



REPUBLIC OF KENYA

High Court at Machakos

Election Petition 4 of 2013

WAVINYA

NDETI.....PETITIONER

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....1ST
RESPONDENT**

**ISAAC HASSAN (RETURNING OFFICER OF THE NATIONAL TALLYING CENTRE)...2ND
RESPONDENT**

**THE MACHAKOS COUNTY RETURNING OFFICER.....3RD
RESPONDENT**

**ALFRED NGANGA MUTUA.....4TH
RESPONDENT**

**MUTUA KATIKU.....5TH
RESPONDENT**

RULING

Introduction

1. The petitioner was a candidate for the position of Governor of Machakos County in the 4th March 2013 General Election. She has filed the petition dated 26th March 2013 in order to challenge the validity of the election of the 4th respondent as the Governor for Machakos County.

The application

2. The subject matter of the present application is a Notice of Motion dated the 30th April 2013 in which the 4th respondent (“applicant”) seeks for the following orders;

i. *THAT the petition dated 26th March 2013 be struck out.*

ii. *THAT pending the hearing and determination of this application all proceedings herein be stayed.*

iii. *THAT the costs of this application and the petition be awarded to the 4th and 5th Respondents.*

3. The applicant contends that the petition is incompetent and fatally defective for failure to

include the announced results for all candidates in the Governor's elections in Machakos County contrary to with **rule 10(1)(c)** of the *Elections (Parliamentary and County Elections) Petition Rules, 2013* ("the Rules") which requires the petitioner to state the result of the election and the manner in which it was declared.

4. The applicant's case is that the Court lacks jurisdiction to determine a petition, where the announced results of the election are not pleaded or deliberately omitted. The applicant contends that the omission to include the results was deliberate and this defect cannot be cured by an amendment of petition. Mr Kilonzo Jnr, counsel for the applicant, 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 election results was mandatory and could not be cured by an amendment or request for particulars. This proposition was supported by the decisions in *Kigen Luka Kipkorir v Joel Langat and Chelaite Alicen Ronoh Nakuru EP No. 4 of 2003 (Unreported)* and *Mudavadi v Kibisu and Another* [1970] EA 585. These cases also emphasise the need to strictly comply with the rules governing the conduct of election petitions. Counsel also noted that the principle was applied in other jurisdictions and cited other authorities in support; *Halsbury's Laws of England, 4th Edition, Vol 15, #829, 832, 834 and 838, The Representation of People Act, 1947* (England), *How India Votes: Election Laws, Practice and Procedure, V.S. Rama and S.K Mediratta, 2nd Ed, Butterworths, p. 1014 - 1051.*

5. The application is supported by the affidavit of Hon. Alfred Nganga Mutua sworn on 30th April 2013 where he claims that the petition is defective as does not set out the election as announced and declared. The applicant states that the elections were publicly announced on the 8th March 2013. The applicant asserts that the petitioner ignored the actual results in order to create the reason for the scrutiny of the ballot boxes and registers as evidenced by the fact that she filed a Notice of Motion under Certificate of urgency together with the petition to in effect compel release of the results. The argument made by the applicant is that the petitioner deliberately omitted the results in order to contrive a case against the respondents.

6. The applicant also takes issue with the failure to name the County Returning Officer in the elections for the County Governor who was duly gazetted by the 1st Respondent, the Independent Electoral and Boundaries Commission ("the Commission"), and to whom all candidates presented their nomination certificates before the General Elections on 4th March 2013.

7. Mr Kilonzo Jnr urged that failure to name the returning officer was fatal to the petition as every returning officer was appointed through a transparent and competitive process and the names published in the Kenya Gazette in accordance with **regulation 4(3)** of the *Elections (General) Regulations, 2012* ("the General Regulations"). He submitted that the appointment of the returning officer was personal and not generic and that the officer appointed bore personal liability in the conduct of the election.

8. Counsel submitted that the petitioner had sought the nullification of the results as part of her relief in the petition and in the absence of the election result, the court could not act to nullify something that is not pleaded. Counsel further submitted that the petitioner had 28 days within which to file the result which were a fundamental part of the pleading and that the only recourse for the court was to strike out the matter. He asserted that the court lacked inquisitorial jurisdiction and in the absence of what constituted a fundamental part of the pleadings, the petition could only be struck out.

