



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

(Coram : F. Azangalala, J.)

CONSOLIDATED CIVIL APPEAL NUMBERS 126 OF 2008,

78 OF 2010, AND 231 OF 2010

BETWEEN

INDEPENDENT ELECTORAL

COMMISSION OF KENYA:.....1ST APPELLANT
RETURNING OFFICER ELDORET

NORTH CONSTITUENCY:.....2ND APPELLANT
AND

JANE WANGUI MURITHI:.....1ST RESPONDENT
WILLIAM CHEMGAA KIPTUM:.....2ND RESPONDENT

JUDGMENT

This judgment is in respect of three appeals which have been consolidated. They are all from Local Government Election Inquiry No. 1 of 2008 which was between **Jane Wangui Muriithi** (hereinafter “the applicant”) and **The Electoral Commission of Kenya** (hereinafter “E.C.K.”) subsequently substituted with the **Interim Independent Electoral Commission of Kenya** (hereinafter “I.E.C.K.”), the **Returning Officer Eldoret North Rift Constituency** (hereinafter “the Returning Officer”) and **William Chemngaa Kiptum** (hereinafter “Kiptum”).

In the cause of the inquiry, **E.C.K.** and **the Returning Officer** applied by a Notice of Motion dated 13th October, 2008 to strike out the inquiry on the main ground that it was incompetent, having been filed prematurely before the results of the election had been published. That application was refused by the Trial Magistrate (**I. Maisiba**, then a Resident Magistrate) on 21st November, 2008. The refusal triggered High Court Civil Appeal No. 126 of 2008 which was lodged by **E.C.K.** and **the Returning officer**. Attempts to stall the inquiry did not bear fruit and the inquiry was concluded on 12th May, 2010. The applicant at the inquiry, **Jane Wangui Muriithi**, was declared the “winner” of Market Ward Civic Election and the true councillor of Market Ward. That decision provoked High Court Civil Appeal No. 78 of 2010 lodged by **Kiptum** and High Court Civil Appeal No. 231 of 2010 lodged by **I.E.C.K.** and **the Returning Officer**.

A background of the appeals will suffice.

The applicant and **Kiptum** were candidates in the Civic elections held in Kenya on 27th December, 2007. On that date Kenya also held its Presidential and Parliamentary Elections. Civic Elections were

held under the Local Government Act (Chapter 265 of the Laws of Kenya) (hereinafter the Act) and the rules and/or regulations made thereunder. **The Returning Officer** issued a Certificate of results certifying that **Kiptum** was the elected councillor of Market Ward. The applicant was taken aback by that decision as she believed she had won the election. She immediately lodged Local Government Inquiry No. 1 of 2008 on 23rd January, 2008. She sought two main reliefs expressed as follows in a contemporaneous application:-

(1) That the court be pleased to restrain Kiptum from discharging his duties as councillor for Market Ward and his election as councillor be stayed pending the hearing and determination of the enquiry.

(2) That Electoral Commission of Kenya and the Returning Officer be restrained from gazetting Kiptum as the councillor for Market Ward pending the hearing and determination of the Inquiry.

The application was supported by the applicant's affidavit and a statutory statement of facts. In the grounds on the face of the application, the applicant contended that she had been declared the winner of the election by **the Returning Officer** after all the results of all polling stations in the ward had been tallied; that at no point was **Kiptum** announced as the winner of the election; that she had information that **Kiptum** had been issued with a certificate declaring him a winner by **the Returning Officer**; that **the Returning Officer** was about to gazette **Kiptum** as the winner of the Civic Election for Market Ward; that unless the application was granted the applicant and the voters of Market ward would suffer irreparable damage as **Kiptum** would be imposed upon them as councillor; and that **E.C.K, the Returning Officer** and **Kiptum** would not suffer any prejudice if the application was allowed and the true winner of the elections determined and declared.

The substance of the applicants case as can be gleaned from the application, the affidavit in support and the statement of facts was that, she vied for Market Ward Civic seat within Eldoret North Constituency on the Party of National Unity (hereinafter "P.N.U.") ticket and garnered 3570 votes while the runner-up was **Kiptum** who had vied on an Orange Democratic Movement Party (hereinafter O.D.M) ticket and garnered 3298 votes. **The Returning Officer** announced her as the winner but when on 14th January, 2008 she went to claim her certificate certifying that she had won the civic seat, she was shocked when she was told that the same would be issued to **Kiptum**. In those premises, (as per her affidavit,) she sought the nullification of the entire civic election for Market Ward since, in her view, **Kiptum** would not suffer any prejudice if a by-election would be held as he would also contest if he so wished. Her position in the statutory statement was somewhat different. The main reliefs sought in the statement were as follows:-

1) That the issuance of the winner's certificate to William Kiptum Chemngaa as the councillor for Market Ward be declared null and void.

2) That the court does declare the applicant duly elected as councillor for Market Ward.

3) That in the alternative, court does order a re-count of the votes cast for the civic election in Market Ward.

4) That the Gazettement of Kiptum as the Elected councillor (if already done) be

degazeted.

Annexed to the supporting affidavit were copies of forms 16 A from various polling stations in Market Ward.

The applicant appeared ex-parte before **B.N. Mosiria** (then a Resident Magistrate) on 23rd January, 2008. On her being satisfied with the *prima facie* merits of the application, the learned Magistrate made the following main orders:-

(1) An order restraining Kiptum from discharging his duties as Councillor – Elect for Market Ward Eldoret North Constituency and his election as councillor be stayed pending the hearing and determination of the application interpartes.

(2) An order restraining Electoral Commission of Kenya and the Returning Officer from gazetting Kiptum as councillor – elect for Market Ward pending hearing and determination of the application.

The application and inquiry, papers were then served. **Kiptum's** advocates filed a replying affidavit, Grounds of Opposition and a Preliminary Objection. The advocates for **E.C.K.** and **The Returning Officer** also filed replying affidavits and grounds of opposition. The gist of the opposition by the Returning Officer was that he supervised Civic elections for Market Ward which elections were won by **Kiptum** with 3897 votes. He therefore issued him with the relevant certificate and declared him the winner. Annexed to his affidavit were copies of various results of polling stations in Market Ward.

On his part **Kiptum** deponed, *inter alia*, that he was duly elected as councillor for Market Ward in the Municipal Council of Eldoret; that he was so declared by **the Returning Officer** and was issued with the requisite certificate. In the premises, in his view, the application had been made merely to vex him and not in good faith.

Before hearing could resume, **E.C.K** and **the Returning Officer** sought an order of the court striking out the inquiry on the main ground that it was incompetent for being filed before the results of the election had been published and consequently offended the provisions of Section 61 of the Local Government Act (Chapter 265 of the Laws of Kenya.) The Learned Resident Magistrate heard the application on 5th November, 2008 and dismissed it on 21st November, 2008, concluding as follows:-

“I had the chance to hear the applicant in person. It is clear there were glaring irregularities in the manner the elections were conducted. I shall not decide this case in (sic) technicalities. I shall require a full and proper hearing to determine where things went wrong before I make a final and proper decision to the inquiry. I shall therefore order the application dated 13th October, 2008 be dismissed with costs being to the same parties (sic).”

That conclusion has certain consequences which will become clear shortly. It triggered, High Court Civil Appeal No. 126 of 2008 which was lodged by **I.E.C.K.** and **the Returning Officer** and is now consolidated with High Court Civil Appeal No. 78 of 2010 lodged by **Kiptum** and High Court Civil

Appeal No. 231 of 2010 lodged by **I.E.C.K.** and **the Returning Officer** on conclusion of the inquiry. That ruling of the Learned Resident Magistrate has a bearing on the final decision of the Learned Magistrate.

