



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 257 OF 2014

BETWEEN

JOHN NDIRANGU KARIUKI.....APPELLANT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE.....FIRST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..SECOND RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya

at Nairobi, (Mumbi Ngugi, J.) dated the 6th day of June, 2014

in

HIGH COURT CONSTITUTIONAL PETITION NO. 408 OF 2013)

JUDGMENT OF THE COURT

INTRODUCTION

- 1. On 8th August, 2013 the 1st respondent filed a constitutional petition in the High Court of Kenya seeking to challenge the assumption and/or holding of public office by the appellant as a member of Parliament for Embakasi Central Constituency in Nairobi, having been cleared by the 2nd respondent to contest for the said public office on the 4th March, 2013 General Elections. The appellant was declared as the duly elected member of the National Assembly for the said constituency.
- 2. The gravamen of the said petition was that in terms of **Article 99 (2) of the Constitution of Kenya, 2010, (the Constitution)**, the appellant was disqualified from being elected as member of Parliament since he had been convicted of two counts of abuse of office and sentenced to a fine of Kshs.100,000/= on each count, in default to serve a jail term of one year for each count. Consequently, the 1st respondent sought, *inter alia*, a declaration that the office of member of Parliament for Embakasi Central Constituency had become vacant by virtue of **Article 103 (1) (g) of the Constitution**.
- 3. In response to the said petition, the 2nd respondent filed an application by way of a notice of motion dated 29th August, 2013 seeking to have the petition struck out. The application was predicated on the

ground that the petition was incompetent and in contravention of the express mandatory provisions of the law requiring that any claim seeking to impugn any aspect of the electoral process and unseat a member of the National Assembly can only be brought by way of an election petition before a duly gazetted election court.

4. It was brought to the attention of the trial court that prior to the filing of the constitutional petition that gave rise to this appeal, the appellant's election had been challenged in **Election Petition No. 8 of 2013, Kituo cha Sheria V John Ndirangu Kariuki & Independent Electoral & Boundaries Commission** that was heard before **Kimondo, J.** The election petition was struck out, as the court found that the petitioner had no capacity to file the petition and hence there was no valid petition before it.

5. In a ruling delivered on 6th June, 2014, **Mumbi Ngugi, J.** dismissed the application, holding that the court had jurisdiction to hear the petition and determine it on its merits.

APPEAL TO THIS COURT

6. Being aggrieved by that decision, the appellant preferred an appeal to this Court. Although the memorandum of appeal contains six grounds of appeal, they may be collapsed into two major issues for determination as hereunder:

(i). whether the Constitutional Petition is a contravention of the express mandatory provisions of the Constitution, the Elections Act, 2011 and the Elections (Parliamentary and County Elections) Petition Rules 2013;

(ii). whether the High Court sitting as a Constitutional Court has jurisdiction to determine the issues raised in the petition.

7. When this appeal came up for hearing, the appellant through his learned counsel, **Mr. Magina**, sought to rely on his written submissions, as did **Mrs. Kinara**, learned counsel for the 2nd respondent, who had also filed submissions. On the other hand, **Mr. Nzioka**, learned counsel who held brief for **Mr. Nying'uro** for the 1st respondent, did not make any submissions. He however told the Court that the 1st respondent was opposed to the appeal and relied entirely on the record of appeal as filed.

8. The second respondent supported the appeal and consequently its submissions were in line with those of the appellant.

9. The first main issue for determination is whether the constitutional petition amounts to a contravention of the express mandatory provisions of the Constitution, the **Elections Act 2011** and the Elections (*Parliamentary and County Elections*) **Petition Rules 2013**.

10. It is *trite law* that determination as to whether a person has been validly elected as a member of Parliament is governed by **Article 105** of the **Constitution** which stipulates as follows:

“105 (1) The High Court shall hear and determine any question whether -

(a). a person has been validly elected as a member of Parliament; or

(b). the seat of a member has become vacant.

(2). A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

(3). Parliament shall enact legislation to give full effect to this Article.”

11. The Elections Act, 2011 together with the accompanying Rules and Regulations were enacted to give effect to the provisions of **Article 105**.

