



REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT WAJIR
ELECTION PETITION NUMBER 5 OF 2017

FATUMA FILLE ELMI.....PETITIONER

AND

I.E.B.C1ST RESPONDENT

PARTY FOR DEVELOPMENT

AND REFORM.....2ND RESPONDENT

SHAMSA MOHAMED OMAR.....3RD RESPONDENT

CLERK OF THE COUNTY ASSEMBLY,

WAJIR COUNTY.....4TH RESPONDENT

RULING:

This petition came up for directions before me on 8th November, 2017. The petitioner's advocate was present but the petitioner was absent. The petitioner had filed a notice to withdraw this petition on 11th September, 2017. This court had ordered the petitioner to strictly comply with Rule 21 and 22 of the Elections (Parliamentary and County Elections) Petition rules, 2017. When the Advocate appeared before me on 8th November, 2017, he informed this court that he had instructions not to withdraw the matter so he would not be complying with the said rule 21 and 22. He urged the court to expunge the notice to withdraw from its records. As such, that notice has no legal value in this suit. The advocate also informed the court that he had not served the petition. The matter was then rescheduled to 10th November, 2017 at 10:00 a.m. for further directions.

On 10th November, 2017, the court considered the effect of failure to serve in view of the strict timelines set by the law. It directed the petitioner through her advocate to appear before it on 14th November, 2017 at 11:30 am to show cause why the petition should not be dismissed for want of service. At 12:05 pm on 14th November, 2017, learned counsel for the petitioner came to open court with a notice of motion. He informed the court that he wished to rely on the filed motion to lay a basis for his cause. The court allowed him to proceed with the motion as suggested. This ruling is on the issues raised by counsel in his bid to salvage this petition.

The motion is premised on Article 38 (2), 50 and 159 (2) of the Constitution of Kenya 2010, section 80 (1) (d) of the Elections Act; Rules 4 (1) (2) 5(1) 10(1) 19(1) of the Elections (Parliamentary and County Elections) petitions Rules 2017. The applicant prayed for two orders; leave to amend the petition and

leave to effect service out of time. The grounds for the motion were enumerated on the face of it and the supporting affidavit of FATUMA FILLE ELMI, the petitioner. The same can be summarized as follows:

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(i) That prayer 1 of the petition was overtaken by events when the 3rd respondent was sworn in hence the need to amend the petition.

(ii) It took time to have the election courts to be gazetted by the Hon. Chief Justice as per the rules. The Wajir Court lacked jurisdiction before the gazettelement so no orders could be sought from it.

(iii) That the short timelines provided in the rules and the distance between Nairobi and Wajir made it practically impossible to effect corrections or amendments to the petition and effect service within time.

I have carefully analyzed the application, the affidavit of FATUMA ELMI (petitioner), oral submissions and the law. Before the issue of amendment can be addressed by this court, there is the key issue of the effect of failure to serve the petition. The petitioner through her advocate admits that the petition has not been served to date, two and a half months down the line since it was filed.

Under rule 5 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (“The Rules”), the effect of any failure to comply with the rules is to be determined at the courts discretion in accordance with the provisions of Article 159 2 (d) of the Constitution.

Failure to comply with rule 10 of the rules therefore ought to be determined with reference to rule 5 which calls for the courts discretion.

The issue of service of election petitions is regulated by the Constitution and the Elections Act which provide the mode and timelines for service of petitions.

Article 87(3) of the constitution provides that a petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

This provision is repeated in section 77 (2) of the Elections Act and complemented in rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

In Mohamed Odha Maro V The County Returning Officer, Tana River and others (2013) eKLR (Malindi EP No. 15 of 2013), the court pronounced itself as follows on the issue of service: -

“The purpose of service of a petition is to give notice to the Respondents or persons affected by the petition that a petition had been filed challenging the outcome of the elections and the grounds upon which the challenge had been instituted to enable them prepare their responses and to defend their respective positions regarding the conduct of the contested elections. Service provides the respondents with an opportunity to be heard and goes to the root of all important tenets of the principle of fair trial and good administration of justice...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.”

