



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Election Petition 3 of 2013

**JOSEPH TIAMPATI OLE MUSUNI 1ST
PETITIONER**

**LEDAMA OLEKINA.....2ND
PETITIONER**

**FRANCIS SIMIREN NKOITOI.....3RD
PETITIONER**

AND

**SAMUEL KUNTAI TUNAI.....
.....1ST RESPONDENT**

**ARUSASA AVALYN CHEPKURUI
2ND RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD
RESPONDENT**

**DR MICHAEL K CHERUIYOT (RETURNING OFFICER, NAROK COUNTY).....4TH
RESPONDENT**

**SAMUEL CHACHA (RETURNING OFFICER, EMURUA DIKIR CONSTITUENCY).....5TH
RESPONDENT**

**JOSHUA TULWO (RETURNING OFFICER, KILGORIS CONSTITUENCY).....6TH
RESPONDENT**

**JACKTON OKUBASU (RETURNING OFFICER, NAROK WEST CONSTITUENCY)...7TH
RESPONDENT**

**MARTIN MALONZA (RETURNING OFFICER, NAROK SOUTH CONSTITUENCY)....8TH
RESPONDENT**

**MOHAMMED RAKA (RETURNING OFFICER, NAROK SOUTH CONSTITUENCY)....9TH
RESPONDENT**

**ISSA TURO (RETURNING OFFICER, NAROK EAST CONSTITUENCY).....10TH
RESPONDENT**

**THE TRANSITION AUTHORITY.....11TH
RESPONDENT**

RULING

1. The subject of this matter is an election petition filed by the petitioners challenging the election of Samuel Kuntai Tunai as the duly elected governor of Narok County during the 4th March 2013 general elections. Samuel Kuntai Tunai was declared the Governor-elect and duly gazetted as such vide **Gazette Notice No. 3155** dated 13th March 2013.

2. The petitioners have filed a Notice of Motion dated 21st March 2013 where it seeks the following orders;

(i) *That for reasons set out herein and in the accompanying Certificate of Urgency this application be certifying urgent and service thereof be dispensed with in the first instance and that the same be heard exparte for purpose of prayers 1, 2 and 6 hereof.*

(ii) *That there be a temporary stay and suspension of the swearing in and assumption of office of Governor, Narok County, set to take place on or before the 27th of March 2013 pending inter parties hearing and determination of this Application.*

(iii) *That swearing in and assumption of office of Governor, Narok County be and is hereby suspended pending the hearing and determination of this petition.*

(iv) *That the 3rd through to the 10th respondents be and are hereby ordered to supply and furnish the petitioners with all Forms 35 for every polling centre in Narok County and the respective Forms 36 for each of the Constituencies in Narok County.*

(v) *That there be an inspection of ballot boxes and a scrutiny of votes for all polling centres in Narok County.*

(vi) *That this application be heard inter parties on a near date to be direct by the court.*

(vii) *That the costs of this application be provided for.*

3. The Motion is supported by the affidavit of Tiampati Ole Musuni sworn on 21st March 2013. In essence, the petitioners' case is that the elections were not transparent, free and fair but rather a complete and utter sham. In the affidavit, the 1st petitioner sets out exhibits to demonstrate that the election data relied upon lacked credibility, integrity and accuracy thereby rendering the entire election nullity.

4. Mr Saitabao, counsel for the petitioners, argued that as a result of the deeply flawed election, the 1st respondent, the Governor-elect, could not be sworn in tomorrow, 27th March 2012, on account of such an election as this would be a grave violation of the will of the electorate of Narok County and a serious mockery of democracy. Counsel submitted that, the petition has high chances of success and the court should issue conservatory orders. Counsel further submitted that **Article 141(2)(b)** of the Constitution which applies to the office of the President and which suspends the swearing in of the president-elect pending resolution of an election dispute relating to the presidential election should be applied.

5. Counsel also submitted that the High Court had unlimited jurisdiction to hear civil matters under **Article 165(3)(a)** and that it could issue any orders that were necessary to meet the ends of justice in the matter.

6. The application was opposed by all the respondents on common grounds. First, they contended that all matters concerning whether a person has been validly elected are governed by **Article 87** of the Constitution, the **Election Act, 2011** and the **Elections (Parliamentary and County Elections) Petition**

Rules 2013 (LN 54/2013) (“the Rules”). In the circumstances, any proceedings must be conducted in accordance with the prescribed procedures. Second, the respondents submitted that an Election Court constituted under **Rule 2** of **the Rules** is the only court empowered to deal with interlocutory applications under **section 80(3)** of the **Elections Act, 2011** thus the Notice of Motion cannot be entertained.

7. Third, following from the last point, the rules do not contemplate an application of the nature made by the petitioners and even if it did, the **Rules** are clear when such an application should be made and it should be made after the close of pleadings and during the pre-trial conference stage as provided by **rule 17** of **the Rules**.

8. Counsel for the 1st respondent, emphasised the public interest in ensuring that the county government run in accordance with the law displaces any personal rights that the petitioners may have entitling them to an injunction.

9. I have considered the petition, application and pleadings and I take the view that the matter before the court is an election petition. In this respect it must be determined in accordance with the provisions governing the presentation of election petitions. **Article 87** of the Constitution provides as follows:

87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

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

10. Pursuant to this provision the legislature has enacted the **Election Act, 2011** which has empowered the Rules Committee to enact the **Elections (Parliamentary and County Election) Petition Rules**. The Act and the rules promulgated thereunder form a complete code governing the resolution of electoral disputes. The principle that where the Constitution or Parliament provide a specific procedure for settlement of a dispute, that provision or procedure must be followed, is now firmly established in this jurisdiction and cannot be ignored by a mere side wind or as an inconvenience particularly in matter concerning elections. (See **Speaker of the National Assembly v Karume (2008) 1KLR EP 425** and **Kones v Republic & Another ex parte Kimani Wa Nyoike and 4 Others Nairobi Civil Appeal No. 94 of 2005 (Unreported)**.)

11. In the more recent case of **Ferdinand Waititu v Independent Electoral and Boundaries Commission and Others Nairobi Election Petition No. 1 of 2013 [2013] eKLR**, Justice Mumbi Ngugi stated as follows; “[27] *The petitioner has submitted that the Court has jurisdiction to entertain his Petition and application on the basis of Article 165(3)(a) of the Constitution, and that this right cannot be truncated by either the Elections Act or the Rules. In my view, however, and I agree with the 4th respondent on this, the provisions of the Elections Act and the Elections Rules, which are made pursuant to Article 87 (2) of the Constitution, constitute the constitutionally underpinned Code of Laws for dealing with election petitions. The jurisdiction to hear and determine election petitions is a special jurisdiction that is conferred by the Constitution itself, and the manner in which it is to be exercised is ordained by the Constitution when it donates power to Parliament to enact the requisite laws and regulations for its exercise. Such truncation as there may be of the right to approach the court under Article 165(3)(a) has therefore been done by the Constitution itself.*” I agree wholly and I adopt this principal of law.

12. It follows that the petitioners’ notice of motion must be looked at through the lens of the entire code that governs election petitions and the question then is whether the court can grant the orders sought in the motion. **Section 80(3)** of the **Elections Act** provides that **“Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court.”** Under **rule 6** of the **Rules**, the election court is duly constituted by the Chief Justice appointing a High Court Judge to hear and determine the petition. The rules also contemplate that all interlocutory application shall be dealt with at the pre-trial conference under **rule 17** of **the Rules**. It is therefore clear that what the petitioner seeks in the application is outside the

contemplation of *the Rules*. The issue sought in prayers 4 and 5 of the Notice of Motion are dealt with by **rule 21** of *the Rules*. In any case, counsel for the IEBC drew the Court's attention to the fact that the issue of delivery of certain documents had been dealt with in **Nairobi Petition No. 167 of 2013**.

13. The issue raised prayer 2 and 3 is whether the Court should restrain the swearing in and assumption of office of the Governor-elect. Although counsel for the petitioners relied on the provisions of **Article 141**, he could not point to any specific provision that applied these provisions to the office of Governor. **Article 141(2)(b)** provides as that, "*The President-elect shall be sworn in on the first Tuesday following the seventh day following the date on which the court renders a decision declaring the election to be valid, if any petition has been filed under Article 140.*" I agree with the respondents that the provisions of **Article 141** apply only to the office of the President-elect. If the framers of the Constitution had intended otherwise, the Constitution would have so stated. Further, the legislature in crafting the *Elections Act, 2011* would have inserted a provision that empowers the court, in an appropriate case, to issue an injunction to restrain an elected State officer from assuming office. In the absence of a specific provision, within the framework that governs the settlement of election disputes, the Court lacks statutory authority to stop a duly elected Governor from taking office.

14. I am also of the view that the office of Governor occupies a central position in the system of devolution set up in the Constitution. Under **Article 74** a State officer is required to take and subscribe to the oath or affirmation of office as a prerequisite for taking office. If this is not done, the State officer cannot assume office and perform the functions of that office (see *Africa Centre for International Youth Exchange (ACIYE) and Others v Ethics and Anti-Corruption Commission and Others Nairobi Petition No. 334 of 2012 [2012] eKLR*). It would therefore not be in the public interest to disable the working of County Government by interposing the swearing in and assumption of office by the Governor-elect with a court order. The Constitution and the *Elections Act, 2011* envisages that once the Governor has been elected he takes office and can only be removed in the manner intended by the law. An injunction of the nature sought by the petitioner would undermine County government and is not permitted by the statute.

15. In view of the position I have taken, I have avoided commenting on the merits of the petitioner's case. The *Election Act, 2011* provides that the election court duly constituted shall examine these allegations and once the pre-hearing procedures prescribed in *the Rules* are complied, the Court, in accordance with **section 86** of the *Elections Act, 2011*, "*shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition*"

16. The result of what I have stated is that the Notice of Motion dated 21st March 2013 lacks merit and is dismissed with costs to the respondents. The petition is adjourned *sine die* and shall be prosecuted in accordance with the requirements of the *Elections Act, 2011* and the *Elections (Parliamentary and County Elections) Petition Rules, 2013*.

DATED and DELIVERED at NAIROBI this 26th March 2013

D.S. MAJANJA
JUDGE

Mr Saitabao instructed by Kachory and Company Advocates for the petitioners.

Mr Kemboy instructed by Kemboy and Ogola Advocates for the 1st respondent.

Mr Havi instructed by Havi and Company Advocates for the 2nd respondent.

Mr Munge with him Mr Oiboo instructed by Muriu Mungai and Company Advocates for the 3rd to 10th respondents.

Mr Okindo instructed by Mr Nyandoro and Company Advocates for the 11th respondent.

Mr Njoroge, Litigation Counsel, instructed by the State Law Office for the Attorney General.