



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELECTION PETITION NO. 2 OF 2013

JACINTA WANJALA MWATELA.....PETITIONER

VERSUS

- 1. I.E.B.C.**
- 2. THE COUNTY RETURNING OFFICER (TAITA/TAVETA)**
- 3. THE SECRETARY I.E.B.C**
- 4. JOHNSON MTUTA MRUTTU.....RESPONDENTS**

RULING

Before this court is the notice of motion application dated 20th March, 2013 filed by the 4th respondent seeking the following orders.

“1. THAT this Honourable court do strike out the petition dated 26th March, 2013 and filed in the court registry on 5th April, 2013.

2. THAT the petitioner do pay to the 4th respondent the costs of the proceedings.”

The application which was opposed by the petitioner was heard by way of oral submissions on 13th August, 2013. **MR. KEMBOI** submitted in support of the motion, whilst **MR. KITHI** argued against the motion. The thrust of the applicant’s argument was that the General Election (the subject matter of this dispute) was conducted on 4th March, 2013. On 6th March, 2013 an announcement was made by the county returning officer declaring the 4th respondent **MR. MRUTTU** as the winner of the gubernatorial contest. Article 87(2) of the Constitution of Kenya sets out the time by which any petition disputing an election must be filed. Article 87(2) 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.”

Based on this provision of the law and based on the argument that the election results for the Governors seat were declared on 6th March, 2013, Mr. Kemboi submitted that the 28 days time limit would have expired to 3rd April, 2013. As such, the filing of this petition two days later on 5th April, 2013 renders the

petition inadmissible for being filed out of time, hence the application to have the same struck out.

Mr. Kithi for the petitioner on the other hand submits that the petition was filed within time, is not incompetent and is not for striking out. He relies on the provisions of section 76 of the Elections Act which provides:

“A petition to the 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.”

The election results were published in the Kenya Gazette dated 13th March, 2013. As such this petition having been filed 23 days after the date of such publication is well within the time frame provided for by the law. The major issue for determination here is the apparent inconsistency between the provisions of Article 87(2) of the Constitution and section 76(1)(a) of the Elections Act. Whereas Article 87(2) talks of 28 days after the declaration of results, presumably at the tallying centre, section 76(1)(a) is more specific and talks of 28 days after publication of the results in the Kenya Gazette. The question of how to resolve this inconsistency has engaged several Election Petition courts throughout the Republic and several decisions have been rendered. The matter was finally placed before the Court of Appeal vide **Malindi Civil Appeal No. 12 of 2013**. At this juncture I feel it is necessary to quote parts of the Court of Appeal determination:

“A casual reading of Article 87(2) of the Constitution reveals that time begins to run after the declaration of the election results by the IEBC. The issue and the bone of contention in this appeal therefore is whether declaration for the purposes of computation of time begins to run after the returning officer who is an agent of IEBC appointed to oversee the election at the constituency level has announced the results of elections at the constituency tallying centre or after the publication in the gazette as envisaged by section 76(1)(a) of the Act. Can the argument that the returning officer at the tallying centre determined and declared the relevant election results and that the role of the commission was merely to publish the same be true? We do not think so, and for reasons to be seen shortly.”

The Court of Appeal found that the declaration envisaged by Article 87(2) of the Constitution **was not** the announcement by the returning officer at the polling station. The court in discussing the apparent inconsistency between the Constitution and the Elections Act held:

“The obvious question thereafter is what are election results. In our view, the Elections Act and section 76(1)(a) having been enacted were meant to give effect to the provisions of Article 87(2) of the Constitution by providing the manner in which declaration of the results is to be done by the Commission. The declaration envisaged by the Constitution at Article 87(2) in our view is a formal declaration which would not surely be contained in forms 34 and 35. Blacks Law Dictionary, 9th Edition at page 467 has defined the work declaration as ‘a formal statement, proclamation or announcement especially one embodied in an instrument’.

It is not in question that Article 87(2) of the Constitution has mandated the IEBC to declare election results. These election results are what is obtained at the end of an election period. An election period has been defined under section 2 of the elections Act as;

“The period between the publication of a notice by the Commission for a Presidential, Parliamentary or county election under sections 14, 16, 17 and 19 and the gazettelement of the election results.”

The Court of Appeal went on to state (and I quote again):

“The obvious question thereafter is what are election results? Election results have been defined by the Election Act at section 2 as; ‘the declared outcome of the casting of voters by voters at an election’.

Concise Oxford English Dictionary has defined the word outcome as ‘a final product or end result’. We therefore find that the manner for the declaration of the results is by publication in the gazette and such finding cannot be inconsistent with the Constitution as Ochieng, J held. The basis of our so holding is as follows:

Firstly, election results as we have stated above imply the final outcome of the election. We have thereafter defined outcome as the ‘*end result or product*’. Surely, the end product or result must be that person who has won the election. We cannot attribute any other meaning to this word. Thus the gazette ought to declare the outcome of the election which is the person who emerged the winner in that election and not the scores garnered by each candidate. The scores as we have found above are to be found in forms 34 and 35 which are prepared by the returning officer. For one to challenge the outcome of an election one has to wait for the election period to end which ends with gazetteing of the outcome. It is only thereafter that one may file an election petition and the Chief Justice then constitutes the court that will determine that election petition as per Rule 6 of the Election Petitions Rules”. *[my own emphasis]*

As such the Court of Appeal concluded as follows:

“Clearly the gazette is the medium of communication between the government and its citizens. A declaration or notice as contained in the Gazette is to the whole world and gives notice to the general public. It can also be seen from the provisions of section 60 of the Evidence Act, that the gazette has the full force of the law. How else would the citizens who are not at a tallying center get to know the persons so elected to office if the declaration was to be contained in Forms 34 and 35 and as declared at the polling station and tallying hall respectively?”

This decision therefore settles for the time being the question of when time for the filing of an election petition starts to run. It is from the date of gazetteing of the election results. Is this court bound to abide by the Court of Appeal decision? Counsel spent much time arguing for and against this position. However, my own view is that there can only be one position. The doctrine of ‘*stare decisis*’ which is a fundamental aspect of our legal system dictates that a Court of Appeal decision is indeed binding on the High Court. The principle of ‘*stare decisis*’ exists to protect the certainty and uniformity that is key in the fair administration of justice. A court may only depart from this position in circumstances where a clear distinction can be drawn between the two cases. That is certainly not the position here. The question for determination in this application is “**on all fours**” with that which was presented before the Court of Appeal for determination. There exists no distinction. As such I do hereby find that this petition having been filed within 28 days from the date of gazetteing of the Election results was filed within time and is properly before the court. I therefore dismiss this application in its entirety and direct that the costs be met by the 4th respondent.

Dated and delivered in Mombasa this 22nd day of August, 2013.

M. ODERO

JUDGE