



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

RISHAD HAMID AHMED.....PETITIONER

VERSUS

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

ABDALLAH MWARUA CHIKOPHE.....2ND RESPONDENT

STANLEY MUIRURI MUTHAMA.....3RD RESPONDENT

RULING

[1st and 2nd respondents' Notice of Motion dated 22nd September, 2017; 3rd Respondent's Notice of Motion dated 2nd October, 2017; and the Petitioner's Notice of Motion dated 30th September, 2017]

1. In the general election held on 8th August, 2017 Rishad Hamid Ahmed was one of the candidates in the race to represent the people of Lamu West Constituency in the National Assembly. At the conclusion of the exercise Stanley Muiruri Muthama, the 3rd Respondent, was declared the winner. The Petitioner has filed these proceedings questioning the validity of that election and has named the Independent Electoral & Boundaries Commission (I.E.B.C.) as the 1st Respondent and the Returning Officer of that election Abdallah Mwarua Chikophe as the 2nd Respondent.

2. The 1st and 2nd respondents' Notice of Motion application dated 22nd September, 2017 (hereinafter simply referred to as the 1st Application) is brought under Article 159(2)(d) of the Constitution; Section 80(1)(d) of the Elections Act, 2011; Rules 5(1) and 19(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and all other enabling provisions of the law. The 1st and 2nd respondents pray for orders as follows:

“i) This application be certified as urgent and the same be heard ex-parte in the first instance in view of its urgent nature.

ii) The firm of M/s Lumatete Muchai & Company Advocates be allowed to come on record on behalf of the 1st and 2nd Respondents herein through the filing of a notice of address for service outside the stipulated five days period.

iii) This Honourable Court be pleased to extend the time limited for filing of a response to the election petition herein.

iv) The response to the election petition filed herein be deemed as duly filed.

v) This Honourable Court be pleased to make any further or other orders as will meet the ends of justice.

vi) Costs be in the cause.”

3. The application is supported by the grounds on its face and an affidavit sworn by the 1st and 2nd respondents’ counsel Mr. Lumatete Walubengo Muchai.

4. The Petitioner opposed the 1st Application through Grounds of Opposition dated 30th September, 2017.

5. The 3rd Respondent’s Notice of Motion dated 2nd October, 2017 (hereinafter simply referred to as the 2nd Application) is premised on Article 159(2)(d) of the Constitution; Section 80(1)(d) of the Elections Act, 2011; Rules 5(1) and 19(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017; and all other enabling provisions of the law. The 3rd Respondent seek orders as follows:

“i) This application be certified as urgent and the same be heard ex-parte in the first instance in view of its urgent nature;

ii) The firm of M/s Mogaka Omwenga & Mabeya Advocates be allowed to come on record on behalf of the 3rd Respondent herein through the filing of a notice of address for service outside the stipulated five days period and the one filed herein [on] 11.09.2017 be deemed as duly filed and served.

iii) This Honourable Court be pleased to extend the time limited for filing of a response to the election petition, replying affidavit, list of witnesses and affidavits herein.

iv) The response to the election petition, replying affidavit, list of witnesses and affidavits filed and served by the 3rd Respondent herein be deemed as duly, properly filed and served.

v) This Honourable Court be pleased to make any further or other orders as will meet the ends of justice.

vi) Costs be in the cause.”

6. The application is supported by the grounds on its face and an affidavit sworn by the 3rd Respondent’s counsel, Mr. Peter Omwenga on the date of the application.

7. The Petitioner swore an affidavit on 4th October, 2017 in opposition to the application.

8. The Petitioner’s Notice of Motion dated 30th September, 2017 (hereinafter simply referred to as the 3rd Application) is based on Section 80(3) of the Elections Act, 2011; Rules 11(1) and (18) of the Elections (Parliamentary and County Elections) Petition Rules, 2017); and any other enabling provisions of the law. Through the application the Petitioner prays for orders that:

“1. The Honourable Court be pleased to strike out and or expunge from the record the 3rd Respondent’s Response to the Election Petition dated 20th September, 2017, the Replying Affidavit of the 3rd Respondent sworn contemporaneously thereto and both filed in this Honourable Court on 21st September, 2017;

2. The Honourable Court be pleased to make such further consequential orders as may be necessary to allow for the efficient disposal of the Petition herein;

3. Costs of this application be provided for.”

The application is supported by grounds on its face and an affidavit sworn by the Petitioner on the date of the application.

9. The 3rd Respondent opposed the application through a replying affidavit sworn by his advocate on 3rd October, 2017.

10. So as to have some form of order in this ruling, I propose to first highlight the grounds and evidence in regard to each application. This will be followed by an outline of the submissions of the parties on all the applications. Thereafter I will state my understanding of the applicable law before making my determination. In doing so, I will be guided by the fact that the core issue in the three applications is whether the belated responses to the Petition filed by the respondents should be accepted.

11. A perusal of the 1st and 2nd respondents' application discloses that the Petition was served on 7th September, 2017 and instructions given to counsel on 11th September, 2017. It is the averment of their counsel that upon receiving instructions he took time to interrogate the case and record statements from witnesses by which time the seven days granted for filing a defence had lapsed. That the delay was occasioned by circumstances beyond control of counsel. It is their case that they should be allowed a chance to present their responses as this matter touches on the people's sovereign power to elect their representative. Further, that the delay was not deliberate or inordinate. They contend that allowing them to file their responses will not affect the court's calendar to hear and determine the Petition within six months and neither will the Petitioner be prejudiced.

12. Through his Grounds of Opposition, the Petitioner asserts that the timelines set by the Constitution and the Elections Act, 2011 are not negotiable and cannot be extended. Further, that the court is not vested with power to extend the timelines. That the timelines set in the election laws are not ordinary issues of procedural compliance and failure to comply with the said timelines is not cureable by Article 159(2)(d) of the Constitution. It is the Petitioner's position that just in the same way this court lacks jurisdiction to extend the time for filing an election petition, so too does it lack jurisdiction to extend time for filing of responses to an election petition. The Petitioner therefore asks this court not to allow the 1st and 2nd respondents to appear or act as parties in these proceedings.

13. I now turn to the 2nd Application. The 3rd Respondent asserts that although he was deemed to have been served with the Petition on 7th September, 2017 when it was advertised, he was physically served with the Petition on 14th September, 2017. That due to the large number of attachments and complexity of the matter a response to the Petition could not be filed within the prescribed time. The 3rd Respondent's position is that this matter touches on the people's sovereign power to elect their representatives. Further, that the delay was occasioned by the fact that the Petitioner failed to leave a copy of the Petition in court as required. The 3rd Respondent contends that he has brought the application without delay and in order for the Petition to be dispensed with on merit the court should exercise its discretion in his favour and admit the response he has already filed.

14. The Petitioner's reply to the 2nd Application is that the Petition was served on 7th September, 2017 and the representative of the 3rd Respondent's advocate collected copies of the Petition and witness statements from his advocate's office on 14th September, 2017. It is his case that the election laws have not empowered this court to extend time for filing a response to a petition. According to him, considering that this court has no jurisdiction to extend the time for filing an election petition, the court likewise does not have jurisdiction to enlarge the time for filing a response to an election petition.

15. In the 3rd Application, the Petitioner asks the court to strike out and or expunge from record the 3rd Respondent's response to his Petition. The Petitioner asserts that the laws governing the conduct of elections in Kenya are derivatives of the principles embodied in Articles 81 and 86 of the Constitution and in interpreting and applying those laws, the courts cannot disengage from the Constitution. It is

therefore the Petitioner's assertion that the provisions of the election laws must be strictly complied with and an election court has no power to extend time unless such power is specifically provided for. Further, that the timelines set by the Constitution, the Elections Act and the rules made thereunder are neither negotiable nor extendable. His view is that the election laws regime has not vested this court with the jurisdiction to extend timelines in election petitions. The Petitioner asserts that election petitions are *sui generis* in nature and are governed by a self-contained regime so that the rules of procedure governing ordinary civil and criminal cases are inapplicable, except where they are specifically imported.

16. The 3rd Respondent's reply is that delay in filing a response in time was contributed to by the Petitioner's failure to leave a copy of the Petition in the High Court Registry. Further, that the physical copy of the Petition was only availed to his counsel on 14th September, 2017. As for the claim by the Petitioner that the law does not allow the extension of time for filing responses to election petitions, the 3rd Respondent asserts that this court does indeed have discretion to enlarge time for filing responses to election petitions.

17. In light of the pleadings by the parties in respect to the three applications, it is clear that the question for the determination of the court is whether it has jurisdiction to enlarge time for filing a response to an election petition and if so, whether the respondents provided sufficient reasons to make the court exercise the discretion to enlarge time in their favour.

