



Republic v Kantai & 4 others; Vihiga County Government & 3 others (Interested Parties); VCBE & HROF (Third party); Obuga (Chairperson VCBE & HROF) (Exparte Applicant) (Judicial Review 4 of 2022) [2024] KEHC 4566 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4566 (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



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

AND

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

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 their Notice of Preliminary Objection dated 18th February 2023 and filed on 20th March 2023, the 2nd and 3rd Respondents raised an objection to strike out the entire Ex parte Applicant's Judicial Review proceedings on grounds that this court lacked jurisdiction to take cognisance of the said application herein, hear and determine issues therein as it was an abuse of the court process and ought to be struck out with costs.
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 that were dated 16th December 2022 and filed on 19th December 2022. Notably, the said Written Submissions were filed well before the 2nd and 3rd Respondents filed their Notice of Preliminary Objection herein. The 2nd and 3rd Respondents' Written Submissions were dated 3rd July 2023 and filed on 14th July 2023. This Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

4. 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 Ex parte Applicant had orders sought herein were in relation to the election of a Member of County Assembly (MCA) which jurisdiction was vested in the Resident Magistrate's Court pursuant to Section 75(1)(a) of the Election Act.
5. 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 is everything and without it, a court had no power to make any more space.
6. 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.
7. They pointed out that the Ex parte Applicant's application herein had been filed outside the statutory timelines for filing of election petitions thus was time barred from being heard and determined by this or any other court for lack of jurisdiction.
8. They further relied on the cases of Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA and Hassan Ali Joho & 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.
9. In addition, they 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's application be struck out and they be awarded costs.
10. 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 it.
11. 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.
12. 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.”



13. 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.
14. The writ for an order of certiorari was to quash decisions of a quasi-judicial body or authority that had failed to observe the rules of natural justice.
15. When seeking the writs of certiorari, mandamus and prohibition, an applicant had to first seek leave of court to apply for the said orders.
16. In his Replying Affidavit in response to the 1st and 2nd Interested Parties' Preliminary Objection that he swore on 1st October 2022 and filed on 26th October 2022 and his Written Submissions, he had alluded to the fact that the application for leave to file a Judicial Review was constitutionally proper vide Article 22(1) 2, (a), (b), (c), (d) read with Article 2(1) and Article 3(1) (sic).
17. This court did not see this application for leave to apply for the orders of mandamus, certiorari and prohibition. In the absence of such leave, the said orders could not be sought in the first instance as the Ex parte Applicant herein had done.
18. Notably, Article 87(1) of *the Constitution* of Kenya provides as follows:-

“Parliament shall enact legislation to establish mechanisms for timely setting of electoral disputes.”
19. Section 75 (1)(a) of the *Elections Act* further 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.”
20. 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.
21. It was clear from Section 75(1)(a) of the *Elections Act* that proceedings challenging the election of a MCA could only be heard and determined by the Resident Magistrate Court designated by the Chief Justice and not by the High Court in the first instance.
22. Indeed, electoral disputes are governed by specialised legal regime as was asserted by Musyoka J in the case of David Aoko Were vs Independent Electoral and Boundaries Commission & 2 Others [2021] eKLR and was not an ordinary suit that could be tried by any ordinary court as contemplated in Section 5 of the *Civil Procedure Act*, a position that this court fully associated itself with.
23. This court therefore agreed with the 2nd and 3rd Respondents’ argument that the Ex parte Applicant herein ought to have approached the right court through an Election Petition within twenty eight (28) days after the declaration of the results of the election as stipulated in Section 76(1)(a) of the Election Act and not through Judicial Review Proceedings. His application seeking orders for mandamus, certiorari and prohibition was therefore misplaced.
24. The question of whether or not this court had jurisdiction to hear and determine the dispute between the Ex parte Applicant and the Respondents and Interested Party was pure point of law.



25. In the case of Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Ltd (Supra), a preliminary objection was defined as follows:-

“ A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

26. In view of the fact that the Ex parte Applicant was challenging the election of a MCA under the Election Act, this court therefore found and held that it did not have jurisdiction to hear and determine the substantive proceedings herein and that the 1st and 2nd Interested Parties' Preliminary Objection was a preliminary point of law as contemplated in the case of Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Ltd (Supra) and Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others [2014] eKLR. 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).

27. 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.

28. 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).

29. 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 dispute but couched as judicial review proceedings, the proceedings herein could not be sustained even if the same were to proceed for hearing.

Disposition

30. For the foregoing reasons, the upshot of this court's decision was that the 2nd and 3rd Respondent's Notice of Preliminary Objection dated 18th February 2023 and filed on 20th March 2023 was merited and the same be and is hereby upheld.

31. It is hereby directed that the Judicial Review proceedings herein be and are hereby dismissed. The Ex parte Applicant shall bear the 2nd and 3rd Respondents' costs of their said Notice of Preliminary Objection and Judicial Review Proceedings. The court did not award costs to the 4th and 5th Defendants 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.

32. It is so ordered.

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

J. KAMAU



JUDGE

