



REPUBLIC OF KENYA

High Court at Machakos

Election Petition 6 of 2013

IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE ELECTIONS (GENERAL) REGULATIONS 2012 AND ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES

AND

IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR SENATE MAKUENI COUNTY HELD ON 4TH MARCH, 2013

BETWEEN

**PARTY OF INDEPENDENT CANDIDATE OF KENYA.....1ST
PETITIONER**

**JOHN HARON MWAU2nd
PETITIONER**

VERSUS

**HON. MUTULA KILONZO.....1ST
RESPONDENT**

**JOSEPH KAMANDI KITONYI.....2ND
RESPONDENT**

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

RULING

1. **John Harun Mwau** the 2nd Petitioner herein was among candidates who contested for the Senate Seat; Makueni County during the General Election held on 4th March, 2013 under the Elections Act, 2011 having been nominated by the 1st Petitioner. They filed a Petition against three (3) Respondents herein. The 1st Respondent was the one declared as the Senator for Makueni County and consequently issued with a certificate thereof. The 2nd Respondent was the Returning Officer who conducted elections in Makueni County. The 3rd Respondent was the one responsible for the conduct of elections.

2. On the 27th April, 2013, the 1st Respondent died. A by- election ought to be conducted following his death.

3. The Petitioner has therefore filed this Notice of Motion pursuant to Article 101, 103, and 105 of the Constitution, Sections 3A of the Civil Procedure Act, Section 80(3) of the Elections Act, Rule 29 of Election (*Parliamentary and County*) Petition Rules 2013, Order 51 of the Civil Procedure Rules and all enabling provisions of the law).

4. He seeks orders/declaration as follows:-

“i. THAT this application be certified urgent and service thereof be dispensed with in the first instance.

ii) THAT Rule 29 (1) of the Election (Parliamentary and County) Petition Rules 2013 is in conflict with Article 103 (1) (a) of the Constitution and hence it is null and void.

iii) THAT the Independent Electoral and Boundaries Commission is hereby notified that the 1st Respondent passed away on the 27th of April, 2013.

iv) THAT upon the death of the 1st Respondent, and in accordance with Article 103 (1) (a), the Senate Seat for Makeni County became vacant.

v) THAT as a result of the foregoing, Petition No. 6 of 2013 hereby abates in view of Article 103(1) (a) and is hereby terminated.

vi) THAT the failure by the 2nd and 3rd Respondents to provide the Petitioners with the documents and information requested for as enumerated in Petition No. 3 of 2013 is unconstitutional, high handed, and violates the Petitioners' rights under Article 35 of the Constitution.

vii) THAT the deposit of Kenya shillings 500,000/= paid by the Petitioner to the Court be refunded forthwith.

viii) THAT each party bears its own costs, both in this application and in the Petition”.

5. The Application is based on grounds that following the provision of the Constitution, upon the death of a Member of Parliament, the seat becomes vacant and the by-election must be held within ninety (90) days. Therefore, any other provision of law purporting to extend the period within which the by-election is conducted would be unconstitutional and therefore *null and void*; the 1st Respondent having died on 27th April, 2013 and the seat having become vacant the end result has already been achieved; the 2nd and 3rd Respondents wilful neglect/refusal to provide petitioners with documents and information they are entitled to, was in violation of the petitioners rights under article 35 of the Constitution. The application is supported by affidavits deponed by **Julius Wambua** the National Vice Chairman of the 1st Petitioner and the 2nd Petitioner, **John Haron Mwau**.

6. In his submissions **Mr. Omwanza** for the Applicants/Petitioners argued that Rule 29(1) of the Election (*Parliamentary and County*) Petition Rules, 2013 (hereinafter “*Petition Rules*”) was in conflict with Article 101(2) (3) (4) Article 103 (a) and 105 of the Constitution. He submitted that there are two (2) parallel systems; the legal process of having the election petition going on and the process triggered by Independent Electoral and Boundaries Commission of conducting a by-election.

7. He submitted further that the process provided by the Election Rules was an inferior process. When it comes to accessibility of justice the deceased will not get a fair hearing. Secondly, he also submitted that since the by-election will be held within ninety (90) days, the petition shall be overtaken by events. He further submitted that looking at the context of the provision of the Rules it would imply a requirement to extend the period provided in the constitution within which the case should be determined prior to the by-election being conducted. He concluded that prayers 3 and 4 had already been overtaken by events.

8. Regarding security for costs deposited, he stated that it would be in the interest of justice that the money be refunded. That would mean each party bears its own costs.

9. **Mr. Mutinda** for the 1st Respondent did not oppose the application, but argued that the deposit made could not be refunded because Respondents had filed their affidavits and statements.

10. **Mr. Murugara** for the 2nd and 3rd Respondents opposed the application on the grounds that there was no inconsistency between Rule 29 (1) of the Petition Rules, 2013 and specified Articles of the Constitution. In his view, petitions are covered by Article 87 of the Constitution which mandates Parliament to make Rules. The petition is not only against the party that died, other Respondents would defend the case hence it could not be dismissed as a mere academic exercise. The court would also be required to make a finding on whether the election process in Makueni County was free and fair, which could not be tied to the by-election.

11. Regarding the issue of the petition abating, he submitted that it had not. The petition could only be terminated through a withdrawal as provided by Petition Rule 23. He called upon the court to make a determination on costs since neither abatement nor withdrawal of the petition affects costs.

12. In considering this application, I will commence by commenting on whether or not it was procedural for the Notice of Motion to be made pursuant to the provisions of section 3A of the Civil Procedure Act which provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

13. An Election Petition is a special litigation which is neither criminal nor civil in nature. These are disputes of great importance to the public. (See ***Rashad Hamid Ahmed versus Fatum Yasin Twaha & others Election Petition No. 4 of 2003***). The Civil procedure Act and Rules made thereunder do not apply to Election Petitions unless it is expressly stipulated (see ***Hassan Ali Joho & Others vs Hothem Nyange & Another [2006] eKLR*** where the Court of Appeal quoted the decision in ***David Wakaine Murathe versus Samuel Macharia – Civil Appeal No. 171 of 1998*** and ***Mwai Kibaki –versus Daniel Arap Moi, Civil Appeal No. 172 of 1999***).

14. Section 3A of the Civil Procedure Act gives the court inherent power to make orders sought to ensure justice is done.

15. The relevant provision in respect of Election Petitions is Rule 4 (1) of the Elections (*Parliamentary and County Elections*) Petition Rules, 2013. Citing the provisions of the Civil Procedure Act, therefore did not conform to legality.

16. With regard to prayers sought in the application I will address prayer 3 & 4 which as correctly pointed out have already been overtaken by events.

17. In prayer 3, Counsel sought a declaration that the Independent Electoral and Boundaries Commission (IEBC) be notified of the 1st Respondent’s demise. Following the demise of the 1st Respondent, the Registrar was required to publish in the Gazette a Notice indicating the event that had occurred. The Registrar duly complied with the law.

18. Prayer 4 was for the court to order/declare that upon the death of the 1st Respondent, and in accordance with Article 103(1) (a), the Senate Seat for Makueni County became vacant. Article 103(1) (a) of the Constitution Provides:-

“The office of a member of Parliament becomes vacant if the member dies”

This is a clear and un-ambiguous provision of the law. This court could not have purported to make an

order granting a relief that is specified by a Constitutional provision explicitly.

19. Prayer 2 is in respect of the issue whether rule 29(1) of the Rules is in conflict with Article 103(1) (a) of the Constitution?

20. Rule 29(1) (a) of the Petition Rules, 2013 provide as follows:-

“If before the trial of an Election Petition, the person whose election is being contested dies... the Petition shall not abate but shall continue whether or not any person applies to be admitted as a Respondent in the manner provided in this Rule”.

21. Article 103(1) (a) (*supra*) concerns vacation of office of a Member of Parliament/Senate who has died. When that situation prevails the effect is provided by Article 101(2) (a). It states:-

“Whenever a vacancy occurs in the office... of a Member of Senate...the Speaker shall, within 21 days of occurrence of the vacancy give notice in writing of the vacancy to IEBC.”

22. Article 101(3) provides ;-

“A vacancy mentioned in clause 2 shall, subject to clause (5) be filled in the manner prescribed by an Act of Parliament within twenty-one days of notification of the speaker”.

23. Article 101(4) & (5) provides:-

“(4) A by-election shall be held within ninety (90) days of the occurrence of the vacancy, subject to clause (5).

(5) A vacancy referred to in clause (4) shall not be filled within the three (months immediately before the general Election”.

