REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Election Petition 8 of 2013

KITUO CHA SHERIA ……………………………………….…………...…..…PETITIONER
VERSUS

JOHN NDIRANGU KARIUKI………..1st RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION……..…............2ND RESPONDENT

RULING

1. John Ndirangu Kariuki, the 1st respondent, was elected a member of the National Assembly on 4th March 2013. He represents the people of Embakasi Central Constituency, Nairobi County. He is a former mayor of Nairobi City. On 14th January 2004, and while still the mayor, he was convicted of abuse of office charges in the Chief Magistrate's Anti-corruption Court, Nairobi case Number 25 of 2002 *Republic Vs John Ndirangu Kariuki and another*. He was found guilty on two counts of obtaining by false pretences and uttering a false document. He was fined Kshs 100,000 on each count. The nature of offences are relevant to the petition now before the court. He had falsely presented to the City Council that he was renting some residential house. As the mayor, he was entitled to rented premises. A lease was prepared for LR 97/2337. It was for Kshs 80,000 per month. It was later amended at the instance of the accused to read LR 2387, Avenue Park, Nairobi. It transpired later that there was no property known as LR 2387 Nairobi and that the other property in the original lease in fact be belonged to the mayor.

2. The petitioner has brought these proceedings to challenge the nomination and subsequent election of the 1st respondent. The gravamen is that the 1st respondent was not qualified to be a candidate for election in view of the conviction. The 2nd respondent's conduct in clearing the 1st respondent to run for election and confirming him as duly elected is impeached for the same reason.

3. The petition before the Court is unique in its character: It is brought, not by a voter or a loser in the election, but by a non-human *persona* known as *Kituo Cha Sheria*. Secondly, the petitioner does not take up cudgels on any aspect of the conduct of the general elections of 4th March 2013. The petitioner only takes umbrage to the *nomination or qualification* of the 1st respondent to contest that election.

4. The 1st respondent has now presented a notice of motion dated 29th April 2013 praying that the petition be struck out. It is predicated on 4 primary grounds:

a) *A dispute as to the eligibility of a candidate to contest a seat of member of the National Assembly, on the face of it, is a nomination dispute which is not within the jurisdiction of this Honourable Court.*

b) *On the assumption that all the facts pleaded by the Petitioner are true, the court lacks jurisdiction to*

entertain this petition.

c) *On the assumption that the facts pleaded by the petitioner are true, the petitioner is a non-entity and lacks the requisite locus standi to file and prosecute this petition.*

d) *The petitioner has failed to join the returning officer who is a mandatory respondent in election petitions.*

5. The motion is contested. The petitioner filed a replying affidavit sworn by Gertrude Angote on 16th May 2013. It is deponed that the petitioner is registered under the Non-Governmental Organizations Co-ordination Act as the *Legal Advice Centre* "which translates to *Kituo Cha Sheria* in Kiswahili". A copy of the registration certificate is annexed to the petition marked 'GA 1'. The constitution of the petitioner and its strategic plan 2009 to 2013 is also annexed. The petitioner contends that it is a non-partisan, not-for-profit organization and one of the oldest institutions carrying out legal aid and public interest litigation.

6. It is averred that the petition raises weighty constitutional questions on the integrity of the 1st respondent and his clearance by the 2nd respondent to run in the general elections. The petitioner's case is that under article 258 of the constitution, as read together with articles 22 and 260, it has *locus standi* in the petition. It is deponed that there is no mandatory requirement in the Elections Act to enjoin a returning officer into the petition. Further that the named respondents are the true respondents to the issues raised in the petition. The objections by the respondents are thus of a technical nature and should be frowned upon in view of the Court's overriding objective. Lastly, it was deponed that no prejudice will be suffered by the 1st respondent if the matter is heard on its merits.

