



REPUBLIC OF KENYA

JURISDICTION: IN THE SPM'S COURT AT KILIFI

FILE NUMBER: ELECTION PETITION NO 6/2017

BETWEEN:

JACOB KAZUNGU KAHINDI V/S I.E.B.C & 2 OTHERS.

CORAM: R.K. ONDIEKI- SPM.

HEARD: 6th NOVEMBER, 2017.

DELIVERED: 10th NOVEMBER, 2017.

CITATIONS:

1. Raila Odinga VS Independent Electoral and Boundaries Commission & 3 Others Supreme Court Petition No. 5 of 2013.
2. *Martin Sarakwe Wechuli Vs. IEBC Election Petition No.7 of 2013,*
3. *Joho vs. Nyange & Another [2008] 3 KLR 500 at page 507.*
4. *Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission and 2 Others KSM CA Civil Appeal No. 40 of 2013 [2014] eKLR*
5. *Evans Nyambaso Zedekiah Nyakeriga and Ano v Independent Electoral and Boundaries Commission and 2 Others KISII EP No. 10 of 2013 [2013] eKLR*
6. *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others [2013] eKLR*
7. *Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 others [2017] eKLR*
8. *Jyoti Basu & ORS VS Debi Ghosal & Others reported in AIR 1982 SC,983*
9. *John Michael Njenga Mututho vs. Jayne Njeri Wanjiku Kihara & Two Others, Nakuru Court of Appeal, Civil Appeal No. 102 of 2008.*

RULING OF THE COURT:

Perhaps, it is apt from the outset to bring out the synopsis of this Petition, its applicable Statutes and Case laws which shall act as my anchorage even as I make a detour through the submissions by the Applicant's Counsel and the supportive material before me.

The Petition herein challenges the election of the Members Elect of Kilifi County Assembly and seeks for a declaration that the entire election exercise of Members Elect of Kilifi County Assembly, were marred by irregularities and improprieties as it was not conducted in accordance with the Constitution and the applicable law, rendering the results invalid, null and void and further seeks the election to be nullified and the process repeated.

Many are the principles that govern the Election Disputes and among them is this long-standing common law approach premised on *Omnia praesumuntur rite et solemniter esse acta*: meaning, that all acts are presumed to have been done rightly and regularly as was aptly captured by our Supreme Court in the case of *RAILA ODINGAVUHURU KENYATTA & 3 OTHERS IN ELECTION PETITION NO. 5 OF 2013.*

Applicant's Case:

In the Notice of Motion dated 1st November 2017 brought under Article 87(2) and 87(3) of the Constitution of Kenya, Section 77 (1) and (2), 78 (1), 2 (b), (3) and 80 (3) of the Elections Act (Number 24 of 2011), Rules 7,8,9,11 and 12 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and All other enabling Provisions of the Law, the Learned Counsel beseeches this Honourable Court to strike out the Petition dated 6th September, 2017 and filed in Court, the same day, challenging the election of the 3rd Respondent as Members Elect of Kilifi County Assembly for the Kilifi County be dismissed for want of compliance with the mandatory statutory requirements on time, service and deposit of security.

Further, the Petition is sought to be dismissed on the grounds that it is ambiguous, lacking specificity of material particulars, failing to give grounds upon which the Petition is based thus defective and non compliant with Rule 7, 8 and 9 of the Election (Parliamentary and County) Petition Rules, 2017 and as such, this Petition is non starter and ought to fail in limine.

The Petition is supported by the grounds on its body and on the supportive affidavit of the 2nd Respondent namely *NELLY ILONGO*. In it, the grounds set above have been condensed into 15 paragraphs and were amplified by oral submissions by the Learned Counsel, Madam Wambua who briefly took the Court through the affidavit and raised a litany of complaints against this Petition.

The first complaint is the non service of the Petition: The Petitioner upon filing the Petition, was mandatorily required to effect its service upon the 1st and the 2nd Respondents and indeed the 3rd Respondent within 15 days of filing of the Petition, an act he failed to do and until this day, has neither directly nor through notice in the Newspapers or any other means effected service of this Petition. The applicant came to know the existence of the Petition when this Honourable Court was constituted for the Gazette Notice by the judiciary and so by failure to serve the Petition, the Petitioner intended to impair and gravely prejudice the 1st Respondent and the applicant's right to oppose the Petition, thereby foreclosing her Constitutional rights.

