



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 326 OF 2003

RAPHAEL GERVACE OTIENO KOPIYO.....PLAINTIFF

V E R S U S

ELECTORAL COMMISSION OF KENYA.....DEFENDANT

RULING

This is an application by the Defendant Notice of Motion dated 30th May 2011 for an order that the suit be dismissed since the action as commenced is null and void, discloses no reasonable cause of action and is otherwise an abuse of the process of the Court.

The Defendant's case is that the suit relates to a Parliamentary election and the only valid way of challenging the outcome of the electoral process is through a petition as provided by Section 19(a) of the National Assembly Presidential Elections Act (Cap 7). The Defendant has also pleaded that the action was filed in 2003 and the Plaintiff is yet to list the matter for hearing.

There is a supporting affidavit sworn by Mahmud Jabane, the Manager Legal Services of the Defendant.

There is a replying affidavit sworn by the Plaintiff on 20th June 2011. In it he blames his Advocates for the delay in setting down the matter for hearing as he has not lost interest in it; that he seeks damages against the defendant and not nullification of an election of a Member of Parliament, hence the claim is not an election petition; that the Court should not give due regard to procedural technicalities and the application should therefore be heard on merit; that he should be given time to pay further court fees so that he can amend his plaint; that the Defendant should be compelled to comply with the pre-trial requirements before it can be heard. He therefore prays that the application be dismissed with costs.

The Defendant was established under Section 41 of the previous Constitution. It was a constitutional body charged, under section 42A of that Constitution, with the responsibility of:-

- a. the registration of voters and the maintenance and revision of the register of voters;
- b. directing and supervising the Presidential, National Assembly and local government elections;
- c. promoting free and fair elections;
- d. promoting voter education throughout Kenya; and
- e. such other functions as may be prescribed by law.

There is a serious issue raised in the application which is that of jurisdiction. What is challenged by this suit is the outcome of an electoral process, namely the removal of the Plaintiff's name from the list of

duly nominated candidates and its replacement with another person's name which was eventually gazetted and presented as the Parliamentary candidate for Kasipul Kabondo Constituency on NARC party ticket for the General Elections held on 27th December 2002.

Section 3 of the Civil Procedure Act (Cap. 21) provides that where another statute reserves special jurisdiction and powers, Cap. 21 has no application. The now repealed National Elections and Presidential Elections Act (Cap 7) (replaced by the Elections Act No. 24 of 2011) reserved such special jurisdiction and powers regarding electoral disputes.

Section 3 of Cap. 21 provides:-

“3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.”

In the context of the issue at hand, that is, the jurisdiction, or lack of it, of this court to hear and determine this suit, this provision simply means that where a special jurisdiction has been conferred and a special procedure prescribed by or under any other law for the time being in force, then that special jurisdiction and procedure must be invoked, and, in the absence of any specific provision to the contrary, nothing in Cap. 21 shall limit or otherwise affect such special jurisdiction or procedure.

The nomination of candidates by the political parties, the presentation of nomination papers by candidates to the Electoral Commission and the conduct of the actual poll are all part of an electoral process.

Section 44(1) of the repealed Constitution donated to the High Court jurisdiction to hear and determine any question whether, *inter alia*, a person has been validly elected as a member of the National Assembly. Under subsection (4) of that section, Parliament could make provision with respect to the circumstances and manner in which, the time within which and the conditions upon which, this jurisdiction could be invoked, and the powers, practice and procedure of the High Court in relation thereto. Parliament had made such provision under Part VI (which covers sections 19 to 31) of Cap. 7.

Under section 19(1) thereof, an application to hear and determine a question whether a person has been validly elected as President, or whether a person has been validly elected as a member of the National Assembly, or whether the seat in the National Assembly of a member thereof had become vacant, was to be made by way of petition.

That special jurisdiction is conferred to an election court duly constituted, consisting of one judge of the High Court. The special procedure is a petition. No ordinary suit under provisions of the Civil Procedure Act and the Rules made hereunder could thus be brought to challenge any aspect of a parliamentary electoral process. In the case of **THE SPEAKER OF THE NATIONAL ASSEMBLY vs JAMES NJENGA KARUME Civil Application No. NAI 92 of 1992 [NAI 40/92 UR]** the Court of Appeal held

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“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....”

This is not an election court duly constituted, and there is no petition before the court. The suit is clearly incompetent and the court has no jurisdiction to hear it.

Even if the court had jurisdiction to hear and determine the suit, in a period of eight (8) years from when the suit was filed and the time this application was brought to court, the Plaintiff has not taken any step towards having the matter heard. The explanation given for the delay in his replying affidavit is nowhere near satisfactory.

In the event, the application is hereby allowed. The suit as commenced is incompetent and not properly before the court. Furthermore, the court has no jurisdiction to hear it. It is hereby struck out, also with costs to the Defendant. Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of July, 2015

A. MBOGHOLI MSAGHA

JUDGE