



REPUBLIC OF KENYA
IN THE PRINCIPAL MAGISTRATES COURT AT KARATINA
ELECTION PETITION NO. 1 OF 2017
MACHARIA JAMES SIMPSON NDEGWA.....PLAINTIFF
VERSUS
THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION.....1ST RESPONDENT
WERU PETER KINYUA.....2ND RESPONDENT
RULING

Factual background

The General Elections in Kenya that were held on **8th August 2017**, where the Petitioner herein was running for the seat of Member of County Assembly (hereinafter referred to as MCA), Ruguru Ward, Mathira Constituency in Nyeri County. The 2nd Respondent was declared the winner and the MCA of Ruguru Ward by the 1st Respondent.[\[1\]](#)

The Petitioner having been dissatisfied with the manner in which the elections were conducted and disputing the declared results, filed the petition before this court seeking orders *inter alia*[\[2\]](#), that there be a fresh election for the position of MCA, Ruguru Ward.

The matter went on for full hearing. The Petitioner called a total of 9 witnesses, the 1st Respondent called 4 witnesses and the 2nd Respondent called 3 witnesses. At the close of the hearing by all the parties, the matter was fixed for mention on **8th December, 2017** for confirmation of filing of written submissions by the parties herein.

On the mention date, none of the parties had filed their submissions as the full set of the typed proceedings were received late. Parties sought for more time and the matter was adjourned to **27th December, 2017**.

Matter arising

On **27th December 2017**, the court was informed of the sudden and sad demise of the 2nd Respondent on **12th December, 2017**. The counsel for the Petitioner, **Mr. Abubakar** sought for court's direction on how to proceed with the matter, as it was his opinion that the matter had already been overtaken by events.

Issue for determination:

The 2nd Respondent died while the petition against him was still ongoing. The Petitioner would therefore not have any claim against him as the petition has abated. However, the petition against the 1st Respondent still survives. The issue for determination is;

a. Whether the petition against the 1st Respondent should still continue as scheduled

The Petitioner's claim against the 2nd Respondent was to have '**a declaration that the 2nd Respondent was not validly declared as the winner and that the declaration was invalid, null and void**'.[\[3\]](#)

The 2nd respondent passed on before the matter was determined on merits. **Article 194 (1) (a)** of the **Constitution**[\[4\]](#) states;

'The office of a member of county assembly becomes vacant – if a member dies'

By the death of the 2nd Respondent, the office of the MCA, Ruguru Ward became vacant on **12th December, 2017**. The Speaker of the Nyeri County Assembly has already declared the seat vacant under **Section 19 (3) of the Elections Act**.[\[5\]](#) The effect of such a declaration is to have a by election in Ruguru Ward. The main purpose of this Petition was to have the elections conducted for the office of the MCA, Ruguru Ward be declared null and void thereafter resulting to a by - election.

The death of the 2nd Respondent was an act of God. There shall be a by election on a date to be gazette by the 1st Respondent. It would therefore serve no practical purpose to proceed with the Petition against the 1st Respondent. In the event the court would proceed to make a determination, either for or against the Petitioner, the said decision would have been overtaken by events.

In **Party of Independent Candidate of Kenya & Ano V Hon. Mutula Kilonzo & 2 others**,[\[6\]](#), grey areas were highlighted in the event a decision is made in favour of the Petitioner and the remedies available to the Petitioner where a 3rd party has already been elected to the office through a by - election.

The available electoral laws are silent on the issue, and this is an area that needs to be looked into towards the growth of jurisprudence in this area. The **Elections Petition Rules**[\[7\]](#) only provides for a situation where the person whose election is being contested dies before the bearing of a petition.[\[8\]](#)

Court's findings

From the above, the office of the MCA Ruguru Ward having been declared vacant by the Speaker of the Nyeri County Assembly, and a by - election date likely to be announced soon, the court directs that the petition has been overtaken by events and it would serve no practical purpose to proceed with the petition against the 1st Respondent.

Costs

Section 84 of the **Elections Act** states;

'An election court shall award costs of and incidental to a petition and such costs shall follow the cause'

There was no logical conclusion of this petition due to the demise of the 2nd Respondent. The provision of costs under the **Election Petition Rules**[\[9\]](#) does not apply in this situation. Under the prevailing circumstances, each party to bear its own costs.

Dated, signed and delivered at Karatina this 5th day of January, 2018.

F.W. MACHARIA

SENIOR PRINCIPAL MAGISTRATE

[1] A body Corporate established under the Independent Electoral and Boundaries Commission Act No. 9 of 2011, with the responsibility of conducting elections under Article 88 (4) of the Constitution of Kenya.

[2] The Petitioner had prayed to have the court issue a total of 10 orders in his favour in his petition dated 6th September, 2017

[3] Prayer no. 'g' of the Petition dated 6th September 2017

[4] The Constitution of Kenya, 2010

[5] Section 19 (3) of the Elections Act No. 24 of 2011 states;

'Whenever a vacancy occurs in a county assembly, the speaker of the county assembly shall within 21 days after the occurrence of the vacancy issue a notice to the commission in the prescribed form'

[6] High court of Kenya at Machakos, Election Petition No. 6 of 2013

[7] The Elections (Parliamentary and County Elections) Petition Rules, 2017

[8] Ibid, Section 27

[9] Supra note 7, Section 30