



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT Garissa**

**ELECTION PETITION NO. 2 OF 2017**

**JAMAL ABDI HASSAN.....PETITIONER**

**VERSUS**

**DIRIYE BARE ABDI.....1<sup>ST</sup> RESPONDENT**

**I.E.B.C.....2<sup>ND</sup> RESPONDENT**

**ISAACK MUHUMED /CONSTITUENCY RETURNING**

**OFFICER DADAAB CONSTITUENCY .....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent in his application dated 16<sup>th</sup> November, 2017 seeks that the petition dated 21<sup>st</sup> August, 2017 together with the supporting affidavit of the petitioner sworn and filed on 21<sup>st</sup> August, 2017 be struck out (among other prayers).

2. The application is based on the following grounds

(a) That the petition and the supporting affidavit of the petitioner is incurably defective from the face of the record.

(b) That the petition and supporting affidavit of the petitioner do not comply with mandatory Provisions of Rule 8 and Rule 12 of the Elections (Parliamentary and County Elections) Petition Rules 2017 which have jurisdictional implication.

(c) That the petition does not state the address of the petitioner in contravention of the mandatory provision of Rule 8(a) of the Elections (Parliamentary and County Elections) Petition Rules 2017.

(d) That the petition does not state the results of the election if any and however declared in contravention of the mandatory provisions of Rule 8 (c) of the Elections (Parliamentary and County Elections) Petition Rules 2017.

(e) That the petition does not state the date of the declaration of results of the election in contravention of the mandatory Provision of Rule 8 (d) of the Elections (Parliamentary and County Elections) Petition Rules 2017.

(f) That the supporting affidavit of the petitioner does not state the address of the petitioner in contravention of the mandatory provision of Rule 12 (2) (a) of the Elections (Parliamentary and

County Elections) Petition Rules 2017.

(g) That the supporting affidavit of the petitioner does not state the date when the election in dispute was conducted in contravention of the mandatory provision of Rule 12 (2) (b) of the Elections (Parliamentary and County Elections) Petition Rules 2017.

(h) That the supporting affidavit of the petitioner does not state the results of the election, if any, however declared in contravention of the Mandatory Provisions of Rule 12 (2) (c) of the Elections (Parliamentary and County Elections) Petition Rules 2017.

(i) That the supporting affidavit of the petitioner does not state the date of the declaration of results of the election in contravention of the mandatory Provision of Rule 12 (2) (d) of the Elections (Parliamentary and County elections) Petition Rules 2017.

(j) That due to the strict constitutional and regulatory timelines the effect of the grounds herein above which are substantive and go to the root of the petition are incurable under Article 159 of the Constitution thereby rendering the petition bad in law and incompetent and must be struck out forthwith.

The application is further supported by the affidavit of the 1<sup>st</sup> respondent sworn on 16<sup>th</sup> November, 2017.

The petitioner filed grounds of opposition dated 23<sup>rd</sup> November, 2017. The grounds which are relevant to this application are'

(i) That the application herein is premature, bad in law and amounts to an outright abuse of the process of this Honourable court.

(ii) That the grounds contained in (on) the application do not in any way disclose an arguable case on the part of the applicant to warrant granting of the orders sought.

(iii) That in the circumstances, the instant application is vexatious and an abuse of the process of this court and meant to scuttle the implementation of the orders for scrutiny and recount.

The application was canvassed before me on 23<sup>rd</sup> November, 2017.

Mr. Joshua Kembero for the applicant argued that the petition filed on 21/08/2017 and the supporting affidavit of the petitioner does not comply with mandatory provisions of Rule 8 and 12 of the Elections (Parliamentary and County Elections) Petition Rules 2017. He cited the following cases.

1. Jacob Mwirigi Muthuri Versus John Mbaabu Muriithi & 2 others (2013) eKLR.
2. Mbaraka Issa Kombo Vs. Independent Electoral and Boundaries Commission & 3 others (2017) iKLR.
3. John Mututho Vs. Jayne Kihara (2008) eKLR.
4. Jimmy Mkala Kazungu Vs. IEBC & 2 others (2017) eKLR.

Mr. Faruq Kyalo for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the application by the 1<sup>st</sup> respondent. He submitted that Rules 8 and 12 of the Elections (Parliamentary and County Elections) petition Rules are mandatory in nature and any party who fails to comply with them must meet the consequences, which is to have his/her petition struck out. He cited the case of Jimmy Mkala Kazungu Vs. IEBC & 2 others (supra) where the court held that it is an abuse of the court process to allow a defective petition to proceed to trial.

Mr. Faruq further argued that Article 159 of the Constitution cannot come into aid of the petition. To this end he cited the case of Nicholas Kiptoo Arap Korir Salat Vs. IEBC & 6 others (2013) eKLR where the court held that Article 159 of the Constitution is not meant to oust the obligation of the petitioner.

Mr. Mwalimu for the petitioner submitted that the petition and the supporting affidavit adheres to Rules 8 and 12 of the Election (Parliamentary and County Elections) Petition Rules.

He submitted that the address of the petitioner is stated in the petition and that the Rules do not prohibit the petitioner from adopting the address of his advocate. He argued that the applicant wants this court to give a narrow interpretation of Rules 8 and 12 of the Elections (Parliamentary and County Elections) Petition Rules. He argued that the form set out in the First schedule under Rule 7 (b) of the Elections (Parliamentary and County Elections) petition Rule 2017 does not provide for inclusion of the address of the petitioner.

He further argued that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent refused to grant the petitioner access to forms 36 (B) which contained the declared results.

In conclusion the petitioner sought refuge in Article 159 of the Constitution and urged the court not to strike out the petition on mere technicalities.

I have considered the application, the submissions made by all the parties as well as all the cited authorities. The following two issues emerges for determination:-

(1) Whether the petitioner complied with Rules 8 and 12 of the Elections (Parliamentary and County Elections) petition Rules 2017;

(2) If not (referring to (i) above), should the petition be struck out?

Rule 8 of the Elections (Parliamentary and County Elections) petition Rules 2017 provides as follows:-

**“Contents and form of a petition”**

i. An election petition shall state:-

(a) The name and address of the petitioner.

(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

(e) The grounds on which the petition is presented; and

(f) The name and address of the advocate, if any, for the petitioners which shall be the address for service.

Rule 12 of the Election Petition Rule states as follows:-

**“Affidavits generally”**

(1) A petition shall be supported by an affidavit which shall

(a) Set out facts and grounds relied on in the petition and

(b) Be sworn personally by the petitioner or by at least one of the petitioners, if there is more

than one petitioner

(2) An affidavit in support of a petition under sub rule (1) shall state:-

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

**Does the petition comply with the above stated provisions of the law?**

The petitioner gives his address in both the petition and the supporting affidavit as follows;

“... care of MCM & Associate Advocates, 6<sup>th</sup> floor, New Waumini House, Westlands, P.O. Box 105838 – 00101 Nairobi..”

The petitioner elected to adopt the address of his advocate.

In my humble view this address is sufficient and meets the requirements of Rule 8 (1) (a) and Rule 12 (2) (a) of the Election Petition Rules 2017.

I have carefully looked at the petition and the supporting affidavit and I note that the only requirement the petitioner has failed to comply with is not to state the date of the declaration of the results of the Election. The petitioner did not state the date of the declaration of the results of the election both in the petition and in the supporting affidavit of the petitioner. This is in contravention of Rules 8 (1) (d) and 12 (2) (d) of the Elections (Parliamentary & County Elections) petition Rules 2017. These rules are couched in mandatory terms.

It is now settled law that failure to comply with provisions of Rules 8 and 12 of the Election (Parliamentary and County Elections) petition Rules 2017 is fatal to the petitioner’s case.

In the case **of Mbaraka Issa Kombo Vs. Independent Electoral and Boundaries Commission & 3 others (2017) eKLR** the court held as follows:-

“Having found that the petitioner failed to give detailed results and the date of declaration and that such particulars are mandatory and being bound by the decision of the Court of Appeal in Mututho’s case I have come to the conclusion that the petition filed herein by MBARAKA ISSA KOMBE is incurably defective and being so incurably defective it merits no further scrutiny whether the complaints by him can be proved or supported by evidence, it presents itself to only one fate, having not been heard on its merits of being struck out...”

In the case of JIMMY MKALA KAZUNGU VS. IEBC & 2 OTHERS (2017) Eklr the court held as follows:-

“...the court finds that the petitioner failed to comply with the express and mandatory provisions of Rule 8 (1) of the Elections (Parliamentary and County Elections) petition rules. It must follow therefore that the petition herein s incurably defective and allowing the same as presently drawn to proceed to trial would be an abuse of the court process. The same is hereby struck out.”

The two above cited cases are decisions of the High Court and therefore binding on this court. Article 159 (2) (d) of the Constitution cannot come to the aid of the petitioner. In the case of NICHOLAS KIPTOO ARAP KORIR SALAT VS. IEBC & 6 OTHERS (2013) eKLR, KIAGE, J. A held as follows:-

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free – for – all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rule and timelines...”

In view of the foregoing the fate of the petition herein is sealed. The petitioner having failed to state the date of declaration of the election results makes the petition herein incurably defective and I hereby strike it out with costs to the respondents. I would cap costs at Kshs. 500,000/= to be paid by the petitioner to the respondents.

It is so ordered.

**HON. COSMAS MAUNDU CM**

**12/12/2017**

**13/12/17**

BEFORE : C. M. MAUNDU CM

C/CLERK : ABDIKHEIR

PETITIONER : PRESENT

1<sup>ST</sup> RESPONDENT : PRESENT

Miss. Hassan holding brief for Mr. Faruq for 2<sup>nd</sup> and 3<sup>rd</sup> respondents present

Mr. Tembero present for 1<sup>st</sup> respondent

Kinyua present holding brief for Mr. Mwalimu for the petitioner

**COURT:** Ruling delivered in open court

**HON. COSMAS MAUNDU CM**

**13/12/2017**

**MR. KINYUA:** I apply for proceedings and a stay of execution of whatever (cost). I ask for 7 days stay.

**MR. KEMBERO:** Much obliged. I am satisfied with the ruling. The ruling has settled the matter. It would be an abuse of the court process to stay its own ruling. This court is bound by the decisions of the High Court. It would be an act in futility to proceed to the High Court.

**MISS. HASSAN:** We concur with the 1<sup>st</sup> respondent.

**COURT:** The petitioner to be supplied with certified copies of the proceedings and ruling upon payment of the required fees. There will be 7 days stay of execution.

**HON. COSMAS MAUNDU CM**

13/12/17