



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

PETITION NO. 3 OF 2017

SOLOMON P. MUKENION.....1ST PETITIONER

NGURASIA RUMOT.....2ND PETITIONER

VERSUS

JOHN MWOK.....1ST RESPONDENT

EMMANUEL PKERIO LOSHANGOLE.....2ND RESPONDENT

REGISTRAR OF SOCIETIES.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The 1st Petitioner, Solomon P. Mukenion, and the 2nd Petitioner, Ngurasia Rumot, are the officials of a splinter group of Pokot Council of Elders.
2. The 1st Respondent, John Mwok, and the 2nd Respondent, Emmanuel Pkerio Loshangole, are officials of the Pokot Council of Elders.
3. The 3rd Respondent, Registrar of Societies, is an office established under Section 8 of the Societies Act, Cap. 108. The 3rd Respondent is mandated to perform the duties and exercise the powers imposed or conferred on it under the Act.
4. The 4th Respondent is the Attorney General of the Republic of Kenya and the principal legal advisor to the national government. The office is established by Article 156(1) of the Constitution.
5. The petitioners lodged the petition dated 17th February, 2017 supported by the 1st Petitioner's verifying affidavit. At the same time the petitioners filed a notice of motion seeking a stay of registration of the 1st and 2nd respondents as officials of Pokot Council of Elders. The petition is brought pursuant to Articles 22(1) & (2) and 23 of the Constitution.
6. The petitioners allege that the 1st Respondent denied them an opportunity to exercise their right to vote and chose their representatives hence violating their rights under Article 81(a), (d) and (e) of the Constitution. The petitioners also allege that the actions of the respondents are unconstitutional and a threat to their rights under Articles 23 and 36 of the Constitution.
7. The 1st and 2nd respondents filed their replying affidavit to the petitioners' notice of motion on 20th April, 2017. They also filed a replying affidavit to the petition on 5th March, 2018.
8. The 3rd and 4th respondents replied to the notice of motion and petition by filing an affidavit on 27th April, 2017.
9. The petitioners filed a further affidavit on 20th July, 2017 and submissions in respect of the notice of motion application on 21st September, 2017. Similarly, the 1st and 2nd respondents filed their written submissions to the notice of motion on 21st September, 2017.
10. In a ruling delivered on 16th November, 2017 in respect of the petitioners' notice of motion dated 17th February, 2017, this Court ordered that the status quo be maintained pending the hearing and determination of the petition.

11. In their petition, the petitioners seek the following reliefs and prayers:

- i. A declaration that the petitioners had a right to participate in the elections of Pokot Council of Elders held on 22/12/2016 since they are also members of the said Pokot Council of Elders;**
- ii. A declaration that the elections of the Pokot Council of Elders held on 22/12/2016 are null and void for not being free, fair and transparent and for lacking credibility hence the same be cancelled;**
- iii. An order directing that a fresh election for Pokot Council of Elders be held within the time frame as this court shall deem fit;**
- iv. Costs of this Petition;**
- v. Such other orders and direction as this Honourable Court shall deem fit.**

12. The petitioners' case is that there has been a dispute regarding the leadership of the Pokot Council of Elders. The dispute led to the filing of Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015. In that case, the 1st Respondent and his group went to Court seeking an order stopping the 1st Petitioner and his group from holding elections for the officials of the Pokot Council of Elders. The elections were temporarily stopped by the Court. However, before the main suit was heard and determined, the parties through a consent dated 5th November, 2016 agreed to have fresh elections. The said order stated as follows:

a. By consent of both parties, it is agreed that the parties proceed to hold fresh elections and the chairman JOHN MWOK to issue all relevant notices to all the parties interested.

b. The suit be marked as settled.

13. The petitioners' case is that they sought to cooperate and consult with the 1st Respondent before the elections were held but he declined to cooperate with them. According to the petitioners, the 1st Respondent went ahead and unilaterally organized and conducted elections on 22nd December, 2016 against the consent order entered in Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015. The petitioners allege that the said elections were held without their knowledge or involvement and resulted in the 1st Respondent being elected unopposed as the chairman of the Pokot Council of Elders.

14. It is the petitioners' averment that the unilateral actions of the 1st Respondent infringed on their rights to vote, participate and choose their representatives as provided by Article 81(a), (d) & (e) of the Constitution. The petitioners also allege that the 1st Respondent's actions were unreasonable, unfair, un-procedural and in bad faith hence their prayer to have the elections conducted on 22nd December, 2016 nullified.

15. The petitioners assert that the respondents infringed on their right under Article 36 of the Constitution by denying them an opportunity to participate in the elections and failing to serve them with any formal notice of the intended elections. They therefore pray that the actions of the respondents be declared unconstitutional.

16. At the hearing of the petition, the petitioners called four witnesses. Alexander Reuben testified as PW1 and adopted his written statement filed on 25th October, 2018. He reaffirmed his support for the 1st Petitioner's statement and stated that the elections were unfair, in bad faith and un-procedural. He asked the Court to order fresh elections. On cross-examination, he confirmed that the 1st and 2nd respondents were the recognized chairman and secretary of the interim council. He also stated that no elections were held at the grassroots or on 22nd December, 2016 as alleged by the respondents.

17. PW2 Samson Pkomoi Kachio adopted his written statement filed on 25th October, 2018. In the written statement he reaffirmed his support for the 1st Petitioner's case and stated that the elections were unfair, in bad faith and un-procedural. He asked for nullification of the elections so that they can be given an opportunity to elect their leaders. He added in his oral testimony that the two warring factions had met severally but no agreement was reached as to when the elections were to be held. He asked the Court to order fresh elections. On cross-examination, PW2 stated that he was not aware of any elections that were conducted in respect to the leadership of the Pokot Council of Elders.

18. Robert Cherukwo testified as PW3. He adopted his written statement filed on 25th October, 2018 in which he affirmed his support for the 1st Petitioner's statement and added that the elections were unfair, in bad faith and un-procedural. When he testified in Court, he added that the Pokot Council of Elders was to elect new officials but the elections were yet to be held. He stated that no grassroots elections were held and even where such elections were held they were held secretly. He therefore urged the Court to order fresh elections. When cross-examined, the witness told the Court that the 1st Respondent was the chairman and he filed Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015 in his capacity as the chairman of the association.

19. The 1st Petitioner testified as PW4. He adopted his written statement filed on 25th October, 2018. In the written statement, the 1st Petitioner states that after the consent was recorded in Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015, they met and agreed that the 1st Respondent nominates nine members from his group to enable them prepare for fresh elections. A meeting was scheduled for 15th October, 2016 at an appointed venue but on that day the 1st Respondent and his team did not turn up. According to the 1st Petitioner, his group proposed another meeting for 26th October, 2016 but the 1st Respondent instead responded by stating that he would issue notices to

all sub-counties. It is the 1st Petitioner's testimony that the 1st Respondent and his group did not turn up in the meeting of 26th October, 2016. His case is that the 1st Respondent's refusal to work with them was a deliberate move to deny them their right to participate in the elections of 26th October, 2016.

20. In his oral testimony in Court, PW4 stated that he was not aware of any meeting called by the 1st and 2nd respondents informing the members of the association of the elections scheduled for 22nd December, 2016.

21. On cross-examination, PW4 stated that the 1st Respondent was elected chairman of the Pokot Council of Elders at the inauguration of the society in 2012 and as at 2015, he was still the chairman. The 1st Petitioner conceded that through applications dated 20th November, 2016 and 16th December, 2016 he sought to stop the elections scheduled for 22nd December, 2016 but later withdrew the applications after the elections were held. He confirmed that by the time of filing the applications they were aware that elections had been scheduled for 22nd December, 2016. PW4 told the Court that they held their own meeting which was chaired by Solomon Nyorsok but they did not notify the 1st and 2nd respondents about the meeting and the two did not attend the meeting.

22. In opposition to the petition, the 1st and 2nd respondents aver that they were respectively elected the chairman and secretary of the Pokot Council of Elders following the elections held on 22nd December, 2016. They state that the Pokot Council of Elders is governed by its constitution or bylaws which were complied with during the elections. They contend that the society's bylaws require that elections of officials be conducted during an annual general meeting to be held not later than the 31st day of December every year.

23. The 1st and 2nd respondents aver that the Pokot Council of Elders under the leadership of the 1st Respondent has had a long standing dispute after the petitioners herein formed a splinter group. The dispute prompted their filing of Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015 which was later settled when the parties agreed to hold fresh elections in accordance with Section 9 of the bylaws of the association. The 1st and 2nd respondents assert that they adhered to the requirement of section 9 of their bylaws and conducted free, fair and transparent elections. Further, that the association's bylaws mandated the 1st Respondent to oversee and conduct the elections.

24. The 1st and 2nd respondents contend that the petitioners were duly notified of the elections of 22nd December, 2016 but they chose to abscond and not to participate in the said elections. According to the 1st and 2nd respondents, the petitioners cannot therefore approach this Court to enforce rights which they waived.

25. The 1st and 2nd respondents called four witnesses. The 1st Respondent John Mwok Komolkat testified as DW1 and asked the Court to adopt his written statement filed on 2nd August, 2018. He stated that he conducted the impugned elections in accordance with the Pokot Council of Elders bylaws. DW1 told the Court that he instituted Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015 seeking to bar the petitioners' group from holding elections in the name of the association as they were not the validly elected officials. He also stated that the consent order issued in that case mandated him to conduct the elections and he did so in accordance with the association's bylaws.

26. DW1 testified that through a letter dated 2nd November, 2016, he convened a meeting of the Executive Council and invited the petitioners but they declined to attend the meeting. The 1st Respondent told the Court that prior to the elections, he conducted public awareness and issued the relevant notices. According to DW1, he was elected the chairman while Yusuf was elected the deputy chairman whereas the 2nd Respondent became the secretary and Wilson Kamanga became the treasurer.

27. In response to questions put to him during cross-examination, the 1st Respondent stressed that he was the chairman of the Pokot Council of Elders and that the 1st Petitioner was leading a splinter group. He stated that he had indeed received a letter from the 1st Petitioner in respect to the elections which they had agreed to hold. His evidence was that he never worked with the 1st Petitioner and his team. According to DW1, he issued a program for the grassroots elections and went on North Rift Radio to sensitize the members of the association about the elections. The 1st Respondent testified that Rev. Chumum is the person who presided over the elections. He insisted that the elections were fair, free and transparent.

28. DW2 Rev. Ronald Kapteyo Chumum adopted his written statement filed on 2nd August, 2018. He stated that he oversaw the election of officials of the Pokot Council of Elders on 22nd December, 2016 at Mutelo Hall in Kapenguria. He presented the minutes of the meeting and confirmed its contents. He told the Court that he is not a member of the Pokot Council of Elders. On cross-examination, he stated that he presided over the elections following a request made to him through a letter dated 16th December, 2016. DW2 told the Court that after conducting the elections he handed over the records to the officials and went away. He was therefore not in a position to know who attended the meeting and who did not attend it.

29. The 2nd Respondent who testified as DW3 stated that the elections were conducted by DW2 and some members of the splinter group were present and participated in the elections. On cross-examination, he testified that he was elected unopposed as the secretary of the association.

30. DW4 Symon Kapchemungot confirmed that DW2 presided over the elections which started at midday. He also stated that he appended his signature on the list of the attendees of the meeting.

31. It is noted that the 1st and 2nd respondents filed a reply dated 2nd February, 2018 to the petition. The reply takes the same position with the replying affidavit and it is therefore not necessary to restate its contents. It is, nevertheless, necessary to state that housed within the reply is the 1st and 2nd respondents' cross-petition.

32. Through the cross-petition, the 1st and 2nd respondents assert that the elections were conducted in a free, fair, transparent and verifiable manner and they were duly elected as officials of the Pokot Council of Elders. They therefore seek a declaration that the elections held on 22nd December, 2016 were free, fair, transparent and verifiable.

33. The 3rd and 4th respondents opposed the petition through a replying affidavit sworn by Jacob M. Ikiara, an Assistant Registrar of Societies. Their case is that issues regarding the *bona fide* officials of the Pokot Council of Elders are internal affairs governed by the society's constitutive constitution and does not fall under their purview.

34. As regards the facts of the case, the 3rd and 4th respondents aver that the Pokot Council of Elders was registered on 26th August, 2011. Further, that on 3rd January, 2017, they received a letter from the petitioners complaining that the election of the officials of the Pokot Council of Elders held on 22nd December, 2016 had denied them an opportunity to contest, participate and vote for their preferred candidates. By a letter dated 5th January, 2017, the 3rd Respondent replied to the petitioners informing them that they had not received any notice of change of the office bearers of the association nor had they issued letters confirming or effecting the changes.

35. According to the 3rd and 4th respondents, the 3rd Respondent through a letter dated 27th January, 2017 was requested by the 1st and 2nd respondents to formalize and effect change of officials. Attached to the letter were election returns and form H. It is averred that on 3rd February, 2017 the 3rd Respondent informed the 1st and 2nd respondents of their decision to decline the request. By a letter dated 17th March, 2017 the 1st and 2nd respondents once again informed the 3rd Respondent of the election outcome and requested that the new officials be confirmed as elected officials.

36. It is the 3rd Respondent's averment that it came to know of the leadership wrangles in the Pokot Council of Elders after reviewing the order issued in Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015. According to the 3rd Respondent, as a result of the wrangles it has in good faith declined to effect change of leadership and that the decision not to register the officials fell within its mandate.

37. In conclusion, the 3rd and 4th respondents state that this petition is an abuse of the court process as it seeks to advance the selfish and unilateral interests of the petitioners against the best interest of Pokot Council of Elders. Further, that the 3rd and 4th respondents have no interest in the outcome of this case and the same should be dismissed with costs to the respondents

38. The petitioners filed their submissions on 6th December, 2021 and identified three issues for the determination of this Court. On the issue of the jurisdiction of this Court to entertain the matter, the petitioners submitted that this Court is mandated to hear and determine the petition under Article 165(3)(b) of the Constitution since their rights had been infringed upon by the respondents. Additionally, the petitioners submitted that their right to approach the Court in this matter was premised on Articles 22(1) & (2), and 23 of the Constitution. The petitioners argued that they were acting on behalf of a splinter group of the Pokot Council of Elders and were therefore aggrieved with the conduct of the respondents in holding the elections of 22nd December, 2016.

39. The second issue submitted upon by the petitioners is whether the impugned elections were conducted in an open, transparent, participatory and accountable manner. On this issue, the petitioners submitted that the elections were not conducted in compliance with the threshold set under Article 81 of the Constitution. The petitioners also submitted that even though they were willing to jointly work with the 1st Respondent to organize the elections, the 1st Respondent unilaterally proceeded to organize and carry out the elections. It is argued that the actions of the respondents were unfair hence the elections cannot be said to have been free, fair, transparent and verifiable. According to the petitioners, the failure by the 1st Respondent to produce the list of eligible voters and the signed results of the elections shows that the elections were not free and fair.

40. On the final issue as to the appropriate orders to be granted in the circumstances, the petitioners submitted that since the elections were not free and fair, this Court should order fresh elections to be conducted by an independent body such as the Independent Electoral and Boundaries Commission. The Court is consequently urged to allow the petition and grant orders as prayed.

41. On their part, the 1st and 2nd respondents through submissions dated 6th December, 2021 also flagged three issues for determination by this Court. On the first issue as to whether the 1st Respondent properly convened the meeting held on 22nd December, 2016 they relied on Rule 8(b) of the Pokot Council of Elders bylaws and Section 29 of the Societies Act to submit that the meeting, and the agenda including the elections were within the law. They also submitted that the 1st Respondent acted in good faith and adhered to all the procedures as required of him in calling the meeting and holding the disputed elections.

42. The second issue identified by the 1st and 2nd respondents is whether the petitioners were illegally denied the right to participate in the questioned elections. On this issue, 1st and 2nd respondents relied on the case of **Mohammed Omar-Suing as the Chairman and Treasurer of KFF Coast Branch v Maina Kariuki, Hussein Swaleh Mohammed - Sued as National Officials of KFF [2004] eKLR** to submit that the rights under Article 36 of the Constitution should be exercised in a manner that is consistent with the Societies Act. They also contended that there is a limitation to the rights under Article 36 of the Constitution and the question should be whether the limitation was justifiable. This argument was supported by reference to the cases of **Karua v Radio Africa Limited T/A Kiss FM & others [2006] 2 EA 117** and **Muwanga Kivumbi v The Attorney General [2017] eKLR**. Still on the same issue, the 1st and 2nd respondents submitted that the 1st Respondent did not limit the rights of the petitioners to vote and that if there was any limitation such limitation was justifiable as the petitioners had formed a splinter group which was not serving the interests of the association.

43. The final issue submitted on by the 1st and 2nd respondents was the validity of the impugned elections. On this issue they submitted that they contested and were elected in proceedings conducted in accordance with the Pokot Council of Elders bylaws, the Societies Act, and the Constitution of Kenya. They therefore urged this Court to declare that they were duly elected.

