



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

ROBERT MWANGI KARIUKI..... PETITIONER

-V E R S U S-

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

RETURNING OFFICER (TETU) CONSTITUENCY.....2ND RESPONDENT

HON. JAMES GICHUHI MWANGI.....3RD RESPONDENT

R U L I N G

On the 7th of September 2017 at 19.07 hours the humble petition of Robert Mwangi Kariuki was received at the High Court Registry, Nyeri. The respondents were 1st, the Independent Electoral and Boundaries Commission as established under Article 88 as read together with 248 and 249 of the Constitution and the IEBC Act no. 9 of 2011, 2nd, the Returning Officer, Tetu Constituency as the representative of the 1st Respondent, 3rd, the Hon. James Gichuhi Mwangi, the newly elected and sworn in member of parliament for Tetu Constituency as a party member of the Jubilee Party.

The grounds for the petition were set out on the face of the petition and in the petitioner's supporting affidavit sworn on the 7th September 2017. His main complaint was that the election of the 3rd respondent was as a result of a shambolic and irregular exercise that lacked transparency and was so unlawful that the final results were unverifiable, unclear, irregular and unacceptable.

So he urged the court make the following declarations:

- a. A declaration that the 3rd Respondent was not validly elected to the position of Tetu Constituency member of parliament position and that the declaration of the results is invalid, null and void;*
- b. A declaration that the non-compliance, irregularities and improprieties in the impugned election for Tetu Constituency the position for MP were substantial and significant that they affected the integrity and quality of the election and the result thereof;*
- c. An order directing the 1st Respondent to organize and conduct a fresh election in strict conformity with the Constitution and the Elections Act 2011;*
- d. The respondent be condemned to pay your petitioner's costs of this petition; and*

e. Such further, other and consequential orders as this Honourable Court may lawfully make.

On 11th September 2011, the firm of Wahome Gikonyo wrote to the DR seeking to be supplied with a photocopy of the Petition.

The record also shows that the returning Officer Tetu applied for the same on 15th September 2017. On 19th September the firm of Mwangi Wahome entered appearance for the 1st and 2nd Respondents. On the 21st September 2017, they filed a response to the petition.

On 27th September 2017 they filed two Notices of Motion each supported by an affidavit sworn by Mwangi Wahome advocate. The 1st one pursuant to rule 12(6), 7 and (9) of the Elections (Parliamentary and County Elections) Rules 2-17 and s. 7(2) (b) and (c) of the Elections Act seeking extension of time to file the witness statements, and the 2nd one pursuant to Rule 13 of the Elections (Parliamentary and County Elections) Rules and section 78(2) (b) and (c) of the Elections Act seeking the striking out of the petition for failure of the petitioner to deposit security for payment for costs within the stipulated time.

On 29/9/2017, Wahome Gikonyo and Company advocates for the 3rd Respondent filed a Notice of Motion under section 77(2) 78(3) and 80(3) of the Elections Act, and rules 4,10(1) 13(1) of the Elections (Parliamentary and County Elections Petitions) Rules 2017 supported by the affidavit of James Gichuhi Mwangi, seeking the dismissal of the petition for failure one, to serve the 3rd respondent within 7 days or at all, and for the petitioners failure to pay the mandatory security deposit for costs. The Deputy Registrar set the matter down for pretrial conference for the 11th October 2017 and there is an affidavit of service on record by the court process server confirming that each of the law firms on record received the notice.

The essence of a pre-trial conference is to do what is required by rule 15(1) of the Elections (Parliamentary and County Election Petition) Rules 2017, and that is;

- (a) frame the contested and uncontested issues in the petition;
- (b) analyse methods for resolving the contested issues;
- (c) determine interlocutory applications;
- (d) confirm the number of witnesses the parties intend to call;
- (e) give an order, where necessary, for furnishing further particulars;
- (f) give directions for the disposal of the suit or any outstanding issues;
- (g) give directions as to the place and time of hearing the petition;
- (h) give directions as to the filing and serving of any further affidavits or the giving of additional evidence;
- (i) give directions on limiting the volume of any copies of documents that may be required to be filed; or
- (j) make such other orders as may be necessary to prevent unnecessary expenses.

What happened? Neither the petitioner nor his Advocates on record Ng'ang'a and Associates, Advocates showed up. At 9.00 a.m. just when I was about to go to court, my court assistant came to inform me that two counsel, Mr. Mwangi Wahome for the 1st and 2nd Respondents, and Wahome Gikonyo for 3rd Respondent were in court and they were waiting for the 3rd counsel for the Petitioner, could I wait a little? I obliged them and waited till 9.30a.m. On getting to the courtroom I found Mr. Wahome Gikonyo

and Mwangi Wahome. Neither the petitioner nor his counsel was present. As at 9.35 am when we started, she had not arrived and she never did.

We proceeded to deal with the interlocutory applications as per rule 15(1) (c) above. Each counsel submitted on his application.

Mr. Wahome Gikonyo submitted that the absence of counsel for the petitioner left them in an embarrassing situation. On Monday 9th October 2017, Mr. Mwangi Wahome had taken the initiative to get in touch with her to see how they could handle the interlocutory applications. She had told him she would get back to him after consulting 'someone'. She never did and she never showed up together with her client.

Both counsel were in agreement in their submissions that the petition was good for striking out with costs on the grounds of, the absence of the petitioner and his counsel, the bareness of the petition which was without a single annexure, and the failure by the petitioner to comply with S.78 (3) of the Elections Act.

As they made their submission the unanswered question in the court room was why would a person in his right mind make the effort and expense to file an election petition and both himself and his counsel fail to show up, despite being notified of the date by the court?

These are indeed strange times and Mr. Wahome Gikonyo could be right that this petition was filed for its nuisance value only. I cannot hesitate to point out how expensive that nuisance is! It brings to mind memes found on social media of the naughty bunny suggesting the doing of a highly provocative daring act for the sake of it, and simply running away.

The 3rd respondent, whose election the petitioner was challenging was not served. I am not certain that the 1st and 2nd Respondents were served by the Petitioner either as I did not see the affidavit(s) of service. I believe the Deputy Registrar in due diligence and compliance with the law served the pre -trial conference notice on each party that was on record.

Be that as it may.

The election petition though duly filed is a mere skeleton.

The petitioner did not comply with the clear provisions of sections 77 and 78 of the Elections Act no. 24 of 2011 and rule 13 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

The rules provide that;

13. (1) Within ten days of the filing of a petition, a petitioner shall deposit security for the payment of costs in compliance with section 78 (2) (b) and (c) of the Act.

(2) The security for costs deposited under sub-rule (1) shall—

(a) be paid to the Registrar;

(b) be for the payment of costs, charges or expenses payable by

the petitioner; and

(c)...

(3) The Registrar shall—

(a) issue a receipt for the deposit under this rule;

(b) shall file the duplicate of the receipt issued under paragraph

(a) in a record kept by him or her;

(c)...

(d) ...

Section 78 (1) states clearly that;

A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this part.

The petition was filed on the 7th of September 2017. By 18th September 2017, and as at the time of the pre-trial conference, no money had been deposited to that account as required by section 78(2) which clearly stipulates;

A person who presents a petition to challenge an election shall deposit

(a)

(b) five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor;

(c) ...

The consequences of failure to comply with Section 78(3) of the same Act by depositing the amount stipulated for security for costs is fatal to the Petition. These are the clear words;

Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.

I was referred to the case **ROTICH SAMUEL KIMUTAI vs. EZEKIEL LENYONGOPETA 2 OTHERS [2005] eKLR** where the Court of Appeal examined the application of the then Section 21 of the now repealed National Assembly and Presidential Elections Act Cap 7 of the Laws of Kenya. Section 78 of the Elections Act no. 24 of 2014 is a replica of that section word for word except for the time frame which was three days then, and the amount which was Ksh 250,000.

Unlike in this, in that case the purport of the failure to make the deposit for costs was contested. Secondly the petitioner made the payment after the three days stipulated in the law. The High Court still struck out the petition. On appeal the Judges in answering the question whether the delay in paying the deposit was fatal to the petition, set out the submissions by counsel on either side.

“Mr. Majanja submits not, and relies again on the purposive construction of the statute. The purpose, in his view, was to ensure that the remedy provided by Parliament, that is, the deposit of money, was in place by the time the petition was heard. The mischief that the respondent may incur costs and expenses which cannot be recovered is thus suppressed. There was no prejudice caused by the delay, and the delay has no bearing on the remedy. On the other hand, Mr. Mukele was of the view that the time limit was a necessary precondition for exclusion of busy bodies from that vital and expensive process. That is why sub-section 3 has clear wording on the consequences for

non-compliance”

After considering the submissions, they then concluded;

*“Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory language. **“Not more than three days.... shall give”** does not admit of ambiguity or further search for the intention of Parliament. Whether or not Parliament should have enacted a further provision for seeking extension of time in appropriate cases, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. Section 21(3) provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within time was not a mere irregularity which could be waived by the parties.”*

In this case the petitioner did not make the slightest effort to pay or seek the court’s indulgence to make a delayed payment. He made NO payment, bringing himself squarely into the description (as found in the submissions in the **Rotich** case), of busy bodies who needed to be kept out of these expensive proceedings, and for whom the rule was made.

Section 78(1) gives the mandatory period for the deposit as 10 days after the filing of the petition, in the sum of Ksh. 500,000. The petitioner failed to abide by that provision of the rules.

It is apparent from the record, and the petitioner’s conduct that he had no intention of prosecuting this petition and may as well have been a busy body. Mr. Wahome for the 3rd respondent put it quite well, that this petition was filed for its nuisance value. What is not in doubt is the clarity of Parliament’s intention in s. 78 and the consequences of noncompliance. That failure to make that deposit would render the petition dead on arrival. There can only be one outcome, failure to make the deposit in time is fatal to the petition with costs to the respondents.

The petitioner may well argue that he never served the respondents. However, it is in the affidavit of the 3rd Respondent that it was in the print and electronic media that a petition had been filed against his election as the member of parliament for Tetu Constituency. Though no formal service is shown on the record I find nothing wrong with his decision to be proactive, I believe so as to be on the safe side.

Considering that service could also be through advertisement, (S. 77 of the Elections Act) and the six months’ strict timeline set for the completion of election petitions, I think that it was a good thing that the respondents chose to respond. The petitioner however did not follow through.

The petitioner cannot escape the burden of costs. He failed to comply with section 78(3) of the Elections Act no. 24 of 2011. The consequences as stipulated under section 78(4).

(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.

In conclusion, the petition is struck out with costs to each respondent.

The costs to be taxed by the Deputy Registrar as per the Advocates Remuneration Order.

Orders Accordingly.

Dated, Delivered and Signed in open court, at Nyeri this 24th October 2017

Teresia Matheka

Judge

In the presence of;

Court Assistant: Harriet

N/A petitioner

N/A for petitioner's counsel Ng'ang'a and Associates, Advocates

Mr. Macharia holding brief for Mwangi Wahome for 1st and 2nd respondent

Wahome Gikonyo for 3rd Respondent