



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

ELECTION PETITION NO. 2 OF 2017

(FORMERLY NAIROBI MILIMANI ELECTION PETITION NO.15 OF 2017)

AMB. UKUR YATTANI KANACHO.....PETITIONER

VERSUS

1. I.E.B.C.....1ST RESPONDENT

2. ARNOLD NJABANI –MARSABIT

COUNTY RETURNING OFFICER.....2ND RESPONDENT

3. ALI MOHAMUD MOAHMED.....3RD RESPONDENT

RULING

The application dated 4th September, 2017 seeks the following main orders:-

(b) This Honourable Court be pleased to order that the election relating to elections in Marsabit County inclusive of the Gubernatorial elections herein be filed, heard and determined at the High Court in Nairobi and not the High Court in Marsabit.

(c) In the alternative to prayer (b) above the honourable court be pleased to order that the election petitions relating to election s in Marsabit County inclusive of the Gubernatorial Election Petition herein be filed, heard and determined at the nearest High Court to Marsabit County

(d) An order do issue to the Marsabit County criminal Intelligence officer (CCIO) to table a report before this honourable court as to the security situation in Marsabit County with regard to the now filed election petition.

(e) This Honourable court be pleased to grant any other reliefs that it may deem just and fit to grant.

The application is supported by the affidavit of Honourable Ambassador Ukur Yatani Kanacho sworn on 4th September, 2017 and also on the following grounds:

1. That there has been politically motivated violence and clashes in Marsabit County since the

declaration of results after the 8th August 2017 General Elections.

2. That the main protagonists to the violence are the Borana and Gabra ethnic communities who also happen to be the dominant communities in the County and the petitioner and 3rd respondent come from these two communities.

3. That the ethnic violence is likely to spill over to Marsabit town and if not contained, there is risk to life and property if the gubernatorial election petition for Marsabit is heard in Marsabit town.

4. That this politically charged matter should not be heard in Marsabit County as a matter of caution and fidelity to the law.

In his supporting affidavit, the petitioner avers that violence occurred in Marsabit in 2013 and it took about six months to cool it down despite intervention of the state security organs. According to him, previously the violence was due to scarcity of resources such as water and pasture. However, the violence has metamorphosed to involve political power. In July 2017 during the political campaigns, violence erupted in Marsabit town during the visit by His Excellency, the President of Kenya. This violence was politically motivated and the President had to cut short his trip. The Petitioner is of the view that if the Petition is heard in Marsabit, there is a real likelihood that the security of witnesses, the parties and their advocates may not be guaranteed.

Mr. Walukhe, Counsel for the Petitioner, submitted that it is the petitioner's prayer that the location of the Court be transferred to either Nairobi or to the nearest Court to Marsabit. Counsel maintains that Section 75 of the Elections Act provides that the case be heard within the County or a Court nearest to the County. Further, Order 47 rule 6 of the Civil Procedure Code gives this particular Court the discretion to try a matter that has been filed before this court in another locality. Mr. Walukhe contends that the law envisages a situation where for purposes of doing justice, a matter can be heard in a different locality from where originally it should be heard.

According to the Petitioner the application is not seeking a transfer of the Marsabit High Court to another place. The Petitioner has no issue with the Court as constituted. The Petitioner is only seeking the transfer of the location. Mr. Walukhe relies on Articles 48 and 159 of the Constitution of Kenya which provides that Justice shall be accessed by all irrespective of their status. The Objective of the Election Petition Rules is to facilitate the just, expeditious and affordable access to Justice. Counsel submit that in the determination of an election petition, Justice should be paramount, sacrosanct and non-derogative.

Mr. Walukhe made reference to incidents of violence which have occurred in Marsabit County. One such incident occurred on 26.7.2017 in the presence of the National President when supporters of the petitioner clashed with those of the 3rd respondent. Reliance is also made to a report by an international non-governmental organization, Safeworld, on violence in Marsabit County. According to the report, violence in Marsabit County can be attributed to scarcity of resources as well as to political struggle. The petitioner and the 3rd respondent are the leaders of the two largest ethnic tribes in Marsabit County.

