REPUBLIC OF KENYA

High Court at Mombasa

Election Petition 8 of 2013

IN THE MATTER OF: ARTICLES 22, 23, 35, 38, 80, 81, 86 AND 88 OF THE REPUBLIC OF KENYA, 2010.

AND

IN THE MATTER OF: SECTIONS 75, 76, 80 AND 86 OF THE ELECTIONS ACT NO. 24 OF 2011

LAWS OF KENYA AND THE RULES MADE THEREUNDER.

AND
IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

ELECTION FOR THE GOVERNOR OF THE COUNTY OF MOMBASA THE PETION OF SULEIMAN SAID SHAHBAL

BETWEEN

SULEIMAN SAID SHAHBAL
….....PETITIONER

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

MWADIME MWASHIGADI..... 2ND RESPONDENT

HASSAN ALI JOHO ….....3RD RESPONDENT

HAZEL EZABEL NYAMOKI OGUNDE..... 4TH RESPODNENT

RULING

On 4th March 2013 Kenyans participated in General Elections, through which they were to elect their political leaders including the President, County Governors, Senators, Members of Parliament and Members of County Assemblies.

The 3rd Respondent, HASSAN ALI JOHO, was declared as the duly elected GOVERNOR of the COUNTY OF MOMBASA.

The Petitioner, SULEIMAN SAID SHAHBAL, was dissatisfied with the electoral process which culminated in the declaration of HASSAN ALI JOHO as the Governor of the County of Mombasa.

On 10th April 2013 the Petitioner filed a Petition at the High Court of Kenya, at Mombasa, challenging the election of the 3rd Respondent.

The Independent Electoral and Boundaries Commission (IEBC) and the County Returning Officer for Mombasa County are said to have acted unconstitutionally and unlawfully in their conduct of the impugned elections.

This court was being invited to declare that HASSAN ALI JOHO was not validly elected as the Governor of Mombasa.

If anything, the petitioner, SULEIMAN SAID SHAHBAL, believes that he ought to be declared the candidate who was validly elected as the Governor for Mombasa County. Therefore, if the election of the 3rd respondent was declared unconstitutional, this court was being asked to proceed to declare that the petitioner was the Governor.

However, if the court was unable to take that consequential step of declaring the the petitioner as the Governor of the County of Mombasa, it was asked to order that fresh elections be conducted for that office.

Shortly after being served, the 3rd and 4th Respondents filed their Response to the Petition.

The first point that was taken up in the Response was that the Petition had been filed late. As far as the 3rd and 4th Respondents were concerned, the Petition was filed 34 days after the results of the election were declared.

Considering that Article 87 (2) of the Constitution of the Republic of Kenya stipulated that Petitions concerning elections ought to be filed within 28 days after the declaration of the election results, the 3rd and 4th Respondents contended that the Petition ought to be struck out, because it was filed late.

On 30th April 2013, the 3rd and 4th Respondents filed an application seeking a declaration that the Petition was invalid, because it was not filed within the period stipulated by the Constitution. I was invited to either strike it out or to dismiss it.

This Ruling is in relation to that application.

From the outset, I deem it prudent to set out the reliefs sought. The 3rd and 4th Respondents state that theirs is:

".. an application for orders and/or a declaration that:

(a)The provisions of Section 76 (a) of the Elections Act, 2011, that require the filing of an election Petition to question the validity of an election, to be filed within twenty eight days after the date of publication of the results in the Gazette are inconsistent with, and contravene the specific provisions of Article 87 (2) of the Constitution.

(b) By reason of the provisions of Article 2 (4) of the Constitution, the provisions of Section 76 (a) of The Elections Act aforesaid are to the extent of that inconsistency with the Constitution, VOID.

(c)As a consequence of the matters stated in (a) and (b) above, and by reason of the further provisions of Article 2 (4) of the Constitution, the Petition filed herein is invalid.

(d) Consequently, this Court has no jurisdiction to entertain an invalid Petition, and ought to strike out, or alternatively, dismiss the same, with costs to the 3rd Respondent.