The second complaint relate to deposit of security: The Learned Counsel submitted that the Petitioner under Section 78 (1) and 2 (b) of the Election Act (Act No. 24 of 2011) is required to deposit in this Honourable Court Kshs100,000/= as security for costs without which the Petition is dead and cannot be resuscitated. Consequently, it is submitted that no further proceedings can be taken in the matter, as stipulated by law.

The third and last segment of attack is, want of form and content: It was submitted that the Petition is ambiguous and does not specify grounds upon which it is based, does not plead results as declared, does not plead dates of the declaration of the elections, it is not divided into paragraphs each of which should be confined to a distinct portion of the subject and that the Petitioner has deliberately sued the entire County Assembly of Kilifi County composed of elected Members of the County Assembly and as such, it lacks specificity.

Analysis and Determination:

There is this point that I would like to resolve as ancillary to, but still important, nonetheless in this matter before I turn to the complaints raised in the application.

Withdrawal of Petition:

During the pre-trial conferencing, the Learned Counsel, Miss Wambui holding brief for Wandai Matheka & Co. Advocates on 13th October, 2017, verbally sought to withdraw the Petition and thereafter filed notice of Withdrawal dated 13th October, 2017 but the Court directed that the same be done in accordance with Rules 21 and 22 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 which stipulate as follows:

“21 (1) A petition shall not be withdrawn without leave of the election court.

(2) The election court may grant leave to withdraw petition on such terms as to the payment of costs or as the election court may otherwise determine.

(3) An application for leave to withdraw a petition shall-

(a) be in Form 5 set out in the first Schedule;

(b) be signed by the petitioner or a person authorized by the petitioner;

(c) state the grounds for withdrawing the petition; and

(d) be lodged at the registry.

(4) The parties to a petition shall each file an affidavit, before leave for withdrawal of a petition is determined, addressing the grounds on which the petition is intended to be withdrawn.

(5) Despite sub-rule (4), an election court may, on cause being shown, dispense with the affidavit of a party to the petition if it seems to the election court on special grounds to be fit and just.

(6) Each affidavit filed under sub-rule (4) shall contain the following declaration- “to the best of the deponent’s knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition.”

(7) Despite sub-rule (6), where a lawful agreement shall have been made with respect to the withdrawal of the petition, the affidavit shall set out the terms of the agreement.”

“(22) (1) The petitioner shall serve each respondent with a copy of the application to withdraw petition.

(2) The petitioner shall publish in a newspaper of national circulation a notice of intention to withdraw an election petition in Form 6 set out in the First Schedule. “

However, the withdrawal of this Petition as indeed provided in the Rules, has neither been crystallized or actualized.

Be that as it may, Courts have on numerous occasions held that election petitions are not ordinary civil cases between individual litigants that they can choose to deal with in any manner that they so wish. Election petitions are inherently public interest suits because they affect not only the parties listed in the Petition, but also persons/voters who elected the representative whose election is in dispute and the public at large. In the case of Martin Sarakwe Wechuli Vs. IEBC Election Petition No.7 of 2013, Omondi, J stated thus:-

“...an election petition is not just for the interest of an individual, but affects interest of the

entire public; this is why the notice of withdrawal must be published in the Kenya Gazette..."

In the case of *Joho vs. Nyange & Another* [2008] 3 KLR 500 at page 507. Maraga J, (as he then was) said:

"Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance -Kibaki Vs. Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that I concur with the Elections Court's decision in Wanguhu Nganga & Another Vs. George Owiti & Another, Election Petition No. 41 of 1993, that election petitions should not be taken lightly..."

Service of Petition:

Service is a key spoke in the wheels of administration of justice in election disputes. So vital is the element that it is captured in Article 87(3) of the Constitution as follows:

"Service of a petition may be direct or by advertisement in a newspaper with national circulation."

The provisions of Article 87 are reiterated in section 77 of the Act provides as follows;

"77. (1) A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.

(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation"

These provisions no doubt were intended to settle once and for all the lingering question of what constituted proper service that had in the past proved a legal minefield for many hapless petitioner pursuing elusive respondents for service. As Majanja J. observed in the *Patrick Ngeta Kimanzi Case*:

"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 known rules of natural justice demands that a person be given full information on the case against him and given a reasonable opportunity to present a response"

Flowing from the above excerpts, it is abundantly clear that both Article 87 of the Constitution and section 77 of the Act prescribe the time for filing and the mode of service of the Petition. These provisions provide the Petitioner with two options to effect service; direct or personal service or service through advertisement in a newspaper with national circulation. The background leading to the enactment of these provisions is well known and documented as they were intended to ameliorate the rigours imposed on personal service.

