



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

KAKAMEGA LAW COURTS

ELECTIONS PETITION NO.7 OF 2013

**IN THE MATTER OF THE ELECTION OF THE MEMBER OF NATIONAL ASSEMBLY FOR
LUANDA CONSTITUENCY**

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011, NO. 24 OF 2011

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2013**

BETWEEN

AURTHUR KIBIRA APUNGU.....1ST PETITIONER

JULIUS ABRAHAM SIKALO OCHIEL.....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER,

LUANDA CONSTITUENCY... ..2ND RESPONDENT

CHRISTOPHER OMULELE.....3RD RESPONDENT

RULING

1. The 1st & 2nd Respondents to the Petition filed a notice of motion dated 13/5/2013 seeking orders that this Honorable Court does strike out the petition dated 4/4/2013 and filed on 8/4/2013 and that the Petitioner does pay the costs for this application and the entire cause. The application is premised on grounds as set out in the application and is supported by an affidavit sworn by Moses Kipkoge, a Legal Officer with the 1st Respondent.

2. It is the 1st and 2nd Respondents' claim that the petition is incompetent and fatal as it was filed out of time and in breach of the mandatory provisions of the Constitution of Kenya and the Elections Act. The 1st and 2nd Respondents contend that the provisions of Section 77 of the Elections Act and Article 87(2) of the Constitution state that election petitions, other than the presidential election, shall be filed within 28 days after declaration of the results. Thus, the 3rd Respondent having been declared elected on 5/3/2013, the statutory period of filing the petition lapsed on 2/4/2013. The 1st and 2nd Respondents contend that the declaration of election results in respect to elections of Member of National Assembly is in Form 36, which, was executed upon declaration on 5/3/2013. Accordingly, the petition is filed out of time. Further, it is alleged that the provisions of Section 76 of the Elections Act is inconsistent with the provisions of Article 87(2) of the Constitution.
3. This application was opposed by the Petitioners who filed a Replying Affidavit sworn by the 1st Petitioner on 23/5/2013. He deposed that this application is in bad faith and serves no purpose other than to delay the time available to the Petitioners to prosecute their petition to its logical conclusion. He deposed that he is aware that the 3rd Respondent was declared winner of the parliamentary election, the subject matter of this petition, by the 1st Respondent on 13/3/2013 vide a publication in the special issue of the Kenya Gazette Vol. CXV under gazette notice no. 3159. The 1st Petitioner further deposed that the said gazette notice was issued by the chairman of the first respondent in exercise of powers conferred by articles 88, 93, 97, and 99 of the Constitution. Thus the declaration of persons as members of National Assembly on 13/3/2013 is founded on the rule of law and cannot be vitiated by a certificate of results issued by the 2nd Respondent.
4. It was the 1st Petitioner's disposition that the announcement and declaration of results by the 1st Respondent on 13/3/2013 is not lost on the 1st and 2nd Respondents as they have expressly pleaded at paragraph 9 of their response to the petition that they announced and published a gazette notice declaring the 3rd Respondent as duly elected member of the national assembly of Luanda Constituency. Therefore, the said Respondents cannot blow hot and cold over an issue that is not contested in the petition. Accordingly, it cannot be said that the petition herein was filed out of time, as time for filing the petition in court started running from the declaration of the results on 13/3/2013.
5. The 1st Petitioner deposed that the issues raised in the petition were not frivolous and that the ends of justice both for the parties herein and the electorates in Luanda Constituency can only be met if the Court is given an opportunity to inquire into the evidence adduced at a full hearing of the petition. It was his disposition that the petition is well anchored in the constitution and that the remedy for striking out the petition is not available to any of the respondents as it runs contrary to the overriding principle to ensure just, expeditious, proportionate and affordable resolution of the electoral dispute.

Background

6. The Petitioners being aggrieved with declaration of the 3rd Respondent as the elected member of the National Assembly for Luanda Constituency filed a Petition dated 4/4/2013 together with an Affidavit in support of the same sworn on the same date. Both the Petitioners were candidates in the Parliamentary election having been nominated by different political parties to contest for the said seat. The Petitioners averred that the election was not conducted in accordance with the provisions of the Constitution, the Elections Act and the Regulations thereunder which seriously affected the said election to their detriment. The Petitioners thus prayed for *inter-alia*, scrutiny of votes cast including those declared rejected, counterfoils, register of voters; inspection of ballot boxes; recount of ballot papers cast; the parliamentary election held in Luanda Constituency be determined and declared null and void; a determination that the 3rd Respondent was not validly elected as member of National Assembly for Luanda Constituency and the Respondents be condemned to pay costs of the Petitioners and those incidental to the Petition.

