



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 246 OF 2017

IN THE MATTER OF RULE 3, 4, 13, 23(1) AND (2) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS OF THE INDIVIDUAL PRACTICE AND PROCEDURE RULES, 2013 LEGAL NOTICE 117 OF 2013)

AND

IN THE MATTER ARTICLES 1, 19, 20, 21, 23, 24, 27, 38, 159 AND 165 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF THE THREATENED VIOLATION OF RIGHTS AND FREEDOMS UNDER ARTICLES 85 OF THE CONSTITUTION OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 85 (a) OF THE CONSTITUTION AND SECTION 33 OF THE ELECTIONS ACT

AND

IN THE MATTER OF AN APPLICATION FOR EXTENSION OR ENLARGEMENT OF TIME FOR NOMINATION AS AN INDEPENDENT CANDIDATE FOR THE 8TH AUGUST 2017

BETWEEN

MELVIN KIPKOECH KUTOL.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Introduction

1. In his petition dated 23rd May, 2017, the Petitioner herein, **Melvin Kipkoech Kutol**, herein avers that he was an aspirant and contested for the position of the Member of County Assembly for Solai Ward in Rongai Constituency in Nakuru County primaries under the banner of the Jubilee Party (hereinafter referred to as “the Party”) ticket which primaries were conducted on 26th April, 2017 and was declared the winner.

2. The said nomination results were however contested by some parties to the contest before the Party's National Appeals Tribunal which vide its decision of 10th May, 2017 upheld the appeal and declared the runner up one **Nixon Kiprotich Morogo** as the winner. Aggrieved the petitioner appealed to the Political Parties Disputes Tribunal (hereinafter referred to as "the Tribunal") which nullified the nomination results for Solai Valley Polling Station and ordered a recount of the same or a repeat of the same. Following the repeat exercise on 17th May, 2017 the Petitioner emerged the winner but failed to be the aggregate winner. The Petitioner therefore decided to run as an independent candidate but by that time the 1st Respondent's deadline for the submissions and compliance with the nomination rules for the independent candidates had lapsed on 10th May, 2017 before the political disputes process had been exhausted.

3. It was the Petitioner's case that whereas the 1st Respondent herein, the **Independent Electoral and Boundaries Commission** (hereinafter referred to as "the Commission") had extended the period for political parties, the Commission declined to do so for the Petitioner thereby discriminating against him.

4. It was argued that the Commission ought to have come up with a policy framework to manage such eventualities of lapse of time in the interest of both Political Parties and the Potential Independent Candidates like the Petitioner.

5. The Petitioner therefore seeks the following orders:

a. A declaration that the constitutional timelines under Article 85(a) of the Constitution 2010 and Section 33 of the Elections Act 2011 vis-à-vis the nomination timelines set by the IEBC for the Independent Candidates contravened, violated and infringed on the Petitioner's fundamental rights and freedoms to stand as an independent candidate

b. That order to issue compelling the 1st respondent to extend or enlarge time for compliance and nomination for independent candidate to allow the Petitioner to submit his compliance documents to the 1st respondent for clearance for the 8th August 2017 General Elections.

c. That an order do issue compelling the 2nd respondent to issue the Petitioner with a clearance certificate confirming that he is not a registered member of any political party to enable him stand as independent candidate for the 8th August 2017 General Elections.

d. That an order do issue for the 1st respondent in liaison with the 3rd respondent to put in place adequate policy framework and mechanisms for the realization of the fundamental rights and freedoms guaranteed under Article 85(a) of the constitution to ensure adequate timelines for the party nomination and court dispute process does not lock out potential independent candidates who have been disadvantaged in the party primaries.

e. Costs of this Petition be borne by the Respondents.

6. The 2nd and 3rd Respondents objected to the Petition raising the issues touching on the jurisdiction of this Court to entertain the Petition. It is the said objection that is the subject of this ruling.

7. According to the said Respondents, the timelines in question are prescribed by the Constitution vide Article 85(a) thereof as read with section 33 of the **Elections Act**. It was therefore contended that this Court has no power to extend time prescribed by the Constitution and an Act of Parliament enacted pursuant thereto.

8. In support of their objection the said Respondents, through learned counsel, **Mr Manduku** and **Mr Munene**, relied on **Ferdinand Waititu vs. Independent Electoral and Boundaries Commission (IEBC) & Others [2013] eKLR** and **Caroli Omondi vs. Registrar of Political Parties & Another [2017] eKLR**.

9. On the part of the Petitioner it was contended that the issues being raised by the Petitioner were not limited to the extension of the prescribed timelines and that the petition also seeks declarations which may guide future conduct of nominations. It was however contended that this Court has the power to extend time prescribed either by the Constitution or an Act of Parliament in the exercise of its inherent jurisdiction.

10. According to **Mr Ayieko** learned counsel for the Petitioner, the decisions relied upon were handed do after full hearing hence this Court ought similarly to hear the petition on its merits.

11. I have considered the issues raised herein.

12. This being a preliminary objection it is important to deal with circumstances under which preliminary objections can be entertained in order to determine whether or not the objection was properly taken in these proceedings. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** this Court expressed itself, *inter alia*, as follows:

“Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion

whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion...In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication." [Emphasis added].

13. In arriving at that decision, the Court relied on the celebrated case of Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696 in which case Law, JA was of the following view:

"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

14. As for Newbold, P:

"A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop". [Emphasis added].

15. Also cited was the decision in Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177 where it was held that:

"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion." [Emphasis added].

16. Dealing with the same issue, Ojwang, J (as he then was) in Oraro vs. Mbaja [2005] 1 KLR 141 expressed himself as follows:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"...The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."