12. The issue of whether the appellant was constitutionally and statutorily eligible to vie for elections is one that is connected to the electoral process. In **Advisory opinion no. 2 of 2012, in the matter of gender representation in the National Assembly and Senate [2012] eKLR**, the Supreme Court stated that:

“Elections are not a single event; it is in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for the 'qualifications and disqualifications for elections as president', and it touches on the tasks of the agencies such as political parties which deal with early stages of nomination, it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of presidential elections, there may well be a contested question falling within the terms of the statute of elections or of political parties. Yet still the dispute would still have clear bearing on the conduct of the presidential election.”

13. Similarly, in **Kituo Cha Sheria v John Ndirangu & Another [2013] eKLR**, Kimondo, J. held that:

“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.”

14. **Article 87 (1)** of the Constitution empowers Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes. In exercise of that mandate, Parliament enacted the **Elections Act No. 24 of 2011**. **Article 87 (2)** of the Constitution read together with **section 76 (1) a** and **section 77 (1)** of the **Elections Act** provide that petitions concerning an election other than a Presidential election shall be filed within twenty eight days after the declaration of election results.

15. Further, **rules 8 (1) (b)** and **10 (1) (c) and (d)** of the **Elections (Parliamentary and County Elections) Petition Rules 2013** set out the format and the mandatory content of an election petition. Looking at the kind of prayers that were sought in the constitutional petition, they were akin to prayers that are ordinarily sought in an election petition, save for the fact that the format and procedure used was not in compliance with the Constitution and statutory provisions cited above.

16. In **The Speaker of the National Assembly v The Hon. James Njenga Karume [2008] 1 KLR 425** this Court stated:

“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.”

17. Likewise, in **Kones v Republic & Another ex parte Kimani Wanyoike & Others, [2008] 3 KLR EP 29**, this Court held that a seat in the National Assembly can only be declared vacant under the circumstances stated in the Constitution and through a clearly laid down procedure.

18. In view of the foregoing, it is our finding that whereas the question as to whether the appellant was qualified to vie for the position of member of Parliament was critically important, the manner in which the constitutional petition was presented was in contravention of express mandatory provisions of the **Constitution**, the **Elections Act 2011** and the **Elections (Parliamentary and County election petition) Rules 2013**.

19. The second issue that falls for our consideration is whether the High Court, not sitting as an election court, had jurisdiction to determine the issues raised by the first respondent in the petition that was before it.

20. In **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court stated 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. When 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.”

21. The petition that was before the High Court was one concerning the electoral process as the Petitioner was seeking a determination as to whether the appellant was eligible to vie as a member of Parliament and a declaration that the seat he had been elected to hold had fallen vacant. We have already set out the procedure that is provided for by the law in such matters. In addition, under the Elections (*Parliamentary and County Elections*) Petition Rules, 2013 for purposes of hearing an election petition, the court must be constituted by the Chief Justice and duly gazetted.

22. It is thus clear to us that the trial court as then constituted did not have jurisdiction to hear and determine the issues that had been raised in the petition that was before it. The issues could only be determined by an election court in a petition properly presented before such court.

23. We must reiterate the words of the Supreme Court in **Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others** [2015] eKLR that:

“157. It is now an indelible principle of law that the proceedings before an election court are sui generis. They are neither criminal, nor civil. The parameters of this jurisdiction are set in statute (the Elections Act). As such, while determining an election matter, a court acts only within the terms of the statute, as guided by the Constitution. This approach is in keeping with the stand taken by the Supreme Court of India in Jyoti Basu & Others V Debi Ghosi & Others 1982 AIR 983:

"An Election petition is not an action at Common Law, nor in Equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the court is put in a strait jacket."

24. We have said enough to demonstrate that this appeal is for allowing, as we hereby do. Consequently, we hereby set aside the ruling and order of Mumbi Ngugi, J. dated 6th June, 2014 and allow the 2nd respondent's notice of motion dated 29th August, 2013 in terms of prayers 1 and 2 thereof.

The 1st respondent shall bear the costs of the appeal as well as the costs of the High Court Proceedings.

DATED and Delivered at Nairobi this 31st day of March, 2017.

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR