



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**ELECTION PETITION NUMBER 7 OF 2013**

**HEARD BEFORE THE HIGH COURT OF KENYA AT NAIROBI**

**IN THE MATTER OF THE ELECTIONS ACT, ACT NO. 24 OF 2011 AND THE  
SUBSIDIARY LEGISLATION THERETO, THE ELECTIONS (PARLIAMENTARY AND  
COUNTY ELECTIONS) PETITION RULES, 2013**

**AND**

**IN THE MATTER OF ELECTIONS FOR THE NATIONAL ASSEMBLY SEAT OF MANDERA  
NORTH CONSTITUTENCY**

**AND**

**IN THE MATTER OF THE PETITION BY BASHIR HAJI ABDULLAH**

**BETWEEN**

**BASHIR HAJI ABDULLAHI. .... PETITIONER**

**VERSUS**

**ADAN MOHAMMED NOORU. .... 1<sup>ST</sup> RESPONDENT**

**BILLOW ADAN KEROW. .... 2<sup>ND</sup> RESPONDENT**

**EKONIT KOMOL JOHN**

**(The Returning Officer Mandera North Constituency)..... 3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION. .... 4<sup>TH</sup> RESPONDENT**

**R U L I N G**

The application before the court is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notice of Motion dated 31<sup>st</sup> May 2013 seeking the striking out with costs of this petition dated 5<sup>th</sup> April and filed in court on 8<sup>th</sup> April, 2013. The application is based on the ground that the petition is fatally defective in that

- a. **It does not comply with the mandatory provision of Rule 10 of the Elections petition Rules, 2013.**

- b. **The petition does not specify the elections results being challenged by the petition and how the results were declared, fails to specify the votes garnered, rejected and spoiled as well as the overall voter turnout in the constituency.**
- c. **The court's jurisdiction is denied on the ground that the petition is fatally defective.**

The application is supported by an affidavit which effectively repeats the grounds of support abovementioned.

The Petitioner on the other hand opposed the application in a Replying affidavit sworn on 4<sup>th</sup> June, 2013 and filed in court on 5<sup>th</sup> June, 2013. In response to the allegation of his failure to include in the petition, the results of the challenged election, Petitioner averred that the petition carried the necessary or challenged results as required by law. That the petition was good in form and content both of which gave the court the necessary information to understand and determine the dispute in the petition. Petitioner accordingly sought that the application for striking out is unmerited and should be dismissed.

Both sides put in written submissions which they were allowed to highlight during the hearing of the application on 5<sup>th</sup> June, 2013. The written and oral submissions did not add much material to the issue that that the Petitioner had failed in his petition to include the election results as required by Rule 10.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case is that the petition did not disclose the:

- a. **votes garnered by each candidate**
- b. **rejected votes**
- c. **spoiled votes**
- d. **the voter turnout**

They argued further that without the above figures and/or numbers, the Petitioner has no reason to challenge the election results that gave the 1<sup>st</sup> Respondent his election victory. That without the above information in the petition, the petition was incurably defective and only fit for striking out. The Respondents purported to strengthen their position by citing the rulings in the cases for **John Michael Njenga Mututho Vs Jayne Njeri Wanjiku Kihara & 2 others (2008) eKLR** and **Amina Hassan Ahmed Vs Returning Officer, Mandera County & 2 others** (Garissa Election Petition No. 4 of 2013).

On the other hand the Petitioner stated that this application is not merited and was intended to buy or waste time. He said the Petition contained the results of the election which he intended to challenge and that other election information not included, was not challenged by him and that to that extent, it was not so material as to make the petition defective, let alone, incurably defective. He added that the petition contained the total votes garnered by the three candidates who competed in the election for the Mandera North Parliamentary Constituency seat. He accordingly, submitted that Rule 10 (i) was fully complied with and that this application is misconceived. Referred to the relevant findings made in relation to the issue of **"election result declarations"** in **Mututho** case aforesaid and in **Amina Hassan Ahmed** case also aforesaid, Petitioner distinguished them over the fact that while in both the cases the actual election results being challenged had not been included in the petition, in this petition before the court such result is properly included.

I have perused the material in support and in opposition to the application to strike out the Petition. I have carefully considered the submissions by both sides in the face of the legal authorities quoted and, more specifically, in the face of Rule 10(1) of the Election Petition Rules. I will first deal with the issue that the application to strike out was brought on second thought and too late in the day:

It is not in dispute that the application was filed 51 days after the filing of the petition and after several interlocutory applications had been filed and heard. Mr. Kilukumi who first warned the court that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents intended to file such application also referred to the Ruling made by this court in which the court struck out a petition on allegedly similar facts and reasons as relied on herein.

Mr. Ishmael who argued this application relied on the legal principle upon which the court had struck out the earlier petition, indicating that this petition should be dismissed on the same principle.

I have considered the submissions on this point. In my view, a petition should, prima facie show a determinable issue to be investigated by the election court and, Rule 10(1) was intended to help the Petitioner know what information should be included in the petition in order to constitute a probable cause of action.

If therefore an election petition is devoid of the material required to make it one, as dictated by the provisions of Rule 10(1) aforesaid, the court, in my view, would at any stage of the proceedings, have jurisdiction to strike the petition out whether at the instance of the Respondent or suo moto. That is so because a petition which is not a petition for lack of substance and form, is not a petition envisaged under the Elections Act, 2011. It, therefore, has no basis for going to a trial in its fatally defective form since such a trial would be an exercise in futility. The court should, therefore on discovery of the petition's fatal defect, have the right to strike it out unless there is legal basis for amendment to save it. To that end and turning now to this case before me, it is my view and finding that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were entitled to raise the issue of striking out at any stage of the proceedings.

I now revert to the main issue before the court: whether the petition is fatally defective. Rule 10(1) states as follows:-

**“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 however 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.**

**2) The petition shall be divided into paragraphs. ....**

**3) (a) be signed by the Petitioner or a person duly authorized**

**(b) be supported by an affidavit containing grounds on which relief is sought.....**

**(c) .....**

**4) ..... shall conclude with a prayer requesting court to make the appropriate relief. ....**

**a) .....**

**b) .....**

**c) .....**”

I have carefully perused the Petition. It contains the names and addresses of the Petitioner and the name of the person declared winner of the Mandera North Constituency. It also contains the name of the winner of the Senate Seat of Mandera County. The two winners are the named 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the Petition. Further, the petition names the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who were the Returning Officer and the Independent Electoral and Boundaries Commission, respectively. The Petition also states when the disputed election was conducted as the 4<sup>th</sup> March, 2013, and that at the end of the said elections on the 5<sup>th</sup> March, 2013, the 1<sup>st</sup> Respondent, Adan Mohammed Nooru, was declared as duly elected

candidate, having garnered 19,055 votes, while the Petitioner garnered 14,156 votes. Also the Petition shows one Mohammed Dube as the only other candidate and that he garnered 5 (five) votes. The petition further stated that the said election results were declared by the Returning Officer and showed a winning difference of 4899 votes as between the victor, Adan Mohammed Nooru and the Petitioner, Bashir Haji Abdullah. The Petition concludes the declaration of the election result by also stating that the results were published in the Official Gazette of 13<sup>th</sup> March, 2013.

Thereafter, in a length sequence, the Petitioner in the Petition, defined the reasons upon which his petition is grounded. He described the alleged misconduct of the election by the Presiding and clerical officers in the several of the polling stations in the constituency and how such misconduct by the said officer breached election regulations and resulted into election offences which in turn, led to the Petitioner's defeat.

The Petition was made or divided into paragraphs and signed by the Petitioner or his authorized agent. It was properly supported by an affidavit which explained the grounds upon which the petition is made and upon which the reliefs sought are based. The petition finally pleaded several prayers including those seeking a declaration that the 1<sup>st</sup> Respondent was not validly elected and that he and/or his agents committed election offences and must be reported to the Director of Public Prosecutions and the Speakers of the National Assembly and Senate, pursuant to Sections 87 of the Elections Act.

It is not in dispute that in the face of the forecited content of the Petition the Applicants herein logically targeted only the requirement of Rule 10(1) (c) of the aforementioned rules which required that a petition shall state: -

***“... the results of the elections, if any, and however declared...”***

In their explanation in their submissions, they narrowed their complaint to failure to specify

***“... the election results being challenged by the petition and how the results were declared and that Petitioner failed to specify votes garnered by each candidate, and votes rejected or spoilt as well as the voter's overall turnout in the constituency...”***

The applicants did not dispute the fact that the Petition specified the votes validly garnered by the victor who obtained 19,055 votes and the two defeated co-candidates i.e. the Petitioner and one Mohammed Dube, who obtained 14,156 and 5 respectively. Nor did he dispute the fact that the election result challenged in the petition, is that one in which the 1<sup>st</sup> Respondent garnered 19,055 while the Petitioner garnered 14,156 giving the 1<sup>st</sup> Respondent a majority vote by 4,899 votes. The issue that arises for the purpose of this case, therefore, is whether the information given in the petition, sufficiently satisfied the requirement of Rule 10(1) (c) which requires the **“results of the election, if any, and however declared”**?

My understanding of the above Rule is that, it requires the petition to plead the result of the election which makes the core substance of the petition litigation. Put differently, it is the garnering of 19,055 votes by the 1<sup>st</sup> Respondent that facilitated him to be declared the elected person to the national Assembly seat which at the same time relegated the Petitioner who garnered 14,156 votes, to the second and defeated place. The result required to be pleaded is the one that aggrieved the Petitioner and gave him the cause of action pleaded in the petition. That the votes cast for the 1<sup>st</sup> Respondent as well as the Petitioner were part, major or otherwise, of the total registered votes or that during the voting some ballot papers were rejected or spoilt, may be relevant to the facts or particulars forming the petition dispute, but the same do not form the core particulars that so aggrieved the Petitioner as to push him to file the petition.

Accordingly and after considering the wording of Rule 10 (1) (c) which does not define the meaning of the clause **“the results for the election...”**. I find and hold that an election result, such as the one pleaded in this petition by the Petitioner and which includes the votes garnered by both the winner and the losers, sufficiently provides the election result particulars anticipated under the sub-rule. That is to say, failure, if

a failure it should be called, to include the total registered votes or spoilt or rejected votes, did not prejudice the intended meaning of the words used by the legislature in the said provision.

I now turn to the legal authorities. Mr. Ismael cheerfully hurled my decision in **Amina Hassan Ahmed case** at my face and urged me to follow it to strike out this petition. He at the same time also cited the **John Michael Njenga Mututho** Court of Appeal decision and told said that  
t his court was bound by the said decision.

I have however looked back at the decision I made in **Amina Hassan Ahmed petition**. In that case the Petitioner had, contrary to the requirements of rule 10 (1) aforesaid, failed to include the following particulars.

1. **actual election results declared by the Returning Officer and the Commission.**
2. **the names of all candidates participating in the contested Mandera County Women Representative seat elections.**
3. **the date and manner of declaration of the contested results.**
4. **the prayer for an order in the petition to declare the Petitioner as the validly elected candidate instead of the 3<sup>rd</sup> Respondent who was declared the duly elected person.**

The Petitioner had, in addition, admitted the omission and had gone ahead to file an application seeking leave to amend the petition to include the above vital information in the petition, an application which the court rejected after ruling that the court had no power to override the provisions of the Elections Act to allow amendment. It is accordingly, not difficult to see the difference between that case and this one before the court. While in that case all the above stated information was missing, in this case before me virtually all the information was provided in the petition in compliance with Rule 10 (1). In particular, the election result which was the result being challenged was sufficiently included in the petition.

Furthermore this court has also looked back at the Court of Appeal decision in **John Michael Njenga Mututho** case. That court had stated in page 7 of its judgment: -

*“... Consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it.. If she (Petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.”*

Clearly, what is said above by the Court of Appeal, cannot apply to this petition before the court. That is so because the petition herein has not only provided the election result being challenged but also has provided all other information and particulars required under Rule 10(1) for the purpose of enabling the court to conclusively try the issues raised by the Petitioner to challenge the election result. In conclusion, if the facts and decision of the **John Michael Njenga Mututho** case can apply to this case, they do so to effectively distinguish it from the appeal case and I so hold.

The conclusion I, therefore, come to is that this petition complies with the relevant law and this application to strike it out has no merit. It is hereby dismissed with costs, payable by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Orders accordingly.

Dated and delivered at Nairobi this 17th day of June 2013.

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**D A ONYANCHA**

**JUDGE**

No appearance for Petitioner

Nabwayo/Kilukumi for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mungai for 3<sup>rd</sup> and 4<sup>th</sup> Respondents