



**REPUBLIC OF KENYA**

**IN THE SENIOR RESIDENT MAGISTRATE'S COURT**

**AT KILGORIS**

**ELECTION PETITION NUMBER NO. 2 OF 2017**

**IN THE MATTER OF ELECTIONS ACT, 2011**

**AND THE ELECTIONS PARLIAMENTARY AND COUNTY ELECTIONS PETITION RULES,**  
**2017**

**AND IN THE MATTER OF MEMBERS OF THE COUNTY ASSEMBLY ELECTIONS**

**KILGORIS CENTRAL WARD, NAROK COUNTY**

**BETWEEN**

**OLONANA D. OLOLTULET.....PETITIONER.**

**VERSUS**

**MUNKA NANYOKIE JULIUS OLE....1<sup>ST</sup> RESPONDENT**

**MACHARIA OMBOGO ELIJAH.....2<sup>ND</sup> RESPONDENT.**

**INDEPENDENT ELECTORAL AND BOUNDARIES .....**

**COMMISSION.....3<sup>RD</sup> RESPONDENT.**

**Ruling**

**Introduction.**

1. The Petitioner on the 25<sup>th</sup> day of August, 2017 filed this Petition and prays for;- scrutiny and recount as regards County Elections in Kilgoris Central Ward, a determination he was duly elected, the 3<sup>rd</sup> Respondent be ordered to issue him with Certificate of Election, in the alternative, a fresh election be ordered and that it be ordered the Respondents be condemned to pay costs of the petition

2. The 1<sup>st</sup> Respondent filed Response on 11<sup>th</sup> September, 2017. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed theirs on 7<sup>th</sup> September, 2017. On 9<sup>th</sup> October 2017, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed Notice of Motion under Article 159(2)d and 50 of the Constitution, Section 80(1)(d) and 80(3) of the Elections Act and Rules 15 and 19 of the Elections Parliamentary and County Elections Petition Rules 2017. The application was allowed by consent of the parties when the matter came up for pre-trial conference on 16<sup>th</sup> November,

2017.

3. The Petition was fixed for hearing for three consecutive days from 5<sup>th</sup> December, 2017. On 4<sup>th</sup> December, 2017, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Preliminary Objection (P.O) to the Petition. The same is worded thus.

*"1. The Petition herein does not conform to the mandatory provisions of the laws.*

*2.The petition is fatally defective and should be struck out with costs."*

### **The Preliminary Objection.**

4. The Preliminary Objection filed was served upon the other parties in the morning when the Petition was coming up for hearing. The Petitioner lamented over insufficient notice and that it amounted to an ambush. Due to the nature of a preliminary objection, this court in a separate ruling ordered that it be canvassed *inter partes* at 2.00pm. This would give the Petitioner slightly over two hours of preparation.

5. Arguing the P.O, Mr. Muriuki advocate submits that the Petition does not conform to the mandatory requirements of Rule 8(1)c and 8(1)d of the Election (Parliamentary and County Election) Petition Rules, 2017. That the rules are couched in mandatory term "SHALL". He submits that the Petitioner has not pleaded the results of the elections, if any, and however declared as required. That the Petitioner has also not pleaded the date of the declaration of results. He has submitted that election Petitions are special pleadings and statutory proceedings where relevant statutes must be complied with. And that the requirements go to the root and substance of the Petition.

6. In reference to paragraph 7 of the Petition, he submits that there was no indication of declaration made for results for other candidates in the impugned elections. In the absence and in non-compliance, there was no Petition for a court seized with jurisdiction to hear and determine election petition. He also makes reference to Form 36B annexed to the Petition and submits that annexure are not pleadings. That even if they were treated as pleadings, their content ought to have been expressly referred to in the Petition.

7. Mr. Muriuki relies on authorities in *Jimmy Mkala Kazungu vs. IEBC and 2 others (2017) eKLR* which addressed similar issues. He has also relied on authority in *Martha Wangare Karua vs. Independent Electoral & Boundaries Commission & 3 others 2017eKLR*. The matters dealt with the issue of whether the Regulations were issues of substance or procedure and whether Article 159(2) of the Constitution of Kenya can cure non-compliance. He urged that these being High Court matters, they are binding on this court and that the Petition shall be struck out for non-compliance with the said Rules. That the defect can neither be cured by the Constitution nor by amendment. That in fact Section 76(4) of the Elections Act cannot be utilized to cure it since time for amendment lapsed after 28 days of filing of Petition.

8. In support of the P.O, Mr. Koech for the 1<sup>st</sup> Respondent submits that the Petition was filed prematurely, was bad in law and beyond salvage. That election proceeding are strict and rigid with its timelines. He terms the Petitioner guilty of non-compliance of simple mandatory requirements. That a party cannot elect what to do and what not to. He submits that in paragraph 8 of the Petition the Petitioner pleads he was not in opposition to ascertain the valid votes cast. That if the Petitioner was not aware then there was no complaint. In his words the petition has no legs and was beyond redemption. That Article 159(2) of the Constitution offers no excuse, safety valve or exit for a litigant who has failed to comply with mandatory requirements. That the rules were not made in vain. He supports the authorities cited by Mr. Muriuki and prays the Petition be struck out with costs.

