



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE COURT AT KWALE
ELECTION PETITION NO. 6 OF 2017
IN THE MATTER OF ELECTIONS ACT 2011

BETWEEN

BAKARI HAMISI SHEE.....PETITIONER

=VERSUS=

THE INDEPENDENT ELECTION

AND BOUNDARY COMMISSION.....1ST RESPONDENT

MTAYA MADZUNGU.....2ND RESPONDENT

MGUTTA NASSORO BAKARI.....3RD RESPONDENT

RULING

This ruling has three limbs. The first follows a Notice of Motion application by the 1st and 2nd Respondents dated 16th October, 2017 and brought pursuant to Article 159 of the Constitution, Section 3A of the Civil Procedure Act, Rules, 4, 5, 8 and 12 of the (The Election Parliamentary and County Elections Rules 2017) hereinafter referred to as the Rules in which they seek orders that “*The Election Petition dated 6th September, 2017 together with the supporting affidavits annexed thereto and filed in Court on 6th September, 2017 as is or howsoever amended if at all be struck out.*” The application is premised on the grounds that the petitioner had failed to comply with Rule 8(1) and 12(2) in that the petitioner had failed to state his name and address as well as the results and when the same were declared. The application was opposed by the Petitioner who filed a preliminary objection in response in which he stated that the 1st and 2nd Respondents lacked locus as they were in breach of Rules 10(4) and 11, that in any event the affidavit in support of the Petition contained the results of the election and the date when they were held, that striking out was a drastic and draconian remedy that the court should not resort to unless in the clearest of cases and that the Petition did not meet the threshold for striking out, and finally that the court had enormous powers under Article 159 of the Constitution to excuse minor or trivial deviations.

The second application is a Notice of Motion application dated 2nd of November, 2017 by the Petitioner and brought under Articles 22, 23, 27, 50, 87, 105, 259 of the Constitution of Kenya, 2010 under the Elections Act, Legal Notice No. 116 (The Election Parliamentary and County Election Rules, 2017) Rules 11 and 12 thereon and all other enabling provisions of Law. In it the Petitioner prays that the Petition be allowed and that the response by the 1st, 2nd and 3rd Respondents be struck out for failure to file a Notice

of address for service within the time provided by Rule 10(4); that the 1st and 2nd Respondent were served with the Petition on 15th September, 2017 and were by the rules required to file their notice of address for service by the 20th of September, and did not do so until the 25th of September, 2017 whilst the 3rd Respondent who was served with the Petition on the 14th of September, 2017 was required to have filed his notice of address for service by the 19th of September, 2017 and was yet to do so thus making him a stranger to the proceedings. The 1st and 2nd Respondents in reply filed a preliminary objection contending that the Petitioner was himself in violation of Rule 10(1) for failing to serve the Petition within seven days of filing.

The third application is an application by the 3rd Respondent dated 6th November, 2017 and brought pursuant to Article 159 of the Constitution, Rules 4, 5, 8(1) (c) and Rule 12(1) (c), Section 83 of the Election Act No. 24 of 2011 and the inherent Jurisdiction of the court. In it the 3rd Respondent seeks orders that the Petition be struck out for failure to comply with Rule 8(1) (c) in that the Petitioner failed to state the results of the elections as declared by the 2nd Respondent. In his replying affidavit the petitioner maintained that the affidavit filed contemporaneously with the Petition was compliant as it had an annexure which contained the names of each of the candidates and what each garnered and that the affidavit could not be viewed disjunctively from the Petition.

I will now proceed to address each of the limbs.

In this application which was opposed, the 1st and 2nd Respondent seek to strike out the Petition on the grounds that the Petitioner failed to comply with Rules 8(1) and 12(2) in that he failed to state his name and address for service and the results of the election under challenge as well as the manner in and where they were declared. I note at Para 4 of the Petition the Petitioner states as follows *"The Petitioner is an adult male of sound mind and health and a registered voter in Pongwe Kikoneni Assembly Ward in Lunga Lunga Constituency, Kwale County in the General Election held on 8th August, 2017. His address for service for purposed of this petition is care of Mwaniki Gitahi & Partners Advocates – NSSF Building, 7th Floor, South Wing Suite 704- Nkurumah Road, and P. O. Box 92933-80100, Mombasa."*.....hence as far as compliance with Rule 8(1) (a) which provides

"An election petition shall state – (a) the name and address of the petitioner" this court finds that the Petition was compliant.