After several unsuccessful attempts to stall the inquiry the hearing finally resumed on 26th March, 2010 when PW2 concluded his testimony and **Jacinta Mwhaki** (PW3) **William Kipchumba Rono** (PW4) **James Kimani** (PW5) and **Fatuma Ali Mohammed** (PW6) all testified. On 16th April, 2010 the applicant was recalled for cross-examination. The sum total of their testimony was that at the close of the poll, the applicant was declared the successful candidate having beaten **Kiptum**, the runner-up, with a margin of about 272 votes. The results of polling at Uasin Gishu Primary School were significant. According to the applicant and her witness, the actual results garnered by **Kiptum** in room 2 at the said polling station were 27 but the same were altered to read, 427 and in room 4, at the same polling station, **Kiptum** actually garnered 257 votes which were altered to read 457. So, according to the applicant, **Kiptum** was awarded a total of 593 votes which were in reality not cast in his favour.

I.E.C.K. and **the Returning Officer** did not offer any oral evidence at the inquiry **Kiptum** however testified on 7th May, 2010. He called **David Kiprono Bowen** (DW2), **Samson Kipro Kitur** (DW3) **Gaudentia Chelimo** (DW4) **Kenneth Kiptoo Kangogo** (DW5) **Moses Otieno Nyaruoth** (DW6) **Maurice Elias Ochieng Omondi** (DW7) **Edward Kiptum Chebet** (DW8) and **Enock Kiprugut Kogo** (DW9). The substance of their evidence was that **Kiptum** was validly elected councillor of Market Ward within Eldoret Municipality having garnered more votes cast than the applicant. **Kiptum** specifically denied being awarded false votes.

After analysing the evidence which was adduced before him, the Learned Resident Magistrate concluded as follows:-

“A look at annexures AKK5 c prepared by Augustine Kenduiywo the returning officer also indicted Kenduiywo (sic) garnered 3097 because of the alterations in form 16A that document is not a true reflection of the number of votes cast at the Market Ward Civic Election. The 1st and 2nd respondents did not adduce any evidence to controvert, or challenge the applicant’s evidence on the alterations in form 16A and the correct tally. Her evidence remains unchallenged to that extent. It was only the returning officer, Augustine Kenduiywo, who would have set the record straight. He did not attend court for unknown and undisclosed reasons. In the circumstances of this particular case only the returning officer would have explained why in room 2 at Uasin Gishu Primary School, the total votes cast ought to have been 248 and not 648 shown in the document filed as true of the 1st and 2nd respondents list of documents. The true position of the total cast votes can only be known if the ballot boxes for civic elections at Market Ward are re-opened and the votes counted a fresh to show who actually won the election.....”

Following that finding the Learned Resident Magistrate ordered a recount of the votes cast in Market Ward Civic Elections. The recount was scheduled for 11th May, 2010 but was postponed to 12th May, 2010.

In the end not all ballot boxes were re-opened as it appeared the inquiry file was required at the High Court. Notwithstanding the failure to reopen all the ballot boxes, the Learned Resident Magistrate felt that he had enough material from which he could conclude the inquiry. In his own words:

“The Electoral Commission of Kenya official has indicated he is unable to properly identify all the remaining boxes as specifically belonging to Market Ward fortunately yesterday the court was able to count the votes in the disputed boxes for room 2 and 4 at Uasin Gishu Primary School voting centre. I have the advantage to have on record the documentary evidence filed and list of documents by the counsel for the 1st and 2nd respondents. I shall go through them and counter(sic) the tallying done yesterday and are (sic) out with a final result. I shall give my ruling at 12:00 noon after which the file shall be forwarded to the High Court as earlier heard (sic).”

The Learned Resident Magistrate indeed delivered his final ruling on the same date - 12th May, 2010. He found that the rightful winner of the civic election in Market Ward of Eldoret Municipal Council was the Applicant who had beaten **Kiptum** by 272 votes. He therefore ordered that the applicant be given the winner's certificate and declared her the true councillor for the said ward and that she be gazetted accordingly.

The final result as already stated triggered High Court Civil Appeal No. 78 of 2010 by **Kiptum** and High Court Civil Appeal No. 231 by **I.E.C.K.** and the **Returning Officer**.

When the appeals come up for hearing before me on 26th July, 2011 counsel agreed to file written submissions which were duly in place by 18th October, 2011. I have perused the record of the Learned Resident Magistrate, the grounds of appeal and the submissions of counsel. Having done so, in my view the issues for determination are as follows:-

1) Whether the inquiry was incompetent, premature, in breach of section 61 of the Local Government Act and therefore fatally defective.

2) Whether the Learned Magistrate misdirected himself in Law and in fact by concluding that the applicant won the election after a recount which had not been completed.

3) Whether the decision of the Learned Magistrate was based on the evidence and submissions canvassed before him and whether he failed to consider and weigh the evidence impartially fairly and without bias or discrimination.

Section 61 of the Local Government Act is in the following terms:-

“61

(1) If the validity of an election to a local authority under this Act is brought into question by any person qualified either to be elected or to vote at the election or by the returning officer on any ground or for any cause whatsoever, that person or

the returning officer as the case may be, may at any time within fifteen days after the publication of the result of the election, apply to, a Resident Magistrate's court within or nearest to the area of the local authority to set the election aside.

(2) The Resident Magistrate's court shall, after due inquiry declare whether the candidate whose election is questioned, or any and what other person is duly elected or whether the election is void.

(3) If the election is declared void, a new election shall be held.

(4) The Chief Justice may make rules for the conduct of an inquiry by a Resident Magistrate's court under this section."

The contention of **I.E.C.K.** and **the Returning Officer** in Civil Appeal No. 126 of 2008 is that a valid inquiry may only be lodged within fifteen (15) days after the publication of the result of a civic election. The publication according to the said parties must be by gazette notice which in this case was effected on 25th January, 2008. In their view the Inquiry, having been lodged on 23rd January, 2008 and therefore before the said publication, was premature and in contravention of the provisions of section 61(1) of the said Act. It is for the same reason that **I.E.C.K.** and **the Returning Officer** contended that the applicant's inquiry was incompetent.

Publication according to **I.E.C.K.**, and **the Returning Officer**, must be in some visual form-to-be seen. The Interpretation and General Clauses Act is invoked for that proposition.

That argument is quite forceful. But what was the mischief the said provision intended to address. To my mind, the importance of the provision is the requirement to publish to the world the civic election result and limit the period within which a challenge may be made after that publication. The logic of the requirement of publication is obvious. An election is a public interest exercise and the result thereof affects more than the candidates and those who run the election-indeed those who may be interested in challenging the same may be far away from the arena of contest. The publication notifies such intending challengers to do so within fifteen (15) days of publication.

However, what is the position of a participant at the election which is the case here? If one of the candidates witnesses an obvious breach of the election law and desires an immediate decision of the court and the results of the election have been announced but have not been published in the Kenya gazette, should such a candidate have to await the publication of the result by gazette notice? In the matter at hand, the applicant alleged that she had been declared the winner of the civic election in respect of Market Ward but when she expected to be issued with the winner's certificate, it was not to be, because it would be issue to her runner-up. At that point in time the results had been announced. They only awaited publication in the Kenya gazette. If one of her prayers was to restrain the same publication, it would not make sense to await the happening of the same event which was intended to be prevented.

In the premises, in my view, there is nothing to stop a candidate or a voter or any one qualified to vote in a civic election from challenging the election by way of an inquiry where the results have been announced but have not been published in the Kenya Gazette. I also find and hold that publication does not have to be in the Kenya gazette. The party with the onus to publish the results has the election to do so through a daily newspaper with the widest circulation in the area of the civic election or through both the Kenya Gazette and such newspaper.

I must therefore and with great respect, depart from the path taken by my Learned sister **Angawa J. in High Court Civil Appeal No. 436 of 1998: [James Mwangi Wanjau & Another -VS- Joseph Macharia Kairu]** and **Sergon J. in Electoral Commissioner of Kenya -VS Ongwa: [2008] 2 KLR (EP) 625 and Mwawasi & 2 others -VS- Mwashigadi [2008] 3KLR(EP) 196.**

In the premises, I do not find the inquiry incompetent premature or fatally defective.

The three appellants vigorously challenged the Learned Magistrate's finding that the applicant had won the election. They attacked that finding on various grounds but the principal ones are two. First they contend that the applicant could not be declared the winner of Market Ward Civic seat because all the votes cast at the election had not been re-counted.

Secondly, they argued that even if a re-count had been complete and the result favoured the applicant, the Learned Resident Magistrate had no jurisdiction to declare the applicant the winner and therefore the duly elected councillor for Market Ward or any other Ward or at all.

With regard to jurisdiction, the material sub-section is sub-section 2 of section 61 aforesaid. The subsection reads:-

“2. The Resident Magistrate’s court shall, after due inquiry declare whether the candidate whose election is questioned, or any and what other person, is duly elected or whether the election is void.”

A plain reading of this sub-section shows that a Resident Magistrate may make any one of the following decisions after an inquiry:-

1) He may declare the candidate whose election has been challenged as duly elected.

2) He may also declare “any and what other person is duly elected”

3) He may declare the election void.

Given the above interpretation the Learned Resident Magistrate clearly had jurisdiction under the provisions of Section 61 (2) of the said Act to declare any other person, other than **Kiptum** duly elected. For Market Ward, after due inquiry, the Learned Resident Magistrate declared the applicant as having been duly elected after the re-count.

The matter does not however rest there. The question I ask myself is - even though the Learned Resident Magistrate had jurisdiction to declare the applicant the duly elected Councillor for Market Ward, could he do so in the circumstances of this case given the material before him? To declare any candidate as duly elected must follow a validly conducted election. There must first be a finding that the election process was free and fair without material laws. Did the civic election which took place in Market Ward meet that threshold?

I will start with the applicant's own documents and evidence before the Learned Resident Magistrate. In the application she filed simultaneously with the inquiry, she premised the same on 8th ground read as follows:-

“(viii) That the Respondents will not suffer any prejudice if the application is allowed and the true winner of elections

is determined and declared.”

And in paragraphs 15, 16 and 17 of the applicant’s supporting affidavit she deponed as follows:-

“(15) That unless the election of the 3rd Respondent is nullified and the entire civic election for Market Ward is set aside for the above stated irregularities, I stand to suffer irreparable damages
(underlining mine)

(16) That the 3rd Respondent will not suffer any prejudice if a by-election is called again since he will be free to contest.
(underlining mine)

(17) That there is need to re-count all the votes cast in the sealed civic boxes for Market Ward so as to confirm that I am the winner.”
(emphasis supplied)

The appellant’s above averments appreciated that the civic election for Market Ward was marred with irregularities and urged that the election be set aside. She also acknowledged that even though a re-count of the votes would vindicate her, Kiptum would not be prejudiced since a by-election would have to be held.

Then in her oral testimony, the applicant stated as follows:

“The same votes announced by the returning officer it shows (sic) Kiptum garnered 3897 votes. There were cancellations and additions in form 16A. Basically even after adding 593 disputed votes AKK5 e does not show a true picture of the votes. The ballot boxes will show the true number of votes in the ballot boxes were signed by all the agents. I pray for a re-count of the votes after the ballot boxes are re-opened.”

So, the applicant’s own oral testimony cast serious doubt on the integrity of the poll in Market Ward.

There is then the Learned Magistrates own findings before the re-count. In his own words:-

“The 1st and 2nd respondents did not adduce any evidence to controvert or challenge the applicant’s evidence in the alterations in form 16A and the correct tally, her evidence remains unchallenged to that extent. It was only the returning officer Augustine Kenduiywo who would have set the record straight. He did not attend court for unknown reasons. In the circumstances of this case only the returning officer would have explained why in room 2 at Uasin Gishu Primary School the total votes cast ought to have been 248 and not 648 shown in the document filed as true of the 1st and 2nd respondents’ list of documents. The true position of the total cast votes can only be known if the ballot boxes

for the elections are re-opened and the votes counted afresh to know who actually won the elections.”

The Learned Resident Magistrate therefore found that the civic election in Market Ward was flawed which fact was compounded by the failure of the Returning Officer to testify.

In those premises, it was not open to the Learned Resident Magistrate to declare the applicant the winner of the election in Market Ward despite the results of the re-count. The election was flawed and therefore void and under sub-section 3 of Section 61 of the said Act, should have been so declared and a new election ordered.

On the material availed before the Learned Resident Magistrate and on the evidence adduced before him, I have no hesitation in finding that the civic election in Market Ward was indeed marred with irregularities which the Learned Resident Magistrate corrected, identified, I however with due respect do not agree with his conclusion and final orders.

There is an additional reason why the results of the re-count would not confirm who the rightful winner of the election was. That is because the Learned Resident Magistrate did not re-count all the votes case in Market Ward. He had, in his own ruling before the re-count, determined that all the ballot boxes would be re-opened and the votes therein recounted. In the event he only re-counted votes which were in what he described as disputed ballot boxes. In doing so, the Learned Resident Magistrate said:-

“The Electoral Commission of Kenya Official has indicated he is unable to properly identify all the remaining boxes as specifically belonging to Market Ward”

That, with respect was further testimony of a flawed process, casting serious doubt on the integrity of the voting exercise.

On the evidence and the results of the limited re-count, I find and hold that it was not possible to determine who had won the civic election for Market Ward. The peoples’ will could not be ascertained from the material and the evidence presented before the Learned Resident Magistrate. It was, in the premises, not possible to conclude that any of the candidates won the election.

Before concluding this judgment, I will briefly mention the challenge made by **I.E.C.K, the Returning Officer** and **Kiptum** against the rulings of the Learned Resident Magistrate to the effect that the said rulings failed to comply with Order XX of the Civil Procedure Rules which were then applicable. I have deliberately omitted serious discussion on that challenge given the importance all the parties placed on the entire proceedings.

That complaint may have been well founded with respect to the ruling on the interlocutory application. There has however been a final determination on the conclusion of a full inquiry. Despite the apparent defeat of the interlocutory ruling, I have considered the final ruling of the Learned Resident Magistrate and decided the consolidated appeals on other complaints made by the appellants.

My above discussion has determined all the three consolidated appeals. In summary these are the final orders of the court.

1) The inquiry was not incompetent premature or fatally defective because of alleged breach of section 61 of the Local Government Act.

2) The Learned Resident Magistrate misdirected himself in law and, in fact in concluding and

declaring the applicant the winner of the civic election for Market Ward and his order is hereby set aside.

3) The election of the 3rd respondent William Chemgaa Kiptum in respect of Market Ward Eldoret Municipality is hereby declared void.

4) A new civic election for the said Market Ward within Eldoret Municipality shall be held as by law required.

5) The costs of this appeal shall be borne by the Independent Electoral Commission of Kenya and the Returning Officer. The order of the Resident Magistrate on the costs of the enquiry is not disturbed.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 29TH DAY OF NOVEMBER, 2011**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Nyongesa for Interim Electoral Commission of Kenya, and the Returning Officer, Rotich for Kiptum and Ogessa for the Applicant.

**F. AZANGALALA
JUDGE**

29TH NOVEMBER, 2011