



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO. 12 OF 2017

ANDREW TOBOSO ANYANGA.....PETITIONER

VERSUS

MWALE NICHOLAS SCOTT TINDI1ST RESPONDENT

HABIL NANJENDO BUSHURU.....2ND RESPONDENT

RETURNING OFFICER (BUTERE

CONSTITUENCY).....3RD RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....4TH RESPONDENT

RULING

Introduction

1. This ruling relates to the Notice of Preliminary Objection dated 15.09.2017 and filed in Court on 18.9.2017 by the firm of Ogejo Olendo & Company Advocate, on behalf of the 3rd and 4th Respondents. The objection raises the following grounds:-

1) THAT the petition dated 7th September, 2017 has been filed outside the stipulated constitutional timelines of 28 days from the date of declaration of results which was on 9th August, 2017

2) THAT Section 77 of the Election Act No. 24 of 2011 stated that a Petition concerning an Election other than a Presidential Election shall be filed within 28 days after the declaration of the election results by the commission.

3) THAT RULE 19(1) OF THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES 2017 provides:-

19(1) where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.

19(2)Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.”

2. The 3rd and 4th Respondents pray that the petition be dismissed with costs.

3. There is also the Notice of Motion dated 03.10.2017 in relation to the Notice of Preliminary Objection. The same is filed by the same firm of Ogejo Olinde & Co. Advocates for the 3rd and 4th Respondents. The Notice of Motion which is brought under the provisions of Article 87(2) of the Constitution of Kenya, Section 77(1) of the Elections Act, 2011 and Rule 19(1) and (2) of the Elections (Parliamentary and County Elections) Petition Rules 2017 as Amended) seek declarations orders;-

(1) THAT the Provisions of Article 87(2) of the Constitution of Kenya, 2010 require the filing of an Election Petition to question the validity of an election, to be filed within 28 days after the Declaration of the election results by the Independent Electoral and boundaries Commission.

(2) THAT by reasons of the further provisions of Section 77(1) of the Elections Act, 2011, the Petition filed herein is invalid.

(3) Consequently, this Court has no Jurisdiction to entertain an invalid Petition, and the same ought to be strike out or alternatively dismiss the same with costs to the 3rd and 4th Respondents.

(4) THAT the costs of this application together with the petition be borne by the petitioner.

4. The application is premised on six grounds set out on the face thereof and is also supported by the affidavit sworn by Nancy Iyadi on 03.10.2017. Nancy Iyadi is the 3rd Respondent herein and has sworn the affidavit on behalf of both herself and the 4th Respondent. The deponent confirms that between 10.00pm and 11.00 pm on 09.08.2017, she declared the 1st Respondent as the Member of Parliament for Butere Constituency having garnered a total of 18,235 votes. She also depones that on the same day she issued the said 1st Respondent and duly signed form 35C annexure N1 – which shows that the election results were declared on the 09.08.2017. The deponent further avers that according to the provisions of Article 87(2) of the Constitution and Section 77(1) of the Elections Act, this petition should have been filed on 06.09.2017 and not on 07.09.2017. The deponent prays that the application be allowed and the petition be struck out/dismissed.

5. The 1st Respondent filed written submissions together with authorities in support of both the Notice of Preliminary Objection and the application. I shall return to these submissions later.

Other Responses

6. The petitioner opposed both the Preliminary Objection and the application by filing grounds of opposition dated 09.10.2017, to the effect that;-

(1) The purported Preliminary Objection is misconceived and incompetent as it is grounded on contested facts.

(2) The petitioner contends that the declaration of the first respondent as winner of the contested elections was done on 10th of August, 2017 when Form 35B was signed by agents and that time started running from 10th August, 2017 and as such computation of time should be done as from this date.

(3) The validity of the certificate issued to the first respondent on the 9th of August, 2017 by the IEBC and whether there was declaration of results at all is disputed and this issue shall require the court to exercise judicial discretion in determination of the same.

(4) *The determination of the question as to whether this petition was filed out of time is thus evidentiary and not purely a point of law.*

(5) *The purported application is premature and will delay the fair and just determination of the substantive petition herein and should thus be dismissed with costs*

7. The petitioner also filed written submissions together with authorities in opposition to the Notice of Preliminary Objection and the application both seeking to have his petition struck out/dismissed.

8. The 2nd Respondent also filed grounds of Opposition to the Notice of Preliminary Objection. the five grounds of opposition are that;-

(1) *The Application dies the procedural rules of a preliminary Objection as encoded in Law*

(2) *The said Preliminary Objection seeks to preliminarily litigate in issue that is in dispute, to wit, the date of declaration of the results, thus:*

(a) *The date of declaration of the results for the Butere Parliamentary Elections is not certain*

(b) *While the Returning Officer purportedly signed the Declaration Forms on 9th of August, 2017, the Agents signed on 10th of August, 2017*

(c) *The court should take Judicial Notice that Agents usually sign the Declaration forms before the Results are declared.*

(d) *THs means that in the Butere Parliamentary Elections, the declaration dated cannot be stated with certainty, due to gross negligence of the 3rd and 4th Respondents.*

(e) *The 3rd and 4th Respondents cannot create a crisis and purport to benefit from it.*

(3.) *The application fall short of the prerequisite thresholds of raising Preliminary Objections.*

(4) *Without prejudice to the foregoing, the provisions of Article 159(2)(d) of the Constitution run Supreme, as was enunciated in the conduct of parties in the 2017 Presidential Election Petition.*

(5) *The application thus lacks merit, is frivolous, vexatious and mala fides, and seeks the application be dismissed with costs to the respondent*

9. The 2nd Respondent prays that both the Preliminary Objection and the application be found to be lacking in merit, frivolous, vexatious, and mala

fides and to be dismissed with costs

The Relevant Provisions

10. As stated at the commencement of this ruling the notice of Preliminary Objection and the application are anchored in Article 87(2) of the Constitution and Section 77(1) of the Elections Act, 2011. Article 87(2) of the Constitution provides as follows;

*“87(2) Petitions concerning an election, other than a presidential election, **SHALL** be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.” [Emphasis is mine], and e Section 77(1) of the Elections Act, 2011 provides as follows*

*“77(1) A petition concerning an election, other than a presidential election, **SHALL** be filed within*

twenty eight days after the declaration of the election results by the Commission.”[Emphasis is mine],

11. It is to be noted that apart from the word Commission in Section 77(1) of the Elections Act, 2011 instead of the Independent Electoral and Boundaries Commission found in Article 87(2) of the Constitution, the two provisions are framed in exactly the same words and emphasize the twenty eight day timeline by using the word *SHALL*.

The submissions

12. From the submissions of the 3rd and 4th Respondents, the following highlights are important.

- That for the avoidance of any doubt, the date of declaration of results was when the Returning Officer issued the winner with a certificate in form 35C. *See Supreme Court Judgment in Hassan Ali Joho & another – vs – Suleiman Said Shahbal & 2 others [2014] eKLR*, and that in the instant case the date of declaration of results for Member of Parliament for Butere Constituency was 09.08.2017.
- As to what is meant by declaration of results, counsel for the 3rd and 4th Respondents fell back on the definition by the Supreme Court in its **Judgment in Hassan Ali Joho & another – vs – Suleiman Said Shahbal & 2 others(Supra)** in which the Supreme Court defined Declaration as follows;- “Declaration takes place at every stage of tallying. For example, the first declaration takes place at the polling station, the second declaration at the Constituency tallying centre, and the third at the County returning centre..... and that the finality of the set of stages of declaration is the issuance of the certificate in Form35C. The Supreme Court also held that the certificate in Form 35 C as is the case here, marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority, and the declaration of the results is what sets into motion the timeframe within which to lodge an election petition.
- The final declaration of election results is by the issuance of the Certificate in Form 38(or Form 35C as in the present case) to the winner of the election.
- The question as to who declares the election results is provided under Regulation 3(b) (i) of the Elections (General Amendment) Regulations 2017 whereby the IEBC appoints a Returning Officer for each Constituency. In the instant case, the Returning Officer for Butere Constituency was the 3rd Respondent, Nancy Iyadi.
- The Returning Officer is specifically mandated, to declare election results in accordance with Article 86(b) and (c) of the Constitution
- That the winner for the Butere Constituency having been issued with the Certificate in Form 35C on 09.08.2017, that day was the date of declaration of results and the time for purposes of filing of the election petition started running from that day and not from the day when the agent signed Form 35B.
- Only the 3rd and 4th Respondents are allowed in law to declare results, whether agents are present or not and whether agents have signed or not signed the relevant forms. For this proposition, reliance was placed on Regulation 83(1) of the Elections (General Amendment) regulations, 2017, which mandates the Returning Officer to declare results and issue Certificates to persons elected in the county assembly and in the National Assembly elections in Forms 36C and 35C respectively.
- On whether or not the Preliminary Objection raised by the 3rd and 4th Respondents constitutes a point of law, it is submitted that there is no dispute that the election results for Butere Constituency were declared on 09.08. 2017, and that failure by the agents to sign Form 35B on the 09,082017 is not disputed, nor is it disputed that the agents signed Form 35B on 10.08.2017.

13. On the basis of the above, the 3rd and 4th Respondents urged the court to uphold the Preliminary Objection.

Submissions of the 1st Respondent

14. These were based on similar arguments as those of the 3rd and 4th Respondents. The 1st Respondent

placed reliance on the following additional authorities. The first is the case of *Mary Wambui Munene – vs – Peter Gichuki King'ara & 2 others [2014] eKLR* where the Supreme Court confirmed the principle in the *Hassan Ali Joho case (supra)* by saying, “.....for the purpose of this case, we apply the precedent in *Joho*, taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion.

15. The second authority is the case of *Paul Posh Aborwa – vs – Independent Electoral and Boundaries Commission and 2 others [2014] eKLR* where the court of Appeal said the following. “the result of the foregoing is that we uphold the preliminary Objection and determine that we have no jurisdiction to hear and determine the appeal emanating as it does from proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87(2) of the Constitution 2010.”

16. Finally, counsel for the 1st Respondent cited the case of *Anami Silverse Lisamula – vs – Independent Electoral & Boundaries Commission & 3 others [2014] eKLR* where the Supreme Court, dealing with annulled declarations made at the High Court and Court of Appeal upheld the principle that an election petition must be filed within the timelines prescribed by the Constitution by saying . “it is clear to us that the main issue this court was called upon to determine in the Mary Wambui case, is the one we are now asked to determine, which is whether the petition filed in the High Court outside the 28 days prescribed by Article 87(2) of the Constitution is a nullity. We find that the decision in the *Joho case* directly applies in the instant matter and so does the jurisprudence in the *Mary Wambui case*.”

Analysis and Determination

17. From a careful consideration of all the above authorities, one point is clear; and that is that there is no debate about the import of Article 87(2) of the Constitution 2010, meaning that a petition filed outside the twenty-eight day period after declaration of results is a nullity. The issue that this court has to determine is whether by filing the petition on 07.09.2017 instead of 06.09.2017, the petition is a nullity as contended by the 1st, 3rd and 4th Respondents, or whether there is room for this court to go around the problem by arguing that because the agent signed Form 36B on 10.08.2017, then the 10.08.2017 was the day of declaration of the results as contended by the Petitioner and the 2nd Respondent. In my considered view, there is no such debate. In supporting the Petitioner’s case, the 2nd Respondent submitted that though the 3rd Respondent signed the declaration forms on 09.08.2017, the agents signed on 10.08.2017 and that is the circumstances the declaration of results for Butere Parliamentary seat cannot be stated with certainty.

