



Case Number:	Election Petition 1 of 2013
Date Delivered:	10 Jun 2013
Case Class:	Civil
Court:	High Court at Nyeri
Case Action:	-
Judge:	
Citation:	THUO MATHENGE v NDERITU GACHAGUA & 2 others [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

High Court at Nyeri

Election Petition 1 of 2013

DR. THUO MATHENGEPETITIONER

versus

**NDERITU GACHAGUA1ST
RESPONDENT**

RETURNING OFFICER NYERI COUNTY..... 2ND RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

BACK GROUND

1. This petition arises out of the Gubernatorial election for the Nyeri County on 4th March 2013 wherein the 1st Respondent was declared duly elected Governor of Nyeri by the 2nd and 3rd Respondents.
2. The petitioner being aggrieved by the said declaration filed this petition on 8th March 2013 in which he stated that the 3rd Respondent gazetted a stranger as a running mate to the Petitioner instead of gazetting the bona fide running mate one Dr. Geoffrey Kamau Kibui.
3. That the third Respondent failed to gazette the name of the correct running mate to the Petitioner despite request and notices from the Petitioner. That the petitioner was discriminated upon by the 3rd respondent as his running mate in the ballot papers was indicated as GEOFFREY GITONGA NDEGWA instead of DR. GEOFFREY KAMAU KIBUI and that action of the 3rd respondent may have led him to lose the position of Nyeri Governor.
4. On the 10th March 2013 the Petitioner under certificate of urgency took out a notice of motion under Articles 38 and 81(e)(v) of the Constitution of Kenya 2010 section 80(3) of the Election Act 2012, Rules 4(1) and 5 of the Election (Parliamentary and County Elections) Petitions rules 2013 in which he sought an injunction order restraining the 3rd Respondent from Gazetting the 1st Respondent as the Governor for Nyeri.
5. In response to the said application the 2nd and 3rd Respondents filed a notice of preliminary objection against the Petition on point of law to be determined in limine:

1) That the substantive petition filed herein on 8th March 2013 is incompetent, fatally defective

and unConstitutional for having been filed in breach of Article 87(2) of the Constitution of Kenya 2010.

2) *That the petition is fatally defective as it offends the mandatory provisions of section 76 of the Election Act 2012 for having been filed prior to the date of publication of the results of the election in the Kenya Gazette.*

3) *That this honourable court lacks jurisdiction to hear and determine an election petition challenging the validity of ungazetted election.*

6. The 1st Respondent filed his ground of opposition the relevant part for this ruling being:-

3. *That the application is unsustainable as the purported petition upon which it is premised filed herein is premature and therefore incurably defective for want of compliance with the mandatory provisions of*

a) Article 87(2) of the Constitution

b) Section 77 of the Election Act.

7. When the parties appeared before the court the issue of the courts jurisdiction to hear the application at that stage was taken and the court ruled on the same and directed the file to be placed before the Chief Justice for appointment and gazettement of Election Court to handle the same and the Chief Justice in his wisdom or "*lack of it*" appointed this court to hear the same.

8. At the mention of this petition the 2nd and 3rd Respondents indicated that they would like to take their preliminary objection on point of law first before pretrial direction on this matter and the 1st Respondent associated himself with the said position and the Petitioner agreed that the issue be taken out as a preliminary objection on point of law without filing an application

SUBMISSIONS

9. Mr. Kibicho who appeared for the 2nd and 3rd Respondents (objectors on preliminary objection) submitted that the petition was filed on 8th March 2013 and the result of the election were gazetted on 13th March 2013 and therefore the effective date for any aggrieved party to file petition is twenty eight (28) days from the gazettement of the result and he referred to Article 87(2) of the Constitution.

10. He therefore submitted that by filing the petition on 8th of March whereas the election results were declared on 13th March 2013 it therefore follows that the court did not have jurisdiction to hear the petition filed by the Petitioner since time started to run as from 13th March, 2013.

