



5. The petitioner faults the 3<sup>rd</sup> Respondent, the IEBC for its failure to remove the 1<sup>st</sup> Respondent's name from the Ballot Papers thus violated Article 99 (1) (b) and (2) (a) of the constitution and Section 24(2) of the Election Act.

6. The petitioner further contends that clause 24 of the Public Service Code of conduct and ethics prohibits public officers from involvement in politics and calls for political neutrality for resignation of public officers before participation in elections. He further contends that Section 23(2) and (3) of leadership and leadership Act bans public officers from involvement in politics.

7. The petitioner further contends that as at date of filing the petition herein, the 1<sup>st</sup> Respondent was a public officer, having received his salary for the months of May, June and July 2017 hence was not legally eligible to engage in politics.

8. For the above reasons , the petitioner contends that the election of the 1<sup>st</sup> Respondent as the members of parliament for Khwisero Constituency ought to be nullified

9. Upon being served with the Petition, the 1<sup>st</sup> Respondent , filed his response together with a Notice of Preliminary objection on the 22/9/2017 , stating :

**1. That the petition dated 5/9/2017 is a matter that had been heard and determined by the 3<sup>rd</sup> Respondent ( with quasi – Judicial functions and Jurisdiction ) on the 6/8/2017 and its decision was never appealed.**

**2. That the petition borders on res Judicata, save for directions on the same by the court.**

**3. That the petition is frivolous scandalous and vexations thereby being an abuse of the court process and a waste of the courts precious time on the face of the record.**

The 1<sup>st</sup> Respondent therefore sought an order that the petition be dismissed with costs.

10. The petitioner filed grounds of opposition to the preliminary objection on the 5/10/2017 that :-

**1. The preliminary objection lacks merit as it seeks to curtail the petitioners constitutional rights as enshrined in the constitution.**

**2. Section 7 of the Civil procedure Act states when a matter may be considered Res Judicata and the matter does not qualify to be labeled the same.**

**3. The Notice of Preliminary objection together with the Respondents petition were filed way out of time and without leave of court and the same should be struck out.**

**4. The Notice of preliminary objection is bad in law and a blatant abuse of the court process and should be dismissed with costs.**

**11. Mr. Obetto advocate argued the preliminary objection on behalf of the 1<sup>st</sup> Respondent Christopher Aseka Wangaya, on the following issues:**

On whether the preliminary objection was filed out of time , he invoked Article 159(2) (d) of the COK and urged that it be deemed to have been filed within time , the 22/9/2017 . It was his submission that the subject issue of the resignation of the 1<sup>st</sup> Respondent from public service was duly presented to the

IEBC as a complaint by another party and was fully investigated and a report filed absorbing the 1<sup>st</sup> Respondent from any misconduct, and concluded in his favour.

**12.** It was his further submission that the IEBC committee/ tribunal on Election dispute resolution being a quasi – Judicial body, its decision on a complaint remains final so long as it is not objected to or appealed from, as is the position in this matter.

**13.** It was his further argument that the complaint having been resolved by the IEBC ,EDR committee/ tribunal, it is Res Judica and this court has no Jurisdiction to entertain the same.

**14.** The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents supported the preliminary objection and filed a list of authorities in support thereof. Mr. Kenei advocate for the parties urged their position.

**15.** I have carefully considered the parties submissions on the preliminary objection.

Section 7 of the Civil procedure Act Chapter 21 Laws of Kenya states the pre – conditions that must be met for a matter to qualify as Res Judicata , that :-

**1. It must have been decided by a competent court or tribunal**

**2. The issues must have been substantially in issue in the former matter.**

**3. The parties must have been the same, or suing under the same title.**

**16.** Let me first deal with the issue of whether the preliminary objection was filed out of time and without leave of court. I note that the petition hereof was filed on the 6/9/2017. It was served by substituted service (advertisement in the standard newspaper 9/9/17). The 1<sup>st</sup> Respondent was served with the petition on the 11/9/2017 and received the same on the 14/9/2017, receipt stamped and signed.

The preliminary objection was filed on the 22/9/2017 , within 7 days excluding the day it was received, the 14<sup>th</sup> of September,2017.

