



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
THE ELECTIONS ACT 2011
ELECTION PETITION NUMBER 9 OF 2017

JIMMY MKALA KAZUNGU.....PETITIONER

VERSUS

IEBC.....1ST RESPONDENT

NURU FARAJ.....2ND RESPONDENT

BADY BADY TWALIB.....3RD RESPONDENT

RULING

1. The election petition (the Petition”) in these proceedings dated 6.9.17 was filed by Jimmy Mkala Kazungu (the Petitioner”) on 7.9.17 challenging the election of Bady Bady Twalib the 3rd Respondent, as the Member of National Assembly for Jomvu Constituency in Mombasa County. The record shows that along with the Petition was filed the affidavit of the Petitioner (“the Supporting Affidavit”) in support of the Petition sworn on even date. The record further shows that several other affidavits were filed which are sworn by persons intended to be called as the witnesses during the hearing of the Petition. The 3rd Respondent duly filed his Response to Petition on 19.9.17. The Independent Electoral and Boundaries Commission and Nuru Faraj the 1st and 2nd Respondents respectively filed their joint Response to Petition on 27.9.17 response. Simultaneously with their response to Petition, the 1st and 2nd Respondents filed an application dated 26.9.17 seeking leave for their response to be filed on time and that their filed Response be deemed to have been filed and served on time. On 4.10.17, by consent of the parties the application was allowed.

2. By a Notice of Motion dated 2.10.17 (“the Application”), the 3rd Respondent seeks the following orders:

“1. THAT the Petition dated 6th September 2017 together with the Affidavits in Support thereto (sic) all sworn on 6th September 2017 and filed in Court on 7th September 2017 be stuck out.

2. THAT the Petitioner does bear the costs of this Application and the Petition.

3. THAT such further orders as the Honourable court may deem fit to grant do issue in the circumstances.”

3. The Application is premised on the grounds on the face of it and the grounds in the affidavit of the 3rd

Respondent sworn on 2.10.17 annexed thereto.

4. The core ground in support of the Application is that the Petition filed by the Petitioner on 7.9.17 does not comply with the mandatory provisions of Rule 8(1) of the Elections (Parliamentary & County Elections) Petition Rules 2017 (“the Election Petition Rules”). The Petition is fatally/incurably defective in that it does not state the date of the election in respect of which the Petition was filed nor does it state the results of the election and the manner in which they were declared. The above failure renders the Petition merely speculative since the results themselves are not under challenge.

5. In his Replying Affidavit in opposition to the Application, the Petitioner reiterates the contents of his affidavit sworn in support of the Petition sworn on 6.9.17 and reaffirms the facts and averments stated and included in the Petition. The Petitioner avers that the date of the election in dispute is clearly indicated in paragraph 2 of the supporting affidavit and as such, the Application is diversionary and a waste of Court's precious time. He further avers that in annexure JMK-4, is the declaration of the results of the election as per the demands of the Rule 8(1) of the Election Petition Rules. It is the Petitioner's case that the contents of an affidavit in support of an election petition and/or documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings in the petition and that's why they are bound together as a booklet to be read in their entirety.

6. According to the Petitioner, this Court has discretion pursuant to Article 159(2) (d) of the Constitution of Kenya 2010 to excuse minor, trivial and/or petty deviations from strict noncompliance with the Election Petition Rules and other mandatory requirements. The matters raised on the form of the Petition fall within the category of technicalities which should not take precedence over substantive matters. The issue for determination in the Petition is whether the election of Member of National Assembly Jomvu Constituency was free and fair and other matters before this Court are just side shows meant to circumvent and defeat justice. The Petitioner is therefore of the view that in the interest of justice and fairness the Application ought to be refused and dismissed with costs.

7. In an Affidavit sworn by the 2nd Respondent on 6.10.17, the 1st and 2nd Respondents support the Application and pray that the Petition be struck out with costs.

8. The 3rd Respondent's submissions reiterated the grounds stated in the Application and in the affidavit. The 3rd Respondent argues that failure to state in the Petition the date of the elections, the election results and the manner in which they were declared is a fatal omission and not a mere technicality that can be cured by Article 159(2)(d) of the Constitution. The 3rd respondent cited the cases of Amina Hassan Ahmed v Returning Officer Manderu County & 2 Others[2013]eKLR and John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others [2008] eKLR and Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] eKLR to buttress his submission. It is the 3rd Respondent's case that having shown that the Petition is incurably defective, the only recourse left is for the Court to strike out the Petition and the Affidavits in support thereof. He relied on the case of Ismail Suleman & 9 Others V Returning Officer Isiolo County Independent Electoral and Boundaries Commission & 4 Others [2013] eKLR.

9. On his part the Petitioner submitted that he has complied with Rule 8(1) of the Election Petition Rules as the date of the election is stated in the Supporting Affidavit and he has also annexed thereto a copy of declaration of the results as required by said Rule. The Petitioner argued that it was held in Petition No. 2B of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR and Election Petition No. 1 of 2013 Ferdinard Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR that the affidavit in support of a petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings in the case.

10. The 3rd Respondent argues that the contention by the Petitioner that the Supporting Affidavit which contains the date and the results of the election is part of the Petition and the pleadings, is fallacious. Relying on the definition of a pleading in Black's Law Dictionary, 9th Edition the 3rd Respondent submits that a pleading, in this case the Petition should contain all the allegations or claims and the affidavit

should contain the evidence to support and corroborate that claim. He cited the Mututho case (supra), where it was stated that where the results of the election are not introduced in the petition then an essential element would be missing and the petition would be incomplete as the basis for any complaint will be absent. The Petitioner urged the Court to strike out the Petition and the Affidavits in support thereof. He also prayed that the Petitioner bears the costs of the Application and of the Petition.

11. On the issue of striking out of the Petition, the Petitioner submits that it is a general judicial view that this is such a drastic and draconian step that should only be done in the clearest of cases where the defect is incurable, which it was argued is not the case herein. In this submission, the Petitioner relied on the case of D. T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1. It was further submitted that the 3rd Respondent has failed to show that the alleged defects are so material as to render the Petition incurably defective and hopeless. The Petitioner further contends that the Court has discretion under Article 159(2) of the Constitution of Kenya to excuse minor or trivial deviations or omissions from any mandatory terms. The Petitioner further submitted that an election petition must contain a supporting affidavit stating grounds and in this regard the Petition is compliant. The Petitioner contends that given that the Supporting Affidavit is part of the Petition, then it matters not whether the declared results are stated in the 1st, 2nd or 3rd page as under the *de minimis non curat lex* rule, of small things the law knows no cure.

12. The 1st and 2nd Respondents fully associated with the submissions of the 3rd Respondent. As for the doctrine of *de minimis non curat lex*, it was argued that the same is misapplied. Failure to state election results is fatal. The D. T. Dobie case (supra) is a civil dispute under the civil procedure rules while the matter herein is an election petition guided by election rules. The Petition is incurably defective and is for striking out.

13. I have given due consideration to the Application, the rival submissions as well as the authorities cited. The following 2 issues fall for determination:

- i) Whether the Petitioner complied with Rule 8(1) of the Election Petition Rules
- ii) If the answer to i) above is in the negative, whether the Petition should be struck out.

14. The Law relating to electoral disputes is anchored in the Article 87 of the Constitution of Kenya 2010. Article 87(1) provides:

“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”

In 2011, in compliance with Article 87(1) of the Constitution of Kenya 2010, Parliament did enact the Elections Act No. 24 of 2011 and in Part VII thereof made elaborate provisions on election disputes resolution. The rules of procedure relating to electoral petitions are contained in the Election Petition Rules made under the Elections Act and have the sanction of both the Act and the Constitution.

Whether the Petitioner has complied with Rule 8(1) of the Election Petition Rules

15. The first of the two issues for determination is pretty straightforward. In order to determine whether the Petitioner has complied with the mandatory requirements of Rule 8(1) of the Election Petition Rules, all this Court is required to do is look at what is contained in the Petition against the provisions of Rule 8(1).

16. Rule 8(1) of the Election Petition Rules stipulates what is to be stated in an election petition as follows:

(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 election is presented; and

(f) The name and address of the advocate, if any, for the petitioner which shall be the address for service.

17. I have carefully looked at the Petition. I do note that the same does not state the date when the election in dispute was conducted. It does not state the results of the election and it does not also state the manner in which the results were declared. I further note that there are other matters stipulated in Rule 8(1) that the Petition fails to state. These include the name and address of the Petitioner as well as the date of the declaration of the results of the election. Also omitted from the body of the Petition is the name and address of the advocate for the Petitioner being the address for service.

18. The requirements in Rule 8(1) of the Election Petition Rules are couched in mandatory terms. It is noteworthy that the same requirements are replicated in Rule 12 (2) of the Election Petition Rules which requires that the affidavit in support of a petition shall state the very same things that are to be stated in a petition. The Petitioner submits that the omitted information is contained in the Supporting Affidavit and has invited the Court to deem the Supporting Affidavit as part of the Petition. To my mind, the requirement to state the listed matters applies to both the Petition and the Affidavit. It is not a question of ‘either or’ but a matter of ‘both and’. The listed matters must be in *both* the Petition *and* the Supporting Affidavit. The Petitioner does not have the liberty to choose to have the listed matters in *either* the Petition *or* the Supporting Affidavit.

19. The Petitioner anchors his hope in the cases of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR and Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR in which he submits, the respective electoral Courts held that an affidavit in support of a petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings in the case. I do agree with this submission. However such affidavits and documents are only deemed to be part of a petition if the contents thereof are expressly referred to in the petition. In Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR, the Court of Appeal, while faulting the trial Judge for striking out from the record, exhibits that had been expressly referred to in the petition, had this to say.

“Taking into account the explicit provisions of Rule 9 (3) (b) of the Election Petition Rules and noting that annexures (sic) DMK2, DMK3 and DMK4 are expressly referred to in the body of the Petition lodged by the appellant and guided by the judicial decisions cited, we find that these annexures (sic) were part of the Petition and the learned Judge erred in finding that they were not part of the pleadings in the Petition. We find that the trial Judge’s decision was made per incuriam.”

20. In upholding the above finding by the Court of Appeal, the Supreme Court in Petition No. 2B of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR opined:

“We agree with the Court of Appeal in its faulting of the trial Judge’s statement that “annexures to an affidavit cannot be said to constitute pleadings.” The reasoning by the Court of Appeal regarding this question, in our view, represents the correct position in the law and practice relating to pleadings.

21. In the instant Petition, the election date, the election results and the manner in which the results were declared are not stated in the Petition. The Court therefore declines the invitation by the Petitioner to overlook this omission in the Petition and deem the Supporting Affidavit as part of the Petition for

purposes of fulfilment of the mandatory requirements of Rule 8(1) and finds that the Petitioner failed to comply with the express mandatory provisions of Rule 8(1) of the Election Petition Rules.

Whether the Petition should be struck out

22. Having found that Petitioner failed to comply with Rule 8(1) of the Election Petition Rules, I now turn to the second issue as to whether that failure renders the Petition liable for striking out.

23. The Petitioner urged the Court to overlook the failure to state the omitted matters in the Petition and apply the *de minimis non curat lex* maxim, that the law does not concern itself with the trivial. The omissions though procedural are in my view not trivial. The omitted matters are substantive as they go to the root and substance of issues to be adjudicated upon by this Electoral Court. Every provision in the Election Petition Rules is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice. This is as was stated by Onyancha, J. in the Amina case (supra):

“Put differently, the provisions of Rule 10 and others aforesaid, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules must be complied with fully, is because the Act, and therefore the Rules, are a special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court.”

24. The overriding objective of the Election Petition Rules is laid out in Rule 4(1) as follows:

“The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.”

25. The instant matter being an election petition is urgent and constitutionally time bound. Article 105(2) of the Constitution of Kenya provides that a question whether a person has been validly elected as a Member of Parliament shall be heard and determined within 6 months of the date of lodging the petition. This Court has a constitutional obligation to ensure the expeditious resolution of the Petition. In Amina Hassan Ahmed v Returning Officer Manderu County & 2 Others[2013]eKLR, where the petition did not as in the instant case contain the requisite information, Onyancha, J observed:

“The promulgator of the Rule, clearly went into great lengths and details to provide the actual form of and the contents the petitions should contain. The probable reason for going to such details would be that a petition, as filed, should be complete with all the details defined...” so as to avoid the situation now prevailing in this petition in which the Petitioner is seeking leave to amend the petition or in which a party would be making similar moves that would cause unnecessary delays and thereby inflating trial costs... This court therefore, in my view, is under, both administrative and legal obligation to interpret the said law strictly and give effect to the said overriding object. Parties to the petition must also from the onset, including the time of drafting and filing petition pleadings, assist the court to achieve the said objective.”

26. As Onyancha, J. stated and I agree with him, the Rules Committee expended much time and effort to come up with rules that ensured that a petition would be as complete as possible clearly setting out in detail the case for the Respondents to respond to with a view to achieving the just, expeditious, proportionate and affordable resolution of electoral disputes. Under Rule 4(2) this Court is enjoined in exercise of its powers under the Constitution and the Elections Act or in the interpretation of any of the provisions in these Rules, to seek to give effect to the aforesaid overriding objective.

27. The Petitioner submitted against the striking out of the Petition arguing that this drastic and draconian

step that should only be done in the clearest of cases where the defect is incurable, which it was argued is not the case herein. In this regard he seeks refuge in the case of D. T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1 in which the Court of Appeal stated:

“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.”

28. The Petitioner argues that the defects in his Petition are neither incurable nor hopeless. The Court appreciates that the defects in the Petition could be cured by amendment. However, Section 74(6) of the Elections Act provides:

“A petition filed in time may, for the purpose of questioning a 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”.

Regrettably the door for curing the Petition by way of amendment closed 28 days after declaration of the election results which is the time specified for filing the Petition. This therefore renders the Petition incurably defective.

29. On the contention by the 3rd Respondent that the Petition lacks the vital prescribed content, the Petitioner submits that the omitted information is included in the Supporting Affidavit which as stated earlier, he urges the Court to deem as part of the Petition. In John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others [2008] eKLR, the Court of Appeal sitting in Nakuru opined:

“What would happen where, as here the results as envisaged by regulation 40, above are not included in the petition”? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, then the petition would be incurably defective. For instance, paragraph (a) of rule 4(1) deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective.”

Following the finding in the above case, the import of omission of the results in the Petition is that the Petition is incomplete as the basis for any complaint is absent. Likewise all other omissions are so fundamental as to render the Petition incurably defective.

30. On whether this Court may exercise its discretion pursuant to Article 159(2)(d) of the Constitution of Kenya 2010 to excuse minor, trivial and/or petty deviations from strict noncompliance with the Election Petition Rules and other mandatory requirements, I am guided by the Supreme Court of Kenya in the case of Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR where the Court observed:

“We have discussed the application of Article 159 already (See the Law Society case above). In Raila Odinga v. I.E.B.C & others (2013) eKLR, this Court observed further:

“Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

31. The Petitioner had an obligation to comply with the procedural imperatives contained in Rule 8(1) of the Election Petition Rules as he seeks justice from this Court. That obligation has not been ousted by

Article 159(2)(d) and this Court therefore declines to exercise its discretion as proposed by the Petitioner. Rules of procedure must be respected by all parties. Article 159(2)(d) was never meant to aid in the overthrow or destruction of rules of procedure as was succinctly stated by Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines...”

32. The Rules Committee in promulgating the Election Petition Rules made it extremely simple for petitioners and their advocates to draft petitions. Indeed both Rule 8(1) and Rule 12(2) contain a checklist and all one needs to do before filing a petition is to check if all matters listed in the said Rules are captured in both the petition and the supporting affidavit. For whatever reason the Petitioner and/or his advocate neglected to do this very small but extremely necessary exercise.

33. In view of the foregoing, this Court finds that the Petitioner failed to comply with the express and mandatory provisions of Rule 8(1) of the Elections (Parliamentary & County Elections) Petition Rules 2017. *It must follow therefore that* the Petition herein is incurably defective and allowing the same as presently drawn to proceed to trial would be an abuse of the Court process. The same is hereby struck out. The Petitioner shall bear the costs of both the Application and the Petition.

DATED, SIGNED and DELIVERED in MOMBASA this 13th day of October 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the 1st & 2nd Respondents**

.....**for the 3rd Respondent**

.....**Court Assistant**