



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.405 OF 2013

BETWEEN

CENTRAL ORGANISATION OF TRADE UNIONS (K)(COTU).....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

**THE NATIONAL ALLIANCE.....2ND
RESPONDENT**

THE NATIONAL ALLIANCE ORANGE DEMOCRATIC ...

MOVEMENT PARTY.....3RD RESPONDENT

WIPER DEMOCRATIC PARTY.....4TH RESPONDENT

FORD-KEYA.....5TH RESPONDENT

UNITED DEMOCRATIC FORUM PARTY.....6TH RESPONDENT

UNITED REPUBLIC PARTY.....7TH RESPONDENT

THE ATTORNEY GENERAL.....8TH RESPONDENT

RULING ON A PRELIMINARY OBJECTION

Introduction

1. The Petition dated 7/8/2013 seeks the following orders;

“(a) The 2nd, 3rd, 4th, 5th, 6th and 7th Respondents in preparing the list of nominees to the National Assembly acted in breach of its Constitutional obligations under Article 2(1,2,3,4 and 5), Articles 3(1), Article 10, 19, 20(1,2,and 3), 22, 23, 33, 41(1, 2, 3, 4 and), 97(1)(c), 156, 230 and 260(1, 2,,3) of the Constitution and thus its decision is null and void.

(b) The 1st Respondent's decision to Gazette the nominees to the National Assembly on 20th March 2013 was in breach of its Constitutional obligations under Articles 2(1,2,3,4 and 5), Articles 3(1), Article 10, 19, 20(1,2,and 3), 22, 23, 33, 41 (1, 2, 3, 4 and), 97(1)(c), 156, 230 and 260(1,2,3) of the Constitution and thus its decision is null and void.

(c) The Special Issue in the Kenya Gazette No.3508 wherein the 1st Respondent gazetted the names of the nominees to the National Assembly dated 20th March 2013 is illegal, unlawful, ultra vires, mala fides, null and void to the extent of its inconsistency with the Constitution.”

2. On 20/9/2013, the 5th Respondent, Ford-Kenya, a political party filed Grounds of Opposition and gave notice of intention to raise a Preliminary Objection as to the jurisdiction of this Court to entertain the Petition. For avoidance of doubt, the Preliminary Objection reads as follows;

“(1) That the Honourable Court lacks jurisdiction to entertain the Petition dated and filed on 7th August, 2013 which is improperly before it and was filed in violation of the mandatory provisions of the Constitution, the Elections Act, 2011 and the Political Parties Act and should therefore be dismissed in limine for the reasons that:

(a) The Petitioner has not invoked or exhausted the internal dispute resolution machinery of the 1st Respondent as provided for by Article 88(4)(e) of the Constitution of Kenya as read with Section 74 of the Elections Act, 2011;

(b) The Petition as drawn and filed offends the provisions of Article 105 of the Constitution Elections Act, 2011 in that it is not an election Petition nor is it filed within the Twenty Eight (28) days from the date of publication of the Party List;

(c) The Petitioner is not a member of any political party and therefore its nomination or any of its affiliate member organisations or any person by virtue only of being a representative of the Petitioner to the National Assembly of Kenya offends the provisions of Section 34(8) of the Elections Act, 2011.

The 5th Respondent will raise a Preliminary Objection as to jurisdiction to the Petition and seek to have the same struck out with costs.

(2) That on the basis of the foregoing in (1) above, the Petition herein discloses no reasonable cause of action, is filed in gross abuse of the process of Honourable Court and ought to be dismissed with costs.”

3. On 2nd December 2013, the Petitioner filed a Notice of Motion seeking leave to amend the Petition the import of which would have been that the three prayers elsewhere set out above would have been deleted and five wholly new prayers introduced.
4. Before the Notice of Motion for amendment could be heard, advocates for the parties appeared before me on 10/12/2013 and I ordered that the Preliminary Objection be heard first for obvious reasons; it was filed before the Motion for amendment and if upheld, the whole matter would come to an end.

Submissions by the Respondents

5. In his Submissions in support of the objection, Mr. Ouma, learned advocate for the 5th Respondent argued that under **Article 97** of the **Constitution** as read with **Sections 34-36** of the **Elections Act** and **Regulation 56** of the **Elections (General) Regulations**, nominated Members of the National Assembly are required to be nominated by parliamentary political parties long before the General Elections. That they then forward a Party List to the Independent Electoral and Boundaries Commission (1st Respondent) which publishes the lists and this was done vide **Gazette Notice No.5348/2013**.

6. Further, that since the publication thereof, no complaint was raised by the Petitioner until the present Petition was filed and yet the orders sought cannot be granted because this Court has no jurisdiction to grant those orders which could only be granted by the High Court sitting as an Election Court created by **Article 87(1)** of the **Constitution** as read with **Section 6** of the **Elections (Parliamentary and County Election) Rules**. He relied on the following decisions in support of his submissions;

(i) **Orie Rogo Manduli vs Catherine Mwangola & Others [2013]eKLR** where Mshila J. held that **Article 90** presupposes that nominations to party lists of members are an election and therefore any dispute after gazettelement can only be resolved by the High Court in accordance with **Article 105** of the **Constitution**.

