



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
ELECTION PETITION NO 1 OF 2017.

MILLITONIC MWENDWA KIMANZI KITUTE.....PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

2. THE KITUI EAST CONSTITUENCY

RETURNING OFFICER.....2ND RESPONDENT

3. NIMROD MBITHUKA MBAI.....3RD RESPONDENT

RULING

Introduction

The Petitioner herein was a candidate in the elections for Member of Parliament for Kitui East constituency, in general elections held by the 1st Respondent on 8th August 2017. He filed an Election Petition on 5th September 2017 challenging the election of the 3rd Respondent as Member of Parliament for Kitui East Constituency in the said elections. The 3rd Respondent subsequently also filed an application by way of a Notice of Motion dated 12th October 2017, seeking orders that the Petitioner's Petition be struck out *in limine*, that the affidavit in support of the Petition and witnesses affidavits be struck out, and that this Court be pleased to make such other orders as it may deem just and expedient.

The main grounds for the application were that the Petition was served out of the prescribed timelines for service, does not disclose any reasonable cause of action and is an abuse of the process of Court. The application was supported by an affidavit sworn on the same date by the 3rd Respondent, and a further affidavit that he swore on 16th October 2017.

This Court directed during the pre-trial conference held on 5th October 2017 that the Petitioner and 1st and 2nd Respondents file and serve their responses to the 3rd Respondent's application, and that the said application would be canvassed by way of oral submissions. The Petitioner subsequently filed a replying affidavit to the said application sworn and filed on 16th October 2017. The 1st and 2nd Respondents did not file any response to the application.

The respective cases by the Respondents and Petitioner as stated in their pleadings and submissions are hereby set out hereinbelow.

The 3rd Respondent's Case

Mr. Wilfred Nyamu, the counsel for the 3rd Respondent, conceded during the hearing of the application on 17th October 2017 that the Petition was served within time, in line with Rule 10 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017. Rule 10 requires the Petitioner to serve a Petition on the Respondents within fifteen days after the filing of the Petition. It was noted and admitted by the 3rd Respondent in this respect that the Petition herein was filed on 5th September 2017 and served within time on the Respondents by way of advertisement in *The Standard* newspaper on 13th September 2017. A copy of the said advertisement was attached to the 3rd Respondent's further affidavit.

Mr. Nyamu proceeded to urge the outstanding grounds in the 3rd Respondent's application, which are that the Petition does not disclose any reasonable cause of action and is in abuse of the process of Court. The 3rd Respondent's arguments in this regard were with respect to the various grounds alleged by the Petitioner in the Petition and supporting affidavit thereto.

The first was the allegation in paragraphs 45 and 46 of the Petition and paragraph 9 of the supporting affidavit, that the Petitioner's agents were denied access to Forms 34A and Forms 34B. The 3rd Respondent submitted that no evidence to this effect was tendered by the Petitioner's affidavits or other means. Further, that only 3 witnesses are making allegations that access to Form 35A was denied, yet one of them, Kitonga Kilungwa, in his affidavit states that he was an agent for an Independent candidate and only that the results declared were untrue.

In addition, that the said witness signed the Form 35A, according to the 1st and 2nd Respondents' Replying Affidavit to the Petition sworn on 13th September 2017 by Mwangi Kanyoria, the Returning Officer for Kitui East Constituency. The 3rd Respondent contended that all the Petitioner's affected agents ought to have filed affidavits to this effect. The 3rd Respondent attached a list of 102 Petitioner's agents whom he stated signed the Form 35A's, which was prepared from the Form 35A's provided by the 1st and 2nd Respondents. It was also averred that the Form 35B declaring the results is shown to have been signed by Davis Malombe, an agent of NARC Party, which was the Petitioner's political party.

Secondly, that the allegation by the Petitioner in paragraph 47 of the Petition and paragraph 6 of the supporting affidavit that he was physically assaulted by the 3rd Respondent is not supported by any evidence. According to the 3rd Respondent, the said allegation cannot be established without a P3 Form or Occurrence Book entry, and the Petitioner is seeking orders that he be supplied with the same as an afterthought.

Thirdly, that in paragraph 49 of the Petition and paragraph 7 of his supporting affidavit, the Petitioner states that his motor vehicle registration number KBY 367U was detained by the OCPD Sombe Police Division, yet the orders issued on 28th August 2017 and obtained on the same day show the vehicle was detained on 15th August 2017, after the holding of the election.

Fourthly, that the allegation by the Petitioner in paragraph 49 of the Petition and paragraph 11 of the affidavit in support of the Petition that the 3rd Respondent told the residents of the creation of a new district in his campaigns, which district was subsequently created to get him voters is not supported by any evidence. Furthermore, that the creation of a new district is also not within the control and mandate of the 3rd Respondent.

Fifthly, that no corroborating evidence was provided for the allegation in paragraph 50 of the Petition and paragraph 12 of the affidavit in support of the Petition that a clerk and agent of the 1st Respondent by the name Morris Mbuu was arrested for distribution of ballot papers marked in favour of the 3rd Respondent. The same averment was also made by the 3rd Respondent with respect to the allegations made in paragraphs 51 and 52 of the Petition, on the objections and protests by the Petitioner to the declaration of

the results of the elections by the 2nd Respondent, and that the said election was not carried out according to the law.

Mr. Nyamu submitted that the grounds set out in paragraphs 45, 46, 47, 48, 49, 50 & 51 of the Petition are hinged on materials annexed to the supporting affidavit by the Petitioner and other witnesses, which are computer generated results whose source cannot be identified. Further, that there is no indication that they originate from any official source associated with the 1st Respondent, and are not official documents and results.

In addition, that the pictures annexed to the affidavit of one Nicholas Mutuku marked "NMI" have no certificate signed by the person who took the pictures. Reliance was in this respect placed on the requirements of sections 106B and 106C of the Evidence Act on electronic signatures.

Mr. Nyamu further submitted that at the time of filing their petition, the Petitioner ought to have brought out all the evidence they were relying upon, and they cannot now seek to rely on the 1st and 2nd Respondents Response as stated in paragraph 12 of their replying affidavit to the application.

Lastly, on the prayers sought by the Petitioner, Mr. Nyamu submitted that the Petitioner is seeking orders of ballots cast in the election, but has not specified the polling stations, nor provided any evidence laying the basis through affidavits by agents. Reliance was placed on the provisions of rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules that scrutiny and record of votes shall be confined to specific polling stations where the election results are disputed, and the Petitioner ought to have laid basis for the same.

Further, that section 82 (1) of the Election Act which provides that sufficient reason has to be shown for the scrutiny by affidavits which should specify the polling station. The 3rd Respondent submitted that the evidence of such malpractice must be stated and set out before any scrutiny and recount.

Mr. Nyamu also submitted that directions were given by the Court and parties were given timelines to file any additional affidavits and applications, and the Petitioner never indicated that they wanted to file any additional affidavits and evidence in support of their petition. In addition, that under Rules 7 and 8 of the Elections (Parliamentary and County Elections) Petitions Rules it is clear that the Petitioner should bring in all his evidence at the time of filing the Petition.

In conclusion, the 3rd Respondent stated that the Petition brought to court is in abuse of process, and is meant to disturb and interfere with the 3rd Respondent rights under Article 38 (3) (c) of the Constitution. He urged the court to dismiss the petition as it lacks reasonable cause.

