



REPUBLIC OF KENYA
IN THE PRINCIPAL MAGISTRATES COURT AT OGEMBO
ELECTION PETITION NO. 5 OF 2017
IN THE MATTER OF ELECTION OF COUNTY ASSEMBLY REPRESENTATIVE
FOR TABAKA WARD, KISII COUNTY

AND

IN THE MATTER OF: THE PETITION OF JIM KENYANYA

BETWEEN

JIM KENYANYA.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA.....2ND RESPONDENT

DANIEL OMBASA.....3RD RESPONDENT

RULING

Introduction

This Election Petition dated the 6th September 2017 was filed by the Petitioner, Jim Kenyanya, through his Advocates, M/s Bosire Gichana & Company, on the 6th September 2017.

After the service of the Petition upon the Respondents, the 3rd Respondent entered appearance in the Petition through the firm of M/s Oguttu, Ochwangi, Ochwal & Company and the 1st and 2nd Respondent entered appearance through the firm of Murugu, Rigoro & Company.

Coming up for determination in this ruling, are four applications, one by the Petitioner and two by the 3rd Respondent. The applications are as follows:-

1. The 3rd Respondent in the Notice of Motion application dated 2nd October 2017 and filed on 3rd October 2017 seeks the following orders:-

- i. That the court do strike out the petition.
- ii. That the court do strike out the affidavits in support of the petition.
- iii. That the court dismisses the entire petition.
- iv. That costs of the application be borne by the petitioner.

The application is hinged on the reasons set out in the supporting affidavit of Daniel Ombasa Apepo and is based on the grounds that;- the Petition was signed by the petitioner's advocate without the requisite mandate or authority, the Petitioner's advocate failed to file the requisite acceptance of appointment of advocate, the Petition violates the provisions of **Rule 7(4) of the Elections Parliamentary & county election) Petition Rules 2017(Hereinafter referred to as "the Rules")**.

Further that the affidavit by the Petitioner does not contain the requisite particulars and statutory ingredients stipulated under **rule 12(2) of the Rules** and that the defects and anomalies contained in the Petition are fundamental and go to the root of the Petition. The 3rd Respondent also stated that, as a consequence, the Petition is incurably defective and this court is devoid of jurisdiction to entertain the Petition and the same must be struck out.

In reply to the 3rd Respondent's application, the Petitioner's advocate filed grounds of opposition dated 6th October 2016 wherein he contended that the application is misconceived and incompetent, that the application lacks merit in view of the provisions of **Article 159 (2) (d) of the Constitution** and that the application is otherwise an abuse of court machinery.

The 1st and 2nd respondents did not file any opposition to the application.

2. The Petitioner's Notice of motion application dated 5th October 2017 and filed in court on even date seeks the following orders:-

- i. That the court do strike out the respondent's responses to the petition.
- ii. That the court do strike out the affidavits in reply to the petition together with all consequential and incidental documents.
- iii. That costs be borne by the respondent.

The application is based on the reasons stated in the supporting affidavit of Jim Kenyana and on the grounds that;-the respondents filed their response to the Petition well past the duration provided under **rule 10(4) of the Rules** and consequently the respondents' responses to the Petition together with the affidavits in reply to the Petition ought to be struck out.

In opposition to the Petitioner's application the 3rd respondent's advocate filed grounds of opposition dated 5th October 2017. The 3rd respondent's advocate argued that the application was made contrary to **rule 19(2) of the rules** and that the application is calculated to delay the expeditious disposal of the Petition which is devoid of any legal basis.

The 1st and 2nd Respondents did not respond or otherwise oppose the application.

3. The 3rd Respondent's Notice of Motion application dated 4th October 2017 and filed in court on 6th October 2017 seeks the following orders:-

- i. That the court do extend and/or enlarge time within which the response and the attendant affidavits by the 3rd respondent shall be filed.

ii. That the court deems the response by the 3rd respondent together with the affidavits in reply to the petition filed on 20th September 2017 as duly filed and served within the requisite timelines.

iii. That costs of the application be provided for.

The application is based on the supporting affidavit of Daniel Ombasa Apepo and on the grounds that;- by the time of filing the response and attendant affidavits, the 3rd respondent's advocate relied on the provisions of rule 11(1) of the rules and was oblivious to the amendment effected on 27th July 2017.

Further that the delay in filing the responses and attendant affidavits was short and excusable. The delay in filing the responses was due to the mistake of counsel and not the 3rd respondent. That the court has jurisdiction to extend time since the lapse is procedural and does not go to the jurisdiction of the court. Further that the application falls within the purview of **rule 19(2) of the rules**.

No reply was filed against the 3rd Respondent's application dated 4th October 2017.

4. The 3rd Respondent's application dated 11th October 2017 and filed in court on 12th October 2017 seeks the following orders:-

i. That the court do strike out and /or expunge paragraphs 4, 6(a) to (h) of the further affidavit sworn by the Petitioner on 9th October 2017 and filed on 10th October 2017.

ii. That the court do strike out and/or expunge paragraphs 2(a) to (g) of the affidavit sworn by Peter Oseko Matangi on 9th October 2017 and filed on 10th October 2017.

iii. That the court do strike out and/or expunge the affidavit of Samwel Oreti Mogiri sworn on 9th October 2017 and filed on 10th October 2017.

iv. That the court do order that the expunged paragraphs and affidavits do not form part of the record.

v. Costs of this application be borne by the petitioner.

The application is based on the affidavit of Joseph Oguttu Mboya and on the grounds that;- at the pre-trial conference on 6th October 2017 the Petitioner was granted leave to file further affidavits and /or additional evidence but limited to issues already stated in the Petition, the Petitioner however introduced new evidence and grounds in the further affidavits.

Further that the Petitioner brought on board a new witness without leave of court. That the introduction of new grounds and evidence amount to abuse of the due process of the court and the same should be expunged. In any event the Petitioner is bound by the contents of the Petition.

No response was filed against the 3rd respondent's application dated 11th October 2017.

The submissions

Both counsels on record for the respondents submitted that the provisions concerning the form and content of a Petition and the supporting affidavit were mandatory in terms of **Article 87(2) of the Constitution, section 76(4) of the Elections Act, rule 7(4)(a), rule 8, rule 12(2) (c) and (d), rule 15(2), 19(2) of the Rules**. The counsels emphasized that the failure by the Petitioner to sign the Petition or to otherwise give a written authority to his counsel renders the entire Petition invalid and incapable of redemption.

The 3rd Respondent's counsel cited the case **Ismail Suleman & 9 others vs the returning officer Isiolo**

county and 5 others(2013) eKLR, to support the position that there needs to be a written authority by the Petitioner for the Petition to be signed on his behalf

The 3rd respondent's counsel also submitted that the contents of an affidavit in support of the Petition, are statutorily circumscribed and hence the Parties to an Election Petition are required to abide by the statutory requirement. Further that an affidavit is incapable of amendment and in the event there is an omission, the omission cannot be cured by way of an amendment. The 3rd Respondent also submitted that the information alluded to in **Rule 12 (2) of the rules** can only be contained the affidavit in support of the Petition and not in a supplementary affidavit.

Counsel for the Petitioner conceded that the Petition was not signed by the Petitioner but by the petitioner's advocate based on the implied consent between an advocate and his client. He argued that **rule 5(1) of the rules** gives the court discretion to effect any failure to comply with the rules in accordance to **Article 159 (2)(d) of the constitution**.

He also contended that justice shall be administered without undue regard to procedural technicalities in terms of **Article 159 (2)(d) of the constitution**. He relied on **section 80 of the Election Act 2012** which provides that an election court may in the exercise its discretion decide all matters that come before it without undue regard to technicality. He also relied on **section 85 of the Election Act** which provide that Election Petitions shall be heard within the period specified in the constitution.

Counsel for the Petitioner argued that from the cited provisions the Election Petition should be heard and determined on merit without necessarily bogging it up with issues of procedural technicalities.

He stated that the rules remain subservient to the constitution and statute. He conceded that the Petition did not contain the date of declaration of election results but that the same was contained in the affidavit in support of the Petition.

Analysis and determination

I have carefully perused the material in the court record, inclusive of the able oral and written submissions of counsel representing all the parties and in my view the following issues need to be determined:-

1. Whether this court has the discretion to allow the 3rd respondents application dated 4th October 2017 seeking to extend and/or enlarge time within which his response to the Petition was filed?
2. Whether the Petitioner's application dated 5th October 2017 seeking to strike out the Respondents' responses to the Petition and affidavits in support thereof is merited in light of 1 above?
3. Whether the Petitioner's failure to personally sign the Petition renders the Petition incurably defective?
4. Whether the Petition as drafted complied with the requirements laid out in rule 8 of the Rules?
5. Whether the affidavit in support of the Petition complied with the requirements set out in rule 12 of the Rules?
6. Whether the additional affidavits filled by the Petitioner with leave of court granted during pre-trial should be expunged for going beyond the contents of the Petition?
7. Who shall bear the costs of these applications and/or Petition ?

