REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION NO. 15 OF 2013

IN THE MATTER OF THE ELECTIONS ACT, LAWS OF KENYA

AND

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

AND

IN THE MATTER OF THE ELECTION FOR THE MEMBER OF PARLIAMENT, GATUNDU NORTH CONSTITUENCY

HON. CLEMENT KUNGU WAIBARA…….....
…….. 1ST PETITIONER

HENRY NJENGA
MBOTE…….....….2ND
PETITIONER

VERSUS

HON. FRANCIS KIGO NJENGA…….....…….....
….1ST RESPONDENT

RETURNING OFFICER GATUNDU NORTH CONSTITUENCY…….....….
…..…2ND RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)…….....
…..….3RD RESPONDENT

ATTORNEY GENERAL…….....….
…..4TH RESPONDENT

RULING

Background

1. The application herein emanates from this court's Ruling of ***27th May, 2013***, striking out the above petition.

The striking out was done pursuant to a Notice of Motion application based on the grounds that the petition was unconstitutional as being contrary to ***Article 57 (1)*** having been filed out of time; that the petition offended ***section 77 (1)*** of the Elections Act as not having been filed within twenty eight days from the date of declaration of the election results; and that it was an abuse of the court process.

2. The court had held that the election law read together with the Constitution, being special jurisdiction, put the court into a strait jacket. Accordingly, this court held that:

"…..where, as in this case, there is a failure to comply with the constitutional requirements and no excepting provisions are available to remedy the failure and rescue the proceedings, it must lead to a declaration by the court that the petition is incurably, defective, and should be struck out. I so hold." (Paragraph 59 of the Ruling).

3. The Petitioner filed the present notice of motion under certificate of urgency on ***11th June, 2013***. The application seeks the following substantive orders:

"1. ……

2. That this honourable court be pleased to review and/or set aside the Ruling and orders of this court made on 27th May, 2013 dismissing the Petitioner's Election Petition dated 10th April, 2013.

3. That this honourable court be pleased to extend (sic) time and the Election Petition dated 10th April, 2013 be reinstated and fixed for hearing inter-partes.

4. ……."

4. The grounds for the application include:

"1. That there is a mistake or error apparent on the face of [the] record.

2. That a court of law should not allow presumptions of procedure and form to trump the primary object of dispensing substantive justice to the parties.

3. …….

4. …….

5. …….

6. ……..

7. That the court mistakenly fettered its discretion and failed to consider and exercise its inherent jurisdiction by enlarging time and allowing the petitioners to canvas their case and be heard on merit.

8. That although the petition was filed 36 (sic) after the date of declaration of elections, the

said delay was inadvertent and not voluntarily wished for.

9. …….

10. …….

11. …….

12. That the delay in filing a petition after 36 days (sic) is curable in law and not a basis for denying them justice at all.

13. That for any other sufficient reasons and in the interests of justice, the said Ruling and/or order ought to be reviewed and/or varied to the extent that the petition be reinstated for hearing on merits."

5. The court directed that the application be served within seven (7) days and, although it was ready to hear the same on 17th June, 2013, counsel for the applicant was not available until 5th July, 2013. That date was set for inter-partes hearing.

6. On 5th July, 2013, Dr. Khaminwa, Counsel for the applicant, was not present. His brief was however held by Mr. Wachira, who reported that Dr. Khaminwa had been taken ill in Malindi and sought an adjournment. All the respondents opposed the adjournment claiming they had only been served with the application on 1st July, 2013, and that there was no evidence of counsel's indisposition. The court allowed the adjournment, and directed the applicant to take a hearing date in the registry.

7. The application was heard on 15th August, 2013 more than two months after its filing.

Applicant's Contentions

8. Dr. Khaminwa contended that election petitions are creatures of the constitution; that the court must have in mind the context in which petitions arise when dealing with them; that elections have the potential to throw a nation into chaos and must therefore be handled with utmost care. He argued that the court should be generous on technicalities to the benefit of a petitioner who was in breach. He pointed out that the court is empowered under ***Articles 22 and 23 (3) (f)*** of the Constitution, to grant appropriate relief to an aggrieved party including an order of judicial review. Further, he stated that ***section 80*** of the Civil Procedure Act and ***Order 45 (1) (a)*** enable the court to review its ruling where there is an error on the face of the record.

9. Dr. Khaminwa contended that the error on the face of the record was in the court's holding that the petition was time-barred for late filing. He pointed out that this was a constitutional issue, and that the court would be narrow minded to so confine itself to the rules as to timeframe, resulting in striking out of the petition. It was his assertion that so long as a petition was filed at any time before the lapse of the six months' timeframe allowed for hearing and determination of petitions, the court should be willing to bend backwards to accommodate a petitioner, and not strike out a petition on what he called technical procedural grounds.