Submissions

7. This application was canvassed by way of both written and oral submissions. The 1st and 2nd Respondents herein filed submissions dated 30/5/2013 wherein they reiterated the contents of their application. The 1st and 2nd Respondents submitted that it was undisputed that the petition dated 4/4/2013 was filed on 8/4/2013. It was thus filed 35 days after the declaration of results by the 2nd Respondent and 26 days after publication of the said results in the Kenya Gazette. The 1st and 2nd Respondents contended that the petition was filed outside the time stipulated by the Constitution and the Elections Act. Further that there was a distinction between declaration of results and publication of the same in the Kenya Gazette.
8. The 1st and 2nd Respondents submitted that Article 87(2) of the Constitution and Section 77(1) of the Elections Act are couched in identical terms and both create a positive and irrefutable obligation on the part of the petitioner to file a petition within 28 days after the declaration of the election results by the 1st Respondent.

Article 87(2) of the Constitution provides:

“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 77(1) of the Elections Act,

“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”.

The Petitioner sought to rely on the provision of Section 76(1) (a) of the Elections Act which, according to the 1st and 2nd Respondents, materially differs with both Articles 87(2) of the Constitution and Section 77(1) of the Elections Act.

Section 76(1) (a) of the Elections Act,

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

9. Accordingly, the 1st and 2nd Respondents submitted, Section 76 is inconsistent with Article 87(2) of the Constitution and Section 77(1) of the Elections Act in so far as it uses the wording ‘publication of the results of the election in the Gazette’ instead of ‘declaration’. The 1st and 2nd Respondents contended that the two are distinct and separate events from the interpretation of the terms generally and as used in the electoral code, that is, from the Constitution, Statute and Regulations. The 1st and 2nd Respondents further submitted that the effect of the provision of Section 76 (1)(a) of the Election Act was to enlarge time of lodging a petition from the date of declaration of the results to the date of publication in the Kenya Gazette, hence its unconstitutionality. Such enlargement of time by a period of 8 days from 5/3/2013 to 13/3/2013, the 1st and 2nd Respondents submitted, would defeat the intention of timely and expeditious settlement of electoral disputes as provided under Article 87(1) of the Constitution. The 1st and 2nd Respondents called upon this Court to declare the provisions of Section 76 of the Elections Act unconstitutional to the extent to which it extends the computation of time from the date of declaration of results to the date of publication of results in the Kenya Gazette.
10. In respect of the issue as to whether this Court would extend time for the filling of a petition out of time, the 1st and 2nd Respondents submitted that Rule 20 of the Elections (Parliamentary and

County Election) Petition Rules could not be used to extend time where a petition has been filed in breach of the mandatory provisions of Article 87(2) of the Constitution. Rule 20 of the Election Rules provides discretion to an election Court to extend time for anything to be done as provided under the Rules or as granted by Court. The 1st and 2nd Respondents submitted that the discretion to extend time is for those imposed under the Rules or by the Court itself. The 1st and 2nd Respondents maintained that this Court lacks discretion to extend time fixed and limited by the Constitution for filing an election petition after twenty eight days from the date of declaration of results.

Article 20 of the Election Rules, states:

“Where any matter is to be done within the time provided for in these Rules or granted by the Court, the Court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done on such terms or conditions as it may consider fit even though the period initially provided or granted may have expired.”