On the **1st and 2nd issues** above, I notice that the 3rd respondent's application dated 4th October 2017 was

not opposed by the 1st and 2nd respondents. The Petitioner's advocate in both his oral and written submissions stated that he invited court to exercise its discretion in disposing of the said application.

The Petitioner's counsel also left his application dated 5th October 2017 to the discretion of court.

Rule 11 (1) of the Rules provides that;- “ Upon being served with a Petition in accordance with rule 10, a respondent may oppose the petition by filing a response to an Election Petition within 7 days.”(Emphasis mine).

The above rule in my view gives this court discretion and I accordingly exercise my discretion pursuant to **section 80 of the Elections Act, rule 5(1) and rule 19(1) of the Rules** to allow, the 3rd respondent's application dated 4th October 2017 and disallow the Petitioner's application dated 5th October 2017.

On the **third issue**, I have looked at the decision of the **High court at Eldoret in Election Petition 1 of 2013, Charles Kamuren vs Grace Jelagat Kipchom and 2 others**. The judge held that, “... in determining whether an advocate is ‘a person duly authorized’ I took recourse to various provisions concerning signing of a pleading. An election petition, as rightly submitted on behalf of the Petitioner is a pleading. In the applicable **Civil Procedure Rules**, an advocate is treated differently from an agent who requires express authorization to sign a document on behalf of another person. An advocate, in my opinion, once instructed, could sign the Petition on behalf of the Petitioner. As I reasoned in the above-cited case, the express inclusion that a petition could be signed by a person other than the petitioner sought to cure the mischief that resulted in the strict application of the then applicable rules and further that the issue of signature was a matter of form, that ought not to be elevated above the substantive aspect of the pleading.”

I wish to distinguish the findings in the above case and that of **Ismail Suleman & 9 Others vs the returning officer, Isiolo county and 5 others (2013) eKLR** relied on by the 3rd Respondent. In the case of **Ismail Suleman** there were numerous petitioners and I note that in that case it was only Ismael Suleman who signed the Petition and that he did not have the authority from his Co-Petitioners, to sign the Petition on their behalf. The facts in the **Ismail Suleman case** are in my view not comparable to those in this case.

I therefore concur with the submissions of the Petitioner's counsel that as an advocate, he had his client's authority to sign the Petition. In my view an advocate fits the description of a person duly authorized, thus, the Petition cannot in this regard alone be rendered incompetent.

I am duly guided by the finding in the **Charles Kamuren case**(supra) and find that the Petition before me was properly signed by the Petitioner's advocate and is to that extent valid.

On the **fourth and fifth issues**, I have carefully read the Petition plus the affidavit in support of the Petition and noted that the Petition does not comply with **rule 8 (1) (e)** i.e. the date of declaration of the results of the election is not stated.

On the other hand the affidavit in support of the Petition does not comply with the mandatory requirement under the provisions of **rule 12 (2)(c) and (e) of the rules**, specifically it does not contain the results of the elections and the grounds on which the Petition is presented.

The question is, what is the consequence of such non compliance?

I looked at the decision of the **High court at Meru in Election Petition No 5 of 2103 M’Nkiria Petkay Shen Miriti vs Ragwa Samuel Mbae and 2 others**, where the high court held as follows:-

“The conclusion I come to after studying the Rules, is that the Act and the Regulations and Rules made there under, have the legal sanction and authority of the Constitution and of the Act, respectively. Indeed in my view and finding, matters touching elections, and in particular petitions

which are not provided for by the Constitution, are taken up and provided for in the Act, and likewise those not provided in the Act, are provided for in the Rules and/or Regulations.”(Emphasis mine)

The court in the *M’Nkiria case*(supra) further noted as follows:-

“.....the provisions of Rule 10 and others afore stated, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules must be complied with fully, is because the Act, and therefore the Rules, are a special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court.”

The Petitioner in the Petition before me failed to state the date of declaration of the election result being contested which is a mandatory requirement under **rule 8(1)(e)**.

The Petitioner’s counsel severally referred this court 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 judge in the *M’Nkiria case* (supra) further noted that, “*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.*”

The Petitioner’s counsel in his oral submissions asked whether this petition is so useless that it cannot be heard?

The Court of Appeal in the case of *John Michael Njenga Mututho vs Jayne Njeri Wanjiku Kihara & Two Others, Nakuru Court of Appeal, Civil Appeal No. 102 of 2008*, answers this question **at page 8**,

“*Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is an issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues, not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it.... If she (petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.*”

I am duly guided by the above findings of the court of appeal whose findings are binding on this court. In addition, it is my considered view that the mandatory requirements for filing a petition and the affidavit in support of the petition cannot in this case be cured in any other way, other than by the filing of supplementary affidavits or an amended petition, yet that would be outside the mandatory 28 days period specified in **Article 87(2) of the Constitution**.

The Petitioner left out substantive requirements that go to the root of the issues before court.

The Petitioner should have complied with the mandatory requirements so as to ensure that he gave the respondents fair notice of the case against them to enable them to adequately prepare their defense.

In my view and finding, based on the facts and reasons aforementioned, I find that the Petition and affidavit in support are without doubt, fatally defective because they are deficient in form and lack the vital prescribed statutory content.

Consequently, the application by the 3rd Respondent dated 2nd October 2017, seeking to have the Petition struck out and/or dismissed, succeeds. The Petition dated 6th September 2017 is hereby dismissed with costs to the Respondents.

On the sixth issue, the Petitioner filed additional affidavits on the strength of the leave of court granted during the pre-trial conducted on 6th October 2017 and pursuant to **rule 15(1)(h) of the Rules**. The leave was based on the condition that the Petitioner would not introduce new evidence that was not already contained in the affidavit. The 3rd respondent disputed the further affidavits of the petitioner sworn on 9th October 2017, Peter Oseko Matangi sworn on the same date and the new affidavit sworn by Samwel Oreti Mogiri on the same date as well.

Rule 15 (1) (h) mandates the trial court to give directions as to the filing and serving of any further affidavits or the giving of additional evidence. The question is whether or not the Petitioner abided with the directions given? A quick look at the disputed further affidavits of the Petitioner and Peter Oseko Matangi shows that the Petitioner attempted to sneak in additional information not originally contained in the Petition to the detriment of the respondents. The additional information deposed to by the two deponents is information that was within the possession of the Petitioner at the time of filing the Petition and ought to have been included at the onset of these proceedings. I therefore concur with the submissions of the counsels for respondents on this issue.

The new affidavit if Samwel Oreti Mogiri is contrary to **rule 12(3)(4) of the Rules** which provides that each person who the Petitioner intends to call shall swear an affidavit at the time of filing the Petition. The same is accordingly expunged from the court records.

Accordingly I allow the application of the 3rd Respondent dated 11th October 2017 with costs to be borne by the Petitioner.

Costs

Section 87 of the Elections Act and Rule 30 (1) of the Rules grants the court powers to determine the costs to be paid and by whom.

Rule 30(1) (a) and (b) provides that at the conclusion of an election petition, the Court is to make an order specifying the total and maximum amount of costs payable and the persons by whom and to whom the costs are to be paid.

In the **High court at Kisumu in Siaya Election Petition No. 4 of 2017 Aluodo Florence Akinyi vs IEBC and 2 others**, Justice Majanja in specifying the payable costs stated as follows:-

“ As this case has been struck out at a preliminary stage...I award instructions fees for the petition and application to strike out for each party at Kshs 500,000/00. The other incidental costs shall be taxed and the total costs certified by the registrar and shall be paid out of the security for costs on pro-rata basis.”

To this end, the 1st and 2nd respondents and the 3rd respondent are entitled kshs 100,000/= each for the Petition and the application to strike out the Petition.

The other incidental costs of the respondents, if any, shall be assessed by court and be paid out of the security for costs on pro-rata basis.

Dated, signed and delivered in Kisii this 24th day of October, 2017.

S.N. MAKILA

SENIOR RESIDENT MAGISTRATE

In presence of:-

Court assistants- Jael and Rioba

Advocate for the Petitioner-Ms Momanyi h/b Mr Bosire Gichana

Advocate for the 1st and 2nd Respondents- Mr Kibet

Advocate for the 3rd Respondent- Ms Mireri h/b Mr Oguttu Mboya