



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Election Petition 1 of 2013**

**DR. THUO MATHENGE.....PETITIONER**

**versus**

**NDERITU GACHAGUA.....1ST RESPONDENT**

**RETURNING OFFICER NYERI COUNTY.....2ND RESPONDENT**

**INDEPENDENT ELECTORAL BOUNDARIES COMMISSION.....3RD RESPONDENT**

**RULING**

**BACK GROUND**

1. The Petitioner herein filed an election petition against the 1st, 2nd and 3rd respondents herein arising from the election of Governor of Nyeri county on 8th March 2013 and on 14th March 2013 M/S J.K. Kibicho & Co. advocates were appointed by 2nd and 3rd Respondents to act for them.
2. On 18th March 2013 M/S Njoroge Reguru & Co. Advocates filed a notice of appointment under protest in respect of the 1st Respondent.
3. On 18th March 2013 the petitioner under a certificate of urgency took out a notice of motion under Articles 38 and 81(e)(v) of the constitution, section 80(3) of the Election Act 2012 Rules 4(1) and 5 of the Election (parliamentary and county Election)Petition Rules 2013 in which they sought the following orders:
  1. *That this application be certified urgent and be heard exparte in the first instance.*
  2. *That the court be pleased to grant an injunction order restraining the 3rd Respondent from gazetting the first respondent as the Governor for Nyeri county pending the hearing of this application interpartes, and until further orders of the court.*
  3. *That the court be pleased to grant an injunction order restraining the 3rd Respondent from gazetting the first respondent as the Governor of Nyeri County pending the hearing and determination of the petition, and until further orders of the court.*
  4. *That the court be pleased to grant an injunction order restraining the third respondent, by itself or through its agents or any other person from administering the oath of office of Governor of Nyeri County upon the first respondent pending the hearing of this application interpartes, and until further orders of the court.*

**5. That the court be pleased to grant an injunction order restraining the third respondent, by itself or its agents or any other person from administering the oath of office of the Governor of Nyeri County upon the first Respondent pending the hearing of the petition, and until further orders of the court.**

**6. That the court be pleased to grant an injunction order restraining the first respondent from assumption of the office of the Governor of Nyeri County pending the hearing of this application interpartes, and until further orders of the court.**

**7. That the court be pleased to grant an injunction order restraining the first respondent from assumption of the office of Governor of Nyeri County pending the hearing and determination of the petition and until furthers orders of the court.**

4. When the said application was placed before me on the same day I certified the same urgent and directed that the same be served for interparte hearing.

### **PRELIMINARY OBJECTION**

5. The first Respondent filed his grounds of opposition on 21st March 2013 where in the same state:

That this honourable court as presently constituted lacks jurisdiction to hear and determine the application and indeed the purported petition filed herein pursuant to the provisions of Rule 6(3) of the Election (Parliamentary and county Election) petition Rules 2013.

6. the 2nd and 3rd Respondents in addition to filing their grounds of opposition took out a notice of preliminary objection against the petitioner on a point of law to be determined in limine:

**1. That the substantive petition filed herein on 8th March 2013 is incompetent fatally defective and unconstitutional for having been filed in breach of Article 87(2) of the constitution of Kenya 2010.**

**2. That the petition is fatally defective as it offences the mandatory provisions of section 76 of the Election Act 2011 for having been filed prior to the date of publication of the result of the election in the Kenya gazette.**

**3. That this court lacks jurisdiction to hear and determine on election petition challenging the validity of ungazetted election results.**

7. when this matter appeared before me on 22/3/201 both Mr. Marete for the 1st Respondent and Mr. Kibicho for the 2nd and 3rd Respondents were of the view that the issue of jurisdiction be determined first while Miss Mwai for the applicant was of the view that the preliminary objection be treated as a response to her application.

8. I was of the view and ruled that since the respondent had raised the issue of the jurisdiction it was just in order for the preliminary objection to be determined first on the strength of the decision in OWNERS OF MOTOR VESSEL LILLIAN'S'

### **SUBMISSIONS**

9. Mr. Marete for the 1st Respondent submitted that the constitution regards the electoral process as such a sacrosanct process that there is a specific process on how election matters shall be dealt with.

10. While the High Court has unlimited jurisdiction in Election matters the Chief Justice is empowered by the constitution to appoint a court that shall preside over Election disputes.

11. The Election Act rule 6(3) provides that the Chief Justice shall publish the name of the judge and magistrate designated to hear petition and that since the court has not been gazetted to hear the petition it lacks jurisdiction in support thereof. He relied upon the cases of:

**1. OWNERS OF THE MOTOR VESSEL LILLIAN'S' v CALTEX OIL (KENYA) LTD CIVIL APPEAL NO. 50 OF 1989** Mombasa.

**2. THE AFRICAN CENTRE FOR OPEN GOVERNANCE (AFRICOG)v AHMED ISSACK HASSAN & ANOTHER NAIROBI. HIGH COURT PETITION NO. 152/2013.**

12. Mr. Kibicho associated himself with the submission of Mr. Marete and added that the constitution confers jurisdiction on the court under Article 87(1),(2),(3) and that Article 87(2) provides that the Chief Justice shall gazette rules pursuant to the Election Act and that Rule 6 of the Election Rules provides that the Chief Justice shall gazette the Election courts and that since this court has not been gazetted it lacks jurisdiction.

13. He further submitted that the court lacks jurisdiction since the petition was filed before the declaration of the elections were gazetted under article 87(2) of the constitution and that the petitioner having moved the court under the Election Act is bound by the rules made thereunder.

14. Miss Mwai for the applicant submitted that the court has jurisdiction both under the Constitution and under the Act .

15. She submitted that the court has jurisdiction under Section 77 and 76 of the Election Act and that section 77 of the Act talks of a petition being filed within 28 days after the declaration of the result by the commission and therefore the petition is properly before this court.

16. It was submitted by the applicant that under rule 6 of the Election Act the court shall be constituted if:

1. It is composed of one High Court judge, Rule (2) the Chief Justice may

(a) in consultation with the principal judge of the High Court designate such judges and designate such magistrates as are necessary for expeditious disposal of election petition .

(3) The Chief Justice shall publish the names of the judge and Magistrate designated under sub rule (2) in the Gazette and in at least one newspaper of national circulation.

17. It was therefore submitted by Miss Mwai that the appointment is not mandatory and it is only where such appointment is made that it is mandatory to gazette the same.

**ISSUE**

18. From the above submissions there is only one issue for determination in this preliminary objection. Whether a Judge of the High Court not gazetted has jurisdiction to hear and determine election matter?

19. In answering this issue I have looked at the definition of Election court under the Election Act where this is provided:-

***High court in exercise of jurisdiction conferred upon it by Article 165(3)(a) of the Constitution.***

20. Article 165(3) provides that the High Court shall have

a. ***unlimited original jurisdiction in criminal and civil matters.***

e. ***any other jurisdiction original or appellate conferred to it by legislature.***

21. As regards the petition before this court section 75(1) of the Election Act provides as follows:

***75(1) A question as to validity of a county election shall be determined by High Court within the***

**county or nearest to the county**(emphasis added)

22. It is therefore clear to my mind that the Election Act gives this court jurisdiction to hear and determine the petition herein and it is clear that election petition court does not fall within the exclusion provided for under Article 165(5)(b) of the Constitution of Kenya 2010.

23. I therefore agree with the submission by Miss Mwai for the Petitioner that Rule 6 of the Elections (Parliamentary and County elections) petition rules 2012 are purely procedural and administrative and does not oust the jurisdiction conferred upon this court by the constitution and statute.

24. I therefore hold that this court is properly seized of the petition and therefore dismiss the preliminary objection with cost being in the cause.

### **DIRECTION**

25. Having so ruled that this court has jurisdiction I am however of the considered view that the jurisdiction conferred upon this court by the constitution and the Elections Act is a special jurisdiction which ought to be exercised within the provisions of the rules made therein under.

26. In this I find support in the decision by Maraga J as he then was in the case of HASSAN ALI JOHO v NOTHAM NYANGE & ANOTHER (2006) ekl where the judge had this to say

***“it is now well established that the jurisdiction conferred upon the High court by Section 44 of the constitution to hear and determine election petitions is a special jurisdiction. The National Assembly and Presidential Elections Act Cap 7 of the Laws of Kenya and the Rules made thereunder form a complete legal regime with its elaborate procedures concerning the filing service hearing and determination of election petitions. Save where the regime expressly admits and incorporates the provision of other laws its a complete code of its own.”***

27. Since Kenyan have now renewed their trust in the judiciary any false start on the part of the same in the petitions arising from the first election under the constitution will be a betrayal of the said trust and it is therefore prudent that this petition be subjected to the rules established under the Election Act (herein referred to as the Election (Parliamentary and County Elections) Petition rules 2013.

28. I therefore direct that this filed be placed before Honorable Chief Justice of the Republic of Kenya to enable him exercise powers conferred upon him by rule 6 of the aforesaid rules to appoint and gazette a judge in respect of this petition.

29. In so directing I am alive to the fact that the application before the court is very urgent and raises fundamental issues of law in respect to what happens to the election petitions in the interlocutory stage and that article 159(2)(b) and (d) of the constitution requires that

b) ***Justice shall not be delayed.***

d) ***Justice shall be administered without undue regard to procedural technicalities.***

Dated and delivered at Nyeri this 26th day of March 2013.

**J. WAKIAGA**

**JUDGE**

Miss Mwai for the Petitioner

Mr. Marete for the 1st Respondent

Mr. Kibicho for the 2nd and 3rd Respondents

Court: Ruling delivered in open court in the presence of the above named.

**J. WAKIAGA**

**JUDGE**