



**Njiru & 10 others v Ruto & 5 others; Azimio la Umoja One-Kenya
Coalition & 3 others (Interested Parties) (Petition 22 (E25) of 2022)
[2022] KESC 55 (KLR) (Civ) (6 September 2022) (Ruling)**

Neutral citation: [2022] KESC 55 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL**

PETITION 22 (E25) OF 2022

**PM MWILU, DCJ & VP, MK KOOME, CJ & P, MK IBRAHIM,
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

SEPTEMBER 6, 2022

BETWEEN

**KENNETH NJAGI NJIRU 1ST PETITIONER
MESHACK CHURCHILL SUBA 2ND PETITIONER
JACKSON MWALULU 3RD PETITIONER
BEATRICE KAMAU 4TH PETITIONER
AMOS WAFULA 5TH PETITIONER
SOPHIE DOLA 6TH PETITIONER
JULIA WANJIKU CHEGE 7TH PETITIONER
JAMES MAINA MURIMI 8TH PETITIONER
SIMON LOKOMA 9TH PETITIONER
CAROLINE AYITSO NYARUNDA 10TH PETITIONER
JOHNSON MWAKABA 11TH PETITIONER**

AND

**WILLIAM SAMOEI ARAP RUTO 1ST RESPONDENT
RIGATHI GACHAGUA 2ND RESPONDENT
UNITED DEMOCRATIC ALLIANCE 3RD RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 4TH RESPONDENT**



WAFULA CHEBUKATI 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT

AND

AZIMIO LA UMOJA ONE-KENYA COALITION INTERESTED PARTY
AGANO PARTY INTERESTED PARTY
ROOTS PARTY OF KENYA INTERESTED PARTY
ETHICS AND ANTI- CORRUPTION COMMISSION INTERESTED PARTY

(Being an application for conservatory orders restraining the 1st and 2nd respondents from being sworn into office of President and Deputy President respectively, in the event that they got elected during the General Elections then scheduled for 9th August 2022)

Nature of the exclusive original jurisdiction of the Supreme Court to determine disputes relating to the election of the President

The applicants sought among others; a declaration that the 2nd respondent was unfit and unsuitable to hold office of Deputy President; and an order of conservatory injunction to restrain the 1st and 2nd respondents from being sworn into offices of President and Deputy President respectively, in the event they got elected. The Supreme Court held that the Constitution conferred upon it, exclusive original jurisdiction to determine disputes relating to the election of the President, limited only to the circumstances contemplated under article 140(1) of the Constitution. The court further held that it was not a blanket jurisdiction that empowered it to extend its judicial authority over any and all interpretational questions, touching upon the election of the President.

Reported by Kakai Toili

Jurisdiction - jurisdiction of the Supreme Court - exclusive original jurisdiction to determine disputes relating to presidential elections - what was the nature of the exclusive original jurisdiction to determine disputes relating to presidential elections - , articles 140(1), 163(3) and 165(3)(d).

Brief facts

The applicants filed a petition at the Supreme Court on August 8, 2022, seeking among others; a declaration that the 2nd respondent was unfit and unsuitable to hold office of Deputy President; and a declaration that the nomination of the 2nd respondent as a running mate by the 1st respondent was invalid, null and void *ab initio*. The applicants also filed the instant application and sought an order of conservatory injunction to restrain the 1st and 2nd respondents from being sworn into offices of President and Deputy President respectively, in the event they got elected during the general elections then scheduled for August 9, 2022.

The 1st to 5th respondents filed notices of preliminary objection challenging the jurisdiction of the court to entertain the instant appeal and motion. They argued that the court was only clothed with exclusive original jurisdiction pursuant to article 140 of the (Constitution) and that the petition failed the test of justiciability and ripeness. The applicants submitted that the court was vested with exclusive original jurisdiction under article 163(3)(a) of the Constitution.

Issues

What was the nature of the exclusive original jurisdiction to determine disputes relating to presidential elections?

