



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION & HUMAN RIGHTS DIVISION

PETITION CASE NO. 17 OF 2015

ISAAC ALOUCH POLO ALOUCHEIR.....PETITIONER

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

MOSES OTIENO KAJWANG'1ST INTERESTED PARTY

MAURICE RARIA.....2ND INTERESTED PARTY

JUDGEMENT

1. In the general election held on 4th March, 2013 Gerald Otieno Kajwang' was elected the Senator of Homa Bay County for a term of five years. He was elected on the ticket of the 1st Respondent, the Orange Democratic Movement Party (ODM). Gerald Otieno Kajwang' passed away before completing his term thereby necessitating the holding of a by-election to fill the vacancy. The 1st Respondent nominated the 1st Interested Party, Moses Otieno Kajwang' to vie for the by-election that was held on 12th February, 2015.
2. The nomination of the 1st Interested Party by the 1st Respondent as a candidate was accepted by 2nd Interested Party, Maurice Raria who was appointed by the 2nd Respondent, the Independent Electoral and Boundaries Commission (IEBC) as the Returning Officer for the by-election. The 1st Interested Party was subsequently elected by the people of Homa Bay County as their representative in the Senate.
3. It is also important to note that the Petitioner herein, Isaac Aluoch Polo Aluochier had filed Complaint Petition No. IEBC/DRC/HBBE/01/2015 before the 2nd Respondent's Disputes Resolution Committee (the "Committee") seeking the disqualification of the 1st Interested Party from participating in the by-election and the prosecution of the ODM for violation of the Elections Act, 2011. The complaint, which was premised on the allegation that the ODM was not eligible to field a candidate in the by-election as it had knowingly nominated a State officer in the 4th March, 2013 general election, was dismissed on 19th January, 2015.

4. The Petitioner has thus moved this Court through his petition dated 22nd January, 2015 and filed on the same date and prays for orders as follows:

“1. The Court sets aside in entirety the DRC decision in *IEBC/DRC/HBBE/01/2015, Isaac Aluoch Polo Oluochier v Orange Democratic Movement, delivered on 19th January, 2015.*

2. The court orders the 2nd Respondent to disqualify the 1st Respondent from nominating a candidate to contest in the Homa Bay County senatorial elections scheduled for 12 February, 2015 pursuant to section 72(2) of the Elections Act.

3. The court awards costs to the Petitioner as against the 1st and 2nd Respondents.”

5. The Petitioner’s case is brief. He states that between 31st January, 2013 and 1st February, 2013 the ODM nominated the late Gerald Otieno Kajwang’ for the elective post of the Senator of Homa Bay County in the general election scheduled for 4th March, 2013 knowing well that the candidate did not meet the constitutional requirements for nomination as he was a State officer serving as the Minister for Immigration and Registration of Persons.
6. It is the Petitioner’s case that the action of the ODM contravened Section 72(2) of the Elections Act, 2011 which requires a political party which knowingly nominates a candidate who does not meet the requirements of the Constitution to be disqualified from presenting a candidate in that election or in the next election in that electoral area. The Petitioner contends that the ODM violated Article 99(2)(a) of the Constitution by presenting a State officer as a candidate in the 4th March, 2013 general election.
7. The Petitioner faults the Committee for dismissing his complaint. It is his opinion that the reasons given by the Committee for the dismissal of his complaint were not valid. He contends that the Committee dismissed his complaint on the grounds that: Section 12(2) of the Sixth Schedule of the Constitution exempted the late Gerald Otieno Kajwang’ and the ODM from complying with Article 99(2)(a) of the Constitution and consequently the ODM did not contravene Section 72(2) of the Elections Act, 2011; denying the ODM the opportunity of fielding a candidate would infringe its political rights under Article 38 of the Constitution; the IEBC’s jurisdiction with respect to disqualification of a political party pursuant to Section 72(2) of the Elections Act, 2011 only kicks in after a finding in a judicial process that a political party has committed an election offence and as there was no such finding, the IEBC had no jurisdiction under the said Section; the Committee was guided by its decision in a similar matter in the case of **IEBC/DRC/039/0102013, Isaac Aluoch Polo Aluochier v Moses Masika Wetangula & 5 others**, which had not been challenged in any Court.
8. It is the Petitioner’s case that since the facts concerning the nomination of the late Gerald Otieno Kajwang’ played out in all the other political parties it was important to obtain legal clarity on the issue from the courts for the benefit of the affected political parties, State officers and the public at large.
9. The 1st Respondent opposed the petition through the affidavit of its Secretary-General, Hon. Ababu Namwamba sworn on 2nd February, 2015. In brief, the 1st Respondent’s case is that the late Senator Gerald Otieno Kajwang’ was presented as a candidate for the senatorial seat, Homa Bay County in the general election after he was exhaustively vetted and confirmed to have met the constitutional and statutory requirements.
10. On the Petitioner’s claim that the late Gerald Otieno Kajwang’ did not meet the requirements of the Constitution at the time of his nomination as he was a serving State officer by virtue of being a Cabinet Minister, the 1st Respondent asserts that there was no legal bar to the nomination of the late Senator. The 1st Respondent contends that Article 99(2)(a) of the Constitution cannot be read in isolation but must be read along with other attendant constitutional and statutory provisions for its full meaning and purport. The ODM submits that among the attendant provisions to be read together with Article 99(2)(a) are sections 2(b) and 12(2) of the Sixth Schedule.
11. It is the 1st Respondent’s case that the Petitioner has not brought this case in good faith as he never moved any judicial body to challenge the nomination or election of the late Senator and the

- unexplained delay is compounded by the fact that the late Senator cannot respond to the assertions by the Petitioner and the petition is in absolute bad faith.
12. The 2nd Respondent opposed the application through the replying affidavit sworn on 4th February, 2015 by its Senior Legal Officer, Moses Kipkogei. The starting point of the IEBC's case is that it is a constitutional commission established under Article 88 of the Constitution and mandated, *inter alia*, to supervise or conduct referenda and elections to any elective body or office established by the Constitution. In execution of its mandate it is guided by the Constitution, the Elections Act, the Independent Electoral and Boundaries Commission Act and other enabling statutes.
 13. The 2nd Respondent asserts that in pursuance of its mandate, it cleared the 1st Interested Party as the 1st Respondent's senatorial candidate for the Homa Bay County by-election scheduled for 12th February, 2015. Since the 1st Respondent had a legal right to present a candidate, the 2nd Respondent had a duty to clear the candidate in accordance with the provisions of Article 99 of the Constitution and Section 31 of the Elections Act. Further, that the 1st Interested Party's right to participate in the by-election is enshrined in Article 38 of the Constitution and the Petitioner has not challenged his candidature.
 14. On the Petitioner's claim that the late Senator General Otieno Kajwang' was barred by Article 99(2)(a) of the Constitution from contesting the Homa Bay senatorial seat in the 4th March, 2013 general election, the IEBC asserts that the petition is premised on a misinterpretation of the Article which has been occasioned by its being read in isolation contrary to the provisions of Article 259 of the Constitution. It is the 2nd Respondent's case that whereas Article 99(2)(a) disqualifies a serving state officer or other public officer from being elected a member of Parliament, the Article should be read together with Article 262 and sections 2(1)(b) and 12(2) of the Sixth Schedule of the Constitution.
 15. In addition, it is the 2nd Respondent's case that Section 2(1)(b) of the Sixth Schedule suspended the Eighth Chapter of the Constitution until after the first general election under the said Constitution. The first general election was held on 4th March, 2013. Further, that Section 12(2) of the same Schedule allowed for continued service by the cabinet ministers under the former Constitution until the first general election was held under the current Constitution.
 16. It is the 2nd Respondent's case that these proceedings are an election petition, disguised as a constitutional petition, challenging the election of the late Gerald Otieno Kajwang'. The 2nd Respondent contends that the Court has no jurisdiction to hear and determine this matter as the Petitioner, after the nomination of the late Senator Gerald Otieno Kajwang' did not move the 2nd Respondent under the provisions of Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act to challenge his nomination. Further, that the Petitioner also failed to invoke Article 105 of the Constitution and the relevant provisions of the Elections Act to petition the High Court to nullify the election of the late Gerald Otieno Kajwang' as the Senator of Homa Bay County.
 17. In addition, the 2nd Respondent faults the Petitioner for deliberately failing to serve the estate of the late Senator thereby denying the said estate the right to be heard under Article 50 of the Constitution. The 2nd Respondent's view is that this petition is vexatious, frivolous and an abuse of the Court process and the same should be dismissed with costs.
 18. The 2nd Respondent also asserts that a determination whether an electoral offence has been committed can only be determined through a judicial process which had not happened in this case.
 19. There is a Memorandum of Appearance dated 4th February, 2015 filed by the advocates for the 2nd Respondent indicating that the same firm of advocates also acts for the 2nd Interested Party. It is therefore apparent that the 2nd Interested Party adopts the arguments of the 2nd Respondent in respect of this matter.
 20. The 1st Interested Party opposed the application by way of grounds of opposition dated 3rd February, 2015. The 1st Interested Party's case is that the petition is defective, frivolous, fatally incompetent, bad in law and an abuse of the process of the court. Further, that the same does not disclose any reasonable cause of action or triable issue.
 21. I have perused the pleadings and submissions and I note that the first hurdle placed on the path of the Petitioner's case by the respondents and the interested parties is the alleged lack of jurisdiction

by this Court to adjudicate the matter.

22. The objection to the jurisdiction of the Court was clearly brought out in the pleadings of the 2nd Respondent and the 2nd Interested Party. Their case is that the Petitioner is trying to use these proceedings to overturn the election of the late Gerald Otieno Kajwang' on 4th March, 2013 as the Senator of Homa Bay County. They accordingly submit that for that reason, this Court has no jurisdiction since the Petitioner never challenged the nomination of the late Senator prior to the general election. They also contend that the procedure for overturning a parliamentary election as provided by Article 105 of the Constitution and the provisions of the Elections Act was not followed by the Petitioner upon the announcement of the election of Gerald Otieno Kajwang' as a Senator.

23. Article 88(4)(e) of the Constitution which gives power to the 2nd Respondent to settle pre-election nomination disputes states that:

“88 (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e) 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;”

24. This constitutional provision is reiterated in Section 74(1) of the Elections Act as follows:

“74. (1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be 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.”

25. The IEBC argues that a reading of the cited provisions clearly shows that although it is mandated to settle disputes relating to or arising from nominations, the jurisdiction excludes election petitions and disputes subsequent to the declaration of election results. The 2nd Respondent proceeds to submit that its jurisdiction to inquire into the validity of the nomination of the late Senator Gerald Otieno Kajwang' expired on the date the election results were announced. Further, that as no election petition was filed within twenty eight days from the date of the announcement of the results, this Court no longer has jurisdiction to inquire into the validity of that election.

26. In response to this argument, the Petitioner submits that this petition is not a challenge to the election of the late Senator Gerald Otieno Kajwang' since it only questions the legal capacity of the ODM to nominate a candidate in the Homa Bay County senatorial by-election. According to the Petitioner, this matter was firmly in the hands of the 2nd Respondent in so far as the by-election was concerned.

27. The Petitioner asserts that Section 72(2) of the Elections Act provides that a political party which nominates a candidate in contravention of the Constitution is to be disqualified from nominating a candidate in the next election in the given electoral area. The Petitioner contends that since the 1st Respondent knowingly nominated a State officer in clear contravention of Article 99(2)(a) of the Constitution, the penalty was disqualification from nomination of a senatorial candidate in Homa Bay County electoral area. The Petitioner, however, concedes that the 2nd Respondent now lacks the jurisdiction to adjudicate over issues connected with the 4th March, 2013 general election.

28. The second point on jurisdiction raised by the 2nd Respondent was that this constitutional petition is a disguised election petition against the election of the late Senator Gerald Otieno Kajwang'. According to the IEBC, this Court lacks jurisdiction to deal with this matter since election petitions must be filed and adjudicated upon within fixed timeframes. Further, that a special procedure for filing, hearing and determining election petitions has been provided by the Constitution and the Elections Act and that procedure has not been adhered to by the Petitioner.

29. In response, the Petitioner concedes that the 2nd Respondent has jurisdiction to deal with nomination disputes between the date of the announcement of an election and the date of the announcement of the results. He also concedes that after the election results are announced the

only way of overturning a parliamentary election is by way of a petition to the High Court. He, however, asserts that after the announcement of an election, courts with criminal jurisdiction try election offences and that jurisdiction has no time limit as in the case of electoral disputes. The Petitioner submits that notwithstanding the fact that he did not lodge a complaint or an election petition against the 1st Respondent with respect to the Homa Bay County senatorial election of 4th March, 2013, his opportunity was not lost with the closure of the election petitions window.

30. In his view, Section 72(2) of the Elections Act gives him an opportunity to revisit the 1st Respondent's conduct during the general election, not with respect to challenging the outcome of the general election, but with a view to holding it accountable for its conduct in the general election as it affects a particular electoral area namely Homa Bay County.
31. A perusal of the papers filed in Court clearly reveals that the Petitioner's case is grounded on the allegation that the late Senator Gerald Otieno Kajwang' was nominated by the ODM in contravention of Article 99(2)(a) of the Constitution which bars a State officer or other public officer from being elected a member of Parliament. I note that although the Petitioner's case is premised on a constitutional provision, the same is in essence questioning the validity of the nomination of the late Senator Gerald Otieno Kajwang'. In that regard, Section 74 of the Elections Act provides:

”74. Settlement of certain disputes

- 1. Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be 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.**
 - 2. An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.**
 - 3. Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”**
32. Any electoral dispute relating to or arising from nominations shall be heard and determined by the IEBC before the date of the election. In the matter before this Court, the question concerning the eligibility of the late Gerald Otieno Kajwang' to contest the Homa Bay County senatorial seat ought to have been raised with the 2nd Respondent before the general election of 4th March, 2013. The Petitioner concedes that this was not done. The opportunity to challenge the nomination before the IEBC was therefore lost when the results were announced. Consequently, the jurisdiction granted to this Court to review the decisions of the 2nd Respondent did not arise.
33. Another opportunity for the Petitioner to contest the election of the deceased Senator was after the election results were announced. A person aggrieved by the outcome of a parliamentary election is allowed by the law to file an election petition in the High Court within twenty eight days from the date of the announcement of the results by the 2nd Respondent. The Petitioner did not file any election petition.
34. No matter the quantity of constitutional paint the Petitioner splashes on this petition, the same remains what it is: a challenge to the election of the deceased Gerald Otieno Kajwang' on 4th March 2013 as the Senator of Homa Bay County. As already pointed out, the Constitution and the Elections Act deny this Court the jurisdiction to enquire into the election of the deceased Gerald Otieno Kajwang'.
35. On the issue of jurisdiction, the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** expressed itself as follows:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any

proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011.* Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

36. Jurisdiction is what gives a Court the authority to inquire into a matter before it. Where a Court comes to the conclusion that it has no jurisdiction to deal with a matter, the only course of action open to the Court is the one prescribed by Nyarangi, JA in **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd, [1989] KLR 1.** In that case the learned Judge stated that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction.”

37. This Court has no jurisdiction to entertain the Petitioner’s case and the Court being a creature of the Constitution downs its tools without further ado. The petition before this Court is dismissed with costs to the respondents and the interested parties.

Dated, signed and delivered at Nairobi this 7th day of May , 2015

W. KORIR,

JUDGE OF HIGH COURT