



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION 174 OF 2013

BETWEEN

DR. CALVIN KODONGO 1ST PETITIONER

MARTIN NKARI.....2ND PETITIONER

KEN ORENGO.....3RD PETITIONER

AND

THE TRANSITION AUTHORITY.....1ST RESPONDENT

THE CLERK OF THE SENATE..... 2ND RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....3RD RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....4TH RESPONDENT

THE ATTORNEY GENERAL5TH RESPONDENT

THE COMMISSION ON IMPLEMENTATION

OF THE CONSTITUTION6TH RESPONDENT

JUDGMENT

1. The petitioners are Kenyan citizens and have brought the petition dated 22nd March 2013. The nature of the petition is straightforward as can be seen from the prayers which are as follows;
 - a. *That a declaration be issued to declare that until the Supreme Court has determined the validity of the presidential election results pursuant to Article 140 of the Constitution no person election to a position contested in a general election should be sworn in and discharge the duties of a State Office.*

- b. *That a declaration be issued to declare that until the Supreme Court determines the validity of the Fourth Respondent's declaration on 9th March 2013 of Uhuru Kenyatta as duly elected President, no person elected to any of the seats contested in the General Election held on 4th March 2013 should be sworn in and discharge the functions of the state office.*
 - c. *That a declaration be issued to declare that the petitioners rights and freedoms enshrined in and protected by Article 27, 28, 38, and 50 of the Constitution will be violated if the county Governors and parliament on one hand are elected on one hand through one set of electoral rules whilst the president and his Deputy are elected on a different set of electoral rules,*
 - d. *That an order of certiorari be issued to bring into this Court and quash Gazette Notice No. 3155 published in a special issue of The Kenya Gazette dated 13th March 2013 and Gazette Notice No. 3508 published in a special issue of The Kenya Gazette dated 20th March 2013.*
 - e. *That an order of prohibition be issued to prohibit the swearing in and assumption of office of all State Officials elected during the General Election held on 4th March 2013, until the Fourth President of Kenya is sworn in under Article 11 of the Constitution.*
 - f. *That an order of prohibition be issued to prohibit the 1450 County Assemblies Representatives from assuming offices and discharging the functions of that office until the Fourth President of Kenya is sworn in under Article 141 of the Constitution.*
 - g. *That the costs of this petition be borne by the respondents.*
2. Together with the petition, the petitioners filed a Notice of Motion dated 22nd March 2013 in which they seek the following conservatory orders;
 1. *That this application be certified as urgent and heard ex parte at the first instance.*
 2. *That pending hearing and determination of this application the Honourable Court be pleased to issue an order of temporary injunction to stop the Respondent jointly and or severally from conducting, presiding over or in any other way facilitating the swearing-in of the Members of the National Assembly, Members of the Senate, County Governors, Women Members of the National Assembly and County Assembly Representatives elected during the General Elections held – on 4th March 2013.*
 3. *That pending the hearing and determination of this petition the Honourable Court be pleased to issue an order of injunction to stop the respondent jointly and or severally from conducting, presiding over or in any other way facilitating the swearing in of the Members of the National Assembly, Members of the Senate, County Governors, Women Members of the National Assembly and County Assembly Representatives elected during the General Elections held – on 4th March 2013.*
 4. *That pending hearing and determination of the **Supreme Court of Kenya Election Supreme Court of Kenya Petition No. 4 of 2013 Gladwell Wathoni Otieno & Another vs Ahmed Issack Hassan & 3 Others** and **Supreme Court of Kenya Petition No. 5 of 2013 Raila Odinga vs Independent Electoral and Boundaries Commission & 3 Others** the respondents be restrained by an order of prohibition from conducting presiding over or in any other way facilitating the swearing in of the Members of the National Assembly, Members of the Senate, County Governors, Women Members of the National Assembly and County Assembly Representatives elected during the General Elections held on 4th March 2013.*
 5. *That the Honourable Court be pleased to issue an order of stay of Gazette Notice No. 3155 published in a Special Issue of The Kenya Gazette dated 13th March 2013 and Gazette Notice No. 3508 published in a Special Issue of The Kenya Gazette dated 20th March 2013.*
 6. *That the costs of this application be borne by the respondents herein.*
 3. The respondents all took out preliminary objections to the application and petition and I directed that the same be argued in opposition to the Motion and Petition which were heard together. I considered that the matters raised in the petition and motion were really matters of law. Given the nature of the petition, in so far as it was predicated upon the pending cases in the Supreme Court, had a very short lifespan and it was necessary to determine it with finality.

4. The petitioners case is that the validity of the voters registers and conduct of the election officials are the subject matter of two petitions before the Supreme Court in relation to which verdict will be made on or before 30th March 2013. The petitioners contend that in the event the Supreme Court finds that the voters register is invalid then the election of all persons who contested for the six positions in the 4th March 2013 General Election of would all be nullified and all the persons elected would have to relinquish their respective offices.
5. The petitioners argue that in order to avoid persons whose election is invalid from assuming office, it is necessary that this Court stops the swearing in and assumption of office of all the persons elected on 4th March 2013 pending the hearing and determination of the two election petitions filed in the Supreme Court to challenge the election of the President-elect.
6. Ms Shaw, counsel for the petitioners, emphasised that the proper implementation of the Constitution of Kenya requires that until all results of the first general election have been validly and finally pronounced upon by the Supreme Court, no person elected in the General Election held on 4th March 2013 should be sworn in and assume office until the Supreme Court gives its verdict.
7. Ms Shaw emphasised that this case was not an election petition but a matter of the petitioners' fundamental rights and freedoms which should be given full effect. The petitioners contend that their rights under **Articles 27 and 38** will be breached and this court is entitled to grant "appropriate relief" under **Article 23** in order to give full effect to their rights.
8. The respondents all opposed the petition on several grounds. First, they argue that this matter, in so far as it sought orders in relation to cases pending in the Supreme Court, encroaches on the jurisdiction of the Supreme Court. They contend that under **Article 163(3)**, the Supreme Court has exclusive jurisdiction to deal with matters relating to any dispute relating to the Presidential Election hence this court, the High Court, has no jurisdiction to deal with the matter. Secondly, that the petition and application are based on pure speculation of what the Supreme Court would do and what it would hold and in the circumstances, the court should not issue any orders base on a speculative cause of action.
9. The third ground of objection is that Members of Parliament, Governors and Members of Country Assemblies have already been elected and that what remains is for them to be sworn to office. In the circumstances, it was improper to restrain them from taking the oath of office which is a constitutional imperative necessary for them to assume office. The respondents submit that since all State officers have been duly elected, the proper manner in which to challenge their election is through the filing of an election petition in respect of each officer.
10. I have considered the matters set out in the petition, depositions and submissions and I will deal with the prayers set out in the petition as the issues for determination.
11. Prayers (a) and (b) of the petition cannot be granted. I agree with the respondents that any matter relating to the Presidential Election petition must be dealt with by the Supreme Court. What the petitioners seek is some form of interim relief pending the determination of the Supreme Court cases. This relief, whatever its nature, can only be determined by that Court. Attempting to consider the whether the facts or circumstances permit the grant of the orders will obviously lead to this Court meandering into an area where it is not permitted by **Article 163(3)(a)** and **165 (5) (a)**. The issue of the jurisdiction of the High Court was made very clear in the ***The Africa Centre for Open Governance (AFRICOG) v Ahmed Issack Hassan Nairobi Petition No. 152 of 2013 [2013] eKLR*** where the Court held that the High Court lacks jurisdiction to deal with any matter touching upon the Presidential election dispute.
12. Prayer (c) deal with violation of fundamental rights and freedoms. Quite apart from the fact that I am not clear how the petitioners' rights are violated, 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.

13. **Chapter Seven and Eight** of the Constitution titled “**Representation of the People**” and “**The Legislature**” respectively give effect to the principle of sovereignty of 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. Thus it must be clear that prayer (c) cannot be granted as the Constitution itself, while it contemplates, that a general election will be held for all the elective positions on one day, it provides for different modes of dispute settlement.

14. Prayer (d) seeks the quashing of the **Gazette Notice No. 3155** dated 13th March 2013 and **Gazette Notice No. 3508** dated 20th March 2013. The former gazette notice declares the names of the duly elected Governors and their deputies while the latter notice declares the names of the duly elected Members of Parliament. The result of quashing these notices would amount to quashing the election of the gazetted persons in a manner not permitted by the law. In answer to this I would reiterate what was stated in **National Gender and Equality Commission (NGEC v Independent Electoral and Boundaries Commission Nairobi Petition No. 147 of 2013 (Unreported)** where the Court observed, “*Upon such gazettelement 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.*” This principle applies with equal force to the Governors by dint of **Part VII** of the **Elections Act, 2011**. What the petitioner seeks to do is to challenge the election of Members of Parliament and Governors in gross!

15. The granting of prayer (e) and (f) has no basis. As I held in the case of **Joseph Tiampati Ole Musuni and Other v Samuel Kuntai Tunai and Others Nairobi Election Petition No. 3 of 2013**, the Constitution, **Election Act, 2011** and the rules made thereunder do not contemplate the Court taking steps to stop the swearing in of Governors or members of County Assemblies or stopping them from taking up their Constitutional responsibility. An order of the kind sought by the petitioner would simply paralyse the County government system which is a key part of the Constitution.

16. As all the prayers sought in the petition cannot be granted, it follows that the petition lacks merit and it is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 26th March 2013

D.S. MAJANJA

JUDGE

Ms Shaw instructed by Gatundu and Company advocates for the petitioner.

Mr Okindo instructed by Nyandoro and Company Advocates for the 1st respondent.

Mr Mwendwa, Advocates, instructed by the 2nd and 3rd respondents.

Mr Munge with him Mr Oiboo instructed by Muriu Mungai and Company Advocates for the 4th respondent.

Mr Njoroge, Litigation Counsel, instructed by the State Law Office for the Attorney General.