



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO 1 OF 2013

FERDINARD NDUNG’U WAITITUPETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT**

**ISAAC HASSAN (RETURNING OFFICER
OF THE NATIONAL TALLYING CENTRE).....2ND RESPONDENT**

THE NAIROBI COUNTY RETURNING OFFICER3RD RESPONDENT

EVANS ODHIAMBO KIDERO4TH RESPONDENT

JONATHAN MWEKE5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL6TH RESPONDENT

**THE DIVISIONAL COMMANDING OFFICER (DCIO)
GIGIRI POLICE DIVISION, NAIROBI.....7TH RESPONDENT**

**THE DIVISIONAL COMMANDING OFFICER (DCIO)
KAYOLE POLICE DIVISION, NAIROBI8TH RESPONDENT**

**THE INSPECTOR GENERAL OF THE NATIONAL
POLICE SERVICE 9TH RESPONDENT**

RULING

Introduction

1. In the Petition dated 13th March 2013, the petitioner, who was a candidate for the seat of Governor of the County of Nairobi in the elections held on 4th March 2013, challenges the election of the 4th respondent as the Governor of Nairobi. The petition is expressed to be brought under the provisions of various Articles of the Constitution including Article 86, 87(2), 88(5), 165(3)(a) and (e), and sections 75 and 80 of the Elections Act, No. 24 of 2011.

2. The petitioner contends, among other things, that Form 36, on the basis of which the elections for Governor were announced, was not signed or dated by the Returning Officer, and there was therefore no

valid declaration of the 4th respondent as the winner of the elections for Governor.

3. The petitioner asks the court to grant, among others, orders declaring that the 4th and 5th respondent were not validly elected on March 4th 2013 as Nairobi County Governor and Deputy Governor respectively; that they were wrongfully returned by the 3rd respondent as the Nairobi County Governor and Deputy Governor respectively; that the malpractices perpetrated by the agents of the 1st respondent in the conduct of the Nairobi County Governor elections invalidate the said election, and an order for fresh elections for the Nairobi County Governor to be held within the stipulated period.

4. Simultaneously with the Petition, the petitioner filed an application by way of Notice of Motion dated 13th March 2013 in which he seeks various orders by way of interlocutory relief directed at the respondents. At Prayer 2 of the said application, he asks the court to truncate the time period provided for in Rule 17 of the **Elections (Parliamentary and County Elections) Rules 2013** (hereafter the Elections Rules) to allow for the hearing of the application.

5. The 4th respondent filed grounds of opposition challenging both the Petition and the Notice of Motion. He contends that both the Petition and the application are premature as at the time they were filed, the 1st respondent, had not gazetted him as the winner of the seat of the Nairobi Governor. He contends further that the court has no jurisdiction to hear and determine the Petition or the application as the Petition has been filed in breach of the Constitution, the Elections Act, and the Elections Rules.

6. He argues that the Petition and the application are premature and a nullity in law as they are filed in breach of the mandatory provisions of Section 76(1)(a) of the Election Act, which requires that election petitions should be filed within twenty eight days after the date of publication of the results of the election in the Gazette and Section 76(2) and (3) which also provide that a Petition to question a return or election upon an alleged illegal practice should be filed within twenty eight days after the date of publication of the results of the election in the Gazette.

7. When the matter came up before me for hearing on 15th March, 2013, I asked the parties to address me first on the issue of jurisdiction.

8. Mr. Harrison Kinyanjui, Counsel for the petitioner, made three main arguments. First, he contended that as Form 36 in respect of the elections for the Nairobi Governor had not been signed by the Returning Officer as required under the provisions of Regulation 83(1)(d) of the Elections (General) Regulations 2012, there was no declaration of the results. He contended that this declaration of results through Form 36 is the declaration that Article 87(2) of the Constitution directs itself to in order to demarcate the time within which a petition should be filed.

9. He submitted therefore that since Form 36 with respect to the elections of the Nairobi Governor was not signed, and it was therefore not valid, there can be no time frame or bench mark to calculate the twenty eight days set in Article 87(2) of the Constitution. He referred the court to annexure 'FW 5' in the petitioner's affidavit sworn on 11th March 2013, which is Form 36 in respect of the Nairobi Governor's elections. The form is not signed or dated by the Returning Officer.

10. The second argument proffered by Mr. Kinyanjui is that petitions challenging the elections of Governors are governed by section 75 and not section 76 of the Elections Act. Consequently, there is no requirement that such a petition should be filed within twenty eight days of the gazettelement of the election results by the IEBC.

11. Thirdly, and as an alternative argument, Mr. Kinyanjui submitted that even if there is a requirement for gazettelement of the elections of Governors before a petition challenging the results can be filed, this Petition complied with the requirement as it was filed on 13th March 2013 and the 1st respondent gazetted the 4th respondent as the Governor-Elect of Nairobi County on the same day.

12. To the respondent's contention that this court has no jurisdiction as it had not been gazetted as an Elections Court as required under Rule 6 of the Elections Rules, Mr. Kinyanjui submitted that Section 75(1) of the Elections Act stipulated that elections related to the election of Governors should be heard in the High Court; that the right of the petitioner to move this court under Article 165(3)(a) could not be curtailed by either the Elections Act or the Elections Rules, and the court had an obligation, under Article 159, to dispense justice expeditiously. He however asked the court, should it find that it had no jurisdiction to deal with the Petition as it had not been gazetted under Rule 6(3) of the Elections Rules, not to strike out the Petition but transfer it to an Election Court.

13. Prof. Ojienda for the 4th respondent submitted that the provisions of Article 87(2) require that election results be declared before the High Court can have jurisdiction to hear a petition challenging the election results. He argued that Section 75 of the Elections Act provides for the place of filing petitions to challenge the elections of Governors, while section 76 provides the process for filing such petitions. He contended that declaration of results was not done by the Returning Officer but by the IEBC in accordance with Article 87(2), which, in referring to the IEBC, must be read together with section 75 and 76 of the Elections Act and the Elections Rules, as well as Section 73 of the Elections Act which provides for service of election petitions. In his view, one cannot read the Constitution and interpret it while disregarding the Elections Act and the Elections Rules.

14. Prof. Ojienda submitted further that the Constitution gave Parliament power, under Article 87(1), to enact legislation to govern hearing of election petitions, which Parliament had done by enacting the Elections Act. It was this Act which gave the Chief Justice power to make rules, hence the Elections Rules contained in Legal Notice No. 44 of 2013. Prof. Ojienda submitted therefore that the provisions of the Constitution, the Elections Act and the Elections Rules constituted the Elections Code, and the petitioner cannot rely only on the Constitution and ignore the Elections Act and Elections Rules.

15. With regard to the petitioner's Notice of Motion dated 11th March, 2013, Prof. Ojienda submitted that the Elections Rules prescribe, at Rule 17, the manner of dealing with motions in an election petition, which motions must be dealt with at the pre-trial conference. The Notice of Motion before the court was therefore premature and could only be dealt with by an Election Court. He asked the court to strike out the petition as it is filed in contravention of the Constitution, The Elections Act and the Elections Rules.

16. Both Mr. Nyamodi for the 1st respondent and Mr. Muiruri for the 6th – 9th respondents indicated that they would be leaving the question of jurisdiction to the court.

Determination

17. I believe that a determination of the question of this court's jurisdiction to hear this Petition requires a consideration of the provisions of Articles 87(2), 88(4)(e) of the Constitution, the Elections Act and the Elections Rules 2013 with regard to the hearing of elections petitions in general, and concerning the elections of County Governors in particular.

18. Article 87 of the Constitution 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.

(Emphasis added)

17. At Article 88(4)(e), the Constitution provides, with regard to the IEBC, that

(4) 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—

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

19. It is therefore clear from these constitutional provision that, prior to declaration of election results, it is the IEBC which has the mandate to resolve election disputes, with the jurisdiction of the court arising after declaration of results. What, however, does ‘*declaration*’ mean? The petitioner has referred the court to the definition of ‘*declaration*’ in Black’s Law Dictionary. According to the 9th Edition of Black’s Law Dictionary, a declaration is a ‘**formal statement, a proclamation, or announcement esp. one embodied in an instrument.**’

20. In my view, however, the term must also be considered in the context of and from the provisions of the law governing elections. In this regard, the provisions of Article 86(b) and (c) of the Constitution are instructive with regard to the meaning of the term. These provisions are as follows:

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that.

