



REPUBLIC OF KENYA
IN THE ELECTION COURT
AT MALINDI

ELECTION PETITION CAUSE NO. 13 OF 2017

ERNEST HINZAO.....PETITIONER

VERSUS

1. I.E.B.C.1ST RESPONDENT

2. WAFULA CHEBUKATI.....2ND RESPONDENT

3. THE GANZE MALINDI SUB-COUNTY

RETURNING OFFICER.....3RD RESPONDENT

4. AISHAJUMWA.....4TH RESPONDENT

RULING

1. On 11.10.2017, by an application dated, 10/10/2017 the 4th Respondent moved the court and prayed that:-

i. (Spent)

ii.) THAT the officer in-charge of the ICT Department at the Malindi Law Courts/High Court at Malindi do furnish this Honourable Court with copies of emails (bearing digital footprints including date & time) and the scanned copies of Petitions sent (from High Court at Malindi) to the Judiciary in Nairobi on 6th & 7th September 2017 pending the hearing and determination of this Application;

iii.) THAT the Chief Registrar of the Judiciary do furnish this Honourable Court with emails and their attachments/scanned copies of Petitions received from the High Court of Kenya at Malindi on 6th & 7th September 2017 pending the hearing and determination of this Application;

iv.) THAT this Honourable Court be pleased to strike out the entire purported Petition herein dated at Malindi on the 5th September 2017 and purportedly filed on 06/09/2017 as the same was fraudulently filed and/or entered into the register without payment of any or any requisite Court fees.

2. The application was grounded on the allegations that there are two petitions dated 5/6/2017 one at Malindi and one at Kilifi but both date stamped as filed on 6/9/2017 and challenging the election of the 4th Respondent. Additional alleged ground is that the first petition was filed on 6/9/2017 at about 11.30pm while the subsequent one was filed on or about the 14/9/2017 but backdated to 5/9/2017 with no court fees paid and never entered in the Registrar of Petitions and that there were not any records in the court file of correspondence or proceedings requesting for the initial petition to be substituted with the later petition or withdrawing the earlier petition.

3. The Petition was supported by the affidavits of AISHA JUMWA KATANA. The gist of the 4th Respondents affidavits is that we became aware of two petitions filed against her election and both serialized as No. 13 of 2017 and instructed her lawyer to raise the issue with the Deputy Registrar. The Respondent then managed to obtain a copy of the Petition which was transmitted to Nairobi electronically after she had been served by a newspaper advertisement. Upon being served with a copy of the petition she noticed that there were indeed two different petitions; the copy she obtained from Nairobi and that served upon her advocate. To the 4th Respondent the action by the Petitioner of filling the subsequent petition upon an existing file without payout of court fees was improper and fraudulent and amount to an irregular and unlawful withdrawal of the petition filed on 6/9/2017 and dated at Kilifi by having it mechanically plucked out of court file.

4. The Petitioner then relies on the happenings in Petitioner No. 5 of 2017 and the words of the Deputy Registrar which acknowledge having allowed a subsequent petition to be filed upon an existing one on account of an error on the petition already filed and court fees paid and contends that the subsequent petition could not have been filed the same night and that if it was so filed then it was done after midnight on 6/9/2017 and therefore on the 7/9/2017. That affidavit exhibits the petition dated 5/9/2017 at Kilifi and the court filing receipt issued therefore.

5. There was also a notice of preliminary objection dated 6th October 2017 and filed in court the same day also faulting the petition and seeking to have it dismissed on the same basis.

6. The Application and Notice of Preliminary Objection were opposed by a Replying Affidavit sworn by the petitioner whose gist was that due to a mistake and drunkenness of the advocate on the material day a draft of the petition was filed and it was discovered in time and the real petition was called for and filed with the concurrence and permission of the Deputy Registrar. The Petitioner then takes the stand that such having happened, there are no two but only one petition the one dated 5/9/2017 at Malindi and the only one which was served.

7. At hearing the Petitioner/Respondent was represented by Mr. Aboubakar while Ms. Aoko appeared for the 4th Respondent while Mr. Akelo appeared for the 1st-3rd Respondents. Before the matter proceeded, Ms. Aoko sought to amend the Notice of Motion at grounds a,b & d to read petition number 13/2017 instead of 5 of 2017. That oral application was not opposed by Mr. Aboubakar who considered it a honest application to correct a genuine mistake. By reason of such concession the court allowed the amendment at grounds a, b & d of the notice of motion as requested.