24. According to the constitutional provision, it is a mandatory requirement for a by-election to be held within 90 days.

The question to be determined is whether these two (2) legal processes are in conflict?

25. The constitution, the Supreme law of this land provides for filling of a vacancy that may occur following death or any other occurrence as stated.

26. In construing what it means it behoves the court to make an interpretation.

27. This court is mandated by Article 165(3) (d)(i) of the Constitution to hear any question in respect of interpretation of the Constitution including the determination of the question whether any law is inconsistent with or is in contravention of the Constitution.

28. I am also guided by the case of ***Olum & Another versus Attorney General (1) [2002] 2 E.A 508***, where the Uganda Court of Appeal held that in order to determine the constitutionality of a statute, the court had to consider the purpose and effect of the impugned statute, or section thereof and that if the purpose was to infringe a right guaranteed by the Constitution, the court had to go further and examine the effects of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the constitution, the statute or section in question would be declared unconstitutional.

29. The Elections Act is a creature of the Constitution. Article 87 Mandates Parliament to enact legislation to establish mechanism of timely settling of Electoral disputes. This is a constitutional requirement.

30. For operational purpose, the Rules Committee was authorised to formulate rules to regulate the

procedure to be applied. What was the purpose of the Rules created under Statute?

31. The rules objective is stipulated in Rule 4 (1) of the Petition Rules which provide:-

“The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act”

32. In conceptualizing the Rules the Court must give the effect of the overriding objective. The marginal note to Rule 29 is in respect of death, resignation or notice not to oppose by elected person. The occurrence of any of the stated events does not result into abatement of the Petition. The Petition continues. Any person who may have been a petitioner may apply to the court to be admitted as a Respondent to oppose the petition.

33. In all Petitions the Commission must be a Respondent (*see Rule 9*). The Commission (*Independent Electoral and Boundaries Commission*) which is established under Article 88 of the Constitution is a legal person capable of suing and being sued. Therefore, looking at the purpose of Rule 29(1) of the Petition Rules, it was intended to ensure the continuation of the Petition in order for the court to determine issues raised by the petitioner. It is not in all instances that a Respondent may die. What if the seat is left vacant following some other eventuality? The issue will be filling of the vacant seat.

34. The Constitution being the supreme law, any other law, that is inconsistent with it must be *null* and void to the extent of inconsistency (*see Osoyaco Ltd versus Attorney General [2003] 2 E.A 654*). However, a reading of the two provisions does not show any inconsistency.

35. This therefore brings us to prayer 5. Can the Petition abate in view of Article 103(1) (a) of the Constitution? Does the court have the power to terminate the Petition? I have aforesaid that death of the person elected does not make a suit abate. The 1st Respondent herein was not the sole Respondent in this Petition. There are other two (2) Respondents. The Petitioners must therefore proceed notwithstanding publication of the vacancy by the Speaker.

36. This court takes cognizance of the fact that the 2nd and 3rd Respondents have opposed the application. The court has absolutely no power to terminate the petition against them. The petition can only be terminated through a withdrawal (*see Rule 23*). Hearing of the Petition cannot be dismissed as a mere academic exercise because the court has a legal mandate of inquiring into allegations set out in the Petition.

37. With regard to prayer 6, Petition No. 3- a Constitutional Petition is pending hearing. Parties therein are the 2nd Petitioner herein and the 2nd and 3rd Respondents respectively. The 1st Petitioner and 1st Respondent are not parties therein. Making such a prayer in the current petition was either mischievous or a misconception of the law.

38. The issue to be determined in prayer 7 is whether security deposited herein should be refunded? It was argued that if the Petitioners were to withdraw the Petition, in the interest of justice, it would be prudent to have the money deposited in court as security for costs refunded.

39. The general rule is that costs follow the event. However, the court has discretion to make any other order depending on the circumstances of the case. Whether or not this court will depart from the general rule will be decided at a later stage.

40. Having considered the application herein, I find it lacking merit. I therefore dismiss it with costs to the Respondents.

DATED, SIGNED and DELIVERED in open court at **MACHAKOS** this **29TH** day of **MAY, 2013**.

L.N. MUTENDE
JUDGE

IN THE PRESENCE OF:

Mr Ngatia h/b for **Mr. Omwanza** for Petitioners

Mr. Murugara for the 2nd and 3rd Respondents

L.N. MUTENDE
JUDGE