11. He submitted that before the date of gazettement jurisdiction was bestowed upon the 3rd Respondent (IEBC) under Article 88(4)(e) of the Constitution and supported his submission by the holding of Lady Justice M. Ngugi in ELECTION PETITION NO.1 OF 2013 NAIROBI FERDINAND NDUNGU WAITITU vs THE INDEPENDENT ELECTION & BOUNDARIES Commission AND 8 OTHERS where she dealt with what amounts to a declaration and that before the declaration of results the jurisdiction is with the IEBC.

12. He submitted that as per the above authority a declaration of results is in an instrument which in this case is the Kenya Gazette of 13th March 2013 and therefore the petition having been filed before the said date offends Article 87(2) of the Constitution and sections 76 and 77 of the Election Act 2012.

13. He submitted that it was therefore not available to the Petitioner to file the petition before the election results and referred the court to NAIROBI ELECTION PETITION NO. 15 OF 2013 HON CLEMENT KUNGU WAIBARA & ANOTHER V HON FRANCIS KIGO NJENGA & 3 OTHERS where justice Mwongo struck out a petition filed outside time.

14. He submitted that for there to be outside time then there must be the beginning of time and that there is no provision under the statute for extension of time.

15. Mr. Regeru for the 1st Respondent joined the 2nd and 3rd Respondent on the preliminary objection and stated that the question before the court is what is the effective date from which to compute the 28 days.

16. He submitted that Article 87(2) of the Constitution says it is from the date when the results are declared but section 76(1) of the Election Act says from the date when the results are published in the Kenya gazette.

17. He submitted that there is no conflict between the two provisions since the Constitution give the broad principles while the statutes and regulations deals with specifics in support thereof referred to the Supreme Court decision in RAILA ODINGA vs IEBC PETITION NO. 5 OF 2013.

18. On the issue of cause of action he submitted that the same accrued upon gazettelement as it is only then that you have a Constitutionally recognized holder of office whose election can be challenged. He therefore submitted that the Petitioner acted without a cause of action and in support thereof submitted the Supreme Court Petition of ISAAC ALUOCH POLO ALUOCHIER V INDEPENDENT ELECTORAL & BOUNDARIES Commission AND 19 OTHERS [2013] EKLK where the court stated:

“the law has defined the time of declaration of presidential results as the operative moment in exercise of this jurisdiction”

19. He submitted that before the declaration of the result by IEBC in Kenya Gazette it has jurisdiction to deal with any issue under Article 88(4) of the Constitution and that after publication the jurisdiction moves to the High Court and therefore any grievance before gazettelement should have been referred to IEBC as it is the gazettelement that legitimize the result.

20. On the issue of the decision by Justice F. Ochieng in ELECTION PETITION NO. 8 OF 2013 SULEIMAN SAID SHAHBAL vs THE IEBC AND 3 OTHERS he submitted that once the Judge found that the provision of the statute was not properly grounded in the Constitution then he did not have powers to make orders to do justice to the affected party he lost jurisdiction.

21. He fortified his submission by referring to the Supreme Court advisory opinion in APPLICATION NO. 2 OF 2011 S.K. MACHARIA AND ANOTHER vs KENYA COMMERCIAL BANK LIMITED AND 2 OTHERS that the jurisdiction flows from either the Constitution or legislation or both. *“thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction”*.

22. He submitted that if the petition is bad in law then the court lacks jurisdiction to entertain a fatal petition. He referred to the case of LILIAN'S' and submitted that the Petitioner would not suffer prejudice if the petition is struck out since there is still petition No. 2 of 2013.

RESPONSE

23. Mr. Kilukumi submitted in response that the court has jurisdiction both under the Constitution and Election Act and submitted that section 75 of the Act deals with the validity of the election of the governor and therefore court can only decline to exercise jurisdiction if it comes to conclusion that the petition is incompetent.

24. He submitted that there is a competent and valid petition filed in compliance with the Constitution, the Act and Regulation. He submitted that all the other petitions deals with the issue of late filing and not filing at the earliest available opportunity as in the present case.

