REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Coram: F.A. Ochieng J

ELECTION PETITION APPEAL NO. 1 OF 2014

CHRISTINE TALLAM…………………………………….....APPELLANT

VERSUS

JENNIFER NARIAMUT KOIPIRI……….........................…….....1ST RESPONDENT

UNITED REPUBLICAN PARTY…….. 2ND RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...........3RD RESPONDENT

JUDGMENT

1. The Election court, presided over by Hon. Ms A.A. Alego Principal Magistrate, delivered its judgment on 14th February 2014.
2. It was the decision of the said court that it lacked jurisdiction to hear and determine the petition.
3. The learned magistrate held that the petition had been wrongly brought before the court. Therefore, if the said court had determined the issues raised in the petition, it would have been acting in excess of its mandate.
4. As far as the Election Court was concerned, the petitioner ought to have first raised her concerns within the political party that she was a member of. The reason for that was that the concerns were about the process of nomination by the United Republican Party (URP), to the Baringo County Assembly.
5. Being dissatisfied with that decision, the petitioner lodged an appeal to the High Court. In her considered view, the Election Court erred when it held that the petitioner had not followed the proper channels through which she could canvas her case.
6. It was the contention of the appellant that she had not only lodged complaint No. 216 of 2013 before the IEBC Dispute Resolution Tribunal, but she had prosecuted the said complaint to its logical conclusion.
7. As far as the appellant was concerned, she could not have been expected to go before the Political Parties Disputes Tribunal as that Tribunal had no mandate to address nomination or election disputes after a nominee was already gazetted.
8. The appellant's view was that the learned magistrate failed to appreciate both the facts in the petition and the applicable law.
9. Finally, the appellant pointed out that the Election Court had violated the provisions of Section 75 (1) and (2) of the Elections Act. Pursuant to that statutory provision, an Election petition ought to be heard and determined within six (6) months from the date when it is filed.
10. The petition in this instance was filed in court on 8th August 2013.
11. Therefore, when the Election Court delivered its verdict on 14th February 2014, it is said to have

done so without jurisdiction.

12. And because it did not have jurisdiction to dismiss the petition, the appellant submitted that the Election Court should not have made any orders condemning her to pay the costs of the petition.
13. Accordingly, this court was asked to set aside the order for the dismissal of the petition. After setting aside the judgment of the Election Court, this court was invited to substitute the dismissal of the petition with an order allowing the reliefs sought in the said petition.
14. Why should this court allow the petition?
15. Mr. Ondabu, the learned advocate for the appellant said that that was because the petition was un-opposed.
16. His said contention emanated from the fact that none of the respondents filed their respective responses to the petition within 14 days of service.
17. As the said responses were lodged without leave of the court, to allow the late filing of the same, the appellant's view was that the respondents ought never to have been allowed to oppose the petition.
18. Mr. Ondabu also submitted that because he Election court delivered its judgment after the lapse of six (6) months from the date when the petition was filed, the judgment cannot be allowed to stand.
19. Mr. Kipkoech, the learned advocate for the 1st Respondent, **JENNIFER NARIAMUT KOIPIRI,** submitted that the Election Court ought not to have delivered its judgment.
20. Indeed, the 1st Respondent had given a Notice of her Preliminary Objection on 6th February 2014, in the following terms;

> ***"TAKE NOTICE THAT*** *at the hearing thereof of the highlighting of submissions, counsel for the 1st Respondent will contend, as a preliminary point of law, to be determined in limine, that the petitioner's petition cannot be determined since the mandatory 6 months period, given as the time frame for determination of Election petitions have lapsed, and as such the petition has been rendered stale in view of the salient provision of Section 75 (1) as read together with sub-section (2) of the Elections Act, 2011".*

21. Mr. Kipkoech advocate asked this court to strike out the appeal with costs. His contention was that there was nothing which was being appealed against.
22. Miss Sumba, the learned advocate for the 2nd Respondent, the **UNITED REPUBLICAN PARTY,** submitted that the judgment rendered by the Election Court was a nullity. Accordingly, the 2nd Respondent shared the opinion of the 1st Respondent, that there was nothing to be appealed against.
23. Miss Sumba asked me to strike out the appeal.
24. Mr. Kenei, the learned advocate for the 3rd Respondent, the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISISON (IEBC),** drew the attention of this court to the fact that on 23rd August 2013, the Commission had already challenged the jurisdiction of the Election Court.
25. The position taken by the IEBC from the outset was that the court lacked jurisdiction because the parties had not exhausted the laid down mechanisms for dispute resolution.
26. However, the Election court did not determine that issue as a preliminary point of law: choosing, instead to determine it in the final judgment.
27. When this court inquired from the IEBC why the issue had not been resolved at the earliest possible moment in the proceedings before the learned trial magistrate, Mr. Kenei informed me that the parties had agreed to have the said issue held in abeyance.
28. Finally, the IEBC asked me to strike out the appeal, as the decision being challenged was a nullity.
29. Meanwhile, on the issue of costs, the IEBC argued that each party ought to bear his or her own costs.
30. When called upon to reply to the submissions of the Respondents, Mr. Ondabu, the learned advocate for the appellant, **CHRISTINE TALAM,** said that the decision of the Election Court was, indeed, a nullity.
31. However, he still asked me to proceed to allow the petition.
32. In the prevailing circumstances, it is clear that all the parties before me are in agreement on one thing: the judgment which is the foundation upon which the appeal before me is founded, is a nullity. It therefore follows that there was nothing which the appellant could be challenging

through the appeal herein.

33. I could therefore simply conclude the whole matter by saying that there was nothing left before me, upon which this court can be called upon to make a determination.
34. However, I think that it is necessary for me to make a number of statements.
35. First, it is noted that in the Memorandum of Appeal, the appellant raised a total of 12 points. All the said points are described as errors which the Election court made;

> *"both in law and fact…."*

36. Pursuant to the provisions of Section 75 (4) of the Elections Act 2011;

> *"An appeal under subsection (1A) shall lie to the High Court* ***on matters of law only*** *and shall be –*

a. *filed within thirty days of the decision of the Magistrate's Court; and*
b. *be heard and determined within six months from the date of filing of the appeal".*

- Emphasis is mine.

37. Therefore, to the extent that the appeal raised issues of fact, it went beyond the scope permitted by law.
38. Secondly, I wish to reiterate the basic fundamental position on the question about the jurisdiction of courts. A court of law can only handle cases in respect to which it has jurisdiction.
39. I do not think that that position can ever be put in a better language than was stated in **"THE OWNERS OF MOTOR VESSEL 'LILIANS' VS. CALTEX OIL KENYA LIMITED [1989] KLR 1,** wherein it was declared 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, and a court of law downs its tools in respect to the matter before it, the moment it holds the opinion that it is without jurisdiction…"*

40. In the result, the parties herein ought not to have agreed among themselves, to hold in abeyance the decision on the Preliminary Objection which the IEBC had raised before the Election Court.
41. Nyarangi J.A expressed himself thus in the case of **"THE OWNERS OF MOTOR VESSEL 'LILLIAN' VS CALTEX OIL KENYA LIMITED [1989] 1 KLR 1;**

> *"I think jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it".*

42. In effect, the Election court should not have allowed itself to be persuaded by the parties, to withhold its decision on the Preliminary Objection which was pegged on the court's jurisdiction.
43. The petition was lodged after **JENNIFER NARIAMUT KOIPIRI** (the 1st Respondent) had been gazetted as the nominee of the **UNITED REPUBLICAN PARTY (URP)** into the Baringo County Assembly.
44. Through the act of gazettement, the IEBC had declared Jennifer a member of the Baringo County Council.
45. At the stage, the Political Parties Dispute Tribunal no longer had jurisdiction. The jurisdiction of the Tribunal is specified at Section 40 of the Political Parties Act, which stipulates as follows:

> *"(1) The Tribunal shall determine –*

a. *disputes between the members of a political party;*
b. *disputes between a member of a political party and a political party;*
c. *disputes between political parties;*

d. *disputes between an independent candidate and a political party;*
e. *disputes between coalition partners; and*
f. *appeals from decisions of the Registrar under this Act.*

> *(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms".*

46. As the petition herein also challenged the actions of the IEBC, it fell outside the mandate of the Political Parties Disputes Tribunal.

47. Secondly, because the actions of the IEBC were being challenged, the said IEBC could not have been an independent arbiter in the dispute.

48. Pursuant to Article 88 (4) (e) of the Constitution of the Republic of Kenya;

> *"The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for –*

a. …….
b. …….
c. …….
d. ……
e. *the settlement of electoral disputes, including disputes relating to or arising from nominations* ***but excluding petitions and disputes subsequent to the declaration of election results".***

- The emphasis is mine.

49. In this case, it is clear from pages 64 and 65 of the Record of Appeal, that there was a complaint lodged with the IEBC, to challenge the nomination of Jenniffer Nariamut Koipiri. The Dispute Resolution Committee of the IEBC dismissed that complaint, paving the way for Jennifer's nomination.

50. Therefore, pursuant to Article 88 (4) (e) of the Constitution, the IEBC no longer had jurisdiction, after the gazettement of Jennifer.

51. The parties before me did not urge any submissions on the question as to whether or not the declaration of Jennifer Nariamut Koipiri as a member of the Baringo County Assembly constituted an election.

52. She is not a member of the County Assembly by dint of elections by registered voters, as envisaged by Article 177 (1) (a) of the Constitution.

53. She earned her position pursuant to either Article 177 (1) (b) of the Constitution, which sets aside a number of special seats to ensure that no more than two-thirds of the membership of the County Assembly are of the same gender, or Article 177 (1) (c) which sets aside a number of seats for marginalized groups, including people with disabilities and the youth.

54. Nonetheless, she did earn the position subsequent to the declaration of results, because the special seats are allocated to political parties in proportion to the total number of seats won by the candidates of the political party at the general election: That is provided for by Article 90 (3) of the Constitution of the Republic of Kenya.

55. Pursuant to Section 75 (1A) of the Elections Act;

"A question as to the validity of the election of a member of a County Assembly shall be heard and determined by the Resident Magistrate's court designated by the Chief Justice".

56. As I have already pointed out the 1st Respondent herein was not an elected member of the County Assembly of Baringo. Therefore Section 75 (1A) of the Elections Act does not expressly confer jurisdiction on the Magistrate's Court.

57. It may perhaps be necessary for the Legislature to expressly confer jurisdiction on the Magistrates Courts to hear and determine questions as to the validity of members of the County Assembly who earn their position through the provision of the special seats.

58. Having delved into those issues, I now go back to the beginning. By the beginning, I mean the point at which all the parties herein were in agreement concerning the determination of the petition. The judgment of the Election Court was made six (6) days after the lapse of six (6) months. Therefore, all the parties were agreed that the decision was a nullity.

59. Accordingly, an appeal could not be mounted to challenge a decision which was a nullity. For that reason alone, the appeal herein must be struck out.

60. Does that then pave way to having the petition allowed?

61. Given the fact that the IEBC had gazetted Jennifer Nariamut Koipiri as a member of the Baringo County Assembly, she would remain in that position because the attempt to remove her did not succeed. The only way she would have been removed would have been through the successful prosecution of the petition. That did not happen.

62. In **SENATOR JOHN AKPANUDELEHE & 2 OTHERS VS GODWIL ABOT AKPABIO & OTHERS SC No. 154 of 2012**, the Supreme Court of Nigeria held as follows;

"For the avoidance of any lingering doubt, once an election petition is not concluded within 180 days from the date the petition was filed by the petitioner as provided by Section 285 (6) of the Constitution, an election tribunal no longer has jurisdiction to hear the petition, and this applies to re-hearings. 180 days shall at all times be calculated from the date the petition is filed…

Once the 180 days elapsed, the hearing of the matter fades away along with any right to fair hearing. There is no longer a live petition left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever".

63. In this case, all the parties made it clear to this court that they were not critical of the learned trial magistrate for having delivered her decision late.

64. All the parties were well aware that Ms A.A. Alego PM was taken seriously ill during the hearing of the petition.

65. Upon her return to the office, the learned magistrate received written submissions from all the parties. She then proceeded to put together her judgment within four (4) working days.

66. Given those facts, it is understandable why the parties made it clear that they were not condemning her for delivering the judgment a little late.

