



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 17 of 2012

REPUBLIC.....APPLICANT

VERSUS

1. THE RETURNING OFFICER JOMVU CONSTITUENCY MSA.

2. THE SECRETARY I. E. B. C.

3. THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENTS

AND

ABEID KOMBO & 8 OTHERS.....INTERESTED PARTIES

RULING

Before this court is the chamber summons dated 8th March, 2013 brought under certificate of urgency in which the *Ex-Parte* Applicant sought leave to apply for orders of ‘*certiorari*’, ‘*prohibition*’ and ‘*mandamus*’ as follows:

“2. **THAT** this Honourable Court be pleased to grant leave to the *Ex-parte* applicant herein to apply for orders of *Certiorari* to remove into this Honourable court and to quash the decision(s) made by the 1st RESPONDENT herein whereby the said 1st Respondent did purport to:

- i. Accept and/or receive for counting and tallying several un-declared ballot boxes, *inter alia* from Mikindani Social Hall Polling Stations within Jomvu Constituency;
- ii. Proceed to determine and declare the results of the election of Jomvu Constituency National Assembly Representative while including the ballot papers originating from the aforesaid several un-declared ballot boxes;
- iii. Decline to accept and/or receive for counting and several other declared Ballot Boxes from polling stations within Jomvu Constituency which had been segregated at the onset of counting and tallying for reasons not adduced to the *Ex-parte* Applicant despite vociferous inquiries addressed to the 1st Respondent herein;
- iv. Accept an/or receive for counting and tallying, in the absence of all of the Interested parties and/or their agents, several declared Ballot Boxes from extra ‘voting stations’ irregularly set up, *inter alia*, within Mikindani Social Hall Polling stations;

- v. Proceed to determine and declare the results of the election of Jomvu Constituency National Assembly Representative while including the ballot papers originating from the several undeclared Ballot Boxes from extra 'voting stations irregularly set up, *inter alia*, within Mikindani Social Hall polling station And excluding ballot papers in several ballot boxes irregularly left out from the counting process;
- vi. Allow and/or authorize the setting up of several extra 'voting stations' within Mikindani Social Hall Polling Station.
- vii. Authorize voting to proceed within these several extra 'voting stations' using undeclared Ballot Boxes despite the absence of the polling agents of all the aspirants;
- viii. Accept and/or receive for counting and tallying the contents of the aforesaid un-declared Ballot Boxes from the said several extra 'voting stations' *inter alia* at Mikindani Social Hall Polling station; And
- ix. Proceed to determine and declare the results of the election of Jomvu Constituency National Assembly Representative while including the ballot papers originating from the aforesaid un-declared ballot boxes from the several extra 'voting stations' *inter alia* at Mikindani Social Hall Polling station;

Without the 1st respondent hearing the Ex-parte applicant on the question of the validity and/or propriety or otherwise of inclusion of the aforementioned un-declared ballot boxes in the final result Or hearing the Ex-parte Applicant on the question of the validity and/or propriety or otherwise of exclusion of the votes in aforementioned segregated ballot boxes in the final result Or without the 1st respondent giving the Ex-parte Applicant any or any valid reasons for the 1st respondents' aforesaid decisions;

3. THAT this Honourable Court be pleased to grant leave to the Ex-parte Applicant herein to apply for an order of prohibition to be directed to the Respondents to prohibit them from determining, declaring, announcing, publishing and/or gazetting the election results, whether provisional or final of the election of National Assembly Representative for Jomvu Constituency, Mombasa County as required by section 39 of the Elections Act (2011) until hearing *inter partes* and determination of the main motion to be filed herein;

4 THAT this Honourable Court be pleased to grant leave to the *Ex-parte* applicant herein to apply for an order of *Mandamus* to be directed to the RESPONDENTS to compel them to:

