

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

*(Coram: W.M. Mutunga, C.J. & P.; K.H. Rawal, D.C.J. & V-P; Tunoi, Ibrahim,
Ojwang, Wanjala, Ndungu, SC.JJ.)*

PETITION NO. 5 OF 2013

-BETWEEN-

RAILA ODINGA.....PETITIONER

-AND-

**THE INDEPENDENT ELECTORAL
& BOUNDARIES COMMISSION1ST RESPONDENT**

AHMED ISSACK HASSAN2ND RESPONDENT

UHURU KENYATTA3RD RESPONDENT

WILLIAM SAMOEI RUTO4TH RESPONDENT

AS CONSOLIDATED WITH
PETITION NO. 4 OF 2013 (2ND PETITIONER)

-AND-

AS CONSOLIDATED WITH
PETITION NO. 3 OF 2013 (3RD PETITIONER)

RULING OF THE COURT

A. BACKGROUND

[1] Following the **March 4th, 2013** General Elections pursuant to which the Chairman of the Independent Electoral and Boundaries Commission (IEBC), Mr. Issack Hassan declared Mr. Uhuru Kenyatta as the (then) President-elect, three Presidential Election Petitions namely, Petition No. 3 of 2013, Petition No. 4 of 2013 and Petition No. 5 of 2013, were filed before the Supreme Court.

[2] On 25th March, 2013 the Court consolidated the three Petitions and ordered that Petition No. 5 of 2013, ***Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 others***, be deemed to be the pilot file.

[3] The Petition, not surprisingly, elicited keen public interest and generated endless media coverage and commentary. Amidst this highly charged environment, on 20th March, 2013, the Court deemed it fit to issue certain directions, in the interests of justice, and for the efficient, effective, transparent and impartial determination of the Presidential Election Petitions, as consolidated.

[4] One such directive read as follows:

“The Court is now fully seized of the Petitions challenging the Presidential Elections. Towards this end, the Petitioners and Respondents and their agents, supporters or advisors are directed to desist from prosecuting the merits of their cases in any forum other than this Court”.

[5] During the hearing of the Presidential Election Petition, the Court noted a news item published on page 5 of the *Daily Nation* of 28th March, 2013, which was attributed to Mr. Eric Mutua, the Chairman of the Law Society of Kenya.

[6] The newspaper report stated, in part, as follows:

“LAWYERS TAKE ON TOP COURT: Law Society of Kenya boss Eric Mutua has faulted a ruling by the Supreme Court to reject additional evidence. Mr. Mutua said the decision to expunge an affidavit by the Cord could set a precedent for future rulings. The court rejected an 839 – page affidavit because it was filed without its consent.”

[7] On the same page, there was another report attributed to Mr. Mutua wherein he allegedly stated: **“we want to determine [the] circumstances that led to the alleged failure of the technology system used.”** These remarks were reported to have been made after the Law Society of Kenya had unveiled a committee to audit the March 4th General Election.

[8] After considering the contents of the published reports, this Court on 28th March, 2013 made an Order as follows:

“We hereby issue summons for Mr. Eric Mutua to appear at the Supreme Court on a date and time to be notified to him by the Registrar of the Supreme Court.”

[9] Thereafter, the Registrar of the Supreme Court issued Summons dated 22nd July, 2013 to Mr. Mutua directing him to appear before the Court on 1st August, 2013.

[10] On the said date, during the mention of the matter, representatives of several interested parties were present. The Court indicated that the reason for the Summons was to give Mr. Mutua an opportunity to confirm or deny the reports published by the *Daily Nation*, as set out hereinabove. The Court, at the time, clarified that the proceedings are not in the nature of *contempt proceedings*.

[11] Learned counsel appearing for the Law Society of Kenya, however, raised certain preliminary issues to be heard and determined before the Court could proceed with the intended clarification from Mr. Mutua. Thereafter, the Court directed all the parties present to make their respective written submissions to enable the Court to make its Ruling.

[12] The submissions were duly filed and are duly considered by us.

B. THE PRELIMINARY ISSUES

[13] Though differently worded by the parties involved, we shall take the issues formulated by counsel for the Law Society of Kenya for consideration and determination, namely:

(i) the jurisdiction of the Supreme Court in light of the fact that the Presidential Election Petition has already been heard and finally determined; and

(ii) whether the Chairman of the Law Society of Kenya is the proper party to summon in respect of a news item written and published by the Daily Nation newspaper, a third party that was not summoned by the Court.

C. ANALYSIS

[14] The nature and scope of a “preliminary issue” is cogently defined in the statement of Law J.A., in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696 at 700:***

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation.”

[15] Considering the *ratio decidendi* in the above-cited case, we conclude, without much hesitation, that the second issue raised does not fall squarely within the scope of a “preliminary objection;” and we shall, at this stage, refrain from elaborating this issue any further.

[16] The first issue, however, raises concerns regarding the *jurisdiction* of this Court; and we are thus obligated to consider the same, as it is a threshold issue, to be resolved at the earliest opportunity. It is well recognised in our law that a Court of law shall down its tools in respect of a matter before it, the moment it holds that it lacks jurisdiction. We hereinbelow enumerate the relevant cases justifying our decision to hear and determine the question of jurisdiction, as a preliminary point, though without making further comments on this indefatigable principle of law. These are:

- (i) ***The Owners of the Rive Rima [1987] 3 All ER 1;***
- (ii) ***Roy Shipping S.A Agencies and all interested in the Ship “Mama Otan” v. Dodoma Fishing Company Limited [1995 – 1998] 2 EA 293;***
- (iii) ***The Owners of the Motor Vessel “Lillian S” v. Caltex Oil Kenya Ltd. [1989] KLR 1.***

[17] In our view, the objections being raised as to this Court’s jurisdiction to issue the Summons dated 22nd July, 2013 must be regarded as separate and distinct from the question whether this Court had, in the first place, jurisdiction to issue the Order made on 28th March, 2013. Indeed, it is to be taken that, had the Summons been issued *before* the final determination of Petition No. 5 of 2013, the parties would most probably not have raised the objection now before us. Thus, the real contention made as to the Court’s

jurisdiction, is hinged on the supposition that because Petition No. 5 of 2013 has been heard and determined, the Court has become *functus officio*, and so has no further authority to hear or determine any matter attendant on any proceeding in the said Petition.

[18] We, therefore, have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

[19] This principle has been aptly summarized further in ***Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550:***

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor

does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied].

[20] As regards the preliminary objection before us, contesting this Court’s jurisdiction, there is no doubt that Petition No. 5 as consolidated, has been finalized, and the Judgment has been perfected. The issue before us emanates not from the *substantive facts or issues* raised in the Petition, but from an ancillary order issued by the Court during the proceedings – totally unrelated to the main cause of action. *That order* has not been acted upon or perfected, and the Summons issued pursuant thereto by the Registrar of the Supreme Court, was meant to give effect to the Court’s observation and consequent *directions* made on 28th March, 2013.

[21] It is a legal and constitutional obligation of any Court, from the basic-level to the highest level , to preserve and protect the *adjudicatory forum of governance*, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the Court’s jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in

safeguarding the scheme of the rendering of justice, will not be exhausted until the Court is satisfied and it declares as much. Even though, therefore, the Court concluded the hearing of the Petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the Petition, remained uncompromised. The Court therefore could, as it did, issue Summons in the cause of its Orders made during the pendency of the main hearing.

[22] We are also of the opinion that the authorities cited, which we have carefully considered, are not directly relevant to the facts before us. This is an issue of first impression, and no authority invoked by counsel has a direct bearing upon it.

[23] We are, therefore, satisfied, and accordingly hold, that the Court is not *functus officio*, and that we do have jurisdiction to entertain the proceeding before us.

[24] We do not make any Order as to costs in this proceeding.

DATED and DELIVERED at NAIROBI this 24th day of October, 2013

.....
W. M. MUTUNGA
CHIEF JUSTICE & PRESIDENT
SUPREME COURT

.....
K. H. RAWAL
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT SUPREME COURT

.....
P. K. TUNOI
JUSTICE OF THE SUPREME COURT

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

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

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

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

**REGISTRAR
SUPREME COURT OF KENYA**