9. Mr Muhoro, learned counsel for the Commission, 2nd and 3rd respondents, supported the application to strike out the petition. He submitted that the petition was evasive since the petitioner was aware of the name of the returning officer as evidenced by the fact that the petitioner included the name of the returning officer of the National Tallying Centre. Counsel submitted that the returning officer was personally liable for carrying out the election in the County and by reason of **regulation 4(3)** of the *General Regulations*, it was necessary to join the returning officer by name.

Petitioner's response

10. Mr Kinyanjui, learned counsel for the petitioner, opposed the application on the basis of grounds of opposition dated 20th March 2013. Counsel pointed out that the returning officer, David Mutisya Musyimi was specifically addressed as such in the advertisement effect service of the court process carried in the Standard newspaper of 9th April 201 and upon service he appointed *Kimani Muhoro and Company Advocates* to represent him in these proceedings and who has filed a response pursuant to **rule 14(1)** of *the Rules* on his behalf. In the circumstances no prejudice has been occasioned to the respondents by failure to name returning officer.

11. Counsel cited **rule 4(1)** of *the Rules*, which sets out the overriding objective of the rules, and which he submitted incorporated the principles of the Constitution in the determination of election petitions. He urged that the court to take these principles and values into account in determining the application in view of the fact the petition was filed in the form required by the rules.

12. Mr Kinyanjui submitted that it was the petitioner's case, as pleaded, that she had not been furnished with Form 36 which set out the election result. She therefore filed an interlocutory application to seek these documents. He further submitted that the Commission subsequently furnished the results and that the petitioner cannot be faulted for adopting such a course based on the circumstances which she pleads in the petition.

13. Mr Kinyanjui further argued that the respondents were not prejudiced by the omission to set out results as they had all filed responses to the petition unconditionally and that no objection had been raised on that basis.

14. Counsel submitted that the case of *Mututho v Kihara* relied on by the respondents had no place in the current dispensation and was not in line with **Article 159(2)(d)** of the Constitution and right to access justice and the right to a fair trial guaranteed under **Articles 48** and **50** respectively. The petitioner urged the court not to strike out the petition as there would be no injustice visited upon the respondents.

Issues for determination

15. The two issues for determination in this matter are as follows:

- a) Whether failure to specifically plead the election result as required by **rule 10(1)(c)** of *the Rules* renders the petition incompetent.
- b) Whether the failure of petitioner to specifically name the returning officer is fatally defective in the circumstances.

Failure to disclose election results

16. It is not in contention that the petition did not provide all the results. The question for my determination is what effect if any such an omission would have on the validity of the election petition. **Rule 10(1)** of *the Rules* reads as follows;

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.

17. A purposive approach must be taken in interpreting this rule in order to achieve the objects of the rule. The rationale for the enactment was based on the idea that election petitions are primarily about figures and numbers and that being the ultimate challenge, then they ought to be set out in order to enable court address the appropriate relief. Thus in the *Mututho v Kihara* where the pleading simply stated that the returning officer is alleged to have declared, “*this old man was ahead of Mrs. by 100 votes*” was clearly inadequate.

18. It must to be borne in mind that rules of pleadings are intended to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. For example, what is paramount is that a person accused of a corrupt practice must know precisely what he is accused of, so that he may have the opportunity to meet the allegations made against him. (See Supreme Court of India holding in *Raj Narain v Indira Nehru Gadhi AIR 1983 SC 558*).

19. Unlike the former regime of rules under the *National Assembly and Presidential Elections Act (Repealed)* which were the subject of consideration in *Mututho v Kihara*, the current *Rules* now mandate the Commission to furnish the election results within a period of fourteen days of being served with the petition. **Rule 21** of *the Rules* provide as follows;

21. *The Commission shall deliver to the Registrar—*

(a) *the ballot boxes in respect of that election not less than forty-eight hours before the date fixed by the court for the trial; and*

(b) *the results of the relevant election within fourteen days of being served with the petition.* [Emphasis mine]

20. **Rule 21** taken together with **rule 10(1)(c)** of *the Rules* which now permit the petitioner to plead “*the results, if any, however declared*” was intended to deal with the mischief identified in *Mututho v Kihara*. The applicant has tried to demonstrate that the omission of the results was deliberate while the petitioner’s case is that the results were never declared in the manner provided by law. These contentions will be the subject of adjudication in light of the declared results provided by the Commission.