- a) Formally postpone election of the National Assembly Representative for Jomvu Constituency, Mombasa county as provided under Section 73(1) of the Elections Act (2011) until appropriate remedial measures and interventions are put in place to ensure a free, fair and accountable election for the aforesaid seat;
- b) Secure from the 1st Respondent a full and proper account of the total number of:
 - i. Ballot Boxes allocated to Jomvu Constituency for election of National Assembly Representative by the 2nd and 3rd Respondents;
 - ii. Ballot papers allocated to Jomvu Constituency for election of National Assembly Representative by the 2nd and 3rd respondents;
 - iii. Ballot Papers issued to voters to enable them cast votes for the election of National Assembly Representative;
 - iv. Votes cast in the Jomvu Constituency for election of National Assembly Representative,

including those spoilt;

Before proceeding to declare the results of the election of the National Assembly Representative for Jomvu Constituency;

(c) in the alternative to the foregoing, to compel the Respondents to formally extend the voting period as defined in Section 2 of the Elections Act 2011 so as to allow fresh voting, verification of Ballot Boxes and contents thereof, tallying and determination of the election results for the election of the National Assembly Representative for Jomvu Constituency.”

In addition the *Ex-Parte* Applicant did pray:

“5. THAT grant of leave to apply for orders of ‘certiorari’, ‘prohibition’ and ‘mandamus’ aforesaid do operate as a stay of the 1st respondent’s decision to proceed to determine and declare the results for the election of National Assembly Representative for Jomvu Constituency despite having no powers to do as provided under section 39 of the Elections Petition (2011), pending hearing and determination of the main motion to be filed within 21 days of grant of leave to apply for judicial review.

6. THAT costs of this application be granted to the *Ex-Parte Applicant*.”

The application was first brought to court on 11th March, 2013 on which date the court did grant leave as prayed but declined to grant the order of stay as prayed for in clause 5 of the chamber summons.

On 18th March, 2013 the 1st, 2nd and 3rd respondents filed a **Notice of preliminary objection** which was premised on the following grounds:

“1. THAT this Honourable court lacks the requisite jurisdiction to hear and determine this matter.

2. THAT the chamber summons application as filed is bad in law, incompetent, incurable, defective and an abuse of the process of this Honourable court as the same contravenes the provisions of Article 87 of the Constitution of Kenya 2010 as well as the provisions of the Elections Act Number 24 of 2011.”

On 15th April, 2013 the court heard oral arguments from both counsel with respect to the Notice of Preliminary Objection. **MS. NGUGI** appeared for the respondents whilst **MR. KITHI** acted for the *Ex-Parte* Applicant. Ms. Ngugi submitted that this court lacks the jurisdiction to hear and determine Election disputes as these ought properly be heard by the IEBC and/or by a properly gazette court as per the provisions of the Elections Act. On his part Mr. Kithi submitted that the *Ex-Parte* Applicant did write to the IEBC raising complaints over the manner in which the elections were conducted but no response was forthcoming. As such the *Ex-Parte* Applicant was left with no option but to approach the High Court by way of Judicial Review.

As a starting point I must declare that I have dealt with an earlier matter being **Misc. Application JR 15 of 2013 – Republic vs. The Returning Officer Ziwa La Ng’ombe, The Secretary IEBC, The IEBC and Kevin Kwena Lunani and 12 others** in which similar issues were raised. I did deliver my ruling in the above cited matter on 25th March, 2013. I have not been persuaded that there exists any reason to deviate from my finding with respect to jurisdiction in the earlier case. I will therefore merely cite my earlier ruling with the necessary amendments as follows:

1. Does the High Court lack jurisdiction to hear and determine this application for Judicial Review?

In challenging this application for Judicial Review **Ms. Ngugi** for the Respondents submitted that Article

87 of the Constitution sets out a clear process for resolving electoral disputes. She therefore argued that there exists no provision for a party to move to court under Judicial Review in an election dispute.

Mr. Kithi for the *Ex-parte* applicant countered this argument by submitting that since the Election Act was enacted after the New Constitution was promulgated, the Elections Act 2011 cannot be used to limit the fundamental rights and freedoms guaranteed by the Constitution of Kenya. He further submits that since the IEBC is a private body, the actions and decisions of its officers (being public officials) are subject to judicial review.

