



REPUBLIC OF KENYA

High Court at Kitale

Election Petition 9 of 2013

JONAS MISTO VINCENT KUKO 1ST PETITIONER

VERSUS

DAVID WAFULA WEKESA 1ST RESPONDENT

FARAH ABDI IBRAHIM 2ND RESPONDENT

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

RULING

1. The Petitioner, Jonas Misto Vincent Kuko, filed a petition on the 10/4/2013 to question the validity of the election of the David Wafula Wekesa (1st Respondent), as the Member of Parliament for Saboti Constituency in the general election held on 4/3/2013.

2. On 8/5/2013, the 2nd and 3rd Respondent filed a Notice of Motion seeking that the petition be dismissed on the following two main grounds:

“(ii) The Petitioner is mandated under Section 78 of the Elections Act to deposit Kshs. 500,000/= into court as security for payment of costs within 10 days from the date of filing the petition.

“(iii) At the time of filing this application, it is now 28 days since the petition was filed yet the Petitioner has failed to deposit the mandatory sum of Kshs.500,000/= being security for payment of costs.”

3. On 10/5/2013, the Petitioner filed a Notice of Motion seeking;

“That this Honorable Court be pleased to extend time, within which the applicant should deposit Kshs. 400,000/= in court the same being the shortfall of the required deposit.”

The main ground for the application is;

“That the applicant at the time of filing the petition was informed by the Court's Registry that the required deposit had been reduced to Kshs.100,000/= otherwise the applicant had Kshs. 500,000/= at the filing the suit.”

4. On 13/5/2013, The 1st Respondent also filed a similar application to the 2nd and 3rd Respondent's Notice of Motion seeking to strike out the petition for failure by the Petitioner to deposit the required security withing ten days of filing the petition.

5. The three applications were consolidated as they essentially raised a similar issue imposed by **Section 78(1) of the Elections Act** that;

“A Petitioner shall deposit security fro the payment of costs that may become payable by the Petitioner not more that ten days after the presentation of a petition under this part.”

Section 78 (2) (b) of the Act provides for five hundred thousand shillings, in the case of a petition against a member of Parliament.

PETITIONER'S SUBMISSION

6. Mr. Kiarie, Learned counsel for Petitioner supported his application for extension of time. He submitted that the petitioner and himself were present during the filing of the Petition. They were advised by a court clerk at the registry that there was a circular from the head office reducing the security costs from Kshs. 500,000 to Kshs. 100,000. Mr. Kiarie requested the clerk if he could see the circular but it was not available at the time. The Petitioner proceeded to pay the Kshs. 100,000 as advised by the court clerk and was issued with a receipt. Subsequently, it emerged that the circular related to a checklist for County Assembly and not National Assembly.

7. Mr. Kiarie submitted that despite the use of the mandatory term “shall” under **Section 78** of the **Elections Act**, this Court still has discretion to extend the 10 days provided because the Act does not expressly provide that the period can not be extended. It was his submission that the Court could invoke the provision of **Rule 20 of The Elections (Parliamentary and County Elections) Petition Rules, 2013** which gives the Court discretion to extend time. According to Mr. Kiarie, this rule was introduced after the promulgation of the new Constitution in order to do substantive justice to parties before Court.

8. The Court in exercising its judicial authority as provided under **Article 159 (2) (e)** of the **Constitution** should protect and promote the purpose and principles of the Constitution. On such principle under **Article 48** of the **Constitution** is to ensure access to justice for all persons and that justice should not be impeded. It was Counsel's submission, that the petition not only affects the Petitioner but all members of Saboti Constituency and if the petition is struck out because of a mistake of not paying the full deposit, it will be an injustice to the petitioner and the constituents of Saboti.

9. The Learned Counsel invited the Court to employ a broader interpretation of **Section 78 (1)** of the **Elections Act**. He relied on **The Discipline of Law** by **Lord Denning** where he observed that the literal interpretation of statutes is now completely out of date and it has been replaced by a purposive approach that will promote the general legislative purpose underlying the provision. It was his submission that the purpose for the security of costs is to cushion a successful respondent. This is assessed at the end of the litigation and by extending time there is no prejudice suffered by Respondents.

10. **Rule 4 of The Elections (Parliamentary and County Elections) Petition Rules, 2013** provides for the overriding objectives of the Rules. It was the the Learned Counsel's submission that this court should uphold these objectives and provide for a just determination of the petition based on its merits. He relied on the decision in **John Lokitare Londinyo V. Mark Lomunokol and 2 Others** where Karanja J. held that access to justice should not be impeded by failure to deposit security within the 10 days time-line. He also relied on the decision in **Hassan Ali Joho V. Nyange and Another** where Ojwang J. held that technical pretexts should not be allowed to defeat the broad goal of justice. In **Philip Kipchumba Misoi and 3 Others V. Kachero Ole Malala and Another** Ibrahim J. distinguished authorities cited before the new Constitution 2010. The Judge observed that the new Constitution introduced values and principles. Mr. Kiarie urged the Court to uphold these principles and allow the Petitioner's application.

1ST RESPONDENT'S SUBMISSION

11. Mr. Wandabwa, Learned counsel for the 1st Respondent opposed the application for extension of time. Counsel submitted that provisions under the Rules can not be invoked where the Act

has fixed a time. He relied on the decision in **Rotich Samuel Kimutai V. Ezekiel Lenyongopeta and 2 Others** (2008) 3 KLR (EP) and in **Esposito V. Kingii** where in both cases it was held that non compliance with the Act makes the Petition incompetent. Counsel further relied on the decision in **Price V. West** that even if the Rules give the Court power to extend time, the provision of the Rule can not be invoked to extend time that is set out in the Act. The Rules are subsidiary legislation and have no force of the law. According to Counsel the Rules are made for specific activities and elections is not one of them.

12. Mr. Wandabwa submitted that exercising discretion in favour of the Petitioner does not promote the guiding principle that there shall be no delay in hearing the elections petitions. **Section 75** of the **Elections Act** provides that an election petition shall be heard within 6 months. He relied on **Mbuzi V. Omar & 2 others** and **Devani Nair V. Young Kuan Teik** to support his submission that extension of time is a further delay and against the principle of expeditious disposal of the petition.

13. According to Counsel, the reasons given to Court for non compliance are not sustainable. The court clerk should not impress upon Counsel in a case where the statute is clear. He submitted that ignorance of the law can not be the basis to ask Court to exercise its discretion.

14. He finally submitted that deposit of security is not a technicality but substantive issue. He relied on the decision in **Kimutai** and **Esposito's** case (supra) to support his argument.

2ND AND 3RD RESPONDENT'S SUBMISSION

15. Mr. Yego opposed the Petitioner's application because the Petitioner failed to comply with the mandatory provision of **Section 78** of the **Elections Act**. He submitted that before the new Constitution, elections petitions would drag for the entire term of parliament. **Article 159** and **Article 87 (1)** of the **Constitution** provides for timely settling of election disputes. Parliament enacted the Elections Act 2011 and in it sought to address the delay by enacting strict time lines.

16. According to Counsel, the intention of Parliament in extending the period for depositing security from three days as was previously provided in the **National Assembly and President Elections Act-** (now repealed) to 10 days in the new **Elections Act** was to cushion Court from abuse by vexatious litigants. Parliament framed the provision in mandatory terms and provided that if no security is deposited then the petition shall be dismissed.

17. He submitted the reason given for payment for non compliance with the Act is insufficient. The circular the Petitioner relies on is clearly headed it applies to members of the County Assembly. Furthermore, the circular shows court filing fees as Kshs. 15,000 whereas the Petitioner paid Kshs. 35,000. This is an indication that the Petitioner is mischievous.

18. Mr. Yego, relied on the decision in **Raila Odinga V. IEBC and Others** where the Supreme Court held that though **Article 159** provides justice shall be administered without undue regard to technicalities it is not a license to escape procedural imperative. He urged the Court to dismiss the Petition as it was lifeless and incurable.

REJOINDER BY THE PETITIONER

19. Mr. Kiarie distinguished the **Kimutai** and **Esposito** cases. He submitted that both decisions were made before the promulgation of the new Constitution. The promulgation of the Constitution 2010 introduces the overriding objectives to do justice fairly and expeditiously. He further submitted that in **Kimutai** and **Esposito** cases there was no security deposited unlike in our case where part security has been deposited in Court.

20. As to whether extension of time will cause further delays and impede expeditious dispensation. Mr. Kiarie submitted that the parties had not taken directions for the hearing and there is a six month period set by the Constitution to hear election petitions.

ISSUES FOR DETERMINATION

21. Having considered the respective submissions made by Counsel herein, this court finds three (3) issues for determination:

i) discretion

ii) enlargement of time-lines

iii) costs

ANALYSIS

22. On the issue of discretion, the discretion to extend time is vested upon this court by virtue of **Rule 20** of the **Elections Petition Rules 2013**.

23. This discretion is unfettered and may be exercised for the purposes of ensuring that there is no injustice done to any party.

24. However, the court must exercise this discretion judicially and must consider the promptness in bringing the application and the prejudice likely to be suffered by the respondents if the application is allowed.

25. The petition herein was filed on 10th April, 2013. The deposit of Kshs.100,000/= being partial compliance was paid on the same date. Thereafter, the petitioner filed this application for extension of time on 10th May, 2013.

26. This court finds that the application for enlargement of time within which to pay the balance of the security for costs was made without undue delay.

27. On the issue of enlargement of time, the provisions of **Rule 20** of the **Elections Petition Rules** provides 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.”

28. This Rules should be read in tandem with **Rule 11(1) of Elections Rules**, which sets a time-line of ten (10) days as is provided under **Section 78(2)(b) of the Elections Act**.

29. The respondents argue that **Rule 20** is subsidiary legislation and the provision of a rule cannot be invoked to extend time that is set out in an Act.

30. In other words, provisions of a subsidiary legislation cannot override provisions of substantive legislation.

31. This court reiterates that Rule 20 should be read in tandem with Rule 11(1). Rule 11(1) provides for time-lines and Rule 20 allows for extension of time for any matter to be done as provided for in the “Rules”.

32. This court has judicial notice of the fact that a total of nine (9) petitions have been filed at the High Court, Kitale.

33. In a total of eight (8) petitions, all the eight petitioners have made deposits in the sum of Kshs.100,000/= as security for costs.

34. The factual position is that the error was an administrative one on the part of the Court Registry as it misrepresented to all the petitioners that the amount payable was Kshs.100,000/=.

35. This court finds that the petitioner should not be made to suffer by denying him access to justice and finds that from the material placed before it, this is a suitable case for this court to exercise its discretion to avoid injustice being visited upon the petitioner.

36. On the issue of prejudice likely to be suffered by the respondents, this court finds that an award of costs shall suffice in the circumstances.

FINDINGS

37. For the reasons set out above, this court finds that the application has merit and it is hereby allowed with conditions imposed.

CONCLUSION

38. This court makes the following orders:

- i) The application is allowed
- ii) The petitioner shall pay the balance of Kshs.400,000/- before the close of business on 14th June, 2013.
- iii) The respondents shall have the costs of this application. The petitioner shall pay costs of Kshs.45,000/= for the 1st respondent and Kshs.45,000/= for the 2nd and 3rd respondents. The costs shall be paid direct to the Respondents' counsel before the close of business on 14th June, 2013.
- iv) In default the petition shall stand dismissed
- v) This matter is stood over to 19th June, 2013 for pre-trials

It is so ordered

Dated, Signed and Delivered at Kitale this 13th day of June, 2013.

A. MSHILA

JUDGE

Delivered in the presence of

Kassachoon, Court clerk

.....for Petitioner

.....for 1st and 2nd respondent

.....for 3rd respondent

Stephen Karuga, Legal Researcher – High Court

