



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELECTION APPEAL NO. 1 OF 2018

SOFIA GALGALO.....APPELLANT/RESPONDENT

VERSUS

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....RESPONDENT/APPLICANT

ORANGE DEMOCRATIC MOVEMENT.....INTERESTED PARTY

Appeal from the ruling/order of the Chief Magistrate's Court at Isiolo (Hon. S.M Mungai) delivered on 5th January, 2018

In

ISIOLO ELECTION PETITION NO. 1 OF 2017

J U D G M E N T

1. The appellant, **Sofia Galgalo**, filed a petition in the Magistrates' Court in Isiolo challenging the nomination for the Member of County Assembly Isiolo County gender top up that was gazetted by the respondent.
2. Before the petition could be heard, the respondent lodged an application dated 30th October, 2017 to strike out the petition on the grounds, inter alia, that it was filed out of time. By a ruling made on 5th January 2018, the trial court acceded to the application and struck out the petition on the ground that it was served out of time.
3. Being aggrieved by the said ruling, the appellant lodged this appeal setting out nine grounds which can be collapsed into three as follows:-
 - a) that the trial court erred in failing to find that the respondent was not duly served with the petition;
 - b) that the trial court erred granting prayers that were not sought; and
 - c) that the trial court erred in failing to consider the submissions of the appellant thereby arriving at a wrong decision.
4. On the other hand, the respondent filed an application dated 5th March, 2018 seeking to strike out the appeal for the reason that the record of appeal was filed out of time and that the said record did not contain a signed and certified copy of the ruling appealed from and a certified copy of the decree/order.
5. Due to time limitations, the court ordered that both the application and appeal be heard together. Mr. Mutuma Learned Counsel for the appellant argued all the grounds of appeal as one. Counsel submitted the trial court failed to appreciate that what was before it was not an election petition per excellence but a petition against nomination; that the election petition rules 2017 were not strictly applicable. That the time for service of the petition started to run after the file was received at Isiolo and not earlier. That the delay of Gazetting the Isiolo Court as an election court prejudiced the appellant.
6. Counsel further submitted that on the instructions of the respondent, the petition had been served upon Messrs. Mwangi Wahome & Company, Advocates for the respondent, a fact that had not been denied. That on the authority of **Nicholas Kiptoo Arap Korir vs. IEBC (2015) Eklr.**, since the respondent had suffered no prejudice, nothing turned on the late service.

7. On his part, Mr Gikonyo, Learned Counsel for the respondent submitted that, the petition was challenging an election undertaken under the August, 2017 general elections; that under **Rule 10 of the Election Petition Rules** service was to be effected within 7 days of the filing; that in the instant case, service was effected after 52 days and it was effected on and Advocate instead of the party itself. That even after the Isiolo Court dealt with the file on 16th October, 2017, the petition was not served until 30th October, 2017 which was well out of time. That on the authority of **Florence Akinyi vs. IEBC & 2 Others [2017] eKLR**, there had to be instructions before such service could be effected.

8. On the Motion to strike out the appeal, Mr. Gikonyo submitted that the Record of Appeal was filed on 21st February, 2018, 9 days out of time contrary to **Rule 34(b) of the Rules**. The case of **Wavinya Ndeti vs. IEBC & 4 Others [2014] eKLR** was cited on the significance of prompt and expeditious resolution of election petitions.

9. In rejoinder, Mr. Mutuma submitted that since the Memorandum of Appeal was filed on time, nothing turns on the late filing of the Record of Appeal as the latter is only for convenience and is not a statutory requirement. That in any event, if Sundays and public holidays are excluded in terms of **Order 50 of the Civil Procedure Rules (“the Rules”)**, the time for filing would have been 20th February, 2018 and the 2 days delay was a mere technicality. The case of **Nick Salat (supra)** was cited in support of the submission that since the late service had not prejudiced the respondents, it could be excused.

10. This being a first appeal, this court has the duty to re-evaluate the evidence afresh, assess the same and make its own conclusions. See **Selle v. Associated Motor Boat Company Ltd [1968] EA 123**.

11. Having heard both the Motion and the appeal itself, this court does not consider it necessary to make any findings on the Motion in view of the findings arrived at on the main appeal. Further, since all the grounds were argued as one, the court likewise will deal with the appeal as a whole.

12. The appellant submitted that this was not an election petition *per se*. That this was a mere petition challenging a nomination of a candidate to the Isiolo County Assembly. This in my view was akin to a challenge on the jurisdiction of the trial court in handling the matter before it as an election petition.

13. In the case of **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR** the Supreme Court of Kenya held:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

14. **Article 177** of the Constitution provides for the membership of county assembly while **Article 90** provides for how IEBC how to conduct and supervise the election of the nomination seats. **Section 74 of the Elections Act** donates power to IEBC to resolve disputes arising from nominations. The question that arises is; at what point does the court’s jurisdiction commence in the determination of disputes relating to the nomination of members of a county assembly?

15. In **Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR**, the Supreme Court held:-

“It is clear from the foregoing provisions that the allocation of nomination seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazetting of the nominees’ names by the IEBC, as an integral part of the election process.

The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question...

It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.

16. In the present case, the candidates who were nominated for the August, 2017 general election were gazetted on 28th August 2017. That signified the end of the electoral process through nomination. Accordingly, everything thereafter shifted any question as to the validity of the results to the election courts. In this regard, it did not matter whether it was an election by nomination or by ballot, an election court is guided by the **Election Act, Rules and Regulations** which are to be applied strictly and not with modifications as contended by the Petitioner. Accordingly, the trial court cannot be faulted for applying the **Election Rules** strictly.

17. From the record, the petition was filed on 8th September, 2017. The petitioner contended that she filed the petition at Nairobi because there was no election court in Isiolo. One wonders whether by then the Chief Magistrates Court, Nairobi had been gazetted as an election court. Be that as it may, Isiolo Court was gazetted as an election court on 6th October, 2017.

18. The court file was forwarded to Isiolo Court on 11th October 2017. The Isiolo Court began to deal with the file on 16th October, 2017. The advocates for the respondent were appointed on 14th November, 2017 as per the notice of appointment. They were served with the

petition on 30th October, 2017 whereby they filed the respondent's response on 23rd November, 2017.

19. On the issue of direct service, the petitioner contended that the petition was served on the respondent's directly at their offices in Anniversary Towers who directed that it be served their advocates now on record. **Rule 10 (1) and (2) of the Elections (Parliamentary and County Elections Petition Rules) 2017 ("the Rules")** provides that:-

“(1) Within seven days after the filing of a petition, the petitioner shall serve the petition on the respondent by –

(a) direct service; or

(b) an advertisement that is published in a newspaper of national circulation.

(2) Service on the Commission shall be by -

(a) delivery at the constituency, county or head office of the Commission;

(b) delivery at such other office as the Commission may notify; or

(c) an advertisement that is published in a newspaper of national circulation.”

20. There was no evidence that the Appellant did serve the respondent directly as alleged. The name of the alleged officer who directed the process server to the Advocates on record was not disclosed for verification. In any event, the said advocates had not yet been appointed for them to be deemed to be agents of the respondent. The holding in the case of **Florence Akinyi v. IEBC and 2 Others (supra)** applies on all fours in this case. There was no direct service as required by the rules.

21. As to timely service, **Rule 10** of the Rules provides that the petition ought to be served upon a respondent seven days after filing. In this case, there is no dispute that the petition was served on 30th October 2017. According to the appellant, the delay was occasioned by the failure to gazette the Isiolo court as an election court. The appellant contended that the trial court should have calculated the time from when the file was received by the Isiolo Court and not the 8th September, 2017. Counsel for the Appellant submitted that in determining the appeal, this court should be guided by **Order 50 of the Civil Procedure Rules** which provides that Sundays and public holidays do not count.

22. Election petition is of a special proceeding that originate from the Constitution. **Article 87 of the Constitution** provide for the enactment of legislation that establish mechanisms for timely settling of election disputes. This brought forth the **Elections Act No. 24 of 2011** and thereafter **the Election Rules and Regulations**.

23. As to the calculation of time, this court is not persuaded that **Order 50 of the Civil Procedure Rules** apply. Since electoral disputes originate from the Constitution itself, one does not need to look any further than **Article 259 (5) (6) and (7)** of the Constitution. Under that provision, Sundays and public holidays cease to count when the time for doing something is limited to less than six days. In the present case, the time given is seven days and therefore Sundays and public holidays are not to be excluded.

24. It was the appellant's contention that **Article 159** of the Constitution places more emphasis on substantive justice as compared to procedural justice taking into consideration election petitions which affect the public. In **Aluodo Florence Akinyi v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** D. S Majanja J, held that:

“In coming to this conclusion the Court dismissed the argument that Article 159(2)(d) of the Constitution, which obliges the court to administer justice without undue regard to technicalities, could cure the petitioner's situation as failure to effect service was fundamental to the process and a petition that was not served could only suffer the fate of being struck out.”

25. In **Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR** the Court of Appeal held that:

“As we have shown, service of the Petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same. The learned judge was clearly wrong in his holding as he misdirected himself on the law applicable where he had found as fact that the 2nd and 3rd respondents were not served.”

26. In this regard, this court holds that, the time for service started to run from the date of filing of the petition. Nowhere in the statutes or rules is there a requirement that a petition has to be filed in a gazetted election court or a petition becomes an election petition upon gazettment of a court as such. Service of the petition in this case was way out of the period permitted by law. Accordingly, the trial court was right in striking out the same and cannot be faulted.

27. As regards the criticism that the trial court failed to consider the appellants' submissions, nothing can be far from the truth. The record shows that the trial court considered and analysed all material on record before pronouncing itself. As regards the complaint that the trial court granted reliefs that were not sought, this has not seen any extra relief granted than to strike out the petition as had been sought.

28. On the complaint that the trial court erred in relying on the replying affidavit sworn by an advocate who did not have authority to swear the same, this court takes the view that since the advocate was swearing on matters before his own knowledge or as undertaken by his law

firm, there was nothing wrong or irregular with the replying affidavit and the trial court did not err in acting on it.

29. In this regard, I find the appeal to be without merit and the same is hereby dismissed with costs.

DATED and DELIVERED at Meru this 28th day of June, 2018.

A. MABEYA

JUDGE