



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KWALE

ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF THE ELECTION ACT, 2011 ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

BETWEEN

DAUDI YUSUF HERI.....PETITIONER

=VERSUS=

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

THE RETURNING OFFICER (IEBC) MATUGA CONSTITUENCY.....2ND RESPONDENT

THE PRESIDING OFFICER CHAI PRIMARY SCHOOL

POLLING STATION.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

MWINYI BURUDAI MWAWANDEMBO.....5TH RESPONDENT

RULING

1. On 8th of August, 2017, the people of the Republic of Kenya went through the process of electing their political leaders. The petitioner, **Daudi Yusuf Heri** and the 5th respondent **Mwinyi Burudai Mwawandembo** together with seven others participated in the said elections for the position of Members of County Assembly Tiwi ward.

2. The Independent Electoral And Boundaries Commission(IEBC) was responsible for conducting the elections. The second respondent was the returning officer **Matuga constituency** and the 3rd respondent was the presiding officer **Chai primary school**.

3. After conducting the elections, the IEBC, through its returning officer, announced that the 5th respondent was duly elected as a member of county assembly for Kwale,Tiwi Ward. The petitioner was dissatisfied with the process and results of the election and in particular, Chai and mwachema primary school polling stations where he alleged there was importation of voters and other electoral malpractices.

4. By way of a petition dated 4th September, 2017 and filed in court on the 5th September, 2017, the petitioner, Daudu Yusuf Heri challenged the validity of the election of the 5th respondent, Mwinyi Burudai Mwawandembo as member of county assembly, **Tiwi ward**. The petition is accompanied with affidavits of witnesses the petitioner intended to call as witnesses.

5. The 1st, 2nd and 3rd respondents opposed the petition. They filed a response to petition dated 15th September, 2017 and filed in court on 18th September 2017. The response is accompanied with affidavits the 1st, 2nd and 3rd respondents intend to call as witnesses.

6. The 4th respondent was in my view, improperly enjoined in the suit. Independent Electoral And Boundaries Commission (IEBC), as established under **Article 88 (1) of The Constitution 2010**, has the authority to sue and be sued. No relief was being sought from or against the government. There was absolutely no reason to enjoin them in the suit.

7. The 5th respondent filed his response dated 17th September, 2017 on 19th September 2017. The response, was too, accompanied with the affidavits the 5th respondent intended to call as witnesses.

8. After the close of pleadings, this matter was set for pretrial. The last pretrial was held on 6th October, 2017. Mr Were appeared for the petitioner, Mrs. Munyithya appeared for the 1st, 2nd and 3rd respondent while Mr Bwire appeared for the 5th respondent. Parties were directed by this court to file agreed and disputed issues on or before 20th November, 2017. Hearing for the petition was set for 23rd and 24th of October, 2017.

9. On 18th of October 2017, Mrs Munyithya counsel for the 1st, 2nd, and 3rd respondents filed an application dated 17th of October, 2017 under certificate of urgency seeking orders as follows;

1. “Spent.

2. Spent.

3. That the election petition dated 4th September, 2017 together with its supporting affidavits annexed thereto and filed in court on the 5th September, 2017 as is, or as however amended if at all be struck out.

4. That the petitioner does bear the costs of this application and of the petition”

10. The application is supported by an affidavit sworn by Kassim Mwangomha Kaema on 17th October, 2017 and on the grounds set out on the face of the application. The 5th respondent also supports the applications by the 1st, 2nd and 3rd respondents. He relied on his affidavit in response to petition.

11. On 27th October, 2017, the petitioner filed a response sworn on the same date. He sought to have the application filed by 1st, 2nd and 3rd respondents’ dismissed with costs in the interest of justice

12. Parties agreed to have the application disposed off by way of written submissions. Submissions were highlighted on 16th of November 2017. Mr. Were for the petitioner, though absent, relied on his filed written to submission.

13. In her submission, Mrs Munyithya for the 1st, 2nd & 3rd respondents submitted that the petition is incurably defective for failing to comply with mandatory provisions of the Rule 8 (1) and 12 (2) of the Elections (parliamentary and County Elections Rules 2017).

14. That petitioner failed in his petition to state the name and address of the petitioner, the results of the election under challenge and the manner in which the election results were declared. That failure to

comply with the with the rules makes the petition incurably defective and should be struck out.

15. That omission cannot be cured by a gazette notice attached to the petitioner's supporting affidavit. She relied on several authorities including the most recent cases of JIMMY MKALA KAZUNGU -VS- INDEPENDENCE ELECTRAL AND BOUNDARIES COMMISSIONS (IEBC) & 2 OTHERS - MOMBASA HIGH COURT ELECTION PETITION NO. 9 OF 2017 and MALINDI HCCC ELECTION PETITION NUMBER 10 OF 2017 ,-MBARAKA ISSA KOMBO VS INDEPENDENCE ELECTRAL AND BOUNDARIES COMMISSIONS (IEBC) AND 3 OTHERS where **Hon. Justice Thande** and **Hon Justice P.J Otieno**, respectively, struck out petition that did not comply with mandatory provisions of Rule 8 (1) and 12 (2) of the Elections (Parliamentary And County Elections) petitions Rules, 2017.

16. She further submitted that the respondents will be prejudiced if the court allows the petition to go on as results are not indicated. That the court should not be burdened with a defective petition and that the respondent need not spend time and money in defending the petition that is dead in the eyes of law.

17. That mistakes of an advocate cannot be visited upon his client when made in ordinary civil cases, but not in election petitions which are governed by different regime of law emanating from the Constitution, the Election Acts and Election Petitions Rules where mistakes are not excusable by the election courts.

18. Mr. Bwire for the 5th respondent in supporting the application, adopted the submissions of 1st 2nd & 3rd respondents. In addition, Mr Bwire submitted that the petition does not state the numbers of votes casts in favor of each candidate who participated in the election. That the supporting affidavit also failed to comply with mandatory provisions of rule 12 (2) & 8 (1) of elections (Parliamentary and County Election) petition rules, 2017

19. He too relied on several authorities including those cited by counsel for the 1st 2nd and 3rd respondents. He relied on the case of AMINA HASSAN AHMED VS RETURNING OFFICER MANDERA COUNTY & 2 OTHERS (2013)eKLR and M'NKIRIA PETKAY SHEN MIRITI V RAGWA SAMWEL MBAE & 2 OTHERS (2013) eKLR where the petition was struck out on almost similar grounds by **Justice Onyancha** and **Lesiit J** on the grounds that that the provision of Rule 8 (1) and 12 (1) of Elections (Parliamentary And County Election) Rules,2017 are not mere technicalities but are substantive that go to the root of issues in a petition.

20. Mr. Bwire urged the court to struck out the petition dated 4th September, 2017 with cost to the respondents. That non-compliance with the rules cannot be cured by **Article 159 (2) of The Constitution,2010**

21. Mr., Were on the other hand submitted that the petition is well grounded in law and that the current application by the 1st 2nd and 3rd respondents is not only misconceived , but also an abuse of court process. That striking out of any pleading or petition is a draconian measure which the court has to exercise with restraint. He submits that the name and address of the petitioner, the results of the election and the date of declaration of results has been stated at page 1 of the petition.

22. In his view, the petitioner complied with Rules 8 (1) and 12 (2) of the Elections (parliamentary and County Elections) Petition Rules, 2017. That there is a gazette notice dated 22nd August, 2017 attached to the petitioner's affidavit which cured the alleged defect. According to him, and rightly put, it is not possible to separate the petition from the supporting affidavits and the same should be treated as one.

23. Mr. Were further submitted that, this court notwithstanding , has the discretion under Rule 5 (1)1 of the Elections (Parliamentary And County Election Rules) Petition Rules 2017, to excuse non compliance. That Rule 5 make all election provisions directives rather than mandatory provisions.

24. That striking out a petition in it's entirety, is drastic, draconian and should be limited to cases which are scandalous, embarrassing or oppressive. That it should be used sparingly. It is Mr. Were's view that its

only equitable that the petition proceeds to full hearing on its merit as it raises triable issues which not only affect the petitioner, but also the people of Kwale county, Tiwi ward.

25. That the mistake of an advocate cannot be visited upon his clients and that the same can be redeemed by way of costs. That there is no prejudice to the applicants if the present application is dismissed. In his view, and rightly so, election petitions are emotive and should be considered on merit and the application before court should be dismissed in the interest of justice. He prays that the petition be heard on merit.

26. To drive his point home, he too, relied on several authorities including the case **GATIRAU PETER MUNYA -VS- DICKSON MWENDA KITHINJI AND 2 OTHERS** where the court of appeal opined that affidavits in support of a petition and any document annexed thereto are deemed to be part of the petition and therefore pleading, the . **PRESIDENTIAL PETITION NO 1/17, RAILA AMOLLO ODINGA AND ANOTHER V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) AND 2 OTHERS eKLR 2017** where the supreme court observed that rules of the court must be adhered to by all litigants at all times to ensure that orderly and expeditious conduct and disposal of disputes that come before it, but in the interest of justice, the court invoked its inherent jurisdiction and retained documents which were not in compliance with the rules; and the case of **PHILIP CHEMWOLO & ANOR. VS AUGUSTINE KUBENDE (1982-88) KLR 103** in which **Apaloo J A** held that the mistakes of an advocate cannot be visited upon his client.

27. I have carefully considered the application before me, the affidavits in support as well as the reply thereto. I have also read the submissions filed and the authorities cited by the parties. The main questions before me are:-

- 1. Whether the petitioner complied with Rule 8 (1) and Rule 12 (1) of the Election petition Rules in his petition dated 4th September, 2017.**
- 2. What is the legal effect of non-compliance with the election (Parliamentary And County Election) Petition Rules 2017 Rules, 2017?**
- 3. What orders as to costs should this court make.**

A: DID THE PETITIONER COMPLY WITH RULE 8 (1) AND 12 (1) OF THE RULES?

28. To determine this, it is imperative for this court to consider the provisions of Rule 8 (1) and Rule 12 (1) of the election (parliamentary and county election petition rules, 2017).

29. Rule 8 (1) of the election petition rules stipulates what should be stated in an election petition, it provides as follows;

8 (1) An election petition **shall state; (emphasis mine)**

- a) The name and address of the petitioner
- b) The date when election in dispute was conducted
- c) The results of election if any and however declared
- d) The date of the declaration of the results of the election
- e) The grounds on which the election is presented and
- f) The name and address of the advocate, if any for the petitioner which shall be the address for service.”

30. Similarly, **Rule 12 (2)** of the Election (Parliamentary And County Election) Petition Rules, 2017 provides that an affidavit in support of a petition **shall state.....** and give word for word what is provided in Rule 8 (1). Rule 8 (1) stipulates the requirements for petitions while Rule 12 (1) stipulates what should be in an affidavit in support of petition.

31. The two rules provide that the petition and affidavit in support of the petition '**shall state**'. They are couched in mandatory terms leaving the court with no room for discretion. It simply means that the petitioner, had statutory duty to indicate and include all the requirements stated above in his petition and the affidavit failure to which, the petition becomes defective in form and substance.

32. I have looked at the petition dated 4th September 2017. From paragraph (a) to (d), the petitioner did not give the results garnered by each candidate. It does not indicate when, and how the results were declared as well as the petitioners address for service. similarly , at paragraph 1 to 4 of the supporting affidavit, he has not particularized the results or stated when and how the results were declared.

33. The petitioner has, in his supporting affidavit attached gazette notice of the results of the Election for members of county assembly. This in my view does not absolve him from giving all details and particularizing them as required of him under Rule12 of the election (parliamentary and county elections) petition rules, 2017. The rules in my view are succinct. in light of the above, It is my finding that the petitioner did not wholly comply with the Rule 8(1) and Rule 12 (1) of Election (Parliamentary And County Election) Petition Rules 2017.

B: LEGAL EFFECT OF NON COMPLIANCE

34. The overarching objective of the petition rules is to ensure just, expeditious proportionate and affordable resolution of election petition. In the case of **Amina Hassan (Supra) Onyancha J** relied on the Indian case of **Jyoti Basu & Others vs Debi Ghosal & Others AIR 1982 SC, 983** where it was held that:-

"...An Election Petition is not an action at common law nor in equity. It is a statutory proceeding to which neither the common law nor the Principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and Equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them consideration of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statutes lays down. In the trial of election disputes, court is put in a straight jacket....."

the judge went on and opined that;

"In ordinary civil cases, striking out a pleading by court is indeed draconian and is limited to cases or pleadings which are scandalous, embarrassing or oppressive. It is a jurisdiction which is exercised sparingly..... This petition is a creature of special legislation, the Elections Act, 2011. It is not an ordinary Civil Suit and ordinary civil suit and civil suit procedure principles arising from the interpretation of the Civil Procedure Act and Rules may not be applicable. The court has already found the petition before the court is defective. So defective that it cannot be resuscitated or cured. As it is therefore, the petition is as good as dead and however sympathetic this court can be to the Petitioner, it can do but little to assist her."

35. Similarly, in the case of **M'NKIRIA PETKAY SHEN MIRITI = V= RAGWA SAMWEL MBAE & 2 OTHERS (2013) EKLR** Justice Lesiit had this to say concerning non compliance of Rule 8

"Rule 10 (now rule 8) are not the technical requirements laying down procedural form and content of intended election petition but are substantive as they go to the root and substance of the issues and matters presumed upon since the rules like Election Act are special legislation created to give effect to the overlying objective mentioned in the Rule 4 which is to facilitate the

just expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act. Every rule is intended to achieve a required result geared towards inter alia expeditious in resolution of petition.”

36. I agree with the advocates for the respondents' and the learned Judges view that election petitions are unique in nature. They are special proceedings governed by special regime of law intended to assist the court in determining petitions in a timely and organized manner. Articles 159 (2) of the constitution was never meant to oust the obligation of litigants to comply with the rules and procedures as they seek justice.

37. The way children matters are handle is not the same way ordinary civil suits are handle. It's also not the same way employment and labor relations disputes are handle. Criminal matters are also handle differently, so do electoral disputes. This is because they are all governed by different regime of law and rules.

38. Counsel for the petitioner submitted that mistakes of an advocate cannot be visited upon his client .He relied on the case **PHILIP CHEMWOLO & ANOR. VS AUGUSTINE KUBENDE (1982-88) KLR 103** of where **Apaloo JA** stated as follows;

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that the party should suffer the penalty of not having his case on the merits....I think the broad approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as in often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

39. Mistakes of an advocate in ordinary civil matters , I agree cannot be visited upon his client in so far as the mistake can be attenuated by costs. The rules are the handmaidens of justice. They are not meant to impede justice. The above authority as well as others cited by the petitioner are distinguishable as they do not apply in election petitions. There is no single authority in an election petition cited by the petitioner, where mistakes such as in this case has been excused. I have not seen one myself.

40. The particulars required in the petition and its affidavit , goes to the root of petition. Election is matter of numbers, and those numbers must be given to court as the petitioner has to prove that out of non compliance, or because of irregularities and illegalities, the final results being challenged was affected.

41. Indeed, I agree with Mr were that affidavit and documents annexed thereto in support of a petition form and are part of the pleadings. In **Peter Munyas case, (supra)** cited by the petitioner is distinguishable in this case because in **peter** Munyas case, some documents were struck out by the high court and the court of appeal was of the view that the affidavits and its annexure together with the petition are pleadings. This does not apply in the present case. It does not apply to non compliance with the rules.

42. The date when the results were declared is also not disclosed. It is important to state when the results were declared. This will assist the court in terms of determining when the same started running. Election disputes has to be determined in a timely manner. This obliges the petitioner to avail all information to the election court in a timely manner. Election petition such as this, has to be filed within 28 days from the date of announcement of the results. How then, would the court know when time started running if it's not indicated in the petition. It is important to note that parties are bound by their pleadings.

43. In the case of **JOHN MUTUTHO VS JAYNE KIHARA (2008)ekl** , the court of appeal had this to say:

"What would happen if where as the results as envisaged be regulation 40 above are not included in petition. In our view, an essential element would be missing. The petition shall be incomplete as a basis for any complain will he absent, whatever complain a petitioner may he having about an election, may be regarded as having no legal basis the law has set out what a

petition should contain and if the marks supposed to the included is omitted then the petition would be incurably defective."

44. Counsel for the petitioner, Mr. were had urged the court, to dismiss the application and have the petition proceed for hearing on merit. He relied on Article 159 (2) of the constitutions as well as rule 5 of parliamentary election rules. that striking out a petition would be a draconian step by a court.

45. In the most recent case of **JIMMY MKALA KAZUNGU =VS= INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION(IEBC) & 2 OTHERS - MOMBASA HIGH COURT ELECTION PETITION NUMBER 9 OF 2017**, Honorable Justice Thande dealt with similar submissions by the Petitioner therein where it was submitted that striking out is a draconian step and the Petitioner therein relied on the case of **DT Dobie & company (Kenya) Ltd Vs Much in a (1982) KLR** The learned court appreciated that the defect therein could be cured by an amendment but in view of Section 74(6) of the Elections Act, an amendment should have been done within 28 days of the declarations of the results. The court noted with regret that such a door had since closed for the petitioner. I hold this view too.

46. Further, In the case of **MBARAKA ISSA KOMBO VS IEBC AND 3 OTHERS, MALINDI ELECTION PETITION NUMBER 10 OF 2017, EKLR JUSTICE PJ OTIENO** observed at paragraph 27 of his judgment that;

"clearly in law, prior to hearing a matter on merits, the court has no mandate to dismiss the matter .where the pleading is alleged to be defective and therefore deserving no employment of judicial time by production of evidence, and if the court find that indeed there is defect that renders the pleading unremitting for hearing so as to be determined before the merits are scrutinized and delved into, the court only strikes out pleading. i hold the view that striking out a matter is a summary procedure that investigate no merit of dispute but looks at the proprietary of the matter as presented and how it sits with the law ."

47. In short, where a matter is struck out, the petitioner can still file it again within the parameters of law.

48. The petitioner has failed to give detailed results, the date of declaration and how the results were declared. It is mandatory for a petitioner, under electoral laws to give such particulars. This court is bound by the decisions of the court of appeal and that of high court. I find the petition here incurably defective. It's a candidate for striking out I hereby struck it out with costs to the respondents.

C: COSTS

49. The law on costs is that, it follows the cause. Section 84 of the Election Act provides that an election court shall award the cost of, and incidental to a petition and such costs shall follow the cause. **Rule 36(1)** of the rules provides as follows

"36 (1) the court shall at the conclusion of an election petition. make an order specifying

i. total amount of costs

ii. the person by and to whom costs shall be paid."

50. The 1st 2nd and 3rd respondents application dated 17th October, 2017 has succeed at this stage. They shall have the costs of application and petition. The 5th respondent shall have the costs of the petition.

51. This matter has been struck out before it proceed for its determination on merit. I award instruction fee for the application and petition at kshs 100,000 for each advocates representing the respondents.

52. The upshot, and final disposition of the application dated 17th October, 2017 is that it is hereby allowed in the following terms;

1. The petition dated 4th September 2017 be and is hereby struck out for failing to comply with the Election Rules.

2. The respondents are awarded costs of application and petition as follows;

a. The 1st 2nd 3rd respondents shall have costs of the application dated 17th October, 2017

b. Kshs. 100,000 is awarded to the 1st 2nd 3rd respondents

c. Ksh. 100,000 is awarded to the 5th respondents

All other incidentals as to costs shall be assessed and total costs certified

Finally, I wish to most sincerely thank the advocates appearing for the parties for their well researched submissions. The fact that this court did not quote all authorities cited does not mean that it did not give weight to any of them, but rather, saw it not necessary to repeat itself.

LANGAT- KOECH C .BETTY

DATED AND DELIVERED THIS 20th DAY OF December 2017

In the presence of :

..... for petitioner

..... for the 1st 2nd and 3rd respondents

..... for the 5th respondent

ongwaecourt Assistant

LANGAT- KOECH C .BETTY

SENIOR RESIDENT MAGISTRATE, KWALE LAW COURTS