25. It was submitted that Article 87(2) requires that the petition be filed within 28 days from the declaration of results and that it is the Petitioners submission that the Constitution has not put any requirement that an aggrieved party must await gazette ment same as section 77 of the Act.

26. He submitted that there is an internal conflict between Article 87(2) of the Constitution and section 76(1)(a) which requires publication of the result in the Kenya gazette.

27. He submitted that the declaration contemplated is by the IEBC and therefore one needs to look at the relationship between the returning officer and the IEBC which can only act through human agents and that since the county returning officer is a disclosed agent of IEBC when he declares the results it is the IEBC which has declared the results and in support therefore he relied upon the decision of Justice Odunga in MOMBASA HIGH COURT ELECTION PETITION NO. 4 OF 2013 GIDEON MWANGANGI WAMBUA vs IEBC & 2 OTHERS consolidated with ELECTION PETITION NO. 9 OF 2013 where the judge quoted justice M. Ibrahim J as he then was in AYUB JUMA MWAKASI vs MWAKWERE CHIRAU ALI MOMBASA HC. Election Petition NO. 1 OF 2008

“Accordingly the acts of the Returning Officer in my view cannot be treated as being conducted in isolation to that of the IEBC”

28. He submitted that when the Returning Officer for Nyeri declared the results it was the act of IEBC and therefore in computing the 28 days it was from the time when the Returning officer declared the results and not the 13th of March 2013.

29. He submitted that the gazette notice does not constitute a declaration of the result and in support thereof relied upon the decision of Ochieng J in SULEIMAN SAID SHAHBAL supra and urged the court to be persuaded by the said reasoning.

30. It was submitted on behalf of the Petitioner that since the declaration for Nyeri was made on 6th March 2013 the Petitioner believing that he was following the Constitutional requirement in computing time from the time the county returning officer declared the result and that his cause of action arose from the time when the election results were declared filed the petition and in support thereof referred to the Supreme court of India decision in YOUARAJ RAI vs CHANDER BAHADUR KARKI CIVIL APPEAL NO. 8250 OF 2004 quoted by justice Ochieng and a detailed copy thereof I have had the advantage of reading and will comment on in this ruling.

31. The court was also referred to section 39 of the Election Act which states 39(1)

The Commission shall determine, declare and publish the results of an election immediately after close of polling.

2. Before determining and declaring the final results of an election under subsection (1) the Commission may announce the provisional results of an election.

It was therefore submitted that the declaration referred herein is by the returning officer and not publication in Kenya gazette that came a week later.

32. The court was also referred to regulation 87(3)(c) which reads as follows

87(3) the county returning officer shall upon receipt of the results from the returning officers as contemplated under regulation (1).....

(c) issue the persons elected pursuant to the results announced under paragraph (a) with certificate indicating their election in Form 38

33. It was submitted that when the petitioner came to court he had read Article 87(2) and section 77 of the Election Act and should therefore not be punished for plain reading of the two to file his petition noting that the business of court is to do justice.

34. On the issue of internal conflict between the Articles of the Constitution and section of the Election Act Mr. Kilukumi submitted the authority of KIBAKI vs MOI (2000)EA 105.

DETERMINATION

35. From the submissions herein and the pleadings I have identified the following issues for determination.

a) What constitute declaration of election results.

b) When does time start to run in respect of 28 days within which petitions are filed.

c) Is there an internal conflict between the Constitution and the Election Act.

d) Was the Petition herein filed prematurely and if so what is its effect.

(e) What order should the court make herein"

36. I must point out at the onset that this petition is very unique in that while all other applications filed and ruled upon arising out of the March 4th 2013 General Election deals with late filing of petition, this is the only one so far dealing with what is termed premature or early filing. The court is therefore called upon to make a finding and declare that the petition was filed before time.

37. On the issue of declaration of results the emerging jurisprudence from the courts across the country

is that a declaration of the results is by IEBC through Kenya Gazette in fulfillment of the requirement of section 76(1)(a) of the election Act and Article 87 of the Constitution.

