



**REPUBLIC OF KENYA**  
**IN THE RESIDENT MAGISTRATE'S COURT AT LAMU**

**ELECTION PETITION NO. 1 OF 2017**

**JANE NJERI KAMANDE.....PETITIONER**

**VERSUS**

**ANTHONY JOMO MAINA.....1<sup>ST</sup> RESPONDENT**

**PARTY OF DEMOCRATIC UNITY.....2<sup>ND</sup> RESPONDENT**

**ABDALLA MWARUA CHIKOPHE.....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....4<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. This is a ruling in response to a Preliminary Objection filed by the 2<sup>nd</sup> Respondent filed on 11<sup>th</sup> September 2017 and a Notice of Motion filed by the 1<sup>st</sup> Respondent on 25<sup>th</sup> September 2017.
2. The decision to give a ruling on these applications arose from a pre-trial conference that took place on October 10, 2017. The pre-trial conference was conducted in accordance to the Elections (Parliamentary and County Elections) Petition Rules, 2017.
3. During the pre-trial conference Mr. Korir held brief for Mr. Olwande for the petitioners, Mr. Were held brief for Mr. Agonga for the 1<sup>st</sup> Respondent, Mr. Wetaba was present for the 2<sup>nd</sup> Respondent and Mr. Were held brief for Mr. Kadima for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
4. There were four applications in total; two of which were allowed by consent of all the advocates present. The remaining two applications are the subject of this ruling. The parties agreed to file submissions on these two applications during the pre-trial conference. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file any pleadings or submissions with the regard to the two applications that are the subject of this ruling.
5. I will summarize the two applications and then review the submissions filed before giving a decision. I shall begin with the Preliminary Objection filed by the 2<sup>nd</sup> Respondent and then address the Notice of Motion filed by the 1<sup>st</sup> Respondent.

## APPLICATIONS

### PRELIMINARY OBJECTION

6. The 2<sup>nd</sup> Respondent raised a preliminary objection on that the petition should be struck out for the following reasons:

- a. That this court lacks jurisdiction to hear the application filed herein as the issues raised are clearly of the nature of nomination disputes that are within the jurisdiction of the IEBC.
- b. That this application is incurably defective and should be struck out.
- c. That this application has been overtaken by events as the 1<sup>st</sup> Respondent herein has already been elected.
- d. That this application is hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reason inter alia, that the petitioner has not exhausted the Independent Electoral and Boundaries Commission (IEBC) mechanisms as the law stipulates.

7. The 2<sup>nd</sup> Respondent relied on various pleadings as well as the Replying Affidavit sworn by Isaiah Gichu Ndirangu in response to the main petition.

8. It is only the Petitioner who filed Grounds of Opposition to the Preliminary Objection before the deadline set by the court. The Petitioner's Grounds of Opposition are:

- a. Indisputably service of the Petition was by newspaper advertisement on 30<sup>th</sup> August 2017 and none of the Respondents filed a Notice of Address of Service and Responses thereto within the time stipulated by Rules 10[4] and 11 of the Elections (Parliamentary and County Election) Petition Rules, 2017.
- b. The objection is incompetent having been lodged by a party that failed to file and serve as required by Rule 10[4] of the Elections (Parliamentary & County Elections) Petition Rules, 2017 a Notice of Address of Service within five [5] days from the date of service of petition by newspaper advertisement on 30<sup>th</sup> August 2017.
- c. That the 2<sup>nd</sup> Respondent's pleadings which include the Replying Affidavit lodged on 11<sup>th</sup> September 2017 are invalid for having been filed and served outside the seven [7] days period in violation of rule 11 of Elections (Parliamentary & County Elections) Petition Rules, 2017 to which no court sanction has been sought to validate as required by law.
- d. By dint of the High Court's decision in **Constitutional Petition No. 36 of 2017 Michael Kanja Kagori vs. IEBC and Five Others** which touched on the subject matter and **Moses Mwicigi and Four Others [2016] eKLR** the remedy of an aggrieved party against a party already declared a winner in a general election and IEBC is to file an Election Petition as the dispute is part of the electoral process.
- e. Indisputably the purported determination by the IEBC was on a mention date of 6<sup>th</sup> June 2017 without any notification being served in violation of Article 50 of the Constitution hence no substantive order could have been made on that day as was held in **Republic vs. Anti-Counterfeit Agency & Two others Ex parte Surgipharm Limited [2014]** and those made therefore void and a nullity for being a step-in violation in natural justice and Constitution. See the case of **Ngoso General Contractors Limited vs. Jacob Gichunge [2005] eKLR** and **Benjamin Leonard MacFoy vs. United Africa Company Limited [1961]**.

