



**Khalif v Independent Electoral and Boundaries Commission &
another; Waruguru & 2 others (Interested Parties) (Election Petition
E001 of 2022) [2023] KEMC 13 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEMC 13 (KLR)

**REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)
ELECTION PETITION E001 OF 2022**

GO OSORO, SRM

FEBRUARY 9, 2023

**IN THE MATTER OF: ARTICLES 47, 81, 88, 90 AND
177 (1) (B) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE ELECTIONS ACT, NO. 24 OF 2011 LAWS OF
KENYA, THE ELECTIONS (GENERAL) REGULATIONS, 2012, THE ELECTIONS
(PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017 AND THE
ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017**

AND

**IN THE MATTER OF: THE NAIROBI COUNTY MEMBER OF COUNTY ASSEMBLY
(GENDER TOP UP) PARTY LIST GAZETTED ON THE 9TH SEPTEMBER 2022**

BETWEEN

NADHIFA MOHAMMED KHALIF PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

UNITED DEMOCRATIC ALLIANCE PARTY 2ND RESPONDENT

AND

KANYI JANE WARUGURU INTERESTED PARTY

TRICER JEPTOO AYABEI INTERESTED PARTY

UMORO KAME ADANO INTERESTED PARTY



RULING

1. The Application for determination is the Notice of Motion dated November 7, 2022. Filed by the 1st Interested Party seeking.
 1. That this Honourable Court be pleased to strike out the Election Petition dated October 29, 2022 for offending Provisions of the [Elections Act](#) and the [Elections \(Parliamentary and County Elections\) Petition Rules, 2017](#).
 2. That this Honourable Court makes any such further orders and issues any other reliefs it may deem just to grant in the Interest of Justice.
 3. That the costs of the Petition be awarded to the 1st Interested Party.
 4. That the cost of this Application be provided for.
2. The Application was supported by the Affidavit of Kanji Jane Waruguru deponed on November 7, 2022.

The same is premised on the following grounds:

1. The Election Petition (the Petition) herein dated October 29, 2022 was filed more than 28 days after the gazette of the nominated Members of Nairobi County Assembly as the final gazette notice on the nomination of the 1st interested party was published on September 9, 2022 this violating the provisions of Section 77 of the [Elections Act](#).
 2. The Petitioner did not deposit the security for costs within ten days of filing the Petition or at all as required under Section 78 (2c) of the Election Act thus rendering the Petition fatally defective as set out under Section 78 (3) of the Act.
 3. The Interested party was not served within fifteen (15) days as required under Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and only got to learn of it from the Grapevine after which she did her due diligence to obtain copies of the pleadings in the matter and was finally served on November 5, 2022 (Saturday).
 4. The Petition does not conform to the Provisions of Rule 8 of the Election Rules as it does not disclose the position of the 1st interested party in the party list.
3. In her Affidavit the Applicant Kanyi Jane Waruguru deponed that on September 9, 2022, the 1st Respondent published her name in the party list for nomination to the County Assembly of Nairobi and was sworn into the said office on September 29, 2022.
 4. Thereafter on or about the November 3, 2022, she learnt from her colleagues at the County Assembly that there was a Gazette Notice for the Appointment of the Learned Magistrate to hear a Petition over nominations to the Nairobi County Assembly and was listed as one of the Respondents. (Annexure mark 'JWK' was attached).

Thereafter, she instructed her Advocates to make a follow up on the matter and file the relevant pleadings.
 5. She further averred that on November 5, 2022 (Saturday) between 1458 hours and 1501 hours she was served via whatsapp with the Petition and Supporting Affidavit thereof by a person who signed of as the Advocates for the Petitioner herein.



6. The Petitioner opposed the application through a Replying Affidavit deponed on November 15, 2022 by Nadhifa Mohamed Khalif.
7. At paragraph 5 of her Affidavit she indicated that the Election Petition is dated October 29, 2022 which was erroneous by her Advocates on record, and that the same can be cured by the spirit of Article 159 (2) of the Constitution, and that the position was also cured under Rule (5) of the Election, (Parliamentary and County Elections) Petition Rules 2017.
8. She further averred that from the Case Tracking System, the Election was filed on October 7, 2022, after the requisite fees had been paid at 1757 hours therefore that the date October 29, 2022 as at it appears on the Election Petition was a typographical error.
9. In addition, she indicated that the Petition was filed within the 28 days as stipulated in the Election Act, and that they had complied with Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 with regards to Service of the Election Petition to the Respondents, and they served the 1st and 2nd Respondent. On the October 19, 2022 and October 21, 2022 within the timelines as provided for under Rule 10.
10. Upon hearing the respective Counsel's submissions, perusal of the Authorities cited and the pleading filed herein.
11. The following are the issues for consideration and determination by the Court:
 - (i). Whether the Petition was filed within the time as required under the Law.
 - (ii). Whether the Petitioner herein deposited security for costs within 10 days of filing the Petition.
 - (iii). Whether the Petition was served to the parties within the timelines required under the Law.
12. On the first issue, Article 87 (2) of the Constitution provides as follows:

' Petitions concerning an Election, shall be filed within (28) days 'after the declaration of the Election Results by the independent.'
13. In the case of Moses Mwigigi & 14 others Vs Independent Electoral and Boundaries Commission & 5 others. The Supreme Court held at paragraph 117 as follows:

' It is clear to us that the Constitution provides for two modes of election. The first is Election in the conventional sense, of universal, suffrage, the second is 'election' by way of nomination through the party list. It follows from such a conception of the electoral process that any contest to an Election, whatever it's manifestation, is to be, by way of Election Petition.'
14. It's note in dispute that the 1st Respondent (IEBC) published the Nairobi County Member of County Assembly (Gender Top Up) Party list through a Gazette Notice on the September 9, 2022.

According to Rule 7 of the Election Rules provides as follows:

' An Election Petition shall be

 - (a). Filed by presenting to the Registrar and on the payment of fees prescribed in the second schedule and
 - (b). In Form 1 set out in the first schedule.



15. The Petitioner in his response indicated that the date October 29, 2022 was a typographical error, since according to the rules he paid for the same on October 7, 2022.
16. Counsel for the 1st Respondent supported the 1st Interested party's position specifically in terms of prayers (1), (2) and (4) and submitted that Rule 10 of Election Petition provides for service on the Respondents.
17. Counsel for the 2nd Respondent submitted that the Election Petition was filed outside the lawful timelines.

Counsel for the 1st Interested Party conceded in his submissions filed in Court that indeed all documents were filed online and there is a receipt indicating that the Petition was paid for on October 7, 2022 and hence he abandoned that ground.

18. The 2nd Interested Party supported the 1st Interested party's application.
19. The third interested party submitted that the Petition was defective having been filed outside the Constitutional timelines of twenty eight (28) days. I have perused the Court record and it is clear that the Petitioner paid for this Petition on October 7, 2022 at 1757 hours.
20. According to Rule 7 of the Election that is the date that is deemed to have been filed.

According to Article 259 (5a) of the Constitution provides as follows 259 (5)

'In calculating time between two events for any purpose under this Constitution if the time is expressed (A) as days the day on which the first event occurs shall be excluded and the day by which the last event may occur shall be included.'

21. Taking account the above it's clear that the Petition was filed within twenty eight (28) days allowed by the Constitution. I therefore find the Petition properly filed within the timelines.
22. On the second issue is whether the Petitioner deposited security for cost within ten (10) days of filing the Petition.

Section 78 (1) (2) (c) Election Act provides as follows:

1. A Petitioner shall deposit a security for payment of costs that may become payable by the Petitioner not more than ten (10) days after the presentation of the Petition under this part.
 2. A person who presents a Petition to challenge an Election shall deposit. (c) One Hundred Thousand Shillings (100,000) in the case of Petition against a Member of County Assembly.
23. The purpose of the requirement to deposit security of costs is to provide recompense to Respondents who are often constrained to incur expenses in defending hopeless and unsuccessful Petitions, and to discourage frivolous or vexatious litigants from challenging the results of an election, which diverts scarce judicial resources from more deserving Court business.
 24. The position was held in the case of Esposito Franco Vs Amason Jeffah & 2 others NBI Civil Appeal No 248 Of 2008 and In The Case of Tom Onyango Agimba Vs IEBC & 2 Others Milimani High Court Election Petition No 10 of 2017.
 25. I have perused the Court record and it's clear that the Petitioner deposited KShs 100,000/= on October 17, 2022 at 1017 hours as security for costs, this was exactly ten (10) days after this Petition.



26. Therefore, I hold that the Petitioner paid the security of costs as prescribed under the Law and within the set timeline. The third issue is whether the Petition was served to the parties within the timelines required under the Law.

27. Article under Section 87 (1) and (3) of the Constitution provides as follows:

87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(3) Service of a Petition may be direct or by advertisement in a newspaper with National circulation.

Section 76 of the Elections Act provides as follows:

A Petition to question the validity of an Election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation.

28. Rule 10 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 provides as follow:

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(1) Within fifteen days after filing of a Petition, the Petitioner shall serve the Petition on the Respondent by

a. Direct service or

b. An Advertisement that is published in a newspaper of national circulation of the Election Petition.

Rule 2 describes a Respondent

a. The person whose election is complained of

b. The returning officer.

c. The commission and

d. Any other person whose conduct is complained of in relation to an election.

29. The 1st Interested party submitted that there is no provision of an interested party in the Elections Act or the Election Petition Rules, and all parties are to be either Petitioners and Respondents. The 1st Respondent submitted that she was served via whatsapp on November 5, 2022 (Saturday) at 1458 hours and 1501 hours. It was counsel's submission that the 1st Interested party did not enjoin herself and ought to have been a Respondent.

30. He further submitted that a Respondent includes as person whose Election is complained of since she was a nominated member of the County Assembly of Nairobi.

31. Counsel referred the Court to the case of Moses Mwicigi & 14 others Vs IEBC & 5 Others where the Supreme Court held at paragraph 106 'The Gazette Notice in this case signifies the completion of the 'election through nomination' and finalizes the process of constituting the Assembly in question. 107 'It is therefore clear that the publication of the Gazette Notice marks the end of the 'mandate of IEBC, regarding the nomination of party representatives and shifts any consequential dispute to the Election Courts.'



32. He further relied on the case of [*Robert Wamalwa Rambora Simiyu vs IEBC & 2 OTHERS \[2017\] eKLR*](#) where the Court held that service of the Petition goes to the root of the Petition.

33. In his submissions counsel for the Petitioner argued that the root of the Petition is a nomination of a member and an Interested Party is any person who has a stake in the proceedings. He relied on the case of [*Pamet Olekiset Vs Sylvia Moi & 3 Others*](#) where the Court indicated who is an Interested Party.

He further submitted that there is a Lacuna in the Election Petition rules on service of Interested Parties. Counsel argued that no party will suffer any prejudice if the Petition proceeds and as provided under Article 159(2)(d) Justice should be administered without undue regard to procedural technicalities.

34. The Petitioner did not deny that the 1st Interested Party was served on November 5, 2022 which was way past the timeline prescribed under the Law.

But then again, who is an Interested Party?

In the case of [*Trusted Society of Human Rights Alliance Vs Mumo Matemu & 5 others Supreme Court Petition No 12 of 2013*](#) the Court held that:

The difference between an interested party and an amicus curiae is that the former has a stake in the outcome of the proceedings, while the latter has no interest in the proceedings other than ensuring that the Court arrives at a decision of professional integrity.

35. So what are the consequences of failure to serve the Petition within the time prescribed in the Rules.

The Petitioner argued that the interested parties will not suffer any prejudice. If the Petition proceeds and the Court should invoke Article 159(2) of the [*Constitution*](#) which states:

'That justice should be administered without undue regard to procedural technicalities.'

36. Therefore, is service of the Petition as procedural requirement:

In [*Mohamed Odha Mao Vs The County Returning Officer Tana River \[2013\] eKLR*](#) Githua J held:

'Failure to serve a Petitioner is a matter that goes to the very core of the proper and just determination of the Petition and cannot be wished away.'

Service of the Petition is a fundamental step in the Electoral Process and resolution of disputes. This position was laid down by the Court of Appeal in [*Rozaah Akinyi Buyu vs IEBC & 2 others \[2014\] eKLR*](#) and in [*Aluodo Florence Akinyi Vs Independent Electoral And Boundaries Commission and 2 others \[2017\] eKLR*](#).

In the case of [*Patrick Ngeta Kimanzi Vs Marcus Mutua Muluvi & 2 others \[2013\] eKLR*](#),

'Service of the Petition is not a mere procedural requirement that can be dispensed with but is a mandatory requirement that must be complied with it is service of the Petition that triggers all the other steps in the Election Petition.'

In the case of [*Raila Odinga vs IEBC & 3 others \[2013\] eKLR*](#), the Supreme Court held that:

'The provisions of Article 159(2)(d) of the [*Constitution*](#) were never meant to oust the obligation of litigants to comply with procedural imperatives as they seek, justice from Court of Law.'



37. The consequences of late service are clearly set out in the case of *Charles Kamuren Vs Grace Jelagat Kipchoim & 2 others {2013} eKLR* where the Court of Appeal held:

'The High Court had no power to extend the time for serving an Election Petition and proceeded to strike out the Petition for late service.'

From the foregoing, failure to serve the 1st Interested Party within fifteen (15) days as prescribed by Section 76 of the Election Act and Rule 10 of the Election Petition Rules, has rendered it incurably defective and it should be struck out.

38. I hereby strike out the Petition.

On the issue of costs as provided for under Section 84 of the Election Act.

'An Election Court shall award costs of and incidental to a Petition and such costs shall follow the cause.'

39. The final orders of this Honourable Court are therefore as follows:

- i. That the 1st Interested party Notice of Motion dated November 7, 2022 is hereby allowed.
- ii. That the Petition filed herein be and is hereby struck out with costs.
- iii. All the Respondents and interested parties are awarded costs of the Petition and the Application, and the same to be taxed in accordance with the Advocates Remuneration Order.
- iv. A certificate of this determination in accordance with Section 86 (1) of the Election Act shall issue to the Independent Boundaries and Electoral Commission and the speaker of the County Assembly.

Orders issued accordingly.

DATED, SIGNED AND DELIVERED AT CITY COURT VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2023

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HON. G. ONSARIGO

SENIOR RESIDENT MAGISTRATE

In the presence of:

1. Mosioma for Petitioner
2. Moriasi for 1st Respondent
3. Miss. Kurgat holding brief for Dr. Kamotho for the 2nd Respondent
4. Kiprono for the 2nd Interested Party
5. Korir for the 3rd Interested Party

G. ONSARIGO (MR), SRM

9.2.2023

Court – All parties to be issued with a copy of the Ruling.

G. ONSARIGO (MR), SRM



9.2.2023

