



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Miscellaneous Application 15 of 2013**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. THE RETURNING OFFICER ZIWA LA NG'OMBE WARD**

**2. THE SECRETARY I E B C**

**3. THE INDEPENDENT ELECTROL & BOUNDARIES COMMISSION.....RESPONDENT**

**AND**

**KEVIN KWENA LUNANI & 12 OTHERS .....INTERESTED PARTIES**

**RULING**

Before this court is the Chamber summons dated 7<sup>th</sup> March 2013 brought under certificate of urgency. The exparte Applicant did in her Chamber summons seek prayers as follow:-

**“2 THAT this Honourable Court be pleased to grant leave to the Exparte applicant herein to apply for orders of Certiorari to move into this Honourable court and to quash the decision(s) made by the 1<sup>st</sup> RESPONDENT herein [ being the Returning Officer, Ziwa la Ngombe ward, Mombasa whereby the 1<sup>st</sup> Respondent purports to**

**i. Accept and/or receive for counting and tallying six(6) un-declared ballot boxes inter alia from Tumaini, Olive and Ziwa la Ngombe Primary School Polling Stations within Ziwa la Ngombe ward; and**

**ii. Proceed to determine and declare the results of the election of Ziwa la Ngombe county Ward Representative while including the ballot papers originating from the aforesaid six(6) un-declared Ballot Boxes;**

**iii. Accept and/or receive for counting and tallying three (3) other declared Ballot Boxes from polling stations within Ziwa la Ngombe whose seals had been cut by un-known persons;**

**iv. Accept an/or receive for counting and tallying, in the absence of all of the Interested parties and/or their agents, three(3) declared Ballot Boxes from polling stations within Ziwa la Ngombe whose seals had been cut by un-known persons;**

**v. Proceed to determine and declare the results of the election of Ziwa la Ngombe County Ward**

representative while including the ballot papers originating from the aforesaid three(3) declared Ballot Boxes whose seals had been cut by persons unknown;

vi. Allow and or authorize the setting up of three(30 extra voting rooms within Ziwa la Ngombe Primary School Polling Station.

vii. Authorize voting to proceed within these three(3) extra voting rooms using undeclared Ballot Boxes despite the absence of the polling agents of all the aspirants;

viii. Accept and/or receive for counting and tallying the contents of the aforesaid un-declared Ballot Boxes from the said three (3) extra voting rooms; and proceed to determine and declare the results of the election of Ziwa la Ngombe County Ward Representative while including the ballot papers originating from the aforesaid un-declared Ballot Boxes from the three(3) extra voting rooms.”

3 THAT this Honourable Court be pleased to grant leave to the Ex-parte Applicant herein to apply for an order of prohibition to be directed to the RESPONDENT to prohibit them from determining, declaring, cancelling, publishing and/or gazetting the election results, whether provisional or final of the election of County assembly Ward Representative for Ziwa La Ngombe Ward, Nyali Constituency, Mombasa County as required by section 39 of the ELECTIONS ACT 2011 until hearing inter partes and determination of the main Motion herein.

4 THAT this Honourable Court be pleased to grant leave to the Exparte applicant herein to apply for an order of Mandamus to be directed to the RESPONDENTS to compel them to

a) Formally postpone the election of the County assembly Ward Representative for Ziwa la Ngombe ward, Nyali constituency as provided under Section 73(1) of the Elections Act (2011)until appropriate remedial measures and interventions are put in place t ensure a free’ fair and accountable election for the aforesaid seat;

b) Secure from the 1<sup>st</sup> Respondent a full and proper account of the total number of:

i. Ballot Boxes allocated to Ziwa la Ngombe Ward for election of County Ward Representative by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents;

ii. Ballot papers allocated to Ziwa la Ngombe Ward for election of County Ward Representative by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents;

iii. Ballot Papers issued to voters to enable them cast votes for the election of Ziwa la Ngombe County ward Representative and

iv. Votes cast in the election of Ziwa la Ngombe Ward for election of County Ward Representative including those spoilt before proceeding to declare the results of the election of the County Assembly Ward Representative for Ziwa la Ngombe Ward, Nyali Constituency;

(c) in the alternative to the foregoing, to compel the Respondent to formally extend the voting period as defined in Section 2 of the elections Act 2011 so as to allow fresh voting, verification of Ballot Boxes and contents thereof, tallying and determination of the election results for the election of the County Assembly Ward Representative for Ziwa la Ngombe Ward Nyali Constituency

5 THAT grant to leave to apply for orders of Certiorari Prohibition and Mandamus aforesaid do operate as a stay of the 1<sup>st</sup> RESPONDENTS decision to proceed to determine and declare the results of the election of the County Assembly Ward Representative for Ziwa la Ngombe ward Nyali Constituency despite having no powers to do so as provided under section 39 of the ELECTION ACT [2011], pending hearing and determination of the main motion to be filed herein

**within twenty one (21) days of grant of leave to apply for Judicial review.**

**6 THAT costs of this application be granted to the Exparte applicant”**

MR. KITHI Advocate appeared for the Ex-parte applicant whilst MR MUKELE came on record for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

On 7<sup>th</sup> March 2013, I did grant to the Ex-parte applicant leave to commence Judicial Review proceedings. However, I declined to grant a stay as sought by prayer (5) of the Chamber Summons dated 7/3/2013. The reason being that I was not persuaded that failure to grant such a stay would result in irreparable harm being visited upon the ex-parte applicant.

On 11<sup>th</sup> March 2013 the Respondents filed in court a Notice of Preliminary Objection dated 10<sup>th</sup> March 2013. This notice of preliminary objection was based on the following grounds;

**“1. THAT this Honourable court lacks the requisite jurisdiction to hear and determine this matter.**

**2. THAT the application as filed is incompetent, incurably defective and an abuse of the process of this honourable court as the same is in blatant contravention of article 87 of the Constitution of Kenya 2010 and the provisions of the elections Act Number 24 of 2011”.**

Both counsel appeared before me on 14<sup>th</sup> march 2012 and made oral submissions with respect to this preliminary objection. I propose now to deal with each of grounds of Preliminary Objection raised

**1. Does the High Court lack jurisdiction to hear and determine this application for Judicial Review?**

In challenging this application for Judicial Review Mr. Mukele for the Respondents submitted that Article 87 of the Constitution sets out a clear process for resolving electoral disputes. He therefore argued that there exists no provision for a party to move to court under Judicial Review in an election dispute.

Mr. Kithi for the Ex-parte applicant countered this argument by submitting that since the Election Act was enacted after the New Constitution was promulgated, the Elections Act 2011 cannot be used to limit the fundamental rights and freedoms guaranteed by the Constitution of Kenya. He further submits that since the IEBC is a private body, the actions and decisions of its officers (being public officials) are subject to judicial review.

Article 87 of the Constitution provides as follows:-

“87 (1) Parliament shall enact legislation to establish mechanisms for timely setting 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.

(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation”.

The provisions article 87(1) is actualized by the enactment of the Elections Act No. 24 of 2011. It is this Elections Act which sets out the procedure to be followed in determining an election dispute. The election which the Ex-parte applicant seeks to challenge is that of the County Ward Representative in Ziwa la Ngombe ward in Nyalı Constituency. Section 75 1A of the Elections Act provides as follows;

**“75 1A a question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident magistrates Court designated by the Chief justice”.**

Therefore, the question here is whether section 75 1A of the Elections Act ousts the jurisdiction of the

High Court to hear and determine a dispute arising from a County Assembly Ward Election. I think not. The same constitution in Article 165(3) (a) gives to the High Court

**(a) Unlimited original jurisdiction in Criminal and Civil Matters”.**

Likewise the Judicature Act section 3(1) provides

**“3(1) The jurisdiction of the High Court, the court of Appeal and of all subordinates courts shall be exercised in conformity with;**

**(a) The Constitution**

**(b) Subject thereto, all other written laws including the Act of parliament of the United kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule**

**(c) .....**”

It is quite clear from this that the High Court retains residual jurisdiction over all civil and criminal matters upto and including election disputes. The election Act does not and cannot oust the jurisdiction donated to the High Court by the Constitution of Kenya. Therefore in cases where an allegation is made of any violation of the fundamental rights and freedoms guaranteed by the constitution with respect to the conduct of elections then the High court does have jurisdiction to hear and determine the matter.

**2. Is this present application as filed incompetent, incurably defective and an abuse of court Process?**

As stated earlier Article 87(1) of the Constitution of Kenya provided for the enactment of legislation to establish mechanisms for the timely settling of electoral disputes. The legislature did comply and did enact the Elections Act 2011 which set out very clear procedures and timelines for the settling of election disputes. With regard to disputes pertaining to County Assembly Elections section 75 1A of the Elections Act clearly provides that such disputes are to be presented before the Resident Magistrate Court for determination. Mr Kithi for the applicant submits that there is no legal recourse provided to an aggrieved litigant between the nomination period and the period before electoral results are gazetted. It is this gap that the applicant having no other legal recourse sought to seek remedy by way of Judicial Review. This dilemma is however easily solved by a look at Article 88(4)(e) of the Constitution of Kenya which provides

**“(4) the Commission [referring here to the IEBC] is responsible for conducting or supervising referendum and elections by any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and particular for**

**(c) the settlement o electoral disputed, including disputes relating to or arising from nomination but excluding election petition and disputes subsequent to the declaration of election results.**[my own emphasis]

A clear reading of this provision makes it manifestly clear that the IEBC has the mandate to hear and determine all election disputes arising from nominations before the declarations of results. Therefore any dispute arising before the official announcement or pronouncement of results ought to be handled y the IEBC.

did the exparte applicant try to avail herself of this remedy in order to have her grievances addressed?