9. The Petitioner and the 2<sup>nd</sup> Respondent filed submissions and these are summarized below.

## SUBMISSIONS – PRELIMINARY OBJECTION

10. The 2<sup>nd</sup> Respondent's submissions may be summarized as follows:

- a. The matter before this court is an election dispute arising from issues that preceded the election and therefore are in the purview of IEBC under Article 88(4) of the Constitution, Regulation 99 of the Elections (General) Regulations, 2012 among other laws.
- b. The 2<sup>nd</sup> Respondent's point out that according to section 75 of the Elections Act the jurisdiction of an election court under the magistrate's court does not include what the petitioner seeks from this court.
- c. The 2<sup>nd</sup> Respondent relies on the principle that what the petitioner seeks from this court should have been determined before the election.
- d. Mr. Wetaba for the 2<sup>nd</sup> Respondent cited various authorities which were presented; the court has had an opportunity to read the authorities cited.

11. The Petitioner in response argues as delineated below in her submissions:

- a. That this court as the duly gazetted election court for any disputes arising under the member of county assembly elections, is the right forum to ventilate their issues.
- b. The reason why the petition is before this court is because of the declaration by the Returning Officer of the 1<sup>st</sup> Respondent - Anthony Jomo Maina as the winner. The actions by the Returning Officer invokes section 75 of the Elections. Act.
- c. That the preliminary objection is aimed at stopping the Petitioner from having her case heard and all the issues that she raises in the petition.
- d. The Petitioner also cites and present various authorities which were presented which this court has read.

## CASE LAW & ANALYSIS – PRELIMINARY OBJECTION

12. The starting point as always for this court is the law. The substantive issue for determination by this court is if this court has jurisdiction. But before considering this fact, it is important to consider how the superior courts - which guide this court – have described a preliminary objection.

13. The classical case on this point is **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696**. Judge Law, Judge of Appeal had the following to say: -

**“...So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....”**

14. Judge Mrima in **Nancy Anyango Orina vs. I.E.B.C & Four [2016] eKLR** quoting Judge Mwitia in **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** re-stated the position above on what constitutes a preliminary objection in 21<sup>st</sup> Century terms where Judge Mwitia emphasized that a preliminary objection should not have any facts in dispute and he posited:

**“...The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should**

**have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law...”**

15. With the definition of a preliminary objection in the background, it is then possible to consider the issue of jurisdiction. The 2<sup>nd</sup> Respondent cited the case of **Republic v. I.E.B.C Ex-parte Charles Olaro Chebet [2013] eKLR** decided by (Rtd) Justice Emukule. That case can be distinguished from the one before this court in that, the case before (Rtd) Justice Emukule first was an application for judicial review and secondly touched on the nomination of candidate (Chebet) where I.E.B.C refused to accept his certificate. These two facts do not apply to the petitioner before this court though what was for consideration before Judge Emukule was preliminary objection.

16. The Petitioner argues that this court is the right forum and urges this court to find this is the correct position in law as stated in **J.R.(Mombasa) Petition No. 36 of 2017 – Michael Kanja Kagori vs. I.E.B.C and Five Others**. Judge P.J.O. Otieno delivered a ruling where the petitioner filed a constitutional petition challenging (as in this case) the election of the same Anthony Jomo Maina. However, Judge P.J.O. Otieno stated at paragraph 24:

**...The upshot is that I decline to arrogate to myself the jurisdiction vested on the magistracy by accede to the Notices of Preliminary Objections which I consider merited by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents with the that the petition dated August 16, 2017 as amended on August 20, 2017 was filed in the wrong forum and is hereby struck out...”**

17. I associate myself with this decision by Judge P.J.O. Otieno that what was the right proceeding to file is an election petition before the magistrate’s court and not a constitutional petition before the High Court. Therefore, by coming before this court, the Petitioner has presented her issues in the right forum.

18. The 2<sup>nd</sup> Respondent cited the case of Josiah **Taraiya Ole Kores v. David Ole Nkediya & Three Others [2013] eKLR**, where Judge Mabeya gave judgment in an election petition. One of the issues for determination was the eligibility of the 2<sup>nd</sup> Respondent and his running mate. He found that such issues should have been dealt with at the pre-election stage and therefore as a court hearing the election petition, he did not have the mandate to consider this.

19. The Josiah case ought to be juxtaposed with the decision of the Supreme Court in **Moses Mwicigi & Fourteen Others vs. I.E.B.C and Five others [2016] eKLR** an authority cited by the Petitioner. Moses Mwicigi clarified the position when an issue ceases to be before the I.E.B.C and becomes ripe for an election court. Thus, in the case before this court unlike in the Josiah case and following the principles in the Moses Mwicigi case it is ripe for this court to consider the merits of the petition.

20. The Supreme Court further emphasized this point on when an issue should be considered by an election court in **Hassan Ali Joho & Another vs. Suleiman Said Shabhal & Two others** which they quote in Moses Mwicigi at paragraph 100. This court finds it necessary to reproduce paragraph 100 as follows:

**...The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the returning officer makes a decision regarding the validity of the ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer according to Regulation 83(3) terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicated the termination of the returning officer’s mandate, thus shifting any issue as to validity, to the election court...**

**(emphasis mine).**

21. A reading of the above means that this petition is properly before this court as an election court because the returning officer made a decision that the 1<sup>st</sup> Respondent won. Therefore, the appropriate forum to challenge the 1<sup>st</sup> Respondent's victory is this election court and in the manner that the petitioner has come before this court.

22. The 3<sup>rd</sup> Respondent's authority is **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited and 2 others [2012] eKLR**. That case dealt at length with the jurisdiction of the Supreme Court. Indeed, of the seven issues framed, six of the issues were the Supreme Court to determine on jurisdiction. In fact, paragraph 68 of this ruling refers to Article 163(9) of the Constitution and deal at length with the jurisdiction of the Supreme Court.

23. This is very different from what is before this court because the jurisdiction of this court is derived from section 75 (1A) of the Elections Act. It provides:

**A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.**

24. Before concluding, this issue of preliminary objection, I wish to quote Judge Wakiaga in **Thuo Mathenge vs. Nderitu Gachagua & Two Others [2013] eKLR** at length on the importance of giving due consideration to an election petition and the factors surrounding it. He said (and I quote at length):

**...For avoidance of doubt I take the view that this petition raises weighty issues on the conduct of the electoral process, the role of political parties, the role of running mates in Gubernatorial elections and the settlement of election dispute procedure as well as the provisions of the Articles of the Constitution and the legislations made therein and therefore if the petition is struck out that may be the end of it for the petitioner and determination of these issues. My brother Justice Gikonyo in BUNGOMA HIGH COURT ELECTION PETITION NO. 1 OF 2013 had this to say on the nature of petition;**

**Election disputes are not purely private disputes to be confined to strict rules which apply to private disputes but should be seen as public election disputes falling under the league of sue generic proceedings since such disputes carry remedies of a public character they in all civilized legal system enjoy a degree of liberal approach under the Constitutions and in laws of the nations".**

25. I associate myself entirely with the views of Judge Wakiaga and Judge Gikonyo above.

## **CONCLUSION – PRELIMINARY OBJECTION**

26. In conclusion, I therefore dismiss the 2<sup>nd</sup> Respondent's preliminary objection.

## **1<sup>ST</sup> RESPONDENT'S NOTICE OF MOTION**

27. Turning now to the 1<sup>st</sup> Respondent's Notice of Motion filed on September 27, 2017 which was filed under Certificate of Urgency, it seeks the following orders:

- a. That this application be certified urgent and heard ex parte at the 1<sup>st</sup> instance.
- b. This honourable court be pleased to extend the time for filing a response to the petition.
- c. That this honourable court be pleased to order that the draft response attached be deemed to have been filed.
- d. That this honourable court issue any other order in the strict observance of the directives of the honourable court and in the interest of a speedy trial, justice and equity.

e. That costs of this application be in the cause.

