



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
ELECTION PETITION NO. 1 OF 2013
IN THE MATTER OF ELECTIONS ACT NO. 24 OF 2011

AND

**IN THE MATTER OF ELECTION FOR MEMBER OF NATIONAL ASSEMBLY OF BUTULA
CONSTITUENCY**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF PROVISIONS OF ELECTIONS ACT
NO. 24 OF 2011**

BETWEEN

MICHAEL ONYURA ARINGO.....APPLICANT/1ST RESPONDENT

VERSUS

PHILIP OSORE OGUTU.....PETITIONER/RESPONDENT

AND

INDEPENDENT ELECTORAL AND

BOUNDARY COMMISSION (I.E.B.C)..... 2ND RESPONDENT

RETURNING OFFICER..... 3RD RESPONDENT

RULING

(Notice of Motion dated 27th August, 2015)

1. Philip Osore Ogutu was the Petitioner in Busia High Court Election Petition No. 1 of 2013, Philip Osore Ogutu v Michael Onyura Aringo & 2 others. In a judgement delivered on 9th September, 2013 Tuiyott, J dismissed the petition. On the question of costs he stated at paragraph 129 that:

“The upshot is that the entire petition is dismissed with costs. Rule 36 of The Rules empowers this Court to specify the total amount of costs payable at the conclusion of an Election

Petition. While costs will be taxed in the usual way, I do hereby cap the total costs payable by the Petitioner to the Respondents at a sum of Kshs.2,000,000.00. That will be shared equally between the 1st Respondent on one part and the 2nd and 3rd Respondent on the other part”.

2. The 1st Respondent later presented a bill of Kshs.1,114,573.00 to the Deputy Registrar for taxation. The Petitioner protested and asked for the bill of costs to be struck out on the ground that the same was in excess of the Kshs.1,000,000.00 that the 1st Respondent was entitled to as per the order of the Judge. The Deputy Registrar rejected the Petitioner’s prayer.

3. Through a chamber summons application dated 7th October 2014 the Petitioner sought orders as follows:

“1. The orders made by the Deputy Registrar on 17th September, 2014 be and are hereby set aside for want of jurisdiction.

2. The 1st Respondent’s Bill dated 21st August, 2014 be struck out as offending the Judgement of this Court dated 9th September, 2013.

3. The Honourable Court do and hereby find that the Deputy Registrar’s Order allowing the Taxation of the 1st Respondent’s Bill of Costs dated 21st August, 2014 offends Rule 34(1)(2) of the Elections Petition Rules.

4. The Honourable Court do find that the Ruling of the Deputy Registrar dated 17th September, 2014 is contrary to the Judgement of this Court dated 9th September, 2013.

5. In the alternative, the Court do order the Taxing Master to tax this Bill in accordance with the Law.

6. The costs of this application be provided for.”

4. On 16th June, 2016 the 1st Respondent failed to turn up in Court and the Petitioner’s said application was allowed with costs against the 1st Respondent.

5. Through the Notice of Motion dated 27th August, 2015 and filed in Court on 1st July, 2016 the 1st Respondent now prays for orders:

“1. THAT the Honourable Court do set aside the orders made on 16th June 2015.

2. THAT the cost of this application be provided for.”

6. The application is supported by the grounds on its face and an affidavit sworn by the 1st Respondent/Applicant’s advocate Mr. Stephen Aluoch K’opot on 27th August, 2015.

7. According to the supporting affidavit, it is the averment of the Applicant’s counsel that on the material day he was late in coming to Court as he had been arrested for speeding at Yala area along Kisumu-Busia road as he was driving to Court. His averment is that he did indeed inform counsel for the Petitioner/Respondent through SMS that he would be late in coming to Court. It is his case that he later appeared before the Judge with Mr. Kasamani for the Petitioner/Respondent who opposed the setting aside of the orders allowing the Petitioner’s chamber summons. It is the 1st Respondent’s case that allowing his notice of motion will not prejudice the Petitioner in any way.

8. The Petitioner opposed the application through a replying affidavit sworn on 11th August, 2016. His averment is that his chamber summons application dated 7th October, 2014 first came up for hearing on

28th January, 2015 but the Court was not sitting. A new date was taken in the Registry and the 1st Respondent's counsel was served with a hearing notice. On 22nd April, 2015 when the matter came up for hearing there was no attendance on the part of the 1st Respondent and the matter was put off to 16th June, 2015 when the Court allowed his application after waiting for the counsel of the 1st Respondent/Applicant up to 10.30am.

9. The Petitioner accuses the 1st Respondent of inordinate delay in filing the instant application as he did so over one year after the orders were issued.

10. Finally, it is the Petitioner's case that this Court has no jurisdiction to review or set aside the decision of an Election Court duly gazetted for that purpose.

11. For avoidance of doubt the tussle herein does not involve the 2nd Respondent, the Independent Electoral and Boundaries Commission and the 3rd Respondent, the Returning Officer. It is a dispute between the 1st Respondent Michael Onyura Aringo as the Applicant and Philip Osore Ogutu as the Respondent.

12. In my view, two issues present themselves for my determination: firstly, whether this Court has jurisdiction to entertain the current application and secondly, whether the application should be allowed.

13. Jurisdiction is everything and without jurisdiction a court is not tooled to proceed with a matter. Where a question of jurisdiction is raised the court needs to address it before proceeding to the substance of the matter.

14. The Petitioner/Respondent is indeed correct that an election court is specifically and specially gazetted to hear a particular electoral dispute. The jurisdiction of a particular election court cannot be shared with any other court.

15. However, the matter before this Court is one that challenges the acts of the Deputy Registrar as a taxing master. It is a taxation dispute and this Court has power to deal with the matter. I therefore find that the claim by the Petitioner/Respondent that this Court has no jurisdiction lacks merit. The same is thus dismissed.

16. On the application proper, I note that the Applicant/1st Respondent has given very plausible reasons as to why counsel was not in Court on 16th June, 2015 when the chamber summons of the Petitioner/Respondent was allowed.

17. The Petitioner/Respondent has however demonstrated and this Court has witnessed for itself that the Applicant/1st Respondent has no desire of pursuing his application to set aside the order of 16th June, 2015. Although the instant application and the supporting affidavit were drafted and signed on 27th August, 2015 about 70 days after the dismissal of the 1st Respondent's chamber summons, it took the 1st Respondent over one year from 16th June, 2015 until 1st July, 2016 when he filed the application. No reason was given for this inordinate delay. Electoral matters are matters that ought to be attended to with utmost urgency. Preparing the application 70 days after the orders amounted to delay but filing the same one year later is unforgivable.

18. On 3rd October, 2016 this Court in the presence of Mr. Kasamani for the Petitioner/Respondent and Mr. Nyegenye holding brief for Mr. K'opot fixed the application for hearing on 13th March, 2017. This was done after the Court had waited for Mr. K'opot up to midday as he was said to be on the way from Kisumu. He never turned up.

19. On 13th March, 2017 counsel for the Applicant/1st Respondent failed to turn up without giving any reason. The hearing of this application then proceeded in the absence of the Applicant and his counsel.

20. The time taken by the Applicant/1st Respondent before drafting and filing his application and his attitude towards the application after it was filed can only serve to demonstrate that he no longer has interest in his application.

21. I agree with the Petitioner/Respondent that the Applicant/1st Respondent is indeed guilty of laches and no amount of time extended to him will be of any help to him.

22. The only available answer to the application dated 27th August, 2015 is a dismissal and that is my answer to the said application. The same is dismissed with costs to the Petitioner/Respondent.

Dated, signed and delivered at Busia this 30th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT