



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT

AT MALINDI

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011

AND

**IN THE MATTER OF THE ELECTIONS FOR MEMBER OF COUNTY ASSEMBLY, KILIFI
COUNTY, JILORE WARD, MALINDI CONSTITUENCY**

(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

BETWEEN

GERALD IHA THOYA.....PETITIONER

AND

CHIRIBA DANIEL CHAI.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C).....2ND RESPONDENT

RULING

The Applications filed are for the petitioner to have an order for scrutiny and recount.

The 1st and 2nd Respondent's applications are to have the petition struck out.

The position to take.

The order for scrutiny and recount can only be passed if the Petition sets out his/her case with precision supported by averments of material facts.

There has to be a prima facie case. In this regard this position can only be reached once the application to have the petition struck out has been determined in this regard. I will deal with the 1st and 2nd Respondents first. Then address the Petitioners application thereafter.

History of the matter.

The petitioner filed a petition dated the 6th September, 2017 and sought a declaration that each and all the Respondents jointly and severally committed election irregularities and costs of the petition and any other relief then the court may deem just and fit to grant.

There is an affidavit of Evidence attached of the petitioner and of witnesses one Philip Thoya Baya and Hamisi Abu Mwambire.

The petition was amended by the consent of both parties and amended petition was filed dated the 18th September, 2017.

The gist of the 1st and 2nd Respondents applications to strike out the petition are based on the amended petition herby.

That the petition offends the provisions of Article 87 (2) for failure to state the election results and contravenes Rule 8(1) (c) and (d) and Rule 12 (2) (c) and (d) for failure to declare results.

That in this regard the petition is incurably defective. This is the averment of 2nd Respondent. The averment herein is what 1st Respondent has also addressed.

In both instances the response by the Petitioner through the replying affidavit. The petitioner was conversant with the facts of the case. That on the amended petition was by consent and there are annexures of form 36A's and form 36B's which indicate the total number of rules there were received by each candidate in each polling station and the final votes received as indicated in form 36B.

That the arguments are based on more technicality and matters should be determined on merit.

The court's position after considering the submissions.

What is the law on striking out pleadings.

The position in law is that a pleading should only be struck out in clear cases and then the court should look at substance and not form.

This is the general legal position in striking out pleadings.

This is an election petition what does the law deal with this:

The Rules cited herein are what the court to consider.

Generally every election petition must confirm to any mandatory requirement set out in the election Act 2011 and the relevant procedural Rules.

In the case of Ismail Suleiman and 9 others- vs- Returning officer Isiolo County and 2 others (Election petition (Meru) no 2 of 2013, and Amina Hassan Ahmed –vs- Returning officer Mandera County and 2 others. (Election petition (Nairobi) 4 of 2013.

The court may properly dismiss or strike out and offer to do so election petition which do not comply with proscribed mandatory requirements.

Under Rule 8 of the Elections (Parliamentary and county Election Petition Rule 2017) and rules 7 and the first schedules of the Supreme court (President Election Petition) Rules 2017 every Election petition must state:-

- Name and address of the petition

- The date when the election in dispute was conducted
- The results of the election if any and however delivered
- The date of the declaration of the results of the elections
- The grounds on which the petition is presented and
- Name and address of the advocate if any which shall be the address of service amongst other requirements.

The requirements set out in Rule 8 of the Elections (Parliamentary and County election) petition rules 2017 and Rule 7 and the first schedule of the supreme court (Presidential Election petition) Rules 2017 are not more technical requirements limited to procedure form and contents of the election petition.

This was demonstrated in the case of M’N Kina Petkery Shen Mint Vs Regina Samwel Mbae and 2 others. Election petition Meru No. 4 of 2013.

Those requirements are substantive to the extent that they go to the road of the issues before an election court.

It was further brought out that the invocation of Article 159 (2) of the constitution therefore were met necessarily salvage on election petition which doesn’t comply with the requirements set out in Rule 8 of the Elections (Parliamentary and County Election) petition Rule 2017 and Rule 7 and the first schedule of the Supreme court (Presidential Election Petition) Rules 2017.

In Amina Hassan Ahmed vs Returning Officer Mandera County and 2 others. Election Petition (Nairobi) No 4 of 2013, the court held as follows.

That the provisions of Rule 8 are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petition they nevertheless at the same time and substantive and go to the route and substance of the issues and matters prescribed upon.

I do proceed to observe further at Rule 8 (4) (b) and 12 of the Election (Parliamentary and County Elections) parties Rules 2017 require that the parties to file together with an election petition affidavit sworn by parties and all witnesses and therefore they form part of pleadings.

The applicant herein has been specific upon the grounds upon which he seeks the orders sought its submitted then there is an amended petition which apparently cured the defect.

What is the position of the court on this.

The amendment here was by consent.

The amendment of a pleading extinguishes the provision pleading. Accordingly an amended election petition must be supported by a fresh affidavits by the petitioner and the petitioner witnesses. This was demonstrated in the case of

Lumbashue Reuben Moriaso Ole vs Kodi Julius Ole and 3 others in (SRM’S) case Narok Election Petition 1 of 2013.

It was decided that it is settled in law that filing of an amended pleading extinguishes the earlier pleading. Therefore by filing the present amended petition the original became extinct. In this regard a petition can’t be complete without an affidavit in support of the petition and witness affidavits.

Rule 8 of the Election Petition is coached in mandatory terms.

In the case of Amina Hassan Mandera County and 2 others (Garissa Election petition no. 4 of 2013)

The position established was that courts don't allow amendment which seeks to cure a fatal defect (i.e) failure to comply with prescribed mandatory requirements.

In this regard to omit to file affidavit in support is a fatal defect.

The arguments considered the position further of the court is that the general judicial view their summary discussions of case is drastic and draconian steps ought to be taken sparingly and only in cases which are clear where the defect is incurable. Indeed election courts which have discretion pursuant to Article 159 (2) (d) of the constitution to excuse minor or trivial directions for the essence of that prosecution is that a court of law should not allow the prescription of procedure and form to trump a primary object of dispensing substantive justice to the parties on the contrary the court is an urgency of the process of justice it's called upon appreciate all the relevant circumstance and requirements of a particular case and consistency determine the best course.

This is an election petition whose circumstance is considered to have limited period within which is to be heard and determined by:- Amended petition. The earlier is extinguished and since the petition can't be complete affidavit in support

which the amended parties herein lacks if to excuse the deviation were to be allowed. What would be the position? it would be to rely on both on the petition and the amended (petition) if the court was to allow or rather permit this position then the court would end up with bicephelons (petition) in its hands a strange creature unknown to the election regime and law but probably a two headed canine beast whose mythical rule ended when it was clobbered out of existence.

The affidavit in support of the petition and any documents annexed thereof are deemed to be fat of the petition and therefore form part of the pleadings.

Reference is made to the case of Gatirau Peter Munya vs Dickson Githinji and 2 others. Supreme Court petition No. 2b of 2014.

In this case the threshold of the law was not attained by the omission.

The court as an agency of the process of justice and having appreciated the circumstances am persuaded to allow the applications by the 1st and the 2nd Respondents. I do therefore proceed to have the petition struck out with cost to the Respondents.

I do cap costs at ksh. 500,000/= for each of the Respondents. Total therefore be ksh. 1.5 million.

The application by the petitioner of scrutiny and recount has therefore been overtaken by the 1st and 2nd Respondents application being allowed.

Signed

HON. S.R WEWA – PM

Mr. Ole Kina for 1st Respondent and Mr. Mkomba for 2nd and 3rd Respondent.

I do hold the brief.

Mr. Oduor for the Petitioner I don't see him, the Petitioner is present

Signed

HON. S.R WEWA – PM

Court

Read on the 20/12/2017 in the presence of Mr. Ole Kina for the 1st Respondent and holding brief 2nd and 3rd Respondent.

Mr. Shujaa holding brief for Mr. Oduor for the Petitioner

Signed

HON. S.R WEWA – PM

Mr. Shujaa

I do seek leave to appeal against the Ruling and also to get certified copies of the proceedings and Ruling.

Signed

HON. S.R WEWA – PM

Court

The leave to appeal granted.

Certified copies of proceedings and Ruling be supplied on payment.

Signed

HON. S.R WEWA – PM