



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE’S COURT
AT KAJIADO
ELECTIONS PETITION 1 OF 2017

HON NIXON SUNTE KARAINA.....PETITIONER

VERSUS

HON PAUL KIPAMET MATUYA.....1ST RESPONDENT

RETURNING OFFICER IEBC KAJIADO EAST SUB-COUNTY....2ND RESPONDENT

THE IEBC COMMISSION.....3RD RESPONDENT

INTERLOCUTORY APPLICATION BY 1ST REPENDENT

RULING

In the Notice of Motion dated 28th September 2017 the 1st Respondent Hon. Paul Kipamet Matuya asked the court to make the following orders;-

1. That the Hon. court be pleased to expunge paragraphs 24, 26, 28,29, 30, 31, 32, 33, 34, 35, 36,and 37 of the Petition,
2. That the Hon. court be pleased to expunge paragraphs B, 5 (c and) 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the Petitioner’s affidavit sworn on 6th September 2017.
3. The Hon. Court be pleased to strike out the affidavit of;
 - a) Moses Onsinyo Sepekwa
 - b) Robert Cheruiyot Ngetich and
 - c) Samuel Hiuhu

That costs of the application be provided.

He set out grounds relied on as;-

- (a) That the persons whose conduct is complained of are not Respondents
- (b) That the resolution of the petition shall be expedited.

(d) That liability of electoral officers is personal as far as their conduct is concerned.

(d) That the period of joining further Respondents in the petition has lapsed.

In support of the application the 2nd and 3rd Respondents filed a list of grounds to the effect that:-

1. The affidavits in support of the Petition do not comply with the provisions of Regulation No. 12 of the Elections (parliamentary and County Elections) petitions Rules 2017 and Order 19 of the Civil Procedure Rules.

2. The affidavits in support of the Petition offend the provisions of section 16 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya

3. The provisions of Article 159 of the Constitution do not negate the need to conform to express substantive statutory provisions.

4. That the affidavits in support of the Petition are frivolous, irrelevant, general in nature, unsubstantiated and improper and the same should be struck out.

The Petitioner appears to have stuck with the points he raised in the Preliminary point of objection. This application too was canvassed by way of oral submissions by learned counsel. For the 1st Respondent it was argued;

1) That the Presiding Officer and other officers complained about are appointed pursuant to sections 3 and 5 of the Elections General Regulations 2012 and their duties outlined in Article 86 (b) and 86(c) of the Constitution and under Rule No.2 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 these people are listed alongside the IEBC Commission as Respondents.

2) That failing to enjoin the officers in their individual capacities would mean that they will be condemned unheard as they act independently and are not subject to control of any other person. The court was referred to the Maina Kiai case specifically to the decision that the decision at the polling station is final and not subject to change.

3) That for the reason, If a party challenges a decision at the polling station the Presiding Officer ought to be a party to the Petition and failure to enjoin is fatal and incurable under Article 159 of the constitution since the time line has elapsed.

4) It was also submitted that the Affidavit in support of the Petition offends Rules 12 (2) (C) and (d) of the Elections (parliamentary and County Elections) petition Rules 2017 for failing to refer to the affidavits in support which then should be struck out.

5) Concerning the supporting affidavits (witness affidavits), it was submitted that they offend section 16 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya in so far as they refer to more statements that will require the calling of other witnesses to verify the assertions. That they are frivolous, irregular, irrelevant and unsubstantiated.

6) That Article 159 of the Constitution could only arise if the want of form was only procedural and not where they have failed to comply with statutory provisions.

For the petitioner the argument was that the Constitution is the supreme law when it comes to interpretations. The example was given of the **Raila Amollo Odinga –vs- Uhuru Kenyatta and others [2017]** case in which though the Supreme Court noted that there were irregularities it did not punish the officers concerned.

That the Petition was hinged on the supporting affidavits in that the Jubilee agents were denied

access to polling stations and this went against the provisions for transparency enshrined in Article 86 (c) of the Constitution.

It was submitted that under section 17 of Cap 15 makers of affidavits could be called in court for cross examination on their averments while Rule 12 of the Elections (parliamentary and County Elections) petitions Rules provides for evidence by way of affidavits and the Petitioner's affidavits were well within Order 19 of the civil procedure Rules.

The issues for determinations are;-

- a) Whether the Presiding Officer and other polling officers complained about by the Petitioner ought to have been enjoined as Respondents and if failure to do so is overtaken by time that has lapsed necessitating striking out of the relevant parts of the Petition and affidavits in support
- b) Whether the affidavit in support of the Petition is defective for failing to refer to other affidavits in support and therefore should be struck out.
- c) Whether the witnesses' affidavits offend section 16 of the Oaths and Statutory Declaration Act by referring to statements which cannot be verified and therefore should be struck out.
- d) Whether Article 159 of the Constitution could be overlooked in the circumstances.
- e) Lastly, whether the failure to file a substantive response to the application and merely rely on the points raised in the Preliminary objection can be taken as conceding to the application on the part of the Petitioner.

Starting with the last. It was noted in the decision on the Petitioner's Preliminary point of objection raised against this application that it amounted to a premature response to the application before it was argued.

Seeing the suit before the court and its importance in determining who won the County Assembly seat for Kitengela ward, and considering that under section (1A) and (1B) of the Civil Procedure Act this court is enjoined in every case to consider the Overriding Principle to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes before it, Article 159 of the Constitution guides me further not to be overly concerned with issues of want of form in the circumstances but in real issues at hand. Having heard the Petitioner in the Preliminary objection and in the application and listening to counsels' arguments in this application, I am satisfied as to the real issues that must be decided and expeditiously for the Petition to move to the next stage. I therefore move straight into the determination.

The main contention is that the persons complained of in the Petition and affidavits, to have occasioned the irregularities alleged, the Presiding Officer and others conducting the exercise, are not enjoined as Respondents in this Petition and that this is an incurable omission. For the petitioner it was argued that these officers are employees of IEBC.

The Election (General) Regulations 2012 defines the IEBC and the various election officers appointed by the commission as Election Officers. These are: a returning officer, a deputy returning officer, a presiding officer, a deputy presiding officer, a clerk or an interpreter. These are the officers being referred to in the petition. Should they have been sued separately in their individual capacities? The answer is "No". These are employees of IEBC and do not do any personal duties while presiding as elections officers according to the appointing authority. I have not been persuaded otherwise. IEBC is the 3rd Respondent and the correct body to be sued. As to whether affidavits of witnesses offend section 16 of Cap 15 Laws of Kenya, this legislation deals with affirmation in that section. The argument was not clear. The Election (Parliamentary and County Elections) petitions Rules 2017 are clear on requirements for filing a Petition.

The Petition must be supported by an affidavit. Rule 12 (2) gives details of such an affidavit. It does not

provide that the affidavit refers to witness' affidavits as claimed by the Respondents. I have looked at the affidavits filed for the Petitioner's case generally. They refer to the issues coming up in the Petition.

I have not seen anything irrelevant, frivolous or scandalous. The court's primary duty is not to dwell on issues of form as discussed earlier. It is to seek and resolve the real issues before it unless the technicalities go to the core of the Petition or the substance of the case. I am persuaded by the reasoning by Hon Justice Kimondo in;-

Steven Kariuki –vs- George Mike Wanjohi & 2 others [2013] eKLR.

He said and I quote;

“This court is enjoined to navigate round these technical failures and aim at resolving the primary dispute between the parties. The court is only being faithful to the Constitution, the Election Act 2011 and the regulations there under”

I believe that the same should apply in the case before us whereby the court should ignore the minor omissions and want of form and move on to hearing and determination of the Petition.

For reasons stated the 1st Respondents application dated 28th September 2017 is dismissed with costs.

Dated and signed this 23rd October 2017.

S.M SHITUBI – CM

23-10-2017

Before: S M Shitubi CM

CC Caleb

Mrs. Yano and Mr. Muaka for the Petitioner

Mr. Morara and Mr. Nyantika for the 1st Respondent

Mrs. Koech for the 2nd and 3rd Respondents

Court- Ruling is read and delivered in open court

SM Shitubi CM

Mrs. Yano- We are ready for Hearing

Mr. Morara- The 1st Respondent is ready too.

Mrs. Koech- We are also ready for Hearing.

SM Shitubi CM

Court- Hearing Commences

SM Shitubi CM