



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KISUMU
ELECTION PETITION NO. 5 OF 2017
IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS
PETITION) RULES, 2017**

AND

**IN THE MATTER OF ELECTION FOR MEMBER OF THE COUNTY ASSEMBLY FOR
KOLWA EAST WARD**

-BETWEEN-

JOHN OSUMBA OLUM.....PETITIONER

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT

ACHIENG OKEYO YVONE.....2ND RESPONDENT

OWITI STEPHEN OUMA.....3RD RESPONDENT

RULING

INTRODUCTION

The petitioner filed his petition on 06/9/2017 contesting the outcome of the general elections of 8/8/2017 and more particularly his loss in the said elections where he offered himself for the position of

Member of the County Assembly in a ward referred to as KOLWA EAST WARD.

The three respondents filed their responses and points of law. The 1st and 2nd respondents filed a joint response to the petition and a Notice of Motion dated 29/9/2017 supported by the affidavit of the 2nd respondent. This application sought for the striking out of the petition with costs. On the other hand, the 3rd respondent also filed a response on 19/9/2017 to the petition and accompanied the same with notice of preliminary objection seeking for the petition to be struck out.

On 4/10/2017, the court issued notices to all the parties to attend court for directions on 10/10/2017 and on the said 10/10/2017, all the parties appeared in court for directions pursuant to the notices served on

them by the court and after seeking for directions as to how their respective applications ought to be heard, the court ordered that the twin applications seeking for the striking out of the petition be heard at 2pm.

SUBMISSIONS BY THE RESPONDENTS

MR WERE advocate appearing for the 1st and 2nd respondents in arguing the notice of motion dated 29/9/2017 and while relying on the supporting affidavit of the 2nd respondent sworn on the even date submitted that Rule 7(4) of the Elections(Parliamentary and County Elections) Petition Rules, 2017 hereinafter referred to as the Rules provides for the petitioner to draft his pleadings in a certain manner and seek in very clear terms the prayers he wants to be granted. According to Counsel's submissions, this had not been done by the petitioner because his facts were so disjointed with the prayers sought for that no sound relief could be obtained by the petitioner. Counsel pointed out that the petitioner had consistently and repeatedly referred to South West Kisumu Ward which was not the main subject of this petition. It was also submitted that the affidavit by the petitioner in support of the petition and those sworn by his agents were in violation of the cardinal rule of swearing an affidavit because the deponents did not disclose the sources of their information or if it was on a personal believe or information.

Finally, Counsel told the court that under Rule 4, the petitioner had the duty of helping the court to attain the overriding objectives of the court but if the petition was allowed to be heard, then it would be an embarrassment to the fair trial.

MR OGANDA advocate for the 3rd respondent associated himself with the submissions tendered by MR WERE but hastened to add that even though Rule 5 allows the court to overlook non-compliance of certain procedures, the same does not allow the court to exercise jurisdiction where none exists. According to MR OGONDA advocate, since the petitioner had prayed for relieves in respect of wards that did not exists or which were not the main subject of this petition, the court could not thus be allowed to exercise jurisdiction over such wards.

PETITIONER'S SUBMISSIONS

The petitioner was represented by Ms ONSONGO advocate and MR ONSONGO advocate. It was submitted in response by MR ONSONGO advocate that what the respondents were complaining of were mere typographical errors occasioned by cut and paste methods used in preparing the petition and that in any event, the errors complained of did not go to the substance of the petition and that no allegations of prejudice had been made by the respondents. Counsel in support of his arguments on typographical errors referred the court to the Judiciary Bench Book on Electoral Disputes Resolution at page 75 paragraph 4.6.2.2 and submitted that the court has powers to order for amendment where no prejudice will be caused.

On the submissions about the petition being ambiguous and lacking in particulars or not being specific, Counsel for the petitioner submitted that the court also has powers to order for furnishing or supply of further particulars. On this issue counsel referred the court to the same Judiciary Bench Book on elections at page 74 paragraph 4.6.1.1. It was the petitioner's plea that since these were typographical errors, they fell within mere technicalities which should not inhibit access to justice by the petitioner hence the objections should be dismissed.

In conclusion, MR WERE advocate submitted that the typographical errors were many in the petition and the petitioner could not be allowed to make an application for amendment through the back door. Mr OGONDA advocate on his part responded that the typographical errors could not be allowed to affect the prayers in the petition.