(e) ***The costs of this application, as well as the Petition, be paid by the Petitioner to the 3rd Respondent."***

The application came up for hearing on 20th May 2013. On that date, the Petitioner was represented by Mr. Ndegwa advocate.

The Returning Officer and the IEBC were represented by Mr. Nyamodi advocate and Mr. Khagram advocate.

Meanwhile, the Governor and his Deputy were represented by Mr. Ahmednasir advocate, Mr. Paul Buti advocate and Mr. Balala advocate.

When canvassing the application, Mr. Balala submitted the petition in issue herein was a nullity because it had been filed late. He said that because the Constitution spelt out the period within which a petition must be filed, any statute that purported to expand that period was void.

The applicants argued that the provisions of Section 76 of the Election Act were inconsistent with Article 87 (2) of the Constitution, because it introduced the element of gazettement of results, whereas the Constitution simply provided for declaration.

Reading from Section 39 of the Election Act, Mr. Balala submitted that the outcome of the votes cast constitutes the results of such an election, and that such results are required to be declared immediately after the close of the polling exercise.

In that regard, the applicants emphasized that the following 3 words have different meanings:

(a)Determination,

(b)Declaration, and

(c)Publication.

I was told that pursuant to the provisions of Section 109 of the Elections Act, the IEBC was empowered to publish Regulations. Using the said power, IEBC formulated General Regulations. One such regulation is Regulation No. 4(i) (b) which provided that it is County Returning Officers who would be responsible for the announcement and declaration of results.

In that regard, the applicants submitted that the declaration of results was made by the County Returning Officer, through Form 36, as envisaged by Regulation 10.

According to the applicants, even the Petitioner had recognised, in his affidavit, that the election results were declared on 7th March 2013.

Relying on the authority of **JOHN M. N. MUTUTHO VS JAYNE N. W. KIHARA & 2 OTHERS, CIVIL APPEAL NO. 102 OF 2008 (NAKURU)**, the applicants submitted that declaration included particularising of the results of all the candidates.

Therefore, in the opinion of the applicants, the gazette notice which only cited the name of the winner of a particular contest within the electoral process, could not constitute the declaration of results.

The applicants also called to their aid the provisions of Regulation 83.

In their understanding, Regulation 83 (1) (c) states that it was the role of Returning Officers to declare results.

After the Returning Officer declares results, as understood by the applicants, the IEBC would have no jurisdiction to determine any election disputes. Such results were said to be final, subject only to what an Election Court may determine in an Election Petition.

It was not lost of the applicants that in respect of Presidential Elections, it is only IEBC who were mandated to declare final results. Such results, said the applicants, had to be gazetted by the IEBC.

Quoting from the decision of the Supreme Court of India, in **YOUARAJ RAJ VS CHANDER BAHADUR KARKI, CIVIL APPEAL NO. 8250 OF 2004**, the applicants submitted that the period within which the petition had to be filed must be calculated strictly from the date specified by law. In that case, the issue was whether the limitation period would be calculable from the date of the election of the person whose election was challenged or from the conclusion of the entire General Election.

The person whose election was being challenged was declared as elected earlier than the finalization of the general election. His said election was uncontested. The Supreme Court of India expressed itself thus:

"Upholding of submission that the limitation for filing an election petition should be reckoned not with reference to the date on which the candidate whose election is challenged was declared elected, but with reference to the date on which the last candidate was declared elected at a general election would not only make the provision cumbersome and contrary to the provisions of the Act …, but would also make the starting point of limitation uncertain, indefinite and fluctuating."

In the case before this court, the law requires the IEBC to declare the results of the Presidential elections through a gazette notice. The said gazette notice has to be published within 7 days from the date of the elections.

However, pointed out the applicants, there was no similar requirement, for gazettement of the results of the elections of governors or any other elected political leaders.

The applicants conceded that Mumbi Ngugi J. had expressly held that "declaration" of the results of an election conducted under the auspices of the Elections Act, could only be achieved through the gazettement of the said results.

However, the applicants submitted that that holding was made per incuriam. The said decision was made in **FERDINAND NDUNG'U WAITITU VS IEBC & OTHERS, ELECTION PETITION NO. 1 OF 2013**. My learned sister addressed herself thus:

***"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."**

The learned Judge struck out the petition because the said Petition had attempted to circumvent the rigorous rules set out in the Elections Act and the rules made thereunder.

Mr. Ahmednasir advocate advanced the applicants submissions from that point forward.

He expressed the view that this court lacked jurisdiction to adjudicate over the Petition issue because the Petition was filed late.

I was invited to hold that the time limits stipulated in the Constitution were cast in stone. They could not be extended by the court, whether through craft or innovation.

To hammer home that point, the applicants cited the decision of the Supreme Court of Kenya in **RAILA ODINGA VS IEBC & 3 OTHERS, PETITION NO. 5 OF 2013**. In its ruling on an application for the provision of **"Forensic evidence"**, the Court held that the constitutional timelines were not negotiable.

To the extent that Section 76 of the Elections Act purported to confer power beyond what the constitution had stipulated, the applicants invited this court to remind parliament that it had no such power.

Article 87 of the constitution was not ambiguous; I was told. Therefore, as Section 76 of the Elections Act was not in conformity with it, the said statutory provision must be found to be unconstitutional.

The IEBC and the returning Officer supported the applicants' view.

Mr. Khagram advocate pointed out that pursuant to Article 2 (4) of the Constitution, any law that was inconsistent with the constitution was void.

The IEBC's view was that Section 77 of the Elections Act was in conformity with the Constitution, as it made it clear that election petitions must be filed within 28 days of the declaration of the election results.

However, section 76 of the Elections Act is faulted for introducing the requirement for Publication in the Kenya Gazette.

In any event, the petitioner is said to have been well aware that the 28 days period commenced from 7th of March 2013. That contention was founded upon the petitioner's expression, in **ELECTION PETITION NO. 16 OF 2013, SULEIMAN SAID SHAHBAL VS IEBC**, that he was well aware, that from 26th March 2013, he had only upto 7 days more to file an election petition to challenge the election of HASSAN ALI JOHO.

The IEBC also pointed out that the failure to file an election petition within the period stipulated by law, was fatal. See **CHANDRAKUMAR VS KIRUBAKARAN & OTHERS, ELECITON PETITION NO. 01 OF 1988**, in which the Court of Appeal of Sri Lanka held that the failure to file an election petition within the legally stipulated time was a fatal defect.

In answer to the application, Mr. Ndegwa, learned advocate for the Petitioner, submitted that the Petition was filed within the prescribed time.

The petitioner emphasized that the gazette notice number 3155, dated 13th March 2013 constituted the declaration of the results of the elections held in Kenya on 4th March 2013. The said gazette notice expressly made reference to, inter alia, Section 39 of the Elections Act which requires results to be announced immediately after counting was completed.

As far as the petitioner is concerned, Form 36 is a creature of Regulations 84 (a) and (b) . Therefore, the petitioner holds the view that that Form was only created for logistical rather than for legal reasons.

For the legal purposes, the petitioner said that it is only IEBC which is mandated to declare the results of elections. That authority is said to have been vested only on the IEBC, pursuant to Article 87 (2) of the Constitution.

The petitioner also pointed out that although section 109 of the Elections Act gave power to the Returning Officers, the Constitution did not make any reference to Returning Officers.

And because the Elections Act was subordinate to the Constitution, the petitioner emphasised that the statute could never supercede the Constitution.

Within that context, the petitioner submitted that Parliament enacted the Elections Act pursuant to authority given to it by Article 87 (1) of the Constitution. Therefore, as far as the petitioner was concerned, the requirement in section 76 (1) of the Elections Act was nothing more than a mechanism established for the timely settling of electoral disputes.

