

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Ibrahim, Ojwang, SCJJ)
PETITION NO. 2 OF 2013

ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION (IEBC) AND 19 OTHERS.....RESPONDENTS

RULING

A. PRELIMINARY OBJECTION: THE BACKGROUND

[1] The petitioner filed his petition on 5th February, 2013, exactly 27 days before the national elections for the Presidency, the Legislature and the Counties under a new constitutional set-up. He was contesting the validity of the nominations and approvals made by the Independent Electoral and Boundaries Commission (IEBC) in respect of candidature for the office of President. The petitioner questioned the actions of the sponsoring political parties in their initial nominations of candidates who would, at the time, be classified as State Officers in the terms of Article 260 of the Constitution of Kenya, 2010.

[2] When this matter came up before the Court, on 27th February, 2013 it was not for resolution on the merits. The question before us was a preliminary objection to

the petition, raised by the respondents. On 11th February, 2013 counsel for the first, twelfth and twentieth respondents had filed a notice of preliminary objection raising two points of law, namely:

- (i) that the Supreme Court lacked jurisdiction to entertain the petition;
- (ii) that the Constitution, by Article 88(4)(e), confers exclusive responsibility for settling nomination disputes upon the IEBC – and thus the nominations of Presidential election candidates was insulated from the Supreme Court’s jurisdiction and from the jurisdictions of any other Courts.

[3] In the light of the merits of the contending positions at the preliminary stage, of the urgencies attending the process of national elections, and of the limited amount of time then available to the Court, an extempore Ruling was rendered, with a commitment to give reasons, as is done today. The Court’s decision was thus rendered:

“The petitioner’s very detailed petition is the subject of the preliminary objections which have been made by some of the respondents. The objection on the question of jurisdiction has been canvassed before the Court, and we have paid careful attention to the submissions made. Counsel have addressed us on the scope of the Supreme Court’s jurisdiction, and on the governing rules relating to Presidential elections. Counsel have also drawn our attention to an Advisory Opinion rendered [by this Court] in 2012,

regarding jurisdiction in respect of Presidential elections. The parties have made submissions on the powers of the [IEBC] in the conduct of elections, and especially with regard to Presidential elections – and [particularly] the relevance of such powers to the Supreme Court’s jurisdiction.

“Taking all the submissions into account, it has become quite clear to us that the Supreme Court, at this stage, lacks jurisdiction to entertain the petition which we hereby decline to hear.”

B. JURISDICTION OF THE SUPREME COURT: SUBMISSIONS

[4] In the submissions, learned counsel Mr. Nyamodi, for the first, and twelfth-to-twentieth respondents, urged that whereas the petition sought to contest the validity of the nominations already made ahead of the Presidential election, this was a matter excluded by Article 163 of the Constitution, from the jurisdiction of the Supreme Court. Counsel highlighted the Court’s jurisdiction as defined in Article 163(3):

“(3) The Supreme Court shall have –

- (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and*
- (b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from –*

(i) the Court of Appeal; and

(ii) any other court or tribunal as prescribed by national legislation.

“(4) Appeals shall lie from the Court of Appeal to the Supreme Court....

“(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.”

[5] Counsel urged that the petition did not fall within any of the three spheres of jurisdiction assigned to the Supreme Court; and that it did not stand in aid of the petitioner’s case, that the Court did render an opinion, in Advisory Opinion Application No. 2 of 2012, in following terms:

“A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for ‘qualifications and disqualifications for election as president’ – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the [IEBC]. Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question within the terms of the stature of elections, or of political parties. Yet still, the dispute would have clear bearing on the conduct of the Presidential election.”

[6] Granted that the Supreme Court’s jurisdiction in respect of such elections would thus extend, counsel raised the question of the specific occasion on which it will be exercised. Counsel submitted that the proper occasion for the exercise of such jurisdiction would be as defined by the Court in its dedicated Rules; as Article 163(8) provides that:

“The Supreme Court shall make rules for the exercise of its jurisdiction.”

