



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION 12 OF 2017

**IN THE MATTER OF: THE CHALLENGE TO THE VALIDITY OF THE GARISSA COUNTY
SENATORIAL ELECTION, 2017**

AND

**IN THE MATTER OF ARTICLE (1),(2);(2)(2); 4(2); 10; 21(1); 22(1);23; 38(3);47(2); 48;81(A)
&(E); 82(2)(B); 84; 86; 87(2) & (3); 88(5); 165(3)(A) AND (E) ; 180(1) OF TH CONSTITUTION
OF KENYA**

AND

IN THE MATTER OF SECTION 75, 80, 83 OF THE ELECTION ACT 2011

AND

IN THE ELECTION ACT, 2011(ACT NO.24 OF 2011) AS AMENDED

AND

**IN THE MATTER OF THE LEGAL NOTICE NO. 126 OF 2012 (THE ELECTION
(REGISTRATION OF VOTERS) REGULATION, 2012**

AND

**IN THE MATTER OF PARLIAMENTARY AND COUNTY ELECTIONS PETITION RULES,
2017**

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) AMENDMENT REGULATIONS 2017

AND

IN THE MATTER OF A PETITION BY,

HUSSEIN ISSA ABDI.....1ST PETITIONER

ABDIKADIR FARAH MOHAMED2ND PETITIONER

MOHAMED ADEN ABDI3RD PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

COUNTY RETURNING OFFICER,

GARISSA COUNTY.....2ND RESPONDENT

MOHAMED YUSUF HAJI.....3RD RESPONDENT

COUNTY COMMANDANT GARISSA COUNTY.....4TH RESPONDENT

RULING

1. This Election Petition No. 12 of 2017 filed on the 6/9/17 has 3 petitioners. In support of the said petition is the supporting affidavit sworn by Hussein Issa Abdi, who is a voter. Mr. Hussein Abdi swore the affidavit on behalf of the 2nd and 3rd petitioners.

2. The Petitioners' counsel filed an application dated 19th October 2017. The applicant seeks orders that the honorable Court be pleased to summon and or direct the 1st petitioner to attend Court and explain his absence and or state his explicit position with regard to the petition within 3 days. That upon being heard this court do make further appropriate orders as regards his withdrawal from proceedings and or the admissibility of the pleadings to which he has deponed. The application is based on grounds that; the 1st petitioner cannot be reached to depone or swear the affidavit as provided under the law. This Court had directed the filing of a proper application for security and serving the application for security (dated 4th October 2017) within 5 days. Specifically that the supporting affidavit therein be signed by the petitioner. That the petitioner has not delineated any interest whatsoever in this petition and his conduct seems to affirm that he may not wish to have his statement under oath presented as evidence in this honorable Court at all adding that the respondents will not suffer any prejudice that cannot be compensated by an award in damages if the application is allowed.

3. In the affidavit in support to the said application the advocate Mr. Chahilu A. Edwin having conduct of the said petition avers that; the 1st petitioner voluntarily agreed to be enlisted as such and swore the supporting affidavit to the petition but now he has however, become evasive to append his signature on subsequent interlocutory applications leaving the question as to the *locus standi* to participate in these proceedings and that the Elections Rules, 2017 do not envisage participation of parties who will unnecessarily hinder expeditious disposal of an election petition. He urges the Court to summon and direct the 1st petitioner to appear before the Court and state his position on the petition. Adding that the Court has authority to make appropriate orders in lieu of Rules 4(1), 12(1) and bearing in mind the provisions of Rule 24 and 25(1) of the Parliamentary and County Elections Rules, 2017. That the Court has the power to make administrative orders pursuant to Rule 36 of Parliamentary and County Elections Rules, 2017. That it is only fair that this Court allows the application. That pursuant to Article 159(d) of the Constitution of Kenya the Court shall administer justice without undue regard to technicalities and not to render the application defective for want of signing by the 1st petitioner herein. That Section 80(1) (d) of the Elections Act, 2011 provides that an Election Court may in exercise of its jurisdiction decide all matters before it without under regard to technicalities.

4. The 1st and 2nd respondents filed an application dated 6th November 2017 seeking that the Petition dated 6th September 2017 be struck out. It is based on grounds that the petitioners have demonstrated by their conduct that they are not ready to proceed with the petition, which is largely evident from the

petitioners' application dated 19th October 2017, where counsel indicates that the 1st petitioner cannot be reached and pointing out the glaring inconsistencies in the manner in which the affidavit in support of the petition have been attested thus rendering the petition in whole baseless.

5. The 3rd respondent filed their application dated 31st October 2017 seeking to strike out the Petition dated 6th September 2017 on grounds that the petitioners have demonstrated that they are not able or willing to comply with the courts directions. That there are no verifying affidavits filed on behalf of the 2nd and 3rd petitioners and as such the same must be struck out as provided for under Rules 8 and 9 of the Elections (Parliamentary and County) Petitions Rules. Further, that the affidavit by the 1st petitioner must be struck out as it is wholly based on impermissible and inadmissible speculation and hearsay contrary to Rule 12(12) of the Elections (Parliamentary and County) Petitions Rules and with no prima facie evidence to substantiate claims under paragraph 49 to 119 of the said petition, the petition must be struck out.

6. The Court directed that the applications dated 24/10/17 and 31/10/17 be heard on the 7/11/17 with the 1st and 2nd respondent be at liberty to respond within 3 days and serve and now the petitioner to respond to the 3rd respondent's application within 3 days.

7. The applications were argued orally. Mr. Airo counsel for the petitioner argued that the application dated 24/10/2017 seeks orders that the Court summons the 1st petitioner for attend Court to explain his absence and state his position with regard to his petition within 3 days. That the Court makes further orders as regards withdrawal of the petition on the admissibility of pleadings to which he has deponed and that the 1st petitioner cannot be reached to depone to any affidavit under law as had been directed by the Court. That the Court had directed that a proper application for security be filed and served within 7 days and specifically that the supporting affidavit be signed by the 1st petitioner. He argued that the 1st petitioner's conduct seems to affirm that he may not be willing to take any part in the proceedings and it is in the interest of justice that the Court grants the orders sought as the same will not be prejudicial to the respondent herein.

8. He further argued that the 1st petitioner voluntarily agreed to be enlisted as such and also swore the supporting affidavit to the main petition on behalf of the 2nd and 3rd petitioners. That the Court has authority to make appropriate orders in lieu of the Rules 4 and 12(1) bearing in mind the provisions of Rules 24 and 25 (1) which do not in any manner envisaged the current situation. That the 1st petitioner has gone silent without withdrawing himself from the said petition and that Rule 24(1) (2) & (3) deal with substitution of a petitioner. That it is not until leave is granted for withdrawal that a petitioner or any party seeks to substitute hence as provided under the law he cannot be withdrawn by an application. He argued that if only the Court would summon him he would get a platform to seek leave to withdraw and this would allow the 2nd and 3rd petitioner to take over the petition. That by summoning the 1st petitioner the Court would be able to cure the arising questions specifically on his position on pursuing the petition and give answers to the glaring mismatches in the signatures, appended to by the 1st petitioner. It was submitted further that under Rule 36 the Court can make certain administrative orders. That within the meaning of Rules 15(1) (j) the Court is within the time frames to make such order as an omission or commission of this nature should not lead to striking out of the petition as such action on the face of it will not serve the ends of justice as there are two other petitioners willing to take over the petition. That the Court in so doing will be acting within its purview to make appropriate orders as to the taking over of the Petition by the 2nd and 3rd petitioners. He referred the Court to Section 80(d) of the Election Act and Rule 12 which deals with affidavits and submitted further that their submission is also founded on Order 19(7) of the Civil Procedure Rules where the gist of the affidavits have been questioned. That under Rule 12 it is clear that the affidavit shall be part of the record. He urged the Court to find that the conduct of the 1st petitioner is not an error so fatally incurable to warrant the dismissal or striking out of the petition when the petitioner has met the requisite conditionality as to time of filing depositing of security of costs, service upon the respondents.

9. He argued further that the Court to take cognizance of the fact that the irregularity if any is not prejudicial to any of the respondents and in respect of which a dismissal on striking out would amount to an injustice meted out on the 2nd and 3rd petitioners who have not in any manner disobeyed any Courts

directions or orders and cannot make any formal application for substitution until the petitioner makes one seeking leave to withdraw. He urged the Court to grant the orders sought and set down the matter for hearing.

10. In reply to the application by the 3rd respondents dated 31st October 2017, he submitted that this Court granted leave to amend the petition hence the applicant's claim on paragraph 2 & 3 are spent. In answer to paragraph 4 to 9 he argued that the said were merely events of what has taken place in Court. In regards to paragraph 10 he stated that the petitioner's application has put the same into context, stating that on the question of the compulsion the order sought would be in the interest of all parties that the petition takes off as counsel for the petitioner has moved the court to allow the possible dispensation of the 1st petitioner. That the 1st petitioner is not the owner of the petition and the body of the petition identifies the 2nd & 3rd petitioners.

11. He argued that Election Petition Rules 2017 do not expressly provide for a scenario where the 2nd and 3rd petitioner can take over unless leave is granted and as highlighted Rules 24 & 25 are clear on substitution of a petitioner with the main focus being on the death of a petitioner. That it is under this provision that they seek to have the Court advance the same to cater to the peculiar scenario that they are faced with. He stated that the 1st petitioner Hussein Issa Abdi was swearing his supporting affidavit on behalf of the other petitioners and it will therefore be unjust for the 2nd and 3rd petitioner to be denied their day in Court as a result of the acts of the 1st petitioner.

12. In response to the 1st and 2nd respondents' notice of motion dated 6/11/17, he submitted as follows; that paragraphs 1 to 12 are chronological per se. He invited the Court to look at what was on record stating the Court's move was not to open the door for premature application for striking out but to allow for a proper record and a similar record between the parties. The anomaly on the Court's record is not general to what the respondents have but it was purely a mistake on his part brought forth by the Court before parties sat down for pretrial as provided for under Rule 15. He urged the Court to deal with the matters before it without undue regard to technicalities as provided for under Article 159(d) of the Constitution and Section 80 (1) (d) of the Election Act and to dismiss the two applications and grant favorable orders to the petitioners.

13. Mr. Saende for the 1st and 2nd respondents in response to the petitioners application filed grounds of opposition dated the 6/11/17 submitted as follows; that it is clear that the advocate's application confirms that the petitioner is not interested in pursuing the petition. Adding that there is no relevant petition before the Court and no party to prosecute the petition therefore there is no reason to sustain the petition in Court. He urged the Court to exercise its power under Section 79 of the Election Act and to dismiss the petition. Further that the application lacks merit as it is not anchored under any provisions of the relevant law. That Under Rule 12 of the Election Petition Rules 2017 it is a mandatory requirement to have to have a supporting affidavit sworn by the petitioner failure to which the Court is empowered under Section 79 to dismiss the petition summarily.

14. Mr. Ngaca for the 3rd respondent supported the 1st and 2nd respondents Notice of Motion dated 6/11/17 seeking to strike out the petition on grounds similar to the 3rd respondent's application dated 31st October 2017 and submitted there was no factual response to it. In reply to the petitioners' application dated 19/10/17 the 3rd respondent filed an application dated 31/10/17 to strike out the petition. He argued that the Court has to appreciate that there is something wrong with the petition leading to the 2 applications seeking to strike out the petition filed on 6/9/17. He argued that the petition was filed by 3 petitioners but there is no written authority of the 2nd and 3rd petitioner authorizing the filing of their petition and verifying the grounds and matters stated in the petition. That there is an actual requirement under the Oaths and Declaration Act which are incorporated in the Election Petition Rules 2017 under Rule 12(14). That the affidavits were not signed and where signed there were different signatures and even after being given a chance to correct itself the petitioners have not complied with the Courts directions. He urged the Court to strike out the petition with the petitioners at liberty to file a reinstatement motion at their pleasure. Further that no explanation has been given as to why the other 2 petitioners have not filed or sworn affidavits. He sought to point out that in the application made on 19/10/17 by counsel for the petitioner there is no mention of the 2nd or 3rd petitioner and in their absence

they should be struck out. On the application itself, he argued that the same is bad in law and cannot seek refuge under Rule 24 of the Rules which deals with the substitution of a petitioner. That if each had signed the authority each of the petitioners would have been treated as individual petitioners.

15. He further submitted that under Rule 15 (1) (j) the court when dealing interlocutory application makes orders as stated. The proceedings are two months into the 6th month period and the delay has been solemnly at the instance of the three petitioners. The only way the Court can prevent the incurring of further expenses and blocking out time to be used for other matters it is only fair that the petitioner be struck out costs to the respondent. Adding that if the petitioners want to be heard on the merits of the petition they can move the Court appropriately with regard to Rule 24. Adding that the same would not apply to this case as the same requires a competent duly authorized petitioner which is not what is before the Court.

16. He argued that the petition as it is cannot proceed as is based on inadmissible evidence. The petition been left as a mere shell and the petitioners do not want to take ownership of their cause. The most appropriate cause is to allow the respondents applications to struck out the petition with cost and let whoever of the 3 petitioners come and seek out the Courts and not the other way round.

17. Mr. Airo in reply argued that the disinterest has been shown only by the 1st petitioner but not 2nd and 3rd petitioner and that they can only take over only do after seeking leave of the 1st petitioner. Adding that the 1st petitioner cannot vilify the conduct of the 2nd and 3rd petitioner and there is no statutory provision whatsoever and even under Rule 12 that provides for express authority. That there is no express provisions that allows the 2nd and 3rd petitioner to move to court. That the 1st petitioner has to withdraw and then they come and be substituted. That the court should consider the steps that can be taken to correct an anomaly. He argued that what the respondents want is a way out which is not foreseeable under the Rules. That Section 80 (2) is clear on what happens when one does not obey a Court order. He urged the Court to grant the orders sought.

18. DETERMINATION

Having considered the applications and submissions in my view these are the two issues for determination.

- i. Should the Court summon the 1st petitioner to appear before the court as sought by the petitioner's advocate?
- ii. Should the petition be dismissed as sought by the respondents?

19. The advocate having conduct of the said petition indicated that he has been unable to locate the 1st petitioner to append his signature or withdraw his affidavit reasons which have rendered the orders and directions of the Court unenforceable. In his application dated 19th October 2017 he is seeking this Court to summon the 1st petitioner before this court to give an explanation as to whether he is interested in prosecuting the petition or not. Going as per the 1st petitioner's conduct it can be implied that he has since lost interest in prosecuting the petition. Counsel representing the 1st petitioner has indicated his inability to locate the 1st petitioner. The Court is faced with the following questions;

- i. Whether the court can summon the 1st petitioner under Rule 12(1)
- ii. Can the 1st petitioner be summoned for substitution under Rule 21 and Rule 24.

I note that the Rules did not envisage a scenario where the petitioner abandons the petition. Rule 24 only applies where the petitioner dies.

The affidavit in support of the petition indicates that it is the 1st petitioner who signed the said petition. No authority appears to have been signed by the 2nd and 3rd petitioners. Does this warrant the striking

out of the petition? In my view it does not. The 1st petitioner deponed that he swore the supporting affidavit on behalf of the other petitioners. An election petition like any other pleadings in Court is instituted by a party laying claim or seeking to safeguard a right. Under what circumstances then can a Court summon the petitioner? Wouldn't the court be getting into the arena of prosecuting the petition? Having filed a petition each of the petitioners have a duty to appear before Court and it is not the duty of the court to summon the petitioners to appear before it.

20. Counsel for the petitioners argued that if the 1st petitioner is not summoned to appear before this Court he blocks the right of substitution to the 2nd and 3rd petitioners. Rule 24 provides that a person who qualifies to be a petitioner can at the hearing of the application for the withdrawal of a petition apply to the Election Court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition. Rule 25 provides for substitution where a petitioner dies. In the present case the 1st petitioner has not sought this court's leave to withdraw the petition nor is he deceased to invoke Rule 25. A look at the Petition it is evident that the 2nd and 3rd petition are already parties in the Election Petition. How then can they substitute the 1st petitioner? Since the 2nd and 3rd petitioners are still parties in the petition it is therefore the duty of the Counsel having conduct of this matter to produce his clients in court. What happens should the court issue orders and the 1st petitioner fails to appear before this court? It will be an order of futility. The petitioner's counsel also sought to rely on the provisions of Section 80 from the Election Act which provides as follows;

(1) An election court may, in the exercise of its jurisdiction-

(a) Summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence.

(b) Compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;

(c) Examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and

(d) Decide all matters that come before it without undue regard to technicalities.

(2) A person who refuses to obey an order to attend court commits the offence of contempt of court.

The 1st petitioner is not a witness to be summoned by the court but an individual who filed a petition challenging the 3rd respondent election as a Senator for Garissa County. The provisions of Section 80 (a) to (c) of the Election Act do not apply. This court therefore declines to grant the orders sought by the petitioner's counsel to summon the 1st petitioner. Counsel for the petitioner has sought to invoke this Court's powers under Rule 15(1) (j). This rule deals with administrative matters. In my view it cannot be used to summon a petitioner who has failed to attend court or pursue his petition. At the time the two applications by the 1st, 2nd and 3rd respondents were filed it is shown that it is only the 1st petitioner to the exclusion of the 2nd and 3rd petitioner who failed to appear before court. I find that it is only just to the 2nd and 3rd petitioners attend court to indicate whether they wish to prosecute this petition. The 2nd and 3rd petitioners shall appear before this court in 3 days to indicate whether or not they are proceeding with the petition.

21. The 1st and 2nd respondents seek to have the petition struck out on grounds of the conduct of the petitioners have demonstrated that they were not keen on prosecuting the petition. It is important to note that it is only the 1st petitioner who has failed to attend Court the 2nd and 3rd petitioners should be

accorded the benefit of doubt. On the ground of inconsistencies of signatures in the affidavits and also on attestation of the same I find it would be premature to make any findings on the same at this stage.

22. The 3rd respondent has sought to have the petition struck out on grounds that the petition is substantially based on impermissible and inadmissible speculation and hearsay evidence. In my view it would be premature to venture into the same at this stage as the same can only be determined on hearing the petition.

Final orders of the court

- i.** The application dated 19th October 2017 is dismissed. Costs be in the cause.
- ii.** The petitioners advocate shall produce the 2nd and 3rd petitioners in Court within 3 days for the two to indicate whether they intend to prosecute the petition.
- iii.** The 1st, 2nd and 3rd respondent's applications are not granted. Costs be in the cause.

Dated Signed and delivered this **20th** Day of **November**, 2017.

R. E. OUGO

JUDGE

In the presence of:

Mr. Airo For the 1st 2nd and 3rd Petitioner

Mr. Saende For the 1st & 2nd Respondents

Mr. Ngaca For the 3rd Respondent

Ms. Charity Court Clerk