The Rules then goes ahead to state that in addition to the name and address the Petition shall state **8(1) (b) the date when the election in dispute 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. Going through the body of the Petition I note that there was noncompliance with these provisions.** It is on this basis that the 1st and 2nd Respondents seek to have the Petition stuck out. In reply the Petitioner contends that the Respondents lack locus standi in the proceedings; this argument was not pursued by the petitioner and it was lost on this court as a cursory look at the proceedings reveals that the Responses were filed within the fourteen day period provided by Rule 11(1) but later it would emerge that the Petitioner was basing it on the failure to comply with Rule 10(4) which provides for filing of a notice of address for service which issue I will address later in this ruling. That said, he went ahead to state that the results and when they were declared were contained in the affidavit filed contemporaneously with the Petition and thus there was partial compliance; espousing the jurisprudence advanced by Justice W. Korir in **Election Petition 4 of 2017 Samuel Kazungu Kambi & Another –Vs- IEBC & 3 Others** where faced with a similar scenario the learned judge held *"What is the effect of noncompliance with rule 8 and 12 of the Election Petition Rules 2017 on an Election Petition I will confine myself to the post-August, 2010 scenario. There are two schools of thought in the High Court in regard to the question I have posed. The advocates have cited authorities in support of the school of thought that holds that failure to strictly comply with the Rules 8 and 12 renders an election petition incompetent and fatally defective. There is however another school of thought whose view is that failure to comply with the provisions can be ameliorated in light of Article 159 (2) (d) of the Constitution.....I come with a third view. In my view both schools of thought are correct to some extent. The determinant factor is the extent of compliance*

with the rules as gleaned from each case.....My take is that whereas there is need for strict compliance with the Laws and Rules governing the resolution of Election disputes the courts should always be mindful of the fact that the current constitutional dispensation requires substantial justice should be done unless an election petition is so hopelessly defective and cannot communicate at all the complaints and the prayers of the Petitioner the court should ensure that the Petition is heard and determined on merit.....I do not buy into submission that compliance with the Election Petition rules should be 100% and nothing less in my view. Substantial compliance is good enough.....The question is whether the information disclosed in the Petition and Replying affidavit was sufficient to let the Respondents know whether Petitioner's case was in order to respond to the same. The answer is in the affirmative..." In the present Petition this court posits, do the circumstances of this Petition lend themselves to this third view interpretation by the court? At Para 14 of his affidavit filed contemporaneously with the Petition the Petitioner states "...I swear this affidavit to say **that my votes** (emphasis mine) were tampered with in Kikoneni Primary school Polling station and Kiliku Primary school Polling station where there was marred bribery (sic) and also where the 1st and 2nd and 3rd Respondents conspired to open the polling station late. I hereby attach and mark as BHS-2 a copy of the declaration of member of County Assembly Election Results". There is annexed to the affidavit an annexure BHS-2 the declaration of each of the candidates results at the constituency. This court would have probably held that this did constitute some form of compliance were it not for the fact that in the said affidavit at Para 2 and 3 the deponent states" That I am a registered voter at Kinoneni Primary school polling station Pongwe-Kikoneni Ward within Lunga Lunga Constituency in Kwale County. That I was also the chief agent for the Jubilee Party Candidate for the post of Member of County Assembly one Hamisi Bakari Mwanjia"..... then at Para 14 he speaks of "his votes" which were tampered with! Even the affidavit is itself at variance! Given the misdescription contained in the Petition and the affidavit can it be said that the affidavit relates to the Petitioner who had described himself in the Petition as the candidate of the position of Member of the County Assembly of Pongwe Kikoneni Assembly Ward in Lunga Lunga Constituency, Kwale County. Can it be said that we are in fact referring to one and the same person? Indeed can it at all be said that the Petition complied with Rule 8(4) (b) which **provides that a Petition shall be supported by an affidavit sworn by the Petitioner containing the particulars set out under rule 12".... I would find in the negative.....similarly; I would find that the affidavit which purports to partially comply with Rule 12 is unsupported by a Petition as required by Law because as currently drawn the Petition and the affidavit are mutually exclusive! They are disjunctive! To further compound the matter, Paragraph (e) of the Prayers reads "In the alternative to Prayer 4 above declare the Petitioner as the winner of the election of member of the County Assembly for Pongwe Kikoneni ward held on the 8th August, 2017.**

Was he the Jubilee Party candidate or the Agent?

To quote J. Korir "unless an election petition is so hopelessly defective and cannot communicate at all the complaints and the prayers of the Petitioner the court should ensure that the Petition is heard and determined on merit" Adopting this reasoning I would find that where the Petition and the affidavit are so out of sync as to fail to communicate the Petitioner's complaints and prayers as is the case herein, then even invocation of Article 159(2) (d) would be of no consequence and on this limb I find that because of the misdescriptions the Petition is not supported by an affidavit disclosing the results as required by Law and proceed to allow the application by the 1st and 2nd Respondent dated 16th October, 2017 to strike out the Petition for failure to comply with Rule 8(1) and 12(2) with costs. The third application by the 3rd Respondent is a parallel application and similar arguments apply and likewise the court allows the Notice of Motion application by the 3rd Respondent dated 6th November, 2017 and strikes out the Petition with costs to the 3rd Respondent.

In the second application the Petitioner seeks to have the Petition allowed as drawn and the Responses by the Respondents struck off for failure to comply with Rule 10(4) which requires that the notice of address for service be filed within five days of service of the Petition. While this may be a moot point considering that this court has already found that the misdescription of the Petition and the affidavit is such that it goes to the root of the Petition as to render the same to be irredeemable; nevertheless I will proceed to analyze the same. Ironically whilst the Petitioner seeks to have the responses struck out for

failure by the Respondents to comply with Rule 10(4) to file their notice of address for service within five days. He himself is guilty of having served the Petition on the Respondents outside of the seven day period provided by Rule 10(1). The petition was filed on the 6th of September, 2017; the Rules require that the same be served on the Respondents within seven days. He should have thus served the petition on or before the 13th of September, 2017. By the Petitioners' own admission he served the 3rd Respondent on the 14th of September and the 1st and 2nd Respondents on the 15th of September, 2017. Using the reasoning in the Samuel Kazungu Kambi case, hierarchically which omission carries more weight and thus should attract stiffer sanctions by the court? Was it the failure to comply with the law on service of the Petition or the failure by the Respondents to comply with Rule 10(4) to file a notice of address for service? It was contended for the 1st and 2nd Respondents that they did indeed comply albeit outside the period provided by the Rules whilst the 3rd Respondent submitted that what they filed was a notice of appointment and wondered how this differed from the notice of address for service adding that this was merely a question of form and semantics. Adopting the 'third view' argument espoused by the judge in that case where he held that the question should be one of whether there was substantial compliance then this court would hold that yes in the instant case there was substantial compliance by the Respondents and that the Petitioner was neither misled or prejudiced by the naming by the 3rd Respondent of his notice of address for service as a notice of appointment of advocate and dismiss the Petitioner's notice of Motion dated 2nd November, 2017 with costs.

Having said that, this court goes ahead to find that had even the Court found in favour of the Petitioner the convoluted earlier herein referred to would have made it impossible for the court to grant the same Petition as drawn. I hasten to add that the Petitioner had during the pretrial intimated his intention to amend the Petition ostensibly to correct these errors but was forced to withdraw the application after realizing that any such application had to be filed within 28 days of the declaration of the results. In the circumstances this court can only commiserate with the Petitioner and hold that the Petition as drawn was incoherent, a mumble jumble at best making this Petition ripe for summary rejection as provided by Section 79 of the Election Act which this court proceeds to do, and strikes out the Petition with Costs to the Respondents which costs either way should not exceed Kshs.100,000 considering that this Petition did not make it to full trial.

Doreen Mulekyo

Chief Magistrate

19th December, 2017.

COURT: Ruling on notice read, dated and signed in open court in the presence of:-

Petitioner – Ms. Hamid holding brief for Mr. Mwaniki

1st Respondent – Ms. Hamid holding brief for Mrs. Maithya

2nd Respondent – Ms. Hamid holding brief for Mrs. Maithya

3rd Respondent – Mr. Wameyo

Doreen Mulekyo

Chief Magistrate

19th December, 2017.