCRATIC MOVEMENT (ODM)....3RD RESPONDENT

THE NATIONAL ALLIANCE.....4TH RESPONDENT

THE CHAIRPERSON INDEPENDENT

ELECTORAL & BOUNDARIES COMMISSION.....5TH RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES.....6TH RESPONDENT

THE ATTORNEY GENERAL.....7TH RESPONDENT

RULING

1. In his petition dated 21st January 2013, the petitioner *Julius Masiva Obuga* prayed for orders that the nominations of the 1st and 2nd Respondents by the 3rd and 4th Respondents respectively as presidential candidates in the General Elections held on 4th March, 2013 be declared null and void. The petitioner sought a further order directing the nullification of subsequent nominations made by the 2nd and 4th Respondents countrywide. He also sought for costs of the suit and interest.

2. The above orders were sought on grounds that the aforesaid nominations had been made in breach of the provisions of the Constitution and the law. It may be important to point out that the 1st Respondent; *Hon. Raila Amolo Odinga* is the former Prime Minister while the 2nd Respondent is His Excellency the President of the Republic of Kenya.

3. The court record shows that the petitioner expressed an intention to amend his petition. He filed a Notice of Motion dated 14th November, 2014 seeking leave of the court to amend the petition but unfortunately, the application was not prosecuted. It therefore follows that the petition which is before

the court is the one filed on 21st January, 2013 which named the Independent Electoral and Boundaries Commission (IEBC) as the 5th interested party.

4. I have found it necessary to make that clarification because in the proceedings and in the pleadings filed by *Ms. Z.K Yego law offices*, the IEBC has been erroneously described as the 5th Respondent apparently on the mistaken belief that the petitioner had amended his petition which he had not. The IEBC is not named as the 5th Respondent in the petition but is enjoined as the 5th interested party.

5. Having made that clarification, i will now turn to the preliminary objection dated 16th December 2014 which is the subject of this ruling. The preliminary objection was filed by the 5th interested party (IEBC) seeking that the petition be struck out on the following grounds:-

1. “This court lacks jurisdiction to hear and determine this petition in view of the provisions of Article 140, Article 88(4) (d) and (e) of the Constitution and Sections 39 and 40 of the Political Parties Act which vests jurisdiction to the Supreme Court to hear and determine petitions challenging election of President-elect and on the 5th Respondent’s Dispute Resolution Committee to hear and determine disputes arising from nominations of candidates for elections.

2. The petition is time barred in view of the provisions of Article 87(2) and Article 140(1) of the Constitution and Section 76, 74(2) and 75(2) of the Elections Act, 2011.

3. This petition is incurably defective for want of service upon the Respondents pursuant to the provisions of Article 87(3) of the Constitution, Article 140(2) Sections 76 and 77 of the Elections Act, 2011 as the petition ought to have been served within 15 days of presentation, either by direct service or through substituted service.

4. The petition is fatally defective for want of deposit of security for costs of one million shillings as mandated by the provisions of Section 78 of the Elections Act, 2011.”

6. The preliminary objection was canvassed by way of both written and oral submissions. The IEBC through its advocates on record filed its written submissions on 12th July, 2016 while the petitioner who appeared in person filed his submissions on 11th July, 2016.

7. I have considered the preliminary objection, the submissions made by the parties and the authorities cited by learned counsel *Mr. Yego* who urged the preliminary objection on behalf of the IEBC.

I will start with the challenge on the court’s jurisdiction to hear the petition because as held by *Nyarangi JA* in the celebrated case of ***The Owners of Motor Vessel “Lillian S” V Caltex Oil Kenya Ltd (1989) KLR 1*** at Page 14 **“Jurisdiction is everything and 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. Jurisdiction is therefore the first issue that a court should deal with whenever it arises as without it, anything done becomes a nullity. I agree with *Ojwang J* (as he then was) when he stated in ***Boniface Waweru V Mary Njeri and Another Misc. Application No. 639 of 2005 (unreported)*** that; **“Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining a question”.**

9. The gist of *Mr. Yego’s* submissions on the issue of jurisdiction was that as the petition challenges the nomination of the 1st and 2nd Respondents to run as candidates for the office of President of the Republic of Kenya in the 2013 General Elections, this court lacks jurisdiction to determine the petition as only the IEBC is legally mandated to resolve all nomination disputes. For this proposition, counsel placed reliance on *Article 88 (4) (e)* of the Constitution, *Section 13* and *74(1)* of the *Elections Act 2011* and *Section 39* and *40* of the *Political Parties Act*. He also relied on the following authorities;

Dr. Billy Elias Nyonje V The National Alliance party of Kenya and 2 others, Nairobi Judicial Review No 61 of 2013 and Anthony Salau and Another V Independent Electoral and Boundaries Commission and 2 others, Judicial Review No. 233 of 2013.