21. The guiding principle in consideration of this matter is the overriding objective of *the Rules* set out in **rule 4(1)** which is, “*to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.*” This objective is best realised by the Election court having regard to the purpose and mischief which the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance. **Rule 5** obliges this court to conduct proceedings before it to achieve, “(a) *the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.*”

22. **Rule 4** and **5** of *the Rules* is a consecration of the provisions of **Article 159(2)(d)** of the Constitution which obliges every court to dispense justice without undue regard to technicalities. The Supreme Court in *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others Nairobi Petition No. 5 of 2013 [2013]eKLR* discussed this provision thus, “*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...*” I agree and adopt the sentiments of Hon. Justice Kimondo in *Steven Kariuki v George Mike Wanjohi and 2 others, Nairobi Election Petition No. 2 of 2013 (Unreported)* where he observed as follows, “[21] *Once seized of the dispute, the Court is enjoined by Article 159(2) (d) of the Constitution to do substantial justice to the disputants expeditiously and without undue regard to technicalities. Rules of procedure have aptly been described as handmaidens of justice: not mistresses..... [22] Electoral dispute resolution is unique in many ways. But the principles applicable in a motion to strike out a pleading or action cut across the board. A good starting point is the standards applied in ordinary civil cases. Striking out a pleading is a draconian*

measure to be employed sparingly...”

23. I am satisfied that in these circumstances no injustice has been occasioned by the failure of the petitioner to set out the result of the election in the petition. The fact that elections disputes are *sui generis* governed by special regime of rules does not exonerate the court of its prime obligation to deliver substantive justice. It is the primary duty of the court to entertain grievances and to resolve them. Technical matters must not be allowed to defeat the broad issue of justice as between litigants particularly electoral justice (See *Joho v Nyange and Another (2008) 3KLR (EP) 33* as per Ojwang J).

Failure to specifically name the returning officer

24. It is not in contention that the returning officer is a proper party to these proceedings. **Rule 2 of the Rules** defines the term ‘Respondent’ in relation to an election petition as-

(a) *the person whose election is complained of;*

(b) *the returning officer;*

(c) *the Commission; and*

(d) *any other person whose conduct is complained of in relation to an election.*

25. The issue whether the petitioner should name the returning officer is to be approached substantively in light of the overriding objective as I have elucidated in the previous part of this decision.

26. I think the test to be applied, consistent with the overriding objective, is whether the failure to name the returning officer in petition is misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued or is prejudicial to the respondents. The fact that the petitioner named the Machakos County returning officer as the 3rd respondent itself evinces a clear intention by the petitioner to include him as a party to the suit. The county returning officer, David Mutisya Musyimi, has already been served with the papers and he has through his advocate filed a response and has also filed a replying affidavit to the petition in which he acknowledges that he is the “*duly gazetted County Returning Officer for Machakos County, for the March 4th 2013 General Election...*” At Para 10 of the Affidavit, he depones, “*THAT I have read and understood the contents of petitioner Wavinya Ndeti, petition and affidavits in support thereof and deny each and every allegation against me therein...*” and thereafter proceeds to answer the allegation made.

27. It is not in doubt as to whom the expression “*THE MACHAKOS COUNTY RETURNING OFFICER*” used in the petition refers to. To accede to the proposal by the respondents to strike out the petition on this basis would be, according to Justice Ringera in *Microsoft Corporation v Mitsumi Computer Garage [2001] KLR 470*, akin to elevating technical requirements to a fetish.

28. Having found that the petition is not fatally defective on account of failing to name the returning officer, it is unnecessary to order an amendment of the petition to insert the name of the returning officer.

Conclusion and Disposition

29. My determination on the issues framed for inquiry are as follows;

(a) I find and hold that the failure of the petitioner to set out the election result in the circumstances as required by **rule 10(1)(c)** of the *Elections (Parliamentary and County Elections) Petition Rules, 2013* is not fatal to the petition.

(b) I find and hold that failure by the petitioner to specifically name the Machakos County Returning Officer is not fatal to the petition.

30. I decline to grant the orders sought in the Notice of Motion dated 30th April 2013. It is hereby dismissed with costs to the petitioner.

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

D.S. MAJANJA
JUDGE

Mr Kinyanjui instructed by J. Harrison Kinyanjui and Company Advocates for the petitioner.

Mr Muhoro with him Dr G M Kakuli instructed by Kimani Muhoro and Company Advocates for the 1st, 2nd and 3rd respondents.

Mr Mutula Kilonzo Junior instructed by Kilonzo and Company Advocates for the 4th and 5th respondents.