**17.** I am therefore satisfied that the preliminary objection was filed within the requisite time hence leave was not necessary.

**18.** Back to the substantive preliminary objection. To put it into perspective, the petitioners grounds as stated in his petition , in a nutshell is that the 1<sup>st</sup> Respondent, and now the member of parliament for Khwisero constituency was a public officer at the time of nominations and thereafter, that he failed to resign before nomination to vie for the position of member of parliament upto and until the election period and post election as he continued to operate as a public officer.

**19.** It is contended that as result, the people of Khwisero constituency were disenfranchised as they were subjected to vote for the 1<sup>st</sup> Respondent who was in eligible to content for the said position.

The petitioner also faults the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for alleged blatant violation of the constitution and Election laws by allowing the 1<sup>st</sup> Respondent to vie for the said post when he was ineligible.

**20.** The issues that arise for determination are three fold:

**1. Whether the 1<sup>st</sup> Respondent was a public officer prior to and after nomination by his party and**

upto the General Elections held on the 8/8/2017.

**2. Whether the matter of the 1<sup>st</sup> Respondents resignation , raised by another party ( not party to this petition ) and determined by the 3<sup>rd</sup> Respondent , IEBC is Res Judicata.**

**3. Whether IEBC's Dispute Resolution Tribunal/ Committee is a quasi – Judicial organ and if so , whether its decisions are binding to this court , and therefore final and if so , its relevance to the petition filed herewith and the preliminary objection taken on the 22/9/2017 by the 1<sup>st</sup> Respondent.**

21. There is no doubt that the courts findings in respect of the preliminary objection may very well terminate the petition filed herewith. Citing the case of Mukisa Biscuit Company Vs Westerd Distributors Ltd ( 1969) EA at page 701, it was stated that

**“ a preliminary objection is in the nature of what used to be a demurrer. It raises pure points of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion .... “ ( emphasis mine)that is the position to date.**

See also Janet Syokau Kaswii Vs Kathonzweru Financial Service Association ( 2014) Eklr

22. A proper and careful scrutiny of the preliminary objection viz a viz the petition and the responses to the same show that there are certain unclear facts by both parties that ought to be ascertained by the court.

For instance, the 1<sup>st</sup> Respondent in his Preliminary objection is not sure whether the matter at issue is Res Judicata or not. He seeks courts directions on the same.

23. Further it is sought a direction, whether a matter heard by a quasi – judicial body like the IEBC is binding to this court as an Election court.

24. On the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, an answer is sought whether or not the issues before the IEBC being allegations of illegality against the 1<sup>st</sup> Respondent are the same issues or substantially in issue in this petition between the same parties or parties acting under the same title.

25. The petitioner himself too has unclear issues for the courts determination. They appear in the grounds of opposition to the preliminary objection , one being whether or not the alleged report by IEBC's investigation manager can constitute a legally binding report therefore binding to this court ,based on his submission that no hearing was accorded to the alleged complainant before the IEBC investigation arm, as it is alleged that no tribunal was constituted to hear the complaint , no arguments were taken , no sittings happened and non of the parties were heard thus his submission that no binding ruling or determination was made so as to constitute the complaint res judicata before this court .

26. This court faced with the above uncertainties ,and taking into account that an Election petition is a matter of public interest and more so to the residents of Khwisero constituency, it finds itself unable to shut the petitioner out of his electoral rights as enshrined in Article 38 of the constitution of Kenya without giving him a chance to be heard on the pertinent issues, common to the petitioner and the respondents.

27. As a result, I find the preliminary objection filed on the 22/9/2017 as a tool made to seek or fish for

information, and not made purely on points of law but a mixture of both legal and factual assumptions. As an Election Court, I am called upon to ascertain the unclear facts, which ought not to be the case in a preliminary objection to hearing of a suit, petition or application. I have stated the points of determination above, see par 20 above.

**28.** For those reasons, I find that the preliminary objection unmeritorious. I proceed to dismiss it, the circumstances from which the petition and the Preliminary Objection arise comment that each party bears its own costs of the Preliminary Objection.

It is so ordered.

Dated and delivered this 13<sup>th</sup> day of October, 2017.

**J.MULWA**

**JUDGE**



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