



REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT VOI

ELECTION PETITION NO 4 OF 2017

1. MARIAM NEVI BEFAKI.....PETITIONER

2. DEBORAH WAKESHO MWADIME.....PETITIONER

- VERSUS -

1. THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....RESPONDENT

2. ORANGE DEMOCRATIC OF

TAITA TAVETA COUNTY ASSEMBLY.....RESPONDENT

3. THE CLERK OF TAITA TAVETA

COUNTY ASSEMBLY.....RESPONDENT

RULING

Introduction

This is a ruling in respect of the 3rd Respondent application dated 16th November 2017 and the Petitioners application dated 24th October 2017.

The two applications were filed after the transfer of the petition which had been initially filed in the constitutional and Judicial Review Division of the High Court at Mombasa to this court for hearing and determination.

When the matter first came up before me for directions on the 19th October 2017, Mr. Wameyo for the Petitioners sought to orally amend the petition. The court however directed that a formal application for amendment be made. The Petitioners application dated 24th October 2017 for leave to amend the petition was filed pursuant thereto on 27th October 2017. The application was duly served on all parties.

On the 17th November 2017 when the matter came up for further directions, the 3rd respondent filed a notice of motion application dated 16th November 2017 seeking to be struck out as a party to the petition. The court directed that the application be served on all the parties to the petition.

The two application came up for hearing on 6th December 2017. No responses or pleading were filed in opposition in respect to the two application. Nevertheless, Mr. Bwire for the 3rd Respondent and Mr. Wameyo for the Petitioners orally submitted in respect to the 3rd Respondent application dated 16th November 2016 while Mr. Wameyo for the petitioner orally submitted in respect to the petitioners application dated 24th October 2017. The court shall summarize the applications before reviewing the submissions and arriving at a decision on each application.

The applications

1. 3rd Respondent's Notice of Motion application

The application is brought under Section 79(a) and 80(3) of the Elections Act No 24 of 2011 Rules 4,5,7 and 8 of the Elections(Parliamentary and County) Petitions Rules 2017.

It seeks orders that;

- 1) The 3rd Respondent be struck out as a party to the Petition.
- 2) The costs of the application be provided for.

The application is premised on the grounds that:

- a) The 3rd Respondent was made a party to the Petition only with a view of stopping swearing in of the affected party.
- b) The conservancy orders staying the swearing in of the affected parties granted in High Court Petition number 44 and 48 of 2017 were set aside by consent of the parties and the affected parties have since been sworn in.
- c) It is clear from the foregoing that the petitioner's claim as against the 3rd Respondent has been overtaken by events and the petitioner has no real prospect of succeeding as against the 3rd Respondent.
- d) The entire petition as structured does not raise a single violation by the 3rd Respondent on the constitution or any established law and the petitioner does not seek any remedy as against the 3rd Respondent.
- e) The 3rd Respondent is therefore not a necessary party to the proceedings and should be struck off as a Respondent in the petition.
- f) In the interest of administration of justice that the Application be allowed as prayed.

The application is also supported by the Affidavit of Mr. Bwire Okano Advocate for the 3rd Respondent which simply affirms the correctness of the grounds set out in the application as outlined above.

Submissions by 3rd Respondent/Applicant

In his oral submissions, Mr. Bwire for the 3rd Respondent/Applicant noted that the application stands unopposed noting that no documents in opposition have been filed despite service.

He submitted that the 3rd Respondent being the clerk of Taita Taveta County Assembly was only supposed to officiate the taking of oaths by members of the Assembly including the nominated members and whose nomination is being challenged by this petition. He submitted that parties herein recorded a

consent on 5th October 2017 whose effect was to allow the swearing in of the speaker which swearing in was done. The same paved way for swearing in of the members of the County Assembly.

Counsel referred court to the provisions of Section 14(2) of the County Government Act and submitted that the proceedings of the County Government are valid despite there being a vacancy in its membership at any particular time or there being presence or participation of person not entitled to be present or participate in the proceedings. He noted that the duties of the clerk ended with the swearing in of the speaker who upon being sworn in takes charge of the affairs of the assembly and any order can only be directed upon the speaker. He argued that since the first sitting was already conducted and the nominated members sworn in the task of the clerk has ended and the petition is overtaken by events.

He indeed noted that throughout the entire petition no orders have been sought as against the 3rd Respondent and that there is no orders that can be effected by the 3rd Respondent not being the speaker to the assembly. He thus urged the court to strike out the 3rd Respondent from the proceedings.

Mr. Bwire further submitted that the 3rd Respondent having been dragged in to the petition and forced to incur costs, the petitioners has themselves to blame and should pay the cost.

Submissions by Petitioners/Respondents

Mr. Wameyo for the petitioners in his submissions conceded to the factual premise in the grounds to the Respondents notice of motion application and addressed the court only as regard the issue of costs.

He noted the concession by Mr. Bwire for the 3rd Respondent that simultaneously with the petition which was then a constitutional petition, the petitioner filed an application seeking to stop the swearing in the parties nominated by the 1st and 2nd Respondents. He indeed noted that the application was granted at first instance by the Judge. He thus argued that the application was not frivolous or an abuse of the court process as had it been then the orders would not have issued. He thus submitted that at the time of filling the petition it was absolutely necessary that the 3rd Respondent be enjoined. He however conceded that with the conversion of the constitutional petition to an election Petition and the nominated members of County Assembly having been sworn in, the issues became mute by reason of the consent. He noted that indeed no one was condemned to pay costs of the application before the constitutional court which was withdrawn by consent.

He urged me not to visit the natural consequences of the withdrawal on either of the parties who acted in good faith. He urged me to excuse the 3rd Respondent from the proceedings but without condemning the petitioners to costs.

Submissions in response by 3rd Respondent.

Mr. Bwire in response submitted that costs must always follow the events and a successful litigant should be reasonably compensated for expenses incurred for having been brought to court to litigate on issues that he ought not to have been asked to.

He submitted that the consent referred to was not entered in the current petition. He enumerated pleadings filed and court attendances made and urged the court to reimburse the 3rd Respondent for expenses incurred.

Analysis and determination

It is clear from the submissions that the substantive prayer that of striking out of the 3rd Respondent from the pleadings is not opposed. It is indeed conceded that, consent orders having been issued in the High Court allowing the swearing in of the speaker to Taita Taveta County Assembly and swearing in of nominated members to the assembly, whose nomination is the subject of this petition, the application

seeking orders against the 3rd Respondent was overtaken by event and the reason for enjoining the 3rd Respondent thereby spent.

It is indeed clear from the petition that none of the constitutional violations that forms the basis of the petition are attributed to the 3rd Respondent. None of the relief sought are directed to the 3rd Respondent.

As submitted and conceded the only reason why the 3rd Respondent was enjoined in the petition was for reasons of orders sought in the notice of motion application filed simultaneously with the petition and in particular to bar him from officiating the first sitting of the County Assembly. Consent orders having vacated the interim orders barring the exercise and the speaker and the members of the County Assembly having been sworn in, the application was overtaken by event and hence spent. The 3rd Respondent have no role beyond the first sitting of the Assembly and his presence in these proceedings is no longer necessary. The first prayer is therefore granted.

It cannot however be said that the 3rd Respondent was an unnecessary party from the onset. As already noted, the 3rd Respondent was the only legally recognized entity that could officiate the first sitting of the assembly when swearing in of persons whose nomination is being challenged by the petition was expected to be done.

The enjoining of the 3rd Respondent was a necessity and not a luxury that the petitioners would have done without. They cannot be accused of dragging an unnecessary party to court.

Rule 30 of the Elections(Parliamentary and County Elections) Petitions Rules 2017, that provides for costs echos the general principle of law that costs are at the discretion of the court and that unless for good reasons that must be stated on record, costs follows the events.

Section 30(1) is to the effect that:

30(1) The election court **may at the conclusion of a petition** make an order specifying-

- a) The total amount of cost payable.
- b) The maximum amount of cost payable.
- c) The person who shall pay costs under paragraph (a) or (b) and
- d) The person to whom the costs payable under paragraphs (a) and (b) shall be paid.

(2) When making an order under Sub-rule (1) the election court may

- a) Disallow any party for costs which may, in the opinion of the election court have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent, and
- b) **Impose the burden of payment on the party who** may have caused an unnecessary expenses, whether that party is successful or not in order to discourage such expenses.

(3)

I have emphasized the permissive words “may” and the phrase “impose the burden of payment of costs on a party..... whether that party is successful or not” as they captures perfectly the discretion granted to an election court on matters costs. I must however note that for reasons aforesaid there is nothing un toward about the petitioners conduct to compel me to depart from the general principle. Emphasized also is the phrase “ at the conclusion of a petition” because there lies the event upon which costs ought to follow. In **Stanley Kaunga Nakarichia –Vs- Meru Teachers College & Another 2016 eKLR** Justice Gikonyo

had this to say:

“As a matter of general principle, costs follow the event and the successful party will always have costs of his success unless the court has good reason to order otherwise. These word “ the events” means the result of the entire litigation.....”

Going by the words of Justice Gikonyo above the event upon which the costs shall follow in the present proceedings is the final result of the petition, results that bring to a definite end the entire litigation herein. This holding makes good sense noting that if the 3rd Respondent’s application was to be disallowed and he remains as a party to the very end, his costs would be subject to the general principle that the unsuccessful party meets the same. This unsuccessful party need not be the petitioner.

Consequently, and in view of the aforesaid the 3rd Respondent application is granted but the order for cost of the petition shall await the final determination of the petition. The costs of the application shall be costs in the cause.

2. Petitioners’ Notice of Motion Application

The application is brought under Article 159 of the constitution of Kenya, Rules 4(1), (2), 5 and 19(1) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 and Section 76(4) of the Election Act 2011.

The application seeks orders that;

- 1) That the Petitioner may be granted leave to amend the petition as per the draft amended petition.
- 2) That the time for filing the amended petition be extended
- 3) That costs of the application be in the cause.

The application is premised on the grounds that;

- a) That the proposed amendment is intended to amend a simple typographical error in the petition.
- b) That the intended amendment does not fundamentally change the nature of the petition.
- c) That no prejudice will be occasioned to the respondents.

The application is also supported by the Affidavit of William Wameyo, Advocate on record for the Petitioner in which he depones that he has since noticed a typographical error in the petition which needs to be corrected by way of amendment. That the Kenya Gazette Notice which was the subject of the petition herein was erroneously referred to as Volume CXIX 128 instead of Volume CXIX No 124. He deponed that this was a simple typographical error noting that the Gazette Notice with the correct number was annexed in the Affidavit in Support of the Application filed simultaneously with the petition as annexure “ MNB 5 and DWM 5”. He thus noted that reference to the same Gazette Notice as CXIX No 128 was an excusable human error whose correction shall not in any way prejudice the respondents. He depones that since the 5th of September 2017, the matter had been proceeding as a constitutional petition in the High Court and since the conversion as an election petition and the applicability of the election Rules twenty eight days have not lapsed.

He urged the court to consider the special circumstances of the case and exercise its discretion and grant the application. He noted that having noticed the error even before the respondent may raise same and even before the respondents file their replying affidavit to the petition, no prejudice is likely to be suffered by granting the application. None of the Respondents filed any documents in response.

Submissions by the Petitioners

Mr. Wameyo counsel for the petitioner submitted that the nature of the amendment sought do not prejudice any of the parties and indeed none has filed any replying affidavit to the application. He submitted that the petition was converted into an election petition making the election Rules Applicable. He submitted that since conversion twenty eight days had not lapsed. He thus noted that the application was brought within time. Counsel also argued that the petition and the grounds thereto are not purely as a result of an election in the strict sense of the word.

He noted that the relevant Gazette notices were annexed to the Affidavit in support of the application filed simultaneously with the petition and as such the error was purely typographical.

Analysis and Determination

Though the application is not opposed, it still behoves upon this court to determine its merits or otherwise on the basis of the law.

Article 159(2) (d) of the constitution provides:

“ in exercising judicial authority the courts and tribunals shall be guided by the following principles:-

- a)
- b)
- c)
- d) Justice shall be administered without undue regards to procedural technicalities and.....

The Election (Parliamentary and County Elections) petition Rules 2017 gives effect to this constitution imperative of administering justice without undue regards to procedural technicalities in Rules 4 and 5 i.e. Rule 4 is to the effect that:

4 (1) The objective of these Rules is to facilitate the just expeditious, proportionate and affordable resolution of election petitions.

(2) An election court shall, in the exercise of its powers under the constitution and Election Act, or in the interpretation of any of the provisions of these Rules Seek to give effect to the objective specified in Sub rule (1).

Rule 5(1) is to the effect that;

“ The effect of any failure to comply with these Rules shall be determined at the court’s discretion in accordance with the provisions of Article 159 (2) (d) of the constitution

(2) A party to a petition or an advocate for the party shall assist an election court to further the objectives of these rules and for that purpose to participate in the processes of the election Court and to comply with the directions and orders of the election court.

The purport of all these provisions is that this court is constitutionally and statutory bound to determine the petition in a just, proportionate and expeditious manner with the aim of rendering substantive justice.

I do find it important to set out these guiding objective of the court noting the special circumstances of the petition herein. As already noted this petition was initially filed as a constitutional petition.

It is only on the 5th October 2017 that the same was transferred to this court converting it to an election

petition. The petition seeks to quash a Gazette Notice Gazetting persons nominated by the 2nd Respondent. It does not strictly arise from an elective election.

Section 76(4) of the Election Act 2011 which provides for amendment of a petition with the leave of the court within the time limit for challenging the election cannot be applied as a straight jacket. A determination as to whether the application may be said to have been brought within such time as was within the intention of the drafters of Section 76(4) of the Elections Acts needs to be made. A literal interpretation of Section 76(4) would result in absurdity noting the current petition is not challenging an election in the strict sense of the word. The intention of the drafter must have been to ensure expediency in bringing proper pleadings to enable the other parties respond timeously. The petitioners application having been brought within twenty days from the date of the order converting the constitutional petition to an election petition cannot be said not to have been timely brought.

One may wonder why this court is taking the date of convention as the date when time start running. The case of **Moses Mwicigi & 14 others –Vs- IEBC & five others (2016) eKLR** is instructive.

The Supreme Court held as follows;

“It is clear to us that the constitution provides for two modes of ‘election’. The first is election in the conventional sense of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.”

All in all and for reason aforesaid, I do find the application merited and allow the same. The petitioners are hereby granted seven (7) days within which to file and serve the amended petition.

Dated, signed and Delivered in **Voi** on this **14th** day of December 2017

E.G. NDERITU-SPM

14/12/2017

In presence of:-

1. Wameyo present for Petitioners.
2. Bwire present for 3rd Respondent.

No appearance for 1st and 2nd Respondent.

Mr. Ramadhan court Assistant present.

E.G. NDERITU-SPM

14/12/2017