[7] The applicable Rules regulating the exercise of jurisdiction in respect of Presidential elections are set out in a new instrument, the Supreme Court (Presidential Election Petition) Rules, 2013 (L.N. No.15/2013). Clause 4 of these Rules provides:

“These Rules apply to a petition filed in relation to election to the office of President and includes a petition arising –

- (a) upon the declaration by [IEBC] of the President-elect;*
- (b) pursuant to Article 138(1),(2),(3),(4),(5),(6) and (10) and Article 140 of the Constitution;*
- (c) pursuant to section 39 of the Elections Act; and*
- (d) in an election other than a general election.”*

[8] Learned counsel submitted that the Supreme Court’s Advisory Opinion of 2012 was to be read together with the Supreme Court (Presidential Election Petition) Rules, 2013 and that the Court’s full scope of powers expressed in the Opinion are

exercisable only upon the conclusion of the election in question. To demonstrate that this was the law-making intent, counsel called the Court's attention to an earlier draft of the Supreme Court (Presidential Election Petition) Rules, which had six separate paragraphs dedicated to "pre-polling petition", and these were all excluded in the final, published set of Rules.

[9] Mr. Nyamodi submitted that the Court's jurisdiction thus defined, could not be extended to the matter in the petition, and that the Supreme Court has already restated its jurisdictional limits. Counsel invoked an earlier decision, ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited and Two Others***, Sup. Ct. Application No. 2 of 2011 [2012] eKLR in which the Court stated:

"A Court's 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 exceeding that which is conferred upon it by law. We agree with counsel....that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

[10] Learned counsel submitted that the Constitution had entrusted certain electoral matters to the exclusive jurisdiction of IEBC, and hence the Supreme Court's role is excluded. Article 88, on IEBC, thus provides:

“(4) The Commission is responsible for conducting or supervising....elections to any elective body or office established under the Constitution.... and, in particular, for –

.....

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

And so, counsel urged, by virtue of Article 88(4)(e) of the Constitution, the petitioner's grievance ought to have been brought before IEBC, and not the Supreme Court.

[11] Learned counsel Mr. Arwa, for the second respondent, agreed with the earlier submission, urging that the Constitution donated powers to IEBC as the first recourse, in respect of electoral disputes; he urged that a party failing to find satisfaction with the IEBC's decision has an avenue of redress, within the framework of judicial review in the High Court, followed by appellate procedures leading up to the Supreme Court, in a proper case – and that a shortened procedure would be lacking in merit.

[12] The petitioner, who appeared in person, expressed his disagreement with the arguments of counsel, urging that IEBC had itself not complied with the law and that the matter in issue was Presidential election, and so ought to be canvassed before the Supreme Court. He contended that his petition was justified, in view of the Court's Advisory Opinion of 2012; in his words: "[The respondents] are asking the Court to reverse the Advisory Opinion. But jurisdiction covers the entire process of elections, and even party matters are covered." The petitioner objected to counsel's "prioritizing" of the Supreme Court (Presidential Election Petition) Rules, 2013 over the Advisory Opinion, urging: "We – the public – do not know why the pre-poll [draft] rules were excluded; we cannot speculate. Therefore, I rely on the Advisory Opinion, not the Rules."

[13] The petitioner preferred not to take up counsel's forensic method of discovering common cause between the Advisory Opinion and the new Presidential election rules; and he deliberately invoked broad principles of fairness declared in Article 159(2)(d) of the Constitution:

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

.....

(c) justice shall be administered without undue regard to procedural technicalities..."

[14] The petitioner also relied on a general pragmatic perception: “The nomination of candidates has grave financial implications; and so the matter should be determined quickly, to save on costs.”

[15] The petitioner further urged that his grievances did not, by their very nature, lend themselves to resolution by IEBC: “IEBC is an interested party, and so is not competent to decide the matter.”

[16] Mr. Nyamodi, in his response, contested the petitioner’s contention that the call for substantial justice would justify a petition not in keeping with the applicable law on jurisdiction. He submitted that the broad principles of justice declared in Article 159 did not warrant a departure from the Court’s Presidential election rules.

[17] We have considered three questions, in resolving the issue raised: (a) does the Supreme Court have jurisdiction, in this matter? (b) is there a time-frame constraint to the Supreme Court’s exercise of its exclusive original jurisdiction, in the case of Presidential-election matters – given the terms of Articles 163(3)(a) and 140 of the Constitution? (c) did the petitioner prematurely invoke the Supreme Court’s exclusive original jurisdiction?

