



REPUBLIC OF KENYA



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In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011) [2011] KESC 3 (KLR) (15 November 2011) (Order)

In the Matter of Interim Independent Electoral Commission [2011] eKLR

Neutral citation: [2011] KESC 3 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CONSTITUTIONAL APPLICATION 2 OF 2011

WM MUTUNGA, CJ & P, NANCY MAKOKHA BARASA, DCJ & V-P, MK IBRAHIM, PK TUNOI, SC WANJALA, JB OJWANG & NS NDUNGU, SCJJ

NOVEMBER 15, 2011

IN THE MATTER OF ADVISORY OPINIONS OF THE COURT UNDER ARTICLE 163(3) OF THE CONSTITUTION

-AND-

IN THE MATTER OF SECTION 21(2) OF THE SIXTH SCHEDULE OF THE CONSTITUTION

-AND-

IN THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION AS THE APPLICANT

Jurisdiction of the Supreme Court to issue advisory opinions

The issues for determination in the instant matter were; nature of the jurisdiction of the High Court in determining a justiciable matter when seen in parallel with the invocation of the Supreme Court's advisory opinion jurisdiction; the situations in which the Constitution authorized the giving of an advisory opinion; practical considerations that should guide the court's decision to render an advisory opinion. The court highlighted the guiding principles governing the Supreme Court in exercising its jurisdiction to issue advisory opinions.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to issue advisory opinions – what were the guiding principles.

Brief facts

The issues for determination in the instant matter were; nature of the jurisdiction of the High Court in determining a justiciable matter when seen in parallel with the invocation of the Supreme Court's advisory opinion jurisdiction; the situations in which the Constitution authorized the giving of an advisory opinion; practical considerations that should guide the court's decision to render an advisory opinion.



Issues

What were the guiding principles governing the Supreme Court in exercising its jurisdiction to issue advisory opinions?

Held

1. The Supreme Court was guided by the following principles;
 1. the High Court was, by article 165(3)(d) of the Constitution, entrusted with the original jurisdiction to hear and determine any question entailing the interpretation of the Constitution;
 2. it was the obligation of the Supreme Court, as the ultimate interpreter of the Constitution, to protect and reinforce the conferment of first-instance jurisdiction upon the High Court;
 3. the Supreme Court's Rules which provided that those organs entitled to seek an advisory opinion, were to exhaust their internal recourses before seeking an opinion;
 4. Subject to the principles above, the Supreme Court would exercise its discretion appropriately, on a case-to-case basis, in accepting requests for an advisory opinion.

Advisory opinion on the next general election declined; reasons, to be set out in a ruling upon notice

Citations

None referred to

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 101(1); 136(2) (a); 165(3) (d); 177(1) (a); 180(1)-(Interpreted)
2. Constitution of Kenya, 2010 sixth schedule clause 9(1) - (Interpreted)

ORDER

1. The implementation process of the Constitution of Kenya, 2010 has given rise to several motions in Court, beginning with a Petition in the High Court, of 19th April, 2011, by which the petitioners sought a declaration that the next general election for President, National Assembly, Senate, County Assemblies and County Governors "shall be held at the same time, on the second Tuesday of August, 2012" [Constitutional Petition No. 65 of 2011]; followed by an application, the Notice of Motion of 28th April, 2011 in the Supreme Court [Constitutional Application No. 2 of 2011] seeking the Supreme Court's Advisory Opinion interpreting Articles 101(1), 136(2)(a), 177(1)(a) and 180(1) of the Constitution, and Clause 9(1) of the Sixth Schedule to the Constitution, and further seeking a determination of the election date.
2. What has come up for consideration today is a Preliminary Objection to the application. We have no doubt that the subject-matter of the application is an important and urgent one, and, to set the stage for further progress in that regard, we will today determine the Preliminary Objection, while reserving our reasons to a later date, upon notice.
3. Upon reading the application and attendant affidavits, as well as the written submissions, and upon hearing the oral submissions by learned counsel, we have focused our attention firstly, on the nature of the jurisdiction of the High Court in determining a justiciable matter when seen in parallel with the invocation of the Supreme Court's Advisory Opinion jurisdiction; secondly, on the situations in which the Constitution authorizes the giving of an Advisory Opinion; and thirdly, on the practical considerations that should guide the Court's decision to render an Advisory Opinion.



4. We will be guided by certain principles which have clearly emerged from the submissions: the High Court is, by Article 165(3)(d) of the Constitution, entrusted with the original jurisdiction to hear and determine any question entailing the interpretation of the Constitution; it is the obligation of the Supreme Court, as the ultimate interpreter of the Constitution, to protect and reinforce the conferment of first-instance jurisdiction upon the High Court; the Supreme Court has provided in its Rules that those organs entitled to seek an Advisory Opinion, are to exhaust their internal recourses before seeking an Opinion; subject to those principles, the Supreme Court will exercise its discretion appropriately, on a case-to-case basis, in accepting requests for an Advisory Opinion.

We hereby Order and direct as follows:

- (1) We decline to give our Advisory Opinion on the next general election.
- (2) We reserve the reasons, to be set out in a Ruling upon notice.
- (3). Responding to the High Court's request, of 13th October, 2011 for directions, the matter herein shall be placed before the Constitutional and Human Rights Division of that Court, for hearing on priority and on a day-to-day basis.
- (4) High Court Petition Nos. 123 of 2011, 65 of 2011 and 185 of 2011 shall be listed for mention and directions before the Head of the High Court's Constitutional and Human Rights Division on 18th November, 2011.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2011.

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W.M. MUTUNGA NANCY BARAZA

**CHIEF JUSTICE & PRESIDENT OF DEPUTY CHIEF-JUSTICE AND DEPUTY
THE SUPREME COURT PRESIDENT OF THE SUPREME COURT**

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P.K. TUNOI M.K. IBRAHIM

JUDGE OF THE SUPREME COURT JUDGE OF THE SUPREME COURT

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J.B. OJWANG S.C. WANJALA

JUDGE OF THE SUPREME COURT JUDGE OF THE SUPREME COURT

.....
N.S. NDUNGU

JUDGE OF THE SUPREME COURT

