



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION)  
PETITION RULES, 2017

AND

IN THE MATTER OF THE ELECTION FOR THE GOVERNOR OF HOMA BAY COUNTY

BETWEEN

HON. JOSEPH OYUGI MAGWANGA ..... 1<sup>ST</sup> PETITIONER

HON. JOSHUA ORERO ..... 2<sup>ND</sup> PETITIONER

VERSUS

I.E.B.C ..... 1<sup>ST</sup> RESPONDENT

THE RETURNING OFFICER H/BAY

COUNTY ..... 2<sup>ND</sup> RESPONDENT

HON. CYPRIAN AWITI ..... 3<sup>RD</sup> RESPONDENT

HON. HAMILTON OPATA ..... 4<sup>TH</sup> RESPONDENT

RULING

(1) This Petition was filed in Court on 6<sup>th</sup> September 2017, meaning that we are already halfway through its ultimate conclusion. We have been able to reach this far because of the strict attitude that has been applied with regard to the concept of time in electoral disputes which are driven by the Constitutional imperative of timely resolution of the disputes and meant to give effect to the sovereign will of the people to elect persons of their choice at the ballot and also ascertain the intent of the voters with a view to giving it effect whenever possible.

(2) It was stated in the case of Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & Others Supreme Court Case No. 2B of 2014, that it is now a constitutional imperative that the electorate should know with finality and within reasonable time who their representatives are. The people's will in the name of which elections are decreed and conducted should not be held in captive to endless litigation.

It is the Constitution and the Election Act 2012, together with the Rules and Regulations made thereunder which grant this Court a special jurisdiction in electoral disputes.

Thus, election petitions are governed by a self contained legal regime such that the Civil Procedure Rules do not apply except where expressly stated (see, **Murage Vs. Macharia (2008) 2KLR (EP) 244**).

The Election Court must in making any decision in regard to an election petition give due regard to the provisions of the Constitution as well as the Elections Act and the Rules and Regulations made thereunder.

(3) The proceedings in this Petition were in the first instance commenced on **11<sup>th</sup> October 2017**, with a pre-trial conference pursuant to **Rule 15(1)** of the Elections (Parliamentary and County Elections) Petition Rules 2017 which provides that:-

“Within seven days after the receipt of the last response to a petition, an election Court shall schedule a pretrial conference with the parties in which the Election Court shall:-

- a. frame the contested and uncontested issues in the petition
- b. analyse methods of resolving the contested issues.
- c. determine interlocutory applications
- d. confirm the number of witnesses the parties intend to call
- e. give an order where necessary, for furnishing further particulars
- f. give directions for the disposal of the suit or any outstanding issue
- g. give directions as to the place and time of hearing the petition
- h. give directions as to the filing and serving of any further affidavits or the giving of additional evidence
- i. give directions on limiting the volumes of any copies of documents that may be required to be filed or
- j. make such other orders as may be necessary to prevent unnecessary expenses.

(4) Necessary directions were given by the Court and accepted by all the parties on that 11<sup>th</sup> October 2017.

As at that time, the only outstanding interlocutory applications were those of the petitioners dated **6<sup>th</sup> September 2017** and **5<sup>th</sup> October 2017**. The Court directed that the applications be heard by way of affidavits and written submissions which were to be orally highlighted on **24<sup>th</sup> October 2017**.

It was also directed that the Petition shall be heard by affidavit evidence with oral hearing being confined to cross examination of the witnesses availed by the parties. Each party was given the liberty to file further affidavits and/or witness statements by the 24<sup>th</sup> October 2017.

(5) As at 24<sup>th</sup> October 2017, the only applications on record remained those of the Petitioners but they were yet to file their written submissions. The 1<sup>st</sup>/2<sup>nd</sup> Respondents had also not filed their submissions but had filed their grounds of opposition to the Petitioners' applications.

It was only the 3<sup>rd</sup>/4<sup>th</sup> Respondents who had their submissions in place but they requested for leave to file supplementary submissions. It was therefore apparent that the outstanding interlocutory applications could not be finalized on that day.

Consequently, the Court gave further directions and rescheduled the hearing date for the two applications to the **31<sup>st</sup> October 2017** with a caution to the parties on the need to treat with seriousness any directions given by the Court.

(6) On 31<sup>st</sup> October 2017, all the parties had their respective submissions in place. These were orally highlighted at length and thereafter, the Court's ruling on the applications was slated for **7<sup>th</sup> November 2017** on which date the ruling was delivered to the parties. Accordingly, the application dated **6<sup>th</sup> September 2017**, was partially allowed to the extent that the Petitioners' were granted the order to access the original electoral forms and documents on a "**read only**" basis with liberty to produce photocopies. They were also allowed to inspect the ballot boxes and place their own seals thereon. They were further allowed to access and digitally or electronically download the data in the kiems kits used in the gubernatorial election.

(7) These orders were to be effected for a period of five days from the 7<sup>th</sup> November 2017 to the 13<sup>th</sup> November 2017 excluding the weekend.

Further to the foregoing, the Court granted the Petitioners' request for **scrutiny** and **recount** of votes garnered by each candidate in the polling stations specified in Paragraph 33 or 34 of the Petition. The Court indicated that it may in the course of taking evidence at the hearing of the Petition order scrutiny and recount of votes in additional polling stations if it was deemed fit to do so.

The exercise was to be effected in the course of the hearing of the petition as the Court may direct and was to be supervised by the Deputy Registrar of this Court in the presence of three (3) agents for each of the parties.

The other application dated **5<sup>th</sup> October 2017**, was dismissed with costs for being incompetent and fatally defective.

(8) Both applications were vehemently opposed by all the respondents but after being given due consideration by the Court on the basis of the applicable electoral laws and the grounds in support thereof and opposition thereto, the Court made its orders stated hereinabove.

It is instructive to note that immediately after the ruling, the 3<sup>rd</sup>/4<sup>th</sup> Respondents with tacit support from the 1<sup>st</sup>/2<sup>nd</sup> Respondents applied through their counsel for leave to file an application intended to raise issues pertaining to alleged false documents.

The Petitioners opposed the application on ground that similar issues had already been raised in the main Petition.

The 1<sup>st</sup>/2<sup>nd</sup> Respondents indicated that they would have preferred a fresh application but the Court had directed all the parties to file further affidavits to address the issues in the main Petition.

(9) The Court considered the oral application and declined to grant leave while emphasizing the need to hear and determine the Petition within the statutory prescribed period of time and in particular, given that all the parties were given leave to file further affidavits to address any emerging issues for purposes of putting them into trial. Most importantly, the Court noted that the parties had since the pre-trial conference adequate opportunity to file new affidavits and applications and if the respondents did not make use of the opportunity they had themselves to blame.

(10) Viewed against the foregoing background it would not be farfetched for this Court to opine that the

present application by the 3<sup>rd</sup>/4<sup>th</sup> Respondents for leave to file a fresh application after the conclusion of the hearing is not made in good faith and clearly flies in the face of Rule **15(2)** of the Election Rules 2017, which provides that:-

**“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.”**

It is not difficult for this Court to discern that the intended application though disguised as an application for review of this Court’s orders of the 7<sup>th</sup> November 2017 is in actual sense an application to have the petition struck out on the basis of alleged false documents relied upon by the petitioners in support of the petition. Such an application should have been brought before the commencement of the hearing of the petition and absolutely not after the hearing of the petition.

**(11)** And, even if the intended application is indeed for review of this Court’s order, it has come too late in the day and may not be plausible given the fact that the 3<sup>rd</sup>/4<sup>th</sup> respondents are not saying that there is an error apparent on the face of the record which needs to be corrected. Anything to do with alleged false or fraudulent documents would not be a ground for review now that evidence has been led by the parties regarding the documents and what remains is for the Court in its final judgment to rule whether or not it has been proved that the documents are false and if so, what legal action would be taken against the culprit or culprits be they on the petitioners’ side of the respondents’ side.

**(12)** Under S. 80(3) of the Elections Act, interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the Election Court.

It would therefore follow that any party aggrieved by a court’s decision in that regard may only appeal to the Court of Appeal when appealing against the final judgment of the election court respecting the Petition.

It is doubtful whether the Elections Act and the Rules made thereunder provide for a review of interlocutory orders made by election courts given that the Civil Procedure Rules do not apply in election petitions unless otherwise expressly stated.

In **Cornel Rasanga Amoth Vs. William Oduol & Others KSM CIVIL APPEAL No. 26 of 2013**, the Court held that a litigant who seeks to appeal against an interlocutory decision of an election court must await the final hearing and determination of the substantial dispute before the election court.

**(13)** However, where a party applies for a review of the Court’s orders as derived from a decision of the Election Court, such a review may only be granted to correct an “error apparent on the face of the record” (see, **Bob Micheni Njagi Vs. Orange Democratic Movement NBI HC Election Petition Appeal No. 2 of 2017**).

In the case of **National Bank of Kenya Vs. Ndungu Njau NBI Civil Application No. 211 of 1996**, the Court of Appeal stated that the error or omission must be self evident and should not require an elaborate argument to be established.

**(14)** In cases of scrutiny and recount of votes, this is provided for under S.82 (1) of the Elections Act and Rules 28 and 29 of the Elections Rules, 2017. Therefore, an election petition being a statutory proceeding and hence, a special jurisdiction governed by the Elections Act and Rules made thereunder, the common law and the principles of equity would not apply.

Nonetheless, all the parties in this petition are entitled to equal protection and benefit of the law in terms of Article 27(1) of the Constitution and to fair hearing of the Petition in terms of Article 50(1) of the Constitution and also to justice in terms of Article 159(2) (a) and (b) of the Constitution.

There is no doubt that given the stage we have reached in this petition, the petitioners would be most prejudiced and be denied their aforementioned constitutional rights at the behest of the respondents if leave is granted to the 3<sup>rd</sup> and 4<sup>th</sup> respondents to file an application for review of the orders made by this Court on 7<sup>th</sup> November 2017 and amended on 14<sup>th</sup> November 2017.

(15) In sum, whereas the 3<sup>rd</sup>/4<sup>th</sup> respondents' application for copies of the proceedings is hereby granted to the extent that the copies to be furnished shall be typed rather than handwritten and shall also be supplied to all the respondents and the petitioners, the application for leave to file an application for review of this Court's orders is hereby disallowed.

Ordered accordingly.

**[Read and signed this 18<sup>th</sup> day of December, 2017.]**

**J.R KARANJAH**

**JUDGE**

**In the presence of:**

Mr. Oronga for the Petitioners

Mr. Orego for 1<sup>st</sup>/2<sup>nd</sup> Respondents

Mr. Biko for 3<sup>rd</sup>/4<sup>th</sup> Respondents

**J.R KARANJAH**

**JUDGE**