



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 4 OF 2018

JAMES OURU OROKO.....PETITIONER

-VRS-

1. THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

2. CALLEN ATUYA.....2ND RESPONDENT

3. THE KENYA NATIONAL EXAMINATION COUNCIL.....3RD RESPONDENT

4. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...4TH RESPONDENT

5. ETHICS & ANTICORRUPTION COMMISSION.....5TH RESPONDENT

RULING

This ruling is in respect of the petitioner’s Notice of Motion dated 27th January 2020 in which he sought a review of the order of this court dated 23rd January 2020 in which the court dismissed the petition for non-attendance. The petitioner prays that the petition be reinstated.

The application was canvassed by way of written submissions. I have considered the same carefully and I am satisfied that it has merit. The petitioner annexed a discharge summary from Matata Hospital showing that he was admitted to the hospital on 22nd January 2020 and discharged on 24th January 2020 hence giving a plausible explanation for failing to attend court. I say plausible as no evidence has been placed before this court to rebut that discharge summary. In the circumstances the application to reinstate the petition is allowed with no orders as to costs.

Be the above as it may, Counsel for the 4th and 5th respondents have in their submissions raised a very pertinent issue and it is crucial that I determine it at this stage as I am enjoined to do pursuant to the overriding objective set out in **RULES 3 (4) AND (5) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**. The issue raised is one of jurisdiction and it is Counsel’s submission that this court has no jurisdiction to hear and determine this petition as the same is an election petition concerning a Member of a County Assembly but disguised as a Constitutional Petition.

I have perused the petition and it is evident that the petitioner seeks to overturn the election of the 2nd respondent as the Member of the County Assembly of Nyamira for Bokeira Ward. Specifically, his prayers are: -

“1. Declaration that the 2nd respondents was not properly cleared to run for the office of the County Assembly.

2. That upon the honourable granting no. 1 above the office of the 5th respondent do declare vacant the seat of BOKEIRA WARD.

3. An order that parties bear own costs this being public interest litigation.”

The petitioner seeks the aforesaid prayers on the grounds that the 2nd respondent was not qualified to contest for the seat as her certificates were not genuine. In other words, it is his contention that the 2nd respondent was not validly elected. In the case of **In The Matter of the Interim Independent Electoral Commission [2011] eKLR**, the Supreme Court observed: -

“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by

principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

In the case of **Moses Mwigigi & 14 others [2016] eKLR** the Supreme Court pronouncing itself on matters of election and election petitions stated as follows: -

“It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.”

From the above pronouncement it follows that any person seeking to challenge the validity of an election must do so by way of an election petition.

Section 75 (1A) of the Elections Act confers jurisdiction to hear an election petition in regard to the County Assembly on the Resident Magistrate’s Court designated by the Chief Justice. The Section states: -

“A question as to the validity of the election of a Member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

Dealing with an issue similar to the one raised by Counsel in this case the Court of Appeal was in the case of **Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR** emphatic that the High Court has no jurisdiction in these kind of cases. That court stated: -

“48. An issue urged by the 1st respondent is whether the threshold for a constitutional petition was met in the petitions filed at the High Court. In our considered view, the claims by the 1st and 2nd respondents not only met the threshold for a constitutional petition but also substantially met the threshold and grounds for an election petition. The substratum of the 1st respondents claim is founded on nomination to the County Assembly using Party List as an electoral process. In our view, the undisputed background facts in support of the 1st respondent’s claims in the constitutional petition and his claim founded on nomination to the County Assembly are intertwined and inseparable. Being intertwined and not severable, the specific election dispute resolution mechanism provided under the Constitution and the Elections Act is the procedure to be adopted. The mechanism provided is that an election petition is the only way to challenge post-gazettment electoral disputes.

49. On the question whether there is a specific constitutional or statutory bar to the High Court to entertain a constitutional petition on settlement of electoral disputes in relation to Membership to a County Assembly we answer in the affirmative. There is an express statutory bar to the original jurisdiction of the High Court to handle post-gazettment nomination or electoral disputes relating to Membership to the County Assembly. The original jurisdiction to hear and determine post-gazettment electoral disputes relating to membership to a County Assembly is vested upon the Magistrates Court. The High Court has appellate jurisdiction in respect to disputes relating to post-gazettment of Members to a County Assembly. The express statutory bar is Section 75 (1A) of the Elections Act. The Section provides:

A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.

50. In addition, Article 87 (1) of the Constitution enjoins Parliament to enact legislation to establish mechanism for timely settlement of election disputes. The Elections Act which give jurisdiction to the magistrates court has been enacted under the authority of the Constitution. It follows that the jurisdiction of the magistrates court to hear and determine election petitions relating to Membership of the County Assembly has Constitutional underpinning.

