



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 162 OF 2013

SULEIMAN SAID SHAHBAL.....PETITIONER

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION OF KENYA.....1ST RESPONDENT**

**THE SECRETARY, INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION..... 2ND RESPONDENT**

**MWASHIGADI MWADIME (sued in capacity as a
Returning Officer IEBC, Mombasa County).....3RD RESPONDENT**

HON. HASSAN ALI JOHO.....4TH RESPONDENT

RULING

1. In his petition dated 12th March 2013, the petitioner, who was a candidate in the Mombasa gubernatorial race, seeks, among others, an injunction to restrain the 1st respondent from clearing, gazetting or swearing in the 4th respondent, and an order that there should be a repeat of the elections for the Governor of the County of Mombasa.
2. The Petition is expressed to be brought in respect of the alleged contravention of the petitioner's fundamental rights and freedoms under Articles 22, 23, 27, 38, 50, 73, 75, 81, 82(d), 83, 84, 86, 87 and 180 (4) of the Constitution of Kenya and sections 58, 59, 62(1), 65 and 66 of the Elections Act, No. 24 of 2010.
3. The petitioner also filed an application by way of an undated Chamber Summons in which he seeks, inter alia, orders to stop the gazetting and or swearing in of the 4th respondent as the duly elected Governor of Mombasa, and an order placing all the ballot boxes and elections materials in the custody of the court pending the hearing and determination of the Petition.
4. By a Notice of Preliminary Objection dated 15th March, 2013, the 1st, 2nd and 3rd respondents indicated that they would be objecting to the entire suit on the grounds:

1. That the petition is incompetent misconceived and constitutes an abuse of the Process of Court for

the reason that the same offends the Provisions of Article 87 of the Constitution of Kenya, Section 75, 76 and 78 of the election Act and the elections (Parliamentary and County election) Petitions rules which provide for an election Petition as the mode of presenting grievances and disputes relating to County Elections and a specially gazetted Judge of the High Court to be constituted as the Election Court.

2. That the Petition seeks to circumvent the due process the strictures and rigours of the elections Act and the Regulations made thereunder including the deposit of security for costs by seeking to present an election Petition in the guise of a Constitutional Petition.

3. That the elections Court, being a High Court, has the jurisdiction and competence to hear and determine the petitioner's complaints with regard to alleged infractions of the Petitioner's Constitutional Rights and Fundamental freedoms as are alleged by the Petitioner in this Case.

5. The 4th respondent also filed a Notice of Preliminary Objection dated 13th March 2013 in which he asked the court to strike out the Petition and the Notice of Motion on the grounds, among others, that the Petition was premature and contrary to Section 76 of the Election Act, 2011; that it amounted to forum shopping by the Petitioner as it raised issues identical to issues raised in Petition Number 12 of 2012 which had been filed on 12th March 2012 at the High Court in Mombasa; that the court had no jurisdiction to hear the Petition as it violated the provisions of Section 75 of the Elections Act 2011 with regard to the place of hearing of election petitions, and that it does not disclose any cause of action as none of the Petitioner's constitutional rights had been violated.

6. The objections by the respondents were canvassed before me on 19th March 2013 by Mr. Anthony Lubullelah, Counsel for the 1st -3rd respondents, Mr Ahmednasir Abdullahi for the 4th respondent, and Mr Kithi for the petitioner.

The Submissions

7. The position taken by the 1st - 3rd respondents is that the substance of the matters before the court is in respect of the election of the Governor of Mombasa in the 4th March 2013 elections and are therefore election matters. They argue that the powers given to the court under Articles 22 and 23 are very wide and it could therefore be argued that an issue related to elections may cross-cut and be argued as an issue of fundamental rights; that these powers were not, however, given in derogation of or substitution of the general authority given to the High Court under Article 159 and 165, and certain divisions of the High Court may also exercise jurisdiction in respect of other matters which constitute fundamental rights and freedoms.

