



**Republic v Kantai & 4 others; Obuga (Chairperson VCBE & HROF) (Exparte Applicant);
Vihiga County Government & 3 others (Interested Parties); VCBE & HROF (Third
party) (Judicial Review 4 of 2022) [2024] KEHC 5352 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
JUDICIAL REVIEW 4 OF 2022**

JN KAMAU, J

APRIL 29, 2024

**IN THE MATTER OF FAIR ADMINISTRATION ACTION ACT NO 4 OF
2015**

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 24, 35, 46, 75,
156, 165, 201, 232, 233, 234, 235 & 258 OF THE CONSTITUTION
OF KENYA, 2010**

AND

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS,
CERTIORARI & PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

OKOBA MICHAEL KANTAI 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (LUANDA
CONSTITUENCY, VIHIGA COUNTY) 2ND RESPONDENT**

**THE RETURNING OFFICER IEBC (LUANDA CONSTITUENCY, VIHIGA
COUNTY) 3RD RESPONDENT**

REGISTRAR OF POLITICAL PARTIES 4TH RESPONDENT

**THE MAENDELEO CHAP CHAP POLITICAL PARTY (VIHIGA COUNTY
BRANCH) 5TH RESPONDENT**

AND



**JULIUS MASIVA OBUGA (CHAIRPERSON VCBE & HROF) EXPARTE
APPLICANT**

AND

VIHIGA COUNTY GOVERNMENT INTERESTED PARTY

SECRETARY VIHIGA COUNTY GOVERNMENT INTERESTED PARTY

VIHIGA COUNTY ASSEMBLY INTERESTED PARTY

VIHIGA COUNTY ASSEMBLY CLERK INTERESTED PARTY

AND

VCBE & HROF THIRD PARTY

RULING

Introduction

1. The *ex parte* Applicant herein filed Judicial Review Application dated 22nd September 2022 seeking the following orders:
 - i. An order of Certiorari to remove into this Honourable Court and quash the decision of both the 3rd & 4th Respondents of declaring and swearing in the 1st Respondent as the MCA for Emabungo Ward.
 - ii. An order of Prohibition directed towards the Respondent and interested parties herein jointly and/or severally recognizing the 1st Respondent herein as the MCA for Emabungo Ward.
 - iii. An order of mandamus directed to the Respondent/Interested Parties to observe the 2010 Constitution and the Election Act Cap 24 of 2011 without involving corruption practices.
 - iv. An order of mandamus directed to the Respondent/Interested Parties herein any finances enjoyed by the 1st Respondent having resigned if any should be refunded back to the 2nd and 3rd Interested Parties.
 - v. The cost of the application for leave to file a Judicial Review.
2. In his Notice of Preliminary Objection dated 19th December 2022 and filed on 27th June 2023, the 1st Respondent raised objection to strike out the entire Ex parte Applicant's Judicial Review proceedings herein on grounds that this court lacked the jurisdiction to hear and determine this suit as it challenged his election as the Member of County Assembly for Emabungo Ward which suit he claimed, ought to have been heard and determined by a Resident Magistrate Court as designated by the Chief Justice pursuant to Section 75 (1A) of the Elections Act No 24 of 2011. It was therefore his case that the entire proceedings herein were frivolous, vexatious, defective and an abuse of the court process.
3. When this matter came up for mention on 28th September 2023, the Ex parte Applicant indicated that he would be relying on his Written Submissions dated 16th December 2022 and filed on 19th December 2022. These Written Submissions were filed well before the 1st Respondent filed his Notice of Preliminary Objection herein. The 1st Respondent's Written Submissions were dated 5th July 2023 and filed on 10th July 2023 while those of the 2nd and 3rd Respondent were dated 3rd July 2023 and filed



on 14th July 2023. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. The 1st Respondent submitted that the *ex parte* Applicant's application as drawn raised issues relating to electoral disputes arising after declaration of elections results and that the jurisdiction to hear and determine elections disputes flowed from *the Constitution* of Kenya, 2010 and the *Elections Act* No 24 of 2011.
5. In this regard, he placed reliance on the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR where it was held that a court's jurisdiction flowed from either *the Constitution* or legislation or both.
6. He further invoked Article 87 of *the Constitution* of Kenya and Section 75 (1A) of the *Elections Act* No 24 of 2011 and contended that the *ex parte* Applicant's application herein failed the test of a judicial review proceedings as it challenged his election as Member of County Assembly (MCA) for Emabungo Ward.
7. He also relied on the case of *Moses Mwicigi & 14 Others vs Independent Electoral and Boundaries Commission & 5 Others* [2016]eKLR where it was held that any dispute challenging an election of a person to any leadership position following a general election could only be through an election petition.
8. He was categorical that the *ex parte* Applicant Judicial Review proceedings herein were misconceived and that this court had no jurisdiction to entertain it and/or delve into its merit.
9. He pointed out that since an election had already taken place, his election could only be challenged by way of an election petition filed in the Resident Magistrate Court.
10. He added that the same proceedings were also based on alleged criminal acts and thus ought to have been heard by the criminal division of the Resident Magistrate Court.
11. On their part, the 2nd and 3rd Respondent invoked Section 81(3) of the *Election Act* and Section 75 (1) (a) of the *Elections Act* and submitted that the orders sought herein were in relation to the election of an MCA which jurisdiction was vested on the Resident Magistrate's Court pursuant to Section 75(1) (a) of the *Election Act*.
12. In this regard, they placed reliance on the case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989]eKLR where it was held that jurisdiction was everything and without it, a court had no power to make any more space.
13. They further cited Section 76(1)(a) and 77(1) of the *Election Act* and Section 5 of the *Civil Procedure Act* and relied on the case of *Iga vs Makerere University* (1972) E.A 62 where it was held that if a suit was brought after the expiration of the period of limitation and this was apparent from the plaint but no grounds of exemption were shown in the plaint, the plaint had to be rejected.
14. They pointed out that the *ex parte* Applicant's application herein had been filed outside the statutory timelines for filing of election petitions and thus was time barred from being heard and determined by this or any other court.
15. In that regard, they placed reliance on the cases of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA and *Hassan Ali Jobo & Another vs Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR where the common thread was that a preliminary objection



consisted of a pure point of law and could not be raised if any fact had to be ascertained. They urged the court to allow their preliminary objection as it met the threshold as explained in the aforementioned cases.

16. They further cited the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* [2014] eKLR where it was held that costs follow event and that it was in the discretion of court to award costs in order to ensure that the ends of justice are met. They prayed that the *ex parte* Applicant application be struck out and they be awarded costs.
17. On his part, the *ex parte* Applicant submitted widely on the merits of the case but this court only focused on his argument relating to the impugned jurisdiction of this court as that was the issue that was presently before this court.
18. He asserted that the grounds he had raised in his application herein were criminal in nature and therefore properly before this court pursuant to *Criminal Procedure Code* No 89 (1-5)(sic) Chapter 75 and Section 90(1) and Section 129 of the *Penal Code*. He further referred to Article 165 of *the Constitution* of Kenya and reiterated that this matter was properly before this court.
19. Notably, the Ex parte Applicant had sought the writs of certiorari, mandamus and prohibition. In respect of the writ of mandamus, this court had due regard to the case of *Republic vs Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 Others* [2018] eKLR where it was held as follows:-

“Mandamus is a prerogative order issued in certain cases to compel the performance of a duty....Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual.”

20. From the above dictum, it was clear that the High Court had jurisdiction to grant an order of mandamus where it was determined that a public authority or officer was obligated to perform a specific statutory duty but failed to do so. However, to ensure that there was no interference with the functioning of a public authority or officer, the order could only be granted if there was no other remedy available to the person claiming for the order to be granted.
21. However, for the writs of certiorari, mandamus and prohibition, an applicant had to first seek leave to move the court for the said orders. They could not be sought in the first instance as the *ex parte* Applicant herein had sought.
22. This court therefore agreed with the 2nd and 3rd Respondents’ argument that the *ex parte* Applicant herein ought to have approached the right court via an Election Petition and not through Judicial Review Proceedings. His application seeking orders for mandamus, certiorari and prohibition was therefore misplaced.
23. Article 87(1) of *the Constitution* of Kenya provides as follows:-

“Parliament shall enact legislation to establish mechanisms for timely setting of electoral disputes.”



24. Section 75 (1)(a) of the [Elections Act](#) provides that:-

“A question as to the validity of the election of a member of a County Assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

25. A reading of the reliefs that had been sought by the *ex parte* Applicant herein clearly showed that he was challenging the election of the 1st Respondent as the MCA of Emabungo Ward.
26. From the above provisions it was evident that a suit challenging the election of a MCA was to be heard and determined by the Resident Magistrate Court designated by the Chief Justice and not by the High Court in the first instance. A challenge against the election of a MCA could not be instituted by way of Judicial review proceedings.
27. This court therefore found that it did not have jurisdiction to hear and determine the suit herein. A court with no jurisdiction was therefore required to down its tools as was held in the case of [Owners of the Motor Vessel “Lillian S” vs Caltex Oil](#) (Supra).
28. It is important to point out that at any stage of a case, the court has a duty to facilitate the efficient disposal of disputes before it so as not to strain the already scarce resources. The court must therefore very quickly remove any matter that may have the potential of clogging its system and causing backlogs if it can be determined right at the outset that the said matter does not disclose a reasonable cause of action and hence ought not to be in the system.
29. Indeed, the court is enjoined to facilitate the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties as provided in Section 1B of the [Civil Procedure Act](#) Cap 21 (Laws of Kenya).
30. As the *ex parte* Applicant did not demonstrate any grounds for being granted an order for mandamus, certiorari and prohibition in a matter that was actually an electoral issue but couched as judicial review proceedings, the proceedings herein could not be sustained even if the same were to proceed for hearing.

Disposition

31. For the foregoing reasons, the upshot of this court’s decision was that the 1st Respondent’s Notice of Preliminary Objection dated 19th December 2022 and filed on 27th June 2023 was merited and the same be and is hereby upheld.
32. It is hereby directed that the Judicial Review proceedings herein be struck out. The *ex parte* Applicant will bear the 1st Respondent’s costs of the Notice of Preliminary Objection and the Judicial Review proceedings herein. The court did not award costs to the 4th and 5th Respondents and the Third Party as they did not participate in the proceedings herein and to the 1st, 2nd, 3rd and 4th Interested Parties as it would be unconscionable to award costs in favour of a government against its own citizens.
33. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF APRIL 2024

J. KAMAU

JUDGE

