



REPUBLIC OF KENYA



KENYA LAW
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**Mohamed v Independent Electoral and Boundaries Commission
(Petition 9 of 2020) [2022] KEHC 11146 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

PETITION 9 OF 2020

JM MATIVO, J

JUNE 24, 2022

BETWEEN

ASHA HUSSEIN MOHAMED PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

RULING

1. This ruling determines the Petitioners application dated June 3, 2022 seeking to review, set aside or vary the orders of this court made on 2nd day of June 2022 dismissing the Petitioner's Petition for non-attendance. The applicant also prays the Petition be reinstated for hearing and that costs to be provided for.
2. The application is premised on the grounds that this suit was dismissed for non-attendance and also failure to comply with directions on filing submissions. The applicant states that on June 2, 2022 Mr. David Masake Advocate was physically attending court before Hon. Karanja in Busia only to log in later and find that this matter had been dismissed. The applicant states that her submissions were not in the court file because on the said date the court handled its matters from Nairobi and that the registry staff omitted to place the submissions in the court file. Lastly, the applicant states that she will be condemned unheard if the application is not allowed.
3. The application is opposed. The Respondent filed grounds of opposition dated June 6, 2022 stating that the application does not meet the evidentiary threshold for granting the orders sought; that the applicant's advocate was aware that the court starts session at 8.00am as per the courts directions dated May 26, 2022, that this suit has no prospect of success because this court has no jurisdiction to extent time because the time frames are mandatory; that the applicant is forum shopping having had her case heard by the Orange Democratic Party Movement Party Tribunal and the Political Party's Dispute Tribunal; that the application is incompetent.



4. The applicant's counsel relied on the pleadings filed. He submitted that due to technological challenges he was not able to log in. He argued that the Petitioner retains the right to be heard, and that no prejudice will be occasioned to the Respondent. He argued that by the time the Petitioner approached this court the time frames prescribed by the *Elections Act*¹ had lapsed. Lastly, he submitted that under section 33 of the *Elections Act*, this court has powers to extent time under exceptional circumstances.
5. The Respondent's counsel argued that even if the Petition is reinstated, it has been overtaken by events because the statutory time frames have lapsed. She pointed out that the deadline for independent candidates was May 2, 2022 and even if the orders sought are granted, they will be incapable of being complied with because the petitioner was required to have resigned from the ODM Party three months prior to the elections.
6. In a brief rejoinder, the Petitioners counsel submitted that the deadline was on May 2, 2022 but the Respondent has powers to extent time and urged this court to exercise its discretion and allow the application.
7. For starters, the decision whether or not to set aside ex parte judgement/order is discretionary. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. It is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. (See *Shah v Mbogo & Another*).² As was held by the Court of Appeal in *CMC Holdings Ltd v Nzioki*³ the discretion must be exercised upon reasons and must be exercised judiciously and that it would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.
8. The key question is whether the applicant has provided sufficient cause for the failure to log in, and whether, this is a proper case for the court to exercise its discretion and reinstate the Petition. Counsel says he was in another court, hence his inability to log in. The respondent's counsel countered the said argument with the reasoning that this court starts sessions as 8.00am a fact which was already known to the Petitioners counsel. She also referred to this court's directions on time when the parties attended court. I may add that the daily cause list is also written in bold letters that court sessions begin at 8.00am and the court list for the said date clearly indicated the courts starting time. So, had counsel logged in at 8.00am, he would have prosecuted his case and finalize in time to attend the other court he claims he was attending which ordinarily starts at 9.00am. This being the position, it is my finding that the failure to attend court has not been satisfactorily explained.
9. Even though in an application for reinstating a suit it is not a requirement for an applicant to demonstrate he has a good case, it does not escape the court's attention that the Petitioner was a Member of the Orange Democratic Movement, and she participated in the party primaries to vie for the Mombasa County Women Representative. She was unsuccessful and her complaint before the party's appeals tribunal was also unsuccessful. Her appeal to the Political Parties Disputes Tribunal was dismissed. By the time she lost her case in the PPDT, the time frames issued by the Respondent for receiving nomination papers had lapsed. In her Petition, she prays for an order that the Respondent accepts her nomination documents for verification and nomination as an independent candidate. She argues that the Respondent is empowered to extend the time frames it had gazetted for submission of nomination papers.

¹ Act No. 11 of 2011.

² [1967] EA 116.

³ [2004] KLR 173.



10. But the Petitioner's advocate did not seem to appreciate the elephant in the room even after this court severally drew his attention to the constitutional and statutory time frames for those who desire to vie as independent candidates. Eligibility to vie as an independent candidate is provided in article 85 (a) of the constitution which reads: -

Eligibility to stand as an independent candidate.

85. Any person is eligible to stand as an independent candidate for election if the person—

- (a) is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election;

11. The above position is echoed by section 33 of the Elections Act⁴ on nomination of independent candidates which provides that: -

A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of articles 97, 98, 137, 177, and 180 of the Constitution if that person—

- (a) has not been a member of any political party for at least three months preceding the date of the election;
- (b) has submitted to the Commission on the day appointed by the Commission as the nomination day, a duly filled nomination paper as the Commission may prescribe;
- (c) has submitted the symbol that the person intends to use during the election; and
- (d) is selected in the manner provided for in the Constitution and by this Act.

12. If this court is to retain the confidence of the nation as the final arbiter of what the Constitution means, no interpretation of the Constitution by the court can depart from the text of the Constitution and what is implied by the text and the structure of the Constitution. It is not legitimate to construe the Constitution by reference to principles or theories that find no support in the text of the Constitution. It is the text and the implications to be drawn from the text and structure that contain the meaning of the Constitution.⁵

13. The constitution prescribes a period of three months within which a person desiring to vie as an independent candidate must not have been a member of a political party. The core issue for determination is whether or not the petitioner ceased to be a member of the Orange Democratic Movement "at least ninety days prior to August 9, 2022" which is the date scheduled for the general elections. Vide a letter dated May 10, 2022, her lawyer without specifying her resignation date wrote to

⁴ Act No. 24 of 2011.

⁵ {1994} 182 CLR 104 at 1 201197–198.



the Registrar of Political Party's stating she had ceased to be a member of the ODM. This brings into focus the provisions section 14 of the Political Parties Act⁶ which provides

14. Resignation from political party

- (1) A member of a political party who intends to resign from the political party shall give a written notice prior to his resignation to— (a) the political party; (b)... (c) ... (2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.

14. The above provision settles the effective date for the Petitioners resignation from the ODM party which took effect after the 3 months had started running. This is the Petition this court is being urged to reinstate. The time frames prescribed for independent candidates flow from the Constitution so the argument that this court or the Respondent can extend the time frames flies on the face of article 85 of the Constitution and decisions by our superior courts holding that constitutional time frames cannot be extended. The Court of Appeal in Ferdinand Waititu v Independent Electoral and Boundaries Commission, (IEBC) & others⁷ discussing the above provisions stated: -

“...These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Elections Petition Rules be amended to bring about mechanisms of expediting trials...”

15. In Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others⁸ the Court of Appeal⁹ was again categorical, that the provisions of the Elections Act, setting out timelines for the filing and determination of election petitions, were peremptory and non-negotiable. It stated: -

“...this Court¹⁰ held that s.23(4) A of the National Assembly and Presidential Elections Act, which like s.85 A of the Elections Act stipulated the period within which an appeal from the decision of the election court should be filed, was mandatory and that upon the lapse of the stipulated time, the right of appeal automatically lapsed...”

16. Time in principle and applicability, is a vital element in the electoral process set by the Constitution and this is an important consideration which ought to guide persons aspiring to view in elections. Article 85(a) of the constitution and section 33 (1) of the Elections Act are a careful product of a constitutional scheme requiring a proper mechanism aimed at ensuring adequate preparation for the electoral process which does not begin and end on the polling day but embraces wider and deliberate systems aimed at promoting democratic values and practices that are consistent with the spirit and intent of the

⁶ Act No. 11 of 2011.

⁷ Civil Appeal No. 137 of 2013, *Mwera, Musinga and Kiage* JJA

⁸ Nairobi C.A No.191 of 2013 [2014] eKLR

⁹ *Kariuki, Kiage and M'Inoti* JJA

¹⁰ *In Maitha v Said and Another*, (1999) 2 E.A 181



constitution in ensuring preparation for a fair, free, credible, transparent and accountable elections and a purely ethical system of elections.

17. The Constitution's standard of democratic governance entrusts to this court the charge of assuring sanctity to its declared principles. The court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, if an individual is not able to meet the set deadline, his/her inability to present his papers within the set time frame cannot be said to be a limitation of his rights. Individual rights must where circumstances so permit, give way to public interests. It is also important to point out that the above provisions are clear and unambiguous.
18. In view of my findings hereinabove, I find that the applicant's application dated June 3, 2022 is totally unmerited. The upshot is that the said application is hereby dismissed with no orders as to costs.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF JUNE 2022

John M. Mativo

Judge

Delivered in the absence of the parties.

