



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.511 OF 2011

ALI WARIO GUYO.....PETITIONER

VERSUS

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

MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)...3RD
RESPONDENT

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION.....4TH
RESPONDENT

JUDGMENT

1. The Petitioner, Ali Wario Guyo in his undated Petition seeks the following declarations;

(a) A Declaration that the principle of Necessity calls for postponement of the General Elections scheduled to be held on the 4th of March 2013 to a suitable date to be pronounced by this Honourable Court and or otherwise to be determined.

(b) A Declaration that the Petitioner's right to freely exercise the right to vote and to participate in a democratic free, regular and fair election process as envisaged under Article 38 of the Constitution can be properly realized and achieved upon postponement of the General Elections.

(c) A Declaration that conducting general elections on the 4th of March 2013 will violate the Petitioner's right to vote and participate in a democratic free, regular and fair elections.

(d) A Declaration to issue directing the Respondents and all the necessary state organs to set up proper mechanisms to ensure that the next general elections are duly postponed to a date to be declared by this Honourable Court or such time as may be expedient to ensure that the elections are free, regular, fair, democratic and devoid of violence.

2. The Petition is supported by undated affidavit sworn by the Petitioner.

Petitioner's submissions

3. The Petitioner claims that as per the judgment delivered by the Court of Appeal in Civil Appeal No. 82 of 2012, the first general election under the Constitution 2010 will be held on 4th March 2013. He however alleges that, the country is not ready to proceed with the general elections as scheduled on the 4th March 2013. And that in the event that the elections are held, they will likely be irregular and infringe upon the rights of the Petitioner and the citizens because proper mechanisms for free and fair elections are yet to be achieved in order to ensure credible, free and fair elections. He is also apprehensive that the "rush" to elections on the 4th March 2013 will result in the passing of laws that are sub-standard and also use of a sub-standard procedure contrary to the spirit of the **Constitution, 2010**.

4. He further contends that the crucial and vital legislations envisioned to be enacted under the Constitution 2010, if the country is to proceed with the coming general elections, have not been enacted. He alleged that there are no mechanisms that have been put in place, for example, to ensure the realization of the two-thirds principle as contemplated under Article 27(6) and 81(b) of the constitution. He avers that Parliament has also failed to enact the legislation contemplated by Article 87 of the Constitution establishing mechanisms for the timely settlement of election disputes.

5. The Petitioner further contends that essential Independent Commissions as provided for under Constitution are yet to be created and others are yet to begin exercising their mandate. He specifically points out the Ethics and Anti-Corruption Commission which is to be established by Article 79 of the Constitution. According to the Petitioner, this Commission is yet to begin vetting the candidates intending to participate in the electoral process, despite the fact that campaigns are already in full swing.

6. The Petitioner also takes issue with the establishment of the National Police Service Commission which is mandated to tackle integral issues regarding the National Police Service. He claims that this Commission must be up and running ahead of the General Election for the purpose of maintenance of peace and order. He claims that the President is yet to appoint the Inspector General of police as envisaged by **Article 245** of the **Constitution** of Kenya and that even if the Inspector General were to be appointed together with the top brass in the National Police Service, the officials will need time to settle into their new portfolios and as such a 4th March, 2013 general election would be untenable in those circumstances.

7. It was thus the Petitioner's position that by holding the general election on 4th March 2013, Kenyans will not be awarded a free, fair and regular election because the 'rushing' of the holding of the same will leave a lot of room for loopholes and thus irregularities.

Respondent's submissions

8. The Petition is opposed and the 1st and 2nd Respondents filed Grounds of Opposition dated 29th November, 2012. They claim that the Petition is based on misconceived speculations and is littered with apprehensions, exaggerations and unfounded presumptions. They also contend that the Petition is premature and that the Petitioner is not a Kenyan citizen and thus he cannot purport to enforce certain fundamental rights and freedoms under the Constitution.

9. The 3rd Respondent, The Independent Electoral and Boundaries Commission, also filed Grounds of Objection dated 6th December, 2012 and a Replying Affidavit sworn by its Legal Officer Mahamud Mohamed Jabane, on 13th December, 2012. It also filed written submissions dated 21st December, 2012.