38. This is the position taken by Justice Mumbi Ngugi in FERDINAND WAITITU vs IEBC AND OTHERS Justice Mabeya in JOSIAH TARAIIYA KIPELIEN OLE KORES vs DR DAVID OLE NKEDIANYE AND OTHERS Majanja J in CAROLINE MWELU MWANDIKI vs PATRICK MWEU MUSIMBI PETITION NO. 7 OF 2013 MACHAKOS. Mwongo J in NAIROBI ELECTION PETITION NO. 15 OF 2013 HON CLEMENT KUNGU WAIBARA & ANOTHER vs FRANCIS KIGO NJENGA AND 3 OTHERS.

39. On the other hand Justice Odunga in GIDEON MWANGANGI WAMBUA supra is of the view that the declaration is that done by the returning officer and takes the view that declaration means “a formal statement proclamation or announcement expressly one embodied in an instrument while publication is defined as “generally the act of declaring or announcing to the public” and therefore publication is in effect a form of declaration but proceeds to say that the insertion of gazettement in section 76(1)(a) of the Act was meant to give certainty to reckoning of time(emphasis added.)

40. Justice Odunga proceeded to “read” into section 76(1) gazettement within 7(seven) days to avoid what he says if “left as it may be a source of mischief uncertainty and absurdity”

This to my mind brings justice Odunga amongst those who reckon time from the date of publication in the gazette.

41. Justice Ochieng on the other hand in the case of SULEIMAN SAID SHAHBAL supra takes the view that publication is not required and therefore declaration is from the date when the returning officer declares the results a view supported by the petitioner.

42. This court is therefore required to make a determination as to the correct meaning of declaration as that would dispose of the issue as to when the time start to run and whether the petition before the court was premature.

43. I take the view that the Constitution should and only provide the broad principles and aspirations of the people of Kenya with the details and actualization of those aspirations and principles left to the Acts of Parliaments and regulations made thereunder. This is clearly captured in the preamble of the Constitution as follows:

“RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and rule of law.”

44. These broad values and principles are provided for under Article 10 of the Constitution as follows:

10(1) The national values and principles of governance in this Article binds all state organs, state officers, public officers and all persons whenever any of them

a) applies or interprets this Constitution.

b) enacts, applies or interprets any law or

c) makes or implements public policy decisions.

45. The Constitution at Article 259 has given express details as to its construction and interpretation in the following terms

259(1) This Constitution shall be interpreted in a manner that

a) promotes its purposes values and principles

b) advances the rule of law and human rights and fundamental freedoms in the Bill of Rights.

c) permits the development of law

d) contribute to good governance

.....

(3) Every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking emphasis added.

46. The Constitution also states the legislations which must be passed by parliament to actualize the operations of the values and principles stated herein in the following terms

261(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the fifth schedule commencing on the effective date.

47. For the purposes of this ruling Article 82 required legislation on Election and Article 87 Electoral disputes and Article 88 Independent Electoral and Boundaries Commission to which parliament enacted Election Act 2011 and the rules made thereunder and the Independent Election and Boundaries commissions Act to guide the conduct of the elections and election disputes.

48. Whereas Article 87(1) of the Constitution provide the guiding principle on the presentation of election petitions I take the view that section 76(1)(c) of the Election Act therefore gives effect to the Constitutional provisions by providing as follows:

76(1) A Petition

a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the elections in the gazette and served within fifteen days of presentation.

49. I therefore see no inconsistency or contradiction between the Article 87(1) of the Constitution and section 76(1)(a) and 77 of the Election Act as regards the period within which petitions are to be filed having taken the view that those provisions of the Act given effect to the Constitutional aspirations.

50. As regards section 77 of the Act if one looks at the marginal notes which is entitled service of petition then it will mean that a petition so filed must also be served and that is why section 77(2) provides as follows:

“A petition may be served personally upon the respondent or by advertisement in a newspaper with national circulation.”

which reflects the provisions of Article 87(3) as follows:

Service of a petition maybe direct or by advertisement in a newspaper with national circulation.

51. I therefore find that the declaration which the legislatures intended was a declaration by publication of the results through the gazette and this view can be confirmed by a look at the law which was in place before the present Act which will help in looking at the intention of the legislatures.

52. Under the repealed Act Cap 7 of Laws of Kenya the following provision is provided for in respect of presentation of petitions as amended by Act No. 10 of 1997

“20(1) A petition

a) to question the validity of an election shall be presented and served within 28 days after the date of publication of the result of the election in the gazette.

53. By retaining the same provision in the present Election Act in the same wordings then to my mind means that the legislatures thought that it was good law to be imported into the new Constitutional dispensation and therefore see no mischief which the legislature can be said to have intended to cure.

54. When faced with a similar situation Justice Majanja in the case of CAROLINE MWELU MWANDIKU vs PATRICK MWEU MWANDIKU AND 2 OTHERS had this to say;

“21. Article 86 of the Constitution particularly sub article (c) and various provisions of the act and the rules point to the fact that the returning officers are primarily responsible for the announcement of results at the Constituency or County level as opposed to the 'declaration' envisaged under Article 87 and section 77 of the Act.

22. Regulation 83 whose marginal note reads “Tallying and announcement of election results “ reads in part as follows;

83.(1) immediately after the results of the poll from all polling station in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observes, if present-

(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect;

(b) in the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2);

(c) complete Form 34 and 35 set out in the schedule in which the returning officer shall

declare, as the case may be, the-

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate or referendum side in each polling station;

(iv) number of rejected votes for each candidate in each polling station;

(v) aggregate number of rejected votes; and

(d) sign and date the form and-

(i) give to any candidate, or agent present a copy of the form; and

(ii) deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.[Emphasis mine]

23.Regulation 86 of the General Regulations further states that after the final tallying and announcement of results, the returning officer shall seal up in separate tamper proof envelopes.....'From my reading of the above particularly regulation 83(1)(c) the returning officer's duty is limited to "announcement of results' and the 'declaration' referred to can only be read ejusdem generis to the act of 'announcement' of results. In regulation 83(1)(c) declaration is used in reference to Forms 34 and 35. It clearly does not envisage the formal 'declaration' of results by the Commission contemplated under section 77 of the Act and Article 87.

24. The applicant's argument is also anchored on the fact that returning officer is an agent of the Commission. In the present context, and upon a close reading of the Act and General Regulations a line is drawn between the mandate of the returning officer and that of the Commission. For example, under regulation 83 of the General Regulations, the returning officer has a duty to sign the forms and "deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be"Further regulation 87(2) provides that,

87(2) The returning officer shall after tallying of votes at the constituency level-

(a) announce the results cast for all candidates;

(b) issue certificates to persons elected in the National Assembly and county assembly elections in Form 38 set out in the Schedule; and

(c)electronically transmit the provisional results to the Commission.

25.The Regulation 87(9) and (10) of the General Regulations is even clearer as it talks of provisional results being submitted by the returning officers and the county returning officers to

the Commission. Sub-regulation 9 states that, "the returning officer shall on completion of the tallying submit provisional, results to the commission." while sub regulation 10 provides "the county returning officer shall on completion of the tallying of the results at the county level, electronically submit the tallied provisional results to the Commission."

26. Surely the legislature cannot have intended that election petitions be filed based on "provisional results" as pronounced or as 'declared' by the returning officers as opposed to the final results declared by the Commission. Furthermore under the General Regulations, the Commission and the returning officer as terms cannot be used interchangeably. The definition of "Commission" in the interpretative part of the Rules is "the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution." A 'returning officer' under the Act and the General Regulations means "a person appointed by the Commission for the purpose of conducting an election or referendum under the Act."

55. I am therefore in agreement with those who hold and rightly so that the commencement date in computing the 28 days within which to file a petition is the date when the elections results are gazetted by the Independent Electoral and Boundaries Commission. This therefore answers the question that the petition herein was prematurely filed.

56. In this holding I find support in the decision of Supreme Court of India YOURAJ RAI vs CHANDER BAHADUR supra where when dealing with their section 81 which is equivalent to our section 76(1) which is worded as follows;

81 presentation of petition (1)

(1) An election petition calling in question any election may be presented on one or more of the following grounds specified in sub-section (1) of section 100 and section 101 to the High court by any candidate at such election or elector within forty five days from but not earlier than the date of election of the returned candidate.....

57. The court had this to say

"to avoid any doubt and to make the position explicit clear as to what should be the date of which a candidate can be said to have been declared elected parliament also inserted section 67A clarifying that date on which the candidate is declared elected by the returning officer would be the date of election of the candidate.

The High Court was therefore right in holding that the relevant date for calculation of the period of limitation was the date of election of the returned candidate and an election petition ought to be filed within forty five days from such date.....

Upholding of submission that limitation for filing an election petition should be reckoned not with reference to the date on which the candidate whose election is challenged was declared elected at a general election would not only make the provision cumbersome and contrary to the provisions of the Act, particularly against the scheme of amendments introduced in 1956 and 1961 but would also make the starting point of limitation uncertain, indefinite and fluctuating ...

Finally the interpretation sought to be suggested by the respondent is otherwise reasonable, just

and equitable in as much as it has nexus with the “cause of action “ when a defeated candidate or an elector has grievance against an act of declaring a particular candidate successful at the election his cause of action arises as soon as such declaration is made (emphasis added)

58. In our case the legislature for avoidance of doubt put the publication of the election result in the gazette as the starting point and as the mode of declaration for purposes of Article 88(A) of the Constitution and therefore this court would not interpret the said provision in such away which would frustrate legislature intent.

59. My holding is fortified by the Court of Appeal decision in MURATHE vs MACHARIA [1998]LLR 2233(CAK) where Kwach JA as he then was had this to say;

“The result of the election was published in a special issue of Kenya Gazette dated 6th January 1998 and for the purposes of section 20(1)(a) of the Act 28 days allowed for presentation and service of petition started to run on 7th January 1998 anybody who wished to present a petition had to do so and also have to serve on or before 3rd February 1998 subject to compliance with rule 14(1) of National Assembly Elections Act.”

and therefore if only declaration by the returning officer was intended as submitted by the petition the purpose of gazette would have been reduced to futility and therefore the word immediately under section 39(1) of the Election Act should be given broader interpretation.

JURISDICTION

60. Having therefore ruled that this petition was filed prematurely did or does this court have jurisdiction to hear the same" It was submitted by the respondents that Article 87(2) of the Constitution require the election results be declared before the High Court can have jurisdiction to hear a petition challenging the election results and that before the declaration of election results the jurisdiction to settle any electoral dispute is vested solely with the IEBC.

61. It should be noted that the settlement of election disputes has now been “devolved” and shared out between the Supreme Court in respect of Presidential Election, the High court, Magistrates courts, Independent Electoral and Boundaries Commission, Political Parties Dispute Tribunal and Political Parties Internal Disputes Settlement Machineries.

62. Article 88(4)(e) of the Constitution gives the Commission the jurisdiction in

(e) The settlement of electoral disputes including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results .

63. The above Constitutional provision is captured in the Elections Act as follows;

Section 74(1) pursuant to Article 88(4)(e) of the Constitution the Commission shall be responsible for settlement of electoral disputes including dispute relating to or arising from nomination disputes including disputes relating to or arising from nominations but excluding election petitions and dispute subsequent to the declaration of election results.

(2) An electoral dispute under subsection (i) shall be determined within seven days of lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2) where a dispute relates to nomination or election the dispute shall be determined before the date of nomination or election whichever is applicable.

64. To confirm therefore when the jurisdiction of IEBC ends for the purposes of the said provision of the law one needs to define what the Act means by election as the extent of that jurisdiction is dependent on the meaning of the word “election” and I have looked at the definition offered by Supreme court of PAPUA NEW GUINEA in MASIVE vs OKUK AND KENDEROP [1985] PNGLR 263 when the court had this to say.

“The extent of this power is dependent on the meaning of “election”. It can mean the whole process from the issue of a writ to the declaration of the result of the election or the result itself, depending on the context in which the word is used in any particular statutory provision. If “election” in section 135(b) means the whole process of the electoral process then I cannot see the reason for Section 135(a). It seems to me therefore that the word “election” in section 135(b) means the declaration of a person to be the successful candidate or member of parliament.” ...

A similar view was expressed by POWELL J in MCDONALD vs KEATS [1981] 2NSWLR 268 at 274 where his Honour says;

....upon its proper construction, the word “election” is not to be restricted to the declaration of the poll, but is apt to extend to each and every step in the election process from the issue of the writs to the various returning offices up to and including the declaration of the poll” emphasis added)

65. I take it that this reflect the correct definition of election for the purposes of jurisdiction of IEBC under Article 88(4)(e) of the Constitution and section 74(1) of the Act and take judicial notice that the 3rd respondent did exercise the said jurisdiction before the declaration of results in respect of election of member of National Assembly for Mathare constituency in NAIROBI PETITION No. 150 of 2013 GEORGE MIKE WANJOHI vs STEVEN KARIUKI the subject matter of which was a declaration on the certificate issued by the returning officer and in some areas where its postponed election.

66. If then one looks at these provisions of the law then it follows that the petition filed before the timelines set out by the Constitution and the Act was therefore filed in wrong forum. In the case of THE SPEAKER OF NATIONAL ASSEMBLY vs KARUME (2008) I KLR 426 the court stated that where there is a clear procedure for redress of any particular governance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed.

67. The above position also finds support in the Supreme court of India decision in JYOTI BASU & OTHERS vs DEBI GHOSAL & OTHERS AIR 983 1982 SCR (3) 318 where the court had this to say;

A right to elect fundamental though it is to democracy is anomalously neither a fundamental right nor a common law right. It is statutory right. So too is the right to be elected and the right to dispute an election. Outside of statute there is no right to elect no right to be elected and no right to dispute an election, Statutory creations they are and therefore subject to statutory limitations. An election petition is not an action at common law, nor in equity. It is statutory proceedings to

which neither common law nor the principles of equity and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those related to the trial of election disputes, is what the statute lays down. In the trial of election disputes court is put in a straight jacket emphasis added.

68. The above statement has found approval by Mwongo J in the case of CLEMENT KUNGU WAIBARA & ANOTHER vs HON FRANCIS KIGO NJENGA AND 3 OTHERS supra in respect of late filing of petition and in which I quote with approval in respect of the jurisdiction to settle election dispute which has been statutorily distributed between the institutions stated herein above and as also confirmed by the Supreme court in the advisory opinion in APPLICATION NO. 2 OF 2011 SAMUEL K. MACHARIA & ANOTHER vs KENYA COMMERCIAL BANK LTD AND 2 OTHER. Where the court said:

“A courts jurisdiction flows from either the Constitution or legislature or both”

69. To the extent that the legislature gave jurisdiction to the IEBC to handle disputes before declaration then it follows that this court did not have jurisdiction to determine the petition as at the time when it was filed.

DETERMINATION/DECLARATION

70. Having ruled that the the election petition herein was filed prematurely and in a wrong forum should the court therefore strike out the same"

71. For avoidance of doubt I take the view that this petition raises weighty issues on the conduct of the electoral process, the role of political parties, the role of running mates in Gubernatorial elections and the settlement of election dispute procedure as well as the provisions of the Articles of the Constitution and the legislations made therein and therefore if the petition is struck out that may be the end of it for the petitioner and determination of these issues.

72. My brother Justice Gikonyo in BUNGOMA HIGH COURT ELECTION PETITION NO. 1 OF 2013 had this to say on the nature of petition;

“Election disputes are not purely private disputes to be confined to strict rules which apply to private disputes but should be seen as public election disputes falling under the legue of sue generic proceedings since such disputes carry remedies of a public character they in all civilized legal system enjoy a decree of liberal approach under the Constitutions and in laws of the nations”.