Mr. Walukhe further submit that the Court should consider whether when the hearing of the petition begins there would be no propensity to violence since the supporters of the two parties will come into contact. When the two camps met in Marsabit town the last time, property was destroyed, people sustained gunshots and even the petitioner's property was damaged. There is a possibility that some of the petitioner's witnesses may not be willing to testify if the location remains in Marsabit. This is due to intimidation and threat to violence. Mr. Walukhe contends that the security of Counsels appearing for the parties is not guaranteed.

It is further submitted that the right to institute an election petition challenging an election is a Constitutional right. That right includes the right to call witnesses to prove whatever election malpractices are being alleged. The burden of proof rests with the petitioner. Such a right should not be exercised under a shadow of intimidation and threat to violence.

Counsel for the Petitioner relies on the case of **HANGZHOU AGROCHEMICAL INDUSTRIES LTD –V- PANDA FLOWERS LIMITED [2012] eKLR**. In that case, Justice Odunga stated as follows on the issue of transfer of cases:-

That then brings me to the issue of the circumstances under which the court may direct that a matter filed in a particular High Court registry be heard in a different place. In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.

Counsel also relies on the *South African case of CHIEF DIKERO LESAPO –Versus- NORTH WEST AGRICULTURAL BANK & ANOTHER; Constitutional Court of South Africa Petition No.23 of 1999*. In that case, **MOKGORO J** expressed himself on the right of access to Courts as follows: The right of access to courts is important in the adjudication of justiciable disputes. In **concorde Plastics (Pty) Ltd V NUMSA and others, Marcus AJ** expressed the importance of the right as follows:

“In my view, access to the courts of law is foundational to the ability of society. It ensures that parties to a dispute have an institutionalized mechanism to resolve their differences without recourse to self-help. The nature of civil proceedings has been eloquently described by Eduardo Couture. The nature of Judicial Process (1950) 25 Tulane Law Review 1 at 7 in the following way.

“The facts tells [sic] us that when a plaintiff wants to instigate a suit, he can do so although the defendant does not want him to do so, nor even the judge. This is a fact derived from legal experience, from the life of law.

Those who have been able to see this fact in historical perspective and have noted its slow but steady growth, have realized that the law had proceeded in this direction from necessity, not from expediency. Primitive man’s reaction to injustice appears in the form of vengeance, and by “primitive” I mean not only primitive in a historical sense, but also primitive in the formation of moral sentiments and impulses. The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mightly[sic] historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities.

A civil action, in final analysis then, is civilization’s substitute for vengeance. In its present form, this civilized substitute for vengeance consists in a legal power to resort to the court praying for something against a defendant. Whether the claim is well-founded or not, is a totally different, fact”

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitations to be reasonable and justifiable.

Mr. Walukhe maintains that the determination as to where the case is to be heard is within the inherent Jurisdiction of this court. Not even the Chief Justice can direct this court as to where it should sit. The incidents of violence explained by the petitioner have not been denied.

Mr. Muganda and Miss Hashim appeared for the 3rd respondent. Counsels maintain that their preferred location is Marsabit. There is no report by the petitioner that there has been intimidation. None of the witnesses have sworn affidavits indicating that they have been threatened. It is submitted that Section 75 of the Elections Act provides that the High Court within the County or the nearest Court to the County is the one to hear a gubernatorial election petition. Cogent reasons must be substantiated for the location to be moved. The application is based on speculation and conjectures. Rule 6 (3) of the Election Petition rules require that the Petition be filed in the concerned County. The Petition herein was filed in Nairobi but the Chief Justice who was fully aware of that fact gazetted Marsabit as the Court to hear the matter. There were petitions for Garissa and Mandera that were filed in Nairobi. The Chief Justice allocated those cases to be heard in Nairobi.