44. On the issue of costs, the 1st and 2nd respondents urged that the petitioners should be condemned to pay the costs of these proceedings.
45. The 3rd and 4th respondents did not file any submissions in this matter.
46. The petitioners in this matter allege infringement of their rights under Article 36 of the Constitution. They also allege that the election of the officials of the Pokot Council of Elders held on 22nd December, 2016 was not fair, transparent, accountable, and verifiable therefore violating the provisions of Article 81 of the Constitution.
47. The jurisdiction of this Court to hear and determine this matter has not been raised by the respondents. The only issue that may have arisen about jurisdiction is whether the issues raised in the petition merit consideration through constitutional litigation. The response to such a question would be that Article 165 of the Constitution which establishes this Court vests in it the authority to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The Court is also empowered to determine any question respecting the interpretation of the Constitution. It is also observed that Article 23(1) of the Constitution grants this Court **“jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”**
48. The petitioners allege violation of their rights under Article 36 of the Constitution. The right to freedom of association includes the right to form, join or participate in the activities of an association to which a person has subscribed. In this case, the petitioners claim that their right to participate in the election of the officials of the Pokot Council of Elders was violated. This claim clearly ties to the right to freedom of association because the petitioners are saying that they have been denied the right to participate in the activities of the Pokot Council of Elders. A constitutional question therefore arises because this Court is being asked to determine the issue of alleged violation of a constitutional right.
49. A review of the pleadings, the evidence and the submissions of the parties clearly show that the overall question for the determination of this Court is whether the respondents infringed on the petitioners’ right under Article 36 of the Constitution.
50. It is the petitioners’ case that their rights under Article 36(1) of the Constitution were infringed by the respondents. Their case is anchored on the allegation that they were never informed of any impending elections and were therefore denied an opportunity to participate in the elections held on 22nd December, 2016.
51. The 1st and 2nd respondents have denied the claim and submit that the petitioners were not denied their right under Article 36 as alleged. It is their position that the petitioners were aware of the meeting held on 22nd December, 2016 but decided not to attend the meeting. They contend that any limitation of the petitioners’ rights was therefore within the law.
52. From the evidence on record, it is clear that there were two warring groups within the Pokot Council of Elders. The parties also agreed that as at the time of the meeting on 22nd December, 2016, the 1st Respondent was the legal and substantive chairperson of the Pokot Council of Elders.
53. According to the 1st and 2nd respondents, the impugned elections were held pursuant to and in compliance with the consent entered in Kapenguria Principal Magistrate Court Civil Case No. 16 of 2015 between their faction and that of the petitioners.
54. The question then is whether the petitioners were notified of the elections and they failed to participate in those elections. According to the consent recorded before the Magistrate’s Court, the parties agreed to hold fresh elections and the 1st Respondent was tasked to *“issue all relevant notices to all the parties interested.”*
55. From the evidence that was adduced in this matter, it is evident that the petitioners were aware of the Pokot Council of Elders meeting scheduled for 22nd December, 2016. They were also aware that one of the items of that meeting was the election of the officials of the association. The 1st Petitioner acknowledged this fact in his testimony and confirmed that he filed an application dated 16th December, 2016 in an attempt to scuttle the elections. It is also on record that the notice calling for the meeting that was issued by the 1st Respondent was copied to the petitioners’ advocates. Even though the petitioners later appointed another firm of advocates to act for them, they never denied the fact that the notice of the meeting was issued to their advocates.
56. The notoriety of the impending elections is confirmed by the fact that the same was broadcast on North Rift Radio, a local media station. The suggestion by the petitioners through cross-examination that advertisement of the meeting ought to have been made on Kalya Radio does water down the evidence that the meeting was announced in advance. The petitioners did not provide any evidence to show that North Rift Radio did not broadcast in the local dialect and did not reach areas inhabited by members of the Pokot community.
57. The 1st and 2nd respondents cannot therefore be said to have limited the rights of the petitioners to participate in the affairs of the Pokot Council of Elders. Rights have been provided in the Constitution but sometimes it takes the effort of an individual to partake of those rights. A person cannot intentionally decline to enjoy fundamental freedoms and rights only to later turn around and complain of violation of the same fundamental freedoms and rights.
58. The petitioners were aware of upcoming elections of their association scheduled for 22nd December, 2016 but instead of participating in the elections they opted to go to Court to try and stop the event. Having failed to obtain stay orders, the advisable action was to participate in the elections. It is always important for litigants to remember that courts have no votes in their organizations and the best thing to do is to lobby the voters so that one can emerge victorious. It follows therefore that the respondents did not infringe on the petitioners’ rights under Article 36 of the Constitution. The petitioners voluntarily failed to attend the meeting and participate in the elections thereby waiving their rights to participate in the affairs of the Pokot Council of Elders.

59. There is the claim by the petitioners that the elections were not free and fair. First, it is noted that this claim is too generalized and not particularized. Secondly, the petitioners having failed to participate in the elections cannot now turn around to claim that the elections were not conducted in line with the association's bylaws.

60. In view of my findings in this judgement, it follows that this petition is without merit. The same is therefore dismissed. Considering the fact that the parties herein are members of the same association, and in order to foster unity for the benefit of the entire membership of the Pokot Council of Elders, I direct the parties to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 16TH DAY OF FEBRUARY, 2022.

W. KORIR,

JUDGE OF THE HIGH COURT