10. Counsel referred to ***Article 87*** of the Constitution as a procedural provision which does not willy-nilly tie the court's hands, as that, in his view, would be an error. Counsel relied on the petitioner's Affidavit in support of the application, and also on authorities which he had filed that morning, but not served on the parties.

11. All opposing counsel consented to the filing of the applicant's authorities, but pointed out that Dr. Khaminwa had not addressed himself to any of the said authorities.

Respondent's Contentions

12. The Respondents all opposed the application. Mr. Maina for the 1st Respondent, filed grounds of objection arguing that the application was a veiled attempt to re-open matters that the court had conclusively dealt with. He contended that the applicant essentially sought that the court do sit on appeal upon its own decision, yet it was ***functus officio***.

13. Mr. Murugara, for the 2nd and 3rd Respondents, also filed grounds of opposition and a list and bundle of fifteen authorities. He re-stated the grounds of opposition, and contended that the Civil Procedure Act and Rules were inapplicable to elections petitions. He provided the following authorities amongst others:

i. **Philip Mukwa Wasike v. James Lusweti Wasike & 2 Others**. **H.C.C. Bungoma Petition No. 5.2013 [2013] eKLR** and
ii. **Party of Independent Candidates of Kenya and John Harun Mwau v. Hon. Mutula Kilonzo & 2 Others**, **H.C.C. Machakos Election Petition No. 6 of 2013.**

In these cases, Omondi, J and Mutende, J, separately held that the Civil Procedure Rules do not apply to election petitions except where specifically provided for.

14. Mr. Murugara also argued that the court cannot sit on appeal on its own orders even where the Judge is accused of exercising his discretion wrongly, as that would be a ground for appeal- See **Humphrey Maina Kariuki & 4 Others v. Telepost Investment**, **Cooperative Society & Another**, **Nairobi HCCC 263 of 2004, cited in [2007] eKLR.**

15. Counsel further submitted that under the Election Act, the court has no power to review its decisions; that ***Article 23*** of the Constitution referred to by Dr. Khaminwa relates to judicial review proceedings and not proceedings for election petitions; that the court has no power to enlarge the constitutional timeframe for filing petitions; and generally that the application is misconceived and bad in law.

16. Ms. Irari, for the 4th Respondent argued that the court was ***functus officio*** and could not review its decision; that the court had exercised its discretion properly in striking out the petition; that the striking out was pursuant to an earlier application made under a notice of motion and duly argued; and that the elections Act and Election Petition Rules were made to bring into operation ***Article 87 (2)*** of the Constitution.

17. On fully considering the application and the parties' contentions, I am of the view that prayer 3 in the motion is for summary dismissal. No arguments for extension of time were broached by the applicant, and no case was made out in respect thereof. In any event, this court had fully considered the issue in its impugned Ruling, in reference to Articles ***87*** and ***261*** of the Constitution. The court found that no constitutional authority existed for such extension. That point cannot now be reviewed by me. The only route available to the applicant in respect of extension of time is through appeal.

18. The remaining issue for determination is whether the court can or should review and or set aside its Ruling. Dr. Khaminwa cited ***section 80*** and ***Order 45 rule 1 (i) (a)*** as grounding the application. He asserted that the impugned Ruling contained a mistake or error apparent on the face of the record. The alleged error, he said, is the fact that the petition was struck out on what counsel considers a technicality: that the petition was filed outside the timeframe allowed under ***Article 87 (2),*** read together with ***section 76*** of the Elections Act.

19. ***Article 87 (2)*** of the Constitution provides as follows:

"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."

And ***Section 76 (1) (a)*** Elections Act makes provision in similar

terms:

"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."***

20. The court, in its impugned Ruling, had considered these provisions. It does not appear to me that there is any other way of construing those provisions to allow for bending of timeframes to suit Dr. Khaminwa's argument that so long as a petition is filed within the timeframe for *hearing* of petitions, the court should bend backwards to allow a petition to be heard on its merits.

21. Any such interpretation would be repugnant to the justice expected by a Respondent to a petition, who is by law entitled to respond to a case against it, since such response must also be filed within the timeframes provided under the Elections Act. Any elasticity in time for the Petitioner would have a knock-on effect on the Respondents. This would affect such Respondents, on their part, in complying with the legal timeframes for replying to the case against them.

22. I do not see what it is in these provisions, or in the court's earlier interpretation of them, that can be construed as an error on the face of the record. Even if this court were to hold, which it does not, that the Civil Procedure Act and Rules are applicable to Election petitions, the applicant's real complaint is clearly that the court in its Ruling had interpreted those provisions strictly, rather than expansively or generously so as to allow for petitions to be filed beyond the stated twenty eight day period. From that perspective, the petitioner's application can only be construed as an appeal. If so, this court cannot sit on appeal on its own earlier decision, and I so hold.

23. I am also unable to appreciate Dr. Khaminwa's argument that ***Article 87*** of the Constitution is a mere procedural of technical provision, which would fall afoul of ***Article 159 (1) (d)*** that requires the courts to administer justice without undue regard to procedural technicalities. Both are constitutional provisions, and none has inherent supersession over the other. I am not aware of any principle of constitutional interpretation that requires the court to subjugate Article ***87 (2)*** to ***Article 159 (2) (d).***

24. Dr. Khaminwa prayed that the court should not be narrow in its outlook towards the handling of petitions filed late. That is neither an argument for review on the basis or ***Order 45***, nor is it a "*sufficient reason*" for review under that Order. It could form a ground of appeal but certainly not a ground for review.

25. I have carefully reviewed the authorities supplied by Dr. Khaminwa. In **Eastern and Southern African Development Bank vs. Africa Greenfields Ltd. & 20 others**, **H.C.C.C. Nairobi 1189 of 2000,** Ringera, J, found that the issue was whether or not the invocation of a wrong procedure or wrongful exercise of judicial discretion is a sufficient reason for review. He held that it was not and relied on **National Bank of Kenya Ltd. vs. Ndungu Njau**, **Civil Appeal No. 211 of 1996,** quoting the Court of Appeal as follows:

"It will not be a sufficient ground for review that a another Judge could have taken a different view of the matter, Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law, and reached an erroneous conclusion of law. Misconstruing a statute of other provision of law cannot be a ground for review."

In the **Eastern and Southern Africa Development Bank** case, Ringera, J, concluded:

> ***"In my opinion the proper way to correct a Judge's alleged misapprehension of the procedure in the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."***

25. I agree entirely with the sentiments of Ringera, J. In this case, Dr. Khaminwa presented an elaborate argument to identify the alleged error on the face of the record. I am unconvinced about that alleged error given the clear provisions of ***Article 87 (2)*** and ***Section 76*** of the Elections Act.

26. With regard to the Applicant's reference to **Michael Mungai vs. Ford Kenya Elections & Nominations Board & Others and IEBC & Another, [2013] eKLR,** the five Judge bench of this court held that:

> ***"……for one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see."***

The court there adopted relevant dicta from Muyodi **vs. Industrial and Commercial Development Corporation & Another [2006] EA 243**, which in turn cited the famous dicta from **Nyamogo and Nyamogo vs. Kogo [2001] EA 174**, on the parameters of review.

27. The final authority filed by the applicant which I will review is the supreme Court of Uganda Case of Rtd**. Col Dr. Kezza Bessigye vs. Electoral Commission and Yoweri Kaguta Museveni**, **Presidential Election Petition No. 1 of 2006**, Uganda Supreme Court. Counsel provided only the "*Reasons for judgment of Odoki, C.J*." The highlighted section relates to the court's emphasis that the Presidential Elections Act anticipates that some non-compliance or irregularities may occur during the election, but such election should not be annulled unless the irregularities have affected it substantially.

28. The Chief Justice of Uganda then goes on to say in that case that the (Uganda) Constitution:

> ***" ….provides that in adjudicating cases of both a civil and criminal nature, the courts shall subject to the law, apply the principle, among others, that substantial justice shall be administered without undue regard to technicalities Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice."***

29. A keen reading of the Uganda Supreme Court's decision reveals that the court's mind was focused on the errors that occur during and within the electoral process proper. That is, errors such as those made by elections officers *during* the election process, which the court stated could be disregarded unless they had caused substantial injustice. A similar position avails under ***Section 83*** of our Elections Act. The Ugandan Court was not at all concerned with post-election errors such as that in the present case where there is failure to comply with a constitutional provision to file a petition within a given timeframe.

Accordingly, the Uganda Supreme Court's dicta is not applicable to the circumstances of the present case.

Disposition

30. For the foregoing reasons, I am not satisfied that the applicant has made a case warranting review of the court's earlier Ruling, or for extension of time so as to reinstate the petition. Accordingly, I hold that in the circumstances herein, this court has no power under the Elections Act to review its decision; and further, that the review provisions of the Civil Procedure Act and Rules are not imported into the comprehensive, substantive and procedural electoral law regime.

Accordingly, I hereby dismiss the application with costs to the Respondents.

Dated at Nairobi this 29th day of August, 2013.

R. M. Mwongo

JUDGE.

Delivered in the presence of:

1.Mr. Kinga holding brief for Dr. Khaminwa for the Petitioner.

2.Mr. Maina Njuguna for the 1st Respondent.

3.Mr. Murugara for the 2nd and 3rd Respondents.

4.M/s Irari for the 4th Respondent.