Relevant provisions of the Law

Article 140 - Questions as to validity of presidential election



(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

Article 163 - Supreme Court

(3) The Supreme Court shall have—

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and

Held

1. The conferred upon the Supreme Court, exclusive original jurisdiction to determine disputes relating to the election of the President, limited only to the circumstances contemplated under article 140(1) of the Constitution. It was not a blanket jurisdiction that empowered the Supreme Court, to extend its judicial authority over any and all interpretational questions, touching upon the election of the President. Article 163(3) of the did not oust the High Court's original jurisdiction to interpret the under article 165(3)(d). The Supreme Court's exclusive and original jurisdiction to determine the validity of a presidential election, only kicked in after the declaration of results, following a petition challenging the election.
2. The Supreme Court could not determine the validity or otherwise of a presidential election, before the same was held and the results thereof declared. It was one thing for the court to pronounce itself on a constitutional or legal question, but it was another thing to determine the validity of an election. In other words, the Supreme Court could not anticipate the validity of a presidential election, within the meaning of article 140(1) of the .
3. The petition and application before the court were filed on August 8, 2022, a day before the general elections and seven days before the declaration of the results of the presidential election. Therefore, the applicants were inviting the court to assume jurisdiction outside the confines of article 163(3) as read with article 140(1) of the . They were inviting the court to unconstitutionally expand its jurisdiction. To wait until a day to the general elections, before seeking the orders of such magnitude, cast the applicants in a cynical scheme of abuse of the processes of the court. The court lacked jurisdiction to hear and determine the petition and application.

Preliminary Objections allowed; application and petition struck out; applicants to bear the costs.

Citations

Cases

1. Okiya Omtatah Okoiti v. Independent Electoral and Boundaries Commission & Others (SC Petition No. 18 of 2017, [2020] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 3, 10, 88(4)(d)(e); 99(1); 137(1); 140(1); 148(1); 163(3)(a)(4) (a) — Interpreted
2. Supreme Court Act — Section 21(1) (a); 24(1) — Interpreted

Advocates

None mentioned

RULING

1. Upon considering the petition dated 5th August, 2022 and filed on 8th August 2022, which is brought pursuant to articles 3, 10, 88(4) (e), 99, 137, 148 and 163 (3) (a) of the *Constitution* and Section 12 of the *Supreme Court Act*, 2011, the petitioners seek ten declarations herein condensed into four main prayers, to wit; a declaration that the 2nd respondent is unfit and unsuitable to hold office of Deputy President



- by dint of his non-compliance with chapter six of the Constitution and articles 99(1) as read with article 148(1) of the Constitution; a declaration that the nomination of the 2nd respondent as a running mate by the 1st respondent was invalid, null and void *ab initio*; a declaration that the 1st respondent violated articles 99(1), as read with articles 137(1), 148(1) of the Constitution by nominating the 2nd respondent as a candidate for Deputy President in the general elections conducted on August 9, 2022, hence unfit and unsuitable to hold office of President; and an order quashing the 4th respondent's Gazette Notice No. 7995 published on July 1, 2022 declaring the 1st and 2nd respondents as the President and Deputy President candidates for the 3rd Respondent; and
2. Upon perusing and examining the notice of motion dated August 5, 2022 and filed on August 8, 2022, which is brought pursuant to the provisions of article 163(4)(a) of the Constitution, sections 21(1)(a) and 24(1) of the Supreme Court Act, 2011) and rules 3(5), 31 and 32 of the Supreme Court Rules, 2020, wherein the applicants seek an order of conservatory injunction to restrain the 1st and 2nd respondents from being sworn into offices of President and Deputy President respectively, in the event they got elected during the general elections then scheduled on August 9, 2022;
 3. Upon reading the supporting affidavit in support of the motion sworn by Kenneth Njagi Njiru on August 5, 2022, further affidavit sworn on August 12, 2022 and the 1st to 3rd respondents' replying affidavit sworn by Veronica Maina on August 11, 2022 in opposition of the motion; and
 4. Upon considering the notice of preliminary objection by the 1st to 3rd respondents dated 11th August and filed on even date, as well as the 4th and 5th respondents' similar notice of preliminary objection and grounds of opposition dated August 11, 2022 and filed on August 15, 2022, challenging the jurisdiction of the court to entertain the present appeal and motion; that for those reasons, the court is only clothed with exclusive original jurisdiction pursuant to article 140 of the Constitution; that the petition and motion offends the principle of exhaustion as regards avenues of recourse available pursuant to article 88(4)(d) and (e) of the Constitution; that it fails the test of justiciability and ripeness and offends the principle of *sub-judice* as Constitutional Petition No. E395 of 2022 is pending before the High Court; and
 5. Upon considering written submissions by the applicants dated August 9, 2022, filed on August 10, 2022 and further submissions dated August 12, 2022, filed on August 15, 2022 to the effect that the preliminary objections are unmerited; that the court is vested with exclusive original jurisdiction under article 163(3)(a) and that the application seeks to preserve the subject matter of the petition;
 6. Upon considering the written submissions by the 1st to 3rd Respondents dated August 11, 2022 and filed on even date restating the grounds of objection and urging that both the petition and motion are incompetent; that they are an abuse of the court and ought to be struck out; and
 7. Noting that the objections raised by the 1st to 5th respondents raise questions challenging this court's jurisdiction to hear and determine this application or the petition within which it is brought. And further noting that the questions having been raised at the earliest opportunity, then this court must determine the preliminary objection in the first instance.

