



REPUBLIC OF KENYA
IN THE MAGISTRATE'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
ELECTION PETITION NO. 17 OF 2017

ABDI MUHYADIN ABDI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

ABDULLAHI MOHAMED BUTHUL.....2ND RESPONDENT

RETURNING OFFICER, SANGAILU WARD,

IJAARA CONSTITUENCY3RD RESPONDENT

RULING

1. On the 8th of September, 2017, the humble petition of Abdi Muhyadin Abdi was received at the Milimani Commercial Courts Registry- Nairobi. The 1st Respondent is the Independent Electoral and Boundaries Commission as established under Article 88 as read together with 248 and 249 of the Constitution and the IEBC Act No. 9 of 2011. The 3rd respondent, the Returning officer Sangailu ward, Ijaara Constituency. The 3rd Respondent was sued as the representative of the 1st Respondent while the 2nd Respondent is the newly elected and sworn in member of County Assembly for Sangailu Ward- Ijaara Constituency.

2. The copy of petition filed in court is not signed, nor dated by the petitioner. In his petition, the Petitioner prays for Judgment against the Respondents for;

(i) A declaration that Section 83 of the Elections Act is unconstitutional and the same be declared null and void.

(ii) This Honourable Court does find that the 2nd Respondent may have committed a serious electoral offence of bribing voters contrary to Section 9 of the Electoral Offices Act and that an order to that effect be transmitted to the Director of Public Prosecutions.

(iii) That a declaration that the 2nd Respondent election as member of County Assembly was void ab initio since the 2nd Respondent contravened the provisions of sections 26(1) of the Electoral Act by participating directly in a public fund raising or harambee within 8 months proceeding the 8th

of August.

(iv) A declaration that Abdullahi Mohamed was not validly elected as member of county assembly for Sangailu Ward Ijaara Constituency in the general elections that were held on 8/8/2017 and a certificate to that be issued to the speaker of the county Assembly Garissa.

(v) A declaration that Abdi Muhyadin Abdi, the petitioner herein, was in the circumstances validly elected as the member of county assembly for Sangailu Ward, Ijaara Constituency and not Abdullahi Mohammed Buthul in the general elections that were held on 8/8/2007.

(vi) That the 1st respondent be compelled to issue Abdi Muhyadin Abdi, the petitioner herein, with a certificate of Election immediately and unconditionally.

(vii) In the alternative and strictly without prejudice to the above captioned prayer, a declaration that the election of the member of county assembly for Sangailu Ward, Ijaara Constituency on the general elections that were held on 8/8/2017 was not conducted in conformity with the constitution, the election laws and election regulations and the same be, declared null and void.

(viii) An order for the conduct of fresh election for the Member of County Assembly for Sangailu Ward, Ijaara Constituency.

(ix) Costs of this petition and the interest thereon be provided for. Any other and further relied that this Honourable Court may deem fit and just to grant in the circumstances.

3. The firm of Hassan Mutembei & Co Advocates filed response to election petition on behalf of the 1st and 3rd Respondents on 22/9/2017. The firm of Muma & Kanjama filed the response to petition on behalf of the 2nd petitioner on 22/9/2017.

4. Further on 27th September, 2017, the 2nd respondent filed a notice of motion dated 27th September, 2017 together with grounds of oppositions in respect to the petitioners application dated 8th August, 2017 seeking dismissal of the petition.

5. On the 4/10/2017, Mr. Musyoki holding brief for Mr. Mogaka for the petitioner, Mr. Hassan representing 1st and 3rd respondents and Mr. Kanjama representing 2nd respondent appeared before court for pretrial conference. In the essence of a pre-trial conference is to do what is required by Rule 15(1) of the Elections Rules 2017, and that is;

a) Frame the contested and uncontested issues in the petition.

b) Analyse methods for resolving the contested issues.

c) Determine interlocutory applications.

d) Confirm the number of witnesses the parties intend to call.

e) Give an order, where necessary, for furnishing further particulars.

f) Give directions for the disposal of the suit or any outstanding issues.

g) Give direction as to the place and time of hearing the petition.

h) Give directions as to the filing and serving of any further affidavits or giving of additional evidence.

i) Give directions on limiting the volume of any copies of documents that may be required to

be filed; or

j) Make such orders as may be necessary to prevent unnecessary expenses.

6. It is a cardinal principle of election disputes resolutions that the hearing and determination ought to be heard expeditiously and that is why there are strict timelines to be complied with by the court and the parties involved. Section 85 of the Elections Act provide that Section 85;

“An election petition under this Act shall be heard and determined within the period specified in the constitution’ section 75 (2) of the Elections Act provides that “ a decision under sub section (1) shall be heard and determined within six months of the date of lodging the petition.”

7. During the pre-trial conference, Mr. Musyoki, holding brief for Mr. Mogaka informed the court that Mr. Mogaka has lost contact with his client the petitioner. Mr. Mogaka had been trying to reach the petitioner in vain and that he was not familiar with his residence at Garissa. The petitioner had also not filed security for costs and as such, Mr. Mogaka sought time to file an application to cease from acting. In response, Mr. Hassan was not opposed to Mr. Mogaka being granted time to file application to cease from acting, but did apply that the petition be dismissed since the petitioner had not complied with the law. Mr. Kanjama submitted that since the petitioner had failed to comply with the constitutional time lines as required under Article 87 of the Constitution, and the statutory requirements in respect to deposit of security for costs, the court ought to dismiss the petition as the court could undertake further proceedings.

8. The court did grant orders that Mr. Mogaka files his application to seek from acting and file and serve by close of business on 9/10/2017. The application by Mr. Mogaka to cease from acting and the 2nd respondent’s application dated 27/9/2017 were to be heard on 12/10/2017 at 2.30 pm. Having so ordered, Mr. Musyoki and Musyoki Advocates & Co. filed application dated 9/10/2017. Subsequently, the 2nd respondent field grounds of opposition to the petitioner’s application dated 9/10/2017.

9. On 12/10/2017, Mr. Kanjama for 2nd petitioner, Mr. Anyona for 1st and 3rd respondent and Mr. Musyoki for the petitioner were present before court. By consent, advocates agreed that the application dated 27/9/2017 field by the 2nd respondent, canvassed, first, and thereafter parties do proceed to canvass the application by Mr. Musyoki Mogaka dated 9/10/2017.

2ND RESPONDENT’S APPLCIAITON DATED 27/9/2017

10. The 2nd application sought for orders that the petitioners petition dated 8/9/2017 be dismissed with costs to the 2nd respondent. The application was based on the grounds that;

(i) *On 8/8/2017, the 1st respondent conducted general elections for various electoral posts including that of member of county assembly for various across the county. The 1st respondent tallied results for Sangailu Ward on the 9th August, 2017 declared the 2nd respondents as the member of the county assembly elect for Sangailu Ward.*

(ii) *Article 87(2) of the constitution provides for a constitutional limitation period of 28 days from the day of declaration of results within which anyone can challenge the election of results declared by the 1st Respondent.*

(iii) *The electoral laws requires that upon filing of any petition, the petitioner should deposit kshs. 100,000/= as security for costs within 10 days of such filing.*

11. The petitioner did not oppose the application filed by the 2nd respondent. In his submissions, Mr.Kanjama pointed out to the court the provision of article 87 of the constitution. In particular, he

highlighted the provisions of Article 87 (2) which provides that petitions concerning an election other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission. He went on to submit that the fundamental provision as supported by section 75 1(A) of the Elections Act which provides that a question of a member of a county Assembly shall be heard and determined by the Resident Magistrates court designated by the Chief Justice.

12. The second respondent cited the following authorities;

- (i) Hassan Ali Joho & Another Vs Suleiman Said Shabhal (2014) eKLR
- (ii) Mary Wambui Muneo –Vs Peter Gichuki Kingara and 2 others (2014) eKLR.
- (iii) Lamanken Aramat –v- Harun Mutamei Lempaika and 2 others (2014) eKLR.

The above cited authorities all make it clear that the twenty eight day period is a limitation period that cannot be extended, and that the rights that accrue to a duly elected member cannot be taken away by extension of time.

13. It was further submitted that time starts running from the time results are declared by the Returning officer and relevant forms filled. In this case the 2nd respondent attached form 36 B which showed that elections were held on 8/8/2017 and declared on 9/8/2017. Twenty eight days after 9/8/2017 would end on 6/9/2017. The instant petition was filed on 8/9/2017 after the limitation period had accrued.

14. On the issue of deposit of security for costs, despite the petitioner having filed the petition on 8/9/2017, there was no evidence at all of deposit of kshs. 100,000/= as required by the law.

15. Mr. Anyonka pointed out that though the 1st and 3rd respondent had not filed a formal application, they had in their response pointed out that intention to raise these issues. He went on to state that the failure by the petitioner to abide by the law, in regard to limitation and timelines deposit of security for costs makes the petitioner non-starter. The two requirements are not procedural or technicalities and hence the petitioner cannot seek refuge under Article 159 (2)(d) of the Constitution or Rule 4 or 19 (2) of the Electoral Rules.

16. As earlier noted, the petitioner did not file any response nor did Mr. Musyoki respond owing to what he termed lack of instructions.

APPLICATION DATED 9/10/2017

17. The application is brought under Section 3 and 3A of the Civil Procedure Act and accompanying Rules 2010, and all other enabling provisions. The application seek orders be granted that the Honourable Court does grant leave to the advocate firm of the petitioner Messers Musyoki Mogaka & Co. Advocates to cease and or withdraw acting in this matter on behalf of the petitioner, and that the costs of the application be provided for. The application is supported by the supporting affidavit of Stephen M. Mogaka.

SUBMISSIONS

18. Even as Mr. Musyoki sought to argue the application before court, there was no evidence, or evidence of attempt made by the firm in question to serve the said application on their petitioner personally or by way of advertisement. It was submitted by Mr. Musyoki that Mr. Mogaka did not have instructions from his client since communication had ceased three weeks ago. Mr. Mogaka had also given clear instructions to the petitioner to deposit Kshs. 100,000/= but this was not done by the petitioner. Without instructions, Mr. Mogaka would not be in a position to continue representing the petitioner, and hence the reason he sought leave to cease from acting to be granted. He was also committed to giving the telephone contacts that the petitioner had been using to the respondents.

19. Mr. Kanjama in opposing the application submitted that the application is unsustainable and defective because it is brought under the provisions civil procedure Act; yet Civil Procedure Act and rules do not apply in Elections petitions. Secondly, he submitted that there is no automatic right to withdraw from a matter by advocate who has presented a case before court and that it was within the discretion of the court to either allow or reject the application.

20. It was further submitted that an advocate is an agent of the litigant, and has several duties before moving the court. He ought to verify and confirm the identity of his client, confirm instructions and also advise the client as to the requirements before moving the court. These duties are even more significant where an advocate initiates time bound proceedings or purports to act for a corporate client. He urged the court to exercise its discretion and find that if the advocate failed to discharge his professional duties, that he be ordered to personally pay costs. He further urged the court to disallow the application and order the cost of the petition and application be paid jointly and severally by the petitioner and the petitioners advocate.

21. Mr. Mogaka submitted that should the advocate be allowed to cease from acting for the petitioner, the court does make orders that the withdrawal be on condition that the firm of advocates do provide the current and correct address of the petitioner, his current and correct telephone number and e-mail address. If the respondents should be unable to reach the petitioner, the advocate to be compelled to facilitate notice by way of advertisement if other modes of service fail.

22. In his response, Mr. Musyoki stated that Mr. Mogaka was ready to provide all the contact details including physical address. The petitioner according to Mr. Musyoki is a member of a political party and had been served with the application to cease from acting. He went further to state that it would not be hard to trace his home and that the advocate should not be compelled to pay for substituted service or advertisement.

ISSUES FOR DETERMINATION

23. From the foregoing, the following issues lend themselves for determination by this Honourable Court;-

(i) *Whether this Honourable Court has jurisdiction to entertain the present petition having been filed outside the constitutional time lines and without furnishing security for costs.*

(ii) *Whether the firm of Musyoki & Mogaka & company Advocates should be allowed to cease from acting for the petitioner at the stage of the proceedings.*

(iii) *Who should bear the costs.*

ANALYSIS

24. (i) Whether this Honourable Court has jurisdiction to entertain the present petition having been filed outside constitutional timelines: I have taken time to peruse the petition filed on 8th September, 2017. As earlier indicated, the said petition is conducted and not signed by the petitioner. The lengthy petition is indeed and skeleton devoid of any annexures or supporting documents. It is not possible to tell from the face of the petition when the results were declared. However, at paragraph 12 of page 16 of the petition, the petitioner states, “ the 3rd respondent purported to declare and certify the 2nd respondent was the winner of the Sangailu Ward County Assembly having gathered and highest number of votes cast. Consequently, the 3rd respondent did issue the 2nd respondent with a certificate of election on 10/8/2017”(Emphasis mine)

25. The certificate of election dated 10/8/2017 was not annexed the petitioned at all. One can only read mischief on the part of the petitioner in a bid to conceal the exact time/day when the results were declared. On their part, the 2nd and 3rd respondents attached in their response Form 36 (c) –certificate of

Electoral Member of County Assembly declared Abdullhi Mohamed Buthul (2nd respondent) as the duly elected member of County Assembly for Sangailu Ward of Garrissa County in the election held on 8/8/2017. The Returning officer Ibrahim A. Farah signed the certificate on 9th August, 2017. This evidence was not rebutted by the petitioner.

26. Article 87 of the Constitution prescribes a constitutional timeline of twenty eight days within which election should be filed on the following terms -Article 87 (2)

“ (2) petitions concerning an election other than a presidential election shall be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission”

27. A Returning officer is supposed to complete and issue form 36 B under Rule 83 of the Elections (general) Regulations, 2012 on tallying and announcement of election results, which in the relevant section provides as follows;-

Section 83(1) Immediately after the results of the polls from all polling stations in a constituency have been received by the returning officer, the Returning Officer shall, in the presence of candidates or agents and observers if present,

(a)-----

(f) Sign and date the relevant forms and publicly declare the result for the position of;

(i) Member of county assembly;

(ii)-----

(g) Issue certificate to persons elected in the county assembly by national assembly elections in Forms 36 (c) and 35 (c) respectively set out in the schedule.

28. Under the interpretation and General Provisions Act (Cap 2) Laws of Kenya, time starts running the following day after the day of the event. Section 57 of the Act provides as follows;

Section 57, in computing time for the purposes of and written Law unless the contrary intention appears-

“(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done”

Applying this provision to the present case where the evidence is that the results of the election that the results of the election were declared on the 9th August, 2017, it follows that time for filing the petition started running on 10th August, 2017. Counting from this date the twenty eight days within which the petition was supposed to be filed ended on 7/9/2017. The instant petition having been filed on 8/0/2017 was clearly outside the constitutional timelines and must fail.

29. The Supreme Court in Lemanken Aramat –Vs- Harun Meiramei Lempaka & 2 others 2014 eKLR, while listening to an appeal in respect of Narok East parliamentary elections, the court was invited to make a finding on whether the High Court, Court of Appeal or the Supreme court had jurisdiction to determine the election petition when the same was filed out of time. In finding that none of the courts had jurisdiction to entertain the proceedings therein the court expressed itself in the following paragraphs:

(69) We have to note that the electoral process, and the electoral dispute resolutions in mechanism in Kenya, are marked by certain special facilities. A condition set in respect of electoral disputes; is the strict adherence to the timelines prescribed by the constitution, and the electoral law. The jurisdiction of the court to hear and determine electoral disputes is

inherently tied to the issue of time, and breach of this strict scheme of time removes the dispute from the jurisdiction of the Court.

'(81) those who filed the elections petition outside the twenty eight day requirement of the constitution cannot in our perception avoid the consequences of their dilatoriness; for it is the prescribed time frame, that opens the jurisdiction of the courts. And this being such an elemental constitutional requirement, it stands out by itself, irrespective of the averments made by the parties in their pleadings. To this question, the general discretion provided for in Article 159 does not apply, as this is not a ordinary issue of procedural compliance'

I reiterate, the petition on this ground must fail.

30. Whether this Honourable Court has jurisdiction to entertain the present petition without furnishing security for costs.

Section 78 of the Election Act provides;-

1. A petitioner shall deposit security for the payment of cost that may become payable by the petitioner not more than 10 days after the presentation of a petition under this part.

2. A person who presents a petition to challenge all elections shall deposit;

(a) -----

(b)----

(c) one hundred thousand, in the case of a petition against a member of a county assembly.

3. Where a petitioner does not deposit security as required by this section, or of an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for the payment of the respondent's costs.

31. There is no evidence of deposit of security for costs as required by Law. It is a matter of general knowledge and not disputed that to-date the petitioner has not made a deposit for security for costs in the sum of Kshs. 100,000/=. The provision for deposit for security for costs is a substantive requirement underpinning the jurisdiction of the court to deal with the dispute. It is meant to cure a fundamental mischief which is to discourage frivolous or vexatious litigants from challenging the results of an election and to cushion the respondent from any costs that might ensure from such petition proceedings.

32. In the case of Evans Nyambaso Zekediah & another –Vs- independent Electoral and boundaries commission & 2 others, (2013) eKLR, Sitati J (Sitati) struck out the election petition for failure by the petitioner to make deposit for security of costs in time as required by the Elections Act. The court cited the decision of the court of Appeal in Nairobi Civil Appeal No. 273 of 2003 (2005) eKLR, thus:

The court of Appeal was faced with a similar of non compliance with section 21 of the repealed Cap 7 of laws of Kenya. On appeal against an order of the superior court and dismissing the petition on account of failure to deposit security within the statutory time frame, the court said the following;

“Once again we think the intention of parliament was clear in enacting the time limit in such peremptory languages –

“ not more than three days shall give....’ does not admit ambiguity or further search for the intention of parliament whether or not parliament should have enacted a further provision for seeking extension of time is appropriate, would of course be academic purposes of this

appeal and in any case there was no attempt to appeal for extension of time at all. Section 21 (3) provides for the consequence of non-compliance which is what in the end transpired in this case. Failure to deposit the money within the time was not a mere irregularity which could be waived by the party”

33. It is not disputed that the petitioner in this case has not made the deposit for security for cost. The petitioner has made no attempt to apply for extension of time to make deposit. Worse still, the petitioner after making the effort and expense to file an election petition did not show up in court, and now his advocate, the only contact person known to the court and the respondents also wishes to cease from acting. I find that the petitioner can be described a busy body who needs to be kept out of these proceedings. This is yet another good ground why this petition must and fails.

34. (ii) Whether the firm of Mogaka & Musyoki & Company Advocates should be allowed to cease from acting for the petitioner at this stage of the proceedings.

Mr. Musyoka submitted that an advocate is simply an agent of his client and cannot speak for the client without instructions. On the other hand, Mr. Kanjama submitted that an advocate has a duty to properly take instructions, ascertain the proper identity, of his client, and more so the cases where there is limitation of time. The application is also brought under the provisions of the Civil Procedure Act, and according to advocate for 2nd respondent the application is unattainable and must fail because the Civil Procedure Rules do not apply in election petition.

35. To the extent that the proceedings before court relate to an election petition, and that the application to cease from acting as brought under the civil procedure Act, I do find that the application to cease from acting must fail.

36. I have looked through the Elections Act and did not find any provision that governs the conduct of advocates in Election petitions. However, Rule 5 (2) of Elections (Parliamentary and County Elections) Petitions Rules 2017 provides;

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

The objective of the Rules is set out in Rule (4) as;

1. The objective of these Rules is to facilitate the just, expeditious proportionate and affordable resolution of election petitions.

2. An election court shall, in the exercise of its power 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).

37. I have considered the circumstances surrounding this petition. Bearing in mind the findings already made on the merit of this petition, again I find no justification or merit in the application by the Mr. Mogaka Musyoki Advocate to cease from acting for the petitioner. The petition filed by the said firm is a skeleton and the said firm of advocates cannot seek to bring it to court and abandon the same. To allow the same would amount to allowing the advocate to throw the skeleton to the respondents to deal with a faceless petitioner, whom the advocate state they have lost contact with. Considering that service could also be through advertisement (section 77 of the Elections Act) and the six months strict timelines set for the completion of election petitions, it would not to give effect to the objective of the Act and the Rules to order that petitioner who has shown no interest by way of advertisement in a newspaper with national circulation to do this would cause more delays and expense. I hereby disallow the application by the firm of Mogaka Musyoki & Co. Advocates to cease from acting.

38. (iv) Who should bear the costs of this petition? The petitioner cannot escape the burden of costs. He failed to comply with section 78(3) of the Elections Act No. 2 of 2011. The consequences are stipulated under section 78(4) as follows;

(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or where no order is made, shall form part of the general costs of the petition.

39. Mr.Kanjama urged the court to order that the petitioner and the advocate do pay cost jointly and severally. However, I find that there is no evidence to the effect that the advocate acted in any unethical, unprofessional or contemptuous manner to warrant the court to give such drastic orders that the advocate should pay costs. The petitioner is a member of a party, and one who can be traced without extreme difficulties. I will order that the petitioner does bear the cost of the 2nd respondents Notice of Motion application dated 27th September, 2017 and cost of the petition to the 1st, 2nd and 3rd Respondents.

CONCLUSION.

From the foregoing, this Honourable court makes the following orders;

(i) That this Honourable court lacks the jurisdiction to hear and determine the petitioner dated 8/9/2017, having been filed outside the constitutional timelines.

(ii) That the 2nd Respondent Notice of Motion dated 27/9/2017 is hereby allowed. Costs to be borne by the petitioner.

(iii) The petitioner's petition dated 8th September 2017 is hereby dismissed with costs to the 1st, 2nd and 3rd Respondent.

Orders accordingly.

HON. M.MUTUKU

SPM

2/11/2017

Dated, delivered and signed in open Court at Milimani this 2nd November, 2017.

In the presence of:-

Mr. Anyona for 1st and 3rd Respondents.

Mr. Kanjama for 2nd Respondent.

No appearance for petitioner.

Right of appeal explained.

HON.M.MUTUKU

SPM

ORDER; Parties to be supplied with certified copies of ruling.

M.MUTUKU

SENIOR PRINCIPAL MAGISTRATE

2/11/2017