



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 35 OF 2017

IN THE MATTER OF: ARTICLES 22, 23, 24, 96, 102 (1), 165(2), 180 (2), 193 (2) (a) AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLE 193 (2) (a) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ELIGIBILITY TO CONTEST THE GIBERNATORIAL ELECTION MOMBASA COUNTY

BETWEEN

HAMILTON MWAKITELE WALONGO.....PETITIONER

AND

HON. HASSAN OMAR.....1ST RESPONDENT

IEBC.....2ND RESPONDENT

AND

JOSPHAT KOLI NANOK.....APPLICANT/INTERESTED PARTY

JUDGMENT

1. The Petitioner contests the eligibility of the 1st Respondent to run for the elective position of Governor of Mombasa County in the concluded elections held on 8th August, 2018. The Petitioner contends that the 1st Respondent was nominated to run for the said position by the WIPER party yet at the time of nomination the 1st Respondent was a sitting member of the Parliament as Senator of Mombasa County hence a State Officer who could not contest for the position.
2. The Petitioner alleges that Article 193 (2) (a) of the Constitution disqualifies a state officer or any other public officer from being elected as a Governor. The Petitioner claims that up until 8th August, 2017 the 1st Respondent was an active Member of Parliament who had not vacated office in the manner stipulated under Article 103(1) of the Constitution.
3. It is the Petitioner's case that by seeking election as Governor of Mombasa County, the 1st Respondent was directly breaching the doctrine of separation of powers, and therefore creating a direct conflict of constitutional duties and responsibilities under Article 96 of the Constitution. The Petitioner thus seeks the following prayers:
 - a) A declaration that State Officers, or any other public officer, with the exception of sitting governors and members of the County Assembly, are ineligible to be elected for the seat of county governor.
 - b) A declaration that the nomination of the 1st Respondent for the position of Governor of Mombasa County by the WIPER Democratic Party of Kenya was unconstitutional and consequently null and void and of no effect.
 - c) A declaration that the 1st Respondent being a sitting member of parliament is not eligible for election as Mombasa County

governor for the election slated for the 8th August, 2017.

d) A declaration that the nomination of the 1st Respondent for the position of Governor Mombasa County by WIPER Democratic Party of Kenya and subsequent acceptance of the nomination by the 2nd Respondent was improper, unlawful and unconstitutional and consequently is null and void and of no effect.

e) An order of Mandamus be issued directed to the 2nd Respondent compelling it to amend the gazette notice No. 6253 by removing the name of the 1st Respondent from the list of nominees of gubernatorial elections for Mombasa County.

f) Or such order as this Honourable court shall deem just.

Response

4. The 2nd Respondent opposed the Petition by way of Grounds of Opposition dated 9th August, 2017.

5. The 2nd Respondent contends that this court does not have the jurisdiction to hear and determine this Petition as the Petitioner has not exhausted all the available dispute resolution mechanisms.

6. Further, the 2nd Respondent claims that the Petition has been overtaken by events as the election in question took place on 8th August, 2017. The 2nd Respondent also states that the petition intends to direct and control the functioning of the 2nd Respondent contrary to the provisions of Section 26 of the Independent Electoral and Boundaries Commission Act.

7. The 1st Respondent and Interested Party did not respond to the petition.

Submissions

8. The Petition was canvassed by way of written submissions. The Petitioner and 2nd Respondent both filed their submissions on 19th December, 2017.

9. **Mr. Oduor**, learned counsel for the Petitioner submitted that the qualifications for one to be elected as a governor under Article 180(2) of the Constitution are that a person must be eligible to be elected as a member of the county assembly (MCA) while the disqualifications for election as an MCA under Article 193 (2) (a) include a person being a state officer or public officer other than an MCA. Counsel contended that a Senator is a state officer as per the definition of "state office" provided in Article 260 of the Constitution.

10. Mr. Oduor submitted that at the material time the 1st Respondent was the Senator of Mombasa County and had not vacated his office in any of the ways provided under Article 103(1) of the Constitution before declaring his intention to run for the position of Governor. Therefore, Counsel opined that the 1st Respondent remained in office until the term of Parliament lapsed on 8th August, 2017.

11. Mr. Oduor submitted that the rationale for barring sitting senators from vying for the position of the governor is that they play an oversight role over the executive, Governors and therefore conflict of interest may arise and the senators may not be able to effectively perform their duties.

12. Mr. Oduor argued that although Article 38(3) (c) of the constitution guarantees every person political rights including the right to run for political office, this right is not absolute and can be limited. The limitation, in this instant, Counsel submitted was that the 1st Respondent needed to vacate office.

13. As to whether there are other alternative dispute resolution mechanisms that have not been exhausted by the Petitioner, Mr. Oduor submitted that the dispute mechanisms put in place by the 2nd Respondent cannot entertain matters touching on constitutional questions.

14. **Mr. Lumetete**, learned Counsel for the 2nd Respondent submitted that under Section 43 (6) of the Elections Act, the 1st Respondent as a member of parliament is exempted from resigning from public office in order to vie for a political office.