18. But as rightly submitted by the 3rd and 4th Respondents, such an argument by the Petitioner and the 2nd Respondent must fall flat on its face, the position being that since the Returning Officer, who is the only one authorized to declare results, declared the results and issued the Certificate to the winner on 09.08.2017, it is immaterial that the agents had not signed Form 36B, or that the agents were not present, nor does it matter that the tally was not correct or that the result is the subject of a contest between the loser and the winner. The only point that matters is that the authorized Returning Officer has declared the results and has issued the winner with the Certificate, being Form 35C.

19. In the instant case, the Petitioner has attempted to donate to himself and to his agents powers that do not belong to them of determining when election results are considered declared. If such situation were to be allowed, there would be total chaos in the system and the provisions of Article 87(2) of the Constitution 2010 and Section 77(1) of the Elections Act 2011 would be rendered redundant.

20. The question that follows is; when were the results for Butere Member of Parliament declared? Nancy Iyadi, the Returning Officer has sworn in her supporting affidavit that she declared the results between 10.00pm and 11.00pm on 09.08.2017 whereupon she issued the 1st Respondent with the Certificate, Form 35C which is annexed to her affidavit. This court can therefore look nowhere else for confirmation of the date on which the declaration of the results was made.

21. Having established that the results for the Butere Member of Parliament were declared on 09.08.2017,

the next issue for determination is when time began to run for purposes of this petition. From the authorities highlighted above, and from the Constitutional and statutory provisions, the time for filing of any petition contesting the validity of the election of the winner for Butere Constituency began to run from that 09.08.2017, and any petition envisaged to be filed was to be filed latest on 06.09.2017. In the present case, the petition was filed on 07.09.2017 and clearly that was outside the twenty-eight day window allowed by the law. The use of the word “shall” in Article 87(2) of the Constitution and Section 77(1) of the Elections Act, 2011 means that the requirement of filing the petition within the said timeline is cast in stone and the election court is bound by it. This strict timeline is captured in the wording of Rule 19 of the Elections(Parliamentary and County Elections) Petition Rules 2017 (the Rules)which provide as follows;-

“19(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.

*(2)Sub-rule (1) **shall** not apply in relation to the period within which a petition is required to be filed, heard or determined.”{Emphasis is mine}*

22. The Constitution 2010, the Election Act, 2011 and the Rules do not give the Elections Court any room for discretion where a petition has been filed out of time, even if that period by which the petitioner has failed to meet the deadline is one day.

23. In light of the above, this petition has no life. It is a nullity. This court has no power to breathe life into what has not been and what is not. As has been stated by the courts over and over again, you cannot make something stand on nothing, and by extension you cannot put something into nothing.

Conclusion

24. The conclusion of this matter is that this court has no jurisdiction to hear and determine a petition that does not exist, the same having been filed outside the stipulated timelines. The *Joho Case* and the other cases highlighted above speak to this position. The decisions in the above cases is informed by the fact that election disputes are no ordinary suits and they also elicit great public interest, so that a party who desires to challenge the results of any election must not only be prepared to meet the cost of doing so, but must also be prepared to operate within the strictures of the law. The Petitioner in this case failed to observe the timelines for filing of his petition.

25. In the result I do uphold the preliminary Objection dated 15.9.2017 and the Notice of Motion dated 03.10.2017 and declare that the Petitioner’s election Petition Number 12 of 2017, dated 07.09.2017 and filed in Court on 07.09.2017 is a nullity and is hereby struck out with costs to the 1st , 3rd and 4th Respondents.

It is so ordered.

Ruling delivered, dated and signed in open court here at Kakamega this 23rd day of October 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Amasakha & Kadenyi.....For Petitioner

Mr. Busiega.....For 1st Respondent

Mr. Ngome.....2nd Respondent

Miss Odek.....For 3rd and 4th Respondents

Polycap.....Court Assistant