(a)...

(b) *the votes cast are counted, tabulated and the results **announced promptly by the presiding officer** at each polling station;*

(c) *the results from the polling stations are openly and accurately collated and **promptly announced by the returning officer;***

21. Article 87(2) refers to ‘**the declaration of the election results by the Independent Electoral and Boundaries Commission.**’ In my view, therefore, what a returning officer is required to do is to **announce** the election results. The formal, official **declaration** of the election results must be done by the IEBC, not by any other party.

22. The question, then, becomes how the IEBC is to declare these results. Black’s Law Dictionary talks of declaration especially ‘***by instrument***’. In the case of election results, 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 Elections 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. For a petition to be properly before the High Court therefore, it must be filed within twenty eight days of the publication of the results in the Kenya Gazette by the 1st respondent.

23. The petitioner has submitted that even if the court finds that the Petition should only have been filed after gazettelement of the results, then it should also find that this Petition is properly before it as it was filed on the same day as the election of the 4th respondent was gazetted. I have looked at 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**”. It was published on the same day as this Petition was filed, the 13th of March 2013. As the Petition was filed on the same date as the results were gazetted. I therefore agree with the submissions of Counsel for the Petitioner that the Petition was filed within the time frame provided under Article 87(2) of the Constitution and Section 76(1) of the Elections Act, and it is therefore properly before this court.

24. The petitioner has submitted that he has filed his Petition under Section 75 of the Elections Act, not section 76, and so the Petition did not need to be filed twenty eight days after gazettelement. However, in view of my finding with regard to the date of filing of this Petition vis a vis the gazettelement of the

election results, this point is moot.

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 -v- 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 Justice 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.

27. The petitioner has submitted that the Court has jurisdiction to entertain his Petition and application on the basis of Article 165(3)(a) of the Constitution, and that this right cannot be truncated by either the Elections Act or the Rules. 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. Such truncation as there may be of the right to approach the court under Article 165(3)(a) has therefore been done by the Constitution itself.

28. Consequently the petitioner cannot disregard the electoral laws and cite the provisions of Articles 159 and 165(3)(a) of the Constitution as empowering him to do so. Article 165(3)(a), and indeed all other provisions of the Constitution, cannot be read in isolation but must be read and interpreted in the context of the entire Constitution.

29. By bringing this election Petition while relying on the jurisdiction of the High Court under Article 165(3)(a), the petitioner is, in my view, attempting to circumvent the rigorous rules set out in the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules 2013. The Act and the Rules were enacted, in accordance with the dictates of the Constitution, to ensure efficient and expeditious disposition of election petitions, taking into account the great public interest in the efficient and expeditious disposition of such petitions. Indeed, the Elections Rules provide, at Rule 4(1), that their overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

30. I believe I need say no more on this matter.

31. In view of the fact that I have held that the Petition was filed within the time frame specified in Article 87(2) and Section 76(1) of the Elections Act, I will not strike out the Petition or the Notice of Motion dated 13th March 2013 as prayed by the 4th respondent. However, the Petition and the Notice of Motion must be heard and determined in accordance with the requirements of the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2013, contained in Legal Notice No 54 of 2013. It is so ordered.

Dated Delivered and Signed at Nairobi this 21st day of March 2013.

MUMBI NGUGI

JUDGE

J. Harrison Kinyanjui instructed by the firm of Harrison Kinyanjui & Co. Advocates for the Petitioner

Prof, Tom Ojienda instructed by the firm of Prof. Tom Ojienda & Associates Advocates for the 4th Respondent.

Mr. Paul Nyamodi instructed by the firm of V.A Nyamodi & Co. Advocates for the 1st, 2nd and 3rd Respondents.

Mr. Muiruri instructed by State Law Office for the 6th - 9th Respondents.