



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
ELECTION PETITION NO. 13 OF 2017
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)

BETWEEN

DR. GEORGE MBOGO OCHILLO AYAKO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

CHARLES KIPROTICH M.....2ND RESPONDENT

ZAKARIA OKOTH OBADO3RD RESPONDENT

RULING NO. 2

1. The 3rd Respondent has raised a preliminary objection dated 25/11/2017 which has the following grounds namely;

(a) The petition dated 5/9/2017 and filed on 7/9/2017 is not signed by the petitioner and or specific person duly authorized by him contrary to Rule 7(3) (a) of the Rules.

(b) The affidavit filed in support of the petition sworn on 5/9/2017 and filed on 7/9/2017 does not state the results of the election in dispute contrary to Rule 15(1) of the Election Rules.

(c) The affidavit by the petitioner in support of the petition as well as those of 65 witnesses sworn on 5/9/2017 does not comply with Rule 15(8) of the Election Rules 2017 as the respective jurats does not state where they were taken in line with Section 5 of the Oaths and Statutory Declaration Act.

(d) The petitioner did not enjoin the Deputy Governor as a party in this petition.

2. Both the 1st and 2nd Respondents as well as the 3rd respondent argued in support of the preliminary objection. I have read extensively the written as well as the oral submissions made in favour of the preliminary objection. The petitioner has equally opposed the same vide his written and oral submissions. The parties have separately filed rival authorities which I have taken time to peruse and analyse.

Analyse and Determination

3. On the first ground the applicant argued that the petition was not signed by the petitioner or specific duly authorised agent. This according to the applicant was contrary to Rule 7(3) of the Elections (Parliamentary and County Elections) petition Rules 2017. I think the proper Rule should be 8(3) (a).

4. Rule 8(3) (c) Provides that a petition shall be signed by the petitioner or by a person duly authorised by the petitioner.

I have perused the petition signed on 5/9/017 and the same is signed by “Nyamori Nyasimi & Co. Advocates” and they have provided the telephone number as 01717 192149.”

5. My respectful view is that the said law firm was and is still acting for the petitioner. If indeed there is any dispute as to the existence or

otherwise of the evidence would be required to be adduced. The moment this would be required then it ceases to be a preliminary point of law as stipulated in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors (1969) E.A. 696*.

6. Does the law firm of Nyamori Nyasimi & Co. exist?

To the extent that no evidence has been adduced otherwise I find that it is the proper agent authorised by the petitioner as anticipated in Rule 8(3) (c) (Supra).

In any case Rule 8(1) (f) clearly indicates that the address of service shall be the petitioners advocate.

7. The other related argument is that the jurat in the affidavit of the petitioner in support of the petition as well as those of the 65 witnesses does not state the place of swearing.

8. I have perused the affidavit of Dr George Mbogo Ochillo Ayako sworn on 5/9/2017 in support of the petition and the jurat thereof state that it was sworn at Kisii before one Jack Omondi Bunde, Advocate and commissioner of oaths.

9. A sample of those affidavits by the witnesses shows that they were signed at Migori before an Advocate who was equally a Commissioner for oaths. In my view the affidavits on board are well explained and commissioned. It is infact on record that during cross-examination of some of the witnesses the respondent questioned them on where they signed their affidavits. Some said in Kisii while other stated Awendo. While this could be an arguable argument, the moment it required further explanation, the same ceases to be a preliminary objection but an issue which can be taken up after full trial. In any case the substantive affidavit by the petitioner clearly explains within the jurat the place of commissioning.

10. I respectively do not find this argument to be a pure issue of law but instead a mixture of both law and fact hence my disapproval of the same falling within the category of a preliminary objection as anticipated in the *Mukisa Biscuit case (Supra)*.

11. Rule 12(2) of the Election (Parliamentary and County Elections) Petition Rules 2017 provides that

12. 12(2) An affidavit in support of a petition under sub rule (1) shall state:-

(f) The name and address of the advocate, if any, acting for the petitioner which shall be the address of service.

13. As stated earlier the same is clearly spelt out in the petitioner's affidavit sworn on 5/9/17 and filed on 7/9/2017.

14. The applicant has also raised an objection that the affidavit in support does not state the disputed results contrary to Rule 15(1). This was countered by the petitioner argument that the same was raised in the supplementary affidavit.

15. The petitioner does contest the disputed results. The supplementary affidavit contains the attachments of Form 37C which echos paragraph 91 of the Petition.

16. Although the Rules requires that the results be tabulated both in the affidavit as well as the petition I do not think that failure to tabulate the same in the affidavit is fatal. The substantive evidence after all is contained in form 37C which is already on record. The tabulation was well captured in the petition. Does this warrant a dismissal of the petition? I do not think so. In any case the parties have proceeded extensively in the matter and non has argued that they cannot get the results. This in my view does not go to the root of the case as the results are clearly available for all and sundry to see.

17. The final grounds raised by the 3rd respondent is on the issue of the failure to include the Deputy Governor as a party in this petition. This argument is still virgin in our jurisprudence and the High court has given two varying decision. On the other hand some courts perspective is that they should be included while others find that they are not a necessary party.

18. The applicant relied on the case of *Mwamlole Tchappy Bwana Vs IEBC and 4 others Mombasa High Court Election petition NO. 5 of 2017* and the petitioner relied on the *Wavinya Ndeti & Another Vs IEBC Machakos High Court Election petition NO. 1 /2017 as well as that of Hassan Omar Hassan & Another Vs IEBC Mombasa High Court petition No. 10/2017*.

The same position obtains in the *Election petition No. 23/2017 Japheth Munoko & Another Vs. IEBC & Another and Mike Sonko*.

19. Article 180 (5) of the Constitution provides as follows in respect to the office of the Deputy Governor.

“Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor.

180(6) the Independent Electoral and Boundaries commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.”

20. My view is that this is not an elective office. The drafter of the Constitution did not anticipate that both the Governor and the Deputy Governor should have been elected altogether. My understanding of the aforesaid Articles of the Constitution. presupposes that the Deputy Governor would be nominated at the whims of the Governor. The governor had to do this prior to the Election date and submit his name to

IEBC. This being the case how can he be termed elected yet he was purely nominated by the governor? As a matter of fact the electorates in the county, and for this matter Migori County did not have a hand in his nomination by the Governor.

21. If the electorate were required to have a say then they would have been given the liberty to elect him or not as of first instance.
22. Infact the deputy governor is an “appendage” to the governor loosely speaking. The governor however once he nominates him must live with the consequences. If for instance he decides to insubordinate him or be disloyal, he has no option but to live with it. For the ordinary wananchi in the county, they also have to tolerate the governors nominee.
23. The drafters of the Constitution should have had no difficulty in stating clearly that the deputy governor should be elected and not nominated by the governor. In my considered view, the moment it delegated the authority of appointment of the deputy governor to the governor, then it ceases being an elected office.
24. As a matter of fact during the election there is no requirement that one has to elect both the governor as well as the deputy as well as the deputy governor. Even if there was such a requirement, the same was ousted by the fact that the deputy governor was nominated by the governor and for that matter the views of the voter was not consulted.
25. The same argument can be applied in the argument by the applicant that failure to include the deputy governor violates his rights under Article 50 of the Constitution, that is “fair hearing.”
26. I listened to this argument herein very keenly and my question is whose rights have been violated? How can ones rights be violated, If he has not brought himself to the per view of this case.
27. Naturally, the deputy governor Migori County must be sitting pretty in his office crossing his fingers that this petition against his boss will not succeed so that he can enjoy the office he has been nominated to. This matter is already in public domain and of public interest. If this is so why does he keep his peace or quite without jumping into the case assuming his rights have been violated?
28. Equity does not aid the intolent. In any event one of the parties, and for this matter the respondents should have applied for the deputy governor to be included as a 3rd party herein or an interested party.
29. Consequently in the absence of such an application I do not think it is necessary for this court to determine that a reluctant party whose rights are supposedly “violated” be brought on board. If for example he is condemned to meet the costs, who shall pay for him? As the old adage goes, “let the sleeping dog lie.”
30. Election Act Section 2 defines an election as “a Presidential, parliamentary or County election and includes a by election while a County election is defined as one of the election of a County governor or a member of a County assembly. A deputy governor does not fall within this definition. There was no difficulty in the drafters of the said act to have clearly stated that such election ought to include the deputy governor.
31. A clear reading of the Election Act does not envisage that a certificate is issued to the deputy governor. If this was the case, he should have been made a party as in the instant case the certificate to be impugned is that of the Governor. The governor as a matter of fact does not issue his deputy with any certificate.
32. The court in the *Mike Mbuvi Sonko case (supra)* stated that;

