



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NO. 6 OF 2013
IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011 SECTIONS 75; 76; 77; 79; 80; 82; 86 AND 87

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES 2013: RULES 3; 4; 5; 6(1)(A); 8; 9; 10; 11; 12; 13; 21; 32; 33 AND 38

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATION, 2012

AND

IN THE MATTER OF THE ELECTION FOR MIGORI COUNTY WOMEN REPRESENTATIVE HELD ON THE 4TH DAY OF MARCH 2013

FATUMA ZAINABU MOHAMED
 PETITIONER

-VERSUS-

GHATI DENNITAH..... 1ST
 RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) 2ND
 RESPONDENT

BENSON NJAU (KURIA EAST RETURNING OFFICER) 3RD
 RESPONDENT

LILINA LILUMA (RETURNING OFFICER AWENDO CONSTITUENCY) 4TH
 RESPONDENT

MOSES OMONDO DAULA (RETURNING OFFICER NYATIKE CONSTITUENCY) 5TH
 RESPONDENT

JACKTON NYONJE (RETURNING OFFICER ORIRI CONSTITUENCY) 6TH
RESPONDENT

NOAH BOWEN (RONGO CONSTITUENCY) 7TH
RESPONDENT

ALEX OYUGA (RETURNING OFFICER SUNA EAST CONSTITUENCY) 8TH
RESPONDENT

MARTIN CHENGERE (RETURNING OFFICER SUNA WEST CONSTITUENCY 9TH
RESPONDENT

JAIRUS OBAGO (RETURNING OFFICER MIGORI COUNTY)10th
RESPONDENT

ADAM MOHAMED (RETURNING OFFICER KURIA WEST CONSTITUENCY)11TH
RESPONDENT

RULING

1. Before the court is an application by way of a Notice of Preliminary Objection taken by the 1st Respondent on the grounds that:

“(a) The Petition is fatally incompetent as it offends Article 87 (2) of the Constitution.

b. The Petition offends the basic structure, object, purport, principles and values of the Constitution.

c. The Petition offends the underpinning principles and values of International Conventions.

d. Section 76 (a) of the Election Act 2011 is null, void and invalid as it contravenes Article 87(2) of the Constitution as read with Article 2 (4) of the Constitution.

e. Section 76 (2) of the Election Act 2011 is null, void and invalid for contravening Article 2 (4) of the Constitution.

f. Rule 20 of the Election Rules of practice 2013 is null and void as it is inconsistent with Article 87 (2) of the Constitution as read with Article 2 (4) of the Constitution.

2. In thanking the counsel for the parties, respectively Mr. Ondieki for the 1st Respondent/applicant, Mr. Odhiambo for the 2nd - 11th Respondents and Mr. Mogeni for the Petitioner, for their written submissions and oral argument, the court has isolated the issues for consideration as follows:

a. Whether section 76 (2) of the Elections Act is inconsistent with Article 87 (2) of the Constitution;

b. When declaration of election results occurs within the meaning of Article 87(2) of the Constitution; and

c. Whether the Petition herein is fatally incompetent and liable to be struck out as having been filed out of time.

3. Before concluding its decision on the issues this court has become aware as a matter of public

notoriety, that the Court of Appeal has scheduled for the 25/7/2013 a ruling on the very issues in an appeal from the recent decision of the Election Court at Mombasa per Ochieng, J., in **Suleiman Said Shahbal v. IEBC & 3 Ors**, Election Petition No. 8 of 2013 at Mombasa and that in the meantime the Court of Appeal has ordered a stay of the proceedings in the said Petition.

4. In the **Shahbal** decision, supra, which has been cited by both sides of the Preliminary Objection, the High Court judge, while holding section 76 of the Elections Act to be inconsistent with Article 87 (2) of the Constitution, declined to strike the petition therein filed outside the prescribed period under the Constitution and said:

“As at the time when the Petitioner was instituting the Petition herein, section 76 of the Election Act was an integral part of the law in force. The said law was, prima facie, lawful. Its legality had not been challenged. Therefore, when the Petitioner filed his Petition within 28 days of the gazettment of the commission, he considered himself to be complying with the law. He did not error. If there be any error, it was committed by parliament; not the Petitioner. As the Petitioner complied with the law which was presumed to be lawful, at the time, it would be wrong, in my considered opinion, to punish him for the mistake of the parliament, by striking out to impose this decision retroactively. It would be akin to punishing an accused person for an act which was committed by him before such act had been criminalized by the law. I therefore decline the applicant’s invitation, to strike out the Petition. Instead, I hold that from this moment, forwards, until and unless an appellate court should hold otherwise, election Petitions must be filed within 28 days of the declaration of the results of the election in question; and such declaration is the one made by the appropriate returning officer responsible for the electoral process in question. I consider this to constitute a purposive approach to the issue at hand. It safeguards the rights of a Petitioner who had complied with the law as had been enacted by parliament. He had no reason, until now, to presume that section 76 of the Elections Act was unconstitutional.”