In the Petition at hand, it was submitted that its existence came to the fore upon gazetting of this Honourable Court. Consequently, the Court has closely turned every page in this Petition and indeed in all pleadings and find no affidavit of service or advertisement of the Petition in any Newspaper of national circulation. I therefore find that there was no service of the Petition on the Respondents as per the mandatory worded requirement.

Indeed in *Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission and 2 Others* KSM CA Civil Appeal No. 40 of 2013 [2014] eKLR and *Evans Nyambaso Zedekiah Nyakeriga and Another v*

Independent Electoral and Boundaries Commission and 2 Others KISII EP No. 10 of 2013 [2013] eKLR the Superior Courts struck out Petitions for their non service and the Honourable Judge had this to say;

"As we have shown, 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 were into the root of the petition and the petition could not stand when there was failure to serve the same. The learned judge was clearly wrong in holding as he misdirected himself on the law applicable where he found as a fact that the 2nd and 3rd respondents were not served."

Equally in Kumbatha Naomi Cidi vs County Returning Officer, Kilifi and Others Malindi EP No. 13 of 2013 (UR) Justice C. Muchemi had this to say;

"Any pleadings filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. It is my considered opinion that this petition (pleading) is a petition that never was."

Quite clearly, service of a Petition is a button that must be triggered for the election dispute to commence and without it, the Petition is as good as dead on arrival and resuscitation can only lie when it is a comatose state.

Deposit of security for costs:

There are two schools of thought. Whereas one school is of the considered opinion that failure to deposit security is fatal to the Petition, the other school of thought are for the opinion that the requirement is not cast in stone. They believe that the Court's fountain of discretion never dries up and that however may will, the discretion is sufficient.

The leading case often cited by the first school adherents, is aptly captured by Justice Ruth Nekoye Sitati in Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR where Hon. Justice Sitati dealt at length with the question as to whether deposit of security for costs is a substantive issue and concluded at Paragraph 80 of her decision that:

"I entirely agree with the learned judges in holding that the deposit of security for costs is a substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of the jurisdiction to deal with the matter further. I also agree that the requirement for deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying the costs once they lose their cases. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it. See Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1."

She then proceeded to ask whether an Election Court can validate a late deposit of security and concluded that an Election Court had no power to expand time.

The other school of thought is well represented by Edward M. Muriithi, J. In Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others [2013] eKLR the learned Judge stated that:

"The position in Kenya today is clearly different from the Indian situation and the old Kenya election dispute resolution regime. It has been changed not by the provisions of Rule 20 of the Election Petition Rules as contended by the Counsel for the Petitioner but by the Constitution of Kenya 2010. Under the Constitution, there is now a constitutional right to vote including the right to approach the Court on an election petition, which is a hybrid constitutional right being both a fundamental human right or civil right under Article 38 (3) (c) of the Bill of Rights and a political right under Articles 87 and 105 of the Constitution of Kenya 2010. The Elections Act of Kenya does not create or give the right to challenge an election as is the case for India. The

object of the Act in accordance with Articles 87 (1) and 105 (3) of the Constitution is to give effect to the constitutional right to vote. Therein lies the difference between the Indian situation and the current constitutional dispensation of Kenya. Accordingly, where the Elections Act restricts the enjoyment of the constitutional right, the Constitution, in terms of Article 2 (4) thereof must prevail. I consider that if section 78 (3) of the Elections Act were construed as not allowing for any good cause an extension of time to deposit security for costs, it would unreasonably restrict the right to approach the court for a determination whether one has been elected to hold office, inconsistently with the constitutional right under Article 38 (3) (c) of the Constitution for "every adult citizen has the right without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office". Accordingly, I find that the time prescribed for deposit of security for costs is a matter of procedure rather than substance of the right to petition the court on election dispute, which is granted by the Constitution itself"

Having held the Court has discretion to extend time to deposit security, Justice W. Korir agrees with Justice Edward Mureithi, adherent of the second school of thought, and had this to say in the case of Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 others [2017] eKLR

"Sub-sections (2) and (3) of Section 96 leaves no doubt as to the fact that unless a deposit of security for costs is made within ten days from the date of presenting the referendum petition, the petition shall be struck out. Unlike Section 96(2) and (3) which commands the striking out of a referendum petition if no security for costs is deposited, Section 78(3) puts an election petition in comatose if no security for costs is deposited. My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition"

Therefore the Learned Counsel submission that failure by the Petitioner to deposit in this Honourable Court, Kshs100,000/= as security for costs, renders the Petition dead, is not correct. The correct position is that the Petition is in a comatose and can be resuscitated so long as the election dispute is within the time frame. I too lean towards the second school of thought.