Article 87 of the Constitution provides as follows:-

“87 (1) Parliament shall enact legislation to establish mechanisms for timely setting of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries commission.

(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation”.

The provision in Article 87(1) is actualized by the enactment of the Elections Act No. 24 of 2011. It is this Elections Act which sets out the procedure to be followed in determining an election dispute. The election which the *Ex-parte* applicant seeks to challenge is that of the Jomvu Constituency National Assembly Representative. Section 75 (1) of the Elections Act provides as follows;

“75(1) A question as to the validity of a County election shall be determined by High Court within the country or nearest to the county.”

Therefore, the question here is whether section 75(1) of the Elections Act ousts the jurisdiction of the High Court to hear and determine a dispute arising from a County Assembly Representatives Election. I think not. The same constitution in Article 165(3) (a) gives to the High Court:

“(a) Unlimited original jurisdiction in Criminal and Civil Matters.”

Likewise the Judicature Act section 3(1) provides:

“3(1) The jurisdiction of the High Court, the court of Appeal and of all subordinates courts shall be exercised in conformity with;

(a) The Constitution

(b) Subject thereto, all other written laws including the Act of parliament of the United kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule

(c)”

It is quite clear from this that the High Court retains residual jurisdiction over all civil and criminal matters upto and including election disputes. The election Act does not and cannot oust the jurisdiction donated to the High Court by the Constitution of Kenya. Therefore in cases where an allegation is made of any violation of the fundamental rights and freedoms guaranteed by the constitution with respect to the conduct of elections then the High court does have jurisdiction to hear and determine the matter.

2. Is this present application as filed incompetent, incurably defective and an abuse of court Process?

As stated earlier, Article 87(1) of the Constitution of Kenya provided for the enactment of legislation to establish mechanisms for the timely settling of electoral disputes. The legislature did comply and did enact the Elections Act 2011 which set out very clear procedures and timelines for the settling of election disputes. With regard to disputes pertaining to County Assembly Representatives Elections section 75(1) of the Elections Act clearly provides that such disputes are to be presented before the High Court for determination. Mr. Kithi for the applicant submits that there is no legal recourse provided to an aggrieved litigant between the nomination period and the period **before** electoral results are gazetted. It is this gap that the applicant having no other legal recourse sought to seek remedy by way of Judicial Review. This dilemma is however easily solved by a look at Article 88(4)(e) of the Constitution of Kenya which provides:

“(4) the Commission [referring here to the IEBC] is responsible for conducting or supervising referendum and elections by any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and particular for

(c) the settlement of electoral disputed, including disputes relating to or arising from nomination but excluding election petition and disputes subsequent to the declaration of election results. [my own emphasis]

A clear reading of this provision makes it manifestly clear that the IEBC has the mandate to hear and determine all election disputes arising from nominations **before** the declarations of results. Therefore any dispute arising before the official announcement or pronouncement of results ought to be handled by the IEBC.”

Mr. Kithi in his submissions sought to distinguish this present application from Misc. Application (JR) 15 of 2013 by arguing that in the present case the *Ex-Parte* Applicant did actually write to the IEBC raising certain grievances but that the IEBC failed and/or declined to respond in any manner whatsoever leaving the applicant with no option but to approach the High Court by way of Judicial Review. The said letter of complaint was annexed to the chamber summons application and is dated 6th March, 2013. It is addressed to “*The County Returning Officer, Mombasa*” and the reference provided is **JOMVU CONSTITUENCY PARLIAMENTARY ELECTION**. The letter goes on to cite several alleged irregularities and ends thus **“I therefore request for a recount immediately.”** The *Ex-Parte* Applicant in this matter is one **HAMISI ALI ESHUMIRA** who describes himself in paragraph 2 of his verifying affidavit as “*an Agent for the Orange Democratic Movement Party (“ODM”)*”. The letter dated 6th March, 2013 is authored by one **Seif Ramadhan Seif Kajembe** and **NOT** by the *Ex-Parte* Applicant herein. Why would the *Ex-Parte* applicant be raising issue about the failure of IEBC to respond to a letter not authored by himself nor by the party which he represents ODM. How can the *Ex-Parte* applicant state with certainty that IEBC **did not** in actual fact respond to Mr. Seif Kajembe who was the author of the letter of complaint. I do not see how the *Ex-parte* Applicant can come to court and claim to be aggrieved by the failure by IEBC to respond to a letter written by a third party. The person who had valid grounds to complain was Mr. Seif Kajembe **not** the applicants. As things stand I find no evidence to show or suggest that the applicant himself wrote any letter of complaint to IEBC.