18. Counsel for the Petitioner urged this court to find that it has no jurisdiction to enlarge time for filing responses to election petitions. In support of the contention that a court cannot act without jurisdiction, reliance was placed on the decision of the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** wherein it was stated that:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

19. The Petitioner is indeed correct that a Court must first consider its jurisdictional boundaries before delving into the substance of a matter before it. Jurisdiction is the court's gateway to the substance of the matter before it for without jurisdiction the court has no basis for considering any matter placed before it.

20. In support of the submission that this Court has no jurisdiction to enlarge time for filing responses to election petitions counsel for the Petitioner cited the decision of the Court of Appeal in **Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (I.E.B.C.) & 8 others [2013] eKLR** wherein it was stated that the **“timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any court for whatever reason.”** Other decisions cited in support of the proposition that time cannot be enlarged are **Murathe v Macharia (2008) 2KLR (EP) 244, Evans Nyambaso Zedekiah & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR** and **Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR**.

21. On their part the respondents hold the view that time can be enlarged. In that regard they have cited the decisions in **Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others [2013] eKLR (High Court at Meru, Election Petition No. 1 of 2013)**, **Mwamlome Tchappu Mbwana & another v Boy Juma Boy & 2 others [2013] eKLR** and **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others**

[2013] eKLR.

22. It is important to acknowledge at the outset that all the respondents filed their responses to the petition outside the time provided for filing responses to election petitions. The time within which to file a response to an election petition is seven days from the date of service as per Rule 11(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (“the Rules”).

23. However, Rule 19 provides for extension or reduction of time 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.”

Rule 19 therefore conveys the applicable law when one is considering whether to extend time in election matters.

24. The Petitioner’s submission that constitutional timelines cannot be extended is indeed a correct statement of the law. However, his view that this position applies to the timelines established by the Rules is incorrect. The legal position is that the court has discretion to enlarge or reduce the timelines set out in the Rules. In deciding whether or not to extend time, the court has to bear in mind that time is of essence in the disposal of election disputes. A party who fails to act within the timelines will not easily attract the mercy of the court unless such a party has given good reasons as to why action was not taken within the provided time.

25. The question that remains to be answered is whether any or all of the respondents have established the need for this court to exercise discretion in their favour. The Supreme Court in the case of **Salat v Independent Electoral & Boundaries Commission & 7 others [2014] KLR** laid down the principles a court should consider in exercising its discretion to extend time for filing an appeal. In my view, the principles are also applicable to a situation where the court is considering a request by a party for enlargement of time to do something that ought to have been done within a given time. In the cited case, the Supreme Court stated that:

“17. The Court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case by case basis;**
- 4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;**
- 5. Whether there would be any prejudice suffered by the respondents if the extension of time was granted;**
- 6. Whether the application had been brought without undue delay; and**

7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.”

26. The 1st and 2nd respondents have explained to the court why it took them over seven days to file their responses. They aver that they had to trace the temporary staff recruited to oversee the election process. That explanation is reasonable. The 1st and 2nd respondents also filed their application for extension of time at the time of filing their belated responses. The Petitioner will not be prejudiced in having the respondents heard. This matter does not only affect the rights of the parties before this court. It also affects every man and woman in Lamu West Constituency who voted on 8th August, 2017 in exercise of their democratic right to pick their representative to the National Assembly. It is therefore in the public interest that the respondents be heard. That is the only way of guaranteeing that the issues herein are addressed on merit.

27. As for the 3rd Respondent's application, I note that the Petitioner does not dispute the averment that a copy of the Petition was not left in the High Court Registry. This failure on the part of the Petitioner could have contributed to the delay by the 3rd Respondent in filing a response within the prescribed time. A good reason has thus been advanced as to why there was delay in filing a response to the Petition. The application for extension of time was brought without undue delay. The Petitioner will not suffer any prejudice simply because the other side has been given an opportunity to be heard. As already stated, it is in the public interest that election petitions be heard and determined on merit. It is necessary and in the interests of justice that all sides be heard before the Petition is determined.

28. In the circumstances of this case, I allow the 1st and 2nd respondents' application. I also allow the 3rd Respondent's application. In light of the success of the 2nd Application (3rd Respondent's application), the Petitioner's application (the 3rd Application) fails and the same is dismissed. Costs shall abide the outcome of the Petition and shall follow the cause.

29. Orders shall thus issue as follows:

- a) The notices of addresses filed by the advocates for the respondents outside the stipulated five days are deemed to have been duly filed;
- b) The respondents' responses together with all the annexures thereto are deemed to have been duly filed; and
- c) Costs to abide the outcome of the Petition and shall follow the cause.

Dated, signed and delivered at Malindi this 13th day of October, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT