



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 359 OF 2013

BETWEEN

DIANA KETHI KILONZO.....1ST PETITIONER

WIPER DEMOCRATIC MOVEMENT-KENYA.....2ND PETITIONER

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION-

DISPUTE RESOLUTION COMMITTEE..... 2ND RESPONDENT

SALAD BORU- MAKUENI COUNTY

RETURNING OFFICER.....3RD RESPONDENT

AND

AGNES MUTINDI NDETEI.....1ST INTERESTED PARTY

RODAH NDUMI MAENDE.....2ND INTERESTED PARTY

PHILES NTHENYA MUINDE.....3RD INTERESTED PARTY

JOHN KURIA KIHICO.....4TH INTERESTED PARTY

JOHN HARUN MWAU.....5TH INTERESTED PARTY

LABOUR PARTY OF KENYA.....6TH INTERESTED PARTY

URBANUS KATHIMO MUTHOKA.....7TH INTERESTED PARTY

RULING

This is the 2nd Petitioner's application under certificate of urgency dated **23rd July 2013**. It was filed yesterday, and brought to my attention in the late afternoon. I directed, through my secretary and in view of the urgency and I not being in court or chambers, that the parties be served and appear before me today. They have done so.

The application is supported by the affidavit of Hon. David Musila, chairman of the 2nd Petitioner, also dated 23rd July, 2013 and annexures thereto. The annexures include a Kenya Gazette special notice No. 10153 being an addendum to Gazette Notice No 9394 of 2013, that notified the public of candidates duly nominated for the Makueni senate by election seat.

The application seeks an order in the following terms:

“2. That the honourable court be pleased to order the 1st Respondent to include the names of the nominee of Wiper Democratic Movement of Kenya, in a printed form on the ballot papers in compliance with the Judgment of the court dated 19th July 2013”.

The Applicant also seeks costs.

Mr. Musila in his affidavit depones, *inter alia*, that Mr. Muhoro for IEBC undertook that the IEBC would include the Wiper nominee's name in the ballot papers; that Mr. Mutula Kilonzo Jnr was nominated on **20th July 2013**, as shown in the annexed Gazette Notice; that on **23rd July 2013** the IEBC invited all parties participating in the Makueni senate by-election for a consultative meeting, which he attended; that IEBC announced that the ballot papers printed overseas did not include the name of Mutula Kilonzo Jnr, the Wiper nominee; that he told IEBC that such omission was unacceptable as the ballot paper did not comply with this court's orders; nor was it consistent with the law; that the by-elections are scheduled for 26th July, 2013, and unless otherwise ordered, the ballot papers will contain the names of the Wiper party's Nominee by embossment rather than in a printed form.

At the hearing, counsel for the applicant/ 2nd petitioner, argued that such an omission was a blatant disregard of the court's orders; that **Regulation 68(3)** of the Elections Regulations requires a single or one notice in the Kenya Gazette containing the names of all nominees, and not several notices; that the solution offered by IEBC to affix Wiper candidate's name and photographs, although practical and expedient, such process is highly amenable to manipulation and would set a bad precedent because the elections would not be seen to be credible, transparent and fair.

Counsel agreed that the appearance of credibility is an essential feature of an election, particularly in circumstances where the nominee is a beneficiary of the court's orders after litigation.

In addition, counsel urged that a ballot paper with an embossment such as proposed by the IEBC would not meet the requirements of **Regulation 68(4)** of the Regulations.

Finally, counsel argued that elections being very emotive, it was imprudent for the IEBC not to come to court and seek a review of the court's order if it had difficulties complying. On its part, the 2nd Petitioner had taken the first opportunity to come to court when the situation was pointed out to it. Counsel seeks that the orders prayed for be granted with costs.

The IEBC represented by Mr. Muhoro sought to dispel the suggestion that he or IEBC had given an undertaking that Mutula Kilonzo Jnr would be on the ballot papers. He said Mutula Kilonzo Jnr was not a candidate at the time of the litigation or when the judgment was made.

In addition, counsel argued that the Gazette Notice issued in respect of Mutula Kilonzo Jnr was an “*addendum*” which clearly links it to the previous Gazette Notice with other or earlier nominees. He pointed out that IEBC has complied with **Regulation 68(4)** in every respect as the ballot paper contains all the particulars required therein. Further, agents of candidates and parties would be allowed to inspect the ballot papers and note serial numbers.

Counsel pointed out that the meeting held by IEBC with participating parties was called by IEBC as a matter of good faith and transparency. IEBC explained at that meeting the circumstances it had found itself in and how it would implement the affixing of the adhesive slip with the names of Mutula Jnr on the ballot papers.

Counsel considers that the fears of the applicant are unsubstantiated as each ballot paper and the adhesive slips will have security features. He pointed out that the whole situation was brought about by shortage of time, and that it was impossible to foresee the consequences of the original timeframe for the officially ordered printing of ballot papers was not complied with.

Finally, counsel stated that the Applicant had not demonstrated what prejudice he would suffer.

In reply, Mr. Orengo referred to the definition of ballot papers in **section 2** of the Election Act. It is supposed to be a single paper in the format shown in the schedule to the Regulations. As a statutory document, any deviation there from would amount to bending the law, which would be a bad precedent.

I have considered the parties’ submissions carefully and perused the 2nd Petitioner’s application and affidavit of Mr. Musila. I note that what is sought by the Applicant/2nd Petitioner is an order of this court directing that the name of the Wiper Party nominee, namely Mutula Kilonzo Jnr., be in a printed form on the ballot papers.

I note that it is not in dispute that what has been printed is a ballot paper that omit the name of Mutula Jnr., but that provision has been made to cure the omission in that as stated by Mr. Muhoro a space was left in the 5th column whereby an adhesive slip containing the name of Mutula Jnr will be adhered. It is said that the slip is of the same quality of paper as the rest of the ballot paper and has all the security features and that IEBC explained this in good faith to the parties as part of the effort to ensure transparency and credibility of the election, once the problem had been brought to its attention by the overseas printers.

In my view, the Regulation requires that a ballot paper is in the form No 27 in the schedule to the Regulations. There is no place for affixation of adhesive slips Regulations 68(2) provides:

“Where an election is in respect of more than one elective post each ballot paper shall be printed on paper of a different colour which is prominent and distinctive from those for use in other elective posts.”

This rule implies that a ballot paper shall be printed and that the printing shall be on one paper. Notwithstanding that that Regulation relates to situations of multiple elections. I think it is instructive in respect of an election of a single elective post. Further the absence of any other regulation on the mode of printing of a ballot paper leave the impression that ballot papers should be printed as indicated in **Regulation 68(2)**.

I will hold this to be the portion. I cannot imagine that where the Regulation shows the format of a ballot paper, that it could be intended that such ballot paper may be made out using a hotchpot of documents pasted in a mix and match sort of way, with the intention of making the ballot paper resemble that prescribed in the Regulations.

The law is intended to be detailed to remove the mischief that can impugne credible elections free from criticism or which can throw the election into dispute and disarray. There are numerous authorities that hold that the election laws are:

“Special jurisdiction has always to be exercised in accordance with the statute (and regulation creating it.” See Jyoti Basu & Others vs. Debi Ghosal & Others - 1982 AIR 983 SCR (3) 318 of the Indian Supreme Court.”

The same has been held recently by Kimaru, J in ‘About Ali v IEBC & Ors [2013] eKLR, Onyancha J in HC Election Petition No 4 of 2013, Amina Hassan Ahmed v Returning Officer, Madera County and 2 others.

The court of Appeal has also cemented this position where it says:

“.....the provision of the Election Act and/or Rules must be complied with fully because they are special legislation for the purpose of prescribing the proper efficient expeditious and just conduct of the elections.”

See the Speaker of the Nationally Assembly v Karume (2008) I KLR 425.

So it is that the electoral legal provision must be complied with strictly.

Having found that the Act, Rules and Regulations do not provide for affixation of an adhesive sticker with the names of the nominee for Wiper the legal option available would be to order for the reprinting of the ballot papers.

However, I must take into account the legal consequences of making such an order and balance the same with the best interest of all the candidates and of the Nation.

If I order reprinting of ballot papers, I am told that the exercise would require the extension of the date of the by election due on 26th July, 2013; that it would be almost impossible to achieve the reprinting so that the ballot papers are delivered on Thursday 25th July 2013 that is tomorrow and be available to IEBC for distribution to the distribution and polling centre’s ready for the polling to start on Friday 26th July 2013, the day after tomorrow.

I am then put in a conundrum, because under **Article 103(1)(a)** of the Constitution the vacancy in the elective post for Makueni occurred on 27th April 2013, and under **Article 101(4)(b)**, I quote:

“the by-election shall be held within 90 days of the vacancy

This court’s hands are tied as 90 days expire on **26th July 2013**. The court cannot alter the wishes of the people of Kenya by extending the by election date to allow for reprinting so as to facilitate the production of ballot papers that strictly comply with the Regulations.

Further if the election is not held on the 26th July 2013, then the vacancy created in the senate seat for Makueni cannot be filled without a constitutional amendment; this will lead to a constitutional crisis which this court is not prepared to facilitate.

Weighing all the options available to the court, and the best interests of the Nation and of the people of Makueni, and noting that parties and candidates will have agents at every polling station to check on ballot papers and on strict compliance with the elections processes, I will order that the elections shall proceed. The IEBC will conduct the elections in a fair, transparent and just manner in the full glare of observers, eagle eyed agents and the public.

This will also diffuse the possibilities of a potential constitutional crisis since at the end of the by elections, parties will have full opportunity to contest a petition. I prefer to err in favour of allowing further opportunity for competitive election rather than a constitutional hiatus.

I therefore order that the Makueni by election shall proceed with the ballot papers as printed and in the

manner proposed by the IEBC.

Orders Accordingly.

DATED AT NAIROBI THIS 24TH DAY OF JULY 2013

RICHARD M MWONGO

JUDGE