73. Under Article 159(2)(d) of the Constitution the court is enjoined to do substantial justice to the disputants expeditiously and without undue regard to technicalities and the right of the parties to fair trial under Article 50 of the Constitution need also to be taken into account and as stated by the Supreme Court in RAILA ODINGA AND OTHERS vs INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 3 OTHERS supra

The essence of that provision [Article 159(2)(d)] is that the court of law should not allow the

prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. The principle of merit, however in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course” emphasis added.

74. In the case of DICKSON KARABA vs JOHN NGATA KARIUKI & ANOTHER 2010 EKLR the court had this to say;

“Striking out is a very serious matter it is draconian and it should be resorted to as an avenue where the cause filed is hopeless or it is meant or intended to abuse the process of the court..... The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice..... Inherent power is a residual power which may be used upon unnecessary event and when it is just and equitable to do so in a particular case to ensure the observance of the due process of law or to prevent vexation or oppression or to do justice between parties and to secure a fair trial between them.”.....

75. I have taken into account the fact that both the Constitution and the Act does not take a way the inherent and supplementary powers of the court which view is supported by Halsburrys law of England 4th Edition vol.10 para 713 thus:

“Prima facie no matter is deemed to be beyond the jurisdiction of the Superior Court unless it is expressly shown to be so while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court”

76. In therefore arriving at the decision to use the inherent jurisdiction of the court not to strike out the petition, I have noted that both the Constitution and the statute does not expressly provide that a petition filed irregularly ought to be struck out and each case must be decided on its own merits.

77. In the petition before me it should be noted that from the pleading the petitioner is not really challenging the outcome of the election per se but the process leading to the outcome and therefore the validity thereof. This is supported by the fact that the petitioners application filed herein on 10th March 2013 which was not dealt with on the merit thereof had the main prayer to injunct the 3rd respondent from gazetting the 1st Respondent as duly elected and having noted herein above that the said gazettelement was the requisite declaration for the purposes of filing an election petition the court takes view that there is a triable issue as to whether there is a need for courts intervention in an electoral process before the actual declaration of the results.

78. The right to access to court/justice is an important right vested in every citizen and it implies the existence of power of the court to render justice according to law. Where statute is silent and judicial intervention is required courts strive to redress grievance according to what is perceived to be principles of justice equity and good conscience.

79. I therefore decline to strike this petition at this stage as to do so would therefore mean that one cannot invoke the judicial intervention to file petitions before the declaration of elections even where the

same is merited if something happens during election which would provide good grounds for election being set aside so as to preserve the purity of election process through the means of depriving the returned candidate the success secured by him by resorting to means and methods falling foul of the law and the body charged with responsibility fails or refuses to exercise jurisdiction to right the same.

80. I take the view that by virtue of Article 159 of the Constitution of Kenya 2010 the era of technicalities are over, the courts ought to deal with any matter placed before it on merit with the overriding objective being to meet substantive justice.

81. I note that the law seems to be against those who have moved the court out of the stipulated period of time taking into account the fact that petitions must be determined within six months from the date of filing. To punish the petitioner for coming too earlier and based on misinterpretation of the law and the Constitution which we now herein do would be a miscarriage of justice as equity ought to come to the aid of the vigilant and not the indolent.

82. I therefore uphold the preliminary objection herein in part with costs to the respondents but decline to strike out the petition for reasons stated herein above and declare that the same proceed for trial purposes for determination on merit.

83. Finally I must thank the counsels who appeared before me on this matter for the manner in which they conducted themselves in assisting the court and in taking personal initiative to file written submissions in advance without the direction of the court and thereby helping in achieving the overriding objectives of the rules and in the process helping this court to develop the law as mandated under Articles 20(3)(a)(b) and 259(1) of the Constitution.

Dated and delivered at Nyeri this 10th day of June 2013.

J. WAKIAGA

JUDGE

Miss Lucy Mwai for the Petitioner.

Mr. Regeru for the 1st Respondent.

Mr. Kibicho for the 2nd and 3rd Respondents.

J. WAKIAGA

JUDGE



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