



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT GARISSA
ELECTION PETITION NO 3 OF 2017

IN THE MATTER OF ARTICLE 1 (2), 38 (2) AND 177 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTION ACT NO 24 OF 2011

AND

**IN THE MATTER OF THE ELECTION AND PURPORTED DECLARATION OF RESULTS BY
THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION OF FAFI WARD IN
FAFI CONSTITUENCY IN GARISSA COUNTY**

BETWEEN

IBRAHIM MOHAMMED THERAR.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER FAFI CONSTITUENCY.....2ND RESPONDENT

HASSAN HALANE HAYE.....3RD RESPONDENT

RULING

The Petitioner herein, Ibrahim Mohamed Therar, filed this petition on the 22nd August 2017 challenging the election of the the 3rd Respondent, Hassan Halane Haye, as the member of the County Assembly, Fafi Ward, Fafi Constituency, Garissa County. He also enjoined the Independent Electoral and Boundaries Commission and the Returning Officer, Fafi Constituency as the 1st and 2nd Respondents respectively. The 1st and 2nd Respondents filed their joint response to the petition on the 21st September 2017. Whereas, the 3rd Respondent filed his response to the petition on the 18th September 2017. On the 24th November 2017, the 3rd Respondent raised a preliminary objection vide a notice filed on the same date on the following grounds:

1. THAT the petition as drawn and filed is incompetent and contravenes the express provisions of Rule 8 (1) (d) of the Elections (Parliamentary and County Elections) Petition Rules as the date of the declaration of results of the election is not stated.

2. THAT the petition as drawn and filed is fatally defective as the specific Kenya Gazette Notice declaring the results of the election held is not pleaded and stated in the petition. The declaration of results is not pleaded or annexed in the petition.

3. THAT the petitioner failed to state when the results were declared, how the declaration was made and when the declaration was made.

4. THAT the petitioner served a supplementary affidavit upon the Advocates on record for the 3rd Respondent on 22nd November 2017 which Affidavit was filed without leave and in any event was served out of time without leave.

5. THAT by the a supplementary Affidavit, the Petitioner seeks unlawfully to introduce new evidence not pleaded in the petition.

On the 29th November 2017, the parties agreed to dispose of the above preliminary objection by way of written submissions. The parties undertook to file their respective submissions by 11th December 2017. Pursuant to the said consent, the 3rd Respondent filed his submissions on the 7th December 2017 within the agreed time. The Petitioner filed his submissions on the 20th December 2017 albeit out of time

Having laid down the background of the case, before me for consideration are the above four preliminary points of law raised by the the 3rd Respondent. However, I will reduce them to two because the first three points are inter-related are inter-related. Hence, I will consider them as follows;

1. Whether the failure by the Petitioner to comply with Rules 8 (1) (c) and (d) and 12 (2) (c) and (d) of the Election (Parliamentary and County Elections) Petition Rules 2017 renders the petition fatally defective.

2. Whether the supplementary affidavit filed on 6th November 2017 was filed without leave of court and served out of time.

1. Whether the failure by the petitioner to comply with Rules 8 (1) (d) and (c) and 12 (2) (d) and (c) of the Election (Parliamentary and County Elections) Petition Rules 2017.

In his submission, Counsel for the 3rd Respondent submits that the preliminary objection is well grounded as the same is based purely on points of law. In support thereof, he cites the following two authorities:

1. MUKISA BISCUITS MANUFACTURING CO LTD-VS-WEST END DISTRIBUTORS LTD [1969] E.A 696.

2. OWNERS OF MOTOR VESSEL LILLIAN 'S'-VS-CALTEX KENYA LTD [1989] KLR 1.

He further argues that, a reading of Article 87 (2) of the Constitution of Kenya together with Section 76 (1) of the Election Act, Rules 8 (1) (d) and 12 (1) (b) and (2) (d) of the Election (Parliamentary and County Elections) Petition Rules 2017 clearly indicate that time, in principle and applicability, is a vital element in the electoral process. He cites the decision in **MARY WAMBUI MUNENE-VS-PETER GICHUKI KING'ARA & 2 OTHERS [2014] e KLR**. He further submits that, in the present case, the date of the declaration of results of the member of County Assembly for Fafi ward is not pleaded in the petition and the supporting affidavit. Further, the results of the election, however declared are not provided in the affidavit in support of the petition, and thus, no evidence can be led to prove that which was not pleaded. In his view the whole petition is incompetent and ought to be struck out with costs. He cites the decision in **I.E.B.C & ANOTHER-VS-STEPHEN MUTINDA MULE AND THREE OTHERS [2014] e KLR** which states in part that:

“ Parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce”.

He posits that Rules 8 and 12 of the Elections (Parliamentary and County Elections) Petition Rules 2017 are mandatory with the only inference being that, Parliament intended that the date of elections, the date of declaration and the outcome of the election be clearly and specifically pleaded and disclosed in the petition, without which, one has no valid petition to merit the consideration of the court. In order to determine whether the petitioner has complied, all the court requires to do is look at the petition against the provisions of Rules 8 and 12. He submits that the court has no jurisdiction to entertain an incurably defective petition, and without jurisdiction, there would be no basis for continuation of the proceedings. In support thereof, he cites the following authorities:

1. MOMBASA ELECTION PETITION NO 9 OF 2017, JIMMY MKALA KAZUNGU-VS-I.E.B.C & 2 OTHERS.

2. MALINDI ELECTION PETITION NO 10 OF 2017, MBARAKA ISSA KOMBO-VS-I.E.B.C & 3 OTHERS.

3. KERUGOYA ELECTION PETITION NO 2 OF 2017, MARTHA WANGARI KARUA & ANOTHER-VS-I.E.B.C.

4. MOMBASA ELECTION PETITION NO 5 OF 2017, MWAMLOLE TCHAPPU MBWANA-VS-I.E.B.C.

In addition, Counsel for the 3rd Respondent submits that, Article 159 (2) (d) of the Constitution of Kenya 2010 cannot be pleaded to excuse non-compliance with the Election Petition Rules and other mandatory requirements. He argues that rules of procedure in electoral disputes are not mere technical requirements, but rather, they go to the root and substance of the disputes. To buttress his submission he cites **RAILA ODINGA-VS-I.E.B.C & OTHERS [2013] e KLR.**

In reply, Counsel for the Petitioner submits that preliminary objection revolves around two fundamental questions law which are as follows;

a. Whether the court has jurisdiction to entertain the petition.

b. Whether procedural technicalities defeat the petitions.

On jurisdiction, he submits that this Honourable court is clothed with the requisite jurisdiction to entertain this case. In that respect, he cites section 75 (1A) of the Elections Act No 24 of 2011, Rule 6 (1) (b) and 2 (b) of the Elections (Parliamentary and County) Petition Rules 2017. He submits further that, it is not in question that this court was gazetted by the Chief Justice to be an election court. His view is that the issue of jurisdiction submitted by the 3rd Respondent does not arise. He faults the 3rd Respondent for relying on the judgement in **OWNERS OF THE MOTOR VESSEL LILIAN 'S'-VS-CALTEX KENYA LTD [1989] KLR1** without espousing how this court is bereft of jurisdiction. In his view, the determining factor in this case are statutory provisions as provided in the Election Act No 24 of 2011 and the Election (Parliamentary and County) Petition Rules 2017. In his submissions, Counsel for the Petitioner also cites the decision in **RE: THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, SUPREME COURT OF KENYA CONSTITUTIONAL APPLICATION NO 2 OF 2011.** The Petitioner further submits that his petition is not fatally defective as submitted by the 3rd Respondent. While the petition fell short of the provisions of rule 8 (1) (d), it materially and substantially complies with the provisions of the Election (Parliamentary and County Elections) Petition Rules 2017. To buttress his submissions, he cites authority of **WAVINYA NDETI & ANOTHER-VS-INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & TWO OTHERS [2017] e KLR.** He argues that, of cardinal importance when making a determination on the question of compliance with the provisions of the Elections (Parliamentary and County Elections) Petition Rules 2017, the court must take into consideration the purpose of the rule as espoused in the **WAVINYA NDETI** case (supra), which is, to adequately inform the respondents of the case they have to meet. Counsel for the Petitioner also submits that, where there is non-compliance with the rules, it is important that justice be administered without undue regard to the procedural technicalities. He refers to rule 5 (1) of the rules