11. In support of their application, the 1st and 2nd Respondents relied on the decision by Mwangi J. in the case of **Clement Kungu Waibara & Anor. v Francis Kigo Njenga Petition No. 15/2013** and submitted that the Court had an opportunity to consider the issue raised in this petition. Mr. Mungai, counsel for the 1st and 2nd Respondents commented on the decision by Ochieng’ J. in the case of **Suleiman said Shahbal v IEBC & 3 Others Mombasa Election Petition No. 8/2013** wherein they submitted that the Judge therein agrees that S. 76 (1) (a) of the Elections Act contravenes Article 87(2) of the Constitution. Mr. Mungai submitted that parties cannot hide behind errors of Parliament where there is an express provision in the Constitution.
12. The Petitioners filed skeleton submissions dated 31/5/2013 in response to the 1st and 2nd Respondents’ submissions. The Petitioners maintained that the event that occurred on 5/3/2013 was not a declaration but an announcement of the provisional results pending official declaration by the 1st Respondent through the Kenya Gazette. Therefore the certificate of results, referred to and annexed in the 1st and 2nd Respondents’ supporting affidavit marked “MK-1”, is not a declaration of results by the 1st Respondent as provided in the Constitution but is merely a provisional statement allowed by law. They submitted further that in interpreting the Constitution, the Court must uphold and give effect to the spirit of the Constitution, always ensuring that the interpretation is in tandem with the aspirations of the citizenry and modern trends. The 1st and 2nd Respondents submitted further that there was no dichotomy between the usage of the words “publication” and “declaration” in the Kenyan legal system.
13. Mr. Muyondo, counsel for the Petitioners also made oral submissions. He reiterated that declaration of results is by gazette. Kenya Gazette Notice No. 3159 of 13/3/2013 refers to the declaration of the persons elected as members of national assembly for each constituency. Mr. Muyondo further submitted that in the event that the Court struck out the petition as prayed in the application only to be referred back to the High Court or a re-trial ordered by the Court of Appeal, there may be no time to hear the petition because the 6 months constitutional period within which a petition should be determined shall have expired. Counsel prayed that the petition be heard on its merits. In support of their opposition to this application, the Petitioners relied *inter-alia* on the following cases of **Josea T.K. Kores v Dr. David Ole Nkendenye & 3 Others E.P (Nairobi) 6/2013**, **Suleiman S. Shahbal v IEBC & 3 Others E.P (Mombasa) 8/2013**, **Ferdinand N. Waititu v IEBC & 8 Others E.P (Nairobi) 1/2013**
14. The 3rd Respondent filed submission dated 13/5/2013 and fully relied on the same as per his counsel, Mr. Imbukwa. The 3rd Respondent supported the 1st and 2nd Respondents application. In their view, the main issue of law in the instant application is whether the provisions in the Constitution on electoral laws are to be considered to be mandatory and superseding the electoral laws found in statute, specifically Article 87(2) and S. 76 of the Elections Act. The 3rd Respondent

maintained that on the plain reading S. 76 of the Elections Act, it is inconsistent with Article 87(2) of the Constitution in so far as it states that the petition should be filed 28 days after publication and not after declaration. Thus, no effect of law can be given to S. 76 of the Elections Act. The 3rd Respondent alluded to the supremacy of the Constitution which is expressed under Article 2(4).

Determination

15. I have carefully considered the application and the grounds thereto, the affidavits and submissions in support and in opposition to the petition. In my view, there is only one issue for determination, that is,
- i. *Whether S. 76 (1) (a) of the Elections Act is inconsistent with the Article 87(2) of the Constitution and therefore unconstitutional.*
16. The Respondents submitted at length on this aspect and contended that the use of the words, ‘*within twenty eight days after the publication of results of the election in the Kenya Gazette*’ in S. 76(1) (a) of the Elections Act, materially differed with the expression of Article 87(2) of the Constitution, ‘*within 28 days after the declaration of results*’. It was their view that declaration of results was a distinct and separate event from publication thereof and that declaration occurred on 5/3/2013 and publication on 13/3/2013. The Respondents to the petition maintained that time within which to present an election petition started to run from the date of declaration being 5/3/2013 as stipulated in the Constitution and not 13/3/2013 as stated in the Elections Act. Consequently, the provisions of S. 76(1) (a) of the Elections Act essentially enlarged the window period of presenting a petition by 8 days. This, the Respondents submitted, was contrary to the timeframe stipulated in the Constitution and the latter being the supreme law of the land, any provision inconsistent with it is therefore unconstitutional.
17. The Petitioners submitted that the event of 5/3/2013 was a mere announcement of the provisional results pending the official declaration by the Commission on 13/3/2013 vide Kenya Gazette, such that time started running as from 13/3/2013 after the publication of the results in the Kenya Gazette. The Petitioners were of the view that S. 76 (1) (a) of the Elections Act was not inconsistent with Article 87(2) of the Constitution.
18. Statutes give effect to the provisions of the Constitution. At Article 87(1) the Constitution empowers Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes. With the powers derived from the Constitution, Parliament enacted the Elections Act, 2011 and its purpose expressly stated in the preamble thereto. Understandably, empowering Parliament to enact legislation is because the Constitution cannot contain in detail the laws, rules and regulations that govern all spectra. The Constitution only provides the yardstick that guides the making and interpretation of legislation. Thus, underlying the yardstick are numerous rigorous laws, rules and procedures set out in detail in the relevant Acts of Parliament. In the instant application, where the issue revolves around the phrase ‘*declaration of the results*’, I find that the Constitution under Article 87(2) plainly gave a yardstick of presenting an election petition before court, being 28 days. However, the Constitution, pursuant to Article 87(1), envisages that Parliament would have the power, through legislation, to ensure a timely framework of the said 28 days. Parliament in its wisdom, correctly determined that declaration of results is not a single process but a multiplicity of processes which for the purposes of clarity culminates and is concluded by the formal publication of the same via Kenya Gazette.
19. The Respondents submitted that the declaration of the election results by the Constituency Returning Officers through form 36 was what was contemplated by the Constitution, and that the timeline set, twenty eight days, commenced after such declaration and not anytime thereafter. The 3rd Respondent referred the Court to the Black’s Law Dictionary, 9th (ed) to obtain the definition of the term ‘*declaration*’, “*A formal statement, proclamation, or announcement especially one embodied in an instrument.*” Part XIII of the Election (General) Regulations, 2012 outlines the process involved in the counting of votes and declaration of results. The role of the Returning

