



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 6 of 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA, THE ELECTIONS ACT (2011) AND THE REGULATIONS MADE THEREUNDER AND PUBLIC OFFICER AND ETHICS ACT
AND

IN THE MATTER OF ELECTION FOR GOVERNOR AND DEPUTY GOVERNOR OF KAJIADO COUNTY

AND

IN THE MATTER OF THE PETITION OF JOSIAH TARAIYA KIPELION OLE KORES

BETWEEN

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JOSIAH TARAIYA KIPELIAN OLE KORES.....PETITIONER

VERSUS

DR.DAVID OLE NKEDIENYE.....1STRESPONDENT

PAUL NTIATI.....2ND RESPONDENT

TOM MBOYA3RD RESPONDENT

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

RULING

1. The Elections of the Governor for the county of Kajiado, like all the others in the recent past General Election took place on 4th March, 2013. From those elections, the record shows that the 1st and 2nd Respondents were declared elected as Governor and Deputy Governor, respectively. On 8th April, 2013, the Petitioner lodged his Petition challenging the said declaration and sought various declarations, the principal of which is the nullification of the election of the Governor for Kajiado County.

2. On 8th May, 2013, the 1st and 2nd Respondent filed on notice, an objection to the said Petition. In the said notice, it was contended that the election results for the County of Kajiado were declared on 6th

March, 2013 and the Petition was therefore lodged out of the 28 days timeline set by Article 87(2) of the Constitution.

3. Mr. Ndubi teaming up with Mr. Agina submitted that the question before the court is whether the election results for the County of Kajiado were declared on the 6th or the 13th of March, 2013. That Section 76(1) of the Elections Act, 2011 was inconsistent with Article 87(2) of the Constitution of Kenya, that the holding by Hon. Mumbi J in **Election Petition No. 1 of 2013 Ferdinand Waititu –vs- IEBC & 8 others** (hereinafter “the Waititu case”) to the effect that Gazettement is the declaration of result was erroneous. Counsel submitted that the County Returning Officer for all purposes and intents, is the person who has the legal mandate to conduct the elections and therefore declare the result in terms of Article 87(2) of the Constitution. To Mr. Ndubi, the Gazettement of the results on 13th March, 2011 was only a notification of winners and was for other administrative purposes such as commencement of County Governments and remuneration of Governors and not a declaration of election results. Counsel therefore urged that this court should depart from the decision in the **Waititu case** and hold that declaration of results occur upon such announcement by the County Returning Officer and the consequent issuance of a certificate of Results of Election.

4. Mr. Imende appearing for the IEBC and the Returning Officer supported the objection. He submitted that Article 87(2) of the Constitution is in mandatory terms, that the body mandated to count, tally, verify and declare election results under Article 138(3) (c) of the Constitution was the IEBC through its officers. That these officers are the Presiding and Returning Officers who in this case were the officers mandated to do so on behalf of IEBC. That Section 76(1) of the Election Act, 2011 purported to extend the time for filing of Election Petitions and it was therefore inconsistent with the Constitution.

5. Mr. Imende further submitted that the declaration envisaged in Article 87 (2) of the Constitution was the one contained in Form Nos.34 and 35 of the Election Forms made pursuant to Regulations 79 and 83 of the Elections (General) Regulations, 2012. That such declaration should contain the results of the election which was not the case with Gazette Notice No.3155 which only contained the names of winners of the subject elections. Counsel therefore urged that the court departs from the holding in the **Waititu case** and strike out the Petition herein.

6. Mr. Okworo appeared for the Petitioner. He opposed the objection on various grounds. He submitted that the objection had been filed out of the 14 days period allowed for the Respondent to oppose a Petition under Rule 14 of the Election Petition Rules, that the objection was therefore incompetent having been filed out of time. That since Article 87(2) of the Constitution had allowed parliament to enact a law to provide for timelines for settlement of Election disputes under Section 76(1) of the Elections Act Gazette Notice No. 3155 was properly issued and was the applicable declaration in terms of Article 87 (2) of the Constitution.

