



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(NAIROBI MILIMANI LAW COURTS)

PETITION 152 OF 2013

THE AFRICA CENTRE FOR OPEN

GOVERNANCE(AFRICOG).....PETITIONER

AND

AHMED ISSACK HASSAN.....1ST RESPONDENT
THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....2ND RESPONDENT

RULING

Introduction and Application

1. The Petitioner, the African Centre for Open Governance (AFRICOG) is a non-governmental organization working in the area of democracy, transparency and open governance in Kenya. It filed the Petition dated 7th March 2013 together with a Notice of Motion supported by an affidavit sworn by Gladwell Otieno its Executive Director. The Motion seeks the following orders:

- 1) *This Application be and is hereby certified as urgent and service thereof be dispensed with.***
- 2) *The Respondents be and are hereby directed to stop forthwith the manual tallying of the Presidential ballots without verification with the actual Constituency based results in the relevant forms.***
- 3) *The Respondents be and are hereby directed to start the tallying and verification of the ballots of the Presidential election afresh.***
- 4) *The Respondents be and are hereby directed to allow unhindered/unfettered access by the political party agents and accredited observers to witness and participate in the tallying and verification of the presidential ballots.***
- 5) *The Respondents be and are hereby directed to revive and use the electronic tallying system and or continually explain to the public the nature of the failure of the tallying system and any information relating to any act that will affect the integrity of the election results.***
- 6) *In the event that the Respondents will have announced the Presidential results by the hearing of this Application, an order restraining the Respondents by themselves, agents or assigns from gazetting***

or causing the gazettelement of the results until hearing and determination of the Petition herein.

7) Costs be in the cause.

2. Before the Motion could be heard inter partes and noting the urgency of the matter, we directed the parties to address us on the jurisdiction of this Court to determine the Motion and the Petition.

The Submissions

3. Mr. Ndubi, Advocate for the Petitioner submitted that the matter is not an election petition challenging the results of presidential elections but one premised on Article 38 which protects political rights and Article 138(3) (c) which obliges the Independent Electoral and Boundaries Commission (IEBC) to tally, verify, count and declare the results after an election.

4. According to the Petitioner, the IEBC has failed to properly and competently tally and verify the results of the presidential elections for the 4th March 2013 Presidential Election. It seeks orders to compel the IEBC to obey and abide by the law. Mr. Ndubi contended that these are not matters or questions regarding the validity of the Presidential Election envisaged under Article 140 of the Constitution.

5. Mr. Karori, Advocate for the 1st Respondent, the Chairperson of the IEBC and the Returning Officer for the Presidential Election, contended that under Article 87 and 163(3) of the Constitution, it is only the Supreme Court which has the exclusive jurisdiction to deal with the matters concerning Presidential election. He relied on Supreme Court Advisory Opinion; **Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion Application No. 2 of 2012 (2012) e KLR**, where it was held that all issues arising from and involving Presidential election are within the exclusive jurisdiction of the Supreme Court.

6. Mr Nyamodi, Advocate for the IEBC, associated himself with the submissions of Mr. Karori and added that whereas it is true that the matter before the Court is not an election Petition, it arises from a process involving a presidential election. That process and all the issues arising from and around it are reserved for the exclusive jurisdiction of the Supreme Court. He further submitted that since no Presidential election results have been declared and no gazettelement thereof has been made, then under Article 88(4)(e) of the Constitution, the dispute should be dealt with by the proper Court which in his view is the Supreme Court of Kenya.

Determination

7. We have considered the singular issue before us which we had asked the parties to address us in *limine*, that is, whether this Court, the High Court, has jurisdiction to entertain this matter.

8. We now make the following findings. First, the jurisdiction of the High Court is provided for by Article 165(3) of the Constitution. However, this jurisdiction is expressly limited by Article 165(5)(a) which states;

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;

9. Second, Article 163(3) (a) of the Constitution provides that the Supreme Court shall have the exclusive original jurisdiction to hear and determine disputes relating to elections to the office of President arising under Article 140 of the Constitution which provides for the manner in which questions as to the validity of presidential elections shall be handled by the Supreme Court.

10. The import of all the above provisions read together is that where jurisdiction is exclusively donated by the Constitution to the Supreme Court, the High Court cannot invoke its jurisdiction under Article 165(3) (d)(ii) and enquire whether anything done under the authority of this Constitution is inconsistent

with or in contravention of the Constitution. In **Advisory Opinion No. 2 of 2012 (supra)**, the Supreme Court in no uncertain terms settled that issue comprehensively. The Court rendered itself as follows;

“It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for “qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election.

Does the entire question concerning Presidential elections belong to the Supreme Court’s jurisdiction? Or is the Supreme Court’s power limited by the express language of Article 140 of the Constitution? An analogy may be drawn with other categories of elections; Article 87(2), on electoral disputes, thus provides: “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.” It is clear that Presidential elections have separate provisions, in Article 163(3) (a) which provides:

“The Supreme Court shall have –

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140.....”

On a literal construction, it may be stated that the foregoing reference to “the elections to the office of President” suggests the draftspersons contemplated that several rounds of election may be involved, before the emergence of a duly elected President.

Besides, a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon all such disputes as would arise from the Presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising after the election – while excluding those disputes which might arise during the conduct of election. ”

11. This Court is bound by the above holding and is further expressly denied jurisdiction over any matter in which the Constitution has reserved for the exclusive jurisdiction of the Supreme Court.

12. The matters arising from the Petition before us are matters that involve the process leading to the declaration of a successful presidential candidate. As the Supreme Court has stated above, the Presidential election is not a single event; it is a process from nominations to election petitions subsequent to the declaration of Presidential election results. This Court cannot appropriate jurisdiction to entertain this matter, however urgent or important it may be to the parties or the public. As was stated in **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd [1989] KLR**

“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

We adopt the above holding as clearly applicable in the matter before us.

Conclusion and Disposition

13. We have perused the Petition, the Supporting Affidavit and the Annextures to it, particularly copies of Form 36 for a number of Constituencies, although we have held that we have no jurisdiction to entertain this matter and have declined to enter into the substance of the purported dispute before us, we however venture to say that the issues raised are not idle but should be pursued in the right forum.

14. Having held, as we have done above, it follows that the proceedings before us having been instituted in the wrong forum are misguided and both the Petition and the Notice of Motion are hereby struck off.

15. As to costs, the nature of the matter would determine each party bears its own costs.

16. Orders accordingly.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 8TH DAY OF MARCH 2013

I. LENAOLA

JUDGE

D. MAJANJA

JUDGE

W. KORIR

JUDGE