17. It is therefore clear that a preliminary objection is an objection based on law that is argued on the assumption that the facts as pleaded are correct. In other words, a person raising a preliminary objection must be prepared to argue the same on the premise that the facts as they appear on record are correct. As long as that is done, it is not objectionable for the party raising the objection to refer to the facts on record. What the Court does not permit is the attempt to reconcile factual disputes in a preliminary objection.

18. In this case the Respondents rely on Article 85(a) of the Constitution as well as section 33 of the *Elections Act*. Article 85(a) aforesaid provides that:

Any person is eligible to stand as an independent candidate for election if the person—

(a) is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election.

19. Similarly section 33(1)(a) of the *Elections Act* provides:

A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) has not been a member of any political party for at least three months preceding the date of the election.

20. In this case the date of elections pursuant to Articles 101(1), 136(2)(a), 177(1)(a) and 180(1) of the Constitution is due for the 8th August, 2017. In this case going by the Petitioner's own pleadings, he must have been a member of Jubilee Party by 17th May, 2017 when the results of the repeat elections for the Ward in question was announced since according to him, on that day he emerged the winner of the said repeat elections. It is in fact, according to him, the release of the same that provoked his decision to seek to vie as an independent candidate.

21. It is clear that by 17th May, 2017 the period to the elections date was less than the prescribed three months. The question for determination is whether this Court can extend time for the Petitioner in those circumstances. According to the decision of the Court of Appeal in **Ferdinand Waititu vs. Independent Electoral and Boundaries Commission (IEBC) & Others** (supra) at page 7:

“...the timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any court for whatever reason. It is indeed the tyranny of time, if we may call it so.”

22. Similarly in **Caroli Omondi vs. Registrar of Political Parties & Another [2017] eKLR**, **Matavo, J** expressed himself on a matter whose facts were similar to this matter as follows:

“This petition was filed on 11th May 2017, outside the constitutionally stipulated period of ninety days. In my view, an order directing the second Respondent to receive and gazette the petitioners name and symbols as an independent candidate outside the stipulated ninety days, if granted will fly on the face of article 85(a) of the constitution and section 33 (1) of the Elections Act...In fact the second Respondent has no constitutional mandate to extend the above constitutionally and statutory stipulated period, hence the argument that the second Respondent discriminated independent candidates when it extended the deadline for political parties and failed to extend the deadline for independent candidates is totally erroneous. Article 85 (a) of the constitution and section 33 (1) of the Elections Act [9] leaves no room at all for the second Respondent to extent the period and this court cannot issue an order compelling the second Respondent to violate the clear provisions of the constitution and the statute, because such an order would be a nullity.”

23. In my view, to purport to extend the time prescribed by and under the Constitution would amount to amending the Constitution in particular Article 85(a) thereof through the backdoor. Kenyans must have had a good reason why they prescribed the said period and this Court cannot under the guise of the exercise of inherent powers overrule the will of the people expressed in the Supreme Law of the land. In the exercise of its judicial functions, Article 165(1) of the Constitution provides that the judiciary is subject to the Constitution and the law and unless the law is inconsistent with the Constitution, the Courts must apply the same.

24. In prayer 1 of the petition the Petitioner seems to suggest that Article 85(a) of the Constitution contravened, violated and infringed on his fundamental rights and freedoms to stand as an independent candidate. If there is any infringement the same is an infringement that is sanctioned by the Constitution and hence cannot be unconstitutional and moreover Article 2(3) of the Constitution provides that:

The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

25. As was held by the Supreme Court in **Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR**:

“...we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality.”

26. As regards the contention that notwithstanding the aforesaid authorities this Court must still proceed and determine the petition on its merits I with respect find that that position is untenable. **Where it is clear to the Court that the proceedings before it no longer serve any useful purpose the Court ought to bring the same to end in order to prevent abuse of its process.** As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

“A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v*

CORP OF LLOYDS [1992] 2 ALL E.R 486 at page 488 where *Lord Roskil* states:

“It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge’s time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges’ time as is necessary for the proper determination of the relevant issues.”

At page 493 of the same case *Lord Templeman* delivered himself thus:

...“an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge.”

.....

In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues it would be farcical to waste judicial time on it.”

....In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice... The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in *bona fides* and was oppressive to the appellant. All these in our view constitute abuse of process.”

27. This was the position adopted by *Nyamu, J* in *Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728* when he expressed himself as follows:

“In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time.”

28. The Court ought therefore to take appropriate steps in order to manage it said resource. This was appreciated by the Court of appeal in *Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 OF 2010* where it held that:

“...the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. [Underlining mine].

29. To quote *Omollo, JA* in the case of *J P Machira vs. Wangethi Mwangi & Another Civil Appeal No. 179 of 1997* although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so. A trial must be based on issues otherwise it may become a farce.

30. That the Court may invoke its inherent powers to bring to an end otherwise unnecessary proceedings was also appreciated by *Kimaru, J* in *Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009* expressed himself as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its

process and its duty to intervene and stop the proceedings, or put an end to it”.

31. The same Judge in Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005 similarly held that:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

32. Having considered the submissions made before me it is clear that prayers (a), (b) and (c) cannot see the light of the day however long the night is.

33. With respect to prayer (d) I agree with the petitioner that the same can still be sustained in light of this Court’s powers under Article 165(3) of the Constitution as read with Article 258 thereof.

34. In the premises the order which commends itself to me and which I hereby grant is that prayers (a), (b) and (c) are incompetent and are hereby struck out.

35. The costs of this objection are awarded to the 2nd and 3rd Respondents in any event.

36. It is so ordered.

Dated at Nairobi this 5th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Manduku for the 2nd Respondent

Mr Munene for the 3rd Respondent

Mr Bosek for an intended interested party

CA Mwangi