It is further submitted for the 3rd respondent that this is an election Court and it is exercising special Jurisdiction. Article 48 of the Constitution provides for access to Justice. There will be no injustice if the matter is heard in Marsabit. Further, there will be no barrier to access to justice. The issues being raised on insecurity dwell on past incidents before the elections. The security reports on Marsabit relate to the year 2014.

Counsels further submit that parties and their counsels appeared in court on 13th October, 2017 for the pre-trial. The proceedings continued without any interruptions. Since the time elections were conducted, there has been no incidents of post-election violence. The Police department has not indicated that it will be difficult to preserve law and order. Hearing the petition in Marsabit will set a precedent for the Marsabit Court. Most of the witnesses come from Marsabit. It will be expensive and disruptive to take all the witness out of Marsabit. The people of Marsabit would like to be part of the case. They should not be denied their right to access justice. The costs incurred by counsels to reach the court should have been considered when they took the briefs. Even if the witnesses were to testify in Nairobi, they would still have to come back to Marsabit.

According to Counsels for the 3rd respondent, the authorities relied upon by the petitioner do not relate to election petitions. The authorities are neither persuasive nor applicable. The South African case involved a conflict between a Provision in an Act of Parliament and the constitution while the Hangzhou case involved two different suits involving the same parties. Counsels rely on the case of *SAMUEL M.W. NJUGUNA V BENJAMIN ACHODE & OTHERS, Nairobi Milimani HCCC No.711 of 2012(2013) eKLR. Justice Henelock* in that case cited the observations made by *Mutava J* in a different case as follows:

Be that as it may, given that the Constitution of Kenya Act, 2010 gives this court unlimited original jurisdiction in civil and criminal matters, and given the supremacy of the Constitution over the Civil Procedure Act, and given further that Article 159(2)(d) of the Constitution vouches for substantive justice even in the face of procedural technicalities, a party seeking to oust the jurisdiction of one station of the High Court in favour of another, must in my view go beyond the face value of the tenets of convenience stipulated in Section 15 of the Civil Procedure Act. At the minimum, the applying party must demonstrate that the right of access to justice under Article 48 of the constitution is at threat. This should be advanced by placing before the court material showing that beyond the pillars of convenience stipulated in Section 15 of the Civil Procedure Act, there is a verifiable motive on the part of the plaintiff to use geographical inconvenience to defeat the substantive ends of justice. A mere apprehension of such a possibility may not suffice. Further, the applicant should demonstrate that it has come to court at the earliest opportunity with its request.

The 3rd respondent swore an affidavit on 14th October, 2017 in reply to the application. The main averments are that Section 75 of the Election Act requires that a gubernatorial election petition be determined by a High Court within the county or nearest to the County. The objective of rules 4 and 5 of the Election Petition Rules is to the effect that the objective of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions. The events of 2013 have no correlation to the present situation in Marsabit.

It is further stated that on 13th October 2017 during the pre-trial, supporters of the parties attended court and there was no tension. The proceedings were conducted in a peaceful, calm and secure environment. The Marsabit court was established recently for purposes of advancing access to justice. Majority of the witnesses are residing in Marsabit and public interest requires that the dispute be heard in Marsabit County. The Police have the responsibility of maintaining law and order. The application is based on mere allegations and on speculative violence.

The main issue for determination is whether the petition herein should be referred to a different venue or location other than the Marsabit High Court or it should be heard in Marsabit. The core ground of the application is security concerns. The petitioner was the first governor of Marsabit County. He is knowledgeable about security issues in this County having held the office of the governor for a period of about five years. There is no doubt that incidents of insecurity characterized by clashes have been experienced in the county. The petitioner has made reference to one incident whereby the national President had to cut short his campaigns due to clashes between the supporters of Jubilee political party and those of the Frontier Alliance Party.

It is prudent to make reference to the legal provisions relating to the hearing of election petitions. Section 75 (1) of the Elections Act No.24 of 2011 states as follows:-

“A question as to validity of an election of a County governor shall be determined by High Court within the county or nearest to the County.”

Rules 4 (1) and (2) of the Election (Parliamentary and County Elections) Petition Rules, 2017 states as follows:

(1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions

(2) An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule(1)

Rule 5 (2) of the Election Petition Rules requires a party to an election petition or an advocate for the party to assist an election court to further the objective of the rules and to comply with direction given by an election court.

Order 47 rules 6(1) and (2) states as follows:-

1. Every suit whether instituted in the Central office or in a District Registry of the High Court shall be tried in such place as the court may direct, and in the absence of any such direction a suit instituted in the central office shall be tried by the High court sitting in the area of such central office and a suit instituted in a district registry shall be tried by the High court sitting in the area of such district registry.

2. The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:

Provided always that in appointing such particular place for trial the court shall have regard to the convenient of the parties and of their witnesses and to the date on which such trials is to take place, and all the other circumstances of the case.

Section 15 of the Civil Procedure Act provides that every suit shall be instituted in a Court within the local limits of whose jurisdiction the defendant or defendants reside or where the cause of action wholly or partly arose.

Article 48 of the constitution states as follows:

The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 50(1) of the Constitution provides that every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or any other Independent Tribunal.

According to the petitioner, if the petition is heard in Marsabit the following is likely to occur:-

- (i) Political violence
- (ii) Threats to violence
- (iii) intimidation of witnesses
- (iv) Withdrawal from testifying by witnesses due to intimidation or threats of intimidation
- (v) Restricted access to justice due to violence or threat to violence.

The Petitioner is sounding alarm to the Court that in the event that the petition is to be heard in Marsabit, there is likelihood of political violence due to the nature of the dispute. I take the petitioner's position to be a positive warning to this court and all those involved in the hearing and determination of the dispute. The core issue is that the petitioner and the 3rd respondent comes from the Gabra and Borana communities who are the majority in Marsabit County. There has been political clashes between the two communities.

I have seen the gazette notice Vol .137 of 15th September 2017 which gazetted this Court to hear this election petition. My attention has been drawn to the election petitions from Tana River County, Turkana County and Nairobi County. Having worked in Malindi for over two years, I am quite aware that the level of violence involving the Ormas and Pokomos in Tana River County is more or less similar to that of Marsabit County. I have handled not less than five criminal murder cases where not less than ten (10) lives were lost in each case. In some cases over thirty (30) people were killed in one incident. Despite all that past incidents, a High Court was established in Garsen, Tana River County and that Court will hear the election dispute between the elected governor who is a Pokomo and the former governor who is from the Orma Community. The Garsen High Court was established almost at the same time as the Marsabit Court. Both Courts are about to complete two years of operation.

With regard to gubernatorial election petition case for Turkana, the chief Justice gazette the Lodwar High Court to hear the matter. The case involves Hon. John Munyes Kiyongo of Jubilee against Hon. Joseph Nanok of ODM. The locality of Lodwar is more or less the same as that of Marsabit only that one can fly directly to Lodwar from Nairobi. That does not mean that if political violence occur between supporters of the two parties to the election petition, all of them will fly out of Lodwar.

With regard to the election Petition involving the governor of Nairobi County, it is public knowledge that each of the two candidates, that is Mike Mbuvi Sonko and Dr. Evans Kidero garnered over 700,000 votes. If most of their supporters were to attend the hearing at the Milimani Law Courts, in Nairobi, it would be quite difficult to control the crowd.

My view on the issue of violence or threat to violence is that we have to learn how to live with it. We should not be held captive by those who are out to create chaos, dishamony and violence. The police force is expected to maintain law and order. The same security arrangements being made at the Marsabit law court is the same arrangements being made in all Courts that will hear election petitions. All election petitions involve political emotions. At time those emotions erupt and the result is violence. It is quite difficult to predict when and how such violence will occur. All what we can do is to put up security measures to prevent its occurrence. Parties should also know how to handle their supporters.

The legal provisions on the place of hearing of the election petitions are clear. The petitioner is quite aware of these provisions and is not challenging the composition of the court. The petitioner's main concern is the location of the place where the election petition is to be heard. The concern is well founded. The application cannot be said to be frivolous. However, if the court was to accede to the whims of those who are out to create violence, then no case will be heard in the Marsabit High Court whether such a case involves an election petition or not. I have seen two of my judicial officers and other staff from the Judiciary and the office of the DPP travelling all the way to North Horr, Loiyangalani and Laisamis on a mobile court. The first two places are located in the remote parts of Marsabit. No violence has been expressed. According to me, the people of Marsabit are starting to benefit from the fruits of devolution. Access to justice is paramount. An election petition is not the concern of the petitioner and the person whose election is being challenged. It involves all the electorates of the county. Those who voted for the petitioner would like to know how the petition will be handled. Equally, those who voted for the 3rd respondent are anxious to know the outcome of the petition. All parties need to participate in the proceedings, hear the evidence being adduced and make their own view about the case.

I do agree that the law allows this Court to move the location where the case is to be heard either to Nairobi or any other nearby convenient court. However, I do reiterate that doing so is tantamount to giving in to those bent to creating chaos and violence. It will be a bad precedent whereby other high profile future cases may have to be moved out of Marsabit High Court to other localities due to threat to violence.

I do appreciate the concerns raised by the petitioner. The issue of costs to the parties is not a concern to this court. The election involves the governor of Marsabit County and is important to the residents. I have gone through the 17 witnesses' statements by the petitioner. Witnesses are from Loiyangalani, Marsabit town, Gilgil, Laisamis and Moyale (more than five). It will be expensive and inconveniencing to the witnesses if they are to be ferried all the way to Nairobi or other location. This Country has enough security to contain any violence that may occur. Further, parties agreed on the hearing dates. Each of the two election petitions will be heard for a period of five days. That gives a cumulative period of ten (10) days. Submissions from Counsels for each petition should not take more than two days. Effectively the active period of the two petitions is two (2) weeks. I believe the security personnel should be able to handle those who will attend the hearing of the cases.

In order to assure the parties of smooth and conducive handling of the matter, this court makes the following orders and directions.

1. The petitioner and the 3rd respondent shall each be allocated a certain number of their supporters who shall be allowed access to sit in the open court.
2. Sitting places shall be reserved for counsels appearing for all the parties.
3. During the period the cases will be heard, the cases before the Magistrates courts shall not be heard.
4. Witness for the parties shall be placed in the other open Magistrate's court while the case continues.
5. The witnesses for the respondents shall not attend Court until those of the petitioner fully testify.
6. Should a witness indicate that he is not comfortable testifying in open court or before the public, the court will make arrangements to either hear such witness in chambers or clear the court from members of public.
7. In line with the objectives of the election petition rules, counsels and their parties should inform the court as soon as possible any form of intimidation or threat exhibited against a witness, party or counsel.

8. The petitioner and the 3rd respondent shall provide two names of persons who shall be the contact persons with the deputy registrar on how those who shall be allowed access to the open Court shall participate in the proceedings.

9. Any party addressing his supporters within the Court premises shall ensure that those supporters do not become violent. The Court reserves the right to ban parties from addressing their supporters within the Court premises.

Taking all the circumstances of this case, I do find and hold that the best locality to hear the election petition is the Marsabit Law Court. This will reduce expenses of having the parties and court staff translocate to another locality. I do take the petitioner's application as a precautionary measure intended to alert the court on the security situation in Marsabit County.

In the end, I do find that the application dated 4.9.2017 seeking to transfer the hearing of the petition from the Marsabit Court to either Nairobi or nearby Court lacks merit and the same is disallowed. Costs shall follow the outcome of the main Petition.

Dated Signed and Delivered at Marsabit this 17th day of October, 2017

S. CHITEMBWE

JUDGE