Officer in this process commences at Regulation 83 of the Election Regulations when he has obtained the results of the polls from the presiding officers. On receipt of the results, he conducts a tally and fills out the requisite forms capturing the number of votes cast, rejected votes etc. Thereafter, at Regulation 87(2) of the Election Regulations, the Constituency Returning Officer, after tallying the results at the constituency level, (a) is mandated to *announce the results cast for all candidates* and (b) *issue certificates to persons elected to the National Assembly etc.* The announcement of these results is not final, as the Constituency Returning Officer (c) *electronically transmits the provisional results to the Commission.* The transmission of provisional results from the returning officers to the Commission is reiterated in sub-regulation 9 and 10. It is only upon receipt of the provisional results sent from the returning officers, that the Chairperson of the Commission, pursuant to Regulation 87 (4), shall publish a notice in the Gazette showing the name of the person elected. Section 87(4), “*Upon receipt of a certificate under sub-regulation (1), the Chairperson of the Commission shall-*

(b) in the case of the other elections, whether or not forming part of a multiple election, 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.”

20. From the foregoing provisions, it is observable that the announcement of the results by the returning officers is not the final exercise. The Returning Officers must still relay the results to the commission for its action through the Chairperson as stipulated under Regulation 87(4) (b). Notably, the results conveyed to the Commission are termed as provisional results. This is in spite of the Returning Officers issuing certificates to the elected persons in the National Assembly pursuant to Regulation 87(2) (b). This, in my view, signifies that the results declaration process is not formal until the same is published in the Kenya Gazette. The question still remains: is S. 76(1) (a) of the Elections Act unconstitutional? No, in my view it is not. I have outlined herein that the Constitution mandated Parliament to enact legislation to give effect to its provisions and, to govern elections and election dispute resolution. Further, it is also discernible that the Elections Act contemplates that the declaration of the results will be done by the Commission through its Chairperson by way of the Kenya Gazette. In that regard, I do not agree with the submissions by the Respondents that the effect of S.76 (1) (a) is to enlarge time by 8 days contrary to the provisions of Article 87 (2) of the Constitution.
21. I have had the privilege to look at decisions, in respect to the subject matter of this application, made before mine by my sister Mumbi Ngugi J. and, brothers Ochieng J., Odunga J. Mabeya J., Majanja J., and Mwongo J. These decisions are not binding upon me, but are nevertheless, persuasive. I note that the Respondents relied on the decision by Mwongo J. in **Clement Kungu Waibara & Anor. v Francis Kigo Njenga Petition No. 15/2013**, the Judge in the said case did dismiss the petition for being filed out of time. However, the Judge computed the time from the date of publication of the notice in the Kenya Gazette. The petition was filed on 18/4/2013, which is 36 days after 13/4/2013, being the date of publication.
22. Having found that S. 76 (1) (a) is not inconsistent with Article 87(2) of the Constitution, it follows therefore that computation of the 28 days commences from the date of publication of the notice in the Kenya Gazette. Therefore, the petition is filed within time as stipulated by the law.
23. The upshot of this ruling is that the 1st and 2nd Respondents application dated 13/5/2013 is hereby dismissed with costs to the Petitioners.

DATED, READ AND DELIVERED AT NAIROBI

THIS 20TH DAY OF JUNE 2013.

E. K. O. OGOLA

JUDGE

In the Presence of:-

Mr. Muyondo for the Petitioners

Mr. Mungai for the 1st and 2nd Respondents

Mr. Tollo for the 3rd Respondent

Teresia- Court Clerk

Legal Researcher - Jackie Kibogy