51. The appellate jurisdiction of the High Court to hear appeals from the Magistrates Court in relation to Membership to the Court Assemblies is conferred by Section 75 (4) of the Elections Act which provides that an appeal from a decision of the Magistrate’s court in an election petition lies to the High Court on matters of law only. In light of the provisions of Sections 75 (1A) and 75 (4) of the Elections Act, we are of the considered view that in election dispute resolution, when a specific procedure and forum has been provided for under the Constitution or Statute, that procedure and forum is the way to initiate and move the court that has the jurisdictional competence to hear and determine the dispute.

52. In the instant appeal, the 1st and 2nd respondents have urged us to find that the Magistrates Court is not the proper forum to hear and determine Bill of Rights disputes on violation of minority rights and protection and enforcement of rights of marginalized communities even if the substance of the dispute arises from or is related to nomination or elections. We decline to make such a finding. The Magistrate’s court has original jurisdiction to hear and determine post-gazettment

election disputes on membership to the County Assembly. Whatever ground that is raised in an election petition properly before the Magistrates court, the court has jurisdiction to hear and determine the same. There is no principle or rule of law that in an election petition properly before a Magistrates court, the court shall not have jurisdiction to hear and determine any ground urged in violation of the Bill of Rights. It is opportune to recall that an election court is a court with specialized jurisdiction and in this context, a Magistrates court sitting as an election court hearing disputes on Membership to the County Assembly is a specialized court. As an election court, the magistrate has jurisdiction to hear and determine any and all grounds raised in an election petition properly before it. In this regard, we are reminded of the dictum of the Supreme Court in Peter Ngoge –v - Francis Ole Kaparo and Five Others, Sup. Ct. Petition No. 2 of 2012, [2012] eKLR, where it was stated that:

“In the interpretation of any law....., the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law....”

55. In the instant appeal, the issue at hand is whether the trial court had jurisdiction to hear and determine a nomination dispute relating to membership of the Lodwar County Assembly. In our considered view, the High Court had no jurisdiction for the following reasons:

(a) Party nomination disputes after gazetment by the IEBC can only be heard and determined by way of an election petition. Neither a judicial review application nor a constitutional petition can resolve or initiate electoral dispute resolution after gazetment of nomination or election results.

(b) As regards membership to the County Assembly, jurisdiction to hear an election petition is vested upon the Magistrates Court and not the High Court. In the instant case, the petition filed by the 1st and 2nd respondent at the High Court in Lodwar were not election petitions before an election court presided over by a Magistrate duly gazetted by the Chief Justice.

(c) In addition, the prayers sought by the 1st and 2nd respondents in the Petitions before the High Court include prayer for degazetment of the 4th and 5th respondents who had already been gazetted as Members of the Lodwar County Assembly. The jurisdiction to deal with any such disputes after gazetment lies with the Magistrates court which can only be moved by way of an election petition.

(d) The 1st and 2nd respondents cannot through draftsmanship and legal craftsmanship through pleadings in Petition Nos. 2 and 3 of 2017 confer jurisdiction upon the High Court.

56. In our decision in the instant matter, we are guided and bound by the Supreme Court decision in Moses Mwicigi & 14 others (supra) where the Court stated that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’. Guided by the judicial authorities cited and bound by the Supreme Court, we find that this appeal has merit. We reiterate that a court with original jurisdiction cannot nullify or cancel results for any electoral seat under the Constitution or Elections Act unless the court is moved as an election court by way of an election petition. For avoidance of doubt, the High Court sitting qua High Court with its original and unlimited jurisdiction under Article 165 (3) of the Constitution is not an election court envisaged under Article 87 (1) of the Constitution. Further, the High Court in exercise of its jurisdiction under Article 165 cannot nullify or cancel the results of an election. We reiterate that a constitutional petition or judicial review proceedings is not an election petition and it is not the mechanism for settling election disputes envisioned under Article 87 (1) of the Constitution.” (Underlining mine).

Similarly, in the case of **Jaldesa Tuke Dabelo v IEBC & another [2015] eKLR** the same court stated: -

“20. It is our considered view that the jurisdictional competence of a court and the statutory procedure for commencing a cause of action are aimed at facilitating and enabling a party to be heard. A litigant cannot ignore the jurisdictional competence of a court or the procedure for commencing a cause of action and then aver that he has not been heard. Article 159 of the Constitution or the Overriding Objective principles are not blanket provisions that shelter a party who disregards the proper forum or jurisdictional competence of a court or fails to follow the procedure for commencing a cause of action. In totality, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.”

I need not say more as I am bound by the decisions of both the Court of Appeal and the Supreme Court and accordingly as I do not have jurisdiction I must now down my tools because as was stated by Nyarangi J in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1:-**

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

It would be futile and a breach of the overriding objective set out in **Rules 3 (4) and (5) of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013** and the express provisions of **Article 159 (2) (b) of the Constitution** to continue holding in abeyance a petition for which I have no jurisdiction. Accordingly, the petition is struck out. There shall be no orders as to costs.

Signed, dated and delivered in Nyamira this 8th day of October 2020.

E. N. M AINA

JUDGE

Judgement delivered electronically via Microsoft Teams