



REPUBLIC OF KENYA

High Court at Bungoma

Election Petition 1 of 2013

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2013 NO 24 OF 2011

AND

IN THE MATTER OF NATIONAL ELECTIONS FOR COUNTY REPRESENTATIVE FOR
MISIKHU WARD, WEBUYE WEST CONSTITUENCY, BUNGOMA COUNTY

BETWEEN

MILKAH NANYOKIA MASUNGO.....PETITIONER

Versus

ROBERT WEKESA MWEMBE.....1ST RESPONDENT

BENARD ODUOL-RETURNING OFFICER

WEBUYE WEST CONSTITUENCY.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

Preliminary issue: Directions by the court

[1] On 9th May, 2013, by consent of the parties, the court issued the following directions:

That the P.O's filed on 24/4/13 and on 3/5/2013, be heard together with the application by the Petitioner dated 3/5/2013.

[2] P.O is an abbreviation for Preliminary Objection. The P.O's referred to above, are questioning the jurisdiction of this court, whereas the Petitioner's application dated 3/5/2013, is asking the court to transfer this petition to a Chief Magistrate's Court, Bungoma or any other competent court for hearing and disposal.

THE QUESTION OF JURISDICTION

Respondents' submissions

[3] The court allowed the Respondents to begin as theirs were P.O's. Mr Mutubwa and Mr Situma, counsels for the Respondents, urged that, this court has no jurisdiction to try this petition which is challenging an election of a member of county assembly. It is a Resident Magistrate Court designated by the Chief Justice which would have jurisdiction on the subject matter of the petition. Both counsels ably argued; that jurisdiction is everything and once it is lacking, the concerned court is required to down its tools. On that basis, they asked this court to down tools and strike out the petition. The celebrated case of

'Lilian s' was relied upon to augment this point.

[4] Again, both counsels posited that, the High Court does not have the power to transfer the petition to a Resident Magistrate Court for two reasons: First, the petition was filed in a court without jurisdiction, and, therefore, this court is devoid of jurisdiction to transfer the petition: Second, the High Court has no power to constitute an election court consisting in a Resident Magistrate; only the Chief Justice would under the law.

[5] They fortified their arguments further, that, the High Court, in election petitions: exercises a special jurisdiction of the nature of *sui generis* which is conferred by the Chief Justice by name and notice in the Gazette of the particular judge to preside over particular petition(s); and can only give orders set out under section 76 of the Election Act. To them, a transfer of this petition is not legally feasible under the existing electoral laws. They termed the application for transfer as an abuse of the court process.

[6] The relied on the following judicial authorities in support of their perspective on this matter:

1. The Owners Motor Vessel 'Lilian S' v CalteX Oil Kenya Ltd (1989) KLR
2. Speaker of the National Assembly v James Karume (1995) eKLR
3. Francis G. Parmisei & 2 Others (2012) eKLR
4. Joho v Nyanga & Another (NO. 2) (2008) 3 KLR
5. Hunker Tradding Co Ltd v Elf Oil Ltd (2010) eKLR
6. Peter Ngoge & Associates v Amm Inv Co L TD (2012) eKLR

Petitioner's perspective

[6] The Petitioner, represented by Mr Sichangi, holds a different view on the question of jurisdiction of the court. According to him, the jurisdiction of the High Court is not donated by Section 75 of the Elections Act, but by Article 165 of the Constitution. His argument, he says, finds support in the Constitution which established the High Court and conferred it with unlimited jurisdiction in civil and criminal cases. He cannot fathom how such jurisdiction that has been conferred by the Constitution can be taken away by an Act of Parliament or subsidiary legislation. Any legislation that attempts to do that would be unconstitutional. It is only the Constitution that can take away a jurisdiction which it has conferred.

[7] Going by the orientation of the Respondents on the question of jurisdiction, Mr Sichangi submitted that, it is not fatal for this petition to have been filed before the High Court. He submitted that, the High Court and the Resident Magistrate Court exercise a concurrent jurisdiction on election petitions challenging an election of a member of county assembly which cannot be taken away by subsidiary legislations like the Election Rules, 2013. The High Court can, therefore, transfer this petition to the right forum for hearing. He expressed utter shock on the arguments by the counsels for the Respondents, that the court cannot transfer this petition to the appropriate court for hearing.

[8] Mr Sichangi's arguments were even more visible when he said that, under Article 165(3) (a) and (b) of the Constitution, the supervisory jurisdiction is reserved to the High Court; and a transfer of this petition could be done under that jurisdiction. He confessed that the filing of the petition in the High Court was a bona fide mistake, and given the nature of this dispute, the decision of the court on the issue at hand should not be on technicalities.

ON DEPOSIT OF SECURITY

Respondents' submissions

[9] Counsels for the Respondents hold the view that, the petitioner is bound by section 78(1) of the Elections Act to deposit security for costs with the Registrar within ten (10) days of the lodging of the petition. Any petitioner at default of this requirement should not be heard to apply for enlargement of time to make the deposit. Accordingly, a petition which is filed without security for costs deposited in court as required is set for dismissal; and the lapse cannot be cured by enlargement of time. To fasten the argument, legally and technically, time that has lapsed cannot be enlarged.

[10] The Respondents, are convinced, that, since the court lacks jurisdiction to hear the case, the petition was, thus, dead on arrival, which means, there is not petition before the court in the first place and so, there is nothing to transfer. For those reasons, they pray that the petition be struck out.

Petitioner's view

[11] Mr Sichangi is of the view that the requirement for the deposit of security for costs within a given period is flexible, and could be enlarged under rule 20 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Failure to deposit security for costs within time is, therefore, not fatal.

[12] In sum, he prays that this court finds that it has jurisdiction and transfers the petition to the appropriate court for hearing and disposal.

ABOUT ARTICLE 159(2) (d) OF THE CONSTITUTION

[13] What I find to be quite exhilarating is the discourse on Article 159(2) (d) of the Constitution. Counsel for the petitioner urged that, the Article commands the court to disregard all technicalities and serve substantial justice. And, a party should never be denied an opportunity to be heard; that should be the last resort. To him, the Article is able to cure the factual situation in this petition; of its being filed before the wrong court.

[14] Counsels for the Respondents, on the other hand, contend that the question of jurisdiction is not a technicality but rather, a substantive issue; and cannot be cured by article 159(2)(d) of the Constitution. I too agree.

COURT'S RENDITION

The framework

[15] The issue that has arisen is an important one. It will be unfair to prattle on it. I will, instead, engage in a more searching and deep treatment of the issue. As I have said before, and I repeat; these are defining times when courts, legal practitioners and scholars, and other eminent disciplines are engaged in interpretation sessions of the Constitution. It is a task that we must do with wise circumspection in order to adopt an interpretation that gives effect, in a pragmatic manner, to the objects, values and purposes of the Constitution; avoid those that are ephemeral, for those that are more lasting and enduring. That is the constitutional framework within which I should determine this matter.

Jurisdiction is everything

[16] This argument on jurisdiction is not novel; it has been presented many times before. Nevertheless, the question will forever remain very important in adjudication of cases by courts. Without doubt, jurisdiction is everything; it is *sine qua non* the court's authority to adjudicate a legal dispute. It a principle that was elucidated on in a masterly fashion in the celebrated "**Lilian S' case** and has become the sweetest canticle on jurisdiction, that:

"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[17] In accordance with section 75(1A) of the Elections Act and rule 6(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013, the proper court to hear and determine a petition questioning the validity of the election of a member of a county assembly, is a Resident Magistrate's Court designated by the Chief Justice. That jurisdiction is not disputed, and the High Court does not intend to usurp jurisdiction.

THE ISSUE

[18] However, the issue here is: whether or not it is competent for the High Court to transfer to the appropriate court for hearing and determination, an election petition that had been wrongly filed before the High Court.

Two schools of thoughts

[19] As far as my understanding goes, there have been two schools of thoughts on this subject. The issue has always been a sort of squirm to the courts of law which had been confronted with this question. Some courts have agreed to transfer the case; while others have declined and struck out the case. I admit, there has been a dichotomy in approach by our courts on this issue.

[20] On my part, the decision of the court should be guided by looking at the situation in this case, which is somewhat different: it is not a purely private civil claim as shall be borne out later, and should, therefore, be considered from a more public-spirited approach within the country's constitutional structure, which is quite a departure from the earlier constitutional design on access to, and administration of justice.

High Court: devoid of jurisdiction to transfer the petition?

[21] Is the High Court devoid of jurisdiction to transfer this case to the proper court for determination? The answer to this question should be seen within the authority of the High Court to transfer cases as a jurisdiction by itself. I hold the view that, the jurisdiction to transfer cases ordinarily resides in a superior court; in this case it is the High Court. Unlike in purely private civil claims, the jurisdiction should be broadly exercised in public-law-remedy proceedings depending on the circumstances of each case. I am not able to find any express limitation on that kind of exercise of that jurisdiction in the Constitution or a statute or a charter that Kenya has ratified. Nor has it been ousted, expressly or by necessary implication by the Constitution or Elections Act or the Rules. I do not, therefore, agree that the order sought cannot be granted under the Elections Act.

The scope of exercise of power to transfer

[22] The authority of the High Court to transfer cases should be exercised in the interest of justice without unnecessary limitations. See case of ***Matayo K. Kaboha v Abibu Bin Abdalla and Others (1936-51), 6 U.L.R. 121***. In transferring a case to the appropriate court for disposal, the High Court will not be deciding on a substantive issue in the case; it is simply exercising its power to transfer cases as a superior court. That power, it bears repeating, is a constitutional power vested in the High Court, and should not be limited by a practice of by-gone years: which is out of tune with our Constitution. What is imperative is for the court to pay homage to the Constitution by developing strong deprecation against any position that negates the demands of the Constitution. It is the kind of legal evolution that is necessary in any country that is advancing in the polity of legal, socio-political and economic realities.

[23] At this point, it is important to state that the principal considerations in an application of this nature include:

- a) Constitutional principles
- b) Balance of convenience,

- c) Questions of expense,
- d) Interest of justice;
- e) Nature of claim
- f) Is there a possibility of undue hardships?
- g) Is court in doubt on whether to grant a transfer?

I will consider these considerations at a later stage.

[24] Majority of the judicial decisions on the question before me were on civil suits under the respective civil procedure rules, and were decided within the existing constitutional and statutory designs upon an express provision of the law, say, Section 18 of the Civil Procedure Rules. These cases are legion and I do not wish to multiply them, except, see and distinguish on the above basis, the case of ***Kagenyi v Musiramo and another* [1968] E.A. 43** and the case of ***Andre Vernon Oosthuzein v Road Accident Fund (258/10) [2011] ZASCA 118 (06/07/11)***. The courts in these cases did not transfer the impugned cases. Particularly reference is made to the reasons advanced in the latter case by the Supreme Court of South Africa that; the case was a purely civil claim where the plaintiff is taken to have made the choice to file the case in the wrong forum; there was a specific provision to cover the situation; and that there was no public interest involved that would call the court to invoke its inherent jurisdiction in the interest of justice. Contrast this with the present situation where, the case before me involves a *public-election dispute*, and there is no specific provision on the subject, save for the undergirding constitutional prescriptions on access to, and dispensation of justice. Consider also that in the case before me, as shall become apparent shortly, the major primary considerations attending an application for transfer have been raised for determination.

CONSTITUTIONAL UNDERPINNINGS

Election petitions: Public-Interest disputes

[25] The approach I have adopted follows after the constitutional prescriptions on access to justice and administration of justice, particularly in election disputes. I am guided by the words of wisdom by Honourable Justice (Prof.) J.B Ojwang, Justice of the Supreme Court of Kenya, in a seminar-paper he delivered to the Colloquium for Selected Bench on Election Disputes on 23rd April, 2013, entitled; ***Election Disputes and the Judicial Process: Emerging Lessons***, that:

To those categories of action sui generis, we should add public-election disputes....And no election is of bona fide interest to the litigants; on the contrary, elections are of much more substantial interest to the voters and to the public at large.

[26] For emphasis, see the case of ***John Kiarie Waweru v Beth Wambui Mugo & 2 Others* [2008] eKLR** that;

....election petitions are not ordinary suits where a party is enforcing a right that accrues to him as a person. The court has to take cognizance of the fact that an election is a signification of the exercise of the democratic rights of the people to have a person of their choice represent them in the National Assembly.

[27] Election disputes are, therefore, not purely private disputes to be confined to strict rules which apply to private disputes; but should be seen as *public-election disputes*; falling under the league of *sui generis* proceedings. Since such disputes carry remedies of a public character, they, in all civilized legal systems, enjoy a degree of liberal approach under the Constitution and the laws of the nation. And, it is indisputable, the fact that a party has lost interest in a *public-election dispute*, does not necessarily mean that the remedy cannot be granted.

[27] To cap the reasons above, *all election disputes raise questions on the integrity of the electoral process*, which is public-serving process. There is, therefore, real practical value in those statements by the Honourable Judge, and are imbued with public law connotations. Public law disputes operate *erga omnes*, so to speak, and scarcely does strict *inter partes* fairness in such disputes, do justice to rights and obligations of a public character-least of all in public-election disputes. Thus, momentous electoral issues should not be determined only as between the parties in the proceeding, but with reference to the wider interest of the residents of the concerned electoral area [Misikhu Ward] to challenge the validity of the election of a member to the county assembly as their representative: a right that is guaranteed under the Constitution. This is, indeed, the justification for rules 23-29 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

[28] The above recapitulation of the broad constitutional underpinnings brings me to the point where I should address the rigid and restrictive constitutional timelines for filing of election petitions. If the court were to hold that the petition is incapable of being transferred, then, the petitioner and the voters in Misikhu Ward, Webuye West Constituency, Bungoma County, who would have an interest in the petition would lose their right to challenge the validity of the election of the 1st Respondent to the county assembly forever. I do not think, the Constitution ever intended to rob peoples' rights in that manner. The true intention of the Constitution is mirrored in a court's interpretation that gives effect to the spirit, objects, values and purposes of the Constitution. See the case of ***Maneka Sanjay Gandhi v Rani Jethmalan (1979) 4 SCC 167***, where the Supreme court of India had some splendid proposition on exercise of the power of transfer of cases as follows:

Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for the transfer is made...Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer.

What could be *more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment* than ensuring public justice for, and the right of the people of Misikhu Ward to have this public-election dispute resolved in a hearing by a competent court? It makes sense, therefore, to state that, the new constitutional order and the growing awareness that election disputes are public- disputes should lead the courts and the National Assembly to develop new norms and standards to deal with applications of the type before the court.

Supervisory power

[29] An order for transfer of a case to a subordinate court is an exercise of a judicial function of the High Court within the sphere of administration of justice. I have stated earlier, the High Court is not devoid of the jurisdiction to transfer a petition filed before it but which relates to the election of a member to a county assembly.

Demands of the Constitution; per se

[30] The power of the High Court to transfer this petition is not a matter of mere judicial practice, rather, it is an exercise of a jurisdiction founded on the constitutional command that the court; should not deny, but promote, the right of a party to access justice; should serve and promote substantial justice. Article 159 spells out the principles that guide the exercise of judicial authority delegated to the courts by the people of Kenya under Article 1(2)(c) of the Constitution of Kenya, 2010; of essence, the court must act in accordance with, protect and promote the purpose and principles of the Constitution.

[31] I am convinced, in this case that is *public-election dispute*, and in other matters of public law, courts should adopt a purposive interpretation of the law in tandem with Article 259 of the Constitution: as to promote the purposes, values of the Constitution; advance the rule of law; and permit the development of the law. The requirement for development of the law by the courts, is a clarion call for the courts to build jurisprudence that supports a pragmatic reconciliation of the live objects in the Constitution with legal theory; move away from the incidence of driving a person from the seat of justice without allowing the

person a treatment on substantial justice, to a more sensitive constructive touch with constitutional realities.

Transfer is not constitution of an election court

[32] It is doubtless that the Chief Justice is the only person mandated by the Elections Act to constitute an election court to hear and determine an election petition on the validity of the election of a member of a county assembly. The High Court, therefore, cannot constitute an election court for that purpose. However, it is not entire defensible to equate an order for transfer of this petition by the High Court, to "*constituting an election court*", in the sense of the Elections Act and Rules.

[33] The order for transfer is a general order directed to the Resident Magistrate's Court, with the aim of placing the petition in the right Court, and Registry. The relevant Court Registry will then employ the laid down administrative mechanisms to enable the Chief Justice to constitute the election court for the particular petition. Invariably, all petitions are filed in the appropriate court registry before an election court is constituted. Therefore, there should be little difficulty in understanding this simple reality, and that transfer of this petition is perfectly in order.

Will trial court face any practical or technical difficulties on the petition?

[34] On purely practical terms, the pleadings filed in this petition fully comply with the technical and substantive requirements prescribed for a petition filed in a Resident Magistrate's Court pursuant to section 75 (1A) of the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules, 2013. The election court will, therefore, not have any technical or practical difficulties in proceeding with the petition.

Issue was raised at opportune time.

[35] Before I make my final order, it is profitable to state that the issue in question was raised *in limine*- and at opportune time- which should be contrasted to a situation where the court has heard a case, and at the tail end of proceedings, is when the issue of jurisdiction is raised. Each of these situations would, ordinarily though not invariably, produce different result.

PROBITY OF ORDERS

[36] I have considered all the rival submissions by parties, and the authorities filed herein, and I must state that this court is not in any doubt as to whether, in the circumstances of this case, it is competent for the petition herein to be transferred. I am alive to the fact that refusal to transfer this petition to a competent court for hearing and disposal will be a service to purely individual *inter partes* fairness at the expense of the wider public justice of the residents of Misikhu Ward. I should, therefore, make an order for transfer guided by the fact that it:

- a) Is in the interest of justice
- b) Is supported by the Constitution and a construct of jurisprudence that would be of contemporary value under the Constitution
- c) Gives effect to the objects, values, principles and purposes of the Constitution on access to, and dispensation of justice
- d) Is inexpensive, causes no prejudice or undue hardships to any of the parties herein
- e) Reinforces the right of the people of Misikhu Ward, Webuye West Constituency in Bungoma County to have the dispute on the election of the 1st Respondent as their representative to the county assembly.

f) Is, on balance of convenience, the right thing to do in the circumstances of this case

ORDERS

[37] *Accordingly, it is hereby ordered that this petition is transferred to the Resident Magistrate's Court, Bungoma Law Courts, as shall be assigned by the Chief Justice to hear and determine the validity of the election of the 1st Respondent as a member of county assembly for Misikhu Ward, Webuye West Constituency in Bungoma County.*

[38] *The issue of deposit of security for costs under section 78 of the Elections Act is a substantive matter that should be determined by the election court that has been properly constituted in accordance with the Elections Act and the Elections (Parliamentary and County) Petition Rules, 2013.*

Need for legislative provision on transfer

[39] I would have failed, if I did not express the desirability of providing for an express provision in the Elections Act, on the power of the High Court to transfer an election petition that has been filed in the wrong court. Such legislative act would be in tandem with the Constitution, and would obviate the kind of discourse the court has had to entertain on the subject.

Dated, signed and delivered in open court at Bungoma this 17th day of May, 2013

**F. GIKONYO
JUDGE**

In the presence of:

Court Assistant: E. Khisa

Situma for the 1st Respondent

Situma for Watubwa for 2nd and 3rd Respondents

Sichangi for Petitioner

COURT: Ruling read in open court.

SITUMA: I pray for copies of certified ruling.

COURT: Certified copies of the ruling be provided by the court to all parties on payment of requisite fee.

**F. GIKONYO
JUDGE**