



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KITUI

ELECTION PETITION NO. 3 OF 2017

KITHIKII KAVINDI ALLAN.....PETITIONER

VERSUS

ANNTONY JOHN.....1ST RESPONDENT

WANDEO PAMELA AWUOR

(RETURNING OFFICER, KITUI

SOUTH CONSTITUENCY).....2ND RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....3RD RESPONDENT

R U L I N G

Application for determination is dated **17th October, 2017** and filed on **18th October, 2017**. **2nd and 3rd Respondents** Applicant seeks to strike out the petition dated **5th September, 2017** together with the affidavits in support.

Application is based on the grounds;

- 1. THAT** both the **Petition** and **Supporting Affidavit** dated **5th September, 2017** and filed in Court on the **6th September, 2017** do not comply with 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 name and address of the Petitioner, the name and address of the Advocate acting on behalf of the Petitioner and further fails to state the final results announced by the **Constituency Returning Officer**.
- 3. THAT** further the Petition fails to state both the date of declaration of the results and manner in which the declaration of the results was done.
- 4. THAT** the supporting Affidavit to the Petition is defective in that it fails to comply with the **Provisions of Elections (Parliamentary & County Elections) Petitions Rules 2017**.
- 5. THAT** the Supporting Affidavit to the Petition fails to state the date of declaration of the results and the manner in which the Results were declared.
- 6. THAT** the Petitioner has expressly admitted in paragraph one of the Petition that the General Elections in the concluded August, 8th 2017 elections were conducted well and the whole process went on smoothly.
- 7. THAT** based on the said admissions in both the Petition and the Supporting Affidavit the Petitioner has no cause of action against the Respondents.
- 8. THAT** the Petition is based on mere allegations not supported by any evidence.

Application is brought under the **Provisions of Section 80** of the **Election Act 2011**.

Rule 3,4,8(1) and 12(2) of the Elections (Parliamentary & County Elections) Petitions Rules 2017.

The application is opposed.

The Petitioner/Respondent in his response states that he has complied with the Provision of the Law and is therefore validly before Court.

He further states that the Application is based purely on technicalities of form and not Substance.

1st Respondent supports the application.

Rule 8 outlines the contents and form of petition;

(1) An election petition shall state:

(a) The name and address of the petitioner;

(b) The date when the election in disputed 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.

In support of her application **Pamela Awuor Wandeo** the second Respondent depones in her affidavit as follows;

1. The petition is fatally defective as it does not disclose the name and address of the Petitioner, the name and address of the Advocate acting on behalf of the Petitioner. The final results announced on Constituency Returning Office have not been stated.

2. The Petitioner has failed to state date of the declaration of the results and the manner in which the declaration was done.

Mr. Mwalimu Counsel for the petitioner submits that under **Rule 5** and **Article 159(2)** of the **Constitution** the court has discretion to determine the petition on merit.

Rule 5 (1);

“The effect of any failure to comply with these Rules shall be determined at the Court’s discretion in accordance with the provisions of Article 159(2) (d) of the Constitution,

and

“Article 159 (2) (d) justice shall be administered without undue regard to procedural technicalities”.

That notwithstanding the petitioner does not admit any defect in the petition.

Firstly, the statement by the Petitioner that the General Elections were concluded well and the whole process went on smoothly is an introduction of the process. It cannot be taken as a concluding remarks and neither can they be taken on their own. They have to be read in context by reading the entire petition. It therefore cannot be a ground of striking out the petition.

Secondly, this court will determine whether indeed the petition has not complied with **Rule 8** as alleged by the 2nd and 3rd respondent.

(a) On the issue of **Petitioners address**, I have gone through the Petition and finds that none has been provided.

(b) The **date** when the election was conducted is stated in the introductory part of the petition.

(c) On the issue of **declarations of the result** the same is not stated. **Rule 8 1 (c)** stipulated that the petition shall state the result of the election if any and how it’s declared.

What the petition has stated is who won and this information was obtained from the official website of the 3rd Respondent. The petition does not state how it was declared.

In the introductory part of the petition, the petitioner states that there were several candidates and the first respondent was returned. There is no detail of the result nor the manner it was declared.

(d) On the issue of **the date of declaration per Rule 8 (d)** the same is also omitted.

In the body of the petition, the address of the advocate is omitted. However, at the conclusion of the petition the same is provided. The purpose of the address is to provide address for service. It is therefore sufficient.

The omission in the petition are also reflected in the affidavit. In support of the petition in contravention of **Rule 12 (2)** which is mandatory.

The counsel for the Applicant has submitted that the provisions of **Rules 8 (1) and 12 (2)** of the Election (Parliamentary and County Elections) Petitions Rules are in mandatory terms such that any election petition which does not comply with any single requirement of the rules is for striking out as such omissions are fatal and goes to the root of the petition. They are not mere technicalities.

On the other hand, the petitioner states that court has discretion under the Rule 5 and Article **159 (2) (d)** of the Constitution in determining the petition.

The petitioner further submits that the petition complies with both procedural and substantive requirement. He has therefore specifically stated where the details of the alleged omission are to be found.

