



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NO. 12 OF 2017

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE GARISSA COUNTY
SENATORIAL ELECTIONS, 2017**

AND

**IN THE MATTER OF ARTICLE (1), (2); 2(2); 3(1); 4(2); 10; 21(1); 22(1); 23; 38(3); 47(2); 48;
81(A) & (3); 88(5); 165(3) (A) AND (E) & 180(1) OF THE CONSTITUTION OF KENYA AND**

IN THE MATTER OF SECTION 75,80, 83 OF THE ELECTIONS ACT, 2011

AND

IN THE ELECTIONS ACT, 2011(ACT NO. 24 OF 2011) AS AMENDED

**IN THE MATTER OF LEGAL NOTICE NO 128 OF 2012, THE ELECTIONS (General
REGULATIONS, 2012**

AND

**IN THE MATTER OF LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS REGISTRATION
OF VOTERS) REGULATIONS, 2012**

AND

**IN THE MATTER OF PARLIAMENTARY AND COUNTY ELECTIONS PETITION RULES,
2017**

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) AMENDMENT REGULATIONS, 2017

AND IN THE MATTER OF A PETITION BY

HUSSEIN ISSA ABDI.....1ST PETITIONER

ABDIKADIR FARAH MOHAMED.....2ND PETITIONER

MOHAMED ADEN ABDI.....3RD PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

COUNTY RETURNING OFFICER,GARISSA COUNTY.....2ND RESPONDENT

MOHAMED YUSUF HAJI3RD RESPONDENT

COUNTY COMMANDANT GARISSA COUNTY.....4TH RESPONDENT

RULING

1. The petitioners filed their petition on the 6th of September 2017. At paragraph 2 of the petition they state that they were candidates in the election for the Member of Senate seat for Garissa County held on the 8th of August 2017. The rest of their petition gives a background of their case and prayers sought. On the 19th September 2017 the 1st and 2nd Respondents filed their response to the petition. At paragraph 5 their response they state the following;

“ Attention of this honourable court should be brought to paragraph 2 of the Petition wherein the Petitioners describe themselves as candidates for the Senate seat for Garissa County Election held on 8th August 2017. This paragraph is intended to mislead the court and should be struck out the Petitioners are neither party nominated candidates or independent candidates.

The respondent further avers that the validity of election results is first designed for the candidates at the election. The petitioners here questionably give themselves the title of candidates which is not factual and the whole basis of this Petition is incompetent”.

2. The 3rd Respondent filed his response to the petition on the 18th September 2017. At paragraph 5 he states the following; *‘Turning to the specific matters stated in the petition, the petitioners, in paragraph 2 of the petition, describe themselves as candidates for the Senate Seat for the Garissa County Election held on 8th August 2017. This is factually untrue, as they were neither partly nominated candidates or independent candidates”.*

3. When the matter came up before this court on the 27th September 2017, Counsel for the Petitioner indicated that they wanted to substitute the affidavits. The court directed that a formal application be filed within 7 days and directions were to be taken on the 5th October 2017. On the said date Mr. Airo for the Petitioners informed the court that they were going to seek leave to amend the Petition due to typo errors that have serious implications if not cured at this stage. The Court granted the Petitioners leave to file a formal application. On the 12th October 2017 Mr. Airo informed the court that they had filed their application to amend the petition. The Court directed that the matter be heard.

4. Mr. Airo submitted that in the application dated 9th October 2017 the Petitioners are seeking to amend the plaint to rectify the errors in the Petition and failure to amend the petition will occasion irreparable harm to the Petitioners. That the application is supported by the affidavit of Chahilu A. Edwin, the advocate on record for the petitioner who depones that they discovered errors in the petition which required to be amended. That the oversight in the petition was inadvertent and not in bad faith and the amendment sought is necessary to enable the court determine all the issues. That the errors are regrettable and purely attributed to the rush to file the petition in time to meet the deadline set in the Election Act. That the Respondents will not suffer any prejudice if this application for leave to amend is allowed. Mr. Airo asked the court to be guided by Rules 2 and 4 of the Election Rules and Section 76 (4) of the Elections Act which provides for an amendment of the petition with the leave of the Election Court. He emphasised that the amendment sought strictly touches on paragraph 2 of the petition and that it would be in the interest of both parties that the amendment be allowed.

5. The application was opposed by the Respondents. The Respondents took issue with the fact that the application is supported by the affidavit of Counsel and not the Petitioners. That the proper person to swear the affidavit in support for application to amend the petition should have been the petitioners as the application seeks to amend the petition. That Rule 12 of the Election Petition Rule sets out what should be filed and one of them is an affidavit sworn by the Petitioner. That the Petitioners request is that if the application is allowed the amended petition should be deemed as filed and that should be supported by the affidavits of the alleged Petitioner. The court was referred to the amended draft petition at paragraph 2. That the said paragraph deposes to issues of facts and what is deposed are not facts which Counsel can confirm but only the Petitioner. It was further submitted that there is prejudice as the Petitioners have not provided any information as to where they were registered or their identification cards so that the 3rd Respondent can verify if it is true or an error on their part. That if it is discovered they are registered voters it will be an embarrassment and that without that factual foundation it will be unsafe for the court to allow the amendment. In reply Mr. Airo submitted that the Petitioners were not candidates and what they seek to do is to help the court adjudicate the Petitioner on merit. That the errors were purely human and that since they were raised in the responses there is a window for the amendment and the Respondents will not be prejudiced.

6. I have considered the submissions and pleadings. Amendment to a Petition as provided for under Section 76 (4) of the Elections Act which provides that, *“A petition filed in time may, for the purpose of questioning in return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented”*.

7. The Petitioners counsel has explained that the amendment they seek is due to an error on the part of their office. The principles of amending pleadings are well settled. In considering an application the court considers the following;

- i. The proposed amendment is necessary for determining the real question in controversy. It is not immaterial or useless or merely technical.
- ii. There has been no undue delay in making the application.
- iii. The amendment does not introduce a new or inconsistent cause of action which would change the action into one of a substantially different character, which can only be more conveniently made the subject of a fresh action. The documents which support the amendment of the impugned averments in the plaint, clarifies the mix-up, are part of the record and relate to the same facts on which the cause of action is based.
- iv. There is no vested interest or accrued legal rights which will be affected; and
- v. The amendment does not occasion prejudice or injustice to the other side which cannot be properly compensated in costs.

8. The Respondent's main argument is that the affidavit in support of the application is sworn by the advocate instead of the Petitioner. In my view the advocate has admitted in his affidavit that the mistake was occasioned by his office. This being so it is quite in order that he deposes to the said fact. The only paragraph that is being amended is paragraph 2 of the petition to correct the earlier averment that the Petitioners were candidates. The amendment seeks to clarify that averment that they were not candidates but voters. Together with the proposed amended petition there is a supporting affidavit by one Hussein Issa Abdi the 1st Petitioner and at paragraph 1 describes himself as a voter in Garissa Township Constituency, Garissa County. The amendment as sought is necessary for the determination of the real question in controversy and has been brought without delay. It does not introduce a new or inconsistent cause of action that will change the substance of the petition. It will be upon the Petitioner to establish he was a voter and the allegations made in the petition. As an Election Court it is my duty to ensure that the petition is conducted in a just and expeditious manner. No prejudice shall be caused to the Respondents. Counsel's mistake in drafting the petition is one that the court can excuse and allow the amendment. I

have noted another typo on the Notice of Motion at prayer 1. It reads “*the defendant/applicant be granted leave to amend the petition*”. The said application is the amendment of the petition. The applicant is the petitioner and cannot be described as the defendant. I take it that this was a typing error caused by the office of the advocate whilst typing the application and can be excused. The Amended Petition shall be filed within 3 days and served on the respondent. The Respondents are at liberty to file amended responses within 10 days. Costs shall be in the cause. It is so ordered.

Dated, signed and delivered this 17th Day of **October 2017**

R. E. OUGO

JUDGE

In the presence of :

Mr. Maanzo For the Petitioner

Mr. Saenda For the 1st and 2nd Respondent

Mr. Ngaca For the 3rd Respondent

Ms Charity Court clerk