7. The petition came up for directions on 13th May 2013. I directed all the parties to file and exchange skeleton submissions *before* the hearing slated for 17th May 2013. Only the 1st and 2nd respondents complied. The petitioner's learned Counsel, Mr. Osoro, said he was under the impression that he would file his submissions *after* service by the applicants. That was clearly not the direction by the Court. To be fair to the petitioner, I then ordered that it would reply to the application by detailed oral submissions. It prayed for 25 minutes to do so. In view of the fact that the petitioner had 3 learned counsel in Court, and who all wished to address the Court, I granted them additional time. Mr. Osoro, learned counsel took the entire 25 minutes, Mr. Agwara took a further 15 minutes while Ms Mburugu took 10 minutes: in all, the petitioner had the lion's share of the Court's time. The 1st and 2nd respondents' learned counsel Mr. Ongoya and Ms Ndegwa briefly highlighted their written submissions both dated 17th May 2013.

8. I am grateful to all the lawyers for their diligent research. It is imperative that I capture the pertinent parts of those submissions. The applicant's case in a nutshell is that the grievances by the petitioner pre-date the election. The law has elaborate procedures for settling nomination disputes. If the main grievance is that the 1st Respondent ought not to have contested the Embakasi Central seat, then the petitioner should have followed the procedures laid down in law to challenge the nomination. In this regard, he relied on the cases of *Francis Gitau Parsimei Vs The National Alliance Party & Others* Nairobi, High CourtPetition 356 of 2012 [2012] e KLR, *Sikudhani Vs Pius Otieno & 2 Others* Nairobi, High Court Petition 53 of 2012 [2013] e KLR, *Kipkalya Kones Vs Republic* Civil Appeal 94 of 2005 2006 e KLRand *Samuel Otieno Otaja Vs IEBC and 2 others* Nairobi JR [2013] e KLR 20 of 2013

9. In relation to the *locus standi* of the petitioner, counsel for the 1st Respondent referred the court to annexture 'GA1', which shows that the petitioner is registered as *Legal Advice Centre*, a non-governmental organization. It was his submission that under our law, non-governmental organizations are body corporates which have the right to sue and be sued in their own name. Since *Kituo Cha Sheria* is not registered as such, the petition is incompetent and should be struck out.

10. The applicant submitted on the meaning of a *respondent* under Rule 2 of the Elections (Parliamentary and County Elections) Petition Rules (hereafter "the Rules"). It was, in his view, a fatal

error to exclude the returning officer from the named respondents. He relied there on the decision in Mose Nyambega Vs. Walter Nyambati and others Kisii, High Court Petition 4 of 2008 [2008] e KLR.

11. Learned counsel for the 2nd respondent, Ms. Ndegwa, associated herself with the submissions of Mr. Ongoya. She added that the petitioner is not a person endowed with rights under article 38 of the Constitution and it therefore cannot challenge an election under the Constitution. She relied on the case of Famy Care Limited Vs. Public Procurement Administrative Review Board & Another Nairobi, High Court Petition 43 of 2012 [2012] e KLR.

12. The petitioner's answers were as follows. On the jurisdiction of the court, the petitioner submitted that the application is a stratagem contrived to defeat the Constitution. Mr. Osoro highlighted the history of the petition beginning with the conviction of the 1st Respondent in the Anti-corruption Chief magistrate's Criminal Case 25 of 2002, to the judicial review application number 452 of 2012, Nairobi, filed by the 1st respondent. The latter was triggered by a recommendation of the Commission on Administrative Justice to the 2nd Respondent not to clear the 1st Respondent to run for political office. The judicial review application was dismissed on the 28th of January 2013 on merit.

13. The petitioner's counsel relied on the decision inLuka Angaiya Lubwayo and another Vs GeraldOtieno Kajwang and another Nairobi, High Court Petition 120 of 2013 [2013] e KLR for the proposition that the Court can hear the petition on its merits. Since the IEBC had failed to investigate the qualification of the 1st Respondent, the duty now lies with the Court. If for example the 2nd Respondent arrived at a perverse decision, then the court is vested with jurisdiction. He referred to article 103 as read with article 99 (2) (h) and article 99 (3) of the constitution. The petitioner had established that there was a conviction for abuse of office and that there was no pending appeal. This was evidenced by the letter from the Registrar of the High Court dated 20th of December 2012 which showed that the 1st respondent had not lodged an appeal.

14. Learned Counsel for the petitioner further submitted that the elections are a continuum. Accordingly, only the court has ultimate jurisdiction to hear and determine this matter. Moreover, this court is the only forum that can issue the orders sought for two reasons: there is a timeline for challenging the validity of an election; and, that failure to do so would deny the petitioner the right to enforce the Constitution under article 165 (2) (d). He also cited article 159 (2) (d).

15. Mr. Agwara's view was that the petition is primarily anchored on article 99 (2) of the Constitution which refers to election to Parliament and not the nomination of candidates. Referring to article 88 (4) (e), he submitted that the IEBC is precluded from addressing any issue arising after the declaration of the results and that this was further buttressed by article 105. He relied on Ferdinard Waititu Vs. IEBC & Others Nairobi, High Court Petition 1 of 2013 [2013] e KLR. He submitted that article 103 (g) anticipates a situation where an elected member of parliament can be disqualified on the basis of article 99. Such a determination can be made under article 105. Mr. Agwara disputed the assertion that there is a mandatory requirement to enjoin the returning officer. He referred to Rule 2 and stated that the rule merely defined the parties: the other persons referred to in Rule 2 (d) are dictated by the nature of the petition. He further asserted that there is no requirement under Rule 9 for the returning officer to be included and that, in any case, no prejudice would be occasioned since the 2nd Respondent has responded to the petition by the affidavit of the returning officer.

16. Lastly Ms. Mburugu, also for the petitioner, submitted that the petitioner was well within the boundaries of its own constitution which provides that the *Legal Advice Centre* shall also be known as *Kituo cha Sheria.* She stated that the constitution and the registration certificate are not in conflict. Article 7 of the Constitution of Kenya provides that the national language of Kenya is Kiswahili. English is an official language. Therefore, the translation of Legal Advice Centre into Kiswahili as *Kituo Cha Sheria* is legitimate. Accordingly, the petitioner is properly before the court.

17. Ms. Mburugu also submitted that the court has, by its previous conduct, admitted the status of *Kituo cha Sheria.* In this regard counsel referred to Petition 120 of 2012 Luka Angaiya Obwayo&

Another v. Gerald Otieno Kajwang (supra)as an admission by the courts of the *bona fides* of *Kituo Cha Sheria*. In her view, the petitioner is not seeking to enjoy civil and political rights under Article 38: rather the petitioner seeks to enforce article 99of the Constitution. She asserted that every person has the right to institute court proceedings to claim that the Constitution has been contravened. In her view *Kituo Cha Sheria* is a legal person within the meaning of Article 258 of the Constitution.

18. None of the parties addressed the court on the status and import of the application for leave to file an appeal out of time that was lodged by the 1st Respondent on the 20th of December 2012. It appears that the 1st respondent deliberately left the court in a blind spot. Was leave finally granted or denied? Has that motion been heard? I will revisit that matter on my independent findings from the record in that suit.

19. I have carefully considered the rival submissions. I am of the following considered opinion. Striking out an action is a draconian measure to be employed sparingly. It is to be meted out only in the clearest of cases and where the action has no legs to stand on. That is the common thread in a long line of decided cases. See *Wambua Vs Wathome* [1968] E.A 40 and *Coast Projects Ltd Vs M.R. Shah Construction* [2004] KLR 119, *Sankale Ole Kantai t/a Kantai & Company Advocates Vs Housing Finance Company of Kenya Limited* Nairobi, High Court case 471 of 2012 (unreported), *Dyson Vs Attorney General* [1911] 1 KB 410 at 418, and *Musa Misango Vs Eria Musigire and others* [1966] E.A. 390 at 395.

20. The dictum of Madan J.A. (as he then was) in *D T Dobie & Company (Kenya) Limited Vs Muchina* [1982] KLR 1 is an all time classic. He said at page 9;

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it".

See also *Francis Ngira Batware Vs Ashimosi Shatabansi t/a Ashimosi Shatabansi & Associates Advocates and 2 others* Nairobi High Court case 476 of 2009 [2013] e KLR.

21. In the unique circumstances of an election petition where political rights are at stake, that principle of restraint becomes paramount. See *Steven Kariuki Vs George Mike Wanjohi and 2 others* Nairobi, High Court Petition No 2 of 2013 (unreported).

22. The court, in the election petition of *Dickson Karaba Vs. John Ngata Kariuki & Another* 2010 e KLR,stated as follows:

"…striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court…The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice……".

23. This petition is proceeding against the backdrop of the Constitution of Kenya 2010. Article 159 of the constitution enjoins the court to administer justice fairly and without undue regard to technicalities. That is not to say that rules shall not apply. I recently had this to say on the matter in *Steven Kariuki Vs George Mike Wanjohi* petition (supra):

"But that is not to say that rules or technical rules shall not apply: only that the Court should not pay undue regard to them. If rules were to be thrown out of the window, chaos akin to a village baraza, will step in through the wide door. That was clearly not the intention of the legislature".

24. I was there relying on the landmark decision of our Supreme Court in *Raila Odinga and others Vs Independent Electoral and Boundaries Commission and 3 others* Nairobi, Petition No. 5 of 2013 [2013] e KLR. The six learned Judges defined the spheres of article 159 2 (d) as follows:

"The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course".

25. The principle to be distilled from all these cases is that where an action has a semblance of a cause of action or can be resuscitated by amendment it should, as far as practicable, be sustained. The converse is true. Where the action is so hopeless and has no legs to stand on, it must be dismissed at the earliest opportunity. There must then be a delicate balancing act of the competing interests of the disputants. At times, the Court must pay regard to the wider public interest. In the present petition one must weigh the underlying questions of integrity of the candidate (the constitutional qualification threshold) against the serious challenge that there is no petitioner before the court (the *locus standi* and competency question). A key plank of that consideration is whether the latter is simply a technical objection or one of substance and the law. If it be the latter, the integrity question to be urged in the petition becomes dead on arrival: there would be no petitioner or petition upon which to anchor those arguments.

26. Article 38 of the Constitution enshrines political rights. The rights secured are for adult *citizens*. It guarantees citizens freedom to make political choices. It provides, in sub article (3) for example, that "every adult citizen has the right without unreasonable restriction, to be a candidate for public office …….and if elected to hold office".

27. Non-citizens cannot bring an action to enforce the right. I doubt very much that a minor would qualify. While article 258 contemplates a party acting in person or by a representative to enforce the constitution, the nature of political rights may as well preclude non-political actors such as corporations. But within the context of an *election*, and once a candidate is duly elected, the enforcement of the *political* right is limited to the narrow confines of the Elections Act. In that limited space, an unincorporated *persona* like the petitioner here must meet the strict code governing electoral dispute settlement. I am alive to the notion that the constitution must be read as a whole. *Centre for Rights Education and Awareness (CREW) and 7 others Vs. Attorney General* [2011] e KLR.

28. D.S. Majanja J, has aptly captured the interplay between the constitution and electoral dispute settlement in *Dr. Calvin Kodongo and others Vs The Transition Authority and others* Nairobi, High Court Petition 174 of 2013. He delivered himself thus:

"It is a cardinal principle of interpretation of the Constitution that it must be read as a whole and in this respect the provisions regarding the electoral and election process cannot be isolated and sacrificed at the altar of absolute individual rights and fundamental freedoms. The fundamental rights and freedoms guaranteed under the Bill of Rights are also given effect and realized within the framework of governance. Chapter seven and eight of the Constitution titled "Representation of the People" and "The Legislature" respectively give effect to the principle of sovereignty of the people articulated in the Preamble and article 1. These provisions are underpinned by various fundamental rights and freedoms, which include political rights guaranteed under article 38, which are given effect by provisions dealing with elections. Thus it must be clear that prayer (c) cannot be granted as the Constitution itself, while it contemplates, that a general election will be held for all the elective positions on one day, it provides for different modes of dispute settlement".

29. The petitioner does not challenge any aspects of the conduct of elections on 4th March 2013. It does not challenge the 1st respondent's win. When one unpacks the petitioner's case, it fundamentally impeaches the nomination of the 1st respondent by the 2nd respondent to contest the Embakasi Central seat. As I will discuss shortly, elections are not an event but a process. In that long process starting from registration of voters, nomination of candidates to the actual election, the Constitution and the law have anointed independent organs, besides the Courts, to deal with specific electoral disputes. In my view the petition as drawn does not find full support in article 38. See *Famy Care Limited Vs Public Procurement Administrative Review Board and another* Nairobi, High Court Petition 43 of 2012 [2012] e KLR,

International centre for policy and conflict and others Vs *Attorney General and others* Nairobi, High Court Petitions 552 of 2012 [2013] e KLR.

30. That in fact is partly conceded by the petitioner: Its learned counsel's view is that their petition is not truly anchored on article 38 but articles 88 (4) (e) and 99 (2) (h) of the Constitution as read together with articles 103 and 105. Those articles provide as follows:

"88 (4) The commission is responsible for conducting or supervising referenda and elections to any elective office …….in particular, for – (a)…(b)….(c)….(d)……..

(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;"

"99 (2) A person is disqualified from being elected a member of parliament if the person – (a) ….. (b) …...(c)…… (d)……. (e) …… (f)………. (g)

(h) Is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter six".

"103 1 The office of a member of parliament becomes vacant – (a)…… (b)…… (c)…….. (d)………… (e) ……… (f)………..

(g) If the member becomes disqualified for election to parliament under Article 99 (2)(d) to (h)."

"105 The High Court shall hear and determine any question whether –

a) a person has been validly elected as a member of parliament or…….".

31. The Supreme Court in *Advisory opinion No 2 of 2012 In the matter of the Gender Representation in the National Assembly and Senate* [2012] e KLR acknowledged that elections are not an event but a process: a continuum. The learned Judges, when considering the jurisdiction over presidential election disputes delivered themselves 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".

32. A parallel can be drawn. In the equivalent continuum of a national assembly election, there are various independent state actors and institutions with jurisdiction to settle nomination disputes. They include the IEBC under the Independent Electoral and Boundaries Commission Act and the Ethics and Anti-corruption Commission under the Ethics and Anti-corruption Act. For example article 88 (4) (e) that I cited earlier bestows on the IEBC jurisdiction to hear and resolve nomination disputes. This is reinforced by section 74 (1) of the Elections Act. The petitioner here did not seek redress, for example, from the IEBC on nomination of the 1st respondent. This issue was addressed at length by a 5 Judge bench of the High Court in *International Centre for policy and conflict & 5 others Vs Attorney General and 4* *others* High Court, Nairobi Petition 552 of 2012 [2013] e KLR. The court held:

"Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such

mechanisms have been exhausted. In this regard, we refer to the decision *<u>In Re Francis GitauParsimei & others v. National Alliance Party and others</u>Nairobi Petition No. 356 of 2012 (unreported) in which the court emphasised the principle that:*

"Where the Constitution and or a statute establishes a dispute resolution procedure, then that procedure must be used."

33. On that continuum then, there are key milestones for redress. See *<u>Narok Council Vs Transmara County Council</u>* [2002] 1 E.A. 161, *<u>The Speaker of the National Assembly Vs James Njenga Karume</u>*, Court of Appeal, Civil Application 92 of 1992 (unreported), *<u>Kipkalya Kones Vs Republic & another ex parte Kimani wa Nyoike & 4 others</u>* [2006] e KLR, *<u>Wanyoike Vs Electoral Commission of Kenya (No 2)</u>* [2008] 2 KLR (E.P) 43. The petitioner tacitly concedes that it never sought such remedies at any of those steps manned by independent constitutional bodies, or that those bodies failed to give it redress. The 1st respondent did not hide his criminal past or conviction to IEBC. I have seen the document at page 12 of the 2nd respondent's response to the petition. It comprises a statement pursuant to section 9 (1) and (m) of the first schedule (self declaration form). It is made to IEBC. The 1st respondent in that statement declares that on 14th January 2004 he was convicted in the criminal case and fined. The Commission on Administrative Justice recommended to IEBC not to nominate him. The 2nd respondent's case is that it was the role of the Ethics and Anti-corruption Commission to enforce chapter six of the Constitution. There is back-peddling and buck-passing. The IEBC should be the last to feign ignorance of the question of qualification of the 1st respondent.

34. That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. If for example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would be perfectly be in order for the court to right the wrong. *<u>In Luka Lubwayo and another Vs Gerald Otieno Kajwang and another</u>* Nairobi Petition 120 of 2013 [2013] e KLR the court found that where IEBC had failed to exercise its mandate under statute, the High Court could intervene. Article 105 1 (a) seems to widen the scope of the court in a petition to determine whether a person has been *validly* elected as a member of parliament. The question of validity may encompass the clearance to run.

35. The 1st respondent, on the face of it, fails the qualification or integrity test under article 99 (2) (h). He was convicted of abuse of office charges on 14th January 2004. He did not appeal the decision. He has purported to file Nairobi Miscellaneous Criminal Application number 614 of 2012, a whole 9 years later for leave to appeal out of time. It bears all the hallmarks of a self-serving afterthought. It is meant to create, during the nomination and in this petition the impression that there is a pending appeal. There is none. I express very serious doubt that an application for leave to appeal out of time is what is contemplated by article 99 (3). That sub-article provides that a "person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted". But there remains the possibility that such leave will be granted and an appeal lodged.

36. Earlier I said that the respondents made no comment about that application. I exercised the inherent powers of the Court and called for the original record in the miscellaneous criminal Application 614 of 2012. True, it was filed on 20th December 2012, the same date the Chief Registrar of the Judiciary confirmed there was no appeal pending. The application came up on 21st January 2013 before Msagha Mbogholi J when he ordered service on the Director of Public Prosecutions. There has been no other action. I can only speculate for now. Theoretically, the 1st respondent's intended appeal may come to fruition. If this petition had been brought by a competent party the question whether the 1st respondent qualified for nomination and whether the 2nd respondent erred in clearing him was not entirely without merit.

37. From the nature of the pleadings in the petition, no reliefs were sought against the returning officer. The petitioner, like I said was not challenging any aspect of the *conduct* of the election. The requirements to enjoin the returning officer in section 2 of the Rules is not cast in stone. The petitioner in this case had enjoined the most relevant parties for the reliefs sought. It would be to turn logic onto its

head to require every petition, even one *sui generis* like this one, to religiously follow the format of form EP1 in the Rules. Even those Rules themselves at rule 4 require this court to consider the overriding objective to do substantial justice. The decision in *Mose Nyambega Vs. Walter Nyambati and others* [2008] e KLR (supra) can thus be distinguished.

38. It is trite that artificial legal persons can bring legal proceedings. The capacity to sue and be sued in their *own* names is however limited. Incorporated companies and statutory corporations are clothed with that legal power. A relevant example here is the *Legal Advice Centre.* It is registered as a non-governmental organization. By virtue of section 12 (3)of theNon- Governmental Organizations Co-ordination Act, the Centre has perpetual succession and power to sue and be sued in its own name. Had the Centre brought these proceedings in its own name, this debate would be unnecessary.

39. As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor's names. See *The Fort Hall Bakery Supply Co. Vs Fredrick Muigai Wangoe* [1959] E.A. 474 at 475. Templeton J, relying on *Banque Internationale de Commerce de Petrograd Vs Goukassaow* [1923] 2 KB 682 found that the entity before the court was a mere name only and could not maintain the action. In the latter decision at page 688, Bankes L.J. delivered himself as follows:-

"the party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence".

See also *Savana Jua Kali Association Vs Amos Ngata* [2005] e KLR, *Kenya National Union of Nurses Vs Attorney General* Industrial Court, cause 1049 of 2012 [2012] e KLR.

40. That is apt in the present circumstances. From a legal standpoint, the entity known as *Kituo Cha Sheria* exists only in the internal constitution of the *Legal Advice Centre.* The edition of the constitution annexed to the replying affidavit is undated. It ends abruptly at page 11. The execution pages are not attached. It is not even clear whether it was similar to the constitutive instruments and documents presented for registration in 1993 before the Non-Governmental Organizations Co-ordination Board. In the petition, at paragraph 1, the petitioner, *Kituo Cha Sheria*, describes itself as a "non-governmental organization". There is no evidence of such registration. The entity so registered is the *Legal Advice Centre.* I readily find that *Kituo Cha Sheria* is not a party at all but a mere name. It is not illegal. But it can only maintain an action in that name through the officials named in the constitution of *Legal Advice Centre or* any other personnominated by its board. In the alternative and more conveniently, *Legal Advice Centre* trading as *Kituo Cha Sheria* can maintain such action. Needless to say, the *Legal Advice Centre* can of course maintain action in its own name. The legal capacity of a party to institute proceedings in court is not a *technical* matter or one of *form.* It is *not* a simple *misdescription* of names as obtained in the case of *A.N. Phakey Vs World Wide Agencies Ltd* [1948] Vol XV EACA 1. Far from it. It is a substantive matter of law that cannot be accommodated within the latitude of article 159 (2) (d) of the Constitution or Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules 2013. The petition is incapable of amendment at this stage in view of the strict time lines in article 87 of the constitution and section 77 of the Elections Act.

41. Facts can be very stubborn. The fact is that the registered legal entity under the Non-Governmental Organizations Co-ordination Act is the *Legal Advice Centre.* That is explicit from the certificate of registration dated 11th March 1993 and annexed to the petition marked "GA 1". Now, *Kituo cha Sheria* is not one and the same thing *in law*. It is not even the direct or exact Kiswahili interpretation. The word *advice* which translates to *ushauri* or *kushauri* in Kiswahili is not even there. In the strategic plan of the organization annexed to the petitioner's replying affidavit there is a brief history. It says at page 6 that the organization was at one point registered as *Kituo Cha Mashauri*. So I am not far off the mark. But even assuming that *Kituo cha Sheria* is the Kiswahili equivalent of *Legal Advice Centre*, the former is not an entity in law capable of bringing an action in its *own* name. If the petitioner wished to bring the action in the name of *Kituo cha Sheria,* the least that was required of it was to do so through its officials in its constitution or persons nominated by its board. A copy of that constitution is annexed to the replying affidavit of Gertrude Angote sworn on 16th May 2013 and marked "GNA 1". From its heading or cover

page, it is the constitution for *Kituo cha Sheria* or *The Centre for Legal Empowerment*. That is yet a new party. But to be fair to the petitioner, article 1 of that constitution states;

"The name of the Centre shall be Legal Advice Centre also known as Kituo Cha Sheria whose registered office shall be at Nairobi within the Republic of Kenya".

42. That constitution states that the Centre, and presumably the *Centre for Legal Empowerment* or the *Legal Advice Centre* shall also be known as *Kituo Cha Sheria*. But that internal constitution cannot override the law or bind third parties. The petitioner has not sought to amend the petition and the strict legal regime governing election petitions provides no window to do so now. The incompetence of the present petitioner to sue is not then a simple technical matter. As I have stated earlier, it cannot be cured by the provisions of article 159 2(d) of the constitution or Rule 4 of the Petition Rules. The failure to bring an action by a recognized juridical person is one of law and substance. It goes to the root of the petition. The substratum upon which the petition has been brought is thus compromised completely.

43. The petitioner put forward an argument that *Kituo Cha Sheria* has previously brought proceedings and obtained reliefs at the High Court. An example was proffered where *Kituo Cha Sheria* brought proceedings against the Attorney General to assert the rights of prisoners to vote. I have perused the decision in <u>*Ms Priscilla Nyokabi Kanyua Vs Attorney General and another*</u> Nairobi, Petition 1 of 2010. The proceedings were not brought in the name of *Kituo Cha Sheria* as is clear from the citation. They were brought by Ms Kanyua on behalf of it. I have also perused the decision in <u>*Luka Angaiya Lubwayo and Kituo cha Sheria Vs Gerald Otieno Kajwang and another*</u>. Again *Kituo Cha Sheria* was only a co-petitioner.

44. But even assuming for a moment that *Kituo Cha Sheria* brought the proceedings, the court in both cases was not asked and *did not* make a finding on the issue whether *Kituo Cha Sheria* could bring and maintain the proceedings in its own name. From the decisions I cited earlier on legal capacity of *persons* to bringaction, it is doubtful that that such a finding can be made. I am also fortified there because the legal regime governing election petitions is very strict. See <u>*Muiya Vs Nyaga & 2 others*</u> [2008] 2 KLR (EP) 493 at 498. In the end, I have reached the conclusion that *Kituo Cha Sheria* is not a competent legal person as known under article 258 of the constitution, section12 (3) of theNon-governmental Co-ordination Act or any other statute. Its capacity to bring an action in its *own* name and a petition to challenge an election does not find support in the law or precedent. In the result, there is no *petitioner* in Court or a valid petition. It follows as a corollary that the petition is incurably defective. It has no legs to stand on. It is hereby struck out and dismissed.

45. Costs ordinarily follow the event and are at the discretion of the Court. Rule 36 (1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 provides as follows:

"36 (1) The Court shall, at the conclusion of an election petition, make an order specifying –

a) the total amount of costs payable; and

b) the person by and to whom the costs shall be paid".

46. If the Court does not do so, then the Registrar of the Court is required by Rule 37 to tax such costs. The 1st and 2nd respondents are entitled to costs. Those costs shall be paid by the petitioner. Parties have in the past abused the taxation process to exaggerate their costs at the expense of the losing party and the taxpayer. This petition has terminated early and before the hearing of any witnesses. Accordingly, and as per Rule 36 (1), I order that the petitioner shall pay costs assessed at Kshs 150,000 to the 1st petitioner who brought this motion and Kshs 100,000 to 2nd Respondent who joined in the motion. The total costs are thus Kshs 250,000 only. It is a reasonable and fair sum noting the nature of the matter and complexity of the issues. Both respondents have instructed counsel in the matter. They have filed responses to the petition. They have filed other depositions and written submissions relating to the motion for striking out. Their lawyers have appeared in court to contest the petition. They must look up to the petitioner for redress. Under Rule 37 (3), I direct that the whole of those costs shall be met from the

money deposited by the petitioner as security in Court. The balance of that deposit shall be refunded to the petitioner.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 24th day of May 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. C. Agwara with him Ms. C. Mburugu instructed by the Petitioner, Kituo Cha Sheria.

Mr. D. Wambola for 1st Respondent instructed by Ongoya & Wambola Advocates.

Ms W. Thanji for Ms Ndegwa for 2nd Respondent instructed by Sisule Munyi Kilonzo & Advocates.