We now therefore find as follows:

8. We have carefully considered the reasoned arguments by all parties as pertains the jurisdiction of this court, to hear and determine disputes relating to the election to the office of President arising under article 140 of the Constitution. To this end, where jurisdictional questions have arisen, article 163 of the



Constitution is the first point of call and the guiding provision. Specifically, Article 163 (3) (a) provides that:

“The Supreme Court shall have:

exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under article 140” [emphasis added].

9. Article 140 (1) on the other hand provides that:

“A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election” [emphasis added].

10. The Constitution therefore confers upon the Supreme Court, exclusive original jurisdiction to determine disputes relating to the election of the President, limited only to the circumstances contemplated under article 140 (1). In the case of *Okiya Omtatah Okiiti v. Independent Electoral and Boundaries Commission & others*; SC Petition No. 18 of 2017, [2020] eKLR, the court has, with finality settled the question of its jurisdiction under article 163 (3) (a) as follows:

“We hasten to restate the position that, the Constitution confers upon the Supreme Court, exclusive original jurisdiction, to determine disputes relating to the election of the President arising under article 140 only. Though exclusive and original, this jurisdiction is limited to the circumstances contemplated in article 140 (1). It is not a blanket jurisdiction that empowers the Supreme Court, to extend its judicial authority over any and all interpretational questions, touching upon the election of the President. It must be further emphasized that, article 163 (3) of the Constitution does not oust the High Court’s original jurisdiction to interpret the Constitution under article 165 (3) (d). The Supreme Court’s exclusive and original jurisdiction to determine the validity of a presidential election, only kicks in after the declaration of results, following a petition challenging the election.

...

(52) The Supreme Court cannot determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. It is one thing for the court to pronounce itself on a constitutional or legal question, but it is another thing to determine the validity of an election. In other words, the Supreme Court cannot anticipate the validity of a presidential election, within the meaning of article 140 (1) of the Constitution” [emphasis added].

11. It is general knowledge that the Presidential Elections were held on August 9, 2022 and the declaration of results of the Presidential Election made on the August 15, 2022. On the other hand, the petition and motion before us were filed on August 8, 2022, a day before the general elections and seven days before the declaration of the results of the Presidential Election. Therefore, the applicants are inviting the court to assume jurisdiction outside the confines of article 163 (3) as read with article 140 (1) of the Constitution. They are inviting the court to unconstitutionally expand its jurisdiction. To wait until a day to the general elections, before seeking the orders of such magnitude, casts the petitioners/ applicants in a cynical scheme of abuse of the processes of this court.

12. Consequently, applying the settled principles, we find that this court lacks jurisdiction to hear and determine the petition and also the present application. We reiterate that this court’s jurisdiction under



article 163 (3) (a) of the Constitution only kicks in after the declaration of the presidential election results and subsequent to a competent petition challenging the election.

13. Accordingly, we make the following orders:

- i. The objections raised by the 1st to 5th respondents in respect of the notice of motion dated August 5, 2022 and petition dated August 5, 2022 are allowed;
- ii. The notice of motion dated August 5, 2022 and petition dated August 5, 2022, are for the reasons given, incompetent and are hereby struck out;
- iii. The applicants shall bear costs.

14. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2022.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

