



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 21 OF 2008

HARRISON GARAMA

KOMBE.....PLAINTIFF

-VERSUS-

ELECTORAL COMMISSION OF

KENYA.....DEFENDANT

RULING

The application dated 11th March 2010 is made by way of chamber summons under Order VI Rule 13(1) (a) and (2) Civil Procedure rules seeking that the plaint filed herein be struck out on grounds that it discloses no reasonable cause of action and the suit be dismissed.

It is premised on grounds that the defendant and the now Interim Independent Electoral Commission (IIEC) is a creature of the Constitution by virtue of section 41 of the Constitution, and is therefore not part of the Government or a public body.

The defendant therefore is not clothed with a legal entity or body corporate status as capable of being sued in a civil court for redress.

Further that all constitutional bodies or organs such as Parliament, Judiciary and Executive and Executive organs such as the Attorney General, Controller General and such bodies like the defendant, do not qualify as body corporates capable of being sued in a civil court for a civil remedy.

That there is no remedy to amend the plaint and bring in the Attorney General as paragraph 9 of the plaint shows that the Appeal to the Court of Appeal was finalized on 14th March 2007, and a suit against the Attorney General should have been filed by 13th March 2008. Since there is no evidence that plaintiff complied with the provisions of section 113A of the Government Proceedings Act (Cap 40) and there being no remedy available under section 1A and 1B of the Civil Procedure Act to inject life into this suit then it must be dismissed for being against the wrong party.

The application is opposed on grounds that:

(1) Defendant has submitted itself to the jurisdiction of this court and cannot now object to the suit and to be allowed to contest that would be giving applicant a chance to aprobate and reprobate at the same time.

(2) There is nothing unconstitutional in the substitution and/or amendments as the IIEC has stepped into the shoes of the defunct Electoral Commission of Kenya (ECK) and taken over all the assets and liabilities, this suit included.

Counsel filed written submissions in which no arguments or analysis was made by the applicant's counsel. He simply reproduced the chamber summons application then cited the case of **Muriithi v AG HCCC No.1 170 of 1981** Another relevant statute he referred to was the **Interpretation and General Provisions Act (Cap 2)** and the **Government Proceedings Act**.

In response the respondent's counsel submitted that here are many recent decisions where the IIEC has been sued eg **William Kabogo Gitau v George Thuo, IIEC and Watson Mahandia Nrb Hccc No. 10 of 2008 (Milimani) Election Petition**

(3) Reuben Nyanginda Ndolo v Dickson Wathika Mwangi, Jerusha Chepsa and ECK (which was later substituted to read IIEC (HCCC (Nrb) Election Petition No. 11 of 2008.

As regards now suing the Attorney General and whether any attempt to join him would be time barred, the respondent's counsel submits, that is a non starter because parties have already framed issues.

The issue here is very simple – what was the status of the defendant at the time that the cause of action arose? At that time it was a statutory body under section 41 of the Constitution, and went by the name Electoral Commission of Kenya. Following an amendment to section 41 of the Constitution it then became the IIEC which was described as its successor. At the time, the ECK was not a Government Department and so was not covered by the Government Proceedings Act.

IIEC is a creature of the Constitution but does not form one of the three arms of Government i.e the Executive, the Legislature or the Judiciary nor was it a department of Government nor was it described as a servant or agent of the Government.

From my understanding of the provisions and rules of statutory Interpretation, IIEC, merely stepped into the shoes of ECK and became successor. The deeds committed by it in liabilities, remained operational and a party could bring an action as such. The attempt to now fault the respondent for not suing the Attorney general and crowning it all by saying that any attempt to amend the suit to join the Attorney General at his point, is in my view mischievous and in bad faith. The defendant/applicant is now attempting to frame fresh issues under the guise of this application, then posing several questions regarding the status of the defendant in the suit. I am indeed alive to the fact that several other decisions have been presented recently where IIEC was the defendant and not the Attorney General – all without a whimper, and I get the distinct impression that this application is deliberately intended to scuttle hearing of this matter. It has no merit and is dismissed with costs.

Delivered and dated this 3rd day of **November 2010** at Malindi.

H. A. Omondi

JUDGE

Mr. Oduor holding brief for Meenye for plaintiff

Mr. Mwadilo holding brief Munyithya