8. Mr. Lubullelah submitted that while the respondents were not questioning the jurisdiction of the court to hear the Petition, their position was that there was a specialised procedure under the Constitution and legislation made thereunder for the resolution of election disputes. Mr. Lubullelah submitted that Article 87 of the Constitution gave Parliament power to enact legislation for the resolution of election disputes, and pursuant to this Article, Parliament enacted the Elections Act and the ***Elections (Parliamentary and County Elections) Rules*** which deal with the manner in which electoral disputes are supposed to be handled.

9. Mr. Lubullelah submitted that as the petitioner was raising issues related to the late opening of polling stations and the failure to extend time for voting, he was raising issues related to the electoral process of 4th March 2013, all of which were matters for the electoral court. He argued therefore that while there may be an interface between election-related matters and violation of constitutional rights over which the court may have jurisdiction, the High Court had ruled several times that when a specialized process or division exists to deal with such matters, that division should be left to deal with the matters.

10. He relied on the decisions in ***Speaker of the National Assembly -v- Karume (2008) 1KLR EP 425, Kones -v- Republic & Another ex parte Kimani Wa Nyoike and 4 Others Civil Appeal No. 94 of***

2005, Republic vs. Returning Officer Kamukunji Constituency, Nairobi & Another Ex Parte Simon Ng'ang'a Mbugua Misc Civil Application 13 of 2008, and Jeffers Miruka & Others –vs- IEBC High Court Petition No. 9 of 2013, all of which are to the effect that where there is a procedure for challenging the electoral process or any other matter, that procedure must be adhered to. While conceding that most of these decisions were made before the new Constitution and the Elections Act, 2011 came into force, he nonetheless urged the court to be guided by the logic and thinking in these decisions and abide by them, and to strike out the petition with costs to the respondents.

11. Mr. Abdullahi for the 4th respondent supported the submissions made by Mr. Lubullelah, differing with him only on the contention that the court had jurisdiction to hear and determine this Petition. He took the position that not only was the Petition brought under the wrong procedures while there was a clear and specific procedure, and the court therefore had no jurisdiction to hear the matter, but it also sought orders that the court could not grant.

12. Mr. Abdullahi submitted that while the Petition was challenging election results, it was brought as a constitutional petition alleging violation of human rights, but the petitioner had not shown which of his human rights had been violated.

13. Mr. Abdullahi agreed with the submission by Mr. Lubullelah that the law provided a specific procedure for challenging the results of elections and that procedure had to be followed. He also relied on the decisions of the court in **Speaker of the National Assembly -v- Karume and Kones-v- Republic & Another ex parte Kimani Wa Nyoike and 4 Others (supra)** as well as the decision of the Supreme Court of India in **N.P. Ponnuswami -vs-The Returning Officer, Namakkal Constituency Namakkal, Sakem District and Four Others Case No 351 of 1951**. He asked the court to dismiss the Petition with costs.

14. Mr. Kithi for the petitioner submitted that the Petition and the application are properly before the court; that the 1st-3rd respondent had admitted that the court had jurisdiction, and that this was a constitutional petition governed by the Gicheru Rules which do not contemplate the disposal of a constitutional petition by way of a preliminary objection.

15. To the argument that the court could not grant the orders that the petitioner was seeking, Mr. Kithi submitted that there was a period between the conclusion of elections and the declaration of results when the Act does not prescribe what happens, and it was therefore proper for the petitioner to approach the court. He contended, further, that Article 88(5) provides that the IEBC shall exercise power and conduct its functions in accordance with the Constitution.

16. Mr. Kithi argued also that given the submission by Mr. Lubullelah that there was an interface between election offences and violation of constitutional rights, a petitioner who comes to court seeking redress of constitutional rights should not be thrown out; and that if the court is convinced that there are prayers which ought to be the subject of an election petition, it should remove those prayers and address the question of violation of constitutional rights as there was a procedure for enforcement of conditional rights which should be followed and exhausted.

17. With regard to the authorities relied on by the respondents, Mr. Kithi submitted that they all pre-date the Constitution and the Election Act; that the principle of *stare decisis* cannot leap over the gap between a repealed statute and a new statute; and that the principles in those decisions are not applicable to the present circumstances, and he asked the court to apply its mind to the Elections Act as it is today. As to the decision of Majanja, J in **Jeffers Miruka & Others –vs- IEBC** (supra), Mr. Kithi took the position that it may be persuasive but invited the court to consider the possible confluence of constitutional rights and elections offences and whether Majanja J was confronted with similar facts.

Determination

18. Before embarking on an analysis of the respective merits of the cases by the petitioner and the respondents, it is important to set out the prayers that the petitioner is seeking from this court. The

petitioner asks the court, upon the hearing and determination of the Petition, to grant:

- a. A permanent injunction from clearing and/or gazettement and/or swearing in the 4th respondent as the duly elected governor of the county of Mombasa on the 3rd March 2013.**
- b. A declaration that the Mombasa county gubernatorial election held on the 4th of March 2013 (was) unconstitutional, illegal, unlawful, irregular and is null and void and an order of a repeat of the said election to issue.**
- c. An order barring the 3rd respondent from participating in the repeat election having committed an electoral offence.**
- d. An order of Judicial Review under Article 23(3) (f) by way of an order of Mandamus compelling the 1st respondent to conduct a recount and scrutiny of all the gubernatorial votes and election documents and materials in Mombasa County.**
- e. An order of Judicial Review under Article 23(3) (f) by way of an order of Prohibition prohibiting the 1st respondent from clearing and/or gazettement and/ or swearing in of the 3rd respondent.**
- f. An order for compensation under article 23(e) of the constitution of Kenya**
- g. Costs of the petition.**

19. Counsel for the petitioner maintains that this is a petition for vindication of the constitutional rights of the petitioner, but it is clear that what is before me is essentially a petition the ultimate goal of which is to nullify the election of the 4th respondent as Governor of Mombasa County. The only order that the petitioner seeks that can be said to be connected with violation of constitutional rights *strictu sensu* is prayer (f) which seeks compensation under Article 23(e) of the Constitution.

20. In my view therefore, two issues arise for consideration in determining the preliminary objections raised by the respondents:

- i. Is there a procedure provided by law for lodging of election petitions?**
- ii. If there is, can such procedure be circumvented by way of a petition alleging violation of constitutional rights?**

Constitutional and Legislative Provisions for Resolution of Election Disputes

21. In considering this issue, I am alive to the fact that the Constitution has provided within its Articles not only for protection of fundamental rights, but also for the manner in which various aspects of social and political relations, and the disputes arising therefrom, are to be resolved. Thus, Article 22 provides for the manner in which petitions for protection of rights protected under the Bill of Rights are to be presented before the Court, while Article 23 sets out the relief that a court seized of a petition for vindication of constitutional rights can grant. Similarly, Article 87 provides for the manner in which electoral disputes are to be resolved. Article 87 provides as follows:

87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

22. Pursuant to the provisions of this Article, Parliament has enacted the Elections Act, No. 24 of 2011,

and the Chief Justice has, pursuant to powers granted under the Act, made the ***Elections (Parliamentary and County Elections) Petition Rules, 2013***, which are contained in ***Legal Notice No 54 of 2013***. Section 75 of the Elections Act provides that a question regarding the validity of a county election ***‘shall be determined by (the) High Court within the county or nearest to the county.’***

23. The Elections Act thus provides specifically for the place for filing election petitions for the election of members of County Assemblies, which includes the Governor. There must have been, I believe, good reasons for this provision, including the convenience of the parties and witnesses with a view to ensuring access to justice. This petition pertains to the election of the Governor of the County of Mombasa. There is a High Court in Mombasa, and there is no good reason why the Petition was not filed in that court. This, however, is not fatal to the Petition as the Petition can always be transferred to the High Court in Mombasa.

24. At section 76(1)(a), which echoes the provisions of Article 87(2) of the Constitution, the Elections Act provides that a petition challenging the elections results must be filed within 28 days after the results have been gazetted by the 1st respondent. This section is in the following terms:

76. (1) A petition—

(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation;

...

25. The election of the 4th respondent as Governor of Mombasa was declared officially by the IEBC in compliance with the provisions of Article 87(2) on 13th March 2013 vide Gazette Notice No. 3155 contained in the Special Issue of the Kenya Gazette Vol. CXV-No. 45 of 13th March 2013 and titled ***“Declaration of Persons Elected as Governors and Deputy Governors.”***

26. Counsel for the 4th respondent has asserted that this Petition is filed in breach of the provisions of section 76(1) of the Elections Act. However, I note that it was filed on 13th March, 2013, the same day as the 4th respondent was declared Governor by the 1st respondent through Gazette Notice No. 3155. It is therefore, at least in relation to time for filing election petitions, properly before the court under the provisions of Article 87(2) and Section 76(1)(a) of the Elections Act.

27. In addition to the requirements of the Constitution and the Elections Act, however, a party seeking to challenge the results of an election must bring his or her challenge in accordance with the rules made by the Rules Committee in compliance with section 96 of the Elections Act. As this Court observed at paragraph 25 and 26 of its decision in ***Ferdinand Ndungu Waititu -vs- The IEBC and 8 Others Election Petition No. 1 of 2013***:

25. The law, however, contains other provisions with regard to the filing and hearing of election petitions. Consequently, even after complying with the time frame with regard to filing a petition after gazettment of election results, a party seeking to file a petition to challenge election results must comply with the requirements of the Elections Act and the Rules made thereunder, for they provide a specific procedure for the presentation, hearing and determination of election petitions. The principle that where the Constitution or Parliament provide a specific procedure for settlement of a dispute, that provision or procedure must be followed, is now firmly established in this jurisdiction. See, for instance, the decision of the court in Speaker of the National Assembly- Karume (2008) 1KLR EP 425 and Kones-v- Republic & Another ex parte Kimani Wa Nyoike and 4 Others Civil Appeal No. 94 of 2005.

26. This Petition, like all petitions challenging election results, must therefore comply with the rules and procedures set out in the Elections Act and the Elections Rules. The Elections Rules applicable at the hearing of this matter are contained in Legal Notice No 44 of 2013. (These Rules have since been amended by Legal Notice No 54 of 2013). They provide the specific requirements, mechanisms and

time frame for the filing, hearing and determination of elections petitions. The Rules also contemplate that several steps must be taken prior to the actual hearing of the petition. For instance, the Rules require, among other things, that the Chief Justices gazettes, by name, the Judge or Magistrate who has authority to hear an election petition. They also provide the manner in which interlocutory applications arising in election petitions are to be dealt with. Under Rule 17, such applications are to be dealt with during the pre-trial conference pertaining to a specific petition.

28. Despite Counsel for the petitioner maintaining strenuously that this is a Petition alleging violation of fundamental rights, what we have before this court is a Petition challenging the election of the County Governor of Mombasa. It has been filed as a constitutional petition alleging violation of the petitioner's rights under the Bill of Rights, rather than as an election petition that complies with all the provisions of the Constitution, the Elections Act and the Elections Rules pertaining to the filing, hearing and determination of election petitions.

Whether the Constitutionally Mandated Procedure for Resolution of Election Petitions can be Circumvented by Way of a Petition Alleging Violation of Constitutional Rights

29. I now turn to a consideration of the second issue before the court.

30. The petitioner submits that since there is an interface between violation of constitutional rights and commission of election offences, the court has jurisdiction to hear this Petition. Mr. Kithi has distinguished the authorities that dictate that a procedure set by law should be followed, arguing that the precedents pre-date the current Constitution and the Elections Act.

31. I believe that while the law on elections may have changed in keeping with the new constitutional dispensation, the logic of the law has not. There were, and continue to be, cogent reasons for insisting that where there is a specific procedure or remedy provided by law, that procedure must be followed. To hold otherwise would lead to chaos in the administration of justice, for parties would be at liberty to allege violation of constitutional rights even where no such violations exist, and pick and choose which laws and rules to follow and which to disregard. There is great public interest in the expeditious resolution of election disputes, and the Elections Act and the Elections Rules are intended to achieve this.