67. The strict time-lines for the hearing and determination of election petitions were put in place so as to ensure that voters and their leaders knew, with certainty, who their elected leaders would be within a limited period of time, after the General Elections. One is therefore almost tempted to say that none of the parties suffered any prejudice by the small delay in delivering the judgment in

this case. But if the court would open that window of opportunity to "save" the judgment herein, it may end up being abused in future.

68. It may thereafter be a question of how many days of delay would be acceptable. And I think that that would be counter-productive.

69. Therefore, I hold that any delay, however little it may be or how reasonable is the explanation for it, cannot cure a judgment which was delivered after the lapse of six (6) months from the date the petition was filed.

70. On the question of costs, I note that this judgment was pegged on the fact that the decision being challenged was a nullity. None of the parties before me can be said to be more blameworthy than any other, for the late delivery of the judgment.

71. Many varied factors contributed unwittingly to the delay.

72. The petition was filed on 8th August 2013. But it was not until two (2) months later that the Election Court was constituted.

73. By the constitution of the Election Court I mean the gazettement of specific judicial officer, by the Hon. Chief Justice, as the court assigned the role of hearing and determining the petition.

74. It is not difficult to see how that delay came about. The first point is that this petition did not emanate directly from the General Elections which were held on 4th March 2013.

75. The results of the General Elections were declared soon after the elections were concluded. At that stage, the people of Kenya were very focused on those results. And those who wished to challenge the results, focused their attention on that process.

76. But the close of exercise of vote counting was just the beginning of the process for filling up the special seats.

77. It is almost as if the process relating to the special seats was secondary to the "main event". Therefore, if the judiciary does not make a deliberate effort to keep an eye on the issues arising from the choices for the special seats, there could result in some serious errors of omission.

78. I am therefore recommending that a team be put together to computerize the judicial processes of handling election petitions. I hope that the system can trigger an automatic notice to a designated Deputy Registrar, immediately after an election petition was filed.

79. The said Deputy Registrar would then notify the Hon. Chief Justice about each such petition.

80. That notice would then trigger the prompt gazettement of an Election Court.

81. The second factor which contributed to the delay was the fact that the Election court was taken seriously ill. Therefore, the hearing stalled for awhile.

82. When a person is taken ill, he or she may be expected to notify the designated Deputy Registrar that there might be a delay in the hearing of the matter assigned to him or her.

83. But in real terms, when a person is very ill, they are unlikely to be thinking about the case. The person would be concentrating their efforts in regaining good health.

84. There should therefore be a monitoring system, which could alert *"the Election Petitions Secretariat"* that a particular case had stalled. It is better to *"disturb"* a judicial officer after every two (2) weeks, to inquire if there was any further progress in the case, than assuming that all was

well.

85. When talking about stalling, it is not only illness of the judicial officer which can cause it. Advocates could also be indisposed; or there could be orders for the stay of proceedings.

86. In my considered view, anything which causes a case to stagnate needs to get the attention of the *"Election Petitions Secretariat"* as soon as possible, so that a solution can be sought timeously.

87. The third factor which caused the delay was the pace at which the parties canvassed the case. It is noted that the written submissions were filed very close to the end of the six months period. By doing so, the Election Court was left with very little time to put together its decision.

88. It is therefore critical that parties allow sufficient time to enable the Election Court give due consideration to the case and to come up with a reasoned decision, within the time specified by law.

89. The parties in this matter filed their respective submissions so close to the deadline for concluding the petition that it would have been almost impossible for any judicial officer to have delivered a proper judgment within the prescribed time.

90. On the issue of timely judgments, the Election Court needs to give itself sufficient time to prepare the same. That can be done at the stage of Directions.

91. The parties, and in particular, the petitioner should also have a keen interest in having the petition concluded within time.

92. And the proposed *"Election Petitions Secretariat" could* also serve as a back-up to the Election Court, by giving out regular reminders about the amount of time still left before the six months elapsed.

93. In the final analysis, the key to the timely adjudication of election petitions is in adequate preparations; efficient monitoring and timely interventions.

94. Finally, I order that each party will pay his or her own costs of this appeal, as well as of the petition.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

<u>Judgment read in open court in the presence of</u>

Miss Tum for Ondabu for Petitioner.

N/a for the 1st Respondent.

Eshikuri for Boinet for the 2nd Respondent.

Kenei for the 3rd Respondent.