



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT HOMA BAY

ELECTION PETITION CASE NO. 2 OF 2017

(FORMERLY HIGH COURT CONSTITUTION PETITION NO.11 OF 2017)

JOHN OGINA NYABOLA.....PETITIONER

VERSUS

ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDERIES COMMISSION.....2ND RESPONDENT

CLERK OF THE COUNTY ASSEMBLY

OF HOMABAY COUNTY.....3RD RESPONDENT

RULING

This petition was initially filed in the High Court on 4/9/2017 as a constitutional petition. Under Article 10(a), 27(3) and 90(c) of the constitution and sections 34, 35, 36, 37 of the Election Act 2011;

It prayed inter alia for orders that:

1. The swearing in of the nominated members be stayed by the 3rd respondent on the basis of an irregularity in the nomination process.

When the parties – counsel for applicant and counsel for 3rd respondent – appeared before the Honourable Judge Migori on 5/9/2017, the court gave the following orders

1. Given that the nominated members of the County Assembly of HomaBay have already been sworn into office, this matter is now an election petition which ought to be heard and determined before a designated magistrate. That being the case the legal process on elections shall apply.

That being the case, the file was forwarded to this this court and on 11/10/2017 counsel for petitioner and counsel for 3rd Respondent appeared before me for directions.

Counsel for petitioner sought stay of proceedings for 30 days stating that the petitioner wished to move the High court for review of the orders of 5/9/2017.

The court, bearing in mind the time limits set as to hearings in election petitions declined to allow the

request for stay for 30 days and indulged the petitioner for 7 days within which he ought to have moved to the High court.

It also ordered that the 1st and 2nd respondents be served with a copy of the petition and also that the 3rd Respondents do put in a replying affidavit.

On 16/10/2017 when matter came up for mention to confirm status, the counsel for the petitioner informed court that they would not move to the High court for revision after all and would instead be withdrawing the petition. He asked for 2 weeks within which he would have consulted his client and filed the necessary application for withdrawal. The court obliged him and fixed the matter for mention on 6/11/2017.

The 3rd respondents had by then complied and filed a replying affidavit.

On 6/11/2017 counsel for petitioner appeared before me and asked for one more week, stating that the application would have been filed by then.

On 15/11/2017 when matter came up for mention, counsel informed court that he had not seen his client and asked that court fix matter for directions.

Court fixed the same for pre-trial on 17/11/2017. Issues raised by court on that day;

- **Payment of security deposit.**

This is a requirement under section 78(1) and 2(c) of the Elections Act No.24/11.

In this case, the petitioner was to deposit a security of ksh.100,000/- with court.

Counsel informed court that his client **would not comply** with the order as he had filed a constitutional petition and not an election petition.

Counsel for 3rd Respondent stated that the counsel for petitioner was in court when the matter was referred to the lower court as an election petition and he had not objected to the same or filed a review of the order. Thus ought to comply.

- **Service of Petition:**

A requirement under section 76(1)a of the same Act that it must be served within 10 days of filing of the same. On 11/10/2017 court had ordered the petitioner to serve the 1st and 2nd respondents with the said petition.

As at 17/11/2017 they still hadn't. Counsel stated rather caustically

“ having found ourselves with a crossroads petition, the judge gave orders suo moto and we opted not to serve when it became apparent the Judge was hell bent on having this as an election petition. WE OPTED NOT TO SERVE AND DO NOT INTEND TO SERVE. We only served 3rd respondent”.

- **Interlocutory Application:**

The only issue that came up was the application for withdrawal which counsel for petitioner stated his client had abandoned and left the court to know what he wants to do with the petition.

He maintained that his client was ready to proceed with his constitutional petition at the High Court.

3rd Respondent stated they were ready to proceed with the petition in whatever form it was.

That notwithstanding the court gave the petitioner seven days within which to comply with the mandatory requirements of the Election Act or show cause why the same should not be struck out.

When this matter came up for mention today, counsel again asked for more time to consult his client. He has not complied with the order made on 17/11/2017 as to:

- Deposit of Security
- Service upon 1st and 2nd respondents
 - *Deposit of security*

Section 78(1) Elections Act 2011 is curved in mandatory terms:

A petitioner SHALL deposit security for payment of costs that may become payable to the petitioner not more than 10 days after presentation of the petition under this thus Part.

Petition herein was filed on 1/9/2017. It was referred to the lower court on 5/9/2017 as an election petition. The petitioner has not deposited the requisite security of ksh.100,000/- as required by section 78(2)c of the same Act. Indeed he has expressly stated to court that he **does not intend to**.

This is despite the court enlarging time for him within which to deposit the same. The section is curved in mandatory terms. No election petition can proceed without deposit of security for costs. Court can only enlarge time within which the same is to be paid but the bottom line is the same **MUST** be deposited for hearing to proceed.

- *Service upon 1st and 2nd respondents.*

The petitioner has stated categorically that he does not intend to serve the 1st and 2nd respondents. In the case of **Patrick Ngeta Kimanzi –V- Marcus Mutua Muluvi & 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 petition has been liberalized, the requirement of service was not dispensed with. Service of 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.

As a component of due process, it is important that a party has 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 dealt with by the court and not lawful order can be drawn from 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 the 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.

Court of Appeal in *Rozaah Akinyi Buy V independent Electoral and Bouderies Commission & 2 others, Civil Appeal (Kisumu) No.40 of 2013* stated thus:

Service of the petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same.

The issue of whether or not this is an election petition is spent. It was declared as on 5/9/2017 by the Hon. Judge Migori in the presence of counsel for the petitioner who then stated on 11/10/2017 when he appeared before me that he would be moving the High court for review of the said order. He has not done so to-date stating he will not comply with the mandatory requirements of the Elections Act 2011 and the Elections (Parliamentary and County Elections) Petitions Rules 2017, became what he filed and is ready to proceed with is a constitutional petition is not in good faith. If he believes what is proceeding is a constitutional petition, why not serve it anyway. And why selective service – upon 3rd respondent and not 1st and 2nd respondents.

In view of the foregoing, the petitioner is clearly not interested in pursuing the petition. I thus strike out the petition with costs to the 3rd respondent.

Read out in open court this 23rd November 2017

in the presence of

- i. Mboya holding brief for Nyauke for petitioner
- ii. Ms Dhikosule for 3rd respondent
- iii. Court clerk Christine present

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SUSAN NDEGWA

PRINCIPAL MAGISTRATE

23/11/2017