



**IN THE MATTER OF ARTICLE 89(11) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF DELIMITATION OF ELECTORAL UNITS**

**BETWEEN**

**CLR ELLIOT LIDUBWI**

**KIHUSA.....APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION.....RESPONDENT**

**RULING**

On 24th May 2012, we directed that counsel address us on Preliminary Objections raised by the respondent in relation to the following cases; JR 109/12 Nrb147/12, JR 125/12, JR 134/12, Pet No. 146/12, Pet No 129B/12, MISC. App. No. 134/2012, App. No. 139/2012 – Nairobi, JR. Misc. No. 144/2012 – Kisii, JR. 27/2012 – Kisii, JR. 148/2012 – Nairobi, Pet. 148/2012 – Nairobi. This was with regard to the period within which the matters ought to have been filed in accordance with Article 89(11) as read with section 36 of the Independent Electoral and Boundaries Commission Act (Act No. 9 of 2011) and regulation 5 of the Fifth Schedule. The Independent Electoral and Boundaries Commission (“IEBC”) argues that no party is allowed to file an application for review outside the period specified under Article 89 (11). The contention by the IEBC is that the report containing the decisions under Article 89 was published on 6<sup>th</sup> March 2012 through the Kenya Gazette. Counsel for the IEBC referred to Article 259(5) regarding computation of time and submitted that if time is expressed as days, as it is in Article 89(11) then there must be strict compliance. The Gazette Notice dated 6<sup>th</sup> March 2012 has been referred to in support of their argument. It was contended that the position is that 6<sup>th</sup> of March 2012 being the date of publication is excluded from the computation of time for filing and that the time begins to run from 7<sup>th</sup> March 2012, meaning that the last day for filing the application for review is 5<sup>th</sup> April 2012.

Mr. Lubullelah, counsel for the IEBC, further referred to Article 259 (6) which he submitted did not apply, and in any event the last day did not fall on a Sunday or a Public Holiday. He further submitted that the application for extension of time to lodge an application under Article 89(11), must be determined on the basis of Article 259 (9). According to counsel, authority to extend time must be provided under the Constitution and not statute. He stated that no authority for extension of time had been shown. Counsel submitted that the Constitution is clear that the application for review must be filed within 30 days and any applications filed after 5<sup>th</sup> April 2012 are time barred.

Mr. Lubullelah pointed out that the time for filing applications under Article 89 commenced by way of judicial review must be taken from the date the Notice of Motion is filed after leave has been obtained under the provisions of Order 53 of the Civil Procedure Rules. Thus all applications in which the Notice

of Motion was filed after the 30 day period must be struck out irrespective of whether the Chamber Summons seeking leave was filed prior to the 30 days.

The preliminary objection was opposed by counsel for the applicants and petitioners. Without being disrespectful to the advocates who addressed us but whose names are not mentioned, we highlight the principal arguments made in opposition. Mr. Nabutete's position was that the Notice was published in Kenya Gazette of 9<sup>th</sup> March 2012 and since the Constitution refers to "*publishing*" it strictly means the date when the Kenya Gazette was published. Counsel's took the view that this court has power to extend the time for filing an application for review otherwise the Constitution would have provided for a specific date for publication of the notice.

Mr. Kibe Mungai referred to the Gazette Notice published on 9<sup>th</sup> March 2012. He submitted that 6<sup>th</sup> March 2012 is the date on which Legal Notice No. 14 of 2012 was issued as an order. Counsel emphasized that there should be a distinction between the date the order was made and the date of publication. His contention is that the last date would fall on Easter Monday, so the last date for filing would be 10<sup>th</sup> April 2012.

Mr. Mungai's position is that the right accorded to Kenyans by Article 89(11) especially in determining the date of publication assumes special significance. He pointed out that the National Assembly passed its resolution on 9<sup>th</sup> February 2012 and under the 5<sup>th</sup> Schedule to the IEBC Act, the Commission had 14 days within which to publish through the Kenya Gazette, the Report, so for IEBC to have used 5 days instead of 14 days meant that views of Kenyans were not considered. His contention is that the date on which IEBC should have published its report was 13<sup>th</sup> March 2012 and in choosing to publish its report on the date given, then the decision prejudiced the exercise of a constitutional right in determining the computation of time.

This position is supported by Mr. Mwenesi who submitted that the Preliminary Objections are mischievously conceived and wholly identified with submissions made by Mr. Mungai and Mr. Nabutete. His contention is that time lapsed on 8<sup>th</sup> April 2012 which was a Public Holiday so that the last date for filing was 10<sup>th</sup> April 2012.

Mr. Ogutu urged us to also consider the clause under Legal Notice No. 14 of 2012 which provides that the effective date of the order published in the Gazette Notice of 6<sup>th</sup> March 2012 is actually 7<sup>th</sup> March 2012, so the first date of publication would be 7<sup>th</sup> March 2012. His other argument is that Article 259 (9) of the Constitution gives this court mandate to extend time.

Mr. Ombwayo, counsel acting on behalf of the Attorney General, took the position that the date of publication is that one contained in the Kenya Gazette of 9<sup>th</sup> March 2012. He contended that time therefore began to run on 10<sup>th</sup> March 2012 and the last date of filing was therefore 10<sup>th</sup> April 2012. The position of the Attorney General is that what is contemplated by the Constitution is the Gazette Notice not the Supplement.

We have reflected on the issues raised by the parties and they varied and have Constitutional significance in so far as the process of review under Article 89 is concerned. These issues are as follows;

1. The date that the National Assembly passed a resolution giving rise to the report by IEBC and provision of the 5<sup>th</sup> Schedule on the period within which IEBC ought to have made known its decision and the effect of their action.

2. What criteria ought to be used in computing time. Under this head, fall several sub-concerns, namely;

- (a) When was the IEBC decision made in terms of publication?

(b) Does time begin to run as at the date of filing application seeking leave to commence Judicial Review proceedings or at the time when the Notice of Motion seeking the prerogative orders was filed?

(c) In deciding when the decision was published, the court has been invited to consider the two issues of the Kenya Gazette and determine which one is valid, the Kenya Gazette dated 9<sup>th</sup> March 2012 or the Special Gazette Supplement dated 6<sup>th</sup> March, 2012 and when Legal Notice No. 14 of 2012 took effect.

(d) Does this court have jurisdiction to extend time outside the 30 days period provided under Article 89(11)?

We recognize that the rights accorded to Kenyans, especially in determining the date of publication was set in motion by the National Assembly passing the resolution on 9<sup>th</sup> February, 2012. We think that is an issue of fact not contested by anyone. It is pertinent to set out the relevant portions of the 5<sup>th</sup> Schedule of the IEBC Act which provide;

*(4) The Parliamentary Committee shall, within fourteen days of receipt of the revised preliminary report under sub-paragraph (3), table the revised preliminary report to the National Assembly together with its recommendations.*

*(5) The National Assembly shall, within seven days of the tabling of the revised preliminary report, consider the revised report and forward its resolutions to the Commission.*

*(6) Within fourteen days of the expiry of the period provided for in sub-paragraph (5), the Commission shall, taking account the resolutions of the National Assembly under sub-paragraph (5), prepare and submit its final report outlining the matters set out in sub-paragraph (1)(a) for publication in the Gazette.*

Upon passing of that resolution, then under the 5<sup>th</sup> Schedule of the IEBC Act, the Commission had 14 days within which to publish and gazette its report. The date of publication is argued as being either 6<sup>th</sup> March 2012 or 9<sup>th</sup> March 2012, but of greater concern is whether the publication fell within the 14 days contemplated by the 5<sup>th</sup> Schedule.

We appreciate that the IEBC would have had to act quickly and within its power to publish the report when it did. Article 89 (11), provides as follows;

*An application for the review made under this article shall be filed within thirty days of the publication of the decision in the Gazette, and shall be heard and determined within three months of the date on which it is filed.*

This provision indeed underscores the need of having a clear approach by all parties as to which was the effective date as contemplated by law especially taking into account that the review under Article 89 would only come after 8 years. In our view, the publication of the IEBC reports within within 5 days instead of 14 days after resolution by the National Assembly may have prejudiced Kenyans but this is not an issue that is relevant to the objection and the response by the parties.

When does time run with regard to filing of the matter in court? Article 89 does not prescribe a mode of approaching the court, it only refers to the filing of an application. Parties are at a liberty to approach the court in any manner provided by the general rules of procedure. These modes include the filing of a Petition or commencing Judicial Review proceedings. Since the matter is one of Constitutional importance, it cannot be subject to the formal strictures of procedure. Order 53 rule 1(1) of the Civil Procedure Rules refer to an application for mandamus, prohibition and certiorari. We therefore think that we cannot apportion the Chamber Summons seeking leave and the Notice of Motion. We take the view that for the purpose of Article 89(11) the time for filing an application for orders of judicial review is to be calculated from the date the Chamber Summons seeking leave to commence proceedings is filed.

As regards the Gazette published, two issues need to be addressed;

(a) What does the Constitution say about the Kenya Gazette?

(b) The meaning of the word “publication”?

Article 260 of the Constitution provides;

*Gazette means the Kenya Gazette published by authority of the national government, or a supplement to the Kenya Gazette.*

Section 3(1) of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) states;

*Gazette means the Kenya Gazette published by authority of the Government of Kenya and includes any supplement thereto. Publication includes all written and printed matter and any record ..... by means of which any word or ideas may be mechanically, electrically produced, reproduced, represented or conveyed and everything whether of a nature similar to the foregoing or not, containing any visible representation, or by its form, shape or in any manner capable of producing reproducing representing or conveying words or ideas and every copy and reproduction of a publication.*

Whether one takes the position adopted by the Attorney General in reference to the term Gazette or the one adopted by IEBC in reference to Special Supplement to the Kenya Gazette both are legal and recognized by the Constitution and statute. In the face of the two Gazette publication each containing Legal Notice No. 14 of 2012, any doubt as to the applicability of either the Gazette or its Supplement must be resolved in favour of the citizen who has an undoubted right within the time limit to approach the court for relief. Our findings are underpinned by the values contained in Article 10(2) and the right of every citizen to access to justice contained in Article 48.

The date of the order was made, for purposes of Article 89, is irrelevant because it is only upon publication that the citizen becomes aware of the decision subject of review under Article 89.

The question that we seek to resolve is when would time for challenging the decision under Article 89 begin to run?

Article 259(5) and (7) at the material part provides as follows:-

*(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed -*

*a) as days, the day on which the first event occurs shall be excluded and the day by which the last event may occur shall be included. (emphasis ours)*

*(7) If, in any particular circumstances the period of time prescribed by the Constitution ends on a Sunday or a Public Holiday, the period extends to the first subsequent day that is not a Sunday or Public Holiday.*

Considering Special Gazette Supplement of 6<sup>th</sup> March 2012 and the position taken by IEBC, the effective date of publication of the order is 7<sup>th</sup> March 2012, which means that the first date of computation is 8<sup>th</sup> March 2012 and 30 days would end on 6<sup>th</sup> April, 2012, which was Good Friday, a public holiday. The next date on which filing could be done fell on day, 9<sup>th</sup> April 2012 which was Easter Monday, a public holiday. The last effective date of filing the application for review was therefore 10<sup>th</sup> April 2012. The same result would be achieved by taking 9<sup>th</sup> March 2012 as the date of publication.

On the question raised in Nakuru HCCC No. 120 of 2012 (OS) as to whether this court has jurisdiction to extend the period within which to file the application for review we refer to Article 259 (9) which provides;

*If any person or State organ has authority under this Constitution to extend a period of time prescribed by this Constitution the authority may be exercised either before or after the end of the period, unless a contrary intention is expressly mentioned in the provision conferring the authority.*

Article 89 confers upon the High Court a special jurisdiction. The jurisdiction is specific and exclusively governed by Article 89(11). Article 259(9) contemplates that there is either specific authority to extend time or that the context of the provision entitles the Court to extend time. There is no provision under Article 89(11) granting the court authority to extend time for filing an application for review outside the period contemplated.

The provisions of Article 89(11) are intended to be time limited. Such an exercise cannot be open ended as it has an effect on other activities that lead to the conduct of a free and fair election. The context of Article 89 does not envisage jurisdiction to extend time for filing an application for review. We cannot question the intention behind the limitation of time and if it was the intention of Kenyans to make such a provision nothing would have stopped them from doing so. We therefore find that there is no jurisdiction under the provisions of Article 89(11) or 259(9) of the Constitution to extend time limited for filing an application for review.

Consequently we find that the preliminary objections relating to files No. JR No. 109/2012, JR. No. 147/2012, JR No. 125/2012, JR No. 134/2012, Pet. No. 146/2012, Pet. No. 129B/2012, Misc. App. No. 134/2012, App. No. 139/2012- Nairobi, JR. Misc. No. 144/2012 – Nairobi, JR. 27/2012 – Kisii, JR. 148/2012 – Nairobi, Pet. 148/2012 – Nairobi have no merit and are dismissed. This means that all applications and petitions filed after 10<sup>th</sup> April 2012 were filed out of time. The application for extension of time in Nakuru HCCC No. 120 of 2012 (OS) is struck out.

We make no order as to costs in respect of those applications that have been struck out.

**DATED** and **DELIVERED** at Nairobi this 30<sup>th</sup> day of May 2012

**M. WARSAME**  
**JUDGE**

**R. N. SITATI**  
**JUDGE**

**H. OMONDI**  
**JUDGE**

**P. NYAMWEYA**  
**JUDGE**

**D. MAJANJA**  
**JUDGE**