



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**ELECTION PETITION NO. 10 OF 2017**

**IN THE MATTER OF: THE ELECTION FOR THE MEMBER OF NATIONAL**

**ASSEMBLY FOR GANZE**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT, 2011**

**AND**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017**

**BETWEEN**

**MBARAKA ISSA KOMBE.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)...1<sup>ST</sup> RESPONDENT**

**WAFULA CHEBUKATI.....2<sup>ND</sup> RESPONDENT**

**D. KOMBE HILLARY.....3<sup>RD</sup> RESPONDENT**

**TEDDY NGUMBAO MWAMBIRE.....4<sup>TH</sup> RESPONDENT**

**RULING**

**The Application**

1. By an application dated 6<sup>th</sup> June, 2018 the 4<sup>th</sup> Respondent seeks to have the petition struck out for being improperly before the court. The 4<sup>th</sup> Respondent urges the court to find that there was another petition, similar to this petition, that was originally filed by the Petitioner and was neither withdrawn nor replaced.
2. The 4<sup>th</sup> Respondent contends that two election petitions relating to the election of the 4<sup>th</sup> Respondent, both citing similar parties, were filed in Malindi on 6<sup>th</sup> September, 2017 and allocated the same number, being Election Petition No. 10 of 2017 without following requisite provisions of amending or substituting an election petition as provided by Rule 24 of the Election (Parliamentary and County Election) Petition Rules, 2017 (Hereinafter to be referred to as the Election Petition Rules, 2017). Thus the 4<sup>th</sup> Respondent argues that the Petition herein was filed out of time contrary to Section 76 (1) (a) of the Elections Act.
3. Further, the 4<sup>th</sup> Respondent alleges that no court fees was paid in respect of this Petition as the fees paid was in relation to the other petition.
4. The petitioner responded to the application by way of a replying affidavit filed in court on 10<sup>th</sup> August, 2018. The petitioner averred that Rule 15 (2) of the Election Petition Rules, 2017 does not allow this court to hear and determine an application filed after the pre-trial is done.

Further, the petitioner states that the court did not grant the 4<sup>th</sup> Respondent leave to file this application.

5. In relation to existence of a similar petition, the petitioner claimed that there was neither proof that the 4<sup>th</sup> Respondent was served with another petition other than the one before court, nor that the current petition was a substitution of another similar petition.

6. The Application came up for hearing on 19<sup>th</sup> October, 2018. **Mr. Owour**, counsel for the 4<sup>th</sup> Respondent submitted that there were two petitions that were filed indicating the same parties and case number but distinguishable in terms of content. Counsel argued that the petition before court was the latter of the two petitions and the same was filed out of time and without payment of the requisite court fees and the Kshs. 500,000/= being security for costs in Petition.

7. In the alternative, Mr. Owour contended that if the present petition was a substitution of the other petition, the said substitution was improper as it did not comply with the Election Petition Rules, 2017. Counsel urged the court to be guided by the Election Petition Rules, 2017 which provide strict rules on filing and payment of requisite fees for election petitions, and to find that the petition before court was improperly filed.

8. **Mr. Ole Kina**, Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in support of the application submitted that it is difficult to determine which election petition the Hon. Chief Justice directed to be heard by this court as two similar petitions were filed on this matter. Counsel faulted the Deputy Registrar's report dated 1<sup>st</sup> August, 2018 on this issue, claiming that the Deputy Registrar has no discretion to substitute an election petition or to waive payment of court fees.

9. **Mr. Aboubakar**, Counsel for the petitioner submitted that the application was incompetent as it did not comply with the provisions of Rule 15 (2) of the Election Petition Rules, 2017. Counsel contended that the respondents had not proved that they were served with any other petition other than the one before court.

10. On the discretion of the Deputy Registrar, Mr. Aboubakar submitted that the Deputy Registrar was presented with two petitions on this matter but decided to pick the petition before Court which was later paid for. Counsel stated that the Deputy Registrar, in doing so, was well within her powers under Section 20 (1) (h) of the High Court Organization and Administration Act.

### **The Determination**

11. The issue that arises for determination by this Court is whether the petition herein is properly before this Court. The centrality of the proposition that the petition before this court was irregularly filed stems from the contention by the 4<sup>th</sup> Respondent that two similar petitions on the election of the 4<sup>th</sup> Respondent having the same parties and case number, were filed on 6<sup>th</sup> September, 2017.

12. In a bid to resolve this issue, this Court vide orders date 22<sup>nd</sup> June, 2018 had directed the Deputy Registrar of this Court to write a report as to whether two similar petitions were filed on 6<sup>th</sup> September, 2017. The Deputy Registrar submitted a report to the Court dated 1<sup>st</sup> August, 2018. In the said letter, the Deputy Registrar seems to suggest that indeed two similar petitions were presented before her. In my understanding of the report, one of the petitions, which I believe is the petition before this court, was retained and subsequently court fees were paid for the petition. However, the report does not state the position of the other alleged election petition.

13. Be that as it may, the Court notes that the 4<sup>th</sup> Respondent and indeed all the Respondents, did respond to the petition herein vide responses dated 9<sup>th</sup> October, 2017 and 21<sup>st</sup> September, 2017 for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, and the 4<sup>th</sup> Respondent respectively. If indeed there were two similar petitions, why did the Respondents not file responses to the other petition? Further, the Respondents, specifically, the 4<sup>th</sup> Respondent, went on to file a preliminary objection seeking to have the petition struck out for incompetency for failing to comply with Rules 8(1) and (12) of the Election Petition Rules. The 4<sup>th</sup> Respondents' actions can only be construed to mean that he deemed the petition herein properly before the Court.

14. Secondly, the 4<sup>th</sup> Respondent had an early opportunity to raise this issue but failed to do so. As indicated above the 4<sup>th</sup> Respondent filed a Preliminary Objection seeking to have the petition struck out. In the said Preliminary Objection, the 4<sup>th</sup> Respondent did not mention the propriety of the petition, that the petition was filed out of time and without payment of the requisite fees as alleged. At the time of the filing of the Preliminary Objection, the purported impropriety of the petition was well within the knowledge of the 4<sup>th</sup> Respondent. Further, when this petition was struck out and the decision to strike out the petition subjected to an appeal before the Court of Appeal, the 4<sup>th</sup> Respondent did not raise the issue of impropriety of this petition. The issue of this petition not being properly before this Court was only raised when this matter came for re-trial before this Court. In my view, the timing of this application is mischievous bearing in mind that the issues raised therein were well within the knowledge of the 4<sup>th</sup> Respondent and he had various opportunities to bring them up but chose not to. The timing of the application can be said to be a delay tactic by the 4<sup>th</sup> Respondent aimed at delaying the substantive hearing of this Petition. In **Lesrima Simeon Saimanga v Independent and Electoral Boundaries Commission & 2 others [2018] eKLR**, Wendoh J discussed the relevance of timelines in election petitions and the need to file documents at the earliest opportunity. The learned Judge held as follows:

**“Article 159(2) (b) of the Constitution cautions the court to guard against preventing injustice through delays. It embodies the maxim, justice delayed is justice denied. The courts have an obligation to see to it that litigation is terminated within a reasonable time frame. In this case, Section 75(2) of the Elections Act sets the time within which petitions must be heard and determined. That time cannot be enlarged by the exercise of the discretion of this court. In this case, the applicant had the opportunity to file all the witnesses' affidavits when they first filed the petition. Another opportunity presented itself when the applicant made an application dated 13/10/2017 where the applicant sought to file additional supplementary affidavits and the court did grant the said application by its ruling of 22/11/2017. Prayer”.**

15. While the issue in the above case is substantially different from the issue herein, the principles therein are persuasive to this court. It is incumbent upon any litigant to raise an issue at the earliest opportunity especially in suits where time is of the essence as is in election petitions.

16. For these reasons, this court finds that the application dated 6<sup>th</sup> June, 2018 is not merited and is hereby dismissed. Costs shall be in the cause.

**Dated, Signed and Delivered in open court in Malindi this 15<sup>th</sup> day of November, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Omwanja holding brief for Mr. Aboubakar for Petitioner

Mr. Ole Kina for 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Mr. Oduor for 4<sup>th</sup> Respondent

Mr. Kaunda Court Assistant