



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KITUI

ELECTION PETITION NO. 2 OF 2017

KITAVI SAMMY.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, KITUI CENTRAL

CONSTITUENCY.....2ND RESPONDENT

KATUMO BONIFACE KILUNGYA.....3RD RESPONDENT

RULING

Court has considered the Application dated **6/11/2017** seeking to strike out the Petition dated **6/9/2017** together with the affidavits in support thereto all sworn on **6/9/2017**.

Application is based on the grounds that:

- 1. THAT** both the Petition and Supporting Affidavit dated 6th September 2017 and filed in court on 6th September 2017 don't comply with all the mandatory provisions of the Elections (*Parliamentary & County Elections*) Petitions Rules 2017.
- 2. THAT** the Petition is fatally/incurably defective in that it does not state the final results of the elections and however declared by the Constituency Returning Officer.
- 3. THAT** the supporting affidavit to the Petition fails to state the results of the election and the manner in which the Results were declared.
- 4. THAT** the Petition is based on mere allegations not supported by any evidence.
- 5. THAT** the Petitioner has had ample time as allocated under the Elections (Parliamentary & County Elections) Petition Rules 2017 to amend his pleadings but he has ignored/failed to do so under Section 76 (4) Election Act 2011.

The application is supported by affidavit of the **3rd respondent – Boniface Katumo Kilungya**. He depones that the petition and supporting affidavit do not disclose any triable issue.

The petition has conceded that he didn't indicate the results being contested but that omission cannot be a ground for striking out the petition.

The 1st and 2nd Respondent supports the application in their grounds of affirmation. They state that the petition dated 6/9/17 and the supporting affidavit are fatally defective for failure to state the results and the manner of declaration of the challenged results which is a mandatory requirement of *Rule 8 (1) (c)* of the Elections (parliamentary and County Elections) petition Rules 2017.

Rule 8 (1) c reads; An Election Petition shall state,

“the results of the election, if any and however declared”

Rule 8 is a mandatory requirement and so is **Rule 12 (2)**.

The Petitioner submitted that they complied with all other provisions, and that IEBC is required to file all the results during the hearing. It would therefore be premature to strike a matter that can be determined by evidence.

Petitioner further submits that this is a matter of form and not substance and the same can be cured by evidence of IEBC.

There is no dispute that the petition and the supporting affidavit do not state the final results and the manner declared. The issue for determination is whether the omission is fatal or curable.

Rule 8 (1) (c) makes the final results of an election and the manner of its declaration a mandatory requirement in any petition. The same is echoed in **Rule 12 (2)**.

In the *Case of Hon. Martha Wangari Karua & another VS. The Independent Electoral & Boundaries Commission and 3 others, (High Court of Kenya at Kerugoya; Election Petition No. 2 of 2017)* The respondent sought to strike the petition on the grounds that it did not comply with the mandatory provision of Rule (8) of the Elections (Parliamentary and County election) Petition Rules 2017.

The applicant in that case stated that failure to comply with mandatory provision of Rule 8 (1) made the petition incurable under Article 159 Constitution. In that case the court found that there was non compliance with **Rule 8 (1) (c) and (b) Gitari Judge** in her concluding remark stated that;

“the requirement under order 8 (1) of the rules are not mere technical requirements, they are substantive as they go to the root of the issue before an election court. A petition which has failed to state the date of declaration, the results or the election and how declared is fatally defective and beyond salvage”.

This court finds itself in similar circumstance. The Petitioner has not stated the result of the election and how declared.

The counsel for the petitioner has urged the court not to allow the application and submitted that IEBC is required to file all the results during the hearing. It is therefore premature to strike out the petition that can be determined by evidence.

Rule 8 (1) and Rule 12 (1) puts the burden on the petitioner to provide the information while filing the petition. These details put to Notice the respondents to know the Nature of the petition and relief sought. The requirement for IEBC to provide the results does not shift that burden.

A petition whose results are not declared is incomplete. Differently put; does not the petitioner go to court because he is somehow not satisfied with the results.

Both Rules make it mandatory for those provisions to be complied with.

We must all agree that Election Petitions are not ordinary cases. They have time frame within which they should be determined under Section 75 (2) of the Election Act. The Rules have simplified the procedure for litigants by stating in simple and clear way how a petition should look like.