28. It is based on the following grounds:

- a. That pursuant to the amendments of the Hon. Chief Justice Maraga on 24<sup>th</sup> July 2017, the time for service and filing a response to an election petition was shortened to seven (7) days.
- b. This petition was served by newspaper advertisement on 30<sup>th</sup> August 2017 and it is therefore imperative that the 1<sup>st</sup> Respondent be granted an extension of time to file his response thereto.
- c. That the undue delay was on account of shifted focus on Election Petition No. 36/2017 before the High Court in Mombasa which matter was heard and determined with a dismissal of the same on September 8, 2017.
- d. That no prejudice shall be occasioned if this application is allowed by extending time to file a response forthwith.
- e. A draft response has been attached herewith and we plead that the same be deemed as filed.
- f. This application has been brought in the interest of justice therefore is worthy for this court's audience.

### **OPPOSITION TO THE 1<sup>ST</sup> RESPONDENT'S EXTENSION OF TIME**

29. Only the petitioner opposed the 1<sup>st</sup> Respondent's Notice of Motion for extension of time.

30. They cited the following grounds:

- a. Each litigation is separate and distinct which required specific responses both the High Court and to this honourable court.
- b. No sufficient reasons have been advanced in support of the delay to file the Notice of Address for Service and Response within time to warrant the grant of the orders sought.

### **SUBMISSIONS ON THE 1<sup>ST</sup> RESPONDENT'S EXTENSION OF TIME**

31. The 1<sup>st</sup> Respondent did not file submissions.

32. However, the Petitioner submitted as follows:

As relates to the 1<sup>st</sup> Respondent's application dated 25<sup>th</sup> September 2017 the court's discretion is exercisable judiciously upon sufficient reason being advanced. In the affidavit in support of the said application no justifiable reasons have been advanced for the delay so as to convince the court to exercise her discretion in favour. The same should therefore be dismissed with costs.

### **CASE LAW & ANALYSIS**

33. As always, the starting point for this court is the law. Article 159(2)(d) of the Constitution provides:

**In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(a) ...**

**(b) ...**

(c)...

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

34. The Elections (Parliamentary and County Elections) Petition Rules, 2017 also gives guidance to this court on the 1<sup>st</sup> Respondent's application for extension of time. Rules 4 and 5 state:

**4. (1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.**

**(2) An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).**

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

**(2) A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and, for that purpose, to participate in the processes of the election court and to comply with the directions and orders of the election court.**

35. The Supreme Court in Moses Mwicigi case cited elsewhere in this ruling followed the principle in Article 159(2)(d) of the Constitution. In that case, the Supreme Court was invited to strike out the appeal for failure to comply with Rule 33 of the Supreme Court Rules. But the court declined to do so. The judges opined at paragraphs 66 and 68 (quoted in part below):

**...Yet procedure, in general terms is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the Constitution...We are therefore not inclined to invalidate the appeal on grounds only that it does not stand on all fours with Rule 33 of this Court's Rules. An invalidation, indeed would deprive the court of an opportunity to pronounce itself on substantial questions of law raised by the submissions of counsel for the parties.**

36. I take the same position as the Supreme Court in regard to the 1<sup>st</sup> Respondent's application for extension of time. However, it is not lost on this court that it took the 1<sup>st</sup> Respondent more than two weeks to put his house in order following the decision of the High Court on September 8, 2017 in **J.R. (Mombasa) Petition No. 36 of 2017 – Michael Kanja Kagori vs. I.E.B.C and Five Others**. But it would cause undue hardship if the 1<sup>st</sup> Respondent was locked out of the election petition due to a technicality.

37. (Rtd) Judge Onyancha in **Bashir Haji Abdullahi vs. Adan Mohamed Nooru & Three others [2013] eKLR** faced an issue similar on all fours to that which is before this court. In a ruling he delivered the prayers were as follows:

**The applications before the court are six in number. They were:**

**a. Petitioner's Notice of Preliminary Objection dated 4<sup>th</sup> May, 2013 which on its face does not seek any specific relief after pointing out the fact that the 2<sup>nd</sup> Respondent has so far failed to enter appearance using the Form and manner contemplated under Rule 7 of the Elections (Parliamentary and County Election) Petition Rules.**

**b. Petitioner's Notice of Motion dated 4<sup>th</sup> May, 2013 against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's, and seeking the striking out of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. Response to the Petition on the grounds that the same were filed in time but served out of time or that they were filed and**

served out of the prescribed times.

c. **Petitioners Notice of Motion dated 9<sup>th</sup> May, 2013 against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, seeking the striking out of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents responses to the petition on the ground of the same having been served upon the Petitioner, out of the prescribed time.**

d. **The 1<sup>st</sup> Respondent's Notice of Motion against the Petitioner dated 7<sup>th</sup> May 2013 seeking extension of time within which the 1<sup>st</sup> Respondent should have served an Answer to the Petition and also seeking that the filed Responses in form of affidavits be deemed as timely filed.**

e. **The 2<sup>nd</sup> Respondent's Notice of Motion against the Petitioner dated 7<sup>th</sup> May, 2013, seeking extension of time within which 2<sup>nd</sup> Respondent's should have filed and served his Answer to the Petition and also seeking that the 2<sup>nd</sup> Respondent's Response dated 26<sup>th</sup> April, 2013 and served on the same day, be deemed to be a proper answer to the petition and to be deemed to have been timely filed.**

f. **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' joint Notice of Motion against the Petitioner dated 8<sup>th</sup> May, 2013, seeking extension of time within which they should serve their Response to the petition and also seeking an order deeming the filed Response as properly and timely filed.**

38. In determining the applications before him Judge Onyancha said:

**... the purport of the applications before the court is to seek extension of time so that the documents they filed late may be accepted into the record of this petition to enable the Respondents to have locus to defend the petition. They cited Rule 20 of the Elections Petitions Rule, 2013 as giving the court the power to extend time. It says: -**

***“Where any matter is to be done within such time as provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done with such conditions as it may consider fit even though the period initially provided or granted may have expired.”***

**Clearly, this court has power to grant extension after being satisfied that there are good reasons to do so for the purpose of preventing injustice being done to the party or even generally in the matter before it.**

39. Rule 20 of the revoked Election Petition Rules 2013 is like rule 19(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 which provides:

**Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.**

## **CONCLUSION ON EXTENSION OF TIME**

40. In view of all the above, I find it fit to make the following orders with regard to the extension of time:

a. The time for filing a response to the petition is extended.

b. The draft response attached to the Notice of Motion filed on September 27, 2017 is deemed as filed.

c. The 1<sup>st</sup> Respondent's response if it has not been served is to be served within 7 (seven) days from the delivery of this ruling.

d. Costs are in the cause.

**DECISION**

41. I dismiss the 2<sup>nd</sup> Respondent's preliminary objection.

42. The time for filing a response to the petition is extended.

43. The draft response attached to the Notice of Motion filed on September 27, 2017 is deemed as filed.

44. The 1<sup>st</sup> Respondent's response if it has not been served is to be served within 7 (seven) days from the delivery of this ruling.

45. Costs are in the cause.

DATED AND DELIVERED IN LAMU THIS 17<sup>TH</sup> DAY OF OCTOBER 2017

**NJERI THUKU**

**PRINCIPAL MAGISTRATE**

In the presence of:

Court Assistant.....

Petitioner.....

1<sup>st</sup> Respondent.....

2<sup>nd</sup> Respondent.....

3<sup>rd</sup> Respondent.....

4<sup>th</sup> Respondent.....