



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Election Petition 5 of 2013

KAKUTA HAMISI.....PETITIONER
VERSUS

PERIS TOBIKO.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

RETURNING OFFICER KAJIADO EAST CONSTITUENCY.....3RD RESPONDENT

RULING

1. There are two applications before the Court. They aim at cross purposes. The first is dated 10th May 2013 and taken out by the petitioner. It seeks to strike out the replying affidavits and annexures filed by the 2nd and 3rd respondents filed and served out of time. There are other prayers in the motion praying for scrutiny of votes and materials used in the National Assembly elections for Kajiado East Constituency. The latter prayers have been stayed until an appropriate point in the trial. There is then the second motion dated 15th May 2013 taken out by the 2nd and 3rd respondents. It seeks extension of time within which to file and serve the impugned affidavits and response to the petition. For good order, I directed that the respondents' motion be heard in opposition and at the same time as the petitioner's notice of motion.

2. The facts are straightforward. This petition was lodged on 8th April 2013. It challenges the election of the 1st respondent as a member of the National Assembly for Kajiado East Constituency in the general elections held on 4th March 2013. As required by article 87 of the Constitution and section 77 of the Elections Act, the petition was served by advertisement on 12th April 2013. The 2nd and 3rd respondents did not respond until 30th April 2013. That was well outside the 14 days provided by the Elections (Parliamentary and County Elections) Petition Rules 2013 (hereafter "the Petition Rules"). Those matters are deponed to in the deposition of Kakuta Hamisi sworn on 10th May 2013.

3. The gist of the motion is that the delay was deliberate; that there is no plausible or reasonable explanation; and that the delay has prejudiced the expeditious hearing of the petition. On the law, the petitioner's case is that the Court has no discretion to extend the time. The motion by the 2nd and 3rd respondents for extension of time is impeached because the offending affidavits have already been filed without leave. Since the 2nd and 3rd respondents concede they filed them out of time, the only logical course for the Court is to strike them out with costs, in any event, to the petitioner.

4. The motion is contested. The respondents have filed a replying affidavit sworn by Jennifer Mugambi on 14th May 2013. At paragraph 22 she depones that she was not served personally with the petition and

that the 2nd respondent was only served on 16th April 2013. She avers that her counsel of record Mak' Ogonya Tiego was engaged in another petition being High Court Petition 4 of 2013 in respect of Makadara Constituency. Since instructions in this and that petition were given at the same time, it explains the delay in filing the impugned replying affidavits. That viewpoint is repeated in the affidavit of Mak' Ogonya Tiego sworn on 15th May 2013 in support of the motion by the respondents for extension of time.

5. In a synopsis, the respondents' case is that there was only a delay of about 3 days; that the delay is excusable; that the substance of the petition will be defeated by striking out; and that in view of article 159 of the Constitution, the petitioner is riding on a technicality to defeat the interests of justice.

6. The 1st respondent's learned Counsel, Mr. Koin, associated himself with the submissions of the 2nd and 3rd respondents. He relied largely on article 159 (2) (d) of the constitution and Rule 4 of the Petition Rules for the proposition that the motion to strike out was exploiting a procedural technicality that the court should overlook. He also cited a long line of decided cases that emphasize that a court should only strike out pleadings sparingly and aim at sustaining the petition.

7. I have heard the rival submissions. I take the following view of the matter. The code governing the filing, service and response to a petition is very strict. It is to be found in the constitution at article 87 and the Elections Act 2011 at section 77. The petition must be filed within 28 days and served on the respondents *directly* or by advertisement within 14 days. The timelines in those provisions of the law cannot be expanded. The Court has no discretion in that timetable of events. The rationale of timelines was laid by the Supreme Court in Raila Odinga & others Vs Independent Electoral and Boundaries Commission & 3 others Nairobi, Petition 5 of 2013 [2013] e KLR. In considering an objection to a further affidavit filed out of time, the learned Judges ruled as follows:

“The period for the filing, prosecution and determination of a Presidential Election is only 14 days from the time of filing of the petition. This is a very tight, short and limited period. The background to the setting of the strict time lines must be known to most Kenyans. There was a purpose to this and the intention of the People of Kenya and of Parliament must be respected. The parties have a duty to ensure they comply with their respective time lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided”.

8. The strict legal code for election dispute settlements is not unique to our Republic. It has been employed in a similar manner in England. See *Challenging Elections in the UK*, The Electoral Commission, September 2012 at pages 20 and 21. Failure to adhere to timelines also has serious consequences: in some cases the whole or part of petitions are struck out. See Stephen Kimani Gakenia Vs Francis Mwangi Kimani and others Nairobi, High Court Election Petition 1 of 1998, Muiya Vs Nyagah & others [2002] 2 E A 617 [2008] 2 KLR (EP) 493. I have thus no doubt that the court has discretion to strike out a pleading or deposition filed out of time.

9. On the other hand, there is a long line of decisions in election petitions holding that striking out is a draconian measure to be employed sparingly. See Steven Kariuki Vs George Mike Wanjohi and others Nairobi, High Court Election Petition No 2 of 2013, Dickson Karaba Vs John Ngata Kariuki [2010] e KLR, Gakunga & another Vs Maina & another [2008] 1 KLR (E.P) 520, Mututhori Vs Kibe [2008] 1 KLR (E.P) 592 and Joho Vs Nyangu [2008] 1 KLR (E.P) 15.

10. The principles to be distilled from those cases are that the court should strike a reasonable balance: negligent and deliberate lapses should not go unpunished; inadvertent and technical procedural goofs should not be elevated to a fetish. Fundamentally the court should have regard to the need to do justice in the circumstances of each case. This principle was well explained by Ringera J in Microsoft Corporation Vs Mitsumi Computer Garage Limited and another [2001] KLR 470 at 481.

11. The 2nd and 3rd respondents concede they filed the offending affidavits out of time. Although Jennifer Mugambi calculates the time from the date of personal service on 16th April 2013, it is self serving. Since the petition was also served by advertisement as required by the law, time started running from the 12th April 2013, the date of the advertisement. In fact, the 2nd and 3rd respondents' learned counsel filed a memorandum of appearance in this petition on 19th April 2013. That is a tacit admission of service. The filing of the replying affidavits on 30th April 2013 was thus out of time by at least 3 days.

12. When delay is established, the key question is whether the delay is inordinate or inexcusable. See Allen Vs McAlpine & Sons [1968] 1 ALL ER 543. The delay here is for about 3 days. The explanations by the learned counsel for the 2nd and 3rd respondents is not unreasonable. True, he could have complied between the 19th April 2013 and the 27th April 2013 when the window shut. There is no doubt he was acting for the same respondents in another election petition at the time he received instructions to act here. That may have distracted him. I do not have evidence that that omission was aimed at obstructing the cause of justice. The failure to file a response within the prescribed time is thus not deliberate. To my mind it resonates well with a law firm that had swallowed more than it could chew. Those lapses fall more in the genre of inadvertent mistakes, rather than outright negligence. There is a long line of decided cases that such errors should not be visited upon innocent clients. See Abdul Aziz Ngoma Vs Mungai Mathayo & another [1976] KLR 61 for example. But sympathy alone for the effected party is not decisive. The applicant must show sufficient cause why time should be enlarged. It is only then that other considerations such as absence of prejudice can be considered. See Abdul Aziz Ngoma's case (supra) at page 62, Menya Vs Mc Creas Ltd [1976 – 80] 1 KLR 827.

13. In addition article 159 (2) (d) of the Constitution enjoins the court to do substantial justice to the parties.

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principal of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR. That overriding objective has now been imported into the Elections (Parliamentary and County Elections) Petitions Rules 2013 by dint of rules 4 and 5. See also Walter Enock Nyambati Vs Justus Omiti and 2 others Court of Appeal, Civil Application number 222 of 2010 [2011] e KLR, Republic Vs Chairman Matungu Land Disputes Tribunal Bungoma High Court Misc. App. 107 of 2010 [2012] e KLR.

14. I would then focus on the timelines. Like elaborated in Raila Odinga and others Vs Independent Electoral and Boundaries Commission petition (supra), the underlying rationale is to maintain both parties at equal arms length and to ensure a fair trial. If a party will be severely prejudiced by extension of time to another, or the fair trial is likely to be compromised, then the court will hesitate to grant leave. I am unable to hold that a delay of about 3 days has caused the petitioner any serious prejudice that cannot be cured by costs. This petition is at preliminary stages. A pre-trial conference is scheduled for 27th May 2013. Unlike the Supreme Court in a presidential election, this court has 6 months to determine a petition from the date of its filing.

15. If leave to file out of time is not granted, there will also be a grave injustice. The 2nd and 3rd respondents' affidavits will fall by the wayside and with them the platform to mount a reasonable defence to the petition. Fundamentally, it will compromise the defence of the 1st respondent who will be left to defend the alleged malfeasances of the 2nd and 3rd respondents.

16. Having said so, there is the important question whether the court has discretion to expand the time within which to file the response and the affidavits. The answer is simple. There is a clear distinction between strict or fixed time barriers by statute on the one hand, and lenient and flexible time frames in

subsidiary legislation on the other hand. An example of the former are the times set for filing and serving a petition under article 87 of the constitution and section 77 of the Elections Act 2011. Those are sacrosanct and beyond the discretion of the election court.

17. An example of the other cadre of timelines is in Rule 14 of the Elections (Parliamentary and County Elections) Petitions Rules 2013. That rule requires a respondent to file a response *within a period of not more than fourteen days upon service of the petition*. That rule is part of subsidiary legislation under the Elections Act by dint of Legal notice number 54 of 2013. Rule 20 of those rules further provides as follows:-

“Where any matter is to be done within the time provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done on such terms or conditions as it may consider fit even though the period initially provided or granted may have expired”.

18. The election court thus has express power to enlarge the time within which to file the response and replying affidavits. The fact that the 2nd and 3rd respondents had filed the response and affidavits on 30th April 2013 does not vitiate that power. Those affidavits, though already filed, are meaningless and only continue to hover over the petition until the grant of appropriate leave. Filing them without leave was irregular but by granting the necessary leave now, valuable time of the court is saved. That in my view resonates very well with Rule 4 that calls upon the court to facilitate the just, expeditious, proportionate and affordable resolution of election petitions. The 2nd and 3rd respondents will however suffer the penalty of costs.

19. For all the above reasons, the orders that commend themselves to me to grant are as follows:

- a) **THAT** prayer 3 in the petitioner’s notice of motion dated 10th May 2013 is dismissed.
- b) **THAT** the 2nd and 3rd respondents’ notice of motion dated 15th May 2013 succeeds to the following extent: That the time within which the 2nd and 3rd respondents should file and serve their response to the petition and the replying affidavits of the 3rd respondent as well as those affidavits of Bruce Likama, Risper Makui and Cren Solitei all sworn on 30th April 2013, be and is hereby extended to 30th April 2013 to the intent that the response and those affidavits are deemed to have been filed and served within time.
- c) **THAT** the 2nd and 3rd respondents shall pay the petitioner thrown away costs assessed at Kshs 20,000/- (twenty thousands only) to be paid within 14 days of today’s date.

It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day

of May 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. F.I. Omino for the Petitioner instructed by Abuodha & Omino Advocates.

Mr. L.P. Koin for the 1st Respondent instructed by Sichangi & Partners Advocates.

Mr. T.T. Tiego for the 2nd Respondent instructed by Onsando, Ogonji & Tiego Advocates.

Mr. C. Odhiambo Court Clerk.