[18] Article 163(3)(a) provides that the Supreme Court has –

“exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President arising under Article 140.....”

And Article 140(1) provides that –

“A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election.”

From the foregoing provisions, it is clear that the Supreme Court has the powers to exercise exclusive original jurisdiction when dealing with issues as to *the validity of the Presidential election.*

[19] By ***Black’s Law Dictionary***, 8th ed (2004), “exclusive jurisdiction” means:

“A court’s power to adjudicate an action or class of actions to the exclusion of all other courts....”

[20] The petitioner’s contention is that, by Article 163(3)(a), the Constitution confers upon the Supreme Court exclusive original jurisdiction in respect of Presidential election petitions; and so he is invoking this jurisdiction. Although challenges to a Presidential election must be conducted under the terms of Article 140(1), which refers to “seven days after the date of the declaration of the results of the Presidential election”, the petitioner invokes the Supreme Court’s “exclusive jurisdiction” on the basis that his matter which does not relate to the “results of the

Presidential election”, nonetheless concerns a Presidential election. The legal foundation of the petition, in these circumstances, is specifically the Court’s Advisory Opinion No. 2 of 2012; and in particular, the petitioner rests his case on the Court’s observation that a Presidential election is a *process*, as contrasted with an *event*. The petitioner contends that the Supreme Court has the exclusive jurisdiction to hear his matter, which relates to the *validity of the nomination of Presidential election candidates*.

[21] Thus, the petitioner is asking that this Court should so *interpret* its duly-conferred “exclusive original jurisdiction” [Article 163(3)(a)] to cover both “the [actual] results of the Presidential election”, and the “validity of the nomination of Presidential election candidates.” He urges that the Supreme Court may, in law, accommodate such a composite view, because already, the Court has committed itself to the perception that a Presidential election is not time-specific (Advisory Opinion Application No. 2 of 2012).

[22] Is this tenable? And if it is, is it the right position, on the facts of this case?

C. ORIGINAL JURISDICTION: COMPARATIVE INSIGHT

[23] The Court has considered aspects of the comparative judicial experience, in this matter. In the American case, ***Kentucky v. Dennison*** 65 U.S. 66 (1860), Chief Justice Taney, on the basis of precedent, observed that in all cases in which

the Constitution conferred original jurisdiction upon the Supreme Court, that Court had authority “to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and.....the court may regulate the process it uses in such manner as in its judgment will best promote *the purposes of justice.*”

[24] Our understanding is that under the American Constitution, a conferment of original jurisdiction places the Supreme Court at liberty, as in the recognized common-law style, to exercise a discretion equitably, so as to promote the ends of justice; and also to determine the Court’s limits of remit by appraising the gravity of matters on a case-by-case basis. This perception emerges from several other decisions of the American Supreme Court: ***Utah v. United States*** 394 U.S. 89 (1969); ***Illinois v. City of Milwaukee***, 406 U.S. (1972); ***Wyoming v. Oklahoma***, 502 U.S. (1982); ***Massachusetts v. Missouri*** 308 U.S. 1 (1939).

[25] Is there any resemblance between such a position, and the evolving principles of jurisdiction in this Court? Are there any matters of public interest, or of constitutional principle, that should be taken into account, in appreciating the scope of this Court’s original jurisdiction? Are there relevant principles emerging from this Court’s decisions?

[26] We believe there are relevant principles of interpretation, in this Court’s decisions. For instance, in ***Peter Oduor Ngoge v. Francis Ole Kaparo and***

Five Others, Sup. Ct. Petition No. 2 of 2012 the Court thus pronounced itself:

“The Supreme Court, as the ultimate judicial agency, ought, in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals.”

[27] Learned counsel Mr. Arwa, for the second respondent, urged that the Court be guided by the bearings thus signalled, in sustaining the IEBC’s sphere of appropriate actions, and in taking judicial notice of the advanced stage already achieved in electoral preparations – thus requiring the petitioner to canvass his grievance only on the basis of declared results of the Presidential election. The effect of this argument is that the Court’s exclusive original jurisdiction be taken as crystallizing after the declaration of Presidential-election results, and not before.

[28] Learned counsel, Mr. Nyamodi submitted that the petition could be raised only upon the declaration of Presidential-election results by IEBC, and not earlier. “Declaration” in this regard, is defined in ***Black’s Law Dictionary***, 8th ed. (2004), p. 436 as:

“A formal statement, proclamation, or announcement, esp. one embodied in an instrument.”

And the Elections Act, 2011 (Act No. 24 of 2011) defines “election results” thus (s.2):

“the declared outcome of the casting of votes by voters at an election.”

[29] Counsel urged that the *declaration of election results* in the Presidential election was a key ingredient for setting in motion the Supreme Court’s jurisdiction as envisaged under Article 163(3)(a) of the Constitution. It was submitted that it was the event of the declaration of a particular contestant as President-elect, that triggered the exclusive original jurisdiction of the Supreme Court.

D. ASSESSING THE MERITS

[30] By the Supreme Court (Presidential Election Petition) Rules, 2013 it is specifically provided that a Presidential-election petition is to be filed only after the declaration of the outcome. At that stage, as provided in Rule 12, a variety of pleas may be made – including those now raised by the petitioner. Rule 12(2) provides:

“The grounds upon which a petitionmay be filed include –

- (a) the validity of the conduct of a presidential election;*
- (b) the validity of the qualification of a President-elect;*
- (c) the commission of an election offence as provided under Part VI of the Elections Act;*
- (d) the validity of the nomination of a presidential candidate; or*

(e) *any other ground that the Court deems sufficient, provided such ground shall not be frivolous, vexatious or scandalous.”*

[31] The petitioner’s grievance is, thus, provided for: save that he is to seek it after the declaration of election results. He did not render clearly in Court the cause for pursuing the requisite redress at a premature stage.

[32] The petitioner’s case is squarely founded on the Supreme Court’s Advisory Opinion No. 2 of 2012. Although the Constitution (Article 163(8)) requires the Court to gazette *Rules* for the exercise of its jurisdiction, and the same had been duly made providing for the lodgement of Presidential-election grievances, the petitioner presented as an *excuse* from compliance with these Rules, the existence of an earlier Advisory Opinion with broad indications of situations in which a grievance may be expressed as regards such elections.

[33] The petitioner’s election between the broader principles in an Opinion, and the *formal rules* of the Supreme Court, was in our opinion, in departure from legal principle, and must defeat his cause at this preliminary stage. Whereas the prescribed Rules of the Supreme Court, made by virtue of the Constitution, constitute a *directly-operative code in specific terms*, the Advisory Opinion is not similarly structured, and largely bears *broad principle*, imbued with elements of ethos and spirit. It is not tenable that a party should elect between the two bodies

of law, as a basis for lodging a claim. The prescribed rules are for immediate, and unexceptionable application.

[34] Furthermore, the position of learned counsel for the respondents, that the principles in the Advisory Opinion of 2012 have only undergone a restructuring into the functioning of the Supreme Court (Presidential Election Petition) Rules, 2013, in our opinion, has clear merits.

[35] While it is clear to us that this Court's exclusive original jurisdiction covers the matters in the gravamen of the petitioner's grievance, the law has defined the time of declaration of Presidential results as the operative moment in the exercise of this jurisdiction. The span of the Court's jurisdiction thus defined, occasions no injustice to the petitioner who is allowed, under the Supreme Court (Presidential Election Petition) Rules, 2013 to raise and canvass every one of his current grievances.

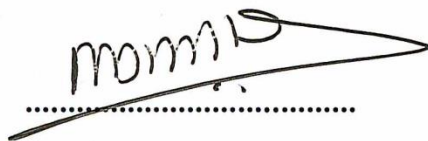
[36] From the comparative lesson, it is clear that the exercise of the original jurisdiction is to be attended with considerations of the public interest, justice and constitutional integrity; and our decision herein must serve the cause of upholding the purpose and intent of the Constitution.

E. FINDINGS AND ORDERS

[37] The preliminary objection is upheld, and this Court declares itself to be without jurisdiction in this matter. We shall make no order as to costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 3rd day of May, 2013.

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**M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT**

A handwritten signature in black ink, appearing to read 'J.B. Ojwang', written over a horizontal dotted line.

**J.B. OJWANG
JUSTICE OF THE SUPREME COURT**

**I certify that this is a true
Copy of the original**

**REGISTRAR
SUPREME COURT OF KENYA**