10. In his opposition to the preliminary objection, the petitioner conceded that the Petition challenged the nomination of the 1st and 2nd Respondents as Presidential candidates in the 2013 General Elections. He maintained that this court has jurisdiction to adjudicate on the petition since it was not a presidential election petition as envisaged under *Article 140* of the Constitution; that the court ought to determine whether the IEBC properly exercised its mandate to supervise the nomination process as required by *Article 88 (4)* of the Constitution.

11. It is important to point out at the outset that jurisdiction flows from the law. It is donated to courts or tribunals by either the Constitution or statute law. It cannot be assumed or presumed. The supreme court in **Re The matter of the interim independent Electoral Commission (2011) eKLR, Supreme Court of Kenya, Constitutional Application No. 2 of 2011** held inter alia that; ***“a court may not arrogate to itself jurisdiction through craft of interpretation, or by way of endeavours to discern or interpret the intentions of parliament where the wording of legislation is clear and there is no ambiguity ...”***

12. In this case, the petitioner has clearly conceded that his petition challenges the validity of the 1st and 2nd Respondents nomination as aforesaid.

There cannot be any doubt that nomination of candidates to vie for various political offices is a crucial step in the election process. Nomination disputes are therefore electoral disputes and under *Article 88* of the Constitution, the IEBC is the only constitutional body mandated to regulate the process by which political parties nominate candidates for elections and to settle disputes arising from such nominations.

13. *Article 88 (1)* establishes the IEBC while *Article 88(4)* provides for its functions. *Article 88 (4) (e)* sets out one of its duties as;

“the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results..”

14. *Article 88(4)* is replicated in *Section 74 (1)* of the *Elections Act* and *Section 4* of the *Independent Electoral and Boundaries Commission Act NO. 9 of 2011*. It is thus clear to me that the IEBC is the state organ that has the Constitutional and Statutory mandate to determine electoral disputes arising from the nomination process.

15. Though the High Court has jurisdiction to inter alia interpret and enforce the Constitution under *Article 165 (3)* of the Constitution subject to the limitation imposed by *Article 165 (5)*, that jurisdiction cannot be invoked to settle a nomination dispute unless it is demonstrated that the alternative modes of settlement of such a dispute provided by *Article 88(4) (e)* of the Constitution and the Statute law referred to earlier had been invoked and exhausted. There is no such demonstration in this case.

16. In view of the foregoing, it is clear to me that the petitioner presented his dispute in the wrong forum. He should have followed the procedure prescribed by the law by filing his complaint with the IEBC for resolution in accordance with *Article 88 (4) (e)* of the *Constitution*; *Section 74* of the *Elections Act* and *Section 4* of the *Independent Electoral and Boundaries Commission Act*.

17. There is also another aspect of the issue of jurisdiction that arises in this petition. The nominations complained about by the petitioner concerned the nomination of candidates for a presidential election. And under *Article 163 (3)* of the Constitution as read with *Article 140*, the Supreme Court has exclusive jurisdiction to hear and determine disputes related to the elections to the office of the President.

18. The supreme Court In **the matter of the principle of Gender Representation in the National Assembly and the Senate Advisory Opinion Application No. 2 of 2012 (2012) eKLR**

while interpreting the scope of its jurisdiction to determine disputes arising from a presidential election held the view that its jurisdiction was not limited to disputes arising after the election but included disputes which may arise during the conduct of elections. The court expressed itself as follows;

“...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.”

19. In my considered view, disputes that may arise during the conduct of presidential elections and indeed the election for any other political office include disputes surrounding the nomination process. I am fortified in this finding by the procedural rules promulgated by the Supreme Court to guide it in the exercise of its jurisdiction under *Article 163 (3) of the Constitution*.

Rule 12 of The Supreme Court (Presidential Election Petition) Rules of 2013 in so far as it is relevant to the instant petition provides as follows;

(1) A person may file a petition challenging

(a) The validity of the election of the President –elect or

(b)

(2) The grounds upon which a petition under sub-rule (1) may be filed include

(d) the validity of the nomination of a presidential candidate.

20. It is thus evident that a dispute regarding the validity of the nomination of a presidential candidate can also be filed in the Supreme Court.

21. For all the foregoing reasons, I am satisfied that this court lacks jurisdiction to hear and determine the instant petition. And on this ground alone, i find that the preliminary objection dated 16th December, 2014 is merited and it is hereby sustained. The petition dated 21st January 2013 is consequently struck out with no orders as to costs.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 26th day of October 2016

In the presence of:

Mr. Kamau Lagat holding brief for Mr. Yego for the 5th interested Party

No appearance for the Petitioner

Ms. Naomi Chonde Ct Clerk.