



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**ELECTION PETITION NO. 3 OF 2017**

**JONAS MISTO VINCENT KUKO.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION OF KENYA...1ST RESPONDENT**

**STANLEY KIPKOSGEI KIPKORE, RETURNING OFFICER -**

**SABOTI CONSTITUENCY.....2ND RESPONDENT**

**CALEB AMISI LUYAI.....3RD RESPONDENT**

**RULING**

1. This is a ruling on a preliminary objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the *Independent Electoral and Boundaries Commission of Kenya* and *Stanley Kipkosgei Kipkore* who was the Returning Officer for Saboti Constituency in the parliamentary elections held on 8<sup>th</sup> of August 2017.

2. It may be important to note at this juncture that the objection was filed on 15<sup>th</sup> December 2017 after the petition had proceeded for hearing and the court had heard a total of eleven witnesses. The late filing of the objection is however insignificant since it is trite law that preliminary objections can be filed at any stage of the proceedings before judgment is pronounced but it is always good practice for parties to file such objections at the earliest opportunity.

3. That said, I now wish to turn to the substance of the objection. The objection challenges the validity or competence of the petition filed by *Jonas Misto Vincent Kuko* on 6<sup>th</sup> September, 2017 on grounds that it offends the provisions of *Rule 8(c) and (d) of the Elections (Parliamentary and County Elections) Petition Rules* (hereinafter the *Election Petition Rules*) and that it is incurably defective, frivolous and vexatious.

4. The court directed that the objection be served on the petitioner and the 3<sup>rd</sup> respondent and that each of the parties do file skeleton written submissions canvassing their respective positions on the issues raised by the objectors.

The 3<sup>rd</sup> respondent was the first to file his written submissions on 8<sup>th</sup> January, 2018 followed by the objectors who filed theirs on 11<sup>th</sup> January 2018 while those of the petitioner were filed on 16<sup>th</sup> January, 2018.

5. The objection was argued interparties on 17<sup>th</sup> January, 2018 when learned counsel *Mr. Kiarie* for the petitioner; *Mr. Akenga* for the objectors and *Mr. Oluoch* for the 3<sup>rd</sup> respondent highlighted their respective written submissions. The 3<sup>rd</sup> respondent supported the objection while the petitioner strenuously opposed it.

6. I have very carefully considered the preliminary objection, the oral and written submissions made on behalf of each of the parties and all the authorities cited. I have also scrutinized the petition and the supporting affidavit.

7. Having done so, I find that the main issue for determination before me is whether the petition as filed is incurably defective and incompetent for want of compliance with the provisions of *Rule 8(c) and (d) of the Election Petition Rules*. *Rules 8(c) and (d)* prescribes the form and content of election petitions. They provide inter alia that election petitions should disclose the impugned results and the date of declaration of those results which the petitioner in the instant petition allegedly failed to do.

8. In their submissions, *Mr. Akenga* and *Mr. Oluoch* advanced the view that the *Elections Act* and the *Election Petition Rules* are anchored on *Article 87 of the Constitution* and that the requirements of the rules that regulate the content of an election petition are mandatory; that petitioners should strictly comply with *Rules 8(c) and (d) of the Election Petition Rules* and that failure to do so renders a petition incurably

defective and a candidate for striking out.

9. Learned counsel for the respondents further emphasized the rationale for the requirement regarding disclosure of the date of declaration of results which is to assist the court and the parties determine whether a petition was filed within or outside the 28 days period prescribed by the constitution. In their view, failure to comply with the requirements of *Rule 8* and *12* of the *Election Petition Rules* cannot be excused as a procedural technicality under *Article 159* of the *Constitution*. They urged the court to find that the petition herein did not disclose the results of the disputed election and the date of declaration of those results and was therefore incompetent. They invited the court to strike it out with costs.

For these propositions, both counsels relied inter alia on the authorities of *John Mututho V Jayne Njeri Kihara & 2 others (2008) eKLR*; *Martha Wangari Karua & another v IEBC & 3 others (2017) eKLR*; *Mbaraka Issa Kombo v IEBC & 3 others (2017) eKLR* and *Mwamlole Jchappu Mbwana v IEBC & 4 others*.

10. On his part, *Mr. Kiarie*, learned counsel for the petitioner submitted that contrary to the respondents averments, the petition disclosed the results of the contested election in paragraph 7 to 9 and the date of declaration of those results in paragraph 20(a) of the petition; that failure to comply with the Rules did not automatically render a petition incurably defective as *Rule 5* of the *Election Petition Rules* specifically empowers the court to invoke its discretion to determine the effect of non-compliance depending on the circumstances of each case; that this discretion must be invited through an application and not by way of a preliminary objection.

11. To buttress his submissions, counsel relied on several decisions by the High Court in which the court exercised its discretion and declined an invitation to strike out election petitions on grounds of non-disclosure of results and the date of declaration of results. These are; *Caroline Mwelu Mwandiku v Patrick Musimba & 2 others (Machakos) Election Petition No. 7 of 2013*; *Sarah Mwangudza Kai v Mustafa Idd Salim & 2 others (Malindi) Petition No. 8 of 2013*; *William Kinyanyi Onyango v IEBC & 7 others Election Appeal No. 2 of 2013* and *Washington Jakoyo Midiwo v IEBC & 2 others (Siaya) Election Petition No 2 of 2017*.

Counsel urged the court to find that the objection lacked merit and dismiss it with costs.

12. A reading of the foregoing authorities' reveals that two schools of thought have emerged in the High Court regarding the interpretation of *Rules 8(c)* and *(d)* of the *Election Petition Rules*.

The first school of thought is the one exemplified by the judges who decided the cases cited by the objectors and the 3<sup>rd</sup> respondent who adopted a narrow and strict interpretation of the Rules holding that the requirements prescribed therein are mandatory and must be complied with and that non-compliance rendered an election petition incurably defective and incompetent.

There is also the liberal approach taken by the judges in the cases relied on by the petitioner who take the view that compliance with the Rules though desirable is not mandatory; that in the event of non-compliance, the court can exercise its discretion in the interest of administering substantive justice depending on the facts and circumstances of each case; that failure to comply can be excused under *Rule 5(1)* of the *Election Petition Rules* and *Article 159* of the *Constitution* if no prejudice is occasioned to the opposing party.

13. It is pertinent to note that in all the above authorities, the petitioners had either completely failed to comply or had partially complied with the requirements of *Rule 8* and *Rule 12* of the *Election Petition Rules of 2017* or their equivalent in the *Election Petition Rules of 2013* (now repealed). Fortunately for me, having carefully perused the petition, I find that it is not necessary for me in this case to consider whether or not the requirements of *Rule 8(c)* and *(d)* are mandatory or the effect of non-compliance with the same. I say so because a reading of the petition clearly reveals that the petitioner fully disclosed the results of the contested election and the date the results were declared.

In paragraph 7 and 8 of the petition, the petitioner specifically stated the names of the eight candidates who participated in the election and the votes garnered by each candidate.

In paragraph 10, he proceeded to disclose the number of votes on the basis of which the 3<sup>rd</sup> respondent was declared the winner of the election; the number of votes that were casted in his favour and the winning margin.

14. With regard to the date of declaration of results, I agree with *Mr. Kiarie's* submissions that the date was disclosed in paragraph 20(a) of the Petition. Though it is true that this disclosure was contained in the prayers by the petitioner, it is my view that this disclosure constituted sufficient compliance with *Rule 8(d)* of the *Election Petition Rules* because besides the fact that prayers are also part and parcel of a petition, paragraph 20(a) referred to the contested election and the date the 3<sup>rd</sup> respondent was declared the winner thereof.

15. Having found as I have above, it is my conclusion that the petitioner fully complied with the requirements of *Rule 8(c)* and *(d)* of the *Election Petition Rules*. Consequently, it is my finding that the petition is competent and properly before the court.

16. Finally, it is important to note that though *Mr. Akenga* submitted at length on the alleged non-compliance of *Rule 12* of the *Election Petition Rules* and the effect thereof, the Rule was not invoked at all in the preliminary objection. The objection did not challenge the validity of the affidavit supporting the petition in any way. And given that as a general rule parties are bound by their own pleadings, I did not find it necessary to make any findings on the validity or otherwise of the supporting affidavit.

17. For all the foregoing reasons, I am satisfied that the preliminary objection dated 15<sup>th</sup> December 2017 is devoid of merit. It is accordingly dismissed with costs to the petitioner.

It is so ordered.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at KITALE this 24<sup>th</sup> day of January, 2018**

In the presence of;

Mr. Kiarie for the Petitioner

Mr. Akenga for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Mr. Oluoch for the 3<sup>rd</sup> Respondent

Miss Sylvia – Court Assistant