That mechanism was, in the opinion of the petitioner, comparable to those which specified the mode of service.

In the circumstances, the petitioner found fault with the respondents decision to only raise questions about the mode of declaration of election results.

Ultimately, the petitioner found nothing inconsistent as between Article 87 (1) of the Constitution and Section 76 of the Elections Act.

The petitioner was not party to the drafting of the Elections Act. He submitted that he simply complied with the law. And as that law remained in place, the petitioner submitted that he should not be sacrificed.

In reply to the petitioner's submissions, Mr. Balala advocate submitted that the issue of time lines was no longer

left in the hands of Parliament, as had been the case prior to the promulgation of the Constitution of Kenya, 2010.

This application has provided me with a tantalizing legal challenge. I therefore wish to start by commending all the advocates who articulated their respective clients submissions. I may not make reference to each and every legal authority that they cited, but all the said authorities have had an impact on this decision.

In the year 2010, the Republic of Kenya promulgated a new Constitution. It brought about a major transformation to our institutions and in the manner in which tasks would be undertaken.

One of the major transformations was in the process of resolving electoral disputes. Instead of leaving it open for election petitions to take five (5) years to resolve, the Constitution made it clear that election petitions had to be heard and determined within six (6) months from the date when they were lodged in court.

However, the Constitution cannot be expected to contain the details of how to achieve that fundamental goal. Therefore, pursuant to the provisions of Article 87 (1), the Constitution empowered Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes.

But just to be sure that the issue of timeliness was not left exclusively to Parliament, the Kenyan people stipulated in Article 87 (2) of the Constitution that:

" 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."

Kenyans also made sure that their Constitution addressed the question of service of an election petition. In years gone by, most petitions were struck out because of either lack of service or because of improper service.

Elected leaders simply made themselves scarce, to avoid service. They could travel to other parts of the country or even outside the country, to avoid personal service.

And if the leader had been elected as the President, the security detail which came with that office made it literally impossible to serve him personally.

Parliament attempted to remedy that situation by allowing service to be effected through the newspapers and the Kenya Gazette, if the petitioner had failed to effect personal service even after exercising due diligence. At that stage, the new area of "***legal jurisprudence"*** was the definition of the phrase ***"***__due diligence.__***"***

Kenyans did not want to have such serious matters as are raised in election petitions, resolved through legal arguments on the mode or sufficiency of service. They decreed that the Petition can be served directly or by advertisement in a newspaper with national circulation: That is what Article 87 (3) of the Constitution stipulates.

In my considered opinion, the new provisions governing the service of election petitions have scored a major victory for all persons interested in substantive justice. But, as I already stated, the Constitution expressly authorised Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes. It is within that context that the Elections Act, 2011 was enacted.

The Elections Act describes itself as;

" An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, County governor and County assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes."

In effect, the said statute recognises itself as, amongst other things, being a body of law that establishes mechanisms for timely settling of electoral disputes.

Section 39 of the Elections Act provides as follows;

"*(1) The commission shall determine, declare and publish the results of an election immediately after close of polling.*

(2) Before determining and declaring the final results of an election under subsection (1), 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."***

In my understanding, that means that the Commission has the discretion to decide whether or not to announce provisional results. However, if it decides to announce provisional results, the Commission has to do so, and also has to announce the final results, in the order in which the tallying of results is completed.

After results have become available, it is open to a party who is aggrieved thereby, to question the validity of the election.

Section 76 of the elections Act provides as follows:

"(1) A petition -

(a)to question the validity of an election shall be filed within twenty eight days after the date of the publication of the results of the election in the Gazette and served within fifteen days of presentation;

(b) to seek a declaration that a seat in Parliament or a county assembly has not be come vacant shall be presented within twenty eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or

(c)to seek a declaration that a seat in Parliament has become vacant may be presented at any time.

(2) ***A petition questioning a return or an election upon a ground of corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty eight days after the publication of the election results in the Gazette.***

(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by any agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice be filed at any time within twenty – eight days after the publication of the election results in the Gazette;

(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplementary petition"

The section identifies three (3) kinds of petitions, as set out in subsection (1) (a), (b) and (c) above.