15. In relation to the issue of conflict of interest, Mr. Lumetete submitted that the conflict of interest is theoretical and not actual as the Petitioner has not demonstrated how it arises and the provisions of the law that the conflict of interest offends.

16. Mr. Lumetete contended that the 2nd Respondent has an elaborate system of settlement of disputes which have not been exhausted by the Petitioner. Counsel opined that this dispute ought to have been filed with the Electoral Dispute Resolution Panel within 7 days after the nomination. Alternatively, Counsel argued that the Petitioner had the option of filing this dispute with the Political Parties Disputes Tribunal. Counsel concluded that this court can only sit as an election court after the elections are held.

17. Mr. Lumetete submitted that once the 1st Respondent was gazetted to run for the position of governor Mombasa County he ceased to be a Senator. Counsel opined that the gazettement was in fact a resignation of the 1st Respondent from the seat of the Senator.

The Determination

18. I have carefully analyzed the Petition. Several issues arise for determination by this court. These are:

- a) Whether this court has the jurisdiction to entertain disputes emanating from the pre-election process.
- b) Whether State Officers, or any other public officer, with the exception of sitting Governors and Members of the County Assembly, are ineligible to be elected for the seat of County Governor.
- c) Whether the 1st Respondent as sitting Member of Parliament was ineligible for election as the Mombasa Governor.

a) Whether this court has the jurisdiction to entertain this Petition.

19. The 2nd Respondent raised the issue of jurisdiction of this court. The 2nd Respondent argues that this is not the proper forum for this matter as there are other available avenues for determination of the issues raised herein that have not been exhausted by the Petitioner. According to the 2nd Respondent the Elections Act and the Political Parties Act provide mechanisms for resolving disputes arising from the nomination process. On the other hand, the Petitioner opined that the Petition raises constitutional questions that can only be addressed by this court.

20. Article 165(3) (d) of the Constitution reads as follows:

(3) Subject to clause (5), the High Court shall have—

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191.

21. This court has the original jurisdiction to determine issues relating to the interpretation of the constitution. However, can this jurisdiction be invoked if there are other appropriate dispute resolution mechanisms provided by the law? In my view, where other dispute resolution avenues are provided by the law such as tribunals or committees these avenues will have the jurisdiction over the matters provided therein. Courts of law cannot purport to usurp the jurisdiction of these other avenues by hiding behind Article 165(3) which gives the High Court jurisdiction over various matters. The High Court can only exercise its supervisory role over these other avenues. The Supreme Court in issuing its advisory opinion in **The Matter of the Interim Independent Electoral Commission [2011] eKLR** opined that a court cannot arrogate itself jurisdiction through the interpretation of the intention of Parliament where a statute or law expressly provides jurisdiction and there is no ambiguity. The court observed as follows:

“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.”

22. Article 88 of the Constitution establishes the Independent Electoral and Boundaries Commission who is the 2nd Respondent herein. At sub-article (4) (e) the Commission is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results. As I understand it the dispute herein originated from the nomination of the 1st Respondent by the WIPER Democratic Party to run for the position of Governor Mombasa County. This implies that this was a pre-election dispute.

23. Section 74(1) of the Election Act reiterates the provisions of Article 88 (4) (e) adding that such a dispute is to be determined within ten days from the date of lodging the dispute with the 2nd Respondent. Therefore the 2nd Respondent’s dispute resolution committee was an avenue for the resolution of the above dispute.

24. The debate as to the jurisdiction of the High Court in pre-election disputes has been the subject of various decisions. In the case of **Republic vs. The Independent Electoral and Boundaries Commission Ex parte Charles Ondari Chebet (Nakuru High Court Judicial Review Application No. 3 of 2013)**, it was held that:-

“where there is clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes this court's jurisdiction is precluded. This court's jurisdiction would only arise after the due exercise by the mandated bodies, the Returning Officer and the Commission of their statutory mandate.”

25. Also in the case of **International Centre for Policy and Conflict & 5 Others vs. Attorney General and 5 others [2013] eKLR** the court stated that:

“Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.”

26. In my view there are sufficient mechanisms under Article 88(4) of the Constitution and Section 74(1) of the Elections Act for the determination of this matter. These mechanisms were not invoked by the Petitioner. This court cannot come to the aid of the Petitioner at this stage. In the case of **Francis Gitau Parsimei & 2 others vs. National Alliance Party & 4 others [2012] eKLR**, the court held that:

“It is also my view that Article 88(4)(e) and section 74(1) of the Elections Act, 2011 provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed”.

27. For these reasons I find that this court lacks the jurisdiction to entertain this matter. This being the case there is no further need to address the remaining issues raised for determination.

28. The Petition dated 28th July, 2017 is hereby dismissed. Costs herein shall be for the 2nd Respondent.

Dated, Signed and Delivered in open court in Mombasa this 18th day of October, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Wachenje holding brief Lumatete for IEBC

No Appearance for Petitioner

Mr. Kaunda Court Assistant