



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
ELECTION PETITION NUMBER 2 OF 2017

STEPHEN KOLIMUK.....PETITIONER

VERSUS

IEBC.....1ST RESPONDENT

JUMA MUGWANGA.....2ND RESPONDENT

DAVID LOSIAKOU PKOSING.....3RD RESPONDENT

RULING

The Petitioner herein filed the petition on 11th September, 2017 alongside a notice of motion seeking to enlarge time to allow him file his petition out of the statutory allowed time of which is within 28 days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

The 3rd Respondent, given the foregoing stated notice of motion, filed a notice of preliminary objection dated 23rd September, 2017 based on the grounds that:-

- 1) **The application is fatally defective, incompetent and an abuse of the due process of the law in that it offends the provisions of Article 87(2) of the constitution of Kenya 2010, which provides that the petitions covering an election, other than a presidential election, shall be filed within twenty eight days after the declaration of results by the Independent Electoral and Boundaries Commission.**
- 2) **This court lacks jurisdiction to entertain the application to enlarge time.**
- 3) **The application is fatally incompetent and should be dismissed with costs to the 3rd respondent.**

During the hearing of the preliminary objection the applicant argued that the petitioner concedes in the supporting affidavit that the time had lapsed by the time he filed the petition and the application. The election results were declared on 10.8.2017 and from that day the petitioner had 28 days to file the petition. **Article 87(2)** is couched in mandatory terms that petitions concerning an election, other than a presidential election, shall be filed within twenty eight days after the declaration of the election results by the **Independent Electoral and Boundaries Commission**. The petitioner had therefore till 6th day of September, 2017 to file the petition, but only did so on 11th September, 2017, which is out of the allowed period. To buttress the point the applicant relied on the case of **Lemakou Aramat versus Harun Meitamei Lempaka and 2 others [2014]eKLR**, in which the petition was filed 38 days after the

declaration of the results, prompting the Supreme Court to declare that petitions filed out of time are ***null ab initio***. The said court made it explicit that filing the petition out of time denies the court jurisdiction to hear it.

I was also urged by the applicant to consider the finding in the case of ***Hassan Ali Joho and another versus Suleiman Said Shahbal and 2 others [2014]eKLR***, in which the court made a finding that time starts running when the Returning Officer makes a decision which becomes final and issues form 38.

The 3rd Respondent submitted that the petitioner did not file a response to the preliminary objection and the preliminary objection was therefore unopposed and should be allowed as prayed.

The petitioner in response relied on the supporting affidavit attached to the notice of motion dated 11th September, 2017, of which gives reasons for the delay in filing the petition.

I have weighed each side position on the matter. There's no dispute that the petition was filed out of the time allowed by the ***Constitution, Article 87(2)***, of which is within 28 days from the date of declaration of the Election Results. ***Section 76(1)(a) of the Elections Act*** reiterates the position as it equally gives the petitioner 28 days to file the petition after the date of declaration of the result. The High Court in Kakamega considered whether the court has jurisdiction to enlarge the time for filing of an election petition, in ***Election petition number 12 of 2017, of Andrew Toboso Anyanga versus Mwale Nicholas Scott Tindi and 3 others [2017]eKLR***, where it held that the ***Constitution of Kenya 2010, the Election Act 2011*** and the ***Rules*** do not give the court any room for discretion where a petition has been filed out of time, even if that period by which the petitioner has failed to meet the deadline is one day.

Given the foregoing, the fact is clear that the petition was filed out of the allowed time. The law is also explicit that I do not have discretion to expand the time and the jurisdiction to hear such a petition. The preliminary objection is therefore merited. It's allowed. The petition and the notice of motion dated 11.9.2017 are struck out with costs to the respondents.

Costs are capped at 2 million Kenya shillings. To be shared by both respondents.

Ruling is read and signed in the open court in the presence of M/S Arunga for the 3rd Respondent, Mr. Songok J. K for the 1st and 2nd Respondent, Mr. Barasa holding brief for Mr. akenga for the petitioner.

M/S ARUNGA

We pray the security for cost be released to the respondents as part payment.

COURT

Request is granted.

S. M. GITHINJI

JUDGE

23.11.2017