



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

PETITION NO.1 OF 2017

LESRIMA SIMEON SAIMANGA.....PETITIONER

- V E R S U S -

INDEPENDENT AND ELECTORAL

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER

SAMBURU COUNTY.....2ND RESPONDENT

LENOLKULAL MOSES KASAINIE.....3RD RESPONDENT

R U L I N G (2)

The application dated 18/10/2017, is brought by the 1st and 2nd respondents pursuant to Articles 1, 2, 3, 10, 27, 38, 81, 86 and 249 of the Constitution; Sections 39 of the Elections Act Regulations 3, 4, 7, 79 and 84 of the Elections Regulations 2017. The 1st and 2nd respondents seek an order that this court be pleased to strike out this petition for non joinder of the Deputy Governor, a necessary party as he will be affected by the decision ensuing from the determination of this petition. They also ask for costs of the petition. The application is supported by the affidavit of Ben Misati dated 18/10/2017 and grounds found on the face of the application.

The application was opposed by the petitioner and submissions were filed by the counsel, Mr. Mombo.

At the hearing of the application Mr. Karanja, counsel for the 1st and 2nd respondent submitted that Article 180 of the Constitution provides for election of a Governor, nominates a person of his choice as a Deputy Governor, that up on nomination, no papers for the Governor can be received without those of the Deputy Governor; that upon nomination, both were gazetted and both appeared as candidates on the ballot paper; that upon declaration of results both were declared as Governor and Deputy and both took oath of office; that the Deputy Governor should have been joined to this petition because he will be affected by the determination of the court; counsel further argued that Section 32 of the County Government Act assigns different duties to the Governor and the Deputy and they are so co-joined that the court cannot deal with one to the exclusion of the other. Counsel further argued that the Deputy Governor will be condemned unheard if the order is not granted and yet he cannot be joined by amendment as time is already over. Counsel urged that the decision relied upon by the petitioner **E.P.10/2017 (MSA) Hassan Omar Hassan and another v IEBC and Hassan Ali Joho** is not binding being a decision of a concurrent jurisdiction.

In reply Mr. Mombo submitted that it is the Governor who is the contender for the gubernatorial elections; that the two positions are co-joined and one cannot deal with one to the exclusion of another; that the positions are one and the same that the Deputy Governor is a beneficiary of the office of Governor.

The issue before me is whether the Deputy Governor was together with the Governor, the successful party in the elections of 8/8/2017 that he should be joined to this petition as a respondent. **J. Kimaru** considered such an issue of who was the successful candidate and the effect of failure to join a party and expressed himself as follows in **Aboub Ali v the IEBC and 20 others (2013) KLR**:

“The Constitution, the Election Act and Election Petition Rules require that the successful candidate be made a party to the petition because such candidate is the primary target of such election petition. He is the one who will be the first person to suffer the consequences of the nullification of the particular election result. Where the petitioner does not include the successful candidate as a party in the petition, such petition lacks legal substratum and is liable to be struck out.”

Different courts of concurrent jurisdiction have dealt with a similar issue like the one before me today and there are two divergent views about the joinder of the Deputy Governor as a respondent to an election petition where the Governor is the respondent. In the case of **Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkendenye & others (2013) KLR** J. Mabeya had this to say:

“Article 180(6) of the Constitution.....In my view....is self-explanatory and only requires a literal interpretation. The 4th respondent is barred by law from conducting separate elections for the post of Deputy Governor. It may therefore seem that the position of Deputy Governor is not an elective post per se. A candidate for Deputy Governor only assumes such a position by being a nominee of the successful candidate of County Governor. Under Regulation 51 of the Elections (General) Regulations 2012 the Returning Officer is required to issue a nomination certificate to a candidate who is validly nominated to contest for the County Governor position. No such certificate is given to a running mate. It would seem that the law only contemplates one elective post in the gubernatorial election and that is the post of County Governor. That notwithstanding, however, the Constitution directs the IEBC to declare a Deputy Governor nominated by a person subsequently elected to have been elected Deputy Governor. To my mind, this means that the election of Governor and his Deputy is one ticket. When electing the Governor, the voters likewise elect the Governor’s Deputy. The nomination of the Deputy Governor is prior to and not after election. Although it is not a direct election, it remains an elective post since the name of the Deputy Governor must be in the Ballot paper. A purposive interpretation of the Constitution in my view will lead to no other conclusion that that the Deputy Governor’s position is elective. This is because of the requirement that the Deputy’s qualification must be akin to those of the Governor and once a vacancy in the Governor’s position arises no by election is to be held but automatic assumption of office of Governor by Deputy. To my mind therefore the election of Governor cannot be separated from that of his Deputy. I therefore hold that the post of Deputy Governor is elective as is a Governor’s seat.”

Justice Lesiit in **M’nkiria Petkay Shem Miriti v Ragwa Samuel Mbae & 2 others (2013) eKLR**:

“49. Provisions on the election of a Governor and Deputy Governor are contained in Article 180 of the Constitution...

50. From a reading of the provision, it is clear that the Deputy Governor, upon the election of the Governor, is treated as elected, as if he had vied in an election. Upon his declaration, he becomes, by virtue of the Constitution, an elected person.

51. The non-inclusion of the running mate to the 1st respondent brings to the fore the question of fair hearing as enunciated in Article 50 of the Constitution. Article 25(c)

.....prima facie, the non conclusion of the running mate to the 1st respondent is not fatal to the petition as the court has the power under Section 80(1)(b) to compel the attendance of any person as a witness who appears to the court and have been concerned in the elections or in the circumstances of the vacancy or alleged vacancy. Whether the failure to include the Deputy Governor in this Petition was fatal will be considered fully at a later stage in this Petition.”

Non joinder of the Deputy Governor was again addressed by J. **Ong’udi in Kithinji Kiragu v Martin Wambora & 2 others (2013) KLR** where the Judge held:

“Correctly stated, the Deputy Governor is not an elected member but a nominee of the Governor. And that nomination is pegged on the valid election of the nominating Governor. This Court’s view is that the provision of Article 181 and 182 concern a validly elected Governor. If the election is challenged and the Governor is found to have been unlawfully elected, then it means he/she has to vacate office alongside his/her deputy. The Deputy Governor could not therefore be enjoined as a party as his/her nomination is not in question. The question concerns only the election of the Governor. I therefore find the issue of non-joinder to have no basis.”

Article 180 of the Constitution governs the election of the County Governor and the Deputy Governor. Under Section 180(1) the County Governor shall be directly elected by the voters during a general election. Under Article 180(5), the candidate for election as County Governor shall nominate a person qualified for nomination for election as County Governor as a candidate for Deputy Governor. Under Article 180(6) no separate election shall be conducted to elect a Deputy Governor but the IEBC shall declare the candidate nominated by the person who is elected County Governor to have been elected as the Deputy Governor.

Article 182 provides for when a vacancy will avail in the County Governor’s Office. It reads as follows:

“182(1) the office of the County Governor shall become vacant if the holder of the office:

(a) Dies

(b) Resigns, in writing, and rises to the speaker of the County Assembly

(c) Ceases to be eligible to be elected County Governor under Article 180(2)

(d) Is convicted of an offence possible by imprisonment for at least twelve months; or

(e) Is removed from office under the Constitution

(f) If a vacancy occurs in the office of County Government, the Deputy County Governor shall assume office of a County Governor for the remainder of the term of County Governor.

As submitted by counsel and set out in the above provisions, it is clear that the Governor is directly elected by registered voters in his County and he nominates a running mate. It means that the Deputy Governor is not directly elected by the voters and can only assume the office of Governor if it falls vacant as envisaged under Article 182 as recently happened in Nyeri County when Mr. Gakuru died and his deputy Mr. Kahiga has taken over.

Under Rule 2 of the Elections (Parliamentary and County Elections) Petition Rules 2017, an Election Petition is brought against the person whose election is complained of or any other person whose conduct is complained of in relation to an election. In Rule 9 of the Rules, the IEBC is the only party that is mandatorily required to be a respondent in every election petition. In this case, the person who was elected as the Governor is the person whom a challenge can be brought as to the validity of his election. So, where the election of the Governor is successfully challenged in an election petition, then the Deputy Governor would leave office too. Flowing from Rule 2 & 9, unless there are specific allegations made

against the Deputy Governor, during the election of the Governor, then it would not be necessary for him to be made a party to the election petition filed against the Governor. The Governor will be the respondent in the petition because he is the one who was elected and would cease to hold office if the challenge is successful. Since the Deputy Governor's office is pegged on the election of the Governor, the Deputy Governor would cease to hold office too because he would have assumed office through an irregular process. The upshot is that the petition is properly before the court without joinder of the Deputy Governor and the 1st & 2nd respondents' application dated 18/10/2017 must fail and is dismissed. Costs to be in the cause.

Dated, Signed and Delivered at NYAHURURU this 22nd day of November, 2017.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mombo for petitioner

Mr. Karanja for 1st & 2nd respondents

Mr. Mwangi & Ms. Peinan for 3rd respondent

Soi – Court Assistant