Secondly, the Elections Act provides as follows at section 74(2):

“An electoral dispute under sub-section (1) shall be determined within seven days of the lodging of the dispute with the Commission”. [my emphasis]

This means that given that the letter to IEBC was written on 6th March, 2013, the author had a statutory obligation to wait for the seven (7) days provided to elapse before contemplating further action. The seven (7) day period would have expired on 14th March, 2013 yet this Judicial Review application was filed in court on 11th March, 2013, three (3) days before the period allowed in law for IEBC to respond had elapsed. The application was therefore premature in my view. However, given that as I have already found that the letter of complaint **was not** authored by the *Ex-Parte* Applicant this latter point is actually moot.

Lastly, a close look at the remedies being sought by the *Ex-Parte* Applicant bring this matter within the ambit of an Election dispute that ought properly to be placed before an Election Court for determination. For example prayer 2(v) seeks orders of '*certiorari*' to quash the decision of the Returning Officer in Jomvu Constituency from **declaring** the results of the election in Mikindani Social Hall Polling Station. The real effect of this prayer is to nullify the electoral results as already announced. Once again I can only restate and reiterate my finding in Misc. JR 15/2013 with necessary amendments:

“This is undoubtedly prayer to cancel and/or nullify the results as announced by the 1st respondent. This and as most of the other prayers sought are orders that can quite properly be sought and obtained under the Elections Act. Where the remedy being sought by a party is provided for by an Act of Parliament, there would be no need for such an applicant to approach the High Court under Order 53 of the Civil Procedure Rules. This same issue was adjudicated upon by the Court of Appeal in the case of **SPEAKER OF THE NATIONAL ASSEMBLY –VS- KARUME [2009]KLR 425**. In this case the court held thus:

“in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear and statutory provisions”.

Similarly in the case of **KONES VS REPUBLIC & ANOTHER EXPARTE KIMANI WA NYOIKE & 4 OTHERS [2008] 3 KLR 291** the court of Appeal stated as follows;

“the jurisprudence underlying these decisions is that the constitution itself and the national Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations for the national Assembly. Those procedures ought to be followed and the Judicial review process which in Kenya is provided for in the Law Reform Act, chapter 26 of the Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular the law reform Act and Order 53 of the civil procedure Rules are both inferior and can only apply subject to the provisions of the Constitution”.

I am in full agreement with the above decisions by the Court of Appeal which by virtue of the doctrine of *stare decisis* are legally binding on this court. Whereas previously there existed the National Assembly and Presidential Elections Act, subsequent to the promulgation of the new constitution such matters are guided by the Elections Act 2011. Where there exists clear procedure in given law to address a particular grievances (in this case the ward elections) (here County Assembly Elections) then a party is required to use such statutory provisions as an avenue to seek redress.”

To challenge the Election of the National Assembly Representative in Jomvu Constituency the *Ex-Parte* Applicant must avail himself of the provisions of section 75(1) and section 76(1), (2), (3), (4) and (5) of the Elections Act 2012. There is no short-cut to this.

For the reasons cited above, I do find that the present application is incompetent in law and amounts to an abuse of court process. The preliminary objection is upheld. I do hereby strike out the present chamber summons application and I further direct that the *Ex-Parte* Applicant meet the costs for this application.

Dated and delivered in Mombasa this 8th day of May, 2013.

M. ODERO

JUDGE

In the presence of: