



REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT VOI

ELECTION PETITION NO. 2 OF 2017

GIDEON NDAMBUKI MUTHIANI.....PETITIONER

VERSUS

FRANK KICHOI & 2 OTHERS.....RESPONDENTS

RULING

This ruling is in respect of the petitioner's Notice of Motion application filed herein on 9/10/2017. The same bears even date as the date when it was drawn by the firm of M/S Mwinzi and Associates Advocates. In the application, the petitioner is seeking the following orders;

1. That the Honorable Court do grant the Petitioner herein leave to amend his petition dated the 5th September 2017 as per the copy herewith filed.
2. That the amended Petition of Election draft herein be deemed as the duly filed(sic) upon payment of the requisite court fees.
3. That the Honorable Court do grant such or further orders it deems fit to grant in the interest of justice.
4. That the costs of the application to be in the cause.

The application is supported by the affidavit of Gideon Ndambuki Muthiani sworn on 9th October, 2017. It is further based on the following grounds;

- (a) That the error reflecting election date as 2nd and not 8th August, 2017 was a mere typing error.
- (b) That all other parts of the petition correctly captures the election date as 8th August 2017.
- (c) That the error is a very minor one which has never (sic) been repeated in the entire pleadings and hence easily ignored and is excusable in the interest of justice.
- (d) That the amendment has no prejudice to be occasioned to the respondents and or if any, it can be cured before hearing takes off and or in the course of the hearing of the petition.
- (e) That the application has been made at the earliest opportunity and in the interest of justice.

In making this application, the petitioner has placed reliance on Sections 5 and 80(1) (d) of the Elections (Parliamentary and County) Petition Rules 2017 and Articles 159 (2) of the constitution of Kenya and all enabling provisions of the Laws of Kenya.

The application was duly served upon the respondents. On 11/10/2017, counsel on record for the 2nd and 3rd respondents filed grounds of opposition and a list of authorities. The authority indicated is that of **Amina Hassan Ahmed –vs- Returning Officer Mandera County and 2 others** (2013) eKLR. The 2nd and 3rd Respondents raised the following grounds in opposition to the application;

- 1) That the Application is misconceived, bad in Law and an abuse of the court process.
- 2) That the Petition herein is an Election Petition.
- 3) That the Election(Parliamentary and County Elections) Rules 2017 do not empower the Court to allow an amendment to the Petition herein.
- 4) That the Petitioner's Application under reply offends the Provisions of Section 76 (4) of the Elections Act Cap 7 Laws of Kenya.
- 5) That more particularly Section 74 (6) of Election Act does not generally allow amendment of Election Petitions except where the following terms are complied with;
 - a) The Petitioner to be amended questions a return or an election result upon an allegation of an election offence.
 - b) The amendment is sought from the election court with 28 days prescribed by the Act for filing an election petition.
- 6) That in the premises this court lacks jurisdiction to grant the Petitioner the prayers sought in the Motion Application dated 9th October 2017, more particularly, the leave to amend petition dated 7th September, 2017.
- 7) That the Petitioner's Application herein is a nullity, lacks both legal and factual merit and ought to be dismissed with costs to the 2nd and 3rd Respondents.

On 12/10/2017, the 1st respondent filed a replying affidavit to the Petitioner's application aforementioned. The said replying affidavit was sworn by Aywa Samwel, the Advocate who is seized of the matter on behalf of the 1st respondent.

Counsel avers that Election dispute herein has a prescribed timeline under the constitution, the Elections Act 2011 and the Elections (Parliamentary and County Elections) Petition Rules 2017, which timelines are geared towards the timely disposal of the dispute.

That whereas Section 76 (4) of the Elections Act provides that an election petition filed in time and based on allegations of election offences may be amended with the leave of the court, the application for leave to amend must be made and granted within the time prescribed for challenging the relevant election.

That Section 76(3) of the Elections Act sets the timeline for challenging the relevant election to be within 28 days of the declaration of the results of the election. That the prescribed timeline is not a mere legal or procedural technicality to be cured by invoking Article 159 (2) (d) of the constitution and or Rule 5 of the Elections (Parliamentary and County elections) Petitions Rules, 2017. That from the date of declaration of the results from the member of county assembly for Chania Ward to the date of filing of this application for leave to amend, reveals that any intended amendment is way beyond the prescribed time line and therefore time-barred.

Mr Aywa further avers that even where courts are inclined to grant leave for amendment of pleadings outside the prescribed timelines, the amendments are never meant to cure a fatal defect in an election petition, as is the case herein. That the error noted is not a minor one as alleged by the petitioner. That the reference by the petitioner to election for the member of County Assembly for Chania Ward on the 2nd August 2017 is a fatal defect that goes to the root of the dispute before this court, which defect they contend cannot be cured by involving Article 159(2) (d) of the Constitution and or Rule 5 of the elections (parliamentary and county elections) petitions Rules, 2017.

It is noteworthy, that the application under consideration now, was filed on 9/10/2017, after an attempt by counsel for the petitioner, Mr Mwinzi to seek to orally amend the petition on 6/10/2017. He sought to invoke the provisions of section 100 of the Civil Procedure Act, and urged the court to allow the verbal amendment. That request was resisted and it was generally felt that for the other counsel representing the respondents to be able to respond, he ought to have filed a formal application, which he did on 9/10/2017 as above mentioned. In addition to the response made by the 2nd and 3rd respondents to the instant application, they (2nd and 3rd respondents) through their advocates on record filed a preliminary objection to the petition on 11/10/2017. The same was given primacy over the notice of motion application. The said preliminary objection has since been disposed of vide this court's ruling delivered on 19/10/2017. It is after the delivery of the said ruling that parties picked a date for hearing of the application, which is now the subject under consideration.

The application by Mr Mwinzi was listed for hearing before me on 23/10/2017. On that date two counsel i.e Mr Mwinzi for the petitioner and Mr Aywa appeared for the 1st respondent and held brief for Mr Omondi for the 2nd and 3rd respondents.

Mr Mwinzi introduced his application and proceeded to argue the same. He reiterated the grounds set out on the face of the application. He too reiterated the averments contained in the supporting affidavit to the application.

Mr Aywa too reiterated the averments contained in his replying affidavit, in opposition to the application by the petitioner. He also relied on the grounds of opposition filed by the 2nd and 3rd defendants. The gist of Mr Mwinzi's submissions is that the misstating of the date was an inadvertent error. That it wasn't meant to mislead. That it was only at the preamble to the petition where the erroneous date is indicated, but the rest of the body of the petition capture the date well. He urged the court, by dint of Rule 5(1) of the petition rules (2017) read side by side with Article 159(2) of the constitution to allow correction of the error, by allowing the current application.

The gist of the respondent's opposition to the application is anchored largely on the inflexibility of the electoral laws and rules. That they have provided express and blatant timelines when an amendment if any could be considered and allowed. Mr Aywa made reference to the provisions of section 76 of the Elections Act and stated that it offers a guide to the election court on the issue of amendments of the petition.

With respect to the 2nd and 3rd respondents, they associated themselves with the submissions made by the 1st respondent and relied on their own grounds of opposition.

They also urged the court to be guided by the authority i.e the case of **Amina Hassan Ahmed vs the Returning Officer Manderu County and 2 others** (2013) eKLR.

I have carefully considered the rival submissions made by the parties herein. It is clear that in this application, the 1st respondent had taken a common position with both the 2nd and 3rd respondents. They are opposed to the amendment of the petition to rectify the date indicated on the face of the petition.

The petitioner has invoked Rule 5 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 and section 80(1) (d) of the Elections Act 2011.

What do the said provisions of the law say;

Rule 5(1) of the petitions rule 2017 states as follows;

“ 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) of the Constitution”.

Section 80(1) (d) of the Elections Act states as follows;

“ An election court may in the exercise of its jurisdiction decide all matters that come before it without undue regard to technicalities.

By invoking the aforesaid provisions of the law, the petitioner was urging the court to exercise its discretion in allowing the proposed amendment and not to be bound by procedural technicalities. The supreme court of Kenya has had occasion to consider Article 159(2) of the constitution. That was in presidential petition of **Raila Odinga and 5 others vs IEBC and 3 others** in Supreme Court Petition No. 5 of 2013. In that case, and as quoted by the High Court in the Amina Hassan Ahmed case, the apex court rendered itself as follows;

“.....our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.....”

It is clear that the apex court is urging the courts of law to ensure that they do not give undue attention to procedural requirements at the expense of substantive justice. That while seeking justice, the procedural imperatives must also be followed.

In the Amina Hassan Ahmed case the superior court was clearly dealing with a case where the Petitioner had failed to comply with prescribed mandatory requirements and when he sought to address the failure through an amendment, that was not permitted.

I have equally had occasioned to consider the case **Charles Nyaga Njeru –Vs- Independent Electoral and Boundaries Commission and Another**, Election Petition(Chuka) No.1 of 2013 the Honourable Court stated that it cannot permit an amendment which is nothing else, than a fishing expedition for evidence.