My understanding of this provision is that they are mandatory. The objectives of the Rules is to facilitate the first expeditious, proportionate and affordable resolution. Therefore failure to comply with them will have a bearing in the determination. I don't think that position is changed by the fact that IEBC is required to file the results.

An election Petition is considered to be of utmost urgent and is time bound constitutionally. It has time frame to determine it; 6 months.

The court therefore has a duty to expeditiously resolve the petition; the rules are facilitative in this respect because they give clear guidelines. None the less, there is provision for amendment if a party wishes to.

In the *case of Jimmy Mkala Kazungu Vs. Independent Electoral Commission and 2 others; In the High Court of Kenya at Mombasa, Election Petition No. 9 of 2017*, the results of the election and the manner in which they were declared were not stated **Thande Judge held that;**

“.....Petition failed to comply with the express and mandatory provisions of Rule 8 (1) of the elections (Parliamentary and County Elections) Petition Rules 2017 it must follow therefore that the Petition herein is incurably defective...”

The Petition was struck out.

It must be noted that in the instant case both the Petitioner and the supporting affidavit omitted the details of the results and how declared.

Petitioners counsel in his submission pleads with the court to consider **Article 159 (2) (d) and section 80 Election Act**. They give the court discretion. The counsel further relied on the case of *Charles Kamuren Vs. Grace Jelagat Kipchoim & 2 others; In the High Court of Kenya at Eldoret Election Petition NO. 1 of 2013* where Achode Judge referred to the *case of Daniel Kipkemoi Bett & 7 others V. Margaret Wanjiku Chege Civil Appeal (Application) No. 152 of 2009 (unreported)* which adopted the words in the case of *Deepak Chamanlal*

“so that as Lord Wool says in the BIGGUZZI case the initial approach of the courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out”

But even then while reflecting on the case that was before her Achode judge stated in Para 45 thus;

“while justice should be done to all parties, and while striking out a pleading ought to be a measure of last resort, I find no alternative available in the law to order otherwise. The timeline is defined by a statute that does not give the Court express authority to act otherwise to extend the prescribed timeline”.

The judge was dealing with an application to extend the period for service rejected the same and struck out the petition.

In Para 43 the Judge held;

“The argument that the court should have no undue regard to procedural technicalities finds no place in the matter herein”.

The Judge did not find **Article 159 (2) applicable.**

This authority cannot aid the petitioner. The failure to serve within the prescribed time in that matter could not be cured **by Article 159 (c) (d)** .

Some decision from High Court are however of a different view.

Kimondo J in EP 2/2013 High Court Nairobi William Kinyanjui Onyango Observed that there should not be a narrow and strict interpretation of the rule that may occasion serious injustice. He further added;

“This is not to say that procedural rules will not apply in all cases; only that the court must guard against their trumping substantive justice”.

With these two opposing views of whether failure to comply with the mandatory provision is fatal or Not. Each court must consider the merit of each application and the omissions complained of.

Article 87 (1) Constitution states;

“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes”.

Parliament has legislated on the mechanism mentioned above in the Election Act and Rules. The Parliament did not leave the election process under the mercy of civil procedure Act but provided the substance and form and made it mandatory and that in any case of one missed out on any of the provision one could seek amendment within the timelines.

In my view any party who choose otherwise or; for any reason fail to comply with **Rule 8 (1) and Rule 12** then renders his/her petition incompetent.

Among the issues for determination in the petition is whether non compliance with the constitution and the law affected the validity of the result. Certainly it was material to have the result and the way they were declared. **Rule 8 (1) and 12(2)** are in mandatory terms. The parliament must have meant that they must be followed otherwise they would have just offered a Guideline. The parties have no choice but to comply.

Arising from the above, I find that the petitioner failed to comply with the mandatory provisions. The petition is incurably defective.

I strike it with costs to the respondents.

HON. M. MURAGE

CHIEF MAGISTRATE

24/11/17

Before M. MURAGE CM

Petitioner – Miller

1st Respondent

2nd Respondent) Malanga

3rd Respondent – Mwalimu

Court- Ruling read out.

M. MURAGE CM

24/11/17