



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION APPEAL NO. 02 OF 2018

FAITH MWENDE KASYOKA.....APPELLANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

SUDI MASHA.....2ND RESPONDENT

DADU DAVID KADENGE.....3RD RESPONDENT

(An appeal from the ruling and order of Hon. S.R. Wewa,

Principal Magistrate, delivered on 11th December, 2017 in

Malindi Chief Magistrate's Court Election Petition No. 6 of 2017)

JUDGMENT

1. The appeal herein arises from a Notice of preliminary objection that was raised by the 3rd respondent, Dadu David Kadenge, before the lower court. The gist of the said notice dated 23rd November, 2017 was the failure by the petitioner therein (appellant) to plead:-

- (a) the date the elections were held; and
- (b) the results of the election as declared.

2. In the said notice, the 3rd respondent held the position that the appellant herein fell short of the requirements of rules 8 and 12 of the Elections (Parliamentary and County) Petition rules, 2017.

3. The Hon. Magistrate after considering the notice of preliminary objection, the pleadings filed for and against the petition; and submissions of the parties ruled in favour of the 3rd respondent, thus striking out the petition for non-conformance with rules 8 and 12 of the Elections (Parliamentary and County) Petition rules, 2017 (Election Petition Rules).

4. The appellant being dissatisfied with the said ruling filed a memorandum of appeal on 8th January, 2018 raising the following grounds of appeal:-

(i) The Learned Trial Magistrate erred in law by holding that there was never compliance with Rule 8(1)(c) and (d) of the Election (Parliamentary and County) Petition Rules, 2017 without considering the full meaning and purport of the said rules in line with the provisions of Articles 259, 159(2)(d), 50, 38 and 78 of the Constitution of Kenya;

(ii) The Learned Trial Magistrate erred in law in basing the holding in ground 1 above on reasons that the full results are not disclosed anywhere in the petition and the supporting affidavit thereof while the appellant has annexed the declaration of results Form 36B which is the prescribed form and which was used to declare the results the subject of the petition before her;

(iii) The Learned Trial Magistrate misapprehended the purport and meaning of the Rule 8(1)(c) which provides that:-

“8(1) An election petition shall state;

(a)

(b)

(c) The results of the election, if any, and however declared; and

(iv) The Learned Trial Magistrate erred in law in awarding costs to the respondents which in any event were excessive under the circumstances.

5. The appellant therefore prays that:-

(i) The Learned Trial Magistrate’s ruling and order dated 11th December, 2017 be set aside with costs to the appellant;

(ii) An order be granted directing the Election Court to forthwith proceed to hear and determine the petition on its merit; and

(iii) This Honourable court grants any other order that it may deem fit to grant under the circumstances of this case.

6. Although this court on 25th May, 2018 gave clear directions as to the timelines within which written submissions should be filed and served for purposes of highlighting, come the 8th of June, 2018, Counsel for the appellant had not filed the same. The foregoing position held back Counsel for the respondents from filing theirs. The hearing of this appeal therefore proceeded by way of oral submissions.

SUBMISSIONS

7. Mr. Aboubakar, Learned Counsel for the appellant, Faith Mwendu Kasyoka, stated that this appeal turns on 4 grounds of appeal with ground Nos. 1, 2 and 3 being on the same issue of interpretation of Rule 8(1) (c) and (d) of the Election Petition Rules. He added that ground No. 4 lies on the issue of the costs awarded.

GROUND Nos. 1, 2 AND 3

8. It was submitted by Counsel for the appellant that the Trial Magistrate misapprehended Rule 8(1) (c) and (d) of the Election Petition Rules by striking out the appeal for failure to disclose the results of the elections. He relied on the Court of Appeal decision in **Martha Wangari Karua vs IEBC and 3 Others** [2018] eKLR, where the petitioner completely failed to disclose the results of the election in her petition and the petition was struck out for that failure. Counsel submitted that the Court of Appeal allowed the appeal for reasons that the 1st and 2nd respondents had annexed documents containing the declaration of

the results which were sufficient, as the High Court was made aware of the pleadings. Mr. Aboubakar further stated that the Court of Appeal in allowing the appeal ordered the hearing of the petition.

9. It was submitted that in the present matter, the 1st and 2nd respondents annexed the declaration of the results which are available at page 217 of the Record of Appeal. Counsel also submitted that the petitioner also annexed the election results but the Hon. Magistrate struck out the petition.

10. Mr. Aboubakar cited Malindi Court of Appeal Election Petition Appeal No. 3 of 2017, **Mbaraka Issa Kombe vs IEBC and 2 Others** which cited the **Martha Karua** case (supra). He stated that in the **Mbaraka Issa Kombe** case (supra) the petitioner had attached the election results but the High Court struck out the petition. The Court Appeal however ordered the hearing of the petition. It was submitted that the Court of Appeal extensively interpreted the provisions of rule 8(1)(c) and (d) of the Election Petition Rules as well as rules 4 and 5 of the said rules together with Section 80(2) of the Elections Act which echo judicial principles under Article 159(2)(d) of the Constitution.

11. It was stated that the Court of Appeal in the **Mbaraka Issa Kombe** case (supra) held that rule 8(1)(c) and (d) of the rules do not go to the jurisdiction of the petition as it is a technical rule. This Court was informed that the Court of Appeal further held that once the results are in the pleadings, the trial court ought not to strike out the petition since the objectives of rule 8 of the Election Petition Rules are met.

GROUND NO. 4

12. Mr. Aboubakar submitted that the costs awarded were excessive. He relied on the **Martha Karua** case (supra) which was struck out at a preliminary stage just like the one that forms the subject of this appeal. It was stated that the costs of Kshs. 1.5 Million awarded to the respondents herein, were excessive and that the lower court should have been guided by the amount provided in the rules as deposit for security for a petition filed by a Member of a County Assembly is set at the sum of Kshs. 100,000/=. In his view, costs of Kshs. 100,000/= would have been adequate.

13. Ms. Mwaka, Learned Counsel for the 1st and 2nd respondents was non-committal on whether she was supporting or opposing the appeal. She submitted that the Court of Appeal in the **Martha Karua** case (supra) was clear that parties are supposed to abide by the rules and when a party fails to do so, it is up to the court to exercise its discretion in deciding on whether or not to strike out a petition for non-compliance with rule 8(1)(c) and (d) of the Election Petition Rules.

14. On the issue of award of costs, Counsel argued that the Court of Appeal in the **Martha Karua** case (supra) held that an appellate court can only interfere with an award of costs if it is satisfied that there was misdirection on the part of the trial court. She left the issue of discretion to this court to determine.

15. Ms. Aoko, Learned Counsel for the 3rd respondent opposed the appeal. She contended that rules 8(1)(c) and (d) of the Election Petition rules were disregarded by the petitioner and the same was fatal to the petition. She indicated that Counsel for appellant had misled this court by stating that the appellant availed the election results yet at page 125 and 126 of the Record of Appeal, the notice attached thereto is for results of the elections of the Member of the National Assembly, yet the appellant vied for the elective post of the Member of the County Assembly. She stated that the Counsel who represented the appellant before the lower court did not give an explanation as to why the election results for Malindi Town Ward were not disclosed in the petition or the affidavit.

16. Ms. Aoko further argued that the Election Petition Rules were drafted pursuant to the provisions of Article 87(1) of the Constitution that gives Parliament authority to draft election legislation and once the rules were published the petitioner should have complied with them. She submitted that the Constitution provides that it must be interpreted in a manner that advances the rule of law as it assists in settling disputes equitably.

17. In making reference to rule 5(1) of the Election Petition Rules, Counsel argued that the lower court had discretionary powers to strike out the petition since the appellant failed to give satisfactory reasons as

to why the election results were not disclosed in the petition and in the affidavit.

18. Counsel contended that the appellant should have particularized the results in her petition or affidavit and could not claim that rule 8 is a mere technicality when she ought to have pleaded the election results. In distinguishing the **Martha Karua** case (supra) and the **Mbaraka Issa Kombe** case (supra) from the present appeal, Ms Aoko stated that the petitioners therein had annexed election results to their affidavits.

19. With regard to the right to a fair hearing, it was submitted that each party was given an opportunity to be heard before the lower court where written submissions were highlighted and as such the provisions of Article 50(1) of the Constitution were not contravened as the appellant would like the court to believe.

20. Counsel for the 3rd respondent further argued that in the present matter, there was no stay of proceedings and therefore the 6 months given by statute cannot be reconstituted. She urged this court not to grant prayer No. 2 of the appeal.

21. In responding to the issue of costs, it was argued that the capping of costs at the sum of 1.5 Million was in order as election petitions are time consuming and all other works in an Advocate's law firm comes to a standstill in an effort to meet the timelines provided by law in the hearing of election petitions. Counsel outlined the court attendances she made and work done so as to justify the costs awarded. In her view, the costs suggested by Mr. Aboubakar of Kshs. 100,000/= would be a far cry from the amount of work done. She stated that each respondent was awarded Kshs. 500,000/=. She urged the court to dismiss the appeal and to award costs of the appeal and the hearing of the petition in the court below to the respondents.

