



REPUBLIC OF KENYA

High Court at Machakos

Election Petition 1 of 2013

RICHARD N. KALEMBE NDILE.....PETITIONER

AND

DR PATRICK MUSIMBA MWEU1ST RESPONDENT

RETURNING OFFICER KIBWEZI WEST CONSTITUENCY2ND RESPONDENT

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

RULING

Introduction

1. Following the election held on 4th March 2013, the 1st respondent was returned as the duly elected member of the National Assembly for Kibwezi West Constituency. The petitioner, a candidate for the same seat, filed a petition dated 19th March 2013 questioning the validity of the election.

The application

2. The 1st respondent (“the applicant”) has moved the court by way of a Notice of Motion dated 24th April 2013 seeking to strike out the petition on two grounds as follows;

(i) The petition does not comply with **rule 10(1)(c)** of the *Elections (Parliamentary and County Elections) Petition Rules, 2013* (“*the Rules*”) in that it does not state the result of the election declared.

(ii) The petition does not disclose a cause of action.

3. **Rule 10** of *the Rules* provides that;

10. (1) An election petition filed under rule 8, shall state-

(a) the name and address of the Petitioner;

(b) the date when the election in dispute was conducted...

(c) the results of the election, if any, and the manner in which it has been declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, for the Petitioner which shall be the address for service.

4. In support of the application, Mr Mari learned counsel for the applicant, asked the court to strike out the petition for the reason that it did not comply with the mandatory provisions of **Rule 10 (1)** of *the Rules* as it failed to disclose a cause of action. Counsel pointed out that Paragraph 1 of the petition merely disclosed the results attributed to the petitioner and the applicant but did not disclose the results of the other candidates, the number of votes cast and those declared as spoilt, rejected or marked as disputed. Learned counsel submitted that the results were declared on 5th March 2013 in accordance with the provisions of **regulation 83(1)(c)** of the *Elections (General) Regulations, 2012* (“*the General Regulations*”).

5. Counsel relied on the Court of Appeal decision in *Mututho v Kihara and Others [1993 – 2009] 1 EAGR 270* where the Court of Appeal held that the rule requiring the pleading of the election result in the petition was mandatory. Counsel submitted that an election petition targets the results of an election and therefore failure to state the results rendered the petition defective and one that ought to be struck out. Counsel also cited the case of *Nyamweya v Oluoch and Others [1993 – 2009] 1 EAGR* for the proposition that election petitions are important matters of public interest hence a party must comply with the prescribed rules and procedures.

6. The second ground of attack was that the petition did not disclose a cause of action. Counsel urged that the petition failed to set out a cause of action, identify a legal right and state how it is violated. It was the applicant’s case that failure to state results meant that there was no cause of action and the Court has power to strike out a petition that is wanting in this respect. Counsel relied on the case of *Chelaite v Njuki (No.3) (2008) 2KLR (EP) 209* where it was held that the court had inherent jurisdiction to strike out a petition.

7. The 1st respondent’s case was supported by the counsel for the 2nd and 3rd respondents, Ms Wambua.

Respondents Case

8. The petitioner opposed the application on several grounds. Mr Kamolo, the petitioner’s counsel submitted that the Notice of Motion lacked merit as it was based on misapprehension of the law and was an abuse of the court process. He asserted that the petition complied with the provisions of **rule 10(3) (c)** of *the Rules* in material respects. It was the petitioner’s case that the affidavit sets out all facts necessary to support a cause of action and further that the results are contained in the affidavits in support of the petition.

9. Mr Makundi, co-counsel representing the petitioner, stated that the petitioner as a candidate was entitled to file the petition and that his affidavit set out all facts necessary to support the cause of action. He urged that the case should not be dismissed summarily citing the case of *DT Dobie and Company (Kenya) Ltd v Muchina [1982] KLR 1* as authority that power to strike out petition must be used sparingly. He submitted that the petition raised serious issues for determination.

10. Counsel for the petitioner also argued that the decision in *Mututho v Kihara* relied on by the applicant should not be followed as it is bad law and is not applicable to this matter as it was based on the former Constitution and the *National Assembly and Presidential Elections Act (Repealed)*. Unlike the rules made under the repealed Act, *the Rules* now require that the petition be filed with the affidavits which set out the entire case. The petitioner submitted that in *Mututho v Kihara*, the pleadings did not set out the result but in the present case the petition and affidavits which are required to be filed with the petition set out the election results. In the circumstances, the petitioner submitted that respondents were not prejudiced with the matter proceeding in its form.

Determination

11. The issue for consideration is whether **rule 10(1)(c)** of *the Rules* is a mandatory requirement rendering non-compliance fatal to the petition.

12. The issue has been the subject of a decision of the Court of Appeal in the *Mututho v Kihara* in which the Court considered the effect of failure to comply with a similar rule contained in the **Presidential and Parliamentary Elections Regulations (“the Regulations”)** made pursuant to the **National Assembly and Presidential Elections Act (Repealed)**. **Regulation 4(1)** of *the Regulations* stated as follows;

An election petition shall

(a) *State whether the petition is entitled to petition under section 44 of the Constitution.*

(b) *State when the election was held and the results of the elections and shall state briefly the facts and grounds relied on in support of the petition.*