5. While this court is entitled to make its own definite concurring or divergent decision on the issues before the court, the matter is of such great importance affecting not only the present petition but many of the election petitions some which are partly heard before the court as to make it imprudent to pronounce on it while a decision on a relevant appeal is shortly coming up for delivery at the Court of Appeal. Whatever decision this court makes, the unsuccessful litigant will feel that the Court of Appeal decision will shortly vindicate his position, and will consequently seek to await a “final” decision by the Court of Appeal. Envisioning the possible two scenarios will help illustrate the inexpediency of a decision by this court at this stage, when the very same questions are pending determination by the Court of Appeal.
6. If this court holds that section 76 of the Elections Act is unconstitutional and therefore strike out the Petition which ought to have been filed 28 days after the declaration of the results on the 6th March 2013, and the Court of Appeal subsequently rules otherwise, so that, the Petition should have proceeded to hearing, then the hearing of this Petition can only be reinstated upon an order of the Court of Appeal on an appeal from the decision of this court. The period prescribed by the Constitution for the hearing of the election Petition may long have lapsed, leading, in my view, to a constitutional crisis with regard to the hearing and determination of the election dispute herein, which will become a constitutional impossibility although sanctioned by the Constitution itself!
7. If, on the other hand, this court holds that section 76 of the Elections Act is not unconstitutional or, to the same effect, as in **Shahbal’s** case, that the section is unconstitutional but the Petitioner had acted within the provisions of the law as it stood at the time of the filing of Petition and that therefore the Petition should proceed to hearing, and the Court of Appeal subsequently rules in the opposite, then this court would have proceeded with the hearing of the Petition to the prejudice of the Respondents who would incur costs of and incidental to the Petition which, in the ‘final’ determination of the Court of Appeal, is time-barred.
8. The Court of Appeal, is by virtue of section 85A of the Elections Act, the final arbiter of the points

of law arising from the election Petitions. Section 85A is in the following terms:-

“An appeal from the High Court in an election Petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be:-

- a. ***Filed within thirty days of the decision of the High Court; and***
- b. ***Heard and determined within six months of the filing of the appeal.”***

Hence the deference to the Court of Appeal.

- 9. I am conscious of the old but appropriate reprimand on Judges that *“it is the business of judges to send into the world not doubts, but decisions”*- per Sir William Scott ***in Lindo v. Belisario*** (1795), 1 Hag Con 216, 220 cited in ***Lanston Monotype Company Ltd v. Anderson*** [1911] 2 KB15, 23 per Hamilton, J., and I consider that a decision of this court on the issues herein would, while positively determinant one way or the other, not be “final” in practical sense. Whatever the pronouncement of the court’s decision, doubts will linger whether or not the position taken by this court would shortly be upheld or perfected by the Court of Appeal in its pending ruling on the same issues scheduled for delivery on the 25/7/2013, only 16 days from the date hereof.
- 10. As held in ***Re Yates Settlement Trusts, Yates v. Paterson*** (1954) 1 ALL ER 619:- ***“a judge of first instance has discretion to adjourn a case pending the hearing of an appeal from a relevant Court of Appeal decision which binds him”***. Sir Raymond Evershed, M.R. in the leading decision said:

“It may well be that, if a case, and an important case, is known to be subject to appeal to the House of Lords, or from a judge of first instance to the Court of Appeal, a judge may reasonably and properly think that it is in the general public interest not to decide another case on the same lines until the result of the case under appeal has become known.”

- 11. Taking judicial notice of the fact that the issue of the constitutionality of section 76 of the Elections Act is before the Court of Appeal on an appeal arising from the Election Petition No. 8 of 2013 at Mombasa, ***Suleiman Said Shahbal v. IEBC & 3 Ors***, which is scheduled for ruling on the 25/7/2013, I consider that, on account of the short period of waiting - 16 days - before the ruling on the Court of Appeal; the binding nature of the authority of the Court of Appeal on the matter; and the remainder of sufficient time for the hearing of this Petition [should that be the course of the Court of Appeal’s ruling] under the constitutional time-table for the hearing and determination of election Petitions, this court should in deference to the Court of Appeal adjourn its decision on the issue until the higher court has pronounced itself on the matter.
- 12. Accordingly, this court’s decision on the preliminary objection is deferred to Friday the 26th July 2013.

Dated, signed and delivered this 9TH day of JULY 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Nyangoro - for the Petitioner

Mr. Ondieki - for the 1st Respondent

Mr. Odhiambo - for the 2nd and 3rd Respondent

Mr. Mongare - Court Clerk