



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENTA AT KITALE

MISC. APPLICATION NO.46 OF 2018

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST APPLICANT

BILHA KIPTUGEN.....2ND APPLICANT

VERSUS

CHRISTINE NAFULA SOITA TANGULI.....1ST RESPONDENT

JANET NANGABO WANYAMA.....2ND RESPONDENT

RULING

1. The Chamber Summons dated 6th September, 2018 by the applicants pray for the following orders:

(a) The court be pleased to enlarge time to enable the Applicants with bill file reference out of time.

(b) Pursuant to prayer (a) above the court be pleased to review and set aside the taxation ruling of 30th May, 2018 and all consequential orders arising thereafter.

(c) That the Applicants bill of costs dated 14th December, 2017 be taxed afresh.

(d) The reference herein be deemed as properly filed though out of time

(e) Cost.

2. The application is supported by the affidavit of **KINYANJUI THEURI** Advocate for the applicants dated the same date.

3. The Applicants have averred that they were dissatisfied with the outcome of the taxation by the Deputy Registrar of this court's ruling dated 30th May, 2018 and that they were not able to file their reference to this court within the stipulated 14 days' period as they were not aware of the date of the ruling. They argued that they did not receive any notice despite the said court stating that the ruling would be delivered on notice.

4. When they filed their application, the Respondents on their part filed a Preliminary Objection on a point of law dated 3rd April, 2019 in which they stated that this court lacked jurisdiction to entertain the application by virtue of the provisions of **Articles 105 (2) of the Constitution of Kenya as read with Rule 31 of the Election (Parliamentary and County Election) Petition Rules 2017.**

5. The court ordered that the application as well as the preliminary objection be determined simultaneously so as to save on judicial time. Indeed, the parties have submitted and attached several authorities which the court has perused.

6. The court as the custom is must of necessity begin with the preliminary objection as this will determine whether the application stands. Article 105 (2) of the Constitution in which the Respondents have relied on states as follows:

“(1) The High Court shall hear and determine any question whether

(a) A person has been validly elected as a member of parliament; or

(b) The seat of a member has become vacant

(2) A question under clause (i) shall be heard and determined within six months of the date of lodging of petition.

(3) Parliament shall enact legislation to give full effect to this Article.”

7. According to the respondents, which is the true position, all election petitions must comply with the above article and that they must be determined within six months.

8. Rule 31 of the Election Rules states as hereunder;

“(1) A Registrar shall tax the costs of a petition on the order of the election court in the same manner as costs taxed in civil proceedings in accordance with the Advocates Act.

(2) An order of the Registrar under sub rule (1) shall be confirmed by the relevant election court.

(3) An election court may direct the whole or any part of any money deposited by way of security shall be applied in the payment of taxed costs.”

9. The simple argument therefore by the Respondent is that the Deputy Registrar cannot operate outside the six months' period which the constitution gave in determining electoral disputes. In other words, the bill of costs ought to be determined within six months as the same is akin to the duties such as scrutiny of votes and such other related.

10. This position has been strenuously opposed by the Applicant who have stated that that the preliminary objection is misconceived and a red herring. They stated that the issue at hand is not an election dispute but taxation proceedings and they relied inter alia on the famous case of **MUKHISA BISQUITS MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS (1969) EA 696.**

11. This court has read carefully the submissions by the parties together with the attached authorities and is of the considered opinion that the preliminary objection cannot stand for the simple reason that all that rule 31 of the Election Rules has done is to empower the Deputy Registrar to undertake other necessary proceedings post an election petition. A closer reading of Article 105(2) presupposes that the substantive election petition should be heard and determined within six months and nothing less. That was the reasoning of the court in the of **MARTHA WANGARI KARUA V. I.E.B.C. & 3 OTHERS (2019) eKLR.**

12. Rule 31 of the Election Rules is a subsidiary legislation and it directs the deputy registrar to **“tax the costs of a petition on the order of the election court in the same manner as costs are taxed in civil proceedings in accordance with the Advocates Act.”**

13. The parliament by referring to the advocates act in my view did not anticipate that it will be done within the six months' period stipulated by the constitution. The Advocates Act has its requirements which then a party is expected to apply as well as the taxing master. If the parliament anticipated that all such acts in an election petition were to be undertaken within six months including taxation, then there would have been nothing to stop it from stating so.

14. Practically rule 31(3) has generally been applied by election courts to determine what to do with the money deposited as security for costs and I think this has been so for the simple reason that such sums of money have always been part and parcel of the petition. It is a requirement when a party is filing a petition. The same may, depending with the court's decision be left with the taxing master to determine as it deems fit although in the general practice it has been utilised to offset the costs in the event of a Petitioner loosing. Again this is left to the discretion of the electoral court.

15. Having found that the preliminary objection cannot stand and is hereby dismissed, the next question is whether the application is meritorious. It appears from the available affidavit evidence that the costs were taxed in the presence of the parties and the court reserved its ruling which was to be communicated by notice. The Applicants counsel has argued that they did not receive the notice and therefore they were unable to mount any reference against the decision.

16. This position has not been challenged by the Respondent. There is no evidence that the Deputy Registrar issued any notice to the parties when she delivered her ruling on 30th May 2018, despite the handwritten notes that the parties were absent though notified.

17. In the absence of any evidence, this court finds the application merited. Rule 11 of the Advocates Remuneration rules clearly stipulates what ought to be done after the taxing master has made a determination and the same has timelines. In this case it appears that the Applicants were unable to comply with the above rules as they were not seized of the Deputy Registrar's decision.

18. This court does not see any prejudiced to be suffered by the respondents since at any rate they will still have the chance to participate in any other proceedings against them. The error was not of the applicants but the court failing to issue them with a notice when it was to deliver the ruling.

19. The Applicants have prayed that this court do review and set aside the decision of the taxing master. I do not see the same to be necessary for now. The taxing master had done her part and the only failure was to notify the parties. It will be onerous to refer the parties for afresh taxation as they fully participated.

20. Consequently, the application is allowed as follows':

(A) The Applicant is hereby granted leave to file their reference out of time and serve within 14 days from the date herein.

(B) The preliminary objection dated 3rd April, 2019 is disallowed.

(C) Costs shall await the outcome of the reference.

Dated signed and delivered in open court at Kitale this 10th day of February, 2020.

H. K. CHEMITEI

JUDGE

10/02/2020

In the presence of:-

Mukire holding brief for Kinyanjui for Applicant

Wanyama for Respondent

Court Assistant – kirong

Ruling read in open court