“ Respecting the argument that removal from office under Article 182(1) € of the Constitution includes removal as a result of a nullification following a successful election petition as this court was urged to find , it would mean that the Deputy Governor would be entitled to take over office, from the governor as provided for under Article 182 (2). This proposition does not append to this court. This is because the consequences following a successful election petition are different from those contemplated under Article 182 of the Constitution no vacancy exists after nullification, while under Article 182 a vacancy exists hence the assumption of office by the Deputy Governor. Once an election is nullified the Governor and his deputy no longer have the legal mandate to hold their respective positions and therefore the Deputy Governor cannot assume the office.”

33. I would not agree more. Although both decisions by the courts of concurrent jurisdiction differ, they do not bind this court but persuasive . My humble view is that the deputy governor is not a necessary party in this petition. In any event even if he was to be a party what evidence would he provide to support or oppose the petition. Needless to say the petitioner had no hand in his nomination by the governor.

34. In dismissing the preliminary objections raised by the 3rd respondent it shall be worthwhile to adopt the line taken by the *Court of appeal at Nairobi in the application No. 228/2013.*

Nicholas Salat Vs IEBC & Others, where the court stated that;

“The power to strike out pleadings and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. Yet the period prior to 2010, when the overriding objective principle and the Constitution were promulgated, striking out pleadings, as demonstrated by the cases cited by the respondents, for reasons that were purely technical was the rule rather than the exception. And this court perfected it. This is demonstrated by the brief (1/4 page) decisions cited by the Respondents in

35. Deviation from and lapses in form and procedure which do not go to the jurisdiction of the court, or to the roots of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction caused no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provision of procedural law which at times create hardship and in fairness.

36. The general trend, following the enactment of Section 1A and 1B of the Civil Procedure Act, Section 3A and 3B of the Appellate jurisdiction Act and Article 159 of the Constitution is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds as will shortly be demonstrated. This trend has now been adopted by recent legislations and procedural rules. Section 80(1) (d) of the Elections Act, Rule 4 of the Elections (Parliamentary and County) Election Petition Rules 2013 are some such development. This appears also general direction in many other jurisdiction.”

37. Section 80(1) (d) state that;

(1) “An election court may, in the exercise of its jurisdiction-

(d) decide all matters that come before it without undue regard to technicalities.”

38. In the premises, the issues surrounding the affidavits as raised by the preliminary objection herein in my view and as clearly stated above does not go to the root of the petition. Equally the non-inclusion of the deputy governor did not prejudice the petition nor the said person in any way.

39. The preliminary objection is hereby dismissed.

Costs shall abide the outcome of the petition.

Delivered, signed and dated at Migori this 12th day of January, 2018.

H.K. CHEMITEI

JUDGE

In the presence of:

Odhiambo & Nyasimi for the Petitioner

Ondiek & Sagana for the 3rd Respondent

Midenga for Onchwaa for the 1st and 2nd Respondents

Court clerk: - Nyauke

Ruling delivered in open court.