Obiter Dictum:

With tremendous respect to the first school of thought and without seen to water down the Rules, the reading of the Elections (Parliamentary and County Elections) Petition Rules, 2017 is no doubt couched in mandatory terms and appears to have no panacea. Shall we then throw our hands in the air, fold them and cross our legs watching the sun goeth down as justice bleed under our eyes in the name of these Rules? Is it not the same Rules and in particular Rules 15(c) and 19 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, which also unties the same hands? Shall we continue to hold that the deposit of security is the pillar upon which a Petition is founded and in default, it stands on sinking sand? I take judicial notice that colossal sums of money are expended on these campaigns and by the time the declaration of results are made, these hapless candidates are exhausted and dry so that when you require them to pay affront or ten days thereafter the filing of the Petition, the election dispute now assumes, a bourgeois character. Whatever the wisdom that may have led to the enactment of this Rule, has with passage of time weakened and is not good law.

Form and Content of the Petition:

I wish to begin from a far field jurisdiction on the nature or character of election Petition legislation.

The Supreme Court of India in the case of JYOTI BASU & ORS VS DEBI GHOSAL & OTHERS

reported in AIR 1982 SC,983, held that: -

***"..An Election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of Equity apply but only those rules which the statute makes and applies.It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket...."* (emphasis supplied)**

Back home, a similar position was taken by our Court of Appeal in the case of JOHN MICHAEL NJENGA MUTUTHO vs JAYNE NJERI WANJIKU KIHARA & TWO OTHERS, Nakuru Court of Appeal, Civil Appeal No. 102 of 2008,at page 8.

"Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is an issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues, not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it.... If she (petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result."

And earlier in the same judgment the Court had stated as follows at page 7 of the judgment.

"What would happen where, as here the result as envisaged by regulation 40 above, are not introduced in the petition? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent..... The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then the petition would be incurably defective..."

Having gotten a handle on the strictness of the Petition law provisions, may I now set out the relevant provisions on the form and content of a Petition.

Under Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 thereof provides as follows:-

"(1) an election petition filed under rule 8 shall state:

(a)the name and address of the Petitioner;

(b)the date when the election in dispute was conducted;

(c)the results of the election, if any, and however declared;

(d)the date of the declaration of the results of the election;

(e)the grounds on which the petition is presented; and

(f)the name and address of the advocate, if any, for the Petitioner which shall be the address for service."

The section provides more regulations concerning the mode of signing and supporting the Petition and the kind of prayers a Petition should contain as well as other related form-and-content issues.

I have carefully perused the Petition herein and I find missing information which include; the actual declared results by the 1st and 2nd Respondents; the names of all the candidates and votes each scored; the name and address of the winner; the date and the manner of declaration of the election results being challenged by this petition and finally, the order or prayer seeking nullification of the election as well as the declaration that either there be new election or the Petitioner be declared the winner and to that end, and without such information or particulars as are stated above, the petition is fatally incompetent. The Rule went into great lengths and details to provide the actual form of and the contents the petitions should contain. The probable reason for going to such details would be that a petition, as filed, should be complete with all the details defined therein.

More important remark I wish to make is that the Petition was not served and the Petitioner did not oppose this application or file rebuttal to the responses filed in a bid to sustain his Petition and of fundamental concern in this Petition, is the fact that the Petitioner, in a blanket form, sued the Members elect of Kilifi County Assembly, leaving out the particulars of their respective names, Wards, the candidates and their respective garnered votes, declaration of the results details, date of the declaration of the results among other particulars as set out in Rule 8 (supra). Therefore, the Petition is not in conformity with the mandatory provisions and so cannot withstand the whirlwind of being struck out.

The upshot is the 1st and 2nd Respondents' application dated 1st November, 2017 and filed in Court on the same day, seeking the striking out of the Petitioner's petition dated the 6th September, 2017 and filed in this court on the 1st November, 2017, is hereby granted. The end result is that the said Petition must be and is hereby struck out, with costs to the Respondents.

Written, dated and delivered in the Open Court this 10th November, 2017.

R.K. ONDIEKI,

SENIOR PRINCIPAL MAGISTRATE,

KILIFI LAW COURTS.