REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELECTION PETITION NO. 1 OF 2017

BETWEEN

WAVINYA NDETI.....1ST PETITIONER

PETER MATHUKI.....2ND PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE MACHAKOS

COUNTY RETURNING OFFICER .....2ND RESPONDENT

ALFRED NGANGA MUTUA.....3RD RESPONDENT

RULING

1. The general election was conducted on 8th August 2017. The 3rd respondent Alfred Nganga Mutua was declared the winner in the Machakos County gubernatorial contest by getting 249,603 votes. The 1st petitioner Wavinya Ndeti came second with 209,141 votes. Her running mate was Peter Mathuki (2nd petitioner). On 5th September 2017 the petitioners petitioned to challenge the validity of the election and declaration of the results by the 1st and 2nd respondents, the Machakos County Returning officer and the Independent Electoral and Boundaries Commission, respectively. The respondents' response was that the election had been conducted in accordance with the Constitution and the electoral law, and that the results declared were valid.

2. On 18th October 2017 a pre-trial conference was held. The petitioner indicated they would call thirty (30) witnesses during the hearing of the petition. The 1st and 2nd respondents said they would call thirteen (13) witnesses, and the 3rd respondent asked to call sixteen (16) witnesses. It was agreed that hearing would commence on 13th November 2017, for the whole week till 17th November 2017, to receive the evidence of the petitioners. On the same 18th October 2017 the 3rd respondent had filed an application to strike out the entire petition because the petitioners had not joined the 3rd respondent's running mate, and that there was breach of the mandatory provisions of **rules 8(5), 10(3) (b)** and **(c)** and **12(2)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**. I ordered the petitioners to respond to it, and the parties to file written submissions. The 1st and 2nd respondents

supported the application. The application was argued, and on 10th November 2017 the court delivered a ruling dismissing the same. Mr. Musau for the 3rd respondent sought leave to appeal the ruling. The court gave him leave of seven (7) days.

3. On the same 10th November 2017, Mr. Musau for the 3rd respondent and Mr. Maanzo for the petitioner all sought to move the hearing date to a later date. They informed the court that the week of 13th to 17th November 2017 would not be convenient to them because their lead counsel, Mr. Gatonye for the 3rd respondent, Mr. Kimani Muhoro for the 1st and 2nd respondents and Mr. Otiende Amolo for the petitioners, had been instructed to participate in the presidential election petition. The court indulged them, and moved the hearing date from that week to 21st to 24th November 2017.

4. Come 21st November 2017, Mr Gatonye applied for the adjournment of the hearing on the ground that his client had appealed the ruling to the Court of Appeal and sought the stay of proceedings in this court. He stated that the application for stay had been certified urgent and would be heard on 27th November 2017. Counsel submitted that the appeal was going to have important jurisprudential value since some courts had decided that a deputy governor was a necessary party in a petition challenging the election of a governor, and others (like this one) had decided otherwise. He wanted the Court of Appeal to decide the issue once and for all. I do not want to mention here that whoever loses on this point at the Court of Appeal may very well, in the exercise of his right that counsel emphasized, go to the Supreme Court. Counsel relied on **rule 18** of the **Court of Appeal (Election Petition) Rules, 2017**. Mr. Kimani Muhoro supported the application to stay the proceedings to await the resolution of the matter before the Court of Appeal.

5. Mr. Willis Otieno for the petitioners opposed the application. His argument, relying on **rules 6** and **18** of the **Rules**, was that the appeal contemplated from an election petition was an appeal from a judgment, and the decree or order arising therefrom; that the law does not allow an appeal following a ruling in an interlocutory application in an election petition. He further submitted that election petitions are time-bound, that three (3) months had passed since the petition was filed; and, that the court was left with only 3 months to hear and determine the matter. If there is delay occasioned by the stay of proceedings and appeal, and the six months allowed by the law are over, the petitioners will be left without a remedy as the court will cease to have jurisdiction to continue with the petition, he argued.

6. An electoral system must ensure that complaints relating to the process are determined promptly within a given timeframe, and that the resolution of the complaints be substantively and effectively handled by an independent and impartial tribunal or court. It is crucial to ensure that the outcome of any such complaint is not delayed. The Constitution of Kenya 2010 and the **Elections Act No. 24 of 2011** provided strict timelines within which to determine election petitions.

7. Under **Article 87(1)** of the Constitution -

> **"(1) Parliament shall enact legislation to establish mechanisms for timely settling of election disputes."**

The legislation that was enacted was the **Elections Act**, whose **section 75(2)** provides that a question of the validity of an election of a county governor shall be determined within six months of the date of the lodging of the petition. In **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014,** the Supreme Court explained the historical context and rationale for the strict enforcement of the election dispute timelines in the following terms:

> **"This provision (i.e. Article 87(1) of the Constitution) must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment……It is now a constitutional imperative that the electorate should know with finality, and within a reasonable time, who their representatives are. The people's will, in (the) name of which**

elections are decreed and conducted, should not be held captive to endless litigation."

8. I hasten to add that, under **Article 17(2)** of the African **Charter on Democracy, Elections and Governance**, redressing election-related disputes in a timely manner is one of the key indicators of transparent, free, fair and democratic elections.

9. Once again, this petition was filed on 5th September 2017 and time begun to run. The court has to receive the evidence of 69 witnesses, each of whom has to be cross-examined. Counsel will then prepare written submissions, be given an opportunity to highlight them before the court adjourns to prepare and deliver a judgement. The parties herein are aware that this court is also handling the Yatta Constituency (member of the National Assembly) petition. This is happening in Machakos, and the court is at the same time responsible for the Family Division in Nairobi.

10. But more important, the parties herein know that the electorate in Machakos County are anxious to know who their governor for the next five years is going to be. The 3rd respondent has the liberty to appeal the decision or orders of this court, and that is why, when he requested, I granted him leave. This court is the one managing this petition to make sure that the constitutional and statutory timelines are not busted. It will accommodate parties and their counsel, like the foregoing will show, but that has to be done taking into consideration the wider interests of all the parties.

11. It is not the business of this court to estimate what chances the 3rd respondent will have on appeal. This is to answer Mr. Otieno's submission that a party in an election petition cannot appeal against a ruling in an interlocutory application.

12. Regarding what prejudice the parties will suffer if this application is allowed or not allowed, it is clear that this court, again, is not responsible for the calendar of the Court of Appeal. However, if the hearing is allowed to proceed and the Court of Appeal ultimately grants stay, some witnesses will have testified at least. If I grant stay, and do not know how long the matter in the Court of Appeal will take, the petitioners will run the risk of being caught up with time, with the consequence that the court will be unable to hear and determine the petition. In the first scenario, the 3rd respondent may be compensated by costs. In the second scenario, the petitioners, and those who voted for them, will be prejudiced in a manner that cannot be compensated by any other way.

13. These are the reasons why I declined to allow the stay of these proceedings. I ask that costs be borne by the 3rd respondent.

DATED and DELIVERED at MACHAKOS on the 24TH day of NOVEMBER 2017.

A.O. MUCHELULE

JUDGE