



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 408 OF 2013

COMMISSION ON ADMINISTRATIVE JUSTICEPETITIONER

VERSUS

JOHN NDIRANGU KARIUKI1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION2ND RESPONDENT

RULING

1. In the petition dated 5th August 2013, the petitioner seeks various orders pertaining to the eligibility of the 1st respondent to vie as a candidate for the seat of Member of Parliament for Embakasi Central Constituency in the elections held on 4th March 2013. It prays for, among others, an order that the 1st respondent was not qualified to vie for elections; that the 2nd respondent, the Independent Electoral and Boundaries Commission (IEBC), in failing to find that the 1st respondent was disqualified from vying, was in dereliction of its constitutional and statutory duty; and finally, for a declaration that the seat of Member of Parliament for Embakasi Central Constituency has become vacant by virtue of Article 103(1) (g) of the Constitution.
2. The respondents oppose the petition and by an application brought by way of **Notice of Motion dated 29th August 2013**, the 2nd respondent pray that the petition be struck out on the basis that it is an abuse of process as any orders for removal of a Member of Parliament ought to be brought by way of an election petition.
3. The position taken by the 2nd respondent through its Counsel, Ms. Ndegwa, is that the proper process for challenging the election of a candidate for elective office is through an election petition; that there is a clear process defined by law in Article 87 of the Constitution, sections 76 and 105 of the Elections Act, as well as the Elections Rules 2013 made under the provisions of the Elections Act. Counsel contended that the election of the 2nd respondent was challenged in an election petition and determined by Kimondo J in **High Court Petition No 8 of 2013 Kituo Cha Sheria vs IEBC & Others**.

4. Counsel relied also on the decision of the Supreme Court in **Advisory Opinion No 2 of 2012 – In the Matter of Gender Representation in the National Assembly and Senate [2012] eKLR** in which the Supreme Court held that the elections process is not an event but a continuum, and that all disputes should be determined under the legally established mechanism.
5. Counsel also relied on the case of **The National Alliance & Another vs IEBC Petition No. 175 of 2013(2013)eKLR** where the Court held that a party cannot rely on Article 165(3) to bring an election petition as a constitutional petition. It was the 2nd respondent's case that the present petition is an abuse of the Court process as it is an attempt to avoid the strict timelines set by the Constitution and it also seeks to re-introduce **Petition No 8 of 2013**, which is contrary to the rules of natural justice. It was Counsel's submission that this Court should consider the precedent likely to be set by a matter such as this as an unsuccessful party can re-introduce an election petition through a proxy as a constitutional petition which would be contrary to the public interest. The 2nd respondent therefore prayed that the petition be struck out with costs.
6. Mr Wambola for the 1st respondent supported the 2nd respondent's application. According to the 1st respondent, the petition may be disguised as a constitutional petition but it seeks remedies that can only be sought by way of an election petition. Counsel observed that prayer No 3 of the petition was seeking the nullification of the election of the 1st respondent as the Member of Parliament for Embakasi Central and for the seat to be declared vacant. It was his contention that the appropriate procedure would have been for the petitioner to approach the Court by way of an election petition, not a constitutional reference.
7. Mr. Wambola submitted further that under the Elections Act, No 24 of 2011 and the Rules made thereunder, prayers of the nature sought in the petition could only be sought within 28 days of the declaration of the disputed results while the present petition was filed 5 months after the declaration of the results.
8. While conceding that the High Court has unlimited original jurisdiction in all civil and criminal matters, Counsel contended that the argument could not be stretched to accommodate a matter that has been presented before Court in a manner that is contrary to the clearly set out statutory and constitutional procedures. He agreed with the 2nd respondent that the petition should be struck out with costs.
9. In response, Mr. Angima for the petitioner contended that the present petition is not a typical election petition, nor was it intended to be; that the petitioner was challenging neither the electoral process or the validity of the 1st respondent's election, nor was it alleging that there was fraud in his election.
10. According to Mr. Angima, the only issue that the petitioner was raising was the eligibility of the 1st respondent to contest the Parliamentary seat because of a constitutional disqualification contained in Article 99(2)(h) of the Constitution. It was the petitioner's contention that at the time of the elections, the 1st respondent was ineligible for having a subsisting criminal conviction for abuse of office.
11. Counsel submitted that under Article 99, there are several disqualifications provided, some of which may arise before or after an election, one of the disqualifications being violation of Chapter 6. It was the petitioner's case that it can bring a constitutional petition at any time and does not need to come to Court within 28 days of the elections.
12. It was the petitioner's case that it was seeking declarations consequential to interpretation of Article 103 of the Constitution; and that Article 103(g) gives rise to a consequential declaration of disqualification under Article 99.
13. The petitioner conceded that a party with an election dispute may go to Court after 28 days but

submitted that it did not have an election dispute with the 1st respondent. What it was seeking was a constitutional interpretation under Article 258 of the Constitution, in good faith, and to bring before the Court what the petitioner considered to be a breach of the Constitution. It contended that it had not come to Court as a proxy for another party, nor did it have any personal interest in the matter.

14. With regard to Election Petition No 8 of 2013 and the contention that it was a bar to any further adjudication of the eligibility of the 1st respondent, it was the petitioner's submission that the petition was struck out without being heard on its merits as the petitioner had no legal capacity. Mr. Angima submitted, however, that the Court, while striking out the petition, recognised that there were serious issues to be resolved with regard to the eligibility of the 1st respondent. Counsel submitted further that the petitioner was not a party to Petition No 8 of 2013 nor did it apply to be joined.
15. According to Mr. Angima, should the Court find that any of the prayers sought are inappropriate, it can decline to issue the said orders but should not strike out the petition.
16. Mr. Angima relied on the decision of the Court of Appeal in **Thuo Mathenge vs Nderitu Gachagua & 2 Others (2013)eKLR** for the holding that the jurisdiction of the High Court was wide enough to inquire into issues of eligibility even though the IEBC is vested with jurisdiction to inquire into such issues.
17. Finally, it was the petitioner's submission, in reliance on **D.T Dobie vs Muchina (1982) KLR1** and **Steven Kariuki vs George Mike Wanjohi and 2 others Nairobi, High Court Petition No 2 of 2013** that the Court should be hesitant to strike out pleadings without hearing parties except in the clearest of cases.

Determination

18. I have considered the respective pleadings of the parties in this matter, particularly the affidavits sworn in support and in opposition to the application dated 29th August 2013 by Mr. Kipkogei and Mr. Ngalema for the 2nd respondent and the petitioner respectively. I have also read the affidavit sworn in support of the petition by Mr. Ngaluma, the Chief Executive Officer of the Commission.
19. In the said affidavit, Mr. Ngaluma sets out the functions of the petitioner, a Constitutional Commission established under Article 59(4) of the Constitution and Section 3 of the Commission on Administrative Act 2011. He states that the Commission is charged with the mandate to protect the sovereignty of the people, secure the observance of democratic values and principles by all state organs, and to promote constitutionalism in Kenya. He states further that the Commission is particularly empowered by Articles 59(2)(h-k) and 249 of the Constitution and Section 8 of the Commission on Administrative Justice Act to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government that is alleged or suspected to be prejudicial or improper or to result in impropriety or prejudice, and to take appropriate remedial action.
20. According to the petitioner, on 20th September 2012, it wrote to the Ethics and Anti-corruption Commission and the Director of Public Prosecutions requesting to be furnished with a list of individuals who had been convicted of abuse of office to enable it compile a register of such convicted individuals for purposes of the Constitution. By the letter of 12th October 2012, the Ethics and anti-corruption Commission and the Director of Public Prosecutions sent separate lists of individuals who had been convicted of abuse of office, corruption, economic, and other related crimes to the petitioner.
21. The 1st respondent was mentioned in both lists as having been convicted of two counts of abuse of office in the Chief Magistrate's Anti-Corruption Court ACC Number 25 of 2002, **Republic versus John Ndirangu Kariuki & Another** on 14th January 2004 and subsequently sentenced to

- pay a fine of Ksh100,000 on each count or in default to serve a jail term of one year for each count.
- 22.The petitioner avers that it confirmed from the judiciary vide a letter dated 20th December 2012 that the 1st respondent had not appealed against his conviction and sentence. It then wrote to the 2nd respondent vide a letter dated 14 December 2012 recommending that the persons in the list including the 1st respondent had failed the integrity test and therefore ought to be disqualified from running for public office in the General Elections of 4th March 2013 for the reason that they did not meet the threshold set forth in the Constitution and the Elections Act.
- 23.It states that it further furnished the 2nd respondent with relevant documents evidencing the conviction of the 1st respondent. It states that the status of his case expressly barred him from election as Member of Parliament by virtue of Article 99(2)(h) of the Constitution and Section 24(2)(h) of the Elections Act. The 1st respondent then filed judicial review proceedings against the petitioner in **Nairobi High Court Judicial Review Application No 452 of 2012; Republic vs Independent Electoral and Boundaries Commission Ex -parte John Ndirangu Kariuki**, which application was dismissed on 28th January 2013.
- 24.The petitioner states that despite this, the 2nd respondent, in blatant disregard of the Constitution, the Elections Act and the recommendation of the petitioner, unlawfully cleared the 1st respondent to vie for elections during the 4th March 2013 General Elections. It subsequently gazetted him as being the duly elected Member for Embakasi Central.
- 25.The petitioner contends that Article 99(2)(h) of the Constitution and section 24(1)(b) of the Elections Act expressly disqualify any person found to have misused or abused a public office or in any way to have contravened Chapter Six of the Constitution from being elected as a Member of Parliament, It contends further that the said Article and section outline the qualifications for election as a Member of Parliament. It is its contention that the 1st respondent was expressly barred by these provisions from running or assuming public office. I have not heard any of the respondents to dispute the above matters.
- 26.It is undisputed that the 1st respondent was elected Member of Parliament for Embakasi Central Constituency in the elections of March 4 2013. It is also not in dispute that his election was challenged in Election Petition No.8 of 2013, and that the said petition was struck out as the Court found that the petitioner had no capacity to file the petition, that there was no petitioner in Court, and therefore no valid petition before the Court.
- 27.The petitioner's contention is that it is not challenging the electoral process leading to the election of the 1st respondent. Its contention is that there has been a violation of the Constitution in the failure by the 2nd respondent to find that the 1st respondent was disqualified by reason of having been convicted of the offence of abuse of office, a conviction that he never appealed against.
- 28.The position taken by the 1st and 2nd respondent is that this petition is disguised as a constitutional petition while it is in reality an election petition; and that a prayer to remove a sitting member of the National Assembly by impugning any aspect of **the electoral process** can only be sought by way of an election Petition. They argue further that the issues that the petitioner now raises should have been the subject of **High Court Petition No. 8 of 2013 - Kituo Cha Sheria vs John Ndirangu & Another** which was struck out on 24th May 2013.
- 29.In my view, the question that arises is whether the present petition challenges 'the electoral process,' in which case the matter should have been brought within the timelines set out in the Elections Act, being 28 days after the declaration of the results for Embakasi Central Constituency.

30. As I understand it, the petitioner does not in any way impugn the electoral process resulting in the election of the 1st respondent. Rather, the question is whether he was constitutionally and statutorily eligible to vie for elections, and if he was not, whether the 2nd respondent abdicated its duty by allowing his participation in the elections.

31. It appears to me that these are very distinct questions which ought to be considered on their merits, and that this petition should not be struck out at this preliminary stage. It would also not, in my view, meet the ends of justice or advance the principles in the Constitution relating to integrity in public office were the Court to strike out the petition without a hearing on the merits. While it is indeed correct, as submitted by the respondents, that the elections process is a continuum and should be dealt with in accordance with the provisions of the electoral laws, the question may arise as to what the position should be where it is alleged that there has been a disregard of the Constitution by the 2nd respondent. Would this be a question concerning the electoral process, which would then fall for determination under the laws governing election petitions?

32. It may be that an unqualified person is allowed to vie by the 2nd respondent, and is then elected. Would this imply that the question of his or her eligibility cannot thereafter be raised? The effect of such a finding may well render the provisions of the Constitution and the Elections Act with regard to eligibility and of suitability to hold public office under Chapter 6 of the Constitution of no effect whatsoever. Anyone raising the question of an elected member's eligibility would be confronted with the response that the issue can only be determined as an election question.

33. I also note the sentiments of the Court in High Court Petition No. 8 of 2013 at paragraphs 33-36 where the Learned Judge states as follows:

34. "That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. If for example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would be perfectly in order for the Court to right the wrong. In Luka Lubwayo and Another vs Gerald Otieno Kajwang and Another Nairobi Petition 120 of 2013 [2013]eKLR the Court found that where IEBC had failed to exercise its mandate under statute, the High Court could intervene. Article 105 1 (a) seems to widen the scope of the court in a petition to determine whether a person has been validly elected as a member of parliament. The question of validity may encompass the clearance to run."

34. Without making any findings one way or the other on the eligibility or otherwise of the 1st respondent, I believe the interests of justice demand that the issues that this petition raises be canvassed and heard on their merits.

35. In the circumstances, the application dated 29th August 2013 is hereby dismissed. The costs thereof shall be in the cause.

Dated and signed at Nairobi this 6th day of June 2014

MUMBI NGUGI

JUDGE

Mr. Angima instructed by the firm of Yuvinalis Angima for the Petitioner

Mr. Wambola instructed by the firm of Ongoya & Wambola & Co. Advocates for the 1st respondent

Ms. Ndegwa instructed by the firm of Sisule Munyi Kilonzo & Associates Advocates for the 2nd respondent