



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION NO. 20 OF 2008

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS
ACT**

(CHAPTER 7, LAWS OF KENYA) AND THE REGULATIONS MADE THEREUNDER

AND

**IN THE MATTER OF: ELECTION FOR THE KANDARA PARLIAMENTARY
CONSTITUENCY**

AND

IN THE MATTER OF: THE PETITION OF ALICE MUTHONI WAHOME

BETWEEN

ALICE MUTHONI

WAHOME.....PETITIONER

VERSUS

JAMES MAINA KAMAU.....1ST RESPONDENT

REUBEN WARUI CHEGE.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

RULING

The 1st Respondent in Election Petition number 20 of 2008 moves this court by his Notice of Motion dated 10th May and filed in court on the 11th day of May 2011 brought by way of a certificate of urgency. The said Motion is brought under the provisions of sections 19 and 23 of the National Assembly and Presidential Elections Act cap 7 of the Laws of Kenya, section 3 of the Judicature Act, cap 8 of the Laws of Kenya, sections 7 and 22 of the Sixth Schedule to the Constitution of Kenya, 2010 and the court's Inherent Jurisdiction. He seeks orders in terms of prayers that this court do find and hold that Gazette Notice No. 2060 dated 25th February 2011 and published in the Kenya Gazette dated 4th March, 2011 does not vest the court with jurisdiction to hear and determine the Election Petition herein and the court should issue an order of certiorari to quash the said Gazette Notice or alternatively the court do find and hold that the said Gazette Notice is null and void.

That Motion is brought on the grounds that this court was appointed in contravention of Articles 263 and 264 of the Constitution of Kenya since on 25th February 2011 when the Gazette Notice in question as carried the former Constitution of Kenya did not vest in the hon. the Chief Justice the power to appoint an election court. That the apparent invalidity of the appointment of the Election Court herein will negate, compromise and vitiate the constitutionality of the proceedings herein under Articles 27, 38, 47 and 50 of the constitution and since it is the duty of the court to uphold, maintain, promote and guarantee the Rule of Law pursuant to Articles 10, 23, 159 and 165 of the constitution, it is fair and just that the hearing of the petition should await the rectification of the invalidity relating to the appointment of the Election Court.

The application was supported by the affidavit of the Petitioner and in it he swore that the Constitution of Kenya in force on 25th February 2011 does not contain a provision known as section 60(5) and hence reference to such a section in the Gazette Notice No. 2060 dated 25th February 2011 did not confer any power upon the then Chief Justice J.E. Gicheru to appoint an election court to hear this Petition. That as at 25th February 2011 the old Constitution that carried section 60(5) had been repealed on 27th August, 2010 and therefore that section could not be lawfully invoked by His Lordship the Chief Justice to appoint an Election Court. He swore further that because of the foregoing this Election Court was not lawfully appointed and so it lacks jurisdiction to hear and determine the same and hence this court ought to uphold the Rule of Law by declaring the said Gazette Notice null and void and further finding that the court is not vested with the requisite jurisdiction and should therefore await the lawful appointment of an Election Court.

The Petitioner filed grounds of opposition to the 1st Respondent's application that the Honourable the Chief Justice J.E. Gicheru lawfully appointed this Election Court and there is no requirement of the Gazettement of a judge appointed to hear an election petition and any Gazette filed for that purpose including the one herein being No. 2060 published on 4th March 2011 is an administrative notice. That the inclusion of section 60(5) of the Constitution in the said Gazette Notice is superfluous, severable and does neither invalidate the order made by the Honourable the Chief Justice appointing this court as the election court in this Petition nor occasion any injustice or prejudice to any party. The Notice of Motion under consideration was then seen as being frivolous and an abuse of the court to the extent that it seeks a restrictive literal construction and interpretation of the constitution.

In his submissions, learned counsel Mr. Kibe Mungai for the 1st Respondent/Applicant argued that such appointment must stipulate the legal provision from which such power to appoint is derived. He argued that jurisdiction to hear and determine election petitions is a special one as indicated by section 60(1) of the repealed Constitution of Kenya and section 44(1) (a) of the said repealed constitution. He added that section 19(3) of The National Assembly and Presidential Elections Act cap. 7 of the Laws of Kenya as to the constitution of an election court must be read together with section 44 of the repealed constitution and that the power to appoint is not administrative but constitutional and statutory. That the Chief Justice must cite the section under which the power to appoint an election court is exercised and since he cited section

60(5) which was not in force on 25/02/2011 then the appointment was a nullity. He argued further that jurisdiction must either exist or not exist and he submitted that in the instant case such jurisdiction does not exist. He said that an error had been committed and the only way to correct it was by the authority and person entitled to exercise that power, the honourable the Chief Justice, who can only act after this court quashes the Gazette Notice in question. Citing various authorities counsel submitted that the Gazette Notice herein is invalid and that the same must be corrected by the person who made the mistake because, as the authorities state, even an innocent mistake must be rectified in the interest of justice.

Further submission was that as per Article 50 of the current constitution, the court must be duly established by the law and that articles 23 and 165 empower this court to issue an order of certiorari. He added that an error affecting jurisdiction is not correctable and there is always prejudice if the Rule of law is not properly invoked or exercised.

In his submission learned counsel Mr. Havi for the Petitioner/Respondent submitted that the order of certiorari sought is so sought wrongly as firstly, it is granted under Judicial Review under the Law Reform Act and it concerns itself with processes and jurisdiction of Tribunals inferior to the High Court and the procedure for seeking certiorari is well spelled out in the relevant law.

He submitted further that neither in the repealed constitution nor in the current one is there the requirement that the Petition court must be Gazetted and therefore an order appointing an election court suffices.

He added that the 1st Respondent/Applicant has not claimed that he has in any way been prejudiced. Counsel emphasized that the order by the Honourable the Chief Justice appointing this court was all that was required.

Learned counsel Mr. Omwanza for the 2nd and 3rd Respondents submitted that the election court was properly appointed by the person who had such power to appoint. He added that citing section 60(5) of the repealed constitution did nothing to the Gazette Notice which Gazette Notice is a matter of practice and which cannot take away jurisdiction.

In a brief reply learned counsel Mr. Kibe insisted that failure to quote the appropriate provision of the Law rendered the Gazette Notice null and void. That certiorari is available under the Law Reform Act order 54 Civil Procedure Rules and Article 23 of the Constitution.

I have fully considered the application, submissions by counsel and the authorities referred to and I have come to the conclusion that for the full determination of this application the central point for decision is whether or not the then Chief Justice had the authority and power to appoint this election court and whether or not that power was properly exercised. I have to decide whether the failure to cite the relevant section of the Constitution and the citing of section 60(5) of the repealed constitution render the exercise of the honourable the Chief Justice's authority wrongful and consequently the appointment of the election court a nullity. The further issue for determination is what to make of Gazette Notice No. 2060 dated 25th February 2011 and published on 4th March, 2011.

The jurisdiction to hear and determine any question whether a person has been validly elected as a member of the National Assembly or the seat in the National Assembly of a member thereof has become vacant, is reserved by **section 44(1) of the repealed Constitution** (the said section having been saved

until the next election – see **section 3(2) of the 6th schedule to the 2010 Constitution**). That jurisdiction is reserved for the High Court. This court sits as the high court and to that extent it has the fullest of jurisdiction to hear and determine this Petition. Now, was that jurisdiction taken away by the honourable the then Chief Justice citing of section 60(5) of that repealed Constitution? Hardly. All section 60(5) did while it existed, was to state that the High Court shall sit at such places as the Chief Justice may appoint. So that, even if the said section 60(5) existed as at 25th February 2011, all it would have done is to notify the Public in general of the place of the sitting of this court. Perhaps the Honourable the Chief Justice should have cited section 22 of the 6th Schedule but I find that his failure to do so does not and it has not taken away any jurisdiction this court has to hear and determine this Petition. In any event it is quite clear that section 60(5) of that constitution did not confer any jurisdiction to this court sitting as an election court so that its citation after its repeal would be fatal as concerns this court's jurisdiction.

The Gazette Notice complained of conveyed his Lordship's appointment of this court. His Lordship the then Chief Justice had the constitutional mandate to direct which high court was to sit at what place and to do what duty. That power and authority was not invalidated by citing section 60(5) of the old constitution. This court was not referred to any law, even after it sought such information from counsel for the Applicant, that makes it mandatory for the Gazettment as in this case. I take it that such Gazettment is good practice, not a mandatory one, so that even failure to have the appointment carried in a Gazette does not invalidate the appointment and most definitely that Gazette, even as it was carried, does not in any way affect either the honourable the Chief Justice's power and authority to appoint this court or this court's jurisdiction to hear and determine the Election Petition. I find the error in citing section 60(5) of the former Constitution to be, not one of substance but one of form, the kind that is curable under order 50 rule 10 of the Civil Procedure Rules and Article 159(d) of the 2010 constitution where the court is enjoined to dispense justice without having undue regard to technicalities. The Gazette Notice no. 2060; though in my view not a mandatory one, did not invalidate this court's jurisdiction and more so because that very Notice cited section 19 of chapter 7 of the Laws of Kenya which is the Primary Law concerned with Election Petitions such as the one underway herein.

The defect or error in citing section 60(5) of the old Constitution, I find and hold, does not take away this court's jurisdiction to hear and determine this Election Petition. To state that such defect or error is correctable and must first be corrected before this Election Petition can be heard by this court is to completely miss the entire point and is a diversionary tactic aimed, in my view, at not the quick disposal of the matters in issue. The Chief Justice correctly made his orders on 17th February and 25th February 2011, which orders stand unaffected to date and Gazette no. 2060, does not take away this court's jurisdiction, and the said Gazette Notice is neither null nor void and that is my finding. The issue of certiorari as sought does not therefore arise. I make the final finding that it is section 44(1) of the old Constitution, which still survives, that vests this court with jurisdiction and such jurisdiction was not taken away or invalidated by the citing of the repealed section 60(5) of that Constitution or indeed by the failure to cite s. 44 (1) of the current Constitution or section 22 of the 6th schedule. Consequently, the application dated 10th May 2011 and filed in court on 11th May 2011 is found to lack in merit and is hereby dismissed with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2011.

P.M. MWILU

JUDGE

In the presence of

Mr. Kibe Mungai & Mr. Ondieki Advocate for 1st Respondent/Applicant

Mr. Havi and Mr. Osundwa Advocate for Petitioner

Absent Advocate for 2nd & 3rd Respondents

Tabitha Wanjiku court clerk

P.M. MWILU

JUDGE

COURT:

Hearing of the application dated 24/10/2008 will be heard on 9/6/2011 at 11 a.m.

P.M. MWILU

JUDGE