DETERMINATION

Having summarized in brief the submissions by all parties herein and also having had the chance of

reading the Notice of Motion dated 29/9/2017, the supporting affidavit of the 2nd respondent and the preliminary objection by the 3rd respondent, I am satisfied that the only issue for determination in this twin applications as presented and argued by the three respondents is to find out whether the reference to award other than KOLWA EAST WARD in the petition, the affidavit in support and the affidavits by the petitioner's agents is fatally defective and renders the entire petition a subject of striking out.

In response to the above issue, the respondents did not refer me to any binding authority to support their submissions that the failure by the petitioner to refer to KOLWA EAST WARD in his petition was fatal. I listened to counsel for the petitioner as he submitted on this issue and he explained that the reference to SOUTH WEST KISUMU WARD and KOLAWA EAST WARD was as a result of typographical errors caused by copy and paste and that from the heading of the petition, it was clear that it referred to KOLWA EAST WARD.

I have read page 75 paragraph 4.6.2.2 of the **Judiciary Bench Book on Electoral Disputes Resolution** as referred to by counsel for the petitioner and the same clearly provides that the election court may allow amendments to correct inadvertent errors and omissions at any stage of EDR proceedings where the amendments would not occasion prejudice to any party.

In this matter and while referring to this paragraph, counsel was of the view that the errors were not grave and were capable of being cured by an amendment without causing any prejudice to the respondents. I listened to the main submissions by all the respondents in their prosecution of their points of law but none indicated any prejudice that would be occasioned to them as a result of the errors cited being left the way they are or if any amendment is done. However, counsel for the petitioner was succinctly clear that he was not applying for amendment at this stage. MR WERE stated that if the trial is allowed to proceed based on the petition as it is, then it would amount to an embarrassment of a fair trial.

I have equally read page 74 paragraph 4.6.1.1 which refers to rule 15(1) that an election court has powers to order a party to furnish further particulars of the allegations made in the petition and it is my finding that, no sound argument was proffered by all the respondents showing that the errors alluded to were so grave that they affected the substratum of the entire petition that no other remedy could be contemplated of by the petitioner to rescue the situation. It was not alleged by the respondents that the petitioner failed to comply with prescribed mandatory requirements of the law governing the drafting of an election petition or any other such law related to election petitions. In any event, a look at Rule 7 as referred to by MR WERE shows that the substantive components of the manner in which a petition ought to be drafted were complied with.

I have equally looked at the petition as filed by the petitioner and it is evident from the first page that the same relates to election for the member of the County Assembly for KOLWA EAST WARD. I believe that MR ONSONGO was right and genuine in owing up to the mistakes apparent in the petition where other wards other than KOLWA EAST WARD were referred to. I am convinced that it is true that such mistakes might have been caused by what he referred to as copy and paste and this should not be visited on the innocent petitioner who trusted that he hired an experienced and competent advocate to advance his petition. In summary, I believe that the reference to SOUTH WEST KISUMU WARD AND KOLAWA EAST WARD in most parts of the petition including the prayers sought for points at the perfunctory nature the drafting of the entire petition was accorded.

MR WERE took offense with the affidavits in support of the petition and those sworn by the intended witnesses for the petitioner on the basis that they were not drawn based on either the knowledge or believe of the deponents. On this one, I must state that this complaint is primarily anchored on form and not the substance of the said affidavits thus I find no basis for sustaining the objection.

Finally, I have read Rule 5(1) which was referred to by MR OGONDA advocate and also being a ware of the sound command of the language of Article 159(2)(d) of the Constitution, I am convinced that the errors disclosed and complained of by the respondents are actually typographical ones as submitted by counsel for the petitioner.

I believe that if the objections raised by the respondents are determined in the positive then the court will have failed in its duties of ensuring that matters are not determined on the basis of technicalities rather than on substance. This court therefore rejects the invitation by the respondents to strike out the petition on the grounds disclosed in their respective notices and as a consequence thereof, the Notice of Motion dated 29/9/2017 by the 1st and 2nd respondents and the notice of preliminary objection dated 19/9/2017 by the 3rd respondent are both dismissed.

On the issue of costs, MR ONSONGO advocate submitted that he will not be pursuing costs. The court therefore makes no orders as to costs.

DATED and DELIVERED at WINAM this 13th Day of October, 2017

HON. BERNARD KASAVULI

SENIOR RESIDENT MAGISTRATE

Coram

C/a Susan Bala

ONSONGO & CO. ADVOCATES FOR THE PETITIONER

.....
.....

MASIKA & KOROSS ADVOCATES FOR THE 1ST AND 2ND RESPONDENTS

.....
.....

MAXWELL O. OGONDA & COMPANY ADVOCATES FOR THE 3RD RESPONDENT

.....
.....