22. In response to submissions by the respondents' Counsel, Mr. Aboubakar stated that the Court of Appeal in the cases of **Martha Karua** (supra) and **Mbaraka Issa Kombe** (supra) did not state that there is a requirement that a trial court in hearing a petition must be given an explanation and cogent reasons as to why election results are not disclosed in an affidavit and in the petition. He indicated that the appellant's affidavit in support of the petition discloses the election results. In addition, he stated that once the 1st and 2nd respondents attached the election results to their affidavit, that was adequate. In clarifying that Ms Aoko's submission was wrong that election results were attached to the affidavits in support of the petitions in the **Mbaraka Issa Kombe** case (supra) and in the **Martha Karua** case (supra), Mr. Aboubakar submitted that election results were attached to the affidavit in the former case and not in the latter case.

23. Counsel submitted that upon filing of the appeal herein, there was an automatic stay of the lower court proceedings and it could not be said that the 6 months stipulated for hearing of the election petition the subject of this appeal have elapsed. He argued that the petition in the present matter was not heard at all and time stopped running on the filing of the present appeal. He also stated that he did not agree with Ms. Aoko's view that an election court is a court of equity due to the fact that election petitions are governed by special rules.

24. In responding to the issue of costs, he contended that the lower court did not have the basis to justify the award of Kshs. 1.5 Million. He indicated that the Court of Appeal in the **Mbaraka Issa Kombe** case (supra) awarded the appellant Kshs. 500,000/= in costs of the appeal.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If failure to disclose the results of the election and the date when the election results were declared is fatal to an election petition; and
- (ii) If costs of the lower court proceeding should be varied.

25. The form and content of an election Petition is laid out in the provisions of rule 8(1) of the Election

Petition Rules. It states as follows:-

“An election petition 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 which shall be the address for service”.

26. Counsel for the 3rd respondent in her submissions contended that paragraphs (c) and (d) of rule 8 of the above rules were not complied with by the appellant herein at all.

27. A perusal of the petition reveals in paragraph 3 that the appellant did disclose the date when the 3rd respondent was declared the Member of the County Assembly for Malindi Town ward on an ODM party ticket. The said paragraph reads as follows:-

“The 3rd respondent was the Member of the County Assembly candidate for Malindi Town ward of the ODM party and was declared as the winner of the said election by the 2nd respondent on 14th August, 2017”. (emphasis added).

28. The foregoing is therefore a clear indicator to the fact that the provisions of rule 8(1)(d) of the Election Petition Rules was complied with.

29. Ms. Aoko rightly contested the annexure marked FMK4 attached to the appellant’s affidavit which purports to be the gazette notice of the election results for Malindi Town Ward. The said results published on 22nd August, 2017 are undoubtedly the results for the persons elected as Members of the National Assembly, and not for persons elected as Members of the County Assembly for Malindi Town Ward.

30. The above notwithstanding, the appellant in paragraph 4 of her affidavit in support of the petition however revealed the results of the election by stating as follows:-

“That the Malindi sub-county returning officer of Independent Electoral and Boundaries Commission (IEBC) declared the 3rd Respondent as MCA of Malindi Town ward on 14th August, 2017 by purportedly by (sic) 6,813 votes”.

31. In the present matter, it is my finding that the appellant also complied with the provisions of rule 8(1) (c) of the Election Petition Rules through her supporting affidavit. Despite the fact that she attached the annexure of the persons elected as Members of the National Assembly which was erroneous, even if the said annexure had been struck out, there were ample facts disclosed in paragraph 4 of her supporting affidavit which revealed the election results for Malindi Town Ward.

32. The ruling dated 11th December, 2017 is indicative of the fact that the Hon. Magistrate did consider at length the pleadings and submissions filed as well as the applicable statutory provisions as well as decided cases. It was her view that evidence whether by affidavit or otherwise is meant to support what is contained in a party’s pleading and not to expand a course of action. She further held that affidavits cannot attempt to bring evidence of allegations or complaints not contained within the content of the petition. She therefore declined to allow evidence of allegations not pleaded within the petition. She held

that the requirement under rule 8(1) of the Election Petition Rules are not mere technical requirements but are substantive and go to the root of the issue before the election court. She struck out the petition on the said ground.

33. In the Election Petitions filed in the year 2017, High Courts dealt with the issue of failure to plead results, and to disclose the date when the elections were held and the date the election results were declared in different ways. While some courts sustained election petitions on preliminary objections raised on the said issues, other courts struck them out. Following the striking out of an election petition filed by Hon. **Martha Karua** who had vied for the gubernatorial seat of Kirinyaga County in the elections held on 8th of August, 2017 for failure to comply with the provisions of rule 8(1)(c) and (d) of the Election Petition Rules, she filed an appeal in the Court of Appeal. The outcome of the appeal is what is reported in **Martha Wangari Karua vs IEBC and 3 Others** [2018] eKLR. The court *inter alia* stated as follows:-

“It should be noted that failure to comply with the provisions of rule 8(1) per se does not mean that the petition is invalid. The remedies provided by the Constitution and the statute, the words under Article 159(2)(d) are unambiguous and mean that, unless the results of the election and date of the declaration cannot be ascertained or determined from the materials filed by the parties, the condition is satisfied. In our judgment, the reason is that these provisions have to cover a number of different situations specified and any other construction is wholly inappropriate. Nothing in the language of the statute suggests that the documents in the file courtesy of any other party other than the petitioner can or should be ignored as the basis of giving life to rule 8(1)(c) and (d).”

34. As was submitted by Mr. Aboubakar, the appellant in the above cited case had not disclosed the results of the election in her petition but the results were contained in the replying affidavit of the 2nd respondent. The Court of Appeal rejected the respondents’ argument that failure to comply with the rule 8(1)(c) and (d) of the Election Petition Rules goes to the jurisdiction of the court.

35. In **Mbaraka Issa Kombe and 2 Others (supra)**, the Court of Appeal while addressing a similar issue as in the **Martha Karua** case (supra) of striking out of an election petition for non-compliance with rule 8(1) of the Election Petition Rules stated that in their view, whether non-compliance would warrant striking out or saving of the petition can only be determined on a case by case basis. In allowing the appeal the said Court held that a supporting affidavit is part and parcel of the petition.

36. The Court of Appeal in the said case went further to hold as follows:-

“Inasmuch as the results were not set out on the face of the petition, the respondents as well as the Election court were not in the dark with regard to that issue. Therefore the omission did not go to the jurisdiction of the court or go to the root of the disputes, nor did it prejudice the respondents.”

37. In the present matter, the 1st and 2nd respondents attached to their joint replying affidavit Form 36B being the declaration of Member of County Assembly Election results dated 10th August, 2017, for Malindi Town Ward.

38. The 3rd respondent in his replying affidavit attached Form 36C being the certificate of elected Member of County Assembly for Malindi Town Ward of Kilifi County in the election held on 8th August, 2017. The said certificate is dated 10th August, 2017.

39. In line with the Court of Appeal decisions cited in this Judgment, it is my finding that the striking out of the petition was unjustified, more so as the results of the election were available in the appellant's affidavit and those of the respondents and also that the date when the election results were declared was disclosed in the appellant's petition as well as the respondents’ replying affidavits. It is therefore my finding that the appellant had fully complied with the provisions of rule 8(1)(c) and (d) of the Election Petition Rules.

40. Contrary to Ms. Aoko's submissions, it is apparent that the Hon. Magistrate misdirected herself by finding that the appellant herein had failed to comply with mandatory provisions of the law and that it affected the substance of the petition.

41. Counsel for the 3rd respondent raised the issue of there having been no order for stay of the timeline of 6 months within which the petition the subject of this appeal should be heard and determined. This court holds the view that Parliament in enacting the Elections Act by virtue of the provisions of Article 87(1) of the Constitution did bear in mind that the Constitution provides a life span of 6 months for the hearing of an election petition. It would therefore have been superfluous for Parliament to provide for the right of appeal under the provisions of Section 75(4) of the Elections Act if time was to continue running even after the filing of an election petition appeal. I am in agreement with Mr. Aboubakar that time stopped running with regard to Malindi Chief Magistrate's Court Election Petition No. 6 of 2017 when the present election petition appeal was filed on 8th January, 2018.

42. On the issue of costs, the petition was struck out at a preliminary stage. The proceedings indicate that the Counsel who represented the respondents before the lower court attended court on less than 10 occasions. The work that was put in place by the said Counsel could not have attracted the costs that were awarded to the respondents at the sum of Kshs. 500,000/= each.

43. Although the award of costs is at the discretion of the Trial Court, taking into account the work done as reflected in the proceedings of the court below, it is clear that the award of Kshs.1.5 Million was excessive. The result is that the appeal is hereby allowed on the following terms:-

- (i) The Hon. Magistrate's ruling dated 11th December, 2017 is hereby set aside;
- (ii) Malindi Chief Magistrate's Court Election Petition No. 6 of 2017 shall be heard and determined on merit before any Magistrate with competent jurisdiction save for Hon. S.R.Wewa, Principal Magistrate;
- (iii) The costs of the proceedings taken in the petition that was struck out are hereby reduced to Kshs. 700,000/=; Kshs. 400,000/= is awarded to the 1st and 2nd respondents and Kshs. 300,000/= to the 3rd respondent; and
- (iv) The costs of this appeal and the preliminary objection dated 23rd November, 2017, at the sum of Kshs. 300,000/= is awarded to the appellant, as against the 3rd respondent, Dadu David Kadenge.

It is so ordered.

DELIVERED, DATED and SIGNED at MALINDI on this 3rd day of July, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

.....for the appellant/applicant

.....for the respondents

.....Court Assistant