10. The 3rd Respondent contends that the date of the first general election under the Constitution 2010, has been fixed by the Constitution and to hold otherwise would amount to a violation of the express provisions of the Constitution. And that this date can only be altered by way of an amendment to the Constitution.

11. In response to the allegation that the 3rd Respondent is not ready to carry out the March 4th General Election, the 3rd Respondent confirmed that it is indeed ready to discharge its constitutional and statutory mandate in conducting free, fair and regular elections. It asserts that Parliament has already enacted all the necessary legislation for the carrying out of free, fair and orderly elections. Further, that the Elections (General) Regulations, 2012 were enacted and published under Legal Notice No. 128 of 2012, and the said Regulations which provide for the conduct of the electoral process generally and and that the 3rd Respondent has established all the required administrative and logistical mechanisms for the conduct of the free and fair elections on 4th March 2013.

12. The 3rd Respondent claims that the Petition invites this Court to engage the Executive and the IEBC's function of law and policy execution, in total breach of the doctrine of separation of powers. It also argues that this Court has no jurisdiction to pre-empt the legislative duty of Parliament and cannot direct Parliament and IEBC to make law and regulations for the implementation of the Constitution.

13. In regard to the diaspora vote, the 3rd Respondent contend that Parliament has passed and the Commission has commenced the implementation of the Elections (Kenya Citizens Residing Outside Kenya) (Registration and Voting) Regulations, 2012, which regulations achieve the progressive realization of diaspora voting as stipulated by Article 82(1) (e) of the Constitution, first in the Eastern Africa countries and then to other States in the world.

14. In response to the issue of the implementation of Articles 27(8) and 81(b) of the Constitution, the 3rd Respondent claimed that the issue has already been resolved by the Supreme Court by its Advisory Opinion rendered on 11th December 2012.

15. With regard to the issues of the National Police Service Commission, the 3rd Respondent submitted that the Inspector General of Police and other Senior Police Officers have been recruited, thus putting in place an operational police force which will further ensure the conduct of free, fair, orderly and regular elections.

16. In the end, the 3rd Respondent urges me to dismiss the Petition for its failure to disclose any constitutional violation.

17. The 4th Respondent similarly filed Grounds of Opposition dated 7th January, 2013. Its grounds are in essence the same ones as those filed by the 3rd Respondent, but added that the granting of the reliefs sought by the Petitioner would lead to an absurd, illogical and artificial result which would adversely affect public interest economically, socially and politically.

Determination

18. Having set out the respective Parties submissions as above, I must now determine the merit or otherwise of the Petition before me. But before I do that, I note that the 1st and 2nd Respondent are claiming that the Petitioner, is not a Kenyan Citizen and thus cannot purport to enforce certain fundamental freedoms and rights as provided for by the Constitution.

19. The Petition is expressed to be premised under the provisions of Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 28, 47, 93,95,97,98,99,100,110,159,176,180,193,246 and 258 of the Constitution.

20. The Petitioner alleged that he is a resident of Tana River District and he does not possess a National Identification Card due to the clashes that have plagued his home area. He does not claim he is not a citizen and even if he was not, It is clear to my mind that under the provisions of Article 22 of the Constitution, he can still institute these proceedings claiming that a right or fundamental freedom in the Bill of Rights has been violated or is threatened. The Constitution has not specifically provided that it is only a citizen who has the right to institute the Court proceedings. I agree with the sentiments expressed by Majanja J in **Famy Care Ltd v Public Procurement Administrative Review Board & Another, Petition No. 43 of 2012** where he opined that the right of access to information is the only right limited to citizens. The Learned Judge stated that;

'The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to 'every person' or 'a person' or 'all persons' this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term 'person' and 'citizen' as applied in Article 35.'

I say no more.

21. I will now turn to consider the allegation as made by the Petitioner that if the current date of the general election (4th March 2013) is adhered to, there is a likelihood that the elections will be highly irregular, and will infringe upon the Petitioner's rights and those of other Kenyans. The Petitioner claims that he is apprehensive that the "rush" to hold elections on 4th March 2013, will result in the passing of a sub-standard law and also the use of sub-standard procedure against the spirit of the Constitution.

22. I agree with the Respondents that this Petition is based on misconceived speculations and is littered with apprehensions, exaggerations and unfounded presumptions. This being a Constitutional petition, the Petitioner is duty bound to outline the specific rights he is apprehensive are under threat and provide factual basis for those apprehensions. From the pleadings, I am not certain that the Petitioner has executed this duty as required of him. It is not enough to make bare allegations or statements regarding a violation or threatened violation of his right to vote as provided for by Article 38 of the Constitution. I say so for reasons to be seen shortly.

23. **Article 38** of the **Constitution** provides that;

(1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

24. The rights articulated under **Article 38 (1) (a-c)** of the **Constitution** are further qualified under the **Political Parties Act 2011 and the Elections Act, 2011**. **Section 3(1)** of the **Political Parties Act** provides for the formation of political parties. **Section 7(2) (a)** addresses the requirements for full registration of the party and states that the party must have recruited members not fewer than 1000 from each of half of the counties. **Section 7(2)(b)** promotes non-discrimination and promotes diversity which is at the core of our fundamental rights in the Constitution of Kenya, 2010. **Section 15 (1) (a)** of the **Political Parties Act 2011** states that a political party which has been provisionally registered shall be entitled to hold and address public meetings in any area in Kenya for the purposes of publicising the

political party and recruiting members.

25. Under **Section 9(1)** of the **Political Parties** the contents of the Constitution or rules of a political party are provided for. This is detailed in the Second Schedule of the Act under Section 6 where the membership requirements are spelt out including the rights and duties of the members of the political party.

26. **Section 3 (1)** of the **Elections Act 2011** states that an adult citizen shall exercise his right to vote specified in **Article 38(3)** of the **Constitution** of Kenya 2010 in accordance with the **Elections Act, 2011**. **Section 4** of the **Elections Act 2011** provides for registration of voters and tasks the 3rd Respondent with the duty to maintain and update this register. **Section 31** of the **Elections Act 2011** provides for Nomination of candidates in a political party under the diverse elective offices as provided for in the Constitution provided that the said nominees meet the requirements stipulated by the Constitution of the political party and subsequently certified for use by the Independent Electoral and Boundaries Commission.

27. There is no material before me to demonstrate a violation of the Petitioner's rights as provided by Article 38 of the Constitution or the legislation concerning elections. It is important to reiterate that this being a Constitutional petition, it is not enough to make mere allegations and the Petitioner ought to clearly and specifically plead his case with some degree of clarity and demonstrate how a right has been violated or is threatened with violation.

28. This Court in the case of *Sophia Abdillahi Chacha v Director of Public Prosecution & Another, e KLR (2012)* stated as follows;

'The Court is alive to the requirement under Article 159(2) of the Constitution to place emphasis, on substance more than form or technicalities, while considering matters before them. However, parties seeking redress in Court are duty bound to articulate with as much precision and care as possible, their respective pleas before the court, both orally and through pleadings.'

In making a finding on the said case, the Court held as follows;

'With the above principles in mind, I have examined the applicant's material and I must agree with the Counsel for the State and 2nd to 4th Respondents as well as the 7th to 10th Interested Parties, that the Applicant's case falls below the *prima facie* standard. For two main reasons, first, that having scoured her entire material, I cannot find any specific right which she claims to have been violated or to be in danger of violation, not even the apprehension that she will not receive a fair trial. Secondly, it is not shown what particular prejudice the Applicant stands to suffer or has suffered, and neither is the 'weighty' constitutional question raised by her Petition demonstrated.'

29. I am wholly persuaded and I am in agreement with the reasoning stated above and I adopt the same as if it were mine.

30. The Petitioner has asked this Court to make a declaration that the principle of necessity calls for the postponement of the 4th March 2013 general election and for this Court to pronounce the date of that election. He claims that it is not possible to currently hold a free, fair and orderly election for reasons stated elsewhere above.

31. According to the Petitioner, this **Doctrine of Necessity** has been given judicial consideration in *Mitchell and Others v Director of Public Prosecutions and Another, 1985 (LRC) Const.* where the the Supreme the Court of Grenada adopted the words of Lord Mansfield that this doctrine demands that, that which is otherwise not lawful to be made lawful by necessity. In *Tilonko v Attorney General of Natal, (1993) AC 93*, the court stated that;the purpose of that principle is;

'...for the preservation of society and the inhabitants of the place as would justify the doing of what would ordinarily be illegal acts. The principle clearly emerging from this address of word

Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done *bonafide* under the stress of necessity, the necessity being an intention to preserve the Constitution, the State or the society and to prevent it from dissolution and affirm Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful....'

32. The question that follows is whether this doctrine is applicable in the circumstances of this case to paraphrase whether the 'Doctrine of Necessity' would demand a postponement of the 4th March 2013 election. I think not, and will say why soon.

33. The High Court in *John Harun Mwau & 3 Others V Attorney General & 2 Others [2012] eKLR* while called upon to interpret the Constitution under Article 165 (3) (b) held that the date of the first general election under the Constitution 2010 would be 4th March 2013. This decision was upheld by the Court of Appeal in *Creaw and Another vs. John Harun Mwau and 6 Others, Civil Appeal 74 & 8 of 2012*. Thereafter, the 3rd Respondent set the date for the first general elections as 4th March 2013. In upholding the High Court decision, the Court of Appeal stated that;

'The High Court after an extensive and objective analysis of the relevant provisions of the Constitution held correctly in my view that the first elections can only be lawfully held within sixty days upon the expiry of the term of the 10th Parliament and computed the date of expiry as 14th January, 2013'.

34. Clearly, the 4th March 2013 and the subsequent General Elections for elective offices and more specifically for election for the Members of Parliament, President, Members of County Assemblies and County Governors as provided for by **Articles 101, 136 (1), 177 (a) and 180 (1)**, respectively, have been set by the Constitution. To my understanding and as rightly put by the Respondents, any postponement of this date will have to be undertaken within the confines of the law and in particular under the provisions of **Chapter Sixteen of the Constitution**. This Court while exercising its authority to interpret the Constitution as stipulated by Article 165 (3) (b), has to be governed by the provisions of **Article 159(2) (d)** of the Constitution which mandates this Court to protect and promote the purpose and principles of the Constitution.

35. To my mind, the '**Doctrine of Necessity**' as argued by the Petitioner cannot apply in the instant case. It can never be true that necessity would make that which is unlawful, lawful if it violates or threatens the Constitution. The Constitution having provided when the 1st general election will be held and the same having been settled by both the High Court and the Court of Appeal, I do not see how the postponement of that first general election can be done without offending the Constitution itself. In so holding, I am alive to the provisions of Article 2(3) of the Constitution which states that, '***the validity or legality of this constitution is not subject to challenge by or before any court or other state organ.,***

36. Certainly, it cannot be constitutional for this Court to order postponement of elections in a manner that would amount to a sabotage of the Constitution in view of the above clear provisions.

37. I now turn to examine the allegation made by the Petitioner that the country is not ready to hold general elections on 4th March 2013 as ordered by the Court of Appeal. The IEBC has claimed that it is indeed ready to discharge its constitutional mandate and has put in place mechanisms of achieving the same. The 3rd Respondent is established under the provisions of Article 88 of the Constitution. Pursuant to the provisions of Article 82(1) (d) Parliament enacted the **Independent Electoral Boundaries Commission Act 2011** which is an Act of Parliament making provisions for the effective operation of the 3rd Respondent as stipulated under **Article 88 of the Constitution**. The objects and purpose of that **Act** is to provide for the appointment and effective operation of the 3rd Respondent.

38. In fulfilling its mandate, the 3rd Respondent, shall, under the provisions of **Section 25 of the IEBC Act**, observe the following principles—

(a) *freedom of citizens to exercise their political rights under Article 38 of the Constitution;*

- (b) *not more than two-thirds of the members of elective public bodies shall be of the same gender;*
- (c) *fair representation of persons with disabilities and other persons or groups with special needs;*
- (d) *universal and equal suffrage based on the aspiration for fair representation and equality of votes;*
- (e) *free and fair elections, which are—*
 - (i) *by secret ballot;*
 - (ii) *free from violence, intimidation, improper influence or corruption;*
 - (iii) *conducted independently;*
 - (iv) *transparent; and*
 - (v) *administered in an impartial, neutral, efficient, accurate and accountable manner;*
 - (f) *undertake elections on a regular basis in accordance with the Constitution;*
 - (g) *ethical conduct; and*
 - (h) *fairness.*

Under **Section 26 of the IEBC Act**, the 3rd Respondent in the performance of its functions shall not be subjected to the direction or control of any person or authority.

39. The above two sections of the IEBC Act deal with the enforcement of **Article 38** through the establishment of the electoral system. Some of these principles are yet to be achieved as Kenya is yet to conduct its first general election under the new constitutional dispensation. For instance the issue of the right to vote by citizens living in diaspora has already been determined by this Court in **Jeffer Isaak Kanu v Minister of Justice, National Cohesion and Constitutional Affairs & 3 Others, Petition No. 556 of 2012** where the 3rd Respondent was ordered to ensure that the people in diaspora will vote in subsequent elections after the first general election. The Court held that;

'That notwithstanding, the Government and IEBC must be told that they need to put in place efficient, concrete and realistic mechanisms including fiscal and logistical measures to ensure that all citizens living abroad take part in the General Election following the March, 2013 Elections. All available means to realise these rights, must be used and all resources applied towards that end, otherwise the right to universal suffrage will merely become be a pipe dream and wrongly relegated to aspirations or "luxuries", so to speak for Kenyans who popularly endorsed the Constitution, 2010.'

40. With regard to the implementation of Article 27(8) of the Constitution which requires that the State shall take legislative and other measures to implement the principle that not more than two-thirds of members of elective or appointive bodies shall be of the same gender, the Supreme Court has rendered a decision in that regard. In its **Advisory Opinion No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate**, it held that;

".....We should state that the Supreme Court, as a custodian of the integrity of the constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of this constitution.

The Court further stated that,

''We are not, however, in agreement with this contention, as the provision in Article 27 (6) for the State to “take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups,” presupposes open-ended schemes of decision-making and programming, which can only be effected over a span of time. By accommodating such prolonged time-spans of action by the Legislative and Executive Branches, the Judiciary by no means negates the principle of the separation of powers.'

41. In light of the foregoing, I believe that the apprehensions held by the Petitioner are very pre-emptive in nature, and I so find.

42. Clearly, it is evident that Parliament has enacted legislation to satisfy the provisions and implementation of **Article 81** of the **Constitution** (Electoral System and Processes). For instance, Parliament enacted and the 3rd Respondent has commenced the implementation of **The Elections (Kenya Citizens Residing Outside Kenya) (Registration and Voting) Regulations, 2012** which provide for the progressive realization of diaspora voting, first in Eastern Africa countries and then to other countries in the world, as envisaged under **Article 82(1)(e)** of the **Constitution**.

43. The 3rd Respondent has also enacted the **Elections (General) Regulations, 2012** under **Legal Notice No. 128 of 2012** which provide for the general conduct of all stakeholders in the electoral process.

44. With respect to voter registration, I take judicial notice that the 3rd Respondent has since undertaken the exercise and there is in place an electronic voter register. Similarly, I take judicial notice of the fact that the 3rd Respondent has since accepted nomination papers for various candidates as proposed by their Political Parties. The candidates were cleared by all the statutory bodies as required by law including the Ethics and Anti-Corruption Commission. It is also in the public domain that the 3rd Respondent has taken strides in preparing for the 4th March 2013 elections including engaging in voter education, conducting mock elections and designating the polling zones. I am therefore satisfied that the 3rd Respondent has demonstrated its preparedness for the 4th March, 2013 General Elections. Certainly, there is no material evidence before me to demonstrate that the whole preparation process was not 'rushed' thus resulting into mal- practices and denied of the Petitioner's right to fair administrative action as suggested by the Petitioner or at all.

45. Likewise, I take judicial notice of the fact that the National Police Service Commission has been appointed and also that the Inspector General of Police and other Senior Police Officers have been recruited.

46. It is crystal clear that, it cannot be true that there is any curtailment of the Petitioner's or any other citizens right to vote and the postponement of the General Election will serve no lawful purpose. The Petitioner has failed to meet the required threshold in proving violation of one's constitutional rights and elsewhere above, I have said why.

Conclusion

47. The Petitioner has not shown this Court any evidence that it is in the wider public good not to hold elections on March 4th, 2013 and his Petition is best dismissed.

48. As to costs, let each party bear its own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Oburu holding brief for Mr. Ojwang for Attorney General

No appearance for Petitioner's

Mr. Ngugi for 4th Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA
JUDGE