The court further found and held that;

“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 imposed on the petitioner by the law”

Since service is such an important element, can failure to serve in the prescribed manner be cured under Article 159 (2) of the Constitution? That Article requires that disputes be administered without undue regard to procedural technicalities. The issue of service is a constitutional and statutory imperative and

failure to comply cannot be cured by invoking Article 159. The Supreme Court in **Raila Odinga and Others Vs. IEBC and 3 others (2013) eKLR (Nairobi) petition No. 5 of 2013** held that: -

“The essence of that Article 159 (2) (d) is that a court of law should not allow prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.”

Service goes to the root of the election petition. Once served, the time for filing of responses starts running. Therefore, if there is no service effected on the respondent, it is difficult to determine at what point he is required to submit his responses, and thereafter, within what timeframe the court should begin hearing the petition. In view of the above, a party cannot therefore invoke Article 159 (2) (d) to regularize the failure to serve.

This court was referred to Rule 19 of the Elections (Parliamentary and County Election) Petitions Rules 2017 which gives it power to extend time. This rule uses the term “may” . It leaves it at the courts discretion. The court is always called upon to examine the circumstances leading to the failure to comply with the rules. I have considered the reasons advanced by the petitioner to support her application. Are they valid reasons? Is the omission excusable in law? I do not think so in view of the foregoing and rule 10 which uses the term ‘shall’. The petitioner is given a strict and mandatory timeline of 15 days within which to serve the petition after filing. This petition was filed on 5th September, 2017. To date, the same has not been served. The petitioner had even contemplated withdrawing the same.

The reasons advanced for the failure to serve are not satisfactory in my considered finding. The petitioner states that she wanted to amend the petition before service. Nothing prevented her from making that application after effecting service once the election court was gazetted. The law had to be complied with first. There was no delay in gazetting the courts. I agree that the distance between Wajir and Nairobi is huge but this cannot be an excuse too. The Respondents are either in Wajir or Nairobi. The petitioners advocate practices Law in Nairobi. The court presumes that she is a resident of Wajir. Her affidavit filed with the Notice of Motion shows that her address is P.O. Box 148 Wajir. It was easy for her to trace and serve all the respondents within 15 days. She has not disclosed any futile attempts made in effecting service. The mistake is inexcusable.

The court appreciates the need to allow all the parties that approach it to have their issues adjudicated on and determined on merit. This right is not absolute. Statutory provisions on procedure, particularly those that go to the root of the dispute have to be adhered to. Election petitions are in a class of their own and they have strict timelines. They also attract immense public interest.

The petitioner has not shown why she needs to amend the petition assuming the same was good in law. The nature of anticipated amendment has not been laid bare to the court. An annexure of the draft proposed amendment would suffice so that the court could interrogate the nature and magnitude of the intended changes. There are some amendments which would completely alter the pleadings thereby introducing a new petition through the back door, which is unacceptable in view of the statutory provisions on timelines for filing a petition. Based on this, it would be impossible to allow an amendment even if the petition was still good.

The upshot of the foregoing is that the petitioner has not convinced me why I should inject new life into this petition. The reasons given for failure to serve are not good enough. It is inexcusable to stay with a petition for over two months without serving the same given the strict statutory timelines for hearing of election petitions. It is my considered finding that this petition is suitable for striking out. The same is hereby struck out for want of service.

The respondents were not served. The court has however incurred logistical and other expenses in handling this matter. I hereby direct and order that half (Kshs. 50,000/-) of the security deposited by the

petitioner in this court be forfeited to the State as reimbursement for incurred costs. She will be refunded the remaining half.

It is also ordered that a certificate under section 86 (1) of the Elections Act No. 24 of 2011 shall issue forthwith.

Hon. P. Mayova

SENIOR RESIDENT MAGISTRATE

MILIMANI LAW COURTS.

Delivered, dated and signed at Milimani Law Courts Nairobi this 21st day of November, 2017.

In the Presence of:

Mr. Amendi, Advocate for petitioner

Michael Onyango, Court Assistant.

Hon. P. Mayova

SENIOR RESIDENT MAGISTRATE

MILIMANI LAW COURTS.

21.11.2017