



REPUBLIC OF KENYA

High Court at Mombasa

Election Petition 5 of 2013

IN THE MATTER OF SENATORIAL ELECTION OF KWALE COUNTY

BETWEEN

MWAMLOME TCHAPPU MBWANA

KALIMBO NAVEED MWAEGA.....PETITIONERS

-VERSUS-

BOY JUMA BOY.....1ST RESPONDENT

RASHID SOUD.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION OF KENYA.....3RD RESPONDENT

RULING

The application before me is dated 13th May 2013. It was filed by the Petitioners, pursuant to section 80 (1) (d) and (3) of the Elections Act.

The application asks the court to strike out the Response which the 2nd and 3rd Respondents filed in answer to the Petition. The reason for that prayer is that the Response, together with the affidavits of witnesses were filed out of time. The Petitioners also asked this court to reject any attempts by the 1st Respondent to obtain an extension of time within which to file his response or his witnesses' affidavits.

Mr. S.M Kimani, the learned advocate for the Petitioners, pointed out that the Response of the 2nd and 3rd Respondents were filed in court on 10th May 2013. He also pointed out that those Respondents had not sought the leave of the court to file their Response out of time.

But even if the Respondents would have sought leave of the court to file their Responses late, the Petitioners submit that the Election Court lacks jurisdiction to extend time in an election petition.

It was the contention of the Petitioners that after this court rejects the Responses which were filed late, I should invoke the provisions of Section 79 of the Elections Act, and thereby direct that the trial of the Petition should proceed as if the Respondents had filed no Responses.

In order to appreciate the application, it is important to put it within perspective. The Petition was filed in

court on 8th April 2013. Thereafter, the Petition was served by way of advertisement in the newspaper. The said advertisement was on 19th April 2013.

The advocates for the 1st Respondent came on record on 26th April 2013, and they thereafter acknowledged receipt of the Petition on 7th May 2013.

Meanwhile, the advocates for the 2nd and 3rd Respondents came on record on 13th May 2013. They had acknowledged receipt of the Petition on 22nd April 2013. In effect, the 2nd and 3rd Respondents received all the requisite documents long before they instructed their lawyers.

By the Petitioners' calculations, the Responses should have been filed by 4th May 2013. As no Responses had been filed by 4th May 2013, the Petitioners submitted that the Responses herein were liable to being struck out, for having been filed late.

It is the contention of the Petitioners that the Respondents must be placed within the same legal position as the petitioner, on the question of time within which various steps must be undertaken. Indeed, the phrase adopted by the Petitioners is:

“What is good for the goose is good for the gander; if time for filing a petition under the Constitution cannot be extended by an Election Court, time for filing responses cannot be extended too.”

The Petitioners argued that Section 96 (1) of the Elections Act expressly excluded Legal Notice Number 54 from Election Petitions.

According to Mr. Kimani advocate, the said Section 96 only gave power to the Rules Committee to make rules in relation to referendum petitions.

The Petitioners submitted that if Legal Notice No. 54 were to be applied to Election Petitions, the result would be an absurdity. In his view, such a step would render Section 79 useless and meaningless.

Another point that was advanced by the Petitioners was that the exclusion of the Responses would not be prejudicial to the Respondents. That contention was anchored on the Petitioners' view that the court would have taken custody of all election materials from the Independent Electoral and Boundaries Commission of Kenya (IEBC).

As the law enjoined IEBC to all election petitions, the Petitioners believe that the shutting out of the IEBC's responses would not be prejudicial to the Commission. The said Commission would continue to remain as respondents even without its Responses.

The Petitioners compared the position of IEBC, in such a scenario, to the situation where an election court would not need to hear respondents to an election petition if the court concluded that the Petitioner had put forward insufficient evidence.

In answer to the application, Mr. Kadima, learned advocate for BOY JUMA BOY, the 1st Respondent, pointed out that this court had granted leave to his client to file his response by 13th May 2013. Therefore, the 1st Respondent submitted that the application herein constituted a blatant abuse of the court process.

Had the Petitioner intended to challenge the leave granted by the court, he ought to have either lodged an appeal or alternatively asked that the said court orders be reviewed.

As no appeal had been preferred, and also because no review had been sought, the 1st Respondent was of the view that this court would be embarrassed if it granted the reliefs sought.

In any event, Section 96 (1) of the Elections Act expressly empowered the Rules Committee to make rules to regulate the practice and procedures with regard to the trial of BOTH election and referendum

petitions.

The Rules Committee had, by Rule 20, granted discretion to the court to grant extension of time, provided that no injustice would be done to any party, by such extension.

Mr. Wang, the learned advocate for the 2nd and 3rd Respondents associated himself with the submissions of Mr. Kadima. He then added that on 3rd May 2013, his clients sought leave to file their responses. The request for the extension of time was made before the period stipulated had lapsed; and the court granted the extension.

As time had been extended and because the orders granting the extension had not been challenged by the Petitioners, the 2nd and 3rd Respondents submitted that the extension that was granted remained valid.

Mr. Wang also pointed out that the Petitioners had placed reliance on Legal Notice No. 54 of 2013. Therefore, the 2nd and 3rd Respondents were surprised that the Petitioners would then turn around and impugn the legality of the very rule that they had cited in their own Petition.

When called upon to reply to the Respondents' submissions, Mr. S.M. Kimani advocate conceded that he had placed reliance on a copy of the Elections Act which had not been duly amended. Having had the opportunity of perusing the amended copy of the Elections Act, the Petitioners' advocate readily admitted that Section 96 (1) of the Elections Act expressly empowered the Rules Committee to:

“make rules generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions...”

In the exercise of the power bestowed upon it, the Rules Committee put together “The Elections (Parliamentary and County Elections) Petition Rules, 2013”.

Rule 20 provides for extension of time, and reads as follows:

“Where any matter is to be done within such time as 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 with such conditions as it may consider fit even though the period initially provided or granted may have expired.”

Nothing could be clearer. This court has jurisdiction to extend time within which things are to be done under the Rules. That power does not extend to time stipulated in the Constitution.

Therefore, if the time within which Responses were to be filed was spelt out in the Constitution, the Petitioners would have been right to have resisted any attempts to have such time enlarged.

By allowing the Respondents more time to file their respective Responses and affidavits, this court acted within its jurisdiction.

If the Petitioners were aggrieved with the orders granted, they ought to have either lodged an appeal or otherwise sought a review of the said orders. But they did not do so. Therefore, the orders enabling the Respondents to file their Responses after 4th May 2013 remained valid.

The Petitioners have not even suggested that they would suffer any injustice due to the extension of time. On the other hand, if the Responses were struck out, the Respondents would become lame ducks, literally. They would have absolutely no material of a factual nature, that they would rely upon, in answer to the Petition. I am therefore convinced that the extension of time, as granted, was in the interest of justice for all the parties.

I find no merit in the application. It is therefore, dismissed, with costs to the Respondents. The Petitioners

will pay costs to the Respondents.

Dated, signed and delivered at Mombasa, this 23rd day of May 2013.

**FRED A. OCHIENG
JUDGE**