



**Khalif v Abdille Eliyas Jimale County Returning Officer, Mandera North & 2 others
(Election Petition E003 of 2022) [2022] KEMC 3 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 3 (KLR)

**REPUBLIC OF KENYA
IN THE MANDERA LAW COURTS
ELECTION PETITION E003 OF 2022
M KIMANI, SRM
NOVEMBER 2, 2022**

BETWEEN

BARROW ABBEY KHALIF PETITIONER

AND

**ABDILLE ELIYAS JIMALE COUNTY RETURNING OFFICER, MANDERA
NORTH 1ST RESPONDENT**

HASHIM A. ISMAIL 2ND RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

RULING

Pleadings

1. By a petition dated August 7, 2022 supported by the petitioner's affidavit, amongst other orders, the petitioner seeks the invalidation of the election of the 1st respondent as the member of county assembly of Rhamu Dimtu ward.
2. The 1st respondent filed a response to the petition on September 19, 2022. On September 21, 2022 the 1st respondent filed a notice of preliminary objection seeking the following:-
 - “1. The election petition was filed out of time in clear breach of section 76(1) (a) of the *Elections Act* No 24 of 2011.
 2. The petitioner has failed to pay the security of costs within the ten (10) days as stipulated under section 78(1) and (2) of the *Elections Act* No 24 of 2011 as read with rule 11 of the *Elections (Parliamentary and County Elections) Petition Rules, 2013*.



3. The petitioner has failed to serve the respondent with the petition with fourteen (14) days as stipulated under rule 13 (1) of the *Elections (Parliamentary and County Elections) Petitions Rules, 2013.* "
3. By way of a notice of motion dated September 29, 2022 filed under certificate of urgency, counsel for the 2nd and 3rd respondents sought the following:-
 - "1. That this application be heard *ex-parte* at the first instance and it be certified urgent.
 2. That this honourable court be pleased to extend time within which to file a response to the petition.
 3. That upon time being enlarged, the 1st and 2nd respondents' response to the petition and various affidavits in support thereof be deemed as properly filed and served.
 4. That this court be pleased to grant any other suitable order that it deems fit and just in the circumstances.
 5. That costs of this application be provided for."
 4. The preliminary objection was opposed by the petitioner through both replying affidavit and written submissions dated October 11, 2022. The 1st respondent through a replying affidavit deponed on October 12, 2022, supported the application dated September 29, 2022.

Issues, Analysis & Determination

5. This ruling seeks to dispose of the preliminary objection dated September 21, 2022 and the notice of motion dated September 29, 2022. It is noteworthy that in the event that the former succeeds, the motion would also crumble on all limbs. Going by the pleadings filed, the court only ought to make a determination on the merits of the preliminary objection as the motion is spent.
6. In the famous case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696* where Law, JA at page 700 held as follows:-

"So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court or a plea of limitation et al."
7. The first ground relied upon by the 1st respondent is that the subject petition was filed on September 8, 2022 in breach of section 76 (1)(a) *Elections Act* No 24 of 2011. The said provision provides;
 - (1) A petition-
 - (a) 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;
 - (b)
 - (c)
8. This court is also alive to similar constitutional provisions under article 87(2) which provides that petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.



9. The Supreme Court stated the rationale behind the strict prescribed timelines in Election Disputes Resolution in Gatirau *Peter Munya v Dickson Mwenda Kitbinji & 2 Others*, Supreme Court Petition No 2B of 2014 through the lens of the historical context in the following terms:-

“The provision [i.e. article 87(1) of *the Constitution*] must be viewed against the country's history. Fresh in the memories of the electorate are those times of the past. When election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment... it is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in [the] name of which elections are decreed and conducted, should not be held captive to endless litigation. ”

10. In the instant petition, the same was undoubtedly filed on September 8, 2022. Going by the copy of the certificate of elected member of county assembly marked "AEJ-I" attached to the 1st respondent's response to the petition, the latter was declared the elected MCA Rhamu Dimtu ward on 11th August 2022. Therefore, mathematically speaking and going by the rules, the petition was filed on the deadline day recognized in law.
11. Shifting to the second ground of the preliminary objection, the 1st respondent averred that to date he has never been served with the petition and he only came to learn of it through the newspaper, whereof he was prompted to enquire from the court registry where he proceeded to acquire copies of pleadings. On this particular issue, the onus was on the 1st respondent to prove the allegations that he was never served. In default of which, the legal presumption is that the 1st respondent was properly served going by the provisions of article 87(3) of *Constitution*. On the flip side, the court takes judicial notice that the 1st respondent instructed counsel within the statutory period of entering appearance, as the notice of appointment was filed on September 19, 2022.
12. Turning to the third issue, the 1st respondent also claimed that the petitioner failed to deposit security of costs within ten (10) days as provided under section 78(1) and section 78(2) (c) of the *Elections Act* No 24 of 2011 as read together with rule 11 of the *Elections (Parliamentary and County Elections) Petitions Rules, 2013*. The 1st respondent alluded that the security of costs was deposited out of time to defeat the preliminary objection on account of non-payment of the same in time.
13. From the record, the security of costs were deposited on September 23, 2022 and as stated earlier, the petition was filed on September 8, 2022. So the question which begs an answer is whether this was fatal to the petition for it to be summarily dismissed? I will dissent for reasons that rule 19 (1) *Elections (Parliamentary and County Elections) Petitions Rules 2017* provides for extension of time for any act or omission which ought to be done within a prescribed time, the election court may for purposes of ensuring injustice is not done to any party, extend or limit time within which the act or omission ought to be done conditionally.
14. It is therefore my finding that since the petitioner omitted to deposit security of costs by a paltry 5 days, the same did not warrant dismissal of the petition in its entirety. I think such an action would be drastic to cause injustice to the petitioner. For the avoidance of doubt, this would not have been the scenario if as of today, the petitioner had not deposited security for costs.
16. The upshot of the matter is that the preliminary objection dated September 21, 2022 is hereby dismissed with costs. On the other hand, the notice of motion dated September 29, 2022 by consent of parties is allowed as prayed.

DATED AT MANDERA THIS 2ND DAY OF NOVEMBER 2022



Mukabi Kimani,

Senior Resident Magistrate

Ruling delivered virtually in the presence of

N/A petitioner

Mr. Hassan for 2nd and 3rd respondents

Mr. Wanyanga for 1st respondent