and Article 159 (2) (d) of the Constitution of Kenya. He does cite the following authorities:

1. WAVINYA NDETI case (supra)

2. NICHOLAS KIPTOO ARAP SALAT-VS-I.E.B.C & 6 others [2013] e KLR.

3. DICKSON MWENDA KITHINJI-VS-GATIRAU PETER MUNYA & 2 OTHERS, NYERI CIVIL CASE NO 38 OF 2013

Having precisely outlined the submissions by Counsels for both parties, and, having considered all the authorities cited by them, I now proceed to determine the issue at hand which essentially revolves around three provision of the law, that is rules 8 (1) (c) and (d), 12 (2) (c) and (d) and 5 (1) of the Election (Parliamentary and County Elections) Petitions Rules, 2017. Rule 8 (1) provides as follows:

8.

(1) 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 elections , if any, and however declared;

(d) the date of 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 the address for service.

Whereas rule 12 (2) provides as follows:

12.

(2) An affidavit in support of a petition under sub-rule (1) shall state-

(a) the name and address of the deponent;

(b) the date when the election in dispute was conducted;

(c) the results of the election, if any, 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, acting for the petitioner which shall be the address for service.

The operative words in the above provisions of law are “*shall state*”. The words connote the mandatory nature of rules 8 and 12 of the rules. Upon perusing both petition and the supporting affidavit, I note that, the date which the results were declared is not stated, and, the results though stated, nothing is mentioned on how they were declared. Counsel for the Petitioner concedes as much. This obviously in contravenes of both rule 8 (1) (c) and (d) and rule 12 (2) (c) and (d). I would agree with Counsel for the 3rd Respondent that, in order to determine this issues, the court has to look at the petition against the

provisions of rules 8 and 12 above. However, I would also agree with Counsel for the petitioner that, it is also important to look at the effects of failure to comply with the rules as envisaged in rule 5 (1). In this, the **WAVINYA NDETI** case (supra) does provide some useful guidance. Rule 5 (1) of the rules provides that:

5.

(1) The effect of any failure to comply with these Rules shall be determined at the courts discretion in accordance with the provisions of Article 159 (2) (d) of the Constitution.

Obviously, compliance has to be determined at the discretion of the court but within the parameters laid down by Article 159 (2) (d) of the Constitution. Rule 5 (1) clearly underscores the importance of Article 159 (2) (d) in election petition. Article 159 (2) (d) provides:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(d) justice shall be administered without undue regard to procedural technicalities.

The question then that the court needs to address in the exercise of its discretion donated by rule 5 (1) of the rules is, whether rules 8 (1) (c) and (d), and, 12 (2) (c) and (d) of the same rules are procedural technicalities within the meaning of Article 159 (2) (d) of the Constitution. Article 159 (2) (d) has been the subject of litigation in our superior courts severally with varying outcomes. Emerging jurisprudence therefrom tends to lay emphasis on substantial justice rather than technicalities. However, courts have to be cautious about the blanket invocation of Article 159 (2) (d). Indeed, in **RAILA ODINGA AND 5 OTHERS-VS-I.E.B.C AND 3 OTHERS, PETITION NO 5 OF 2013 [2013] e KLR**, the Supreme Court rendered itself thus:

“ Indeed this Court has had the occasion to remind litigants that Article 159 (2) (d) of the Constitution is not a panacea for all the procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “ justice shall be administered without undue regard to technicalities”. It is plain to us that Article 159 (2) (d) is applicable on a case to case basis”.

The Supreme Court went further to state:

“ Article 159 (2) of the Constitution simply means that a Court should not pay undue attention to the procedural requirements at the expense of substantial justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court”.

Indeed, I have no doubt in mind that the discretion donated to the Courts by rule 5 (1) of the rules is to be administered in a cautious and purposive manner, and, on a case to case basis just like Article 159 (2) (d) above.

Turning back to the issue at hand, that election petitions are unique and conducted under special jurisdiction cannot be gainsaid. Our superior Courts could'nt have emphasised more. In **FERDINAND NDUNG'U WAITITU-VS-INDEPENDANT & BOUNDARIES COMMISSION & 8 OTHERS [2013]**, the Court observed;

“ The second consideration I must take into account is the status of the proceedings. It needs no restatement that these are election petition proceedings, which are conducted under special jurisdiction. In E.P. No 15/2013 Clement Kungu Waibara & Another-vs-Francis Kigo Njenga & Others, this court pointed out the unique circumstances of a petition and the straight jacket into which the court is put by the relevant statute. The court cited with approval, Jyoti Basu & others-vs-Debi Bhosal & others reported in AIR 1982 SC, 983, where the Supreme Court held as follows:

“.....An Election petition is not an action at common law nor in equity. It is a statutory proceeding to which neither the common law nor principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy in such matters,as those, relating to the trial of election disputes, is what the statutes lays down. In trial of election disputes, the court is put in a straight jacket.....”

Article 87 (2) of the Constitution and section 76 (1) (a) of the Election Act Cap 7 Laws of Kenya do provide that an election petition shall be filed within 28 days from the date of the declaration of the result. The law does not provide for the extension of the period for whatever reason. Therefore, time is a very substantial issue in election petition. I have no doubt in my mind that rules 8 (1) (d) and 12 (2) (d) were enacted to give effect to Article 87 (2) of the Constitution and section 76 (1) (a) of the Election Act. Time, in an election petition, starts running from date of the declaration of result. Therefore, in my view, the date when the results were declared must be specified in both the petition and the affidavit in support thereof. A petition which does not specify the date of declaration of results is fatally defective to the extent that it cannot be cured by Article 159 (2) (d) of the Constitution. This is because, in as much as rules 8 (1) (d) and 12 (2) (d) are procedural, they nevertheless, at the same time, are substantive and go to the root and substance of the issues and matter prescribed upon. See **(AMINA HASSAN AHMED-VS-RETURNING OFFICER MANDERA COUNTY & 2 OTHERS [2013])**. Unlike the **WAVINYA NDETI** case (supra), in this petition the date of declaration of results was neither included in the petition or the affidavit in support thereof. Therefore, it is difficult for Court to look at this petition favourably.

Turning to rules 8 (1) (c) and 12 (2) (c), at paragraph 13 of the petition, the petitioner sets out the results of the election as declared by the 2nd respondent. However, he does not state how the result were declared. It was incumbent upon the petitioner to comply with the rule entirely either by annexing the Gazette Notice or otherwise. In my view this is fatal to the petition.

The upshot of the above is, I find that the requirements under rules 8 (1) (c) and (d) and 12 (2) (c) and (d) are not merely technical requirements. They are so intertwined with the substantive issue that they go to the root of the issue before this court. In my view, a petition which does not state the date of declaration of results and how they were declared is fatally defective, and, therefore, must be struck out. For the reason stated above I uphold the preliminary objection and strike out the petition with costs. Parties are hereby directed to file their respective bills of costs for taxation.

DATED, SIGNED and DELIVERED this 16th day of JANUARY 2018

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J.J.MASIGA

SENIOR RESIDENT MAGISTRATE