



REPUBLIC OF KENYA

IN THE ELECTIONS COURT AT MALINDI ELECTION PETITION NO 11 OF 2017

IN THE MATTER OF THE ELECTION ACT, 2011

AND

**IN THE MATTER OF ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITIONS RULES, 2017**

AND

IN THE MATTER OF THE ELECTION FOR KALOLENI CONSTITUENCY

BETWEEN

SILA SAMUEL MULWAPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION1ST RESPONDENT

WAFULA CHEBUKATI2ND RESPONDENT

SHIDA TSUWI ALPHONSE.....3RD RESPONDENT

PAULA KAHINDI KATANA4TH RESPONDENT

RULING

1. Vide a Notice of Motion application dated 28th September ,2017, the 4th Respondent seeks to have the petition struck out, or alternatively dismissed with costs. The application is premised on thirteen grounds, numbered alphabetically, with ground No(l) challenging the jurisdiction of this court.
2. The jurisdiction of this Honourable court is derived from the Constitution, Statute and the rules made there under. The Honourable court was seized with jurisdiction to hear and determine all the questions in the election petitions by virtue of it being gazetted bide Kenya Gazette Notice dated 15th September, 2017, and by virtue of section 8 of the election Act, 2011, the Honourable court has jurisdiction to address all the disputes relating to the petition.
3. This special procedure was adopted by the drafters of the legislation to prevent idle arguments and mischief since an election court is a special court dealing with the rights of collective individuals within strict timelines. So that, if such arguments are allowed to creep into Election petitions, the court would abandon citizens without redress where there are genuine grievances.

4. I therefore hold that this court is seized with jurisdiction to hear and determine the petition before it so that it can answer whether or not the legal requirements and rules of procedure were complied with by the parties before it. Having stated this, I wish to say that this court has jurisdiction to determine the application before it.

5. From the grounds set out on the face of the application and the supporting affidavit sworn by the 4th Respondent PAUL KAHINDI KATANA, the main despute is that there are two petitions filed in court and that the second petition is improperly before court. It is averred that the petitioner unprocedurally and unlawfully filed a second petition without complying with rule 21 of the Elections (parliamentary and County Election) Petitions Rules,2017. The second grievance is that, this second petition was an amended petition and was filed outside the stipulated time under the Constitution and Statute.

6. The facts of the dispute are set out in the affidavit of the 4th Respondent and the Petitioner's response. The salient features therein is that the 4th Respondent was served with the petition through an advertisement in the Daily Nation newspaper of Thursday September14,2017. He personally proceeded to the registry at the Malindi High Court to collect copies of the summons and petitions on instructions by his advocate. And upon arrival at the said registry, the 4th Respondent was furnished with copies of the petition, witnesses' affidavits and every other documents in the file (Exhibit marked "PKK-3") which he took to his advocates on record. And a perusal of the said documents revealed that he had been given copies of documents drawn by M/s Gatundu and company, Advocates. Whereas the advertisement had been caused by the firm of M/s Mwaniki, Gitahi &Partners.

7. Upon receipt of the documents, the 4th Respondents counsel sent a formal request by email to Mwaniki Gitahi &Partners on 17th September, 2017 using the email address seeking to be supplied with soft/scanned copies of the petition and witnesses' affidavits (Exhibit "PKK-4") but there was no response. And on 18th September,2017 the 4th Respondent's advocate wrote a letter to the Deputy Registrar of the High court at Malindi, requesting for, among others;

(a) certified copies of the petition filed by Gatundu & Co. Advocates and

(b) certified copies of The petition filed by Mwaniki Gitahi & partners. (Exhibit "PKK-5")

Again, no response had been received by the advocate from the Deputy Registrar at the date of affidavit.

8. Further, the 4th respondent in his affidavit pointed out salient differences, in the petition that he was given at the court registry on 14th September,2017, being; as on 19th September, 2017 being as deponed at paragraph 15 of the supporting affidavit;

"(a) in the petition given to me the 3rd Respondent is named as "the Kaloleni sub county returning officer " and the 4th respondent is named simply as " Paul Katana".

(b) In the petition in the court file, the 3rd Respondent is named as "Shida Tsui Alphonse" while the 4th Respondent is now named as "Paul Kahindi Katana"

(c) although both petitions bear the court date an stamp of 206 September,2017,the two petitions are both not in the court file.

9. Since there was no response from either the firm of Mwaniki Gitahi & Partners or the Deputy Registrar, the 4th respondent prepared and filed a response to the petition he had been given on 21st September,2017. Meanwhile, his advocate sent advocate Paul Buti to the registry at Malindi to peruse the court file and ascertain the number of petitions in the court file of Petition No. 11 of 2017. The 4th Respondent avers that he was informed that Mr Buti obliged and perused the said court file where he saw one petition which is presently in court file (Exhibit "PKK-6) and was issued with a receipt of ksh 100/= to confirm the said perusal (Exhibit "PKK-7") According to the 4th respondent the petition in the court file now, was not in the court file on 14th September,2017 and so it could not have been filed on 6th September,2017 as presented. Hence his deposition that the same was irregularly, illegally and

unlawfully introduced into the court record.

10. To me, these averments by the 4th Respondent lay the basis of the application in question.

11. The Petitioner, on the other hand responded through a replying affidavit sworn on 10th October, 2017. The main highlights of this response are captured at paragraphs 19 of the said replying affidavit. Although the petitioner opposed the 4th Respondent's application, at paragraph 19 of his replying affidavit states as follows;

"THAT, I deny the allegations made in paragraph 4 to 8 of the said affidavit and I aver that the same are not true for the following reasons;

(i) That I instructed my previous advocates Gatundu and Company, Advocates, to prepare and file this petition and on 6th September, 2017 he showed me the petition which he had prepared and gave me to sign ready for filing. However Mr Gatundu was at the time drunk and unsteady.

(ii) That Mr Gatundu had prepared 12 petitions and due to his condition a colleague prepared another which I also signed ready for filing.

(iii) That on perusal of the two sets of petitions 1 and the two advocates agreed to file the second petition but inadvertently Mr Gatundu filed the first petition instead.

(iv) That at the same time of filing Mr Gatundu's colleague realized the mistake and requested the registry to withdraw the first petition and filed the second petition.

(v) That there is only one petition which was filed on 6th September, 2017 and served on 14th September, 2017 and that is the petition herein".

He admitted that the second petition prepared by Mr Gatundu's colleague is the one which was served through the news paper advert on 14th September, 2017 but they requested the registry to allow them withdraw the first one and file this one.

12. To support his application, the 4th Respondent's counsel filed skeleton submissions together with a list and bundle of authorities on 30th October, 2017 while the petitioner filed his list of five (5) authorities on 10th October, 2017. The 1st and 2nd Respondents counsel filed their list of three (3) authorities on 9th November, 2017.

13. The applications by the 4th Respondent were canvassed on 31st of October, 2017 and the petitioners' applications on 9th November, 2017. Mr Aboubakar represented the petitioner, Mr Omondi appeared for the 1st and 2nd Respondents and M/s Soweto appeared for the 4th Respondent.

Submissions by 4th Respondent's counsel.

14. In her oral submissions, M/s Soweto, counsel for the 4th Respondent addressed court on the nature of election petitions which she said are governed by a special regime of laws, they are not ordinary civil suits and are to be heard and determined within strict timelines set in the Constitution and at a standard that is higher than in ordinary suits. She also stated that election petitions involve high stakes so that when people come to court, they know what is expected of them to meet one hand but on the other hand, what people are willing to do in order to succeed in such high stakes environment.

15. She submitted that the main ground the petition is sought to be struck out is the undisputed fact that the petitioner filed two petitions, although he claims that one petition was withdrawn immediately upon filing.

16. M/s Soweto, in her submissions referred extensively to the petitioner's replying affidavit and

juxtaposed it with the 4th Respondents supporting affidavit to bring out the issues in dispute.

According to M/s Soweto, the petitioner is not telling the truth when he avers that;

(i) the first petition was withdrawn because the 4th Respondent has it having been furnished with it on 14th September 2017;

(ii) he signed the petition on 6.9.2017 when at page 12 of the same it is shown "dated at Kilifi this 5th day of September 2017" and so are other documents.