The 1st and 2nd Respondent's Response

Ms M. Mwinzi, the counsel for the 1st and 2nd Respondents, associated herself with the arguments made by Mr. Nyamu in support of the application, and relied on the 1st and 2nd Respondents' Replying Affidavit to the Petition sworn on 13th September 2017 by Mwangi Kanyoria, the Returning Officer for Kitui East Constituency. She submitted that the Petition is speculative as shown by the replying affidavit to the application sworn on 16th October 2017 by the Petitioner, in which he seeks leave to respond to annexures filed by the 1st and 2nd Respondent. It is thus clear that the Petitioner did not have evidence before filing the Petition.

In addition, that the Petitioner's claim that his agents were not furnished by Form 35A is not supported by any letter to this effect to the Returning Officer or other officials of the 1st Respondent. Lastly, that the primary evidence in proving election results is Form 35 A and none of the Forms 35A that the 1st and 2nd Respondent presented have been challenged by the Petitioner. Ms Mwinzi asked the Court to find the Petition frivolous and to dismiss it.

The Petitioner's Response.

The Petitioner opposed the 3rd Respondent's application, and filed a Replying Affidavit sworn on 16th October 2017. The Petitioner averred that the issues contained in the application as regards Form 35A and 35B, and those raised by the 3rd Respondent in his supporting affidavit as regards paragraphs 46 and 47 of the Petition are matters of evidence, which can only be canvassed during the hearing of the Petition.

Furthermore, that the 3rd Respondent has not disclosed the source of his averments that all the Petitioner's agents were at polling stations and signed the Forms 35A, or of the document he annexed on the list of the Petitioner's agents who signed the Forms 35A, and that the said document should be expunged from the record.

Mr. Alphonse Mutinda, the counsel for the Petitioner, submitted that the Petitioner will file an application for purposes of seeking the orders and laying basis for the orders of scrutiny, and as there was an application to strike out the Petition that had been filed by the 3rd Respondent, it was only prudent for it to be heard first and for parties to await the outcome, before other applications can be filed.

In addition, that under section 82 of the Elections Act, this Court has powers to call an order for scrutiny of the ballot papers on its own motion and if not, the Petitioners is supposed to make that application.

It was also submitted that evidence was provided on the assault on the Petitioner in the affidavit of Steere Muli Mbuku, a witness for the Petitioner, who also annexed a copy of the court order releasing the motor vehicle belonging to the Petitioner which was detained on 9th August 2017.

Furthermore, that the Petitioner had been granted leave to file a further affidavit, which was to be filed after the filing of the 1st and 2nd Respondents' Further Affidavit. According to Mr. Mutinda, most of the issues raised by the 3rd Respondent as to the Petition not showing a reasonable cause of action were to be addressed by the Further Affidavit. It was submitted that the 3rd Respondent cannot dictate to the Petitioner the number of witnesses he can call, and that the evidence of the Petitioner should be tested by way of cross-examination and re-examination during the hearing.

Mr. Mutinda further submitted that the source of the annexures to its affidavit in support of the Petition was deponed to in Paragraph 9 of the said affidavit. He explained that the annexures were documents which were downloaded from the web portal of the 1st Respondent. Further, that the Returning officer from Kitui East Constituency, Mwangi Kanyoria has not denied these documents in his Replying Affidavit filed on 14th September 2017.

In addition, that the provisions of the Evidence Act are not applicable, as the same are documents of the 1st and 2nd Respondents and not of the Petitioner. The Petitioner thus submitted that his Petition is supported by valid documents which have not been challenged by the 1st and 2nd Respondents.

Mr. Mutinda reiterated that there were irregularities in the conduct of the elections for Kitui East Constituency, as evidenced by the fact that the list of agents who signed Form 35A was from 102 polling stations, yet there are 184 polling stations in the constituency. Hence the agents for the Petitioner did not sign the Forms 35A in 58 polling stations.

Further, that the affidavit by the Petitioner witness, Kitonga Kilungwa, at paragraph 3 states that he was an agent for an independent candidate for member of County Assembly, yet the form 35A shown by the 1st and 2nd Respondent to have been signed by Kitonga Kilungwa is for member of Parliament but not for member of County Assembly.

Lastly, that it was admitted that Morris Nguu was a polling clerk for the 1st and 2nd Respondent, and that he was arrested after being caught with extra ballot papers and charged with an election offence, and that none of the Respondents have produced evidence in support of the averments that results were posted at

the entrances of polling stations.

The Petitioner denied that the 3rd Respondent's rights under Article 38 of the Constitution were being interfered with, and submitted that the Constitution allow for an election to be challenged by way of an election petition. Furthermore, that the Petitioner also enjoys the rights under Article 38 (3) of the Constitution which have been infringed by the electoral process in Kitui East Constituency. Mr. Mutinda urged the court to dismiss the 3rd Respondent's application.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner and Respondents. The issue for determination is whether the Election Petition filed herein by the Petitioner, and his witnesses affidavits should be struck out, for reasons that they do not disclose a reasonable cause of action. The Notice of Motion by the 3rd Respondent is brought pursuant to the provisions of section 80 of the Elections Act and Rule 4, 8, 10 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017. Rule 8 of the said Rules provides as follows as regards the form and contents of a petition:

“8. (1) An election petition shall state -

- (a) the name and address of the petitioner;**
- (b) the date when the election in dispute was conducted;**
- (c) the results of the election, if any, and however declared;**
- (d) the date of the declaration of the results of the election;**
- (e) the grounds on which the petition is presented; and**
- (f) the name and address of the advocate, if any, for the petitioner which shall be the address for service.**

(2) The petition shall be divided into paragraphs, each of which shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively

(3) The petition shall conclude with a statement particulars of the relief sought which may include-

- (a) a declaration on whether or not the candidate setting out the whose election is questioned was validly elected;**
- (b) a declaration of which candidate was validly elected;**
- (c) an order as to whether a fresh election should be held;**
- (d) scrutiny and recounting of the ballots cast at the election in dispute;**
- (e) payment of costs; or**
- (f) a determination as to whether or not electoral malpractice of a criminal nature may have occurred.**

(4) The petition shall-

(a) be signed by the petitioner or by a person authorised by the petitioner;

(b) be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12; and

(c) be in such number of copies as would be sufficient for the election court and all respondents named in the petition.”

Rule 12 of the said Rules provide similar requirements as to the contents of affidavits sworn by a Petitioner’s witnesses. It is notable in this respect that the 3rd Respondent is not challenging the form of the Petition and witness affidavits herein, but the probative value of their contents. He alleges that the grounds of the said Petition are not supported by the available evidence, and the pleadings filed are as a result frivolous and an abuse of the Court process.

Section 79 of the Elections Act gives this Court the power upon receipt of a Petition to dismiss the same summarily if no sufficient ground for the relief sought is disclosed. In addition, the principles applicable to the striking out of pleadings upon application are have been developed in ordinary civil cases, in which it has been established that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in **D.T. Dobie & Company (Kenya) Ltd. v. Muchina** [1982] KLR 1 at p. 9 by Madan, J.A. as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

These principles have been applied to election petitions, and in the election petition case in **Dickson Karaba Vs. John Ngata Kariuki & Another, 2010 e KLR** the election Court stated as follows in this regard:

“...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court...The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice. In my view the inherent jurisdiction of the court enables it, to exercise control over process by regulating its proceedings by preventing the abuse of the process. Inherent power is a residual power which may be used upon unnecessary event and when it is just and equitable to do so in a particular case to ensure the observance of the due process of the law or to prevent vexation or oppression or to do justice between parties and to secure a fair trial between them. It is not intended to displace a party of his matured right which is likely to result in an injustice. I think, striking out of a petition is outside the inherent jurisdiction of the High Court and it cannot be exercised to aid a party who has not suffered any prejudice or injustice due to the acts or omission of another party”.

