



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MANDERA
ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF ELECTION FOR THE MEMBER OF COUNTY ASSEMBLY

DARKHALE WARD, BANISA CONSTITUENCY

ABDULLAHI MAALIM ALIO.....PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

MUSDAF ABDULLAHI AHMED (R.O).....2ND RESPONDENT

YAKUB HASSAN EMOI (OPPONENT).....3RD RESPONDENT

RULING

This ruling is on the oral application made in court by Mr. Benjamin Makokha for the 3rd Respondent seeking leave to file an application to strike out the petition on grounds that the petition is not supported by the affidavit of the petitioner and therefore the same has violated the mandatory provisions of Rules 8(4)(b) and 12(1) of the elections (parliamentary and County) petition Rules 2017.

The application was opposed by Mr. Ombaba for the petitioner but was supported by Mr. Duncan Wachira for the 1st and 2nd Respondents.

Generally every election petition must conform to any mandatory requirements set out in the elections Act 2011, and the relevant procedural Rules. Election courts have discretion however to excuse any non compliance with the procedural Rules (Dickson Mwendwa Kithinji Vs Gatirau Peter Munya and 2 Others, Civil Appeal No. 38 of 2013 Nyeri). The rationale of the discretion lies in the constitutional and statutory objective of administering electoral justice without undue regard to technicalities of procedure.

Under Rule 8 of the elections (Parliamentary and County) petitions Rules 2017, every petition must state:-

- The name and address of the petitioner
- The date when the election in dispute was conducted
- The results of the election if any, and however declared
- The date of the declaration of the results of the election
- The grounds on which the petition is presented and
- The name and address of the advocate if any for the petitioner which shall be the address of service.
- Further every petition must be signed by the petitioner or by a person duly authorized by the petitioner, be supported by an affidavit sworn by the petitioner containing the grounds on which relief is sought and setting out the facts relied on by the petitioner, be in such number of copies as would be sufficient for the court and all respondents named in the petition, and it must conclude with a prayer requesting the court to grant appropriate relief.

The requirements of rule 8 of the elections (Parliamentary and County) petition Rules 2017 are not mere technical requirements limited to procedural form and content of election petitions. In M'Nkiriya Petkay Shen Miriti Vs Ragwa Samuel Mbae and 2 Others (Election Petition No. 4 of 2013 Meru) it was held that those requirements are substantive to the extent that they go to the root of the issues before an Election Court which cannot be cured by invocation of Article 159(2) of the constitution of Kenya 2010.

The courts may properly dismiss or strike out, and often dismiss or strike out election petitions which do not comply with the mandatory requirements, but the power to dismiss or strike out an election petition for non compliance with rule 8 of the elections (Parliamentary and County) petition Rules 2017 is a drastic and draconian step, to be taken sparingly and only in the clearest of cases where the defect is incurable. D.T. Dobie & Company (K) Limited Vs Mudina (1982) KLR1. Indeed election courts have discretion, pursuant to article 159(2)

(d) of the constitution to excuse minor and trivial deviations from the above and other mandatory requirements. Hosea Mundin Kiplagat Vs Sammy Komen Mwaita & 2 others Election Petition No. 11 of 2013 Nairobi).

In Raila Odinga & 5 others Vs IEBC & 3 others Supreme Court Petition No. 5 of 2013 it was held that:-

“The essence of that provision (article 159(2)(d) of the constitution) is that a court of law shall not allow the prescriptions of procedure and form to trump the primary objective of dispensing substantive justice to the parties”

This principle of merit, however, in our opinion bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.

In the instant case the advocate for the 3rd respondent contends that the petition is not supported by an affidavit sworn by the petitioner as the affidavit filed at paragraph 44 is in support of an application. That affidavit was sworn on 2nd of September 2017. That particular affidavit is not in support of the petition, does not contain the reliefs being sought or the grounds on which any relief is being sought and does not conclude with a prayer requesting the court to grant any relief. This court is bound by the decisions of the High Court, the Court of Appeal and the Supreme Court. It is my considered view that a supporting affidavit to a petition and affidavits of witnesses in an election petition are integral parts of a petition that should be filed with the petition within the 28 days window provided for by the constitution for filing of parliamentary and county election petitions. A petition filed without the two is not a competent petition. Rules 8 and 12 of the election rules complement Article 87(2) of the constitution and provisions of Elections Act. In the procedure for filing Election petitions, the rules are mandatory. A petition that does not comply with these mandatory provisions is incurably defective and cannot stand. This petition does not comply with those mandatory provisions. The petition is thus defective. This court has no discretion to allow the petitioner to file a supporting affidavit after the expiry of the 28 days window (AMINA HASSAN AHMED Vs Returning Officer Mander County & 2 Others (2013) eKLR).

The court does recognize that petitions are very important for the country’s democratic dispensation. Petitions are meant to enhance democracy and not to undermine it. However public interest must be considered within the realms of the law and not outside the law. In this regard I am guided by the supreme court in the case of Zacharia Okoth Obado Vs Edward Akongo Oyugi and 2 others (2014) eKLR where the court held that

“Article 159(2)(d) of the constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”

The petitioner was under obligation to follow the law. Courts of law cannot abrogate the law to assuage public interest however important public interest is.

In the foregoing the petition filed herein is not supported by a supporting affidavit sworn by the petitioner as required by Rules 12(1)(b) of the elections (Parliamentary and County) petition Rules 2017. The petition does not therefore comply with the mandatory provisions of the law. The same is incompetent and should not be allowed to stand. Accordingly the application by counsel for the 3rd Respondent is allowed and as a consequence the petition be and is hereby struck out with costs to the Respondents.

Dated, signed and delivered this 4th day of December 2017 in the presence of:-

Mr. Ombaba for the Petitioner

Mr. Makokha for 3rd Respondent

Mr. Duncan Wachira for 1st and 2nd Respondents

Mr. Hassan Suleiman – C/A

Signed: P.N. Areri (SRM)

4/12/2017