The Ex-parte applicant submits that she channeled her dispute to the High court because all attempts to have the matter resolved by the IEBC failed. There is no evidence by way of letters of complaint to either the returning officer to the IEBC to show that the ex-parte applicant ever raised any complaint at all regarding the manner in which the ward elections were being conducted.

As justification for approaching the High Court by way of Judicial Review rather than filing an election petition the applicant contends that she is not seeking to cancel or nullify the results of the ward election, but argues that her petition is only concerned with the process leading to the announcement of the results- that such process be fair and just. However a close look at the actual prayers sought in this petition reveal otherwise. Prayer 2 of the Chamber summons seeks an order of certiorari to remove into the court and quash the decision of the 1<sup>st</sup> Respondent purporting to determine and declare the results of the Ziwa la Ngombe county Ward Representative. This is undoubtedly prayer to cancel and/or nullify the results as announced by the 1<sup>st</sup> respondent. This and as most of the other prayers sought are orders that can quite properly be sought and obtained under the Elections Act. Where the remedy being sought by a party is provided for by an Act of Parliament, there would be no need for such an applicant to approach the High Court under Order 53 of the Civil Procedure Rules. This same issue was adjudicated upon by the Court of Appeal in the case of SPEAKER OF THE NATIONAL ASSEMBLY –VS- KARUME [ 2009]KLR 425. In this case the court held thus

**“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 and statutory provisions”.**

Similarly in the case of KONES VS REPUBLIC & ANOTHER EXPARTE KIMANI WA NYOIKE & 4 OTHERS [2008] 3 KLR 291 the court of Appeal stated 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 for 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 of the Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular the law reform Act and Order 53 of the civil procedure Rules are both inferior and can only apply subject to the provisions of the Constitution”.**

I am in full agreement with the above decisions by the Court of Appeal which by virtue of the doctrine of *stare decisis* are legally binding in this court. Whereas previously there existed the National Assembly and Presidential Elections Act, subsequent to the promulgation of the new constitution such matters are guided by the Elections Act 2011. Where there exists clear procedure in given law to address a particular grievances (in this case the ward elections) then a party is required to use such statutory provisions as an avenue to seek redress. To challenge the election of a county assembly member, the applicant ought to file a petition under Section 76(1)(a) of the Elections Act before the Resident Magistrate’s court within 28 days of declaration of the results. The question may arise as to what the word ‘declaration’ refers to. Does it refer to the announcement of results by the returning officer or does it refer to the publication of the results in the official Kenya gazette. Neither the Constitution nor the Election Act provides a clear definition of the word ‘declaration’. The question was pondered over by my learned sister Justice Mumbi Ngugi in ELECTION PETITION NO. 1 OF 2013 FERDINARD NDUNGU WAITITU VS IEBC & 8 OTHERS. She held as follows:

**I take the view that this has to be by formally publishing the results in the Kenya Gazette, and this is borne out by the provisions of the Elections Act which parliament, in accordance with the mandate conferred on it under Article 87(1), has enacted. Section 76 of the Election Act vests jurisdiction in the High Court to hear petitions filed within twenty eight days of publication in the Kenya Gazette. Thus, ‘declaration’ must mean publication in the Kenya Gazette, not simply the announcement of the results at the polling station or tallying centre.**

By seeking to redress this grievance by way of Judicial Review under Order 53 the applicant is seeking to circumvent the express provisions of Article 87 of the Constitution as actualized through Section 76 1A of the Elections Act. The applicant ought to have waited for gazettelement of the results (which has now occurred) and then file an election petition to seek redress. For these reasons, I find this present petition to be misconceived, incompetent and bad in law.

As such I do allow this Preliminary Objection and I do hereby strike out the present petition and I further direct that the costs of this application be met by the Ex-parte applicant.

**Dated and delivered this 25<sup>th</sup> day of March 2013**

Mr. Omollo – holding brief for Kithi for applicant

No appearance for respondent

**M. ODERO**

**JUDGE**