As regards the elements of a reasonable cause of action, Anyara Emukule J. in **Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance vs Mara Conservancy & 5 Others, Civil Case No. 37 Of 2013 [2014] eKLR**, when dealing with an application seeking to strike out a plaint observed as follows:

“22. There are well established principles which guide the court in the exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being

otherwise an abuse of the process of the court.

23. A cause of action is “a factual situation the existence of which entitles one person to obtain a remedy against another person-”LETANG VS. COOPER [1965] Q.B. 232. If a pleading raises a triable issue, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures. According the Blacks’ Law Dictionary, 9th Edition at page 1644, a “triable issue” is deemed to mean “subject or liable to judicial examination and trial’ whilst “the trial” has been given to mean “a formal judicial examination of evidence and determination of legal claims in an adversary proceeding.”

The Courts in civil cases have also had occasion to rule on the issue when a pleading is considered to be frivolous and in abuse of the process of Court. In Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates vs Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 others [2015] eKLR it was held that a pleading is in abuse of the process of court when it is frivolous or vexatious or both. The Court went on to define a frivolous and vexatious pleading as follows:

“A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument. See Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffersvs. GoldsMid (1894) 1 QBD 186.

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See Bullen & Leake and Jacobs Precedents of Pleading

(12th Edn.) at 145.

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party’s pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See Willis Vs. Earl Beauchamp (1886) 11 PD 59.”

The upshot of the foregoing principles is that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issue, and if the pleading shows a semblance of a cause of action, it must be allowed to proceed to hearing.

In the present election Petition, the Petitioner alleges *inter alia* that his agents were denied access to and did not sign the Forms 35A at the polling stations; he was assaulted and intimidated; and that a clerk and agent of the 1st and 2nd Respondent was found with extra ballot papers marked in favour of the 3rd Respondent. The Petitioner filed affidavits by three witnesses to support his claims.

I note that the 3rd Respondent in his supporting affidavit to the present application that he swore on 12th October 2017, as well as in his replying affidavit to the Petition sworn on 18th September 2017, and the 1st and 2nd Respondents in the Replying Affidavit to the Petition sworn on 13th September 2017 by Mwangi Kanyoria, the Returning Officer for Kitui East Constituency, give their own version of the facts that are alleged by the Petitioner in paragraphs 46 to 51 of the Petition.

It is therefore evident that the Petitioner has raised certain triable issues in his Petition that are disputed by the 3rd Respondent, and this Court cannot resolve that dispute without hearing the parties. Likewise, the sufficiency and probative value of the Petitioner’s evidence in this regard can only be determined after

the Court has heard all the witnesses, and after a process of examination of the said witnesses during trial, as it is only then that the Court can make a finding as to the value and relevance of the evidence in proving the facts alleged by the Petitioner.

Furthermore, the question whether the documents attached by the Petitioner to his Petition and affidavits are to be considered will also depend on their relevance and admissibility, and the appropriate time to place the objection on admissibility of that evidence is at the pre-trial conference or during trial. A decision as to their admissibility or not again can only be made by this court on a case-by-case basis after argument, and as guided by the rules of evidence.

Lastly, I must comment on the arguments put forward by the parties as regards the opportunity to put in further evidence and applications in this election Petition. I must agree with the 3rd Respondent in this respect that the said opportunity is long past for the Petitioner, as this Court held two pre-trial conferences on 5th October 2017 and 13th October 2017 for parties to indicate and make any applications for additional evidence or interlocutory orders, and directions were given in this regard.

Given the time limitations for hearing Elections Petitions set by Articles 87 and 105(2) of the Constitution, parties are advised to make prudent and efficient use of the time and directions set at pre-trial conferences, to ensure expeditious hearing of the said Petitions.

The 3rd Respondent's Notice of Motion dated 12th October 2017 is accordingly found not to have merit and is hereby dismissed. The 3rd Respondent shall bear their costs of the said Notice of Motion.

Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 24TH DAY OF OCTOBER 2017

P. NYAMWEYA

JUDGE