



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT MARSABIT

ELECTION PETITION 2 OF 2017

ABDIA MOHAMED OSHOW-----PETITIONER

VS

1. INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION-----1ST RESPONDENT

2. ECONOMIC FREEDON PARTY-----2ND RESPONDENT

3. ZAMZAM ABDULLAHI ALI-----3RD RESPONDENT

4. UMUL KER KASSIM-----4TH RESPONDENT

RULING

The Petitioner namely Abdia Mohammed Oshow filed an Election Petition dated 22/9/2017 against Independent Electoral and Boundaries Commission (1st Respondent), Economic Freedom Party (2nd Respondent), Zam Zam Abdullahi Ali (3rd Respondent) and Umul Ker Kassim (4th Respondent) seeking the following orders:-

1. Immediately upon filing of the Petition, the 1st and 2nd Respondents do avail all the rightfully part list of nomination of special seats of this impugned nomination.
2. A declaration that the non-compliance, irregularities and improprieties in the nomination of party list were substantial and significant that they affected the gazettelement thereof:
3. This Honorable court be pleased to declare that the 3rd and 4th Respondents were not validly gazetted for the Gender special for Mandera County Assembly (Gender Top up) in accordance with the Constitution and especially Article 90, the Elections Act and written law.
4. This Honorable court be pleased to declare that the 3rd and 4th Respondents were not validly gazetted as the County Assembly members Gender Top up for Mandera County and consequently nullify the said nomination and or order that the said nomination was null and void.
5. This Honorable court be pleased to make an order for Abetment in respect to the gazettelement and consequently declare that the Petitioner was validly nominated as member of County Assembly of Mandera, Gender Top up.

6. In the alternative this Honorable court be pleased to order that a fresh submission of Party list of nominees of County Assembly Gender Top up in respect of Mandera County ward be forwarded by the 2nd Respondent to the 1st Respondent.

7. The costs of this Petition.

8. Any other relief that this Honorable court may deem just and fit to grant.

The Petition is supported by the Affidavit of the Petitioner himself sworn on 22/9/2017.

The 1st Respondent filed a response dated 31/10/2017 which is supported by the Affidavit of Salome Oyugi sworn on 31/10/2017.

The 2nd Respondent filed a response dated 10/10/2017 which is supported by the Affidavit sworn by Abdullahi Abdinoor Gessey on 10/10/2017.

The 3rd Respondent filed a response dated 7/11/2017 which is supported by the Affidavit of the 3rd Respondent himself sworn on 7/11/2017.

The 4th Respondent filed a response dated 7/11/2017 which is supported by the Affidavit of the 4th Respondent himself sworn on 7/11/2017.

The 1st Respondent further filed a Notice of Preliminary objection dated 24/10/2017 based on the following grounds:

1. That the Petition filed herein on 2/10/2017 is incompetent fatally defective and unconstitutional for having been filed outside the time frame provided in Article 87(2) of the Constitution of Kenya and section 76(1)(a).
2. That this Honorable court lacks jurisdiction to hear and determine the election petition challenging the validity of nomination of 3rd and 4th Respondents to the County Assembly of Mandera on the ground that the same was filed outside the mandatory constitutional and statutory time frame since the Gazette Notice Number 8380 nominating 3rd and 4th Respondents was issued on 28/8/2017.
3. That for the foregoing reasons the Petition is incompetent and legally untenable and ought to be dismissed with costs.

The 2nd, 3rd and 4th Respondents also filed a joint Notice of Preliminary objection dated 20/11/2017 on the following grounds:

1. That this court lacks the jurisdiction to try matters to do with Political Party nominations in view of the mandatory provisions of section 39, 40 and 41 of the Political Parties Act (cap 78 laws of Kenya) as read together with section 27 of the Elections (Party Primaries and Party lists) Regulations, 2017 and the Elections Act.
2. That this Honourable court has no jurisdiction to hear and determine an Election Petition that does not exist, as the same was filed outside the time frame stipulated under Article 87(2) of the Constitution of Kenya, section 36 (1) (a) of the Elections Act 2011 and Rule 19 (1) and (2) of the Elections (Parliamentary and County Elections) Petitions Rules 2017.

The Petitioner thereafter filed grounds of opposition dated 20/11/2017 on the following grounds that:-

1. The said Preliminary objection is bad in law, incompetent, misconceived and an abuse of the

process of court.

2. The preliminary objection is in contravention of the very provision in which it is anchored on.
3. The preliminary objection is fatally defective for failure to comply with the mandatory provisions of the law.
4. The preliminary objection is frivolous, vexatious and hopeless and cannot be ventilated for the orders sought.
5. The preliminary objection is duly fit for dismissal with costs to Petitioner.

The parties thereafter filed written submissions and highlighted the same on 11/12/2017.

The 1st Respondent urged the court to dismiss the Petition as it was filed outside the mandatory constitutional and statutory time frame of 28 days.

It urged that this Petition having been filed on 2/10/2017, it was filed 35 days after the publication of the Gazette Notice Number 8380 on 28/8/2017. The 1st Respondent relied on Article 87(2) of the Constitution and section 76(1) (a) of the Elections Act and urged that an election petition must be filed within 28 days from the date of declaration of results or publication of the gazette notice in the case of nominations.

It also referred to various authorities as per the list of authorities filed.

The 2nd, 3rd and the 4th Respondents also urged the court to dismiss this petition as it is a nullity having been filed outside the time frame provided both by the constitution and Elections Act.

They argued that court has no jurisdiction to entertain an election Petition filed outside the mandatory 28 days.

The 2nd, 3rd and 4th Respondents abandoned their first ground in the Notice of Preliminary objection.

The Petitioner urged the court to dismiss the Preliminary objections raised.

The Petitioner sought to distinguish the term declaration of results as used in Article 87(2) of the Constitution and publication as used in section 76(1) (a) of the Elections Act.

Counsel for the Petitioner urged that election is a process that ends with the announcement of the winner. The counsel for the Petitioner further urged that nomination is not an election and therefore the 28 days' time-frame does not apply. That this Petition arises out of Party nominations and there is no declaration of results which is a public announcement of the winning candidate pursuant to Regulations 73 of Election (Parliamentary and County Assembly) Regulations.

It was further submitted on behalf of the Petitioner that this Petition was filed in good time and that this court has special jurisdiction to hear and determination which jurisdiction is conferred by the constitution.

I have considered the Notices of Preliminary Objections raised by the Respondents and the grounds of opposition filed by the Petitioner, the parties' submissions and the list of authorities.

The issues for determination in this matter are:-

1. Whether the preliminary objections raised are proper,
2. Whether this Petition was filed outside the time frame provided for under the Constitution and

the Elections Act, and if so what is the effect thereof.

In the grounds of opposition, the Petitioner stated that the preliminary objections raised are bad in law, incompetent, misconceived and an abuse of the court process. However, the Petitioner did not argue this point in the submissions.

It is settled law that a preliminary objection must raise purely points of law. It also has to have the effect of disposing off the matter if allowed.

I am guided by the decision in the case of ***Mukisa Biscuit manufacturing Ltd v West End Distributors Ltd (1969) E.A 696*** in which it was stated that a preliminary objection is in the nature of what used to be a demurrer, it raises purely a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

The Respondents have raised preliminary objections that this petition is time barred and it does not exist. They have relied on the provisions of the constitution and the Elections Act which they contend provide a time frame within which an election petition has to be filed.

I hold and find that the preliminary objections raised are proper as they are premised purely on points of law. If allowed, they have the effect of disposing off this petition.

This election Petition resolves around the legality or otherwise of the nomination made in regard to the 3rd and 4th Respondents as members of Mandera County Assembly.