In the Application before me, it is clear that what the petitioner seeks to address is the indication of the date of the election on the face of the petition. It is not that no date at all has been indicated. There is a date which has been indicated. That date is 2nd August 2017. The petitioner states that was an inadvertent error, occasioned by a typographical mistake. A perusal of the rest of the body of the petition leaves no doubt that the correct date i.e 8/8/2017 has been captured.

By seeking to amend the date and align it with the rest of the pleadings in the petition, is it tantamount to engaging in a fishing expedition by the petitioner? I do not think so. It would appear to me that the petitioner had inadvertently indicated the wrong date at the preamble of the petition. It is also clear that the error was not replicated in the rest of the body of the petition. The question which lingers is whether an election court is seized of the jurisdiction to allow amendments to correct an inadvertent typographical error?

From the submissions made by both the 1st respondent, and the 2nd and 3rd respondents, it is clear that they are opposed to any correction of the same. As already stated, his objections are anchored on the rules. They firmly stated that the rules as currently embodied, do not give room for such corrections being made through amendments.

In the case **Simon Nyandi Ogari and Another vs Hon Joel Omagira Onyancha and 2 others** the Hon Musinga J (as he then was) while addressing himself on compliance with petition rules, stated as follows;

“ While every effort must be made to follow rules of procedure as stipulated under the act and the election petition rules, the same should not be interpreted in a narrow and restrictive manner that may give undue advantage to some of the parties in an election petition. An election court should endeavour to do substantial justice without allowing unnecessary clogs and fetters to be placed along the path of justice”.

It is clear from many decisions made by the superior courts, the insistence is for the courts to ensure that substantial justice is meted out, other than giving litigation a technician's approach, and thereby shut litigants from the seat of justice.

I have had occasion to consider election petition No. 10 of 2013 **Ramadhan Seif Kajembe vs Returning Officer, Jomvu Constituency and 3 others** (2013) eKLR. The Hon Justice Odunga sitting at Mombasa, while dealing with an issue regarding a typographical error in a pleading filed rendered himself as follows;

“ In my view, the court ought to give a holistic approach to the pleadings filed and ought not to rely on one sentence to arrive at a determination, if it is clear from the rest of the pleadings and case as a whole that such determination will be contrary to the case as presented”.

The learned judge of the superior court proceeded to say;

“Whereas it would have been prudent for the respondents to have applied to amend the response, in the circumstances of this case, I am not prepared to find that the failure to do so did prejudice the petitioner. That the court has power to amend pleadings at any stage of the proceedings is trite, including at the appellate stage where the amendment was occasioned by inadvertence and no prejudice has been occasioned to the other party”.

The decision by the learned judge of the superior court is quite relevant and applicable in the matter at hand. It can be clearly stated that the petitioner had erroneously indicated the election date only in one sentence, but in the rest of his pleadings, he captured it clearly. Justice Odunga clearly admonishes giving the entire petition by the petitioner a consideration and not to just pick that single sentence where he erred in indicating the date of the election and say, he has failed to comply with the law as it is. And on such inadvertence, the learned judge says, yes, why not? The court has powers to amend for purposes of correcting such inadvertent errors, not only before commencement of the trial, but at any stage of the proceedings (including at the appellate stage).

I have carefully considered the submissions made by the respondents in opposition to the application. It is clear that none of them even remotely alluded to any sort of prejudice they are likely to suffer, in the event the court permits the proposed amendment to be done. The gravamen of the objection is simply that the law does not permit it. But the decision of the superior court (Odunga J), makes it clear that the election court can permit an amendment to occur, to correct what is clearly a typographical error occasioned by typing inadvertence on the part of the petitioner. In view of the foregoing, it is my finding that the application herein is merited. The same is allowed as prayed. Costs to be in the cause.

M. ONKOBA- SRM

30/10/2017

Court

Ruling read over and delivered in open court in the presence of Mr Aywa for the 1st respondent, who is also holding brief for Mr Omondi counsel on record for the 2nd and 3rd respondent. Others present include Mr Barua, court assistant but in absence of Mr Mwinzi counsel on record for the petitioner.

Right of appeal within 30 days.

M. ONKOBA- SRM

Mr Aywa

I pray for a copy of certified ruling.

Court

Same to issue to Mr Aywa upon payment of the requisite charges. For avoidance of doubt, any other party interested in the ruling is at liberty to get the same upon payment of the requisite charges.

M. ONKOBA- SRM

Mr Aywa

I have spoken to Mr Omondi, and he informs me that he is preparing an application for filing tomorrow. I propose that we have the matter listed for directions on 2/11/2017.

Court

Matter to be listed for directions on 2/11/2017. All counsel on record to attend court.

M. ONKOBA- SRM

30/10/2017