



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

THE CONSTITUTION OF KENYA

**THE ELECTIONS ACT, 2011 ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS
PETITION RULES 2017**

ELECTION PETITION CASE NO. 2 OF 2017

SAMMY NDUNG’U WAITY1st PETITIONER

DENNIS KIMANGOROR LEMAN 2ND PETITIONER

versus

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....1st RESPONDENT

NDERITU MURIITHI2nd RESPONDENT

JOHN MWANIKI 3rd RESPONDENT

COUNTY RETURNING OFFICER

LAIKIPIA COUNTY.....4th RESPONDENT

and

JOSHUA WAKAHORA IRUNGU...INTENDED INTERESTED PARTY /APPLICANT

RULING

1. JOSHUA WAKAHORA IRUNGU (hereinafter referred to as the intended interested party) was the former Governor of Laikipia County with his tenure ending after the General Elections of 8th August, 2017. During that General Election he was the only other contender for the gubernatorial Election of Laikipia County the other Contender being NDERITU MURIITHI (hereinafter referred to as the 2nd Respondent). The 2nd Respondent was declared the Governor elect following that General Election with JOHN MWANIKI (the 3rd Respondent) being his Deputy. That election of the 2nd Respondent, as the Governor, is challenged in this petition by SAMMY NDUNGU WAITY (hereinafter referred to as the Petitioner).

2. This Ruling is on the application of a Notice of Motion dated 9th November, 2017. That Notice of Motion is filed by the intended interested party. He seeks the order that:

“That the applicant be enjoined as an interested party in the petition herein”.

3. By his affidavit in support of that application the intended interested party had deponed.

That he was one of the candidates for gubernatorial election in Laikipia County during the General Elections held on 8th August, 2017;

That the 1st and 4th respondents in breach of the constitution and Election Laws, through acts of omission and or commission failed to deliver free, fair and credible, verifiable and accurate gubernatorial elections in the Laikipia County;

That it was through such acts of omission and commission the 1st and 4th respondents declared the 2nd respondent the duly elected Governor of Laikipia County which declaration was null and void;

That the nomination of the 2nd respondent to contest the position of governor was in breach of Section 33 of the Election Act;

That that the 2nd respondent committed various offences and should not have been permitted to contest in the election;

That the 1st and 4th respondents failed to accord the intended interested party’s voters in Laikipia North sub-county an opportunity to elect the leader of their choice,

That the intended interested party, if joined as an interested party will demonstrated that the 1st and 4th Respondents conducted elections inconsistent with the principles in the Constitution, Election Act and Election (General) Regulations, 2017 and Elections (Technology) Regulations, 2017 and further that the Counting, tallying and collation of the votes was not transparent, credible, accurate, verifiable, free, or fair, and,

That the intended interested party will, if joined in this petition, file affidavits, of his agents who will give evidence of those irregularities and he will also file about 2000 affidavits of residents of Laikipia North Sub-County who were denied opportunity to participate in the election.

4. Learned Counsel **Mr. Amunga**, for the intended interested party, submitted that his client had a legitimate interest in the outcome of this petition. That he had been mentioned in the pleadings in this petition and if joined as a party he will be able to respond to those pleadings.

5. In response to the Respondents’ opposition to his application intended interested party submitted that, the fact he participated in handing over instruments of power of the Governor’s officer to the 2nd Respondent at the swearing in of the 2nd Respondent was not tantamount to him conceding to that Election of 2nd Respondent.

6. Learned Counsel further submitted that there was no Rule or Act which bars the joinder of an interested party in an Election Petition.

7. Contrary to the intended interested party’s affidavit before court, Learned Counsel submitted from the Bar that if the joinder was permitted the intended interested party would file only three affidavits.

8. The application was supported by the petitioner. Learned Counsel **Mr. Abubakar** for the petitioner submitted that the right to be heard was a right recognized under the Constitution, which was akin to access to justice. That although there was no specific Law permitting joinder in an Election Petition the court should be guided by Rules of natural justice. Learned Counsel compared the present application to the one filed by the former 2nd petitioner (**DENNIS KIMANGOROR LEMAN**) whereby that said former 2nd petitioner sought to withdraw himself from this petition. This court noted that there was no specific Rule governing such withdrawal of a Petitioner, but nevertheless in the interest of justice this

court entertained the application for withdrawal.

9. Learned Counsel for the petitioner was of the view that the fact the intended interested party participated in the swearing in of the 2nd respondent was of no consequence. This he argued was because the Embu High Court when requested in an Election petition declined to stop the swearing in of the Governor elect of Embu County and that therefore the swearing in of the 2nd respondent was inevitable and the involvement of the intended interested party was necessary.

10. Learned Counsel for the Petitioner **Mr. Magee Wa Magee** drew the court's attention to Regulation 15 (h), which he submitted, was of aid to a party seeking to file further documents.

11. I need to state here that Learned Counsel failed to elaborate on which Regulations he was referring to. This is because there are several **Regulations to the Election Act No. 24 of 2011**. They are as follows:

Elections (Registration of voters) Regulations, 2012;

Elections (voters Education) Regulations, 2012 (Revoked);

Elections(General) Regulations 2012,

Elections (Technology) Regulations, 2017

Elections (Party Primaries and Party Lists) Regulations, 2017; and

Elections (Voters Education) Regulations, 2017.

12. With all those Regulations to choose from it was necessary for the petitioner's Learned Counsel to state which one he referred to. I did check those Regulations stated above and I was unable to find one that had paragraph 15(h). It follows that the submission by Learned Counsel in that regard was of no value in this matter.

13. Learned Counsel **Mr. Bush Wanjala** appearing for the 1st and 4th Respondents opposed the application.

14. Learned Counsel submitted that this court had jurisdiction, under its inherent power, to entertain the intended interested party's application but cautioned that the court will not automatically grant such a prayer. In this regard Learned Counsel referred to the case High Court **NAIROBI ELECTION PETITION NO. 23 OF 2017 JAPATHET MUROKO AND ANOTHER – VERSUS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER.** He specifically referred to the following passage in that case:

“That said, should a party seeking to join proceedings as an interested party be shut out completely? The court is clothed with power to promote the interests of justice, and it is on this premise that this court gives audience to the applicant herein. However admission of a person as an interested party is not a matter of right. Even where the law provides the basis for such an application, the court admits a party in exercise of its judicial discretion”.

15. Learned Counsel in opposing the application also referred to **Article 87 (2)** of the Constitution which Article limits the filing of a Petition, challenging all elections exception Presidential Election, to be filed within 28 days after the declaration of the election result.

16. Mr. Bush Wanjala referred 4 Principles of joinder of a party as follows:

The interest that the applying party has to be disclosed.

The prejudice to be suffered by the applying party should be set out.

The applying party has to clearly set out the case it wishes to bring forth.

The conduct of the applying party is relevant.

17. He submitted that the intended interested party in this matter seeks to be enjoined because he was a contender for Governor's position in the General Election. Mr. Bush Wanjala submitted that this sufficed to bring the intended interested party within realm of those who are considered as interested parties. In this regard and making reference to the case **JAPATHET MUROKO (supra)** he relied on the following passage:

“The fact of the applicant having been a candidate in the election that is subject of these proceedings is not in dispute. This fact brings the applicant within the definition of an interested party. However, the fact of being a candidate alone is not an automatic card for the applicant to be so joined, since admission of an interested party is not a right but a matter of discretion of the court”.

18. On prejudice Mr. Bush Wanjala was of the view that the intended interested party was not likely to suffer any because the petitioner was his Chief agent during the last general Elections. And that in that regard the evidence and the witnesses the Petitioner intended to call seem to take care of the intended interested party's case.

19. Mr. Bush Wanjala further submitted that the case of the intended interested party was not entirely clear but that on examining the affidavit in support of the application it is clear that the intended interested party intended to widen the scope of the petition before court. In that regard he referred to the deposition which indicates that the intended interested party wished to file 2,000 affidavits if he was admitted in this matter as an interested party.

20. The application was also opposed by the 2nd Respondent. The 2nd Respondent by his replying affidavit sworn on 20th November 2017 referred to the intended interested party's public concession, whereby he conceded to the election of the 2nd Respondent as Governor of Laikipia County. He also deposed to the ceremony where the intended interested party handed him all the instruments of power which included the Laikipia County Seal and Official Flag.

21. 2nd Respondent referred to the intended interested party speech at that ceremony which in part he stated:

“I humbly respected the will of the people and it is for that reason that today, I join the entire Laikipia populace to congratulate the governor and the Deputy Governor – elect, wishing the (sic) Gods'peed in their quest to make Laikipia great.

22. In view of the above deposition 2nd Respondent further deposed that the intended interested party was estopped from seeking to impugn the election of the 2nd respondent.

23. Similarly to what was submitted on behalf of the 1st and 4th Respondents the 2nd Respondent deposed that admission of the intended interested party was tantamount to allowing a fresh petition to be filed, out of time, because the intended interested party by his application showed that he intended to widen the scope of the petition. To that end the 2nd Respondent deposed that he stood to suffer severe prejudice.

24. **Ms. Maria Mbeneka** Learned Counsel for the 2nd Respondent referred the court to the Black's Law Dictionary's definition of the term interested party, viz,

“a party who has a recognizable stake (and therefore standing) in a matter”.

25. Learned Counsel referred the court to the case FRANCIS KARIOKI MURUATETU & ANOTHER– VERSUS REPUBLIC & 5 OTHERS [2016] eKLR where the court stated:-

“... We are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/ Principal parties before the court Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issue as presented by the Principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. Stakes cannot take the form of an altogether a new issue to be introduced before the court.”

26. In the view of Learned Counsel Ms. Mbeneka the intended interested party had perjured himself, for having conceded the election of the 2nd respondent and now seeking to contest the same election.

27. Mr. J.M.Njengo and Mr. J M. Wanjohi represent the 3rd Respondent. The 3rd Respondent opposed the application.

28. It was submitted on behalf of the 3rd Respondent that although the Law permits the joinder of parties to an action that right was not absolute as was seen in the case CIVIL APPEAL NO. 21 OF 2015 TIMBER MANUFACTURER & DEALERS LIMITED – VERSUS – FLORENCE WAIRIMU MBUGUA & ANOTHER (unreported).

29. In that case the court of appeal found the applicants, wishing to be joined as an interested parties in the appeal had failed to establish that they were person affected by the Ruling of the High Court. The court stated the following in regard to those applicants;

“They have not demonstrated direct nexus exists between themselves and the dispute between the parties so as to be considered as persons affected by the appeal”.

30. Learned Counsel also submitted that to allow the intended interested party be joined in this petition would lead to the reconsideration of the same issues relied upon by the petitioner.

31. Further that the intended interested party by his entry to this petition was seeking to enlarge the original petition contrary to **provisions of Section 76 of the Election Act**.

32. Section 76 provides that Petition challenging County Elections shall be filed within 28 days of declaration of results.

33. It is because of the above Provisions that Learned Counsel of 3rd Respodnent submitted that the intended interested party’s application was time barred. And that to allow the application will lead to prejudice to the 3rd Respondent.

ANALYSIS AND DETERMINATION

34. The intended interested party was, as stated before, one of only two candidates for the gubernatorial election of Laikipia County. From 11th August 2017, when the 2nd Respondent was declared Governor elect, of Laikipia County the intended interested party was aware of the outcome of that election.

35. Having that knowledge the intended interested party failed to explain to this court why he waited until 9th November, 2017 to make the present application. In my view, he sat on his rights to his detriment.

36. The petitioner was a Chief Constituency agent for Laikipia East for the Jubilee Party. The intended interested party is a member of the Jubilee Party. Beyond peradventure of doubt that the intended

interested party was aware of this filing of the petition. Not only because it was filed by the Chief agent of Jubilee party but because it was in the Public domain. It was gazette in the Kenya Gazette when the Chief Justice appointed this court as an Election Court.

37. The application before court seeks the exercise of this court's discretion and the intended interested party had an obligation to approach this court much earlier. This is what was stated by the Supreme Court in the case **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE – VERSUS MUMO MATEMO & 5 OTHERS [2015]** when that court was considering an application to join a party as amicus curiae. The court in that case stated.

“For purposes of proper administration in this Court, applications seeking the exercise of discretionary powers are to be made within reasonable time; this ensures expedition in the proceedings, and gives fulfillment to parties’ constitutional right to access to justice. This is a statement of principle,.....”

38. It is also necessary to remember that there are Constitutional limitation to the hearing of election petitions. There is a historical background to this limitation. That background was discussed in the case **LEMANKEN ARAMAT V HARUN MEITAMEI LEMPAKA & 2 OTHERS (2014) eKLR** viz:

“Kenya today has undergone significant transformation along the paths of democracy and constitutionalism; and, necessarily, the majoritarian expression through electoral practice has had a major role, of which this Court takes cognizance. Thus the Constitution of Kenya, 2010 set out to streamline that electoral system. Part of that streamlining was clear provisions on the settlement of electoral disputes, the timelines involved and various principles running across the entire span of the Constitution.

This court has recently pronounced itself again, on the issue of time, and the importance of adhering to constitutional time lines in electoral disputes, in the Munya case. The Court held (at paragraph 62) that:

Article 87 (1) grants Parliament the latitude to enact legislation to provide for timely resolution of electoral dispute. This provision 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 experience. The constitutional sensitivity about timelines and timeliness, was intended to redress this aberration in the democratic process.”

39. The above quotation although long winded is necessary to show the need for parties to adhere to the time lines set in the Constitution or the statute, and the need for the intended interested party to have filed his application earlier than he did.

40. As stated before the intended interest party filed his application well after this court had given pre trial directions. On that ground alone and taking into account the provisions of **Rule 15 (2)** of The Election (Parliamentary and County Elections) Petition Rules 2017 this application ought to be dismissed. That Rule provides:-

“an election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.”

41. The intended interested party's application for joinder could have been made immediately this petition was filed, that is on 8th September 2017. Instead however the application was not filed until 9th November 2017. The intended interest party failed, as stated before to explain the reason for that delay. It was incumbent for the intend interested party to explain why he delayed to file his application which application was filed after this court had given pretrial directions and fixed the hearing of this petition which hearing is today, 22nd November 2017.

42. I am of the view that to allow the application and enjoin the intended interested party will lead to prejudice to the parties in this case, and more particularly the Respondents, because as correctly submitted by the Respondents the intended interested party does intend, if joined as a party, to enlarge the scope of petition.

43. Even if the intended interested party was to seek to rely on **Article 159 of the Constitution**, the application of that Article was eloquently stated in the case of **SAMUEL KAZUNGU KAMBI & ANOTHER – VERSUS – INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2017] eKLR**, where the court in part stated that the Article was not intended to ‘exhibit scant respect for Rules and timelines’. The Court of Appeal in that case stated:—

*“The answer as to whether the 1st Petitioner can seek refuge under Article 159 (2) (d) was provided by the Court of Appeal in **NICHOLAS KIPTOO ARAP KORIR SALAT - V – I. E. B. C. & 6 OTHERS [2013] EKLR WHERE KIAGE, JA** held that:*

“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 succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts given assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

44. On that ground alone, that is, that the intended interested party failed to file his application without undue delay will lead to the dismissal of the application.

45. In addition to the above I am of the view that the intended interested party will not suffer prejudice if he is not allowed to be joined in this petition. I form that view because the petitioner has largely presented grounds that the intended interested party wishes to present to the court.

46. The petitioner by the petition before court has pleaded that the entire election of the governor of Laikipia County was not done lawfully, transparently and in accordance with the Constitution.

47. It is further pleaded in the petition that a large number of electorates among the Pokot Community were impeded from casting their votes.

48. It was pleaded that there was suspicion that Sosian Ward votes were inflated.

49. It was pleaded that some of the Jubilee agent were denied entry to polling stations and that the exact results were not issued to the agents of Jubilee at the tallying centres.

50. That in some polling stations Presiding Officers were hostile to the agents of Jubilee Party and that those agents were denied their request for recounting of the votes.

51. The petition also faulted the method used in transmitting the results.

52. The petition also questions the qualification of the 2nd Respondent to vie for position of Governor.

53. To the extent that the issues raised in the petition are also some of the issues the intended interested party intends to raise, he will then not suffer prejudice if not jointed. This was clearly stated in the case

TRUSTED SOCIETY OF HUMAN RIGHTS (supra) where the Court stated:

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio, he or she is one who will be affected by the decision of the court when it is made, either way, Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause....”.(Underlining mine)

54. The intended interested party has not shown to this court that the petitioner, who was the Chief agent of Jubilee, and perhaps the man on the ground, will fail to well articulate his grievances.

55. Additionally the intended interested party, clearly by his affidavit has indicated that he intends to introduce new issues to this petition thereby seeming to amend the petition beyond the 28 days limitation period provided under **Section 76 of the Election Act.**

56. The amendments/ or additions he seeks, is to file 2,000 affidavits of voters that were denied voting. He does not elaborate how or why those voters were denied to vote. If the denial was for other reasons than those set out in the petition, since he was not clear in his affidavit, then the intended interested party does seek to materially alter the petition and the alternation will be such that it will go to the root of the Petition: See **MICHAEL GICHURU – V- RIGATHI GACHAGUA & 2 OTHERS [2017] eKLR.**

57. Such attempt to introduce new issues was considered by the Supreme Court in the case **RAILA AMOLO ODINGA & ANOTHER – V- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 others [2017] eKLR** viz:

“The applicant, in essence is introducing new facts and issues that were not before court. It follows that he is not in a position to advance any submission that will be helpful to the court as it resolves the main question at hand. he is, in effect introducing a new petition, and pre-empting the duly- lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly we dismiss this application.”

58. That quotation is very apt to the matter before me. The intended interested party cannot, at this late stage introduce new facts and issues that are not in the petition. That introduction would be prejudicial to the Respondents.

59. Finally this Ruling has been enriched by the authorities supplied by the learned Counsels and I am indebted to them.

60. In the end on the basis of the material before me I am satisfied that the Notice of Motion dated 9th November 2017 is without merit for the intended interested party has failed to demonstrate he has met the principles of being joined as an interested party in this matter. And it was not enough for such a joinder that he as a candidate in the gubernatorial election of Laikipia county. **The Notice of Motion dated 9th November 2017 is dismissed with costs to all the Respondents which costs are hereby determined to be Ksh. 100,000 for each Respondent.**

Dated and Delivered at Nanyuki this 22nd Day of November, 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

1st Petitioner

1st Respondent and 4th Respondent

2nd Respondent

3rd Respondent

intended Interested Party

COURT

Ruling delivered in open court

MARY KASANGO

JUDGE