



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
AT MALINDI
ELECTION PETITION NO. 4 OF 2017
(SHELLA WARD)
IN THE MATTER OF THE ELECTION ACT. 2011
BETWEEN
KAZUNGU WANJE BAYA PETITIONER
AND
INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION (I.E.B.C).....1ST RESPONDENT
SUDI MASHA2ND RESPONDENT
KADENGE MWATHETHE ADAMSON.....3RD RESPONDENT
RULING

Before this court are two Applications for determination:

1. Application (Notice of Motion) dated the 20th day of September, 2017 filed by the 3rd Respondent.
2. Application (Notice of Motion) dated 16th day of October, 2017 by the 1st and 2nd Respondents

From the court records it appears that the Petitioner has not opposed the two applications as to response to it applications have been made by the Petitioner, however in view of the nature of the case before me which is an election petition which has obviously quest public interest and any judicial decision herein affects it larger population of Shella Ward, this court will consider the application on merit.

I. APPLICATION DATED 20/9/17

The applicant who is the 3rd Respondent in this Petition filed the application seeking the following orders;

1. Stay of proceedings in this petition (Petition number 4/2014 pending determination of the

application)

2. That the Petitioner's petition be struck out, or
3. That in it alternative, prayer 1,2,5 of the petition be stuck out as they are not provided for Rule 8 of the (Parliamentary & County) Elections Rules, 2017,or any other law, or
4. That in the alternative and without prejudice to the above prayers, relief number 8 of the petition be stuck out.
5. That all the reliefs sought in the petition be struck out.
6. That costs of the application be provided for.

The applicants case

1. That the petition was filed out of time.
2. That the relief sought is not supported by substantive evidence.
3. That the petitioner has not complied with Rule 8(c) of the Parliamentary and County (Election rules)
4. That the petition is not supported by an affidavit or competent affidavit in accordance with the rules.
5. That the affidavits or statutory declarations filed alongside the petition do not show why they were sworn and further they are drawn by strangers to it petition.
6. The Petition is incurably defective.

The only issues for determination are:-

On the first issue, from annexure – “KMAI” annexed to the application supporting affidavits, which is a certificate of Elected member of County Assembly namely Mwachethe Adamson Kadenge the 3rd Respondent in the petition and the applicant to the application dated 20/9/2017, it's clear that the application was declared by the 2nd Respondent and duly elected as Member of County Assembly on the 10th day of August, 2017.

Under section 76 (1) (a) of the Elections Act, 2011 petition challenging the validity of election of members of county Assembly must be filed within 28 days of the declaration of results of election. From this court's record, it is clear that the petitioners petition dated 5/9/2017 was filed in court on the 19/9/2017 one day after the lapse of the statutory 28 days provided by law and this has not been challenged by the Petitioner.

Similarly under Article 87 (2) of the constitution, 2010 petitions (Election Petitions) concerning an election other than a presidential election shall be filed within twenty eight (28) days after the declaration of the elections results by the independent Electoral and Boundaries Commission.

The Petitioner having failed to comply with the constitutional requirement on the timelines of filing his petition, makes the petition incurably defective and must be struck out.

Under the Elections (Parliamentary and County Elections) petition Rules 2017, there is no Rule 8(c) as quoted by the applicant in his grounds of application. Rules of pleadings dictate that a party is bound by his own pleadings and consequently the applicant must be bound by his pleadings in his application dated

30/9/2017, particularly ground (iii) of the said application.

On the other issue of lack of substantive evidence and affidavit to the petition drawn by strangers and that they do not show the purpose for which they have been drawn or sworn, those are issues that are curably where a petition is filed within its statutory timelines, which is not in this case as the petitioner was filed out of time.

For these reasons above, the Petitioner's petition dated 5/9/2017 and filed in court on 9/9/2017 is hereby struck out with costs to the 3rd Respondents. The application having been filed by one firm of Advocates and having not been opposed by the Petitioner, I cap such costs to an all-inclusive sum of ksh. 450,000/= (four hundred and fifty thousand Kenya shillings) to be paid by the Petitioner to the 3rd Respondent

It is so ordered

Signed

HON. C.O NYAWIRI – SRM

5/12/2017

Ruling, dated and delivered at Malindi this 5th day of December 2017.

Signed

HON. C.O NYAWIRI – SRM

5/12/2017

Petitioner / Advocate - N/A

1st Respondent / Advocate - Mr. Obadha holding brief for Mr. Kioko

2nd Respondent / Advocate - Mr. Obadha holding brief Mr. Kioko

3rd Respondent / Advocate - N/A

Signed

HON. C.O NYAWIRI – SRM

5/12/2017

II. APPLICATION DATED 16TH DAY OF OCTOBER, 2017

The Application is brought (Notice of Motion) under order 159 of the Constitution section 3A and procedure Act, section 78 (1) (2) (3) and (4) of the Election Act no. 24 of 2011 and Rules 4,5,8,12 and 13 (3) (d) of the Election (Parliamentary and County Elections) petitions Rules, 2017 and all necessitating provisions of the law.

By the said application, the applicant seeks the following orders:-

1. That the Election petition dated 5/9/2017 together with the supporting affidavit annexed thereto and filed in court on the 8th day of September, 2017 as is or as however amended, if all, be struck out.

2. That the Petitioner bears the cost of this application and of its petition.

The applicant's case

The applicant case is on the fact of the application itself and the supporting affidavit to the petition, which has been defined on the 16/10/2017 by one MASHA SUDI MWAKULONDA, that

1. The petitioner has failed to deposit security for paying of costs as provided under section 78 (1) and (2) (c) of the Election Act No. 24 of 2011 and Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules, 2017
2. That Rule 8(1) as well as Rule 12 (2) of the Elections (Parliamentary and County Elections) petition provide that in mandatory terms that petitioner's petition should *inter alia*, its name and address of the Petitioner, its results of the election and however delivered and the date of declaration of the results and consequently the petition is incurably defective for failure to comply with the said provisions of law.
3. That therefore the petition is bad in law and is not valid and competent
4. That it is in the interest of Justice that its prayers sought herein be granted for purposes of pulling the records straight from the court records, the petition dated 5/9/17 was filed in court on 9/9/2017, not 8/9/2017.

In summary, the applicants case has lack of compliance with section 78 (1) (2) (3) of the Elections Act, 2011 and Rules 8 (1) and (12) of the Elections (Parliamentary and County Elections) petitions Rule, 2017 by the petitioner which according to the applicant makes the petition defective, bad in law, invalid and incompetent. These are the issues that must be decided on by this court.

Under section 78 (1), a petitioner shall deposit security through payment of costs that may become payable by the petitioner not more than ten (10) days after the presentation of a petition, in the instant case, the petitioner is required by section 78 (2) (c) to deposit security of ksh. 100,000/= (one hundred thousand Kenya shillings) in court.

Under section 78 (3) of the Election Act, 2011 where a petitioner does not deposit security as required in section 78 (1) (2) or if an objection is allowed and not removed, no further proceedings shall be heard on its petition and the Respondent may apply to the election court for an order to dismiss the petition and for payment of Respondents (Respondent in the petition) costs.

Clearly the basis for security for costs is to ensure that should the petition be dismissed, then the Respondent can be compensated by the petitioner (see Kisii HC/ELECTIONS PETITION NO. 6 OF 2013) – FATUMA ZAINABU MOHAMED –VS- GHATI DENNITAH & 9OTHERS and also Re Estate of Karanja (2002) 2 KLR 34, 43 by Khamoni J. in KISII/HC/E.P NO. 6 OF 2013 it was the finding of the judge EDWARD M. MURIITHI J, that the provisions for cost is a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceedings in which the security for costs is required and is based on the said principal for its protection of it defects from unrecoverable costs. The court also found that section 78 (3) would bar the hearing of the petition but not an interlocutory application for extension of time to make the deposit of security for costs.

In the case before me, from the court records, no deposit for security for costs have been made by the petitioner, neither is there any indication from the petitioner that should the court extend it time for deposit of security, then we shall comply and deposit the same within any period that this court may specify. The petitioner as I said has not applied their application in a nut shell from the foregoing tentative to deposit security in the circumstance, I have already stated is sufficient to strike out the petitioner petition dated 5/9/17 and filed on 9/9/17.

Looking at Rule 8 (1), an election petition shall state;

- a. The name and address of the petitioner
- b.
- c. The result of the elections , if any, and however declared
- d. The date of the declaration of the results of election
- e.
- f.

Looking at the petitioner’s petition dated 5/9/17, it’s clear that Rule 8(1) (a) (c) (d) have not been complied with by the petitioner.

It is now trite law that failure to comply with Rule (1) makes the petitioner incurably defective where the constitution and statutory timelines for fixing of the petition has lapsed because there can never be a room for amendments of such a petition in such a case. (see Election Petition, number 9 of 2017 (MBS/HC.Petition No. 9 of 2017) JIMMY MKALA KAZUNGU –VS- I.E.BC & 2 OTHERS

In the case before me, the constitutional period for filing the petition (28 days) have already lapsed and even Article 159 (2) (d) and 48 of the constitution 2010 cannot cure the defect by any form of amendment of the petition.

This court has also looked at and considered the submissions and authorities quoted by the applicants.

For all its results stated some, this court finds the petitioners petition dated 5/9/2017 and filed on 9/9/2017 incurably defective and with costs to the 1st and 2nd Respondents.

The application having been filed by the firm of Advocate and having not been complied by the petitioner, I cap costs to an all-inclusive sum of ksh. 480,000/= (four hundred and eighty thousand Kenya shillings) to suit the 1st and 2nd Respondents.

It is so ordered

Dated and delivered at Malindi this 5th day of December, 2017

Signed

HON. C.O NYAWIRI – SRM

5/12/2017

Petitioner /Advocate - N/A

1st and 2nd Respondents / Advocates – Mr. Obadiah holding brief for Mr. Kioko

3rd Respondent / Advocate - N/A

Signed

HON. C.O NYAWIRI – SRM

5/12/2017