



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE’S COURT AT KEHANCHA

ELECTION PETITION NO. 4 OF 2017

(FORMALLY; CHIEF MAGISTRATES COURT AT MIGORI

ELECTION PETITION NO. 4 OF 2017)

PETER ODHIAMBO OLIMO.....PETITIONER

=V E R S U S=

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION1ST DEFENDANT

DURO GEORGE OKINYI2ND DEFENDANT

WESLEY RUTO3RD DEFENDANT

RULING:

The Petitioner herein was a candidate duly nominated by the Amani National Congress (ANC) Party to contest for the position of Member of County Assembly for Macalder Kanyarwanda Ward in Nyatike Constituency within Migori County in the general elections conducted on 8.8.2017.

After the formal tallying of the votes cast during the afore-said elections, the results for the Member of the County Assembly were subsequently declared by the 3rd Respondent on 16.8.2017. It is was in that declaration that the 2nd Respondent was declared the winner of the afore-said seat/position.

The Petitioner being dissatisfied with the manner in which the afore-said elections were conducted and the final results, engaged the firm of Edward Kisia & Associates Advocates to file the instant petition.

That petition was filed at the Chief Magistrate’s Court at Migori. The Hon. Chief Justice subsequently designated this Court to hear and determine the Petition under Section 75 of the Elections Act. The matter was finally transferred to the Senior Principal Magistrate’s Court at Kehancha for hearing and determination by this Court.

When this matter came up for Pre-trial Conference and/or directions under Rule 15 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 on 24th October 2017 the representatives of the firms of Edward Kisia & Associates for the Petitioner, MMA Advocates, LLP for the 1st and 3rd Respondents and Omonde Kisera & Co. Advocates for the 2nd Respondent did not appear before court. Counsel for the Petitioner however managed to instruct Mr. Muniko Advocate to hold his brief and pray for the pre-trial conference to be deferred to enable him file an application for the withdrawal of the

petition. The Pre-trial Conference was deferred to enable the Petitioner's Advocates file the relevant application.

This court then gave Petitioner's Advocate time to file an application for leave to withdraw the present Petition and gave the following directions;

- (1). That Application shall be in compliance with Rules 21, 22 & 23 of the Elections (Parliamentary and County Elections) Rules, 2017 (hereinafter referred to as "the Rules").
- (2). That the Petitioner is to file and serve his application on or before the 1st day of November, 2017.
- (3). That in compliance with Rule 22(2) of the Rules the Petitioner is to publish his intention to withdraw in a newspaper of National Circulation.
- (4) That the Respondents' Advocates are to file the Affidavits in response to the application for withdrawal Pursuant to Rule 21(4) of the Rules on or before 8th November, 2017.
- (5). That the Petition is set down for further directions on 8th November, 2017.
- (6). Notice to issue.

This court however found it prudent to serve the afore-going orders upon all the Advocates on record via the postal addresses and the emails they had provided to this court.

This matter came up for directions this morning. Counsel for the Petitioner once again instructed Mr. Muniko to hold his brief and have the matter heard at 2:00pm. As at 2:00pm, no Advocate had appeared before this court. Mr. Kisera Advocate for the 2nd respondent finally appeared before this court at 2:55pm.

Mr. Kisera's clearly stated that he had appeared before this court after receiving the order's of this court and went ahead to confirm that the petitioner had not served them with the said orders. Though he intimated before this court that the petition had been filed out of time, an issue he had raised in his notice of preliminary objection filed alongside his response, his application before this court today was for the dismissal of the petition for the non-appearance of the Petitioner and his Advocates. He further stated that the Petitioner had failed to comply with Rule 22(2) of the Rules by publishing his intention to withdraw in a newspaper of National Circulation.

I have considered the court record and the application by the counsel for the 2nd respondent, (Mr. Kisera). It is clear that the petitioner is not interested in pursuing this petition. The petitioner has also failed to fully comply with the orders that were made by this court on 24th October 2017. All he did was file the petition and thereafter file application for withdrawal of the petition. Further, the full statutory deposit on security was not made after filing the petition. The petitioner only found it fit to deposit half of that amount. The petitioner has now failed to comply with Rule 22(2) of the Rules and also appear in court as directed by this court.

I take into account the timelines set by the law and the orders of this court. It is clear that this court is bound to observe strict time lines and the mandatory provisions of the relevant laws. I am guided by the decision of D. S. Majanja J. in **THE HIGH COURT AT KISUMU KAKAMEGA ELECTION PETITION NO. 7 OF 2017 IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION FOR VIHIGA CONSTITUENCY BETWEEN EMILY NYABUTO =vs= IEBC and 2 others** (unreported) where he held inter alia;

"I have considered whether I should now dismiss this petition and I am convinced that I have inherent jurisdiction to do so if the circumstances justify. An election petition is time limited and hence parties must be prepared to proceed when the matter is fixed for hearing. In this

case, since the petitioner denied that she wished to withdraw the matter, I directed that she should avail her advocate and be ready to proceed today. As neither her nor her advocate is present, the only cause available is for me to dismiss the petition."

The circumstances in the present case are similar to those the learned Judge was facing in the afore-going petition. As earlier pointed out hereinbefore, the petitioner has clearly failed to comply with the relevant provisions of the laws on election dispute resolution in so many areas. There is a clear lack of diligence on his part. In view of the strict timelines, this court cannot wait for the petitioner to comply with the relevant laws as that would mean keeping the matter active indefinitely. I accordingly find the application by the 2nd respondent's counsel meritorious and grant the same. The petition is hereby dismissed for the non-attendance of the petitioner and his advocates.

Taking into account that the only appearance is from the 2nd respondent, I award the 2nd respondent Kshs 50,000/= all inclusive in costs. These sums shall be paid out of the security deposit held in court. The 1st and 3rd respondents counsels did not find it necessary to appear in court or even instruct another advocate to hold their brief though the court had on its own motion served the court order for today's date to them by courier and email. I therefore make no orders on costs in relation to the 1st and 3rd respondents.

Court: read and signed in open court this 8th day of November 2017

Coram: Before me: P. N. MAINA(MR.)SPM

Court asst.: PANYAKO

Petitioner: Absent

Respondents: Absent

Omonde Kisera Adv. for 2nd Respondent - present

No appearance for the Petitioner and 1st & 3rd Respondents

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Signed by: **P. N. MAINA(MR.) SPM**