It is not in dispute that this Petition dated 22/9/2017 was filed on 2/10/2017. The gazette Notice No. 8380 gazetting the nomination of the 3rd and 4th Respondents as members of county assembly of Mandera County was issued on 28/8/2017. The Petition was therefore filed about 35 days after the gazette notice.

Article 87(2) of the Constitution provides that petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by Independent Electoral and Boundaries Commission.

Section 76 (1) (a) of the Elections Act provides that a petition to question the validity of an election shall be filed within 28 days after the date of declaration of the results of the election and served within 15 days of presentation.

It is clear therefore that the Petition was filed outside the time frame provided for by the law. Article 87 (2) of the constitution and section 76(1) (a) of the Elections Act are couched in mandatory terms.

The Petitioner sought to distinguish between declaration of results of an election and publication of the gazette notice signifying the nominations of members of county assembly. According to the Petitioner, the nominations are not elections and therefore the term declarations cannot refer to it.

I hold the view that there are two modes of elections. One is by universal suffrage and the other by nomination.

I am guided by the decision of the Supreme Court in the case of ***Moses Mwigigi and 14 others – V- Independent Electoral and Boundaries Commission and 5 others (2016) eKLR*** stated thus:

“The gazette Notice in this case signifies the completion of the “election through nomination”, and finalizes the process of constituting the assembly in question.

It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election courts. The Gazette Notice also serves to notify the public of those who have been elected “to serve as nominated member of a County Assembly”

I am further guided by the decision of the Supreme Court in the case of **Anami Silverse Lisamula – VS – Independent Electoral and Boundaries Commission and 3 others (2014) eKLR** in which the Court upheld the principle that an election petition must be filed within the timelines prescribed by the constitution by saying “*It is clear to us that the main issue this court was called upon to determine in the Mary Wambui case, is the one we are now asked to determine, which is whether the petition filed in the High Court outside the 28 days prescribed by Article 87(2) of the Constitution is a nullity. We find that the decision in the Joho case directly applies in the instant matter and so does that jurisprudence in the Mary Wambui case*”

I am bound by the authorities cited above.

Rule 19 of the Elections (Parliamentary and County Elections) Petition Rules 2017 provides as follows:-

“19(1) where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard and determined.

It is clear that the electoral dispute resolution timelines prescribed under the Constitution and the Elections Act especially those relating to filing and service of election petitions are inflexible and inextensible. This was made clear by the Supreme Court in the case of **Lemanken Aramat –v- Harun Meitamei Lempaka & 2 Others, Supreme Court Petition No. 5 of 2014.**

The Petitioner has relied on Article 105 of the constitution to argue that this court has jurisdiction to hear and determine this matter. With respect, the said Article does not confer jurisdiction to this court to hear and determine election disputes but the High Court. This court is clothed with jurisdiction to hear and determine election disputes pursuant to section 75(1A) of the Elections Act.

The Petitioner has also referred this court to the case of **Orie Rogo Manduli vs Catherine Mwangola & Others [2013]eKLR** where Mshila J. held that Article 90 presupposes that nominations to party lists of members are an election and therefore any dispute after gazettement can only be resolved by the high court in accordance with Article 105 of the constitution. Again with respect, the dispute in this case was about nominations of members to the national assembly and not county assembly as it is the case in this petition.

From the foregoing, it is clear that this court lacks the jurisdiction to hear and determine this Petition challenging the validity of nomination of 3rd and 4th Respondents to the County Assembly of Mandera County on the grounds that the same was filed outside the mandatory constitutional and statutory timeframe. The Petition is incompetent and fatally defective.

In the upshot, I allow the preliminary objection and strike out this Election Petition with costs to the Respondents. I hereby cap costs for each of the Respondents at shs 250,000/=.

Dated and delivered at Marsabit this 19th day of December 2017.

In the presence of:-

- 1.
- 2.
- 3.

4.

B. Ombewa

PRINCIPAL MAGISTRATE