In this case, we are dealing with a petition challenging the validity of the election of Hassan Ali Joho. Therefore, it does appear that it falls under section 76 (a) of the Elections Act.

However, it is also conceivable that the petition could fall within the ambit of subsections (2) (3) and (4), because it alleges corrupt practice, illegal practice by the 3rd respondent and his agents, and election offences.

The bottom line is that the petition should have been filed within 28 days of publication of the results in the Kenya Gazette.

In my understanding of the application before me, the applicants are not asserting that the petition was filed after more than 28 days lapsed, from the date the results were published in the Kenya Gazette. The contention is that even though the petition may have been filed within the period stipulated under Section 76 of the Elections Act, it was nonetheless filed outside the period stipulated in the Constitution.

In the attempt to provide flesh to the main-frame of the Constitution, Parliament mandated the Commission to make regulations generally, for the better carrying out of the purposes and provisions of the Elections Act.

One of the areas in which the Commission was mandated, (under Section 109 of the Elections Act) is to;

" 1(bb) provide the mode of declaration of the result of an election"

Of course, any such regulations must be for the purpose and objective of giving effect to the Constitution and to the Elections Act.

Furthermore, and pursuant to Section 109 (2) (b) of the Elections Act, it was acknowledged that the power to make regulations, conferred on the Commission shall be limited to the nature and scope specifically stipulated in the Constitution.

In furtherance of that goal, the Commission formulated ***"The Elections (General) Regulations, 2012".***

Regulations 4(1) reads as follows:

"The Commission shall appoint county returning officers to be responsible for:-

(a)receiving nomination papers in respect of candidates nominated for the post of Governor or County woman representative to the National Assembly and the Senate;

(b) tallying results from constituencies in the country for purposes of the election of the President, County Governor, Senator and Country Women representative to the National Assembly;

(c) the declaration and announcement of results tallied under paragraph (b).

(d) ***such other functions as may be assigned by Commission."***

Clearly, therefore the Commission mandated the county returning officers to, inter alia, ***declare and announce*** the results of elections.

To my mind, that cannot be termed as a deviation from the provisions of Article 87 (2) of the Constitution, which stipulates that the declaration of results shall be by the Commission. If anything, the Commission had simply made a provision for the mode of declaring the results of the elections.

The actions of a duly appointed returning officer are deemed to be the actions of the Commission, unless such actions give rise to personal criminal culpability on the part of such officer.

In **JOHN MICHAEL NJENGA MUTHUTHO VS JAYNE NJERI WANJIKU KIHARA, CIVIL APPEAL NO. 102 OF 2008 (NAKURU)**, the Court of Appeal expressed itself thus;

"The marginal note to regulation 40, aforesaid, reads

'Announcements of Election Results.'

A careful reading of that regulation clearly suggests that the result is not confined to just declaring who won . The detailed result is what is envisaged."

Notwithstanding the transformation heralded by the Constitution of Kenya 2010, I hold the view that the above-cited understanding of what constitutes the declaration of results of an election remains valid.

That would mean that the Gazette Notice dated 13th March 2013 did not constitute a declaration of the results of elections, because the said Notice only declared the persons who were elected to respective offices.

In relation to the dispute before me, Gazette Notice number 3155 declared that Hassan Ali Joho was the Governor of the County of Mombasa, whilst his Deputy was Hazel Ezabel Nyamoki Ogunde.

To the extent that the Gazette Notice did not contain the particulars of the other candidates; the rejected votes; the total votes cast; and the total number of registered voters, it fell short of constituting the declaration of results.

Therefore, even assuming that the Gazettement ought to be construed as the instrument through which the results of elections were declared, the Gazette Notice in issue did not declare the results.

Pursuant to Regulation 87 of The Elections (General) Regulations, 2012, the Chairperson of the Commission is only required to declare the candidate elected as the President. The rationale for that is that it is only the chairperson who would have received, from the County returning officers, the Forms 38 which are a certificate of the votes cast for each presidential candidate, as tallied from results obtained from the constituency returning officers.

The chairperson holds each form 38 until he gets the results of that election, from every county.

Thereafter, the chairperson is required to publish a notice in the Kenya Gazette, within 7 days of the date when the elections were held, declaring the person who had garnered the greatest number of votes. If that person also complied with Article 138 (4) (a) and (b), the chairperson will declare him to have been elected as the President.

Regulation 87 (4) (b) makes it clear that;

"in the case of the other elections, whether or not forming part of a multiple election, (the chairperson is to) publish a notice in the Gazette, which may form part of a composite notice, showing the name or names of the person or persons elected."

The gazette Notice Number 3155 is thus a notice showing the names of the persons elected as Governors and Deputy Governors, respectively. It does not constitute a declaration of the results.

If a declaration must be in a formal instrument, I find that the Forms containing the results of elections at every level, constitute such formal instruments. When the forms 34, 35, 36, 37 or 38 have been duly signed by the authorised returning officer, it becomes an instrument which cannot be challenged save through an election petition.

If an aggrieved party was to wait for gazettement, neither he nor anybody else could have any idea when such a gazette notice would be published, unless it was a gazette notice in respect of the presidential elections. The failure to set down a period within which election results, other than those for presidential elections, are to be gazetted, fortifies my finding that there is no constitutional requirement for such results to be gazetted.

The Constitution did not impose the requirement for gazettement. It only talked of **DECLARATION OF THE ELECITON RESULTS**.

In my considered view, when Section 76 of the Elections Act imported the requirement of Gazettement into the mechanism it created for timely settling electoral disputes, the said statute exceeded the authority bestowed upon it by the Constitution.

Kenyans wish to have a clear and speedy mechanism for resolving electoral disputes. By imposing a requirement for gazettement, but without specifying the period for it, Section 76 of the Elections Act was putting forth an impracticable and unpredictable mechanism. It would not therefore be enhancing or enabling a timely settling of electoral disputes.

In **YOUARAJ RAI VS CHANDER BAHADUR KARKI, CIVIL APPEAL NO. 8250 OF 2004**, The Supreme Court of India said:

"When a defeated candidate or an elector has grievance against an act declaring a particular candidate successful at the election, his cause of action arises as soon as such declaration is made. He, therefore, can challenge that act. He is not concerned with other constituencies or candidates. He cannot be allowed to join his cause of action with declaration of results in other constituencies or returned candidates in those constituencies."

I am in full agreement with that view. An unsuccessful candidate in the elections need not wait for the Commission to compile the results from any other electoral area, such as a constituency or county, before he can file his petition.

The petition herein was filed about 34 days after the county returning officer for Mombasa had declared the results for the election of the Governor. It may have been filed within 28 days of gazettement of the fact that Hassan Ali Joho was the elected governor, but that did not remedy the defect.

Should I therefore strike it out, as being invalid?

I revert to Article 87 (1) of the Constitution. It donated a power to the Parliament to enact legislation which would establish mechanisms for timely settling of electoral disputes.

Parliament exercised its mandate, and section 76 of the Elections Act is a part of the results of parliament's work.

As at the time when the petitioner was instituting the petition herein, section 76 of the Elections Act was an integral part of the law in force.

The said law was, prima facie, lawful. Its legality had not been challenged. Therefore, when the petitioner filed his petition within 28 days of the gazettement by the Commission, he considered himself to be complying with the law. He did not err.

If there be any error, it was committed by Parliament; not the petitioner.

As the petitioner complied with a law which was presumed to be lawful, at the time, it would be wrong, in my considered opinion, to punish him for the mistake of the parliament.

By striking out a Petition which was, prima facie lawful at the time it was filed in court, this court would be purporting to impose this decision retroactively. It would be akin to punishing an accused person for an act which was committed by him before such act had been criminalised by the law.