(ii) **National Gender & Equality Commission vs Athoney –General [2013]eKLR** where the Court held that IEBC had failed to abide by its obligation to protect the rights of vulnerable and marginalised peoples and it was ordered to develop a programme towards increasing the participation of youth, women, persons with disabilities and other vulnerable groups.

The Court however emphatically also held that after gazettelement of nominated members of Parliament, any challenge thereto can only be made under **Article 105** of the **Constitution**.

(iii) **Charles Kamuren vs Grace Kipchoim [2013] eKLR** where Achode J. held that where an Election Petition was filed outside time, the Court had no jurisdiction to extend the time for doing so.

(iv) **The National Alliance vs The I.E.B.C. [2013]eKLR** where the learned Judge emphatically held that an Election Petition disguised as a Constitutional Petition cannot be allowed to stand.

(v) **Kores vs The I.E.B.C. [2013]eKLR** where the learned Judge like Achode J. in Kamuren (supra) found that there was no extension of time for filing an Election Petition.

7. Prof. Abuya for the 1st Respondent supported the objection and in written Submissions stated *inter-alia* that the present Petition was disguised as a Constitutional Petition while in fact it was an Election Petition to be dealt with under **Article 105(1)** of the **Constitution** and **Rule 6(1)** of the **Elections (Parliamentary and County Elections) Rules**.

8. He also urged the point that should the Petition be struck, off the costs should be awarded to the Respondents.

9. Miss Mwangi, learned State Counsel also supported the objection but also added that the Political Parties Tribunal was the right forum to challenge the alleged failure of a political party to nominate “workers” to its party list.

Submissions by the Petitioner

10. Miss Ngesa, learned advocate for the Petitioner, argued that the Petition is one premised on breach of fundamental human rights and not elections *per se* and this Court is therefore seized with the jurisdiction to determine it. That the Petitioner is an organisation representing workers and its intention is to protect the rights of workers and the sanctity of the Constitution.

11. On costs, she argued that the issues raised are in the nature of public interest litigation and so no penalty of costs should be made against the Petitioner in the event that the objection is upheld.

12. In praying that the objection should be overruled, she relied on the decision of **Charles Maywa Chedotum & Philemon Lotudo vs The I.E.B.C. [2013]eKLR** where J. R. Karanja, J. held *inter-alia* that fundamental rights provisions are permanent and cater for existing and future expectations and should therefore be interpreted liberally, progressively and flexibly.

Determination

13. I have perused the Petition dated 7th August 2013 and although it invokes **Articles 2, 3, 10, 19, 20, 22, 23, 33, 41, 97, 156, 230 and 260** of the **Constitution**, in fact it is the preparation of political party lists and the eventual gazette, in **Gazette No.3508** dated 20th March 2013, of nominated members of the National Assembly that is the gist of the Petitioner's Complaint. I have elsewhere above reproduced the three prayers sought and their wording bears out my statement above.

14. Having so said, I agree with Miss Ngesa that the issues raised are neither pedestrian nor are they to be easily wished away because so far as I know, there is little or no interpretation given by the High Court of **Article 97(1) (c)** which provides as follows;

“(1) The National Assembly consists of -

(a) ...

(b) ...

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(d) ...”

15. In effecting the above provisions, the questions that would then have required determination would have been;

(i) How do parliamentary political parties in nominating the twelve members of the National Assembly ensure that the twelve “[include]” the youth, persons with disabilities and worker”?

(ii) What formulae should they use to ensure that the workers representation of the above categories are met since the party lists are prepared before parliamentary elections and before any of them is even assured that it will have any membership in parliament?

(iii) The Petitioner being an organisation representing workers obviously has an interest in the subject but what role can it play in internal party affairs if it is to remain independent of any political party?

(iv) What role should I.E.B.C. And the Political Parties' Tribunal play in the circumstances?

16. These and many other questions are crucial in securing the gains of the Constitution, 2010 but is the present Petition as framed and without amendment properly before this Court to enable the Petitioner seek the Court's guidance?

17. I should restate that the proposed amendment is not a matter for consideration at all and for reasons given elsewhere above. Further, some facts cannot be contested and they are the following;

(a) The 2nd, 3rd, 4th, 5th, 6th and 7th Respondents are all political parties currently represented in the National Assembly.

(b) The said political parties submitted their party lists which were gazetted by the 1st Respondent prior to the 2013 General Elections.

(c) Individuals dissatisfied with the party lists filed their complaints both in this Court and to

*the Political Parties Tribunal as well as their respective political parties and I am aware that many decisions were rendered in that regard prior to and after the General Elections – See for example **Michael Mungai vs Ford Kenya Elections & Nominations Board & Others and 2 Others JR. Misc. Appl. No. 53 of 2013***

18. The only question that arises from the present objection and which is a matter of law is the issue of jurisdiction. I have deliberately made this statement to clarify the point made by Miss Ngesa that the gravamen of the Petition is the human right's jurisdiction of this Court as opposed to its jurisdiction as an election Court.

“Jurisdiction” has been defined in **Shroud's Law Dictionary, 7th Edition** as follows;

“In its narrow and strict sense, 'the jurisdiction' of a validly constituted Court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its processes by reference (1) to the subject matter of the issue (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.”

19. The above definition is important because as I have shown above, the reliefs sought by the Petitioner are an important pointer as to the real issue(s) in contest between the parties. If the orders as framed were to be granted, the net result and consequence would be that upon the nomination of the nominated members of the National Assembly being declared null and void, they would all lose their positions by orders issued in a constitutional Petition as opposed to an election Petition and that is the gist of the present objection; that this Court has no such jurisdiction.

20. I would have no hesitation in agreeing with the 5th Respondent on this point. In **National Gender Equality Commission vs The I.E.B.C.**, the Court stated partly as follows;

“We have anxiously considered the position of members of the Senate and National Assembly nominated under Articles 97(c), 98(1)(b), (c) and (d) of the Constitution. They were gazetted on 20th March 2013 by Gazette Notice No.3508. Upon such gazettment they became members of the respective houses of Parliament. Under Article 105 of the Constitution, a question of determination of membership can only be determined by way of an election Petition. The provisions of Articles 105 are mandatory and cannot be circumvented by a Petition of the nature we have before us. In the circumstances, we are constrained to decline any conservatory orders affecting the duly gazetted members of the National Assembly and Senate”

21. I reiterate that view and also agree with Majanja J.'s succinct statement in the **The National Alliance Case (TNA) (supra)** where he stated as follows;

“The ultimate result of the Petitioners' case is clear when one appreciates prayers (d), (e), (i) and (j) of the Petition. The Gazette Notice No.3508 is a declaration that a person is a duly elected member of Parliament. An order quashing the Gazette notice will result in the loss of seats by persons who are Members of Parliament. Since they are already members of parliament by virtue of the party list, flawed or otherwise, the 2nd petitioner can only regain her seat if a duly elected Member of Parliament loses her seat and the only way the Court is permitted to intervene is through an election Petition. Prayer (g) of the Petition seeks a declaration that the 2nd Petitioner is the duly elected third member of TNA Senate party list. This prayer is consistent with the power of the election Court under Section 80 of the Elections Act, 2011. In whatever manner this matter is cut, sliced and diced it is one to determine whether a person has been validly elected to Parliament and it is therefore a matter governed by Article 105 of the Constitution.”

22. On the argument that the Petition must be determined as one premised on alleged violations of human rights and should be determined as such, Majanja J. was right in the **TNA Case** when he

further stated thus;

“Fundamental rights and freedoms do not exist in isolation, they are part of the Constitution and must be realised within the framework set by the Constitution. It is a cardinal principle of interpretation of the Constitution that it must be read as a whole and in this respect the provisions regarding the electoral and election process cannot be isolated and sacrificed at the altar of absolute individual rights and fundamental freedoms. The fundamental rights and freedoms guaranteed under the Bill of rights are also given effect and realised within the framework of governance. Chapter seven and Eight of the Constitution titled “Representation of the People” and “The Legislature” respectively give effect to the principle of sovereignty the people articulated in the preamble and Article 1. These provisions are underpinned by various fundamental rights and freedoms, which include political rights guaranteed under Article 38 which are given effect by provisions dealing with elections.”

23.The issue was further put beyond debate by Ngugi J. in **Ferdinand Waititu vs The I.E.B.C. [2013] eKLR** when she stated thus;

“The Petitioner has submitted that the Court has jurisdiction to entertain his Petition and application on the basis of Article 165(3)(a) of the Constitution, and that this right cannot be truncated by either the Elections Act or the Rules. In my view, however, and I agree with the 4th Respondent on this, the provisions of the Elections Act and the Election Rules, which are made pursuant to Article 87(2) of the Constitution, constitute the constitutionally underpinned Code of laws for dealing with election Petitions. The jurisdiction to hear and determine election Petitions is a special jurisdiction that is conferred by the Constitution itself, and the manner in which it is to be exercised is ordained by the Constitution when it donates power to Parliament to enact the requisite laws and regulations for its exercise. Such truncation as there may be of the right to approach the Court under Article 165(3)(a) has therefore been done by the Constitution itself”

24.I will only add that once the window was closed for filing election Petitions, the Petitioner lost the opportunity to challenge the manner in which political parties constituted their party lists. To file a Petition in the manner that it has done and then seek the orders that it has sought is a misguided manner of litigating a very important constitutional issue. I would have been sympathetic if the reliefs sought had been crafted in the manner that the intended amended Petition has sought to do but sadly that is not what is before me.

25.It is obvious that I see merit in the Preliminary Objection but I must dispose of the issue of costs. I see merit in the argument that the Petitioner was not going to benefit directly by the final orders to be made either way and I am satisfied that it was litigating in the interest of the wider public.

26.In the event, the objection is upheld, the Petition is struck off but as to costs, let each party bear its own costs.

27.Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Miss Ngessa for Petitioner

Mr. Kariuki holding brief for Mr. Abuya for 1st Respondent

Miss Rotich holding brief for Mr. Oduor for 5th Respondent

Order

Ruling duly delivered

ISAAC LENAOLA

JUDGE