7. Mr. Okworo further submitted that under Article 88 (1) and (2) of the Constitution, the Commissioners were the only persons allowed to communicate with the outside world on behalf of the Independent Electoral and Boundaries Commission (“IEBC”). That since the alleged Form 35 and the Certificate of Results of Election issued to the 1st Respondent were not in court, there was no acceptable evidence before the court to show that the election results for Kajiado County were declared on 6th March, 2013. Mr. Okworo finally submitted that if the court was in agreement with the Respondents that the Petition had been filed out of time, it should exercise its discretion under rules 4, 5 and 20 of the Election Petition Rules and extend the time for filing. Counsel urged that the objection be dismissed.

8. In rejoinder, Mr. Ndubi submitted that since under Section 39 of the Elections Act, 2011 the results of an election are to be announced immediately after polling, it was incorrect to state that it is the commissioners of IEBC only that were allowed to communicate to the whole world in that they would not be in all the 33,000 polling stations where voting took place. He was of the view that placing reliance on the decision of the **Waititu case** would compromise the independence of this court and the rule of law generally. He further argued that since the substratum of the Petition itself was faulty, no discretion could be properly exercised under rules 4, 5 and 20 of the Election Petition Rules to extend the time sought by the petitioner. He urged that the objection be upheld and the Petition be struck out.

9. I have considered the documents on record and the counsel's submissions. In my view, the issue before me ultimately turns on the construction of Article 87(2) of the Constitution and Section 76(1) of the Elections Act, 2011. That is, when are the results of Elections declared? Is it when they are announced at the Tallying Centre or when they are Gazetted? In this matter, however, for deference to Counsel, I propose to address all the issues raised by them.

10. The first issues to address are those raised by the Petitioner's Counsel that the Preliminary Objection was incompetent for having been filed outside the period stipulated under Rule 14 of the Election Petition Rules and that in the event the Petition is found to have been filed out of time, the court do exercise its discretion under Rules 4, 5 and 20 of the Elections Petition Rules and extends the time for the filing thereof.

11. In my view, these two issues were not well taken. Whilst it is true that the objection was filed on 8th May, 2013 well outside the 15 days period provided for under Rule 14 of the Election Petition Rules, this court however, did on 10th May, 2013 allow the 1st and 2nd Respondents to file documents in opposition to the Petition. It is obvious that that order was made way after the objection had been filed. In my view therefore, that order validated any irregularity that there may have been in the failure by the 1st and 2nd Respondent to oppose the Petition within time including the filing of the objection on 8th May, 2013. The objection is therefore properly before court.

12. As regard the discretion to extend time under Rules 4, 5 and 20 of the Election Petition Rules, I am afraid the same is not available to the Petitioner. Rule 20 is very clear that time is to be extended where such time has been limited by the rules or by the court. Such extension does not extend to instances where the time is limited by the substantive Act or the Constitution. In this regard, the time for filing of the Petition is limited to 28 days by both Article 87(2) of the Constitution and Section 76(1) of the Elections Act. That time in my view cannot be subject to an extension on a discretion granted by the rules. Accordingly, no extension of time to file the Petition out of time can be available to the Petitioner.

13. I now turn to the Objection proper. The Respondents urged that in construing Article 87(2) of the Constitution as to the declaration of results, the court should take cognisance of Article 138(3) (c) of the Constitution which provides that:-

“(c) After counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.”

Their view was that vide this provision, the declaration of results is to be made immediately after the tallying and verification of the count at the tallying centre by the County Returning Officer and not on Gazettement. With due respect, I think reliance on Article 138 3 (c) of the Constitution is misplaced. That Article deals with the procedure at “Presidential Election”. The procedure as to Gubernatorial election is to be found under Article 87 and not Article 138 of the Constitution. That Article therefore is not applicable and cannot be used to advance the Respondent's objections.

14. As I had stated earlier, the question before me turns out on the meanings to be accorded to Article 87 (2) of the Constitution and Section 76(1) of the Elections Act. Article 87(1) provides:-

“(2) Petitions concerning an election, other than a presidential election shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”

Section 76(1) on its part provides:-

“(1) A Petition –

(a) 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 “ (Emphasis provided)

15. The issue therefore turns on the meaning of “***declaration by the Independent Electoral and Boundaries Commission***” and “***publication of the results of the election in the Gazette.***” Are those terms one and the same? According to the Respondents, the announcement of the poll results at the polling station is a declaration of the results. That since those results were announced on 6th March, 2013, the time for filing a petition to challenge the same run out on 4th April, 2013. They urged the court to consider that under Regulations 79 and 83 of the Elections (General) Regulations, 2012 (hereinafter “the Regulations”) Form 35 and the Certificate issued pursuant thereto constitute a declaration of the results under Article 87(2) of the Constitution.

16. I have looked at Regulation 79 of the Regulations and I do not see its relevance to a declaration of the outcome of an election in terms of Article 87(2) of the Constitution. That Regulation provides for the presiding officer, the candidates and agents signing a declaration in respect of results in a polling station. For a Governor, the results of an election are announced at the county tallying centre. Regulation 83 provides that the Returning officer shall, after receiving the results of the poll from all the polling stations, complete Form 35 set out in the schedule and declare amongst others the name of the electoral areas, total number of registered voters, votes cast for each candidate, aggregate number of rejected votes, sign and date that form. He is to deliver the said form to the IEBC. A look at Form 35 to the schedule would show that the said form issued pursuant to Regulation 79(2) (b) and 83 (1) (d) of the Regulations is for the Declaration of, inter alia, Governor Election Results **at a polling station**. The declaration part of the form at No. 6 shows that the same is to be signed by the presiding officer, his deputy, the candidates or their agents. From the foregoing, it is clear to my mind that Form 35 is but a declaration of the Election Results for various polling stations within an electoral area i.e. Constituency or County as the case may be. It does not declare or contain the results of the entire county. There would be as many Form 35 as there are polling stations in a given electoral area. In this regard, which particular Form 35 can be said to have contained the declaration of the results for the County of Kajiado? Firstly, none was produced and secondly, even if any were to be produced they would be so many as not to contain a single declaration of results for the election of the Governor for the County of Kajiado.

17. Regulation 87 of the Regulations provides how the returns of the persons elected is to be made. The County Returning Officer is required under Regulation 87(3) (a) to tally and announce the results for the Governor and submit the results received by the returning officers with results tallied to IEBC. It is only then that under Regulation 87(4) (b), that IEBC then publishes a notice in the Gazette showing the names of the persons elected.

18. I have looked at Section 39 of the Elections Act. It provides that:-

“(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.”

From the said Section, it is clear that IEBC is to determine, declare and publish the results immediately after close of polling. It is also clear from that provision that IEBC is mandated to announce the provisional results of an election. From the regulations I have examined above, right from the polling station, the constituency up to the County level, there is tallying of results at each level before the commission publishes the names of the elected persons in the Gazette. Following that sequence therefore , I am of the view that what the presiding officers, the Returning Officers and County Returning officers do, is to announce the provisional results. Neither Forms 35 nor the certificate issued in terms of Form 38 are in my view a declaration of the results of an election. They are but a record of the election results from polling stations and a document certifying that someone has been elected in respect of a named electoral area.

19. That being the case, what is the meaning of “declaration of results” in terms of Article 87(2) of the

Constitution? The term declaration has been legally defined in **BLACKS LAW DICTIONARY, 9th Edn. 2009** at page 467 as:-

“A formal statement, proclamation or announcement, esp. one embodied in an instrument” (Emphasis mine)

I looked for any other legal definition of that term but did not see any. That being the case, I find it very difficult to agree with the Respondent’s contention that my sister Hon. Mumbi J. was wrong in her finding in the **Waititu case**. In that case, she held that the Gazette Notice by the IEBC is the instrument that contains the formal declaration of results of an election. Having analyzed the statutory provisions and regulations relied on by the Respondents, I do not find anything therein to persuade me to depart from that decision. 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.

20. Being of that persuasion, I hold that Section 76(1) of the Elections Act, 2011 is not inconsistent with Article 87(2) of the Constitution of Kenya. I also hold that the results for the County of Kajiado were declared on 13th March, 2013 in Gazette Notice No.3155. It therefore follows that the Petition filed on 8th April, 2013 by the Petitioner was filed within the time allowed by law and the Preliminary Objection by the 1st and 2nd Respondent dated 8th May, 2013 is without merit. The same is hereby dismissed with costs to the Petitioner.

DATED and **DELIVERED** at Nairobi this **17th** day of **May**, 2013.

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A. MABEYA

JUDGE

In the presence of
Mr. Okworo for petitioner

Mr. Ndubi/Mr. Agina & Mr. Imende for Respondents

Hassan – court clerk