I have once again gone through the submission and compared it with the petition itself and the supporting affidavit. Petitioner states that the name and address of the petitioner are clearly stated in **Pages 1 and 5** of the petition. They are not. **Page 5** only states the address of the advocate. However, the affidavit gives the address of the petitioner as per Rule 12 (2) (a).

The Petition in **Paragraph 10** does not state results of the election and how they were announced. It states events prior to the announcement and what **two** of the **five** candidates got.

Paragraph 6 of the affidavit states that the results appeared on the website and even then only results of two candidates is shown, while Paragraph 7 of the affidavit reflects events after the results.

Rules 8 and 12 are outlined in simple and clear manner one should therefore not struggle to understand them. They leave no doubt as to how a petition should be framed.

The body of the petition in this case does not fully comply with the provision of **Rule 8** and equally the affidavit in support does not comply with **Rule 12 (2)** fully.

The Applicant submits that failure to comply with any single requirement of the rules is for striking out as such omission are fatal and goes to the root of the petition. The 1st respondent supports the Application for striking out the petition for non compliance.

In the case of *Election Petition NO. 9 of 2017; Jimmy Mukala Kazungu Vs. Independent Electoral and Boundaries Commission (IEBC) and two Others*, J.M. Thande, Judge struck the petition and held:

‘The requirement in Rule 8(1) of the Election Petition Rules are couched in mandatory terms and the same requirements are replicated in Rule 12(2) of the Election Petition Rules’.

The judge consequently struck out the petition for non-compliance while in the *High Court at Kerugoya, Election Petition No. 2 of 2017;*

Hon. Martha Wangari Karua & another Vs. The Independent Electoral and Boundaries Commission & 3 others;

Justice Lucy Gitari concluding remarks stated that:

‘The requirement under Rule 8 (1) of the Rules are not mere technical requirements, they are substantial as they go to the root of the issue before an election court. A petition which has failed to state date of declaration, The results of the election and how declared is fatally defective and beyond salvage. The consequence is that it must be struck out.

In the High Court of Kenya at Malindi, Election Petition No. 10 of 2017 *Mbaraka Issa Kombo Vs. Independent Electoral and Boundaries Commission (IEBC) and 3 others Justice J.O. Otieno* dealing with a similar situation of non compliance with Rule 8 held that’

‘a petitioner is obligated to give as much details as possible and not less that the benchmark at Rule 8 (1) and 12 (2); he thereby struck out the petition’.

Other Judges however have held contrary view, In the High Court of Kenya at Kisii, Election Petition No. 8 of 2017 *Thomas Matwetwe Nyamache Vs. Independent Electoral and Boundaries Commission (IEBC) and 2 others Justice H.A Omondi* held that;

“the omission to state the date of declaration was procedural lapse” and hence “constitutes a procedural technicality which does not go to the root of the petition”. She declined to dismiss the petition.

I have considered the petition and the affidavit in support. I consider that the petition and the affidavit are deemed to be part of the petition so that if part of the information is omitted in the petition but is stated in the supporting affidavit or vice versa, then it can be argued that the information is provided as *in the Case of Gatirau Peter Munya Vs. Dickson Mwendwa Kithinji and 2 others (2014) eKLR* where the Supreme Court held that;

“An affidavit in support of the petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings in the case”.

Both the petition and affidavit have omitted vital information. This is fatal.

A cardinal principal in dealing with mandatory omission is that each case ought to be examined on its own merit. Some omission are merely technicality while others go to the root of the Petition and such omission renders them fatal.

It is therefore important to examine the allegations in the petition and the relief sought and see if the omission is fatal.

The petitioner in **Paragraph 4** states that he was announced the winner having garnered **2,258 Votes**. According to the official website of third (3rd) respondent and in **Paragraph 5** the **local F.M Stations** announced him.

The petitioner failure to state the results of the election and how they were declared is a fatal omission. Announcement in F.M Stations is not declaration. Declaration comes before announcement.

1. For petitioner to challenge the results and who was declared a winner then Rule 8 (c) and (d) are crucial.

In Paragraph 6, petitioner states that the results were altered. The petition does not indicate when the results were declared per **Rule 8 (d)**. The date of alteration is crucial in relationship to the date of declaration so again the failure to state the date of declaration is fatal.

In the relief sought the petitioner seeks a determination that the first (1st) respondent was not validly declared. This can only be determined if the petitioner had stated how the declaration was done and the results.

2. Therefore looking at the petition and the prayers thereof the petition is incompetent for failure to include mandatory requirement which have bearing, in prayers sought. The omissions renders the petition to be incomplete and as held in the case of MARTHA KARUA AND THAT OF JIMMY MUKALA (SUPRA) the case is fatally defective. The defects in the instance case cannot be cured under Rule 5 (1) and Article 159 (2) (d) of the constitution.

The court therefore finds the petition is incurably defective in form and substance. I strike it with costs to the Respondents.

HON. M. MURAGE

CHIEF MAGISTRATE

Dated and Delivered this 21st day of November, 2017

Ruling read out in open Court in the presence of:

Petitioner

1st Respondent

2nd Respondent

3rd Respondent

Court Assistant -Collins Mulwa

HON. M. MURAGE

CHIEF MAGISTRATE