



REPUBLIC OF KENYA

High Court at Garissa

Election Petition 7 of 2013

IN THE MATTER OF THE ELECTIONS ACT, ACT NO. 24 OF 2011 AND THE
SUBSIDIARY LEGISLATION THERETO, THE ELECTIONS (PARLIAMENTARY AND
COUNTY ELECTIONS) PETITION RULES, 2013

AND

IN THE MATTER OF ELECTIONS FOR THE NATIONAL ASSEMBLY SEAT OF MANDERA
NORTH CONSTITUTENCY

AND

IN THE MATTER OF THE PETITION BY BASHIR HAJI ABDULLAH

BETWEEN

BASHIR HAJI

ABDULLAHI.....PETITIONER

VERSUS

ADAN MOHAMMED NOORU.....1ST
RESPONDENT

BILLOW ADAN KEROW.....2ND
RESPONDENT

EKONIT KOMOL JOHN (The returning Officer Mandera North Constituency).....3RD
RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....4TH
RESPONDENT

RULING

This petition dated 5th April, 2013 was filed by the Petitioner Bashir Mohammed Nooru on the 8th April, 2013. The 1st Respondent filed and served his Answer to the petition together with the accompanying witness affidavits on 24th April, 2013 and 25th April, 2013.

This application before the court was filed by the 1st Respondent on 9th May, 2013. It seeks the following prayers: -

1) That this court does strike out the petition dated 5th April, 2013 and filed in court on 8th April, 2013.

2) That the Petitioner do pay the 1st and 2nd Respondent costs.

The main ground upon which the application is based is that the petition was filed out of the prescribed time and is, therefore, fatally incompetent. The application is supported by an affidavit sworn by Adan Mohamed Nooru sworn on the same day of filing.

The application was argued on 16th May, 2013 by Mr. Kilukumi for 1st and 2nd Respondent. The 3rd and 4th Respondents represented by Mr. Njoroge Mungai, supported the written and oral submissions recorded by Mr. Kilukumi. Mr. Kilukumi submitted that since the Mandera North constituency seat results were declared by the Returning Officer on behalf of the Commission on the 5th May, 2013, a petition challenging those results was required to be filed within a period of 28 days after the said declaration. That this Petition filed on the 8th April, 2013 was filed out of time and is fatally defective and invalid. He added that the court has therefore, to determine the meaning of “**Declaration of Election Results**” which is the clause used by Article 87(2) of the Constitution. He also asserted that the clause as used in the Article, means that the announcement of the election results by the Returning Officer at the Constituency tallying centre immediately after tallying the votes from the polling stations was the “**declaration of election results**” envisaged under the law.

Responding to the Petitioner’s view, that “**Declaration of election results**” meant the publication of election results by the Commission through a notice in the Official Gazette which was done on the 13th March, 2013, Mr. Kilukumi asserted that such opinion by the Petitioner was not supported by law.

Mr. Kilukumi also argued that the independent Elections and Boundaries Commission, not being a human person, could only be represented by the Returning and Presiding Officer at the polling and tallying levels. That the declaration of the election result as provided in the Elections Act, 2011 and the Regulations made under the Act, was the, act of the Commission since the officers were employees and appointed agents of the Commission.

In reference to Section 76(1) (a) of the Act, Mr. Kilukumi stated that in declaring that an election petition questioning the validity of an election shall be filed within twenty-eight days after the date of publication in the Gazette of the results of the election, the Section was inconsistent with Article 87(2) of the Constitution and should therefore be interpreted to be void. He commended Section 77(1) which appeared to be in pari materia with Article 87(2) of the Constitution. He believed it to be the correct provision that indicated when the period for filing a petition should start running.

Mr. Kilukumi also asserted that a declaration of election results by the Returning Officer at the tallying centre complies with the Act and the Regulations since it certainly ordered that the 28 days to challenge the results started to run immediately after the declaration of results by the Returning Officer. He also pointed out that neither the Act nor the Rules specified when the IEBC was required to publish the election results in the Official Gazette and may deliberately or otherwise delay the gazettelement and thus delay expeditious handling of the petitions.

Mr. Kilukumi also submitted that the declaration of results at the Constituency tallying centre was final and not provisional and that the results could not be altered except by an election court. That also the fact that the Returning Officer issued a certificate for the results under Rule 83(3) confirmed the finality of the Returning Officer’s declaration.

Mr. Kilukumi finally submitted that the gazettelement of the election results in the form it was done by the Commission, left out the actual number of votes obtained by every election candidate, and thus failed to comply with what the Act requires to be announced in an elections result.

Mr. Kilukumi accordingly submitted that the court should find that the petition was filed after expiry of the prescribed 28 days and that it is therefore fatally defective and void and should be struck out. He also sought that this court should find and declare Section 76(1) (a) inconsistent with Article 87(2) of the Constitution.

As earlier stated Mr. Njoroge Mungai for 3rd and 4th Respondents supported Mr. Kilukumi's submissions.

Mr. Muchiri for the Petitioner on the other hand, opposed the application to strike out the petition. He relied on his written submissions and on what he would orally add in highlighting the main issues.

Mr. Muchiri asserted that whether or not the petition was liable for striking out, depended purely on the interpretation of Article 87(2) of the Constitution as read with Section 76(1) (a) and Section 77(1) of the Elections Act. He said that there was no conflict between 77(1) of the Elections Act and Article 87(2) of the Constitution. However, he believed that Section 76(1) (a) differed with the provisions of Section 77(1) of the Act and accordingly, of Article 87(2) of the Constitution without stating the effect of such difference.

Mr. Muchiri further argued that the publishing of the Notice in the Official Gazette No. 3159 on the 13th March, 2013, was the declaration of election results envisaged under the Article and the sections of the Act. He accordingly, stated that although the figures announced and a certificate given by the Returning Officer at the Constituency level tallying centre were final nevertheless, the results were only provisional until declared by the Commission in a Gazette Notice, as happened on 13th March, 2013. He added that the Gazette Notice was titled "**Declarations of person's elected as Members of National Assembly**" and the names of victors were published thereon with a declaration that they had received a majority of the votes validly cast in their respective constituencies.

Mr. Muchiri also asserted that although the Returning Officer was indeed a properly appointed agent of the Commission, the specific functions assigned to the former were clear and distinct and that the declaration of final elections results was a function specifically assigned to the Commission itself and not of the Returning Officer. He also argued that the office "**Returning Officer,**" was not interchangeable with that of "**Commission**" except where the Act or rules so stated. He referred the court to Article 87(2), Sections 77(1) of the Act and Regulations 3 and 83.

Mr. Muchiri while calling the announcement of the election result at Constituency level "**provisional**", argued that announcements of results were in a series i.e. polling station, constituency tallying centre, county tallying centre and national declaration in gazette Notice. Hence, the Constituency level announcement was, just one in a series and cannot be picked aside and be called the final announcement made by the Commission.

In conclusion, Mr. Muchiri submitted that the application to strike out the petition was based on wrong interpretation of the Constitution, the Act and the Regulations and should be dismissed so that the court should move on with the proper trial of the petition.

I have carefully perused the written and oral submissions of the Respondent and of the Petitioner. I have also perused the relevant provisions of the constitution, the Elections Act, 2011 and the Regulations made under the Act. Clearly, the issue before me in summary is what is the correct interpretation of Article 87(2) of the Constitution, Sections 76(1) (a) and Section 77(1) of the Elections Act, as well as the conformity of the Regulations made by the authority of Section 109(1) of the Elections Act.

Article 87 provided as follows:-

(i) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes

(ii) Petitions concerning an election, other than presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries

Commission”.

The above constitutional provision authorized Parliament to enact a relevant statute to establish the envisaged mechanisms for timely settlement of electoral disputes. Parliament indeed enacted the Elections Act, 2011, and included Sections 76(1) (a), 77(1) which state when a petition challenging an election result should be validly filed.

Section 76 (1) (a) states: -

“A petition to question the validity of an election shall be filed within twenty-eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation.”

Section 77(1) states thus: -

“A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.”

It can be noticed that while under Article 87(2) of the Constitution and Section 77(1) of the Act the petition should be filed within 28 days **“... after the declaration of the election results by the commission (IEBC)”**, under Section 76(1) (a) it **“shall be filed within 28 days after the date of publication of the results of the election in the Gazette...”**

In my opinion, the present duty of this court is to investigate the meaning of the two phrases or clauses cited above, to establish whether they hold the same or different meanings, keeping in mind the intention of Parliament particularly to dispute resolution.

The first question that springs into mind is whether this provision is consonant or inconsistent with Article 87(2) of the Constitution? In other words can the words: -

“... after the date of publication of the results of the election

be similar or consonant with the words: -

“... after the declaration of the election results by the Independent Electoral and Boundaries Commission....”?

To answer the above question, we will need to study and understand what culminates in **“the declaration of election results by the Independent Electoral and Boundaries Commission”** which I will hence in this Ruling, refer to as IEBC.

It is clear to me that relevant and vital clauses in Article 87(2), and Sections 76(1)(a) and 77(1) aforesaid, have not been specifically defined. This in my view gives the court freedom to do its best to extract from the provisions, the closest and best meaning that was intended by both the People of Kenya in the Constitution and by Parliament in Act and the Regulations made under it. That will happen only where and in relation to words or clauses which are not clear or where the interpretation of express meaning leads to an absurdity.

The Elections Act, 2011 is described as an Act of Parliament to provide for the conduct of elections to various offices and to provide for, inter alia, election dispute resolution and for connected purposes. Under Section 109 (1) Parliament donates to IEBC power to make regulations generally for the better carrying out of the purposes and provisions of the Act. That included to: -

(x) provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes;

(bb) provide for the mode of declaration of the results of an election;

The Section also under subsection (2), empowers IEBC to make the said Regulations fundamentally for the purpose and objective of giving effect to or implementing not only the Constitution, but also the Elections Act itself. And to make sure that such regulations when made are properly authorized as drawn, Parliament was first and foremost, to inspect and approve them before implementation. That the said Regulation were drawn by the IEBC and properly inspected and approved by Parliament as provided in the Act, is not in dispute.

There is also no doubt that the Elections Act, and the Regulations made under its Section 109(1), were specifically promulgated for the purpose of implementing among others, Article 87 of the Constitution. Careful perusal of the Act and the Regulations, however, show clearly that the Regulations were made to complement the Act. In my view, a major function such the method of declaring an election result should, with great respect, have been included in the provisions of the Act itself instead of being relegated to the Regulations which are generally regarded as inferior legislation. The result is that matters or functions not provided in the Act were provided in the Regulations. It is clear to me, however, that the arrangement in the two legislations have the full sanction of the Constitution and command equal respect in their implementation. It is also clear to me that the two should be read complementarily both in their content, language and meaning.

I now revert to the method of declaring election results as provided by the law. Section 39 of the Act states: -

“(1) The Commission shall determine, declare and publish the results of the election immediately after close of polling.

(2) Before determining and declaring the final results of an election under subsection (i), the Commission may announce the Provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.”

This provision gave the Commission –IEBC- power to determine, declare and publish an election result whether provisional or final result. By the word “**provisional**” as used in this section I understand it to mean that the Returning Officer at the Tallying Centre in respect of the National Assembly Seat representing the Commission, could announce results as he/she gradually received returns from polling stations before announcing the final result after tallying votes from all polling stations. However, the details as to how to receive, tally and announce the final result are found not in Act but in Regulation 83-87. For this case we start with Regulation 83.

Under Regulation 83 (1) the Returning Officer, immediately after receiving the results of the poll from all the polling stations in the constituency shall in respect of all seats contested: -

a) tally the results in respect of each candidate.

b) publicly announce the results to the people present

c) complete and sign forms 34, Form 35 and Form 36

d) deliver the Forms to the Commission

e) issue certificates to persons elected to National Assembly in form 38

Under Regulation 87, the Returning Officer after tallying and announcing the election results and also after filling and signing the relevant forms and issuing relevant certificates, shall also: -

- (i) send the **“provisional”** results electronically to the Commission
- (ii) deliver copy of results of a National Assembly seat among others to County Returning Officer who in return shall submit all the results to the Commission.

It is notorious however, that when during the March 2013 election, sending the provisional results failed, the Returning Officers were ordered to transmit the results to the Commission personally.

Under Regulation 87(4) (b) when the Commission through the Chairperson received the Results including the National Assembly Constituency seats results from the: -

- (i) Returning Officer at Constituency level and
- (ii) County Returning Officer at County level

he was in the case of non-presidential elections to: -

“... publish a Notice in the Gazette ... showing the name or names of the person or persons elected.”

It can be noticed that in the Regulations, the Commission terms **all** the final election results delivered to it by the Returning Officers as **“Provisional”** both under Regulation 87(2) (c) and under Regulation 87(9).

The conclusion I, with respect, come is that announcing or declaring or publishing of the election results, whether it concerned the National Assembly seats, or others, was a transaction or process which started at the polling station by the Presiding officer through to the Constituency Returning Officer and County Returning Officer and finally to the Commission at Nairobi. The Commission then published the names of the victors in a Gazette Notice dated 13th March 2013 as the final act of the process. It is clear, that Article 87(2) of the Constitution envisaged and authorized only the IEBC to make the declaration of the election results. So did Section 77(1) and Section 39 (3) of the Act provide in a mandatory language of **“shall”**. However neither provision tabulated the actual method to be used to declare the result.

