



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Civil Application 273 of 2010**

**IN THE MATTER OF AN APPLICATION BY MARY ARIVIZA**  
**AND**

**IN THE MATTER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF GAZETTE NOTICE OF THE REFERENDUM RESULTS**

**AND**

**IN THE MATTER OF THE PROMULGATION OF THE PROPOSED NEW CONSTITUTION OF KENYA**

**BETWEEN**

**MARY ARIVIZA.....APPLICANT**

**AND**

**INTERIM INDEPENDENT ELECTORAL**  
**COMMISSION OF KENYA.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. Mary Ariviza (hereinafter referred to as the applicant), has come to this court under Order LIII Rule 1 of the Civil Procedure Rules, seeking the following orders:

- (i) That the application be certified urgent.
- (ii) That the applicant be excused from filing the Notice to the Registrar.
- (iii) That the applicant be granted leave to apply for orders of certiorari to remove into the High Court for purposes of being quashed Gazette Notice No.9360 published in the Kenya Gazette, Special Issue Vol. CXII - No.78 dated 6<sup>th</sup> August, 2010, which is a notice of the certificate of results of referendum, and or publication of the text of the new Constitution, in the Kenya Gazette.
- (iv) That the applicant be granted leave to apply for an order for prohibition to prohibit promulgation of the proposed Constitution of Kenya by operation of the Law, and or publication of the text of the new Constitution in the Kenya Gazette.
- (v) That the grant of leave do operate as a stay of the automatic promulgation of the proposed Constitution of Kenya by operation of the Law, and or publication of the text of the new Constitution in the Kenya Gazette.

2. The application is based on the grounds that the applicant who is a registered voter in Westlands Constituency, and was also an accredited polling agent during the recently concluded Referendum, is aggrieved by Gazette Notice No.9360 dated 6<sup>th</sup> August, 2010 published by the Chairman, Interim Independent Electoral Commission (IIEC), declaring the results of the Referendum. Gazette Notice No.9360 was published pursuant to Section 43(1) of the Constitution of Kenya Review Act No.9 of 2008 (hereinafter referred to as the

Constitution Review Act), as read together with Regulation 36(1)(d) of the Constitution of Kenya Review (Referendum) Regulation 2010.

3. The applicant maintains, firstly, that Regulation 36(1)(d) of the Constitution of Kenya Review (Referendum) Regulation 2010, which provides for the publication of the Referendum results, in the format set out in schedule 2 of the Constitution of Kenya Review (Referendum) Regulations 2010, is *ultra vires* Section 43(1) of the Constitution of Kenya Review Act 2008. Secondly, that the Gazette Notice No.9360 which purports to be a certificate of the results of the Referendum does not conform to the format set out in schedule 2 of the Constitution of Kenya (Referendum) Regulations 2010. Thirdly, that there has been some contradictory reports regarding the publication of a valid notice of the final results of the Referendum. The applicant therefore contends that Gazette Notice No.9360 is contrary to Law, invalid, null and void. For this reason the applicant seeks orders which would in effect halt the Constitution making exercise.

4. On 18<sup>th</sup> August, 2010, the applicant appeared ex-parte before the Vacation Judge under Section 3(2) of the High Court (Practice and Procedure Rules). The Judge noting that the application essentially seeks to stop a process which was of great public importance ordered the application to be immediately served for *inter parte* hearing. I do note that no formal order was made granting leave for the application to be heard during the High Court Vacation. Nonetheless, given the urgency and importance of this matter, that is a minor technicality which can be overlooked. Indeed, in hearing the application, the court has impliedly granted leave for the application to be heard during High Court Vacation.

5. In response to the application, the Hon. Attorney General who was the 2<sup>nd</sup> respondent, has raised several issues as follows:

- (i) That this court lacks jurisdiction to entertain the application as presented by dint of the express provisions of Section 60A of the Constitution of Kenya.
- (ii) That the High Court's Jurisdiction in the Judicial Review Applications is a special jurisdiction conferred by Section 8 and 9 of the Law Reform Act, which jurisdiction is subject to the provisions of the Constitution and the order of applicability of the Law as set out in Section 3 of the Judicature Act.
- (iii) That the application for leave and stay is premised on the false assumption that Gazette Notice No.9360 of 6<sup>th</sup> August, 2010 does not conform to the requirements of schedule 2 made pursuant to Regulation 36(1) of the Constitution of Kenya Review Act (Referendum) Regulation.
- (iv) That the ex-parte applicant is seeking leave for an order prohibiting promulgation of the new Constitution by Kenya by operation of the law, whereas this Honourable Court lacks the jurisdiction to prohibit the operation of any law that has not been declared unconstitutional.
- (v) That the provisions of Section 43A of the Constitution of Kenya Review Act, Act No.9 of 2008 specifically mandates the President by notice in the Kenya Gazette to publish the text of the new Constitution of Kenya. Any order of stay/prohibition on the same would be an order against the President of the Republic of Kenya who has not been enjoined as a respondent in these proceedings. The court would have therefore acted in vain if it were to issue any such order.
- (vi) That the President of Kenya enjoys constitutional immunity from any legal proceedings as provided under the provisions of Section 14 of the Constitution of Kenya.
- (vii) That the High Court when exercising its judicial review jurisdiction under the Law Reform Act, which is a special jurisdiction, cannot purport to determine matters which are purely constitutional.
- (viii) That the High Court while exercising its special jurisdiction under the Law Reform Act, cannot adjudicate on the constitutionality or otherwise of any provisions of any Act of Parliament.
- (ix) That the Attorney General has been improperly enjoined in these proceedings as none of the actions challenged are attributed to the performance of any of his duties nor are any orders being sought against his office.
- (x) That the order for stay cannot apply retrospectively as Gazette Notice No.9360 published in the Kenya Gazette Special Issue Vol. CXII No.78 was published on 6<sup>th</sup> August, 2010 and has already taken effect. This Honourable Court should not give an order in vain.
- (xi) That the applicant has not satisfied the conditions for the grant for an order of stay.
- (xii) That the application is incompetent, misplaced and bad in law.

6. The IIEC who is 1<sup>st</sup> respondent to the application did not file any grounds of opposition but associated itself with the grounds filed by the 2<sup>nd</sup> respondent. Counsel for the 1<sup>st</sup> respondent joined counsel for the 2<sup>nd</sup> respondent in raising a preliminary objection to the hearing of the application on the issue of jurisdiction. Pursuant to directions given on 20<sup>th</sup> August, 2010, parties duly filed their skeletal arguments on the preliminary objection.

7. During the hearing of the preliminary objection, which proceeded before me on 23<sup>rd</sup> August, 2010, it was argued by the respondents that this court has no jurisdiction to hear the application filed before this court. Reliance was placed on section 60 A(1) of the Constitution, which states as follows:

***“60A. (1) Notwithstanding section 60 there shall be an Interim Independent Constitutional Dispute Resolution Court which shall have exclusive original jurisdiction to hear and determine all and only matters arising from the Constitutional review process.”***

8. It was argued that in so far as matters arising from the Constitutional Review Process were concerned, Section 60A(1) of the Constitution, explicitly ousts the unlimited original jurisdiction granted to the High Court by Section 60 of the Constitution. It was therefore maintained that the Interim Independent Constitutional Dispute Resolution Court created under Section 60A(1) of the Constitution, had exclusive jurisdiction to deal with the matter before this court as it was a dispute arising out of the Constitutional Review process. Reference was made to Section 3(1)(a) of the Judicature Act for the proposition that the jurisdiction of the High Court and other courts must be exercised in conformity with the Constitution. It was argued that the Constitution having ousted the High Court's jurisdiction to hear matters of Constitutional Review, the High Court has absolutely no mandate to entertain the current application.

9. The Court's attention was drawn to **High Court (Mombasa) Petition No.698 of 2004 Bishop Joseph Kimani & 2 Others vs the Hon. Attorney General & 2 others**, where Ibrahim J. in considering Section 60A and Section 60 of the Constitution had this to say:

***“The words and language used in Sections 60 and 60A speak out for themselves. All disputes arising from the Constitutional review process are to be referred to the Interim Independent Constitutional Dispute Resolution Court which is a special court with absolute jurisdiction on such disputes but for a limited period as set out in Section 60A. Section 60 itself which confers the High Court with its unlimited original jurisdiction in virtually all matters as conferred by the Constitution and other laws has for the first time after amendment (Act No.10 of 2008 s.6) provided for the curtailment of the jurisdiction of the High Court within the Constitution itself.***

***From a correct interpretation face Section 60 and 60A and the subsequent provisions of the Constitution of Kenya Review Act, 2008, it is certain that the intention of the legislature was to totally oust the jurisdiction of the High Court from dealing with the Constitutional review process. Section 60A went even further to state that the said court was not a division of the High Court to demonstrate the object of keeping the High Court from, dealing with these matters.”***

10. It was further submitted that Judicial Review is a special jurisdiction in which the High Court exercises supervisory jurisdiction over acts of the Executive. It was argued that in this case, both the Law and the Constitution were express on the authority and jurisdiction of the High Court. Moreover, the act complained of was not a normal executive act which could be subject of judicial review. Citing **Njoya and others vs the Attorney General and others [2004] 1 EA 194**, it was submitted that the power to make the new Constitution belonged to the people of Kenya as a whole. It was noted that the dispute before the court was about the Referendum results within the Constitutional Review Process, and that there was a legal regime provided in the Constitutional Review Process, which regime should be followed. It was pointed out that the applicant had already filed an application before the Interim Independent Constitutional Dispute Resolution Court, and therefore her application before this court should be rejected.

11. For the applicant it was submitted that Section 60 of the Constitution sets out the High Court of Kenya as a Superior Court of record, as opposed to the Interim Independent Constitutional Dispute Resolution Court. It was argued that the only jurisdiction of the High Court which was limited by Section 60A of the Constitution was the Civil and Criminal jurisdiction, to the extent that it touches on the Constitutional Review Process. It was maintained that the special jurisdiction of the High Court to determine matters of judicial review conferred under the Law Reform Act was not limited. It was submitted that under Order LIII of the Civil Procedure Rules, a party can move the court for orders of judicial review by way of a chamber summons.

12. It was further argued for the applicant that under Section 46(1) of the Constitution of Kenya Review Act, the only relief which can be granted by the Interim Independent Constitutional Dispute Resolution Court, is in relation to a petition challenging the conduct or result of the Referendum. The powers given under Section 46(1) of the Constitution of Kenya Review Act, does not include powers to quash the Gazette Notice or the promulgation of the Constitution. It was maintained that only the High Court had jurisdiction to hear and determine the application for judicial review. It was pointed out that Section 60A of the Constitution only confers status of a High Court Judge but not the powers of the High Court.

13. It was further argued that Section 3 of the Constitution of Kenya provides that the Constitution is supreme, subject to the power to amend it under Section 47 of the Constitution and Section 15A(3). It was submitted that Section 3 of the Constitution cannot be subject to Section 47A or 60A of the Constitution. The original jurisdiction of the High Court as provided under Section 62 of the Constitution therefore remains in force and could not therefore be ousted by the Interim Independent Constitutional Dispute Resolution Court. Further, it was argued that no appellate jurisdiction was provided in regard to the decision of the Interim Independent Constitutional Dispute Resolution Court, nor were the courts independent or answerable to the Judiciary. Therefore the creation of the court offended the

principles of separation of powers.

14. As regards the authorities cited by the respondents' counsel, it was argued that the cases were distinguishable. This is because the cases cited were dealing with matters which arose prior to the Referendum. It was submitted that cases arising after the Referendum could only be dealt with by way of a petition under Section 46 of the Constitution of Kenya Review Act. In support of the submissions made on behalf of the applicant, two authorities were relied upon.

15. The first case was an Australian decision *Hicks vs Ruddock and others [2007] 2 LRC 560*, in which the court held that the issue of jurisdiction was significant as the subject matter touched on the freedoms of the applicants. It was argued that in this case, the applicant is a citizen without a remedy as Section 46 of the Constitution of Kenya Review Act ousts a remedy which is otherwise available to a citizen, and which the review Act does not afford the applicant. It was noted that should the 1<sup>st</sup> respondent publish a Gazette Notice which is fatally defective, the applicant would be without a remedy. It was argued that although the applicant had filed a petition in the Interim Independent Constitutional Dispute Resolution Court, a distinction had to be drawn between the remedy available to the applicant in the Interim Independent Constitutional Dispute Resolution Court, and the remedy available to the applicant in this court. It was argued that the applicant's case presented this court with a *sui generis* situation, and it would not therefore be proper to oust the jurisdiction of the court. It was argued that what was before this court was justiciable and therefore the court had jurisdiction.

16. The 2<sup>nd</sup> case relied upon by the applicant was *Enosa vs Samoa Observer Company Ltd and others [2006] 1 LRC 409*, in which the court noted that the jurisdiction to strike out a statement of claim for disclosing no reasonable cause of action must be sparingly exercised and that the jurisdiction will only be exercised where it is very plain and obvious that the plaintiff's claim is so clearly untenable that it cannot possibly succeed. It was submitted that this court's jurisdiction has been questioned because of the constitutional provision, and not because there is no cause of action which cannot be sustained. The court was urged to weigh what was before it and what was available as a remedy. The court was urged to find that it has jurisdiction to grant the remedy of judicial review.

17. In reply to the applicant's submissions, it was argued that under Section 3 of the Constitution of Kenya, if the Constitution of Kenya review Act is inconsistent with the Constitution, then it would be *ultra vires* the Constitution. It was noted that Section 60A(1) gives the Interim Independent Constitutional Dispute Resolution Court, unlimited powers to deal with all matters arising from the Constitutional review process. Therefore, the remedy sought by the applicant was available in the Interim Independent Constitutional Dispute Resolution Court. It was argued that the Law Reform Act and the Judicature Act were all inferior to the Constitution and any provisions of these Acts contradicting the Constitution would be *ultra vires*. It was submitted that a clear reading of Section 46 of the Constitution of Kenya Review Act 2008, showed that the powers of the Interim Independent Constitutional Dispute Resolution Court were not limited to granting only the reliefs set out in that Section, but that it had discretion to grant other relief.

18. It was maintained that there was nothing stopping the applicant from challenging the correctness of the said notice from the Interim Independent Constitutional Dispute Resolution Court. It was maintained that Parliament in its wisdom gave the exclusive jurisdiction over disputes concerning the Constitutional Review Process to the Interim Independent Constitutional Dispute Resolution Court. As regards the Independence of the Interim Independent Constitutional Dispute Resolution Court, it was argued that under Section 60A(8) of the Constitution, the Interim Independent Constitutional Dispute Resolution Court is not subject to the control or direction of any person but was only answerable to the Constitution and the people of Kenya. The court was urged to ignore the authorities which were relied upon by the respondents as they were not relevant to the issue at hand.

19. I have given due consideration to the application, the submissions made before me and the authorities cited. I find that the applicant is essentially aggrieved by the publication of the referendum results which was done through Gazette Notice No.9360 of 6<sup>th</sup> August, 2010. The publication of the Gazette Notice was part of the referendum process antecedent to the promulgation of the proposed Constitution. The issue at this stage is whether the applicant's complaint can be determined by way of judicial review, and whether the High Court has jurisdiction to hear and determine such a complaint. In determining this issue, it is necessary to examine the constitutional provision which created the Interim Independent Constitutional Dispute Resolution Court. This court was created by an amendment to the Constitution which introduced Section 60A. At the risk of repetition I reproduce herein below Section 60A(1) which sets out the jurisdiction of that court as follows:

**“60A. (1) Notwithstanding Section 60 there shall be an Interim Independent Constitutional Dispute Resolution Court which shall have exclusive original jurisdiction to hear and determine all and only matters arising from the Constitutional review process.”**

20. In my view Section 60A(1) expressly suspends the jurisdiction of the High Court to deal with matters relating to the Constitutional Review process. This is confirmed by Section 60 of the Constitution which gives the jurisdiction of the High Court as:

**“Subject to Section 60A have unlimited original jurisdiction in Criminal and Civil matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other Law”.**

21. Therefore, it is evident that there was a deliberate action on the part of the Legislature through Section 60A of the Constitution, to create a special court other than the High Court, with a specific mandate (i.e. hearing disputes concerning Constitutional Review Process), for a specific duration. In order to achieve that purpose, the Legislature deliberately temporarily suspended the powers of the High Court with regard to the Constitutional Review Process and gave the powers to the Interim Independent Constitutional Dispute Resolution Court. Contrary to the submissions made on behalf of the applicant, the powers of the High Court which are suspended during the lifetime of the Interim Independent Constitutional Dispute Resolution Court, are not just original jurisdiction of the High Court in regard to Criminal and Civil matters relating to the Constitutional Review Process, but also include all other powers specified in Section 60 as relates to the Constitutional Review Process. Such powers include the powers of the High Court of Judicial Review which are donated through the Law Reform Act Cap 26 in so far as such power relate to the Constitutional Review Process.

22. I would entirely concur with the interpretation of Section 60 and 60A of the Constitution given by Ibrahim J. in the case of **Bishop Kimani & others vs the Attorney General** as quoted hereinabove. Ibrahim J. was able to deal with the application before him because although it fell within the jurisdiction of the Interim Independent Constitutional Dispute Resolution Court, that court had not been set up and therefore, the suspension of the powers of the High Court had not taken effect.

23. It should be noted here that the applicant has not challenged nor raised any issue with regard to the establishment or the constitutionality of the Interim Independent Constitutional Dispute Resolution Court. The applicant is merely claiming that she is entitled to seek redress in this court because the Interim Independent Constitutional Dispute Resolution Court has no powers to grant the remedy which the applicant is seeking. Therefore, much as the issue of the constitutionality and independence of the Interim Independent Constitutional Dispute Resolution Court, are pertinent and interesting issues which if properly articulated could give rise to very interesting arguments and results, they are not issues for determination in this matter.

24. The next issue I wish to consider is whether the Interim Independent Constitutional Dispute Resolution Court has powers to grant the remedy sought by the applicant. The applicant’s position was that the Interim Independent Constitutional Dispute Resolution Court’s jurisdiction is limited to hearing petitions under Section 44 of the Constitution of Kenya Review Act, and to provide remedies as set out under Section 46(1) of the same Act. It was submitted that the applicant’s cause of action cannot fall under Section 44 of the Act as the applicant is at this stage only questioning the Gazette Notice publishing the results of the Referendum. Section 44(1) of the Constitution of Kenya Review Act 2008 provides as follows:

**“The conduct or result of the Referendum may be challenged only by petition to the Interim Independent Constitutional Dispute Resolution Court, made within 14 days after the publication of the result of the Referendum under Section 43.”**

25. Section 44(1) does not limit the petitions challenging the Referendum to only the results of the Referendum. It includes **“the conduct or results”** of the Referendum. The Concise Oxford English Dictionary defines the word **“conduct”** as:

- “(i) The manner in which a person behaves.**
- (ii) The directing or managing of something. i.e. organize and carry out.”**

Therefore, in my view, the conduct of the Referendum by IIEC included the management of the process until conclusion when the results of the Referendum become final and are declared in accordance with Section 43 of the Constitution of Kenya Review Act. In this case, the applicant’s complaint related to the management of the Referendum process after the voting. It therefore falls within the conduct of the Referendum and could be brought by way of petition before the Interim Independent Constitutional Dispute Resolution Court, in accordance with Section 44 of the Constitution of Kenya Review Act 2008.

26. With regard to the remedies provided under Section 46(1) of the Constitution of Kenya Review Act 2008 which is as follows:

- “(1) On a petition under section 44 challenging the conduct or result of the referendum the Court may –**
- (a) Dismiss the petition;**
  - (b) Declare the published result to be incorrect;**
  - (c) Order the Electoral Commission to repeat the polling in any place or places; or**
  - (d) Annul the result of the referendum.”**

27. That provision cannot be looked at in isolation. That Section must be read in conjunction with Section 60A of the Constitution, which gives exclusive original jurisdiction to the Interim Independent Constitutional Dispute Resolution Court, to deal with disputes arising from the Constitutional Review Process. The Interim Independent Constitutional Dispute Resolution Court, therefore, has jurisdiction not only to provide remedies as set out under Section 46(1) but may issue any other appropriate remedies. Further, it was admitted that the applicant has another matter which is pending before the Interim Independent Constitutional Dispute Resolution

Court. That is the right forum for her to pursue her legal redress.

28. The upshot of the above is that in view of Section 60 and 60A of the Constitution, this court has no jurisdiction to deal with the application dated 17<sup>th</sup> August, 2010. It is accordingly struck out. Those shall be the orders of the court.

**Dated and delivered this 24<sup>th</sup> day of August, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mrs Madahana & Kinyanjui for the applicant

Muhoro & Ms Kimani for the respondents

Koskei - Court clerk