13. The petitioner in the *Mututho v Kihara* did not particularise in the petition the number of votes each candidate received. She simply indicated that the returning officer had merely declared that “*this old man was ahead of Mrs by 100 votes*” as the result of the election. The Court of Appeal stated, “*The marginal note to regulation 40, aforesaid, reads, “Announcements of Election results”. A careful reading of that regulation clearly suggests that the result is not confirmed to just declaring who won. The detailed result is what is envisaged. The regulation deals with votes cast, votes spoilt and those garnered by each candidate. So when rule 4(1) of the National Assembly Elections (Election Petition) Rules, provides that the date of the election, the results and the grounds relied on must be stated it does not merely connote stating the name of the winner as Mr Kihara suggested. It is clear from the rule 4(1)(b), above that the issue in any election is the result of the election. It should be noted that other than a statement on capacity to bring the petition and the date of the elections, the only other important factor to be included in an election petition is the result. The marginal note of that rule makes the position abundantly clear. It talks about the contents and form of an election petition. The result does not go to form but to the content of the petition and in our view rule 4(1), above is specifically concerned with content. Rule 4(2), (3) and (4) are concerned with form. What would happen where, as here the results as envisaged by regulation 40 above are not included in the petition? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any other matter supposed to be included is omitted, then the petition would be incurably defective. For instance, paragraph (a) of rule (4)(1) deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective.”*

14. It is not disputed that the petitioner did not set out in the petition the election result contemplated in **rule 10(1)(c)** of *the Rules* and in the manner indicated in the *Mututho v Kihara*. What I must now consider is whether I should follow that decision which would result in striking out the petitioner’s claim as submitted by the applicant or whether I should permit the matter to proceed for hearing despite the deficiency in the petition.

15. Since that decision was made, several changes have permeated the election dispute resolution field. First, the Constitution introduces values and principles, set out in **Article 10**, that guide State organs in decision making. Values such as social justice, human rights, transparency and accountability are relevant when making decision. Second, **Article 159(2)(d)** requires the court to dispense justice without undue regard to technicalities. A court dispensing justice must interrogate whether a legal provision is amenable to **Article 159(2)(d)**.

16. In *Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others Nairobi Petition No. 5 of 2013 [2013] eKLR*, the Supreme Court explained what was meant by **Article 159(2)(b)** in the following terms; “[218] *The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing*

substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.”

17. The spirit of **Article 159(2)(d)** is transposed onto **the Rules** through the overriding objective found in **rule 4** which provides as follows:

(1) *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.*

(2) *The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1)*

Rule 5 on the other hand provides:

(1) *For the purpose of furthering the overriding objective specified in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims—*

(a) *the just determination of the proceedings; and*

(b) *the efficient and expeditious disposal of the petition and in*

any case not beyond the timelines provided in the Constitution and the Act with respect to election petitions.

18. I agree with the holding in **Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa HCCC No. 190 of 2010** cited in **Moses Wanjala Lukoye v Benard Alfred Wekesa Sambu & 3 Others, Bungoma Election Petition No. 2 of 2013 (Unreported)** which explained the marked departure wrought by the Constitution, “*I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010.*”

19. This background I have set out provides the milieu in which **rule 10(1)(c)** of **the Rules** is to be interpreted and applied. Such interpretation must determine whether the provision of **rule 10(1)(c)** is mandatory in light of the decision in **Mututho v Kihara**.

20. I agree that the results of the elections are an essential averment in the petition but I do not think failure to state the results is fatally defective under **rule 10(1)(c)** for several reasons. First, the introduction of **rule 21(b)** which provides that, “*the Commission shall deliver to the Registrar the results of the relevant election within fourteen days of being served with the petition*” ensures that all parties have access to the results of the election and the court is able to adjudicate the dispute in a fair manner.

21. Second, **rule 10(1)(c)** of **the Rules** differs markedly from the rule that was subject to interpretation in the **Mututho v Kihara**. The rule specifically states, “*the results, if any, and the manner in which it has been declared.*” The rule as drafted was clearly intended to deal with the problem faced by Ms Kihara in **Mututho v Kihara** where her main allegation was that the results were not declared.

22. Third, in order to ensure the petitions are heard and determined fairly and expeditiously **rules**

10(3)(b) and **12(1)** of *the Rules* requires the petitioner to file a supporting affidavit and witness affidavits at the time of filing the petition. This ensures that all evidence is available to the respondent and the court from the beginning. What is important is that the petition and the affidavits in support sets out sufficient facts to enable the respondent answer the petition and the court adjudicate the dispute.

23. It is not in doubt that there was an election in which the 1st respondent was elected and whose election is now challenged and I am satisfied that the petition and affidavits in support thereof are sufficient to enable the respondents answer the case. Moreover, the 1st respondent has filed a response to the petition dated 3rd April 2013 and witness affidavits in support. The returning officer has also filed a witness affidavit to respond to the allegations made by the petitioner. It would amount to an injustice to strike out the petition on the grounds set out in the application.

Conclusion and disposition

24. Based on the findings above, I have come to the conclusion that **Rule 10(1)(c)** of *the Rules* is not a mandatory provision in the circumstances and thus the petition survives the attempt to strike it out.

25. Consequently the Notice of Motion dated 25th April 2013 is dismissed with costs to the petitioner.

DATED and **DELIVERED** at **MACHAKOS** this 28th day of May 2013

D.S. MAJANJA
JUDGE

Mr Makundi instructed by Andrew Makundi and Company Advocates with him Mr Kamolo instructed by Kamolo and Associates Advocates for the petitioner.

Mr Mari instructed by Wachira Ndung'u and Company Advocates for the 1st respondent.

Ms Wambua instructed by Anne M. Kiusya and Company Advocates for the 2nd and 3rd respondents.