



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

ELECTION PETITION NO 4 OF 2017.

IN THE MATTER OF THE ELECTIONS FOR THE GOVERNOR OF KITUI COUNTY

BETWEEN

DR. JULIUS MAKAU MALOMBE.....PETITIONER

VERSUS

CHARITY KALUKI NGILU.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

GOGO ALBERT NGUMA.....3RD RESPONDENT

RULING

The Application

1. The Applicant herein is David Musila, who was an independent candidate for the position of Governor of Kitui County, in the general elections held on the 8th of August 2017 by the 2nd Respondent. He has filed a Notice of Motion dated 23rd October 2017 and filed on 30th October 2017 seeking to be enjoined in this Petition as an Interested Party, and for this Court to make such other orders as it may deem just and expedient. The Petition herein was filed by the Petitioner on 7th September 2017, and is challenging the election of the 1st Respondent as Governor of Kitui County in the said general elections. The Petitioner was also candidate in the gubernatorial elections.

2. The Applicant's grounds as stated in his application and a supporting affidavit he swore on 23rd October 2017 are that as an independent Candidate in the said elections who had several agents monitoring the electoral process with a view of establishing its transparency, credibility, verifiability and accountability, he is entitled to be a party in these proceedings if the Petitioners prayers for scrutiny are granted by this court. Further, that he will suffer prejudice if he is not joined as a party in these proceedings for purposes of scrutiny and recount of votes.

3. The Applicant annexed his nomination certificate and clearance certificate from the Registrar of Political Parties as well as the declaration of results of the said elections by the 3rd Respondent to his supporting affidavit. He averred that on the 12th day of August 2017, the results of the said elections were announced and declared, whereby the 3rd Respondent declared and announced the 1st Respondent as the

duly elected Governor of Kitui County in the elections held on 8th of August 2017 with 169,990 votes. Further, that the Petitioner had 74,681 votes, and the Applicant got 114,827 votes.

4. According to the Applicant, he has now been informed that the Petitioner has applied for scrutiny and recount of votes, and having garnered 114,827 votes, and coming second to the 1st Respondent herein, he has a legitimate interest in the votes as the same have been questioned by the Petitioner and will be affected directly by the proceedings herein and the outcome thereof. That he has however opted to be enjoined in the current petition as an interested party so as to save time and duplicity of pleadings.

5. The Petitioner opposed the said application by way of Grounds of Opposition filed in Court on 1st November 2017 as did the 1st Respondent. The Petitioner contended that the Application is made outside the statutory period within which the Applicant would have been entitled to bring up an Election Petition, hence it is an attempt to circumvent the express provisions of the Constitution and the Elections Act. Further, that there is no place within our jurisprudence for Interested Parties in election petitions.

6. The 1st Respondent also raised similar grounds, and stated that there is no legal provision permitting admission of an Interested Party in gubernatorial election petitions, and that under Rule 2 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, the only occasion a person interested in the Petition can come on board is upon the death of the Petitioner, whereupon such a person is substituted as the new Petitioner.

7. Further, that section 76 (1) (a) of the Election Act limits time for filing of Petition to 28 days from the date of declaration of results, and it would be impermissible for a person to join the Petition after 79 days from the date of declaration of the results. In addition, that no explanation has been offered by the Applicant for the inordinate delay in seeking to be enjoined.

8. The 1st Respondent also contended that the pre-trial conference was concluded on 5th October 2017, and under Rule 15(2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, no interlocutory applications can be entertained thereafter. Furthermore, that the Constitution of Kenya and the Elections (Parliamentary and County Elections) Petition Rules, 2017 comprise a complete code of electoral regime, and the provisions of the Civil Procedure Act and the Rules there do not apply, unless specifically incorporated in the electoral code. Lastly, that the application is speculative and predicted on an order being granted for scrutiny.

The Determination

9. On 1st November 2017, this Court directed that the Applicant's application proceeds to hearing on that day by way of oral submissions. Mr. Maurice Kimuli, the counsel for the Applicant, reiterated the grounds for the application set out in the foregoing, and submitted that the Applicant got the second highest votes in the gubernatorial elections in Kitui County, and that his wish to participate in this petition limited to the scrutiny or recount of the votes should the court direct that the exercise be undertaken. Further, that he so wishes to participate as a candidate and in the wider public interest.

10. Mr. Kimuli conceded that the applicable rules do not state expressly the entitlement of the candidate to participate in the petition, and relied on the rulings delivered in **Raila Odinga vs IEBC and 3 Others, Supreme Court Petition 1 of 2017** on the applications made by Michael Wainaina and Ekuro Aukot to be joined as interested parties therein. He submitted that the Supreme Court permitted the Applicants to be joined as interested parties for the reasons that they had been candidates in the Presidential elections, and had an identifiable stake in the matter. Mr. Kimuli in particular referred to the applicable principles set out in **Francis Kariuki Muruatetu & Another Vs Republic & 5 Others [2016] e KLR** (hereinafter referred to as **The Muruatetu Case**) that were adopted by the Supreme Court in its rulings.

11. Mr. Kimuli further submitted that while there may appear to be a textual difference in the rules applicable to presidential petitions in the Supreme Court, the principles applicable to petitions before the Supreme Court and this court are similar and are not mutually exclusive. He further submitted that there

is no law that disallows the admission of a party, and the decision is left at the discretion of the court to deal with as appropriate depending on the circumstances of each case.

12. On the filing the application outside the time allowed for filing petitions, Mr. Kimuli submitted that the Applicant does not seek to be a Petitioner or to take sides in the petition. Further, that rule 15 (2) of the Elections (Parliamentary and County Elections) Petition Rules does not close the door to application being filed once directions have been given, and that the present application has been necessitated by the application for scrutiny which were filed by the Petitioner on 4th and 11th October 2017 and which have not been decided. Therefore, that the substratum of the Applicant's application is still existing. Lastly, that no delay will be caused by the joinder of the Applicant and no prejudice to the parties has been demonstrated.

13. Mr. Muinde, the counsel for the Petitioner submitted that the Petition herein is an election petition and the Articles of the Constitution cited in the application do not apply, and Rules 4, 15 and 19 of the Elections (Parliamentary and County Elections) Petition Rules that are cited by the Applicant are also not applicable. Mr. Muinde contended that the application is an attempt to bring an election petition through the back door, and it has not been shown what value the Applicant will bring to the petition other than his right to know what is in the ballot boxes. Further, that since the process of scrutiny and recount is carried out under supervision of the court, the Applicant will still get to know the results whether or not he is involved in the process.

14. Mr. Muinde averred that the law relating to presidential petitions is different and distinct from that relating to parliamentary and county election and different statutes apply, and sought to distinguish the rulings referred to by Mr. Kimuli on the basis that nothing has been tendered to this court to show the basis of the application.

15. Mr. Kioko Kiliukumi, the counsel for the 1st Respondent reiterated that the Applicant has moved this court 79 days after declaration of results, and has no explanation for the delay in a dispute where timelines are constitutionally set. Further, that no provisions exist for joinder of parties and Rule 26 of the Elections (Parliamentary and County Elections) Petition Rules only allows interested parties to be joined in place of a petitioner.

16. On the Supreme Court rulings relied upon by the Applicant, Mr. Kilukumi averred that the Supreme Court in the said rulings was interpreting rule 4(2) of the Supreme Court Presidential Petition Rules for joinder of interested parties, and that we cannot borrow rules from presidential petitions and apply them in this court. Further, that **The Muruatetu Case (supra)** was also decided in the context of the Supreme Court rules which provide for joinder of interested parties and which apply to the Supreme Court only.

17. Lastly, Mr. Kilukumi submitted that the Applicant has a remedy if his application is denied, in that the ballot boxes are required to be kept by the 2nd Respondent for 3 years and he can make an application to the said Respondent under Article 35 of the Constitution. According to Mr. Kilukumi, what is before the Court are adversarial proceedings on an election petition and not a public inquiry about elections.

18. Ms. Mageto, the counsel for the 2nd and 3rd Respondents, informed the Court that she had been served with the Applicant's application a few minutes before the hearing, and limited her submissions to Rule 15(2) of the Elections (Parliamentary and County Elections) Petition Rules that no interlocutory applications are allowed after conclusion of the pre-trial conference. It was her contention that the pre-trial conference having been concluded, and hearing dates having been set, the application is thus made outside the rules.

19. On the reference to **The Muruatetu Case (supra)** by the Applicant, and his submission that his participation is limited to the scrutiny of votes, Ms. Mageto averred that the Applicant has not stated what his case is as regards the petition herein, which is not only concerned about scrutiny. Ms Mageto's submission was that the Applicant needs to indicate clearly his intention as regards the petition and whether he supports it or otherwise, and the reason thereof.

20. I have considered the arguments and submissions made by the Applicant, Petitioner and Respondents on the application before the Court. On the preliminary issue raised as to whether the Applicant's application is properly before this Court, it is evident that it has been brought in the nature of an interlocutory application made in the Petition herein. Rule 15(2) of the Elections (Parliamentary and County Elections) Petition Rules does give discretion to this Court to consider interlocutory applications made after a pre-trial conference if by their nature, they could not be brought before the commencement of the hearing of the petition.

21. The Applicant has in this respect given a satisfactory explanation that his application was motivated by the applications for scrutiny filed by the Petitioner on 4th and 10th October 2017 which are pending ruling by this Court. His application is thus properly before this Court.

22. The issue then before the Court is whether the Applicant can be joined as an Interested Party in this Petition. While it is the case that there are no provisions in the law, and particularly in the Elections (Parliamentary and County Elections) Petition Rules as regards the joinder of Interested Parties in election petitions filed in this Court, this Court is still bound by any principles set by the Court of Appeal or Supreme Court as regards such joinder.

23. The principles governing such joinder of Interested Parties were laid down by the Supreme Court of Kenya in the case of **Francis Kariuki Muruatetu & Another vs Republic & 4 Others** (supra) as follows:

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”**

24. These principles were reiterated by the Supreme Court in **Raila Amolo Odinga & Another v. IEBC & 3 Others** (2017) eKLR. 25. In the instant application, the Applicant seeks to be enjoined as an Interested Party in this petition on the grounds that he was a contestant for the gubernatorial elections of Kitui County in the general elections held 8th August 2017. It must however be noted that there are additional requirements that he must also satisfy to be joined as an interested Party as set out in the decisions by the Supreme Court cited in the foregoing.

26. In particular, I note that the Applicant is not challenging the outcome of the elections and declaration of the 1st Respondent as the elected governor by the 3rd Respondent, and specifically states that his participation is limited to the orders of scrutiny and recount that this Court may give, to the extent that this will also affect his votes in the said elections. He does not identify any particular irregularities that were committed in the said elections to necessitate such scrutiny and recount of the votes, nor seek any remedy in the event of such scrutiny.

27. To this extent, I find that the Applicant has not demonstrated or disclosed the personal interest or stake that he has in any scrutiny and recount that may be ordered by this Court, or in the Petition herein.

He has also not demonstrated the prejudice he will suffer if not enjoined, , and on the contrary did concede that he may have other remedies available to him as regards scrutiny of the votes. Lastly, he has failed to put out his case as a stakeholder in the elections, and what value he will add to the Petition over and above his participation in any scrutiny and recount of votes that may be ordered. I am also of the view that given the timing of the application, it may lead to further delay in the prosecution of this petition.

28. In the circumstances, I am satisfied that the Applicant's Notice of Motion dated 23rd October 2017 lacks merit and it is hereby dismissed with costs to the Petitioner and Respondents.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 16TH DAY OF NOVEMBER 2017

P. NYAMWEYA

JUDGE