



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KIAMBU

ELECTION PETITION NO.3 OF 2017

IN THE MATTER OF:

ARTICLES 10, 21, 22, 27, 50 (1), 90, 177 AND 197 OF THE CONSTITUTION OF KENYA

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION ACT NO. 9 OF 2011

THE ELECTIONS ACT NO. 24 OF 2011

THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

THE ELECTIONS (GENERAL) REGULATIONS (L.N. 28 OF 2012 AND L.O.N.72 OF 2012)

THE ELECTIONS (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017 (L.N. 69 OF 2017)

NOMINATED MEMBERS OF THE COUNTY ASSEMBLY, KIAMBU

INTERNATIONAL CONVENTIONS AND/OR GOOD PRACTICE

BETWEEN

HENRY WANYOIKE WAHU.....1STPETITIONER

CRISPUS MBOGO KIMANI.....2ND
PETITIONER

JANE WANJUIKU KARANU.....3RD
PETITIONER

VERSUS

COUNTY ASSEMBLY OF KIAMBU.....1ST
RESPONDENT

THE CLERK COUNTY KIAMBU ASSEMBLY
2NDRESPONDENT

JUBILEE PARTY OF KENYA.....3RD

RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....4TH
RESPONDENT

RULING

1. The Petitioners moved High Court by way of Petition dated 5th day of September 2017 under a certificate of urgency and it was received on 6th day of September 2017 as Petition No. 440 of 2017.

2. The Petitioners seek:

a) An order of temporary injunction be issued restraining the 1st and 2nd Respondents, whether by themselves, their agents, servants or any other person acting through their instructions from conducting swearing in ceremony of the 3rd Respondent's nominated Members of the County Assembly whose names have been gazetted by the Independent Electoral and Boundaries Commission on the 28th August 2017 in Gazette Notice No. 8380 Vol. CXIX No. 124.

b) A declaration that the 3rd Respondent's Party list forwarded to the 4th Respondent by the 3rd Respondent in respect of Kiambu County Assembly Nominees and the consequential gazettment on 28th August 2017, in Gazette Notice No. 8380 Vol. CXIX No. 124 be and is hereby declared null and void.

c) A declaration that the 3rd and 4th Respondents contravened 10, 21,22,27,50 (1),90,177 & 197 of the Constitution, as read together with Section 36 of the Elections Act and Section 7 of the County Government Act by nominating and or gazetting the persons listed in Gazette Notice No. 8380 Vol. CXIX No. 124 in respect of Kiambu County.

d) That the Petitioners' names be and are hereby included in and forwarded by the 3rd Respondent to the 4th Respondents in a fresh nomination party list for due consideration and gazettment.

e) That in the alternative to (d) above, the Petitioners' names be gazetted by the 4th Respondent as duly nominated by the 3rd Respondent as members of the County Assembly, Kiambu County.

f) That cost of this petition be borne by the 3rd and 4th Respondent.

g) Any other orders that the honourable court may deem just and fit to grant.

3. On the same day received the matter was presented before Mativo J who after perusal found that he petitioners were challenging elections of relating to members of the County Assembly Kiambu County and hence would be required to show why the petition was not filed before the Magistrate's Court at Kiambu who had jurisdiction to hear such petitions.

4. He ordered that the matter be mentioned on 20/9/2017 before him for directions and on that date there was no attendance by the Respondents but Mr. Njehu Advocate for the Petitioners informed the court that the matter ought to have been fixed in Kiambu Chief Magistrate's' court and therefore asked for the transfer of the said case here for hearing and disposal.

5. On the same day, the court made a finding that this is an election petition and he could not entertain it and directed that it be transferred to the Chief Magistrate's court Ki8ambu for hearing and disposal before the relevant gazetted judicial officer for reasons that:

(a) It ought to have been filed at the Chief Magistrate's Court, Kiambu

(b) There are gazette Judicial officers handling such matters pursuant to Sec. 75 of the Elections Act

6. This matter was received here and given a new case number as Election Petition No. 3 of 2017 and pursuant to a notice I issued to parties, they appeared before me for directions on 7/11/2017 and initial directions on filing of documents given for the parties to come back for confirmation of compliance on 21/11/2017.

7. On that date the court brought to the attention of parties that the court record reflects that the Petitioner has not yet deposited the security for costs unless the Petitioner could confirm otherwise. I asked the Petitioner to address me on the same. In the meantime Mr. Waithaka filed a Notice of Appointment to enable him make an application for intended 1st, 2nd and 3rd interested parties who wished to join the proceedings.

8. Ms Ndirangu who was holding brief for Mr. Njehu for the Petitioners told the court is that they had not yet deposited the security for costs and that she had instructions to make an oral application to seek leave to deposit the same for reasons that:

(i) The matter was a transfer from Milimani.

(ii) Upon enquiry at the registry High Court Kiambu, they were instructed to wait until given directions by the court but added that she did not have specifics of such instructions by the registry.

9. Mr. Muriuki for the 1st and 2nd Respondents and Mr. Wanjala holding brief for Mr. Irungu for 4th Respondent had no objection for leave sought by the petitioners.

10. Mr. Ombasa for 3rd Respondent strongly opposed the application and submitted that:

(i) It is a requirement of law that the Petitioner deposits the security for costs within 10 (ten) days.

(ii) The Counsel for Petitioners had admitted that they had filed the petition in Nairobi but did not state whether he got instructions on deposit of security for costs in Nairobi though he says he got them from Kiambu.

(iii) Nevertheless the timelines for the deposit are in mandatory terms and therefore the Petition herein is incompetent before court.

(iv) It is of concern that the petition was filed in Milimani High Court on 6/9/2017 yet High Court does not have jurisdiction to hear county representative election petitions.

(v) The petition was never served upon the 3rd Respondent until 8/11/2017 and had the same been served on time the 3rd Respondent would have filed an objection at the earliest opportunity.

(vi) The Petitioners have tried to sneak in the petition past the stipulated time and therefore the same should be struck out.

11. Mr. Waithaka for the intended 1st, 2nd and 3rd interested parties was also opposed that application on the grounds that:

(i) Section 13 of the Election Petition Rules are clear that security for costs should be deposited with the Registrar and the Registrar is defined as the Registrar of the High Court or the Executive Officer in the case of the Magistrate's Court.

(ii) Those offices existed at the time of filing the petition and there is no requirement for directions to come from any authority for the security for costs to be deposited.

(iii) The requirement is in mandatory terms and the court has no discretion to vary that which has been provided by the statute.

(iv) No officer has been cited so that it can be verified that there was such communication with the Petitioners that the deposit for security be delayed.

(v) No application for leave to extend time was ever filed or made until the court raised the issue and that even if it had been made it would have failed as there is no provision for such extension.

(vi) Failure to deposit the security for costs is fatal to the petition and therefore the application for leave should be dismissed and the petition struck out with costs to the 1st, 2nd and 3rd interested parties.

DETERMINATION

12. I have considered the submissions by the parties herein. From the history of this matter it is clear that all along the Petitioners were aware that this is an election petition which is the only way they can remove from office the elected persons. I will not deal with the issue of them filing this petition in High Court and not in the Magistrate's Court in the first instance as the honourable judge dealt with the same.

13. Even it may be assumed and it has not been suggested, that they did not know it was an election petition and therefore filed it in the Constitutional and Human Rights Division, they were notified of its nature on the same day when the certificate of urgency was handled. The even demonstrated on 20/9/2017 that they were aware that the matter was an election petition that ought to have been filed in this court and it was transferred as such.

14. Despite this knowledge by the Petitioners, there is nothing on record to show that they made any attempt to deposit the security for costs for Ksh. 100,000/= for such this petition as provided for under Section 78 (1) and (2) (c) of the Elections Act No. 24 of 2011.

15. The time lines for such deposit are provided for under Section 78 (1) of the Elections Act in mandatory terms that:

“A petitioner shall deposit security for costs that they become payable by the petitioner not more than ten days after presentation of a petition under this part.”

16. Further Rule 13 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that:

(1) Within ten days of filing a petition, a petitioner shall deposit security for the payment of costs in compliance with Section 78 (2) (b) and (c) of the Act.

(2) The security for costs to be deposited under sub rule (1) shall-

(a) be paid to the Registrar;

(b) be for the payment of costs, charges or expenses payable by the petitioner; and

(c) subject to directions of an election court, be vested in, and drawn upon from the time to time by, the Registrar for the purposes for which security is required.

17. The Advocate for the petitioners admitted that no deposit had been made as at 21/11/2017 when she was making the oral application for leave to deposit the same after prompting by this court. A total of about two and half months had lapsed after filing of this petition. Before then, there was no attempt to seek leave to deposit the same.

18. The argument that failure was occasioned by the fact that the matter was first filed in Milimani does not hold water in light of the history of this matter. There is no reason given as to why it was not deposited in High Court at Milimani where the matter was not filed.

19. The excuse that they were asked by the registry to await directions cannot hold water either. Rule 13 cited above does not provide for any directions or authority to be given by anyone before the security for costs is deposited by a Petitioner.

20. The Petitioner is simply required to deposit the same with the Registrar and under Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, “**Registrar**” means-

(a) the Registrar of the High Court; or

(b) an executive officer, where the petition is filed in the magistrate’s court.”

21. In any event I find no provision for leave to extend time within which the deposit can be made from the above provisions. The issue of failure to deposit security for costs in compliance with the said provisions above and the consequences for such failure has variously been dealt with by the superior courts. It is not material that some of the Respondents do not oppose the application by the Petitioners herein for leave to extend time to deposit security for costs.

22. In *Milton Kimani Waitinga v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR* Joel Ngugi, J, was faced with a similar issue as the in the matter before me and struck out the petition with costs. He cited with approval several authorities on this issue and in particular *Evans Nyambaso Zedekiah & Another v Independent Electoral and Boundaries Commission & 2 others [2013]eKLR*, *Kisii Election Petition No.6 of 2013 Fatuma Zainabu Mohamed v Ghati Dennitali & 10 others* (unreported) and *Kumbatha Naomi Cidi v County Returning Officer, Kilifi & 3 Others [2013] eKLR*

23. In *Milton Kimani Waitinga* case the court held:

“In the circumstances, given the clear stipulation of Section 78(2) (b), Rule 13 and our decisional law, it follows that the Notice of Motion dated 21/09/2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a Petitioner is required to deposit security for costs within ten days of filing their Petition. This did not happen here. Indeed, more than thirty-seven (37) days later (at the time of arguing the Application), the Petitioner had not paid the security deposit. The Petitioner had, also, not made any efforts to get the leave of the Court to deposit the security for costs out of time. What is more is that in this case the Court had instructed the Petitioner to respond to the Application seeking to strike out the Petition and he failed to do so. The clear indication is that the Petitioner is not serious about prosecuting the Petition. There is simply no good reason to keep this Petition alive. As I have already indicated, failure to pay security deposit in Election petitions goes to the root of the jurisdiction of the Court to hear the Petition. The logical conclusion, then, is that the Court has no jurisdiction to take any further action in the Petition.”

24. In the circumstances I am satisfied that there is no need and I have no jurisdiction to proceed further with this petition. I dismiss the oral application for leave to extend time to deposit security for costs. As a consequence thereof, I strike out this petition and order that a certificate do issue pursuant to Section 86 (1) of the Elections Act, 2011. Considering the stage at which the matter has been disposed of and the circumstances herein, I order that each party bears his own costs.

Dated, signed and delivered this 1st day of December, 2017

P. Gichohi

Chief Magistrate