That the function of tabulating the method of declaring the results was finally left to the Commission is, in my view quite logical. That is so because it is the Commission that would eventually conduct the elections. The court takes judicial notice of the fact that the IEBC visited Commonwealth and other states, including Ghana and USA, to gather election information and knowledge on how best to conduct the March 2013 elections, and in particular and possibly, on the best method of declaring results. Although the Act and particularly the Regulation in point may have been promulgated in a hurry, this court nevertheless believes that the legislations were drafted to carry adequate provisions for the purposes they were promulgated.

There is no doubt from the reading of Regulation 87 that the office of Returning Officer, had authority to announce the complete election results at the constituency tallying centre after the tallying of votes from the various polling stations in the Constituency. He also issued certificate to the candidate who had most valid votes. The purpose of that announcement and issuing of the certificate was to inform those present and for the information of the people of the Constituency, the person whom they had elected and that that result would not be alterable in view of the certificate issued. The Returning Officer however, was under legal obligation to transmit the results which the Regulation terms **“provisional”**, electronically to the Commission (IEBC) and also furnish copy of the documents to the County Returning Officer who also was under a similar obligation to submit the same results to the Chairperson of the Commission. The Commission had then to publish the result in a notice in the Gazette showing the name(s) of the person(s) elected.

My conclusion from the study of the above process as tabulated in Regulation 83 to 87 is that the Returning Officer, whether Constituency or County, was not for the purpose of declaring elections equivalent to the Commission. The Returning Officer’s announcement contained the full content of the

actual election results at the constituency level, but nevertheless, amounted only to a **“provisional”** result because it still required a gazettelement by the Commission to mature it to a declaration of an election result as envisaged in the Regulation 87. The fact that publication of a notice in the Gazette of the result appears or sounds like a mere formal act and indeed has been so portrayed by the applicant, is far from the truth. In this case, gazettelement was not only a declaration of the election results to the whole world but also a fulfillment of a legal requirement. Indeed, the fact that Regulation 87 made it the final part of the declaration confirms the great importance that the legislature attached to it.

The next relevant question that necessarily arises from the reading and interpretation of Regulation 87 aforesaid is whether the Regulation as drafted, in any way contradicts or is inconsistent with Article 87 (2) of the Constitution or Sections 39, 76(1) (a) or 77(1) of the Act. The correct reading of Article 87 (2) is that it recognized the function to declare election results as a function of the IEBC, the Commission. So do Sections 39 and 77(1) of the Act. The Act relegated the provision of the function to the Regulations which accordingly provided the process or method of declaring results in Regulations 83 to 87 aforesaid. Regulations 83 to 87, therefore, are the basic law on the actual methodology of the declaration. The methodology does not in any way contradict the provisions of the Act nor the Constitution (Article 87(2)) aforesaid. It, on the contrary, properly provides what the Act should have provided but did not, thus complementing the Act and the Constitution on the relevant function.

It may be correct to say that the Elections Act, 2011 and the Regulations thereunder, may have been better drafted or that the same were drafted in a hurry. As a result some mistakes may have been made inclusive of the interchange of English words or phrases that make interpretation of the legislation a little more difficult. However, the mistakes are not in my view unsurmountable.

In this application for orders to strike out this petition, Mr. Kilukumi for the 1st and 2nd Respondents submitted that this court needs to determine what the phrase **“Declaration of election results”** as used in Article 87(2) of the Constitution and in Section 77(1) of the Elections Act, 2011, means. He submitted that the phrase meant the announcement of the election results made by the Returning officer at the Constituency tallying centre in so far as the National Assembly seat is concerned. He accordingly, added that in respect to the Mandera North Constituency seat, the Returning Officer’s announcement of the constituency result on the 5th March, 2013 was the final declaration of that election result, so that for the purpose of filing a petition to challenge it, the twenty-eight days in which to file it, started to run on the said date. And that since the Petitioner filed this petition on 8th April, 2013, the same was filed 34 – 35 days after the declaration of results.

Forestalling the Petitioner’s argument based on the provision of Section 76 (1)(a) that the 28 days begin to run on publication of election results in a relevant gazette notice in this case published by the Commission on 13th March, 2013, Mr. Kilukumi submitted that Section 76 (1) (a) of the Act, was inconsistent with Article 87 (2) of the Constitution, as well as section 77(1) of the Act, and should be declared as void for such inconsistency.

As I have hereabove found, the meaning of the phrase **“declaration of election results”** can only be found in the legislation that provides for that function. Those are Regulations 83 to 87 of the Elections (General) Regulations, 2012 and appear to be the only providers of the said process. In my understanding, the interpretation of the said Regulations is straight forward and does not require the court to add to or subtract from what is prescribed therein. The Regulations makes the declaration a transaction or process in which, as earlier found, the Returning Officer’s announcement containing all the figures required to be announced, forms only a part of the declaration which would be consummated only by the Commissioner’s notice in the Official Gazette. Any other meanings of those words or phrases included in **“declaration of election result by Commission”** or **“announcing results by the Returning Officer”** are in my view irrelevant if they do not resonate with the meaning given to them in the said Regulations.

In so far as the provision of Section 76 (1) (a) is concerned, I find in it no inconsistency to Article 87 (2) or Section 77(1) aforesaid. Although the function of the said Section 77(1) appears to duplicate the function of Section 76 (1) (a) thereof, the marginal note indicate that Section 77(1) was intended to

provide for the method of service of the filed petition while the marginal notes to Section 76 (1) (a) indicate that it provided for the method of filing and period of service of the filed petition. However, enough criticism of the drafting of the two sections has been voiced and little would be gained by overdoing it.

Mr. Kilukumi draws this court's attention to this court's ruling in **FERDINAND NDUNG'U WAITITU Vs THE INDEPENDENT ELECTORAL AND BOUNDARIS COMMISSION (IEBC) & 8 OTHERS [2013] eKLR** in which Mumbi Ngugi, J inter alia stated thus: -

“In question, then, becomes now the IEBC is to declare these results. Black’s law Dictionary talks of declaration especially by an instrument. In the case of election results, I take the view 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. This, “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 publication of the results in the Kenya Gazette by the 1st Respondent.”

Mr. Kilukumi thought the above decision is bad in law and should not be followed. I, however, find the decision sound and properly based on the interpretation of the Act and more so, on the proper interpretation of Regulation 87 aforesaid. I entirely agree with the above decision and also agree with her when she said that the formal and official declaration of the election result must be done by the Commission by Notice in the Official Gazette and not by the Returning Officer at the Tallying Centre.

I also basically agree with Mabeya, J in Nairobi High Court Petition No. 6 of 2013 being **JOSIAH TARAIYA KIPELIAN OLE KORES VS DR. DAVID OLE NKEDIENYE & 3 OTHERS** when he stated as follows: -

“... It is well known that a declaration contained in the Gazette is to the whole world and has a force of law, whilst the announcement by a County Returning Officer of an election result and the publication thereof in Form 35 is but information to the persons in the tallying hall and a declaration of results of a polling station to the IEBC by its officer. This is so because Forms 35 are supposed to be transmitted to IEBC while a Gazette Notice is to the General Public. Election results are therefore declared on publication in the Gazette...”

The reasons applied above are based both on logic and on legal principles. They are in my view good and are acceptable and are generally in support of Regulation 87 aforesaid.

On the other hand I fully agree with the approach taken by Majanja, J on this same issue in **CAROLINE MWELU MWANDIKU Vs PATRICK MWEU MUSIMBA & 2 OTHERS in MACHAKOS HIGH COURT ELECTION PETITION NO. 7 OF 2013** which was drawn to my attention when the drafting of this Ruling was in an advanced stage. He based his decision mainly on Regulation 87 and applied the now accepted rules of interpretation of statutes and the Constitution. He found as I have done that the announcement of election results at the tallying centre is only provisional and that the date and results which are provisional cannot logically and legally become the basis of a petition. Majanja, J concluded thus: -

“I take the position that in assigning meaning to the word ‘declaration’ the General Regulations must be read in the context that they relate to a process of election which includes defining the duties delegated to the returning officer and the Commission in ensuring the election is carried out in accordance with the principles set out in the Constitution. Thus, the meaning of ‘declaration’ within the context must be read accordingly. At the end of the day the duty to declare the results is one cast on the Commission by article 87(2) and the legislature and Section 76 of the Act contemplates that the manner in which the Commission declares the results is through gazettement”

Majanja, J agrees with Mabeya, J on the importance of gazettelement of matters. He stated thus: -

“Gazettelement is one of the key ways of ensuring that the state and its organs reach out to the public and the public is kept informed. Publication in the Gazette brings the purport of the declaration concerned to the notice of the public or persons likely to be affected by it...”

Having made the above comments and arrived at the various conclusions, I find that the prescribed period for filing an election petition by the Petitioner in respect of Mandera North Constituency began to run on the publication of the notice in the Official Gazette on 13th March, 2013. The period of 28 days ended on the 10th of April, 2013. The petition was filed on 8th April, 2013 well within the prescribed period. Accordingly this application to strike out the petition is misconceived. It is hereby dismissed with costs payable by the 1st Respondent. Orders accordingly.

Dated and delivered at Nairobi this 31st day of May, 2013.

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D A ONYANCHA
JUDGE