32. Perhaps, as the 1st respondent submitted, there is an interface between violation of constitutional rights and acts which may form grounds for annulling the results of an election. However, the framers of the Constitution and the people of Kenya, who overwhelmingly voted for the Constitution at the referendum held on August 4th 2010, thought it best that disputes relating to elections should be resolved as provided under Article 87, through legislation enacted by Parliament. As this court also observed at paragraph 27 of its decision in **Ferdinand Ndungu Waititu vs- The IEBC**:

'In my view, however, and I agree with the 4th respondent on this, the provisions of the Elections Act and the Elections 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.'

33. Consequently, for a party to be properly before the court while challenging the results of elections under the new constitutional dispensation and the resultant statutory regime, he or she must abide by the provisions of the Constitution, the Elections Act and the Elections Rules as contained in the Elections (Parliamentary and County Elections) Petition Rules 2013 contained in Legal Notice No 54 of 2013 which constitute the constitutionally underpinned code for handling election disputes. A party cannot disregard the clear provisions of the Constitution and legislation enacted pursuant to such constitutional provisions and expect relief from the court by alleging violation of constitutional rights.

34. This is the position that our courts have consistently taken. In **Speaker of The National Assembly - vs- Karume** (supra), the Court of Appeal observed as follows:

“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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

35. In **Kones vs. Republic and Another ex parte Kimani Wa Nyoike Civil Appeal No. 94 of 2005** the Court of Appeal, after analyzing several decisions pertaining to election and nomination disputes, observed as follows:

"The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, Chapter 26 Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular."

36. Mr. Kithi for the petitioner took the position that these decisions are not good law as they were made prior to the new Constitution and the Elections Act, 2011. However, I agree with Mr. Lubullelah for the 1st- 3rd respondents that the logic and thinking of the law has not changed. It would in fact be to bend logic to hold that the framers of the Constitution in 2010 and Parliament in enacting the Elections Act went to such elaborate lengths to provide specific legislation and rules to guide the resolution of elections petitions if they did not intend that the provisions of the Act and the Rules should be followed. It is not open to a petitioner to mount a constitutional challenge against elections, and at the same time leave in reserve, as it were, the option of filing an election petition. At any rate, this court has, in decisions dealing with elections matters under the new Constitution and the Elections Act 2011 cited with approval the very decisions that Mr. Kithi casts aspersions on. See in this regard the decision of the court in **National Gender and Equality Commission –v- IEBC and 4 Others High Court Petition No. 174 of 2013**.

37. Similarly, it cannot be proper, as Mr. Kithi suggested, that this court should separate issues related to violation of constitutional rights from those pertaining to elections and hear them separately. The respondents are also entitled to justice, and justice requires that where a challenge of election results is mounted, they should be obliged to defend only a petition that is properly presented and prosecuted in accordance with the constitutional and statutory provisions for resolving elections disputes. I would agree with the reasoning in the decision of the Supreme Court of India in **N P Ponnuswami vs. Returning Officer of Namakkal Constituency and Others** (supra) relied on by the 4th respondent, where the Court observed as follows:

"The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extra ordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded) and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court."

38. The Constitution and the Elections Act, as well as the Rules made thereunder, are very clear with regard to how, before which forum, and at what stage, election results can be challenged. It is not by way of a petition alleging violation of constitutional rights but by way of an election petition that complies with all the provisions of the law governing election petitions.

39. For the above reasons, this petition is hereby struck out with costs to the respondents.

40. For the avoidance of doubt, the petitioner is at liberty to file a petition challenging the election of the 4th respondent. He must, however, do so in strict compliance with the provisions of the Constitution, the

Elections Act 2011 and The Elections (Parliamentary and County Elections) Petition Rules, 2013.

Dated, Delivered and Signed at Nairobi this 27th day of March 2013

**MUMBI NGUGI
JUDGE**

Mr. Kithi instructed by the firm of Sultana Fadhil & Kilonzo Co. Advocates for the Petitioner

Mr. Anthony Lubullelah instructed by the firm of Lubullellah & Associates Advocates for the 1st - 3rd Respondent

Mr. Ahmednasir Abdullahi instructed by the firm of Ahmednasir, Abdikadir & Co. Advocates for the 4th Respondent