8. On 16/10/2017 when the file came up for hearing of some two applications by the petitioner for scrutiny, parties consented to the 4th Respondents' application and recorded a consent allowing the prayers 2 & 3. For that reason the prayer that was argued and now subject to this determination is prayer no. 4.

9. It is also of note that pursuant to the consent order aforesaid, the one Mr. Amos Kimani Njoroge, the ICT Officer, Malindi Law Courts, filed a report dated 18/10/2017 on the 19/10/2017. That report shows that on the 7/9/2017 at about 12.01pm a Mr. Evans Kithale, the judicial staff mandated to share information with the Judiciary Committee on Elections generated an email and attached to the said email copies of the petitions in Malindi Election Petitions No. 8,9,10,11,12,13 & 14 together with court filing receipts for the same. Of interest to the court in this matter is the copy of petition in this petition.

10. The copy of the petition shown to have been transmitted to Nairobi is the Petition dated 5/9/2017 at Kilifi with prayers numbered A- L. That document is indeed the document exhibited in the 4th Respondents' affidavit in support and marked AJ2.

Submissions by the parties

11. Miss Aoko for the 4th Respondent/Applicant urged the Application & Preliminary Objection and relied on written submission dated 30.10.2017 and filed in court the same day. In the submissions counsel reiterated what is in the affidavit in support and then summoned the evidence availed by the ICT department on the transmitted documents to Nairobi. In addition the provisions of the elections Act and the Rules made thereunder were resorted to underscore the handling of an election petition including service, amendment and withdrawal.

12. The two documents; petition dated 5th at Kilifi and that dated the same day at Malindi are then contrasted on what the Applicant considers material differences including in the headings, the person whose election is challenged and the prayers sought. For that reason, the fact that the petition dated in Kilifi was never served but instead the Malindi petition is the one that was served, was emphasized. The 4th Respondent/Applicant further contends that he petition filed on the 6th September 2017 and dated at Kilifi was unprocedural plucked, expunged or withdrawn from the court record and what was served was not properly filed hence is not a valid petition and therefore liable to being struck out. To the 4th Respondent/Applicant what happened here was a fraud and it is not curable that the Deputy Registrar could have allowed or concurred with the removal of the Kilifi petition from the file or its substitution with the Malindi Petition because only the election court has such jurisdiction. To the 4th Respondent, the purpose of High Court Registry operation manual (2013) was to make the Registry operations transparent and accountable and it is that accountability that has demonstrated that the petition dated at Malindi was not with the court as at 7/9/2017 midday when the transmission of the filed petitions was effected and therefore it must have been filed after the deadline of 6/9/2017 and was then filed later and contrary to section 77(1) of the Elections Act and cannot be entertained under section 79 of the Act but ought to be struck out.

13. In oral submissions by Ms. Aoko in court, the counsel pointed out that there was an admission by the petitioner at paragraph 6 of the Affidavit in reply that there was commotion resulting from a difference between the petitioner(s) and the counsel as a consequence of which the Advocate ran away and proper sets of petitions, not one, were presented and with the intervention of the Deputy Registrar the fresh petitions were filed few minutes to midnight but after payment had been made on the petition(s) dated at Kilifi. The counsel then relied on the decisions by the court in Malindi High Court, Election Petitions No. 5 & 6 of 2017 in which similar facts were considered and petitions struck out.

14. Mr. Akelo for the 1st – 3rd Respondent, did not file any paper concerning the Application and Notice of Preliminary Objection but supported the Application and the Notice of preliminary by submitting that the facts disclosed smirked of abuse of court process and sharp practice by the petitioner. He added his voice to that of Miss Aoko that of the petition be struck out with costs.

15. For the Petitioner/Respondent, Mr. Aboubakar did not file submissions but sought to adopt his submissions offered in petition no. 6 of 2017 and sought to add a few points. To him the application was grounded on no facts but speculation and insinuations devoid of evidence. He pointed out very rightly that there was totally no evidence that the Petition dated in Malindi was filed on 14/9/2017. Mr. Aboubakar however, conceded to the existence of two petitions but submitted that striking out is a draconian and drastic measure that should be employed very sparingly.

16. On averment by the applicant that the petition dated at Kilifi was obtained from Nairobi in confidence, the counsel said that amounted to the evidence being obtained illegally and therefore cannot be a basis to resort to the remedy to strike out the petition as that would offend the dictates of Article 50(4) of the constitution.

17. The counsel resisted the submissions that the Kilifi Petition was ever withdrawn and stressed that what was done was to replace the same with that dated in Malindi with the concurrence of the Deputy who exercised discretion under Article 159(2) d of the constitution as echoed by section 1B of Elections Act and Rules 4 & 5 of the Election (Parliamentary Petition) Rules 2017.

18. The advocate placed reliance on Supreme Court Petition No. 1 of 2015 Moses Mucigi & 14 Others vs IEBC and Others for the proposition that procedural rules should not be used to stifle hearing the substance of the dispute.

19. On the decisions in Malindi Petitions No. 5 & 6 of 2017, the counsel submitted that the facts were different from those here but in any event the court is not bound by the same. To him the petition should be spared for no party stood to suffer any prejudice if the petition was heard on the merits.

20. In her reply to the petitioner's submissions, Ms. Aoko referred the court to section 76(5) of the Elections Act on the procedure for filing a supplemental petition and pointed out there being no room to replace a petition once filed. Rules 7 and 21 were also cited to the court to stress the point that the court fees is mandatory and that once filed a petition can only be withdrawn with the leave of the election court. To the counsel, there was a definite something untidy about the petition that exposed it for being struck out with costs.

Issues for Determination

21. When all is considered, the affidavits filed by the parties and the material availed by the ICT department, Malindi High Court, pursuant to court orders of 17/10/2017, one fact is agreed between the parties. The fact is that on the 6/9/2017 at about 11.30pm, several petitions, according to paragraph 6 of the Replying Affidavit of a petitioner, about 9 petitions were presented for filling and court filing fees was duly paid. However, it was then discovered that the document filed was a draft petition hence it was decided that the proper petition be presented and the same was presented and accepted after the Deputy Registrar intervened.

22. What is not agreed is whether it was proper for the petitioner to seek to Replace or supplant the petition dated at Kilifi with the dated at Malindi and at what time that was done. That to this court is the issue that the court is called upon to determine and whose determination would determine whether the petition is validly on record and should be heard or it is invalidity before court and should be struck out. Connected and incidental to that issue are the issues whether a Deputy Registrar is an Election Court and if Articles 159(2) d comes to the aid of the petition.

Analysis and Determination

23. This court proceeds for the understanding that timelines for taking steps in an election petition are engraved in stone by no other authority but the Constitution of Kenya, 2010. That must be for good reason the Kenyan people so decided. The same goes for the timelines set by the Elections Act in taking steps once the petition is filed.

24. Besides, there are the constitutional values and principles on conduct by public institutions including the court to include the questions of promptitude fairness, transparency and accountability by state organs and officials. Those must be the values the institution the Kenya people created and called the Judiciary has been obligated to adhere to pursuant to the elections Act and the Rules made thereunder as well as steps taken incoming up with documents like the Registry Operation Manual (2013). At the core of the Registry Operation Manual is the need toward the safeguard of the integrity of court process and records so as to answer to the requirements of transparency and accountability in its processes.

25. In this petition it is clear as daylight that the petition served by the petitioner is not the one that was transmitted by the High Court Registry, Malindi, to the Judiciary Committee On Elections on the 7.9.2017. What was transmitted is the petition in the document I would call the "Kilifi Petition". Though it was duly transmitted by way of acknowledgement that it was duly filed and paid court fees for, the

same has not been served. The Consequence of failure to serve an election petition in time and at all is not abstract but real. It is real that the petitioner is deemed to have abandoned the petition. The petition then ceases to exist and the court has no business employing its resources in time to consider a matter the originator has abandoned or decided not worth being brought to the attention of the Respondent. Even though the court is not bound by its own judgment, when such a judgment is not shown to have been arrived at on misapplication of either the law or facts or both and where the facts are in all fours with the judgment matter, it is only reasonable that a court of law be consistent in determining similar disputes based on the same facts in a consistent way. This being a court of record, it needs a valid reason and justification for the court to depart from its previous decisions on similar facts and circumstances. The facts here are step by step and character for character of those that participated in **Malindi Election Petition No. 6 of 2017, Jacob Thoya Iha - versus- IEBC & 3 others**. In that matter the court having considered the facts pleaded and the submissions offered rendered itself and held as follows :-

“It is enough to say that for his own reasons, as advised by counsel, the petitioner chose to supplant the petition dated 5/9/2017 at Malindi for that dated the same day at Kilifi without a court order but forgot to take away the undesired/deficient copy and thereby raising the 4th respondent antennae. The first petition, if I believe the Deputy Registrar, as I have done, was paid for but I have not seen my evidence of court fees paid for the fresh petition. I hold that the second petition was not validly filed in accordance with the Rule 7(a) for lack of payment of court fees. It was not properly or validly filed but otherwise procedurally found itself in the court file. That it was validly served does not cure the fact that it was improperly placed in the court file.

... It is not deniable that the Deputy Registrar acts on behalf of the court. However the powers of the Deputy Registrar are exercise on behalf of the court and must be limited to those expressly allowed and permitted by the rules or those that are purely ministerial. For purposes of an election petition the judicial duties and powers of the Deputy Registrar must be confined to those allowed under the Act and the Rules for example; the duty to handle the deposit for security for costs under 13(3), the duty to keep the register of petitions under Rule14 and the duty to tax costs under Rule 31(i). I do not read the Act and the Rules to permit a registrar to exercise the powers of the court like to enlarge time for parties to undertake any actions or indeed to allow it sanitize its pleadings or papers by substituting what the considers untidy or deficient with tidy or complete one. The day such will be allowed, even if one would be to consider it to be in the interests of substantial justice, is the day, it would be difficult for the court and even the litigating public to be sure of what are the authentic court papers. In fact the court shall have lost the standing to guarantee the parties of the veracity and integrity of papers filed by them. On that duty, it is the court through its registry staff who have the duty and obligations to ensure that the integrity of its records is upheld at all times. For this I share the views of my colleagues Fredrick Ochieng and Achode JJ, in *NRB MSC. Criminal Application No 246 of 2010, DANSON MAINA MUCHOKE -VS Republic* when it Judges said:-

“.....the concerned court registry bears the responsibility as it has the primary duty of preserving the security and integrity of court records.”

... The difficulty a court faces when the court record cannot be verified or its integrity vouched for have not been limited to this and the lower courts only but presented itself even to the Court Of Appeal. A reading of some of the decisions by superior courts demonstrate the abhorrence with which the court view the incidences where court records are made to disappear or just falsified. In the case of *FRANCIS NDUNGU WAINAINA -VS- REPUBLIC*, the court of appeal while praying for the end of the area of falsification and loss of court documents said:-

“As stated earlier, the appeal cannot be heard on the basis of records which are admittedly adulterated. There is no way of knowing the contents or retrieving the authentic originals which are confirmed to have been falsified. No direct or otherwise evidence is available to connect the

appellant with the falsification of the records although, as observed by Mr, Monda, he would be the beneficiary of such situation. The irresistible inference is nevertheless that the court registries which are charged with the duty of safe custody of court documents, and those who work in those registries, played a big role in the falsification.”

.....fortunately, the era of interference with the court records will soon come to an end after completion of the ongoing process of digitization of the court records.”

Although the cited decisions were based on criminal proceedings and the disappearance or falsification of court proceedings rather than pleadings, I take the view that all records of the court ought to be verifiable whatever the concerned document is called. That, as said before, will be the only way to protect the authenticity, standing and integrity of the court documents, its proceedings, records and processes.

I do not entertain an iota of doubt that the election court as defined does not include the Registrar and that the registrar clearly had no power to allow the parties exchange the documents in a manner that would be tantamount to an amendment.”

26. I haven't changed my views and opinion that the happenings of that night left quite a bit to be desired and should not be condoned or encouraged. I am also still of the same appreciation of the law applicable to the circumstances of the IHA case and the same do apply here. The petition I am called upon to consider was improperly brought before the court and is to that extent invalid, null and void. It merits no entertainment by the court and must suffer the only fate that justly awaits it.

27. The upshot is that the petition that was properly filed on time was never served and can only be deemed withdrawn or abandoned even if it was never removed from the court file. To the contrary, the petition that was served was not validly filed for failure to pay court fees contrary to Rule 7 and have it entered in the Register of Petitions as mandated by Rule 14. Due to breach of the rules it is not apparent when the petition dated at Malindi was filed just as there is no evidence that it was filed on the 14/9/2017. It is enough that it was not filed according to the law and is thus not validly before the court.

28. Being so invalidly before the court, it merits no employment of court's time to interrogate its merits. It is ordered struck out with costs of Kshs.2, 500, 000/= to be paid by the petitioner and be shared equally between the 1st and 3rd Respondents on one side and the 4th Respondents on the other.

28. A certificate shall accordingly issue pursuant to Section 86 of the Act.

Dated and delivered at Malindi this 20th day of December 2017.

P.J.O. OTIENO

JUDGE