17. M/s Soweto went on to submit that given the high stakes in the matter, the petitioner ought to have produced the best evidence such as letters, or affidavits of Mr Gatundu, his colleagues, the registry staff or Deputy registrar so as to prove or confirm his claims, which are serious.

18. Her further submissions are that their firm has so far received no response to their requests to be supplied with certified copies of the petition drawn and filed by M/s Gatundu & company, Advocates and certified copies of the petition drawn and filed by the firm of M/s Mwaniki Gitahi & company advocates, by the Deputy Registrar and M/s Mwaniki Gitahi & Partners.

19. M/s Soweto submitted that on 14th September 2017, there was only one petition on the court file which was served upon the 4th Respondent, and the 2nd petition, which according to the stamp date was filed on 6.9.2017, was not on the court record, and the court can therefore not presume that it was filed on 14.9.2017 without owing up to the mess the parties have found themselves in.

20. She goes on to submit that if the court finds that the 2nd petition, which is now in court records, was not there on 14.9.2017 but was introduced after this, then it must be presumed that it was filed out of time, since the results of Kaloleni Constituency were declared on 10.8.2017.

21. On the issue of the 1st petition having been withdrawn, M/s Soweto submitted that if this was done, it was done illegally, irregularly and un-procedurally as there are rules of procedure when it comes to withdrawing a petition or amending the same. That an application for leave to amend or withdraw should have been made but it was not.

22. M/s Soweto urged the court to divest itself of the proceedings and expunge or strike out the petition so as to retain the confidence in the courts.

23. Finally, M/s Soweto submitted that they were also challenging the validity and competence of either petition on the fact that none of them states the results that are being challenged. as per the provisions of rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

24. To support her arguments, M/s Soweto referred to authorities where the issues they have raised have also been addressed;

1. ISMAEL SULEIMAN & 9 OTHERS V. INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 4 OTHERS, HIGH COURT (Meru) KLR, where Justice Makau in dealing with errors that had been made by the petitioner when filing their petition and cite the case of ;

2. STEPHEN KIMANI GAKENA VRS FRANCIS MWANGI AND 32 OTHERS, ELCTION PETITON NO. 1 OF 1998, AT (Nyeri), where Justice J.W.Mwera, as he then was, faced with similar application stated;

" This court is of the view that the desired amendments were mistakes in assuming specific places the constituency and some polling stations, it is always of great importance that respondents know exactly where anirregularity or misdeed took place. This is not a trivial matter and a petitioner who is not careful in drafting his petition, itself not an impossible

task should not demean the importance or the errors he makes. Once the respondent gets a petition, he embarks on putting together what material he desires in his defence. He should not be confused and thrown in disarray by the unfortunate errors of the petitioner. If this remains for hearing as it is, the pleadings will allude to Changamwe from or concern Ol-Kalor. This cannot be. It is trite law that pleadings accord with evidence. Noting les. So this petition must go out. Even had the amendment gone through paragraph 7 would have differed from the original or TOTAL REGISTERED VOTERS :541 OR 48589 "A sign of further errors"

3. JOHN MICHAEL NJENGA MUTUTHO VRS JAYNE NJERI WANJIKU KIHARA & 2 OTHERS, COURT OF APPEAL (Nakuru)) Civil Appeal No. 102 OF 2008 (2008) e KLR.

4. HASSAN ALI JOHO VRS SULEIMAN SAID SHABAL & 2 OTHERS, S.C PETITIOIN NO. 10 OF 2013 (2014) eKLR where the issue of the form that is issued by the returning officer being the relevant instrument for the declaration of results was addressed.

Submissions by Mr Omondi counsel for 1st and 2nd Respondents.

25. In his submissions, Mr Omondi, counsel for the 1st and 2nd Respondents supported the 4th respondent's application dated 28th September, 2017 that had been made by the petitioner when filing their petition, and associated himself with submissions by M/s Soweto counsel for the 4th respondent, in support of the said application in which the court is being urged to dismiss the petition herein.

26. In addition, Mr Omondi submitted that by the petitioner's own disposition at paragraph 19 (i) of the replying affidavit, there is no petition signed and dated by him on 6.9.2017. He also pointed out that there were no receipts for the 2nd petition on record.

27. Generally, Mr Omondi's submissions were in line with M/s Soweto's on the grounds upon which they are seeking to have their petition declared incompetent and defective.

Submissions by Mr Aboubakar on the Petitioner.

28. In his submissions, Mr Aboubakar relied on his replying affidavit by the petitioner filed on 10.10.2017 in which the 4th respondent's application is opposed. He also relied on the list of authorities filed on the same date.

29. According to Mr Aboubakar, the averments by the 4th respondent that there is no proper and valid petition before court is a general ground. He submitted that there is a proper petition before court which the 4th Respondent acknowledges was filed on 6.9.2017.

30. Mr Aboubakar highlights paragraphs 5 to 7 of the supporting affidavit and submitted that there is no evidence to prove that the 4th Respondent went to the registry where he was furnished with any pleadings, and *moreso* because he did not annex a receipt to confirm this.

31. Mr Aboubakar goes onto submit that the reason the advertisement was done by M/s Mwaniki, Gitahi & company is because there was a notice of change of advocates filed on 7.9.2017.

32. He also submitted that the 4th Respondent did not disclose in their email to the firm of M/s Mwaniki Gitahi & Co. Advocates that they had visited the court registry and served with a copy of petition on 14.9.2014 and whether did they had two documents with different particulars.

33. He also submitted that the facts on record reveal that there was no visit by the 4th respondent to the court registry on 14.9.2017 except for the visit by Mr. Buti, advocate on 21.9.2017, who found the 2nd petition.

34. On the question of whether the Deputy registrar has discretion to allow one to correct a mistake that

may have happened during filing, as shown at paragraph 19 of the petitioner's replying affidavit, Mr. Aboubakar submitted that the Deputy Registrar has such discretion derived from the provisions of Article 159 (2) (d) of the Constitution, Section 80 of the Elections Act, 2011, and Rules 4 and 5 of the Election Petition Rules. He went on to state that presenting of a petition is a matter of procedure and can therefore not be dismissed on procedural technicalities since it is about parties pursuing a right under Article 38 of the Constitution

35. As for the payment for the 2nd petition, Mr Aboubakar submitted that this was not necessary as they were not correcting mistakes in the other petition but were filing a 2nd petition. He averred that the only petition on record is the one served on 14.9.2017 and that the 1st petition was never served because it was expunged from the record. He went on to state that even if there were two petitions, the situation has not been addressed by the Election laws and neither do the said laws provide for striking out of a petition because there are two petitions filed.

36. With regard to the application by the 4th Respondent's counsel that the petition be struck out on the basis of being incompetent since it does not include results of the election, he argues that the same is an afterthought as it was not included as a ground in the application dated 28th September 2017.

37. In response to the application by the 1st and 2nd Respondent dated 16th October, 2017, Mr Aboubakar submitted that the same was incompetent and bad in law in that it is filed on 18th October, 2017 which is after directions had been given by court on 11.10.2017, without leave of court and that it should be struck out. However in response to what was raised in the said application, Mr Aboubakar submitted that the petitioner, in filing his petition, complied with Rule 8 (1) (c) of the Election Petitions Rules, 2017.

38. Mr Aboubakar referred to the following authorities in support of the petitioner's response;

1. JOHN MICHAEL NJENGA MUTUTHO VRS JAYNE NJERI WANJIKU KIHARA & 2 OTHERS , COURT OF APPEAL (Nakuru) Civil Appeal No 102 of 2008 (2008 e KLR

2. The AMINA CASE

3. WAVINYA NDETI VRS IEBC& 4 OTHERS, ELECTION PETITION NO 4 OF 2013 AT MACHAKOS HIGH COURT

4. BASHIR HAJI ABDULLA VRS HASSAN MOHAMMED NOOR, ELECTION PETITION NO 4 OF 2013 AT GARISSA HIGH COURT.

5. HOSEA MUNDUI KIPLAGAT VERSUS SAMMY KOMEN MWAITA AND 2 OTHERS, HIGH COURT OF KENYA AT NAIROBI ELECTION PETITION NO. 11 OF 2013

These cases, according to Mr Aboubakar relate to the issues raised in the applications that have been canvassed before court.

Rejoinder by the Respondents

39. In response to the submissions by Mr Aboubakar, M/s Soweto submitted that the system of our laws is settled, so that, the authorities petitioner's counsel has sought to rely on are all court cases, which are not binding on this court. She stated that they had relied on court of appeal and Supreme court authorities which have settled the issues they have canvassed before this court

40. As for the issue of Article 159 (2) (d) of the constitution, M/s Soweto submitted that this was addressed by the court of appeal in the case of CHARLES KAMUREN VRS GRACE JELAGAT KIPCHOIM & 2 OTHERS, COURT OF APPEAL (Nairobi) NO. 159 OF 2013 (2013) e KLR. where it was held that this Article is not a panacea for every problem or transgression of the law the way this

court was being invited to do.

41. On question of the challenge, that the petition is incompetent on the basis of results having not been declared, though appears to be a jungle, the issues of invalidity and incompetence have been raised over that.

42. All in all, M/s Soweto just reiterated what she submitted before court in addressing their application. This was the same observation of the response by Mr Omondi, counsel for 1st and 2nd Respondent.

DETERMINATION

43. In considering the application before this court, I read through the affidavit of the 4th Respondent, the replying affidavit of the petitioner, the cited laws and authorities. I also listened to the oral submissions by all counsel on record.

I find that the following issues arise for determination of the application;

- (i) How many petitions were filed in this petition? And , whether the petition (s) were paid for;**
- (ii) whether the petition was filed within the prescribed period**
- (iii) whether the withdrawal or replacement of one petition with another was properly done; and if so ,**
- (iv) whether the Deputy registrar of the High court has discretion to allow for such practice.**
- (v) Whether the petitioner complied with the provisions of rules 8 (1) (c) and 12 of the Election (Parliamentary and County Elections) Petitions rules, 2017.**
- (vi) Is there a proper petition on record?**
- (vii) any orders for costs?**

44. From the court record, it is noted that there is a petition dated 5th September, 2013, filed in court and a receipt issued to that effect. The court has also observed that there is no second receipt which was issued by the court upon presentation of the second petition which the petitioner wants to rely on.

45. The court has also seen a copy of the amended petition filed on 10th October, 2017. The position this court takes is that all these actions reflected on the court record must be tested against the law.

46. The law places a burden on the petitioner to file this pleadings within time.

Article 87 (2) of the Constitution of Kenya stipulates time within which a petition should be brought.

It provides as follows;

"Petitions concerning an election, other than a presidential election shall be filed within twenty eight days after the declaration of the elections results by the Independent Electoral and Boundaries Commission".

47. It is not in dispute that the results in the election referred to in this petition were declared on 10th August, 2017 and therefore the last date of filing the petition was 7th September 2017,

Section 76 (1) (c) provides the same time lines in the same wording as the Constitution and stipulates as follows;

"to question the validity of an election shall be filed within twenty eight days after the date of declaration of results of the election and served within fifteen days of presentation".

48. The petition filed on 6th September 2017, whose receipt was paid for by the firm of M/s Gatundu & Company advocate and the one which was given to the 4th Respondent was filed within the prescribed time by the law and is therefore in compliance with the Constitution and statute.

49. The petitioner has, himself, admitted that there was switching or swapping of the petitions on the same day which brings us to the question of whether the law provides or allows for such practice by the petitioner.

50. It is now established practice that an amendment has the effect of substituting a document and where a party adopts this standard practice, then it is relieved from paying filing fees afresh

51. And where a party brings in a new set of documents without reference to the document already filed on record, it is by law required to pay full court fees.

52. I, therefore, find that the second petition which the petitioner is relying on, court fees was not paid for it. It should be noted that in election petitions, it is not only court fees which is required to be paid for, there is also the mandatory requirement to pay security for costs as stipulated by Section 78 of the Elections Act, 2011 which provides as follows;

78 (1) "A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of the petition under this part".

By virtue of section 78 (2) (b) of the Election Act, the amount stated to be paid as a deposit for security of costs is Ksh 500,000/= for members of the National Assembly.

53. I have perused the court records and find there is no deposit for security of costs which was deposited for either petition.

54. There was the issue of the petitioner at paragraph 19 (iv) of his replying affidavit deponing;

"That at the same time of filing Mr Gatundu's colleague realised the mistake and requested the registry to withdraw the first petition and filed the second petition"

From this affidavit, and even from the submissions by the petitioner's counsel, it is not clear under what circumstances such withdrawal was done.

55. As put by Justice P. J. Otieno in the case of JACOB THOYA IHA VRS INDEPENDENT, ELECTORAL BOUNDARIES COMMISSION AND 2 OTHERS, ELECTION PETITION NO. 6 OF 2017 AT MALINDI HIGH COURT, (Which was filed under similar circumstances as this one)

43 "...To me filing the petition in terms of Rule 7 (c) of the Election (Parliamentary and County Elections) Petitions Rules, 2017 entailed the presentation of the petition to the Deputy Registrar and payment of assessed court fees".

43 Now, in my understanding once parties file documents, the copy they tender to court to form part of the court record ceases to be owned by them but by the court. They are, hence, not at liberty to deal with such papers as they deem fit without recourse to court. Therefore, even in ordinary litigation the law provides how to deal with a deficiency in a pleading. It is by an amendment either with the leave of the court or without the leave before pleadings close. For elections petitions, the remedy is once again by an amendment within 28 days allowed for filing petition and only with the leave of the court. Thus, to this court, is the only

way to guarantee the integrity of the court records so that incidences like this one here where the 4th Respondent was kept wondering which petition to respond to can be avoided".

56. I agree with the findings by my brother Judge, in total and only wish to add that the questions in such circumstances becomes;

Whether there is a proper, competent and valid petition in this case where the first petition filed (and which is acknowledged by the petitioner) and was not served but was supposedly withdrawn. How was the registry moved to withdraw or substitute the petition which had already been filed and become a court record and substitute with another one?

In fact was the Deputy Registrar involved in the process at all ?

57. This court asks this because, Mr Aboubakar stated that the Deputy Registrar has discretion to allow for such withdrawal where a defect is found in the pleadings. He even cited Article 159 (2) of the constitution in support of this practice.

58. I have looked at the law and the procedure on whether the Deputy Registrar or the staff in the registry of a court have power to substitute documents and assign a receipt paid for a different documents to a new documents. I find that there is no legal backing for this. If this practice is allowed to happen or is encouraged, it would cause accounting problems and become an avenue or receipt for corruption. It would, in fact create a situation where the same receipt would be used to change documents and pay for several other documents. The result of this would then be that the law on amendments would die and the court will be confronted with storage challenges, especially, in election petition cases, where bulky documents are presented for filing.

59. From my observation and consideration of the application and arguments advanced for and against it, the irregularities that have been brought forth, go to the root of this petition and the prejudice caused to the 4th Respondent is evident. The court equally finds itself in the dilemma which the Respondents are in at the moment.

60. Without going into the other grounds raised, and even considering the other applications which have been canvassed before me, the reasons brought out in this applications have the effect of disposing off the whole petition.

61. I therefore find and hold that application dated 28th September 2017 has merit and allow the same in its entirety .

The petition herein dated 5th September 2017 and the amended copy dated 9th October, 2017, are hereby struck out with costs.

I will restrict the costs to Ksh 1,000,000/= and apportioned the same follows;

(i) the first and 2nd respondents to equally share Ksh 500,000 /-

(ii) the balance of Ksh 500,000 to be paid to the 3rd Respondent.

It is so ordered.

Ruling delivered, signed and dated this 20th day of November, 2017

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Aboubakar ,counsel for the petitioner/respondent

Mr Adala counsel holding brief for Mr Omondi, counsel 1st and 2nd Respondents and M/s Soweto ,
counsel for 4th Respondent/Applicant

C/clerk- Mwanaidi