I therefore decline the applicants' invitation, to strike out the Petition. Instead, I hold that form this moment, forwards, until and unless an appellate court should hold otherwise, election petitions must be filed within 28 days of the declaration of the results of the election in question; and such declaration is the one made by the appropriate returning officer responsible for the electoral process in question.

I consider this to constitute a purposive approach to the issue at hand. It safeguards the rights of a petitioner who had complied with the law as had been enacted by parliament. He had no reason, until now, to presume that Section 76 of the Elections Act was unconstitutional.

I wish to also make it clear that this conclusion has been influenced by other practical considerations.

In my view, if the petition was struck out, that may well be the end of the road for the petitioner even if the Court of Appeal may subsequently upset this Ruling.

In **SENATOR JOHN AKPANUDELEHE & 2 OTHERS VS GODWIL OBOT AKPABIO & OTHERS SC NO. 154 OF 2012**, the Supreme Court of Nigeria set aside the order of the Court of Appeal, which had directed the High Court to hear an election petition.

In the first instance, the High Court had struck out the election petition.

On an appeal to the Court of Appeal, the court held that the High Court had erred. The appellate court ordered the High Court to hear the petition.

However, the respondents moved to the Supreme Court, where they raised a Preliminary Objection to the orders requiring the High Court to hear the petition. The objection was founded upon Section 285 (6) of the Constitution which reads as follows:

"An Election Tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition."

To my mind, that provision is comparable to that in Kenya, wherein election disputes are required to be heard and determined within 6 months from the date when such petitions were filed.

The Supreme Court of Nigeria expressed itself thus:

"For the avoidance of any lingering doubt, once an election petition is not concluded within 180 days from the date the petition was filed by the petitioner as provided by Section 285 (6) of the Constitution an election tribunal no longer has jurisdiction to hear the petition, and this applies to re-hearings. 180 days shall at all times be calculated from the date the petition was filed.…

Once the 180 days elapsed, the hearing of the matter fades away along with any right to fair hearing. There is no longer a live petition left. There is nothing to be tried even if a retrial order is given . It remains extinguished forever."

That, to my mind was a significant factor in determining the orders to be made. It recognises the possibility that I could be wrong, and thus actively keeps open the door for all the parties to pursue their legal rights.

If the Court of Appeal were to disagree with my findings or orders arising therefrom, the petition could simply be struck out. But if I struck out the petition now, and then thereafter the said decision were to be upset by an appellate court, it may serve no useful purpose.

I thank the applicants' advocates for drawing to my attention that decision of the Supreme Court of Nigeria. It has helped me appreciate the need to arrive at a just conclusion.

Before concluding this Ruling I feel obliged to mention that Section 77 (1) of the Elections Act expressly provides as follows:

"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."

That is exactly what Article 87 (2) of the Constitution stipulated. Perhaps if Section 76 (1) (a) of the Elections Act did not import the requirement for Gazettement, there would have been no room for the arguments of unconstitutionality of such requirement. But that is perhaps being too optimistic, as the word "*declaration"* was not defined. I do therefore recommend that the requirement for gazettement be removed from Section 76 (1) (a) of the Elections Act, and that the wording in Section 77 (1) be used instead.

The alternative would be to amend Article 87 (2) of the Constitution, by introducing therein the requirement for gazettement of results, as the mechanism for declaration. If publication of the results in the Gazette is made a requirement of the Constitution, it will be necessary to specify the period within which there must be compliance.

On the issue of costs of the application, I direct that each party will bear his own costs. The applicants raised an issue of major significance. Through their effort, the court has, hopefully, made the position in law clear. But, at the same time, the ultimate goal of the application, which was to have the petition struck out, was not achieved. That is what has informed the order on the issue of costs.

Once again, I say to all the advocates in this Petition, thank you for all the work you put into the application.

Dated, signed and delivered at Mombasa, this 23rd day of May 2013.

FRED A. OCHIENG
JUDGE