



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KERICHO

ELECTION PETITION NO 1 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ELECTIONS ACT & REGULATION 2014

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)

PETITIONS RULES, 2013

AND

**IN THE MATTER OF THE ELECTION FOR THE MEMBER OF THE COUNTY ASSEMBLY
OF KAPKATET WARD**

AND

**IN THE MATTER OF THE PETITION FOR THE DECLARATION OF WHICH CANDIDATE
WAS VALIDLY ELECTED**

BETWEEN

AMOS KIMUTAI BIRIR.....PETITIONER

VS

HILLARY KIPYEGON BETT.....1ST RESPONDENT /APPLICANT

ONYANGO PETER OUMA

BURETI CONSTITUENCY

RETURNING OFFICER.....2ND RESPONDENT /APPLICANT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT/ APPLICANT

RULING

The petitioner in this Election Petition was a County Assembly candidate, Kapkatet Ward within Kericho County. The election aforesaid was conducted with other elections, presidential and National Assembly elections. The elections in respect of Kapkatet Ward were held on 8 / 8 / 2017 and results were declared. The petitioner lost to the 1st respondent/ applicant. He was dissatisfied on the grounds that there were irregularities and malpractices. Consequently he has filed this petition with the following prayers:

- a) A recount, verification and scrutiny of all the votes cast in the election for Member of County Assembly, Kapkatet Ward.
- b) That the court do declare that the 1st respondent not validly elected member of the County Assembly Kapkatet Ward
- c) That this honourable Court do declare the petitioner the duly and validly elected member of County Assembly Kapkatet Ward
- d) That costs of this petition be borne by the respondent

The respondents filed their responses to the petition on different dates. They contended that the election was conducted in accordance with the Constitution , the Independent Electoral and Boundaries Commission Act, the Regulations there under and all other relevant provisions of the law.

They also averred that the elections conducted on 8 / 8 / 2017 were free, fair and credible and were conducted in accordance with the constitution and Elections Laws.

That in declaring the results of the County Assembly election Kapkatet Ward, effect was given to sovereign will of the people of the Kapkatet Ward.

The respondent pleaded that service of the petition was not done as per the law. The 1st respondent was served outside the legally stipulated time. The 2nd and 3rd respondents were never served.

The petition was further challenged that it had not complied with a mandatory requirement. The petitioner was under obligation to deposit in court a sum of Kshs. 100,000/= being security for costs within 10 days of filing the petition.

The court fixed this matter for the pre- trial conference on 12 / 10 / 2017. The court bailiff effected service on all the parties to the petition or their respective counsels. The petitioner and his counsel were not in attendance for the pre-trial conference. The 1st respondent's counsel was in attendance and sought to be given a date for an application for striking out the petition. The advocates for the 2nd and 3rd respondents had just come on record and required time to file their response and an application to strike out the petition.

The court gave directions allowing the 2nd and 3rd respondent time to file their application within 5 days. All applications were fixed for hearing on 25/ 10 / 2015. However, the hearing did not proceed on that day as it turned out to be a public holiday. The hearing was rescheduled for 9/ 11/ 2015.

On 9/ 11/ 2017 the petitioner and counsels for the respondents were present. The respondents were ready to argue their respective applications seeking to strike out the petition. In the first instance, the petitioner who had filed notice to act in person told the court that he had filed a notice to withdraw the petition. Counsels for the respondents gave their input that the notice for withdrawal did not meet the threshold for the withdrawal as enshrined in Petition Rules, 2017 (Rules 21-23)

On the other limb the petitioner sought for more time to appoint an advocate and regularize the position. The court allowed him 7 days to appoint an advocate thereof.

The applications for striking out the petition came up for hearing on 15/ 11/ 2017. Again, neither the petitioner nor an advocate of his choice was present. Because the date had been fixed in the presence of the parties, the court allowed the applicants counsel to proceed.

The applications by the applicants were identical. They were brought under Rules 8, 10 , 12, 13 of the Elections (parliamentary and County Elections) Petitions Rules, 2017, Sections 77 and 78 of the Elections Act and all enabling provisions of the law)

The two fundamental prayers in the applications are:

- a) That the petition dated 22nd August, 2017 and filed in court on 23/ 8/ 2017 be struck out for failure by the petitioner to serve the petition on time
- b) That the Election petition by the petitioner herein dated 22nd August, 2017 and filed on 23rd August, 2017 be struck out for failure by the petitioner to deposit security.

The 1st respondent swore an affidavit dated 9 / 10 / 2017 giving a chronology of events. As earlier indicated the petition had been filed on 23 / 8 / 2017 and served on the 1st respondent's servant on 6/ 9 / 2017.

The 1st respondent's contention was that the petitioner ought to have effected service within 7 days from the date of filing. Clearly the petitioner did not comply with the requirement of the law Petition Rules, Rule 10 thereof provides:

10(1) within seven days after the filing of a petition, the petitioner shall serve the petition on the respondent by-

- a) direct service or
- b) an advertisement that is published in a newspaper of national circulation.

(2) Service on the commission shall be by-

- (a) delivery at the constituency, county or head office of the commission
- (b) delivery at such other office as the commission may notify;

Or

(c) an advertisement that is published in a newspaper of national circulation

On the other limb, the respondents contended that the Rules and the Elections Act require the petitioner to deposit in court a sum of kshs. 100,000/= being security for costs within 10 days of filing the petition. Rule 13 provides;

(1) Within 10 days of filing of a petition, a petitioner shall deposit security for the payment of cost in compliance with Sec. 78 (2) (b) and (c) of the Act.

Sec.78 (2) (C) provides for deposit of kshs. 100,000/=, in the case of a petition against a member of County Assembly.

Further the law allows the respondent to apply for an order to dismiss the petition and costs incidental thereto. The 2nd and 3rd respondents became aware of the petition upon being served by the court on 5 / 10 / 2017.

I have given a chronology of the events from the time this petition was commenced. The petitioner did not challenge the fact that the petition was filed on 23/ 8 / 2014. That it was served on the 1st respondent on 6 / 9 / 2017. It is also not disputed that the 2nd and 3rd respondents were never served with the petition herein.

It is important to note that upon filing the petition, the petitioner did not endeavor to deposit kshs. 100,000/= as per the requirement of the law.

As demonstrated hereinabove, the petitioner failed to meet the fundamental requirements in law before a petition is set down for hearing. Courts have dealt with similar situations previous. There is nothing herein showing that certain factors prevented the petition from effecting service on the respondent by any of the modes above.

In **Patrick Ngeta Kimanzi vs Marcus Mutua Muluvi 7 2 others, Election Petition (Machakos) No. 8 of 2013**, the court explained the importance of service in EDR as follows:

Although the regime of service of election petitions has been liberalized, the requirement of service was not dispensed with. Service of the petition is still a requirement under the Constitution, the Act and the Rules. Without service, the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which is underpinned by the well-worn rules of natural justice. A component of due process, it is important that a party has a reasonable opportunity to know the basis of allegations against him. Elementary justice demands that a person be given full information on the case against him and given reasonable opportunity to present a response ...Any pleading filed and not served on the opposite party has no legal force. It cannot be it ...Failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away ...service of the petition is a mandatory requirement and a petition that has not been served cannot proceed for hearing as the respondent is denied the opportunity to contest the facts in the petition.

Mere knowledge of existence of a petition by the respondent can neither cure want of service nor discharge the burden of service imposed on the petitioner by law... service of the petition is not a mere procedural requirement that can be dispensed with but is a mandatory requirement that must be complied with...It is not a mere technicality that can be swept aside by application of the provisions of Article 159(2) (d) and the overriding objective set out in rules 4 and 5 of the Rules. Unless waived by the respondent, service must be effected as it is an essential and mandatory step and an affected party is entitled to apply to the court to strike out the petition for want of service.

The cited case demonstrates that service of a petition is a mandatory requirement. The hearing of a petition cannot go on when the respondent is not aware of what is pleaded in the petition.

The issue was considered by Muriithi J. in **Kisii Petition No.6 of 2015 Fatuma Zainabu Mohamed vs. Ghati Dennitali & 10 others** (unreported)

“Accordingly, security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceedings though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited. As such, the provisions for security for costs are, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principles for the protection of the defendant from unrecoverable costs.”

The case cited hereinabove indicates that security for costs is mandatory. There is a timeline for doing that. Once the petitioner fails to comply with the law, the court’s jurisdiction is ousted. The petitioner herein having failed to comply with the law within the stipulated time this court cannot continue with the hearing of the present petition.

On the premise of the holding by the courts on the fundamental issues hereinabove, I hereby strike out the petition dated 22/ 8 / 2017 with costs to the respondents.

The respondents have succeeded to have the petition struck out. The petition did not go through the full hearing. The counsel for the respondents put in much in defending the petition. The counsels for the respondents were travelling from Nairobi and Nakuru respectively to attend court sessions. The petition has been concluded at this interlocutory stage, i cap costs at kshs. 160,000/= . The same to be assessed for appropriate sharing between the two law firms for the parties herein.

Ruling delivered in open court this 30th day of November, 2017

In the presence of

Petitioner in person

1st respondent Mr. Langat for him

2nd & 3rd respondents Mr. Langat for Mr. Anam for them

Ms. Margaret C/A

SIGNED

S. M. MOKUA, CM

KERICHO LAW COURTS