### **The Response.**

9. Mr. Otieno for the Petitioner in opposition to the P.O submits that with the hearing date taken, the Notice of P.O was an abuse of the court process which violates Rule 15(2) of the Election Parliamentary and County Election Petition Rules. That by filing P.O this court is being invited to review its orders setting the matter for hearing at the end of Pre-trial conference. That review cannot be done by way of

P.O.

10. On the substance of the P.O, he submits that the Petitioner has not failed to comply with the Rules. That the schedule to the Rules has a format that addresses the way Petition should be presented. That the Rules do not specify the manner in which the information should be set out. That all that was required of the Petitioner was to set out the results if any and however declared. That the same are captured in Paragraph 7, 8 and 11 of the Petition. That the information is sufficient and that the Rules are not cast in stone. As to the question of date, he submits that the same appears in Paragraph 10 of the Petition. That the Petitioner has set out the publication date which is official communication to the public. He further submits that, the Petition was not speculative and brings out the issues and backed by affidavits and annexures.

11. On the authorities cited, he submits that the circumstances were not similar. That unlike in the present Petition, nowhere in those cases was the results set out for the courts. He submits that no mistakes were made to require the Petition to be salvaged. That the petition was proper, precise and does not speculate and has met all the legal requirements. He prays that the P.O be treated as baseless, not proved and be dismissed and or struck out for non-compliance.

### **Issues for determination.**

12. The main issues for the determination of this court are as follows;-

- 1) Whether the Petition does not conform to mandatory provisions of law.
- 2) If the answer to 1 above is in the affirmative, in what particulars?
- 3) Whether the Petition is fatally defective and that the P.O is meritorious.
- 4) What consequential orders, declarations and reliefs should the court grant in the circumstances?

### **Analysis and Determination.**

13. For a start it suffices to set out the applicable law. Do we have a Preliminary Objection? What amounts to a Preliminary Objection is now well settled. The essence of a Preliminary Objection was given by JA Sir Charles Newbold P in Mukhisa Biscuits manufacturing Co. Ltd Vs. West End Distributors (1969) E. A 696 at page 700 Law J.A. stated that;

***“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”***

14. Sir Charles Newbold P added as follows page 701:-

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion”.***

15. In the famous case of Owners of the motor vessel “Lillian S. Vs. Caltex Oil (Kenya) Ltd Civil appeal No. 50/1989, the court held that a question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court”.

16. As a general rule, every election Petition must conform to all mandatory requirements set out in the law, rules and regulations. Parties are bound by their pleadings. The P.O should ideally have been raised before commencement of hearing and precisely at the pre trial conference and directions stage. Pre-trial

conferencing and interlocutory applications are dealt with under **Rule 15. Rule 15(2) provides –**

***“An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.”***

This however was not an interlocutory application as it were but a Preliminary Objection. The Rule does not bar it from being presented.

**17.** True to submissions by Mr. Muriuki, **Rules 8 and 12(2) of Elections Parliamentary and County Elections Petition Rules, 2017 prescribes** the contents of a petition and the affidavit in support of the petition. Under **rule 8(1):**

***“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 petitioner which shall be the address for service.” Emphasis added***

**18. Rule 12(2)** provides that the same information shall be contained in the affidavit sworn to support the petition. The rules applicable for amendment of election Petitions are governed by Section 76(4) of the Elections Act, 2011 which states;

*“A petition filed in time may, for purpose of questioning a return or an election upon an allegation of an election offence, be amended with leave of the election court within the time within which the petition questioning the return or election upon that ground may be presented.”*

19. On the argument that the Petition does not comply with Rule 8(1)(c), I have looked at Paragraphs 7, 8, 9 and 10 as referred to by the Petitioner. In paragraph 7 the Petitioner gives the votes garnered by himself and the 1<sup>st</sup> Respondent. In paragraph 8 he pleads that he was not in opposition to ascertain the valid votes cast in favour of the other contestants since neither him nor his agents were given copies of the relevant declaration forms showing results. In paragraph 9, he pleads that the 1<sup>st</sup> Respondent was declared winner. And in Paragraph 10 says the 1<sup>st</sup> Respondent was subsequently gazetted under Gazette Notice published on 22<sup>nd</sup> August 2017.

20. On the Section on grounds of Petition, the Petition goes ahead to enumerate various malpractices committed at various polling stations and attacks results declared in those stations. True to submissions by Mr. Muriuki, reference to the declaration of results appears in the Affidavit sworn by Petitioner in support of the Petition. In Paragraph 15 thereof he depones that;

*“THAT I beseech this Honourable Court to order scrutiny and recount of the votes cast in Kilgoris Central Ward in order to determine the true winner of the Member of County Assembly seat for Kilgoris Central Ward. Annexed hereto and marked ODO-4 is a true copy of the declaration of the election results at Kilgoris Constituency Tallying Centre.”*

21. On the question that the Petition does not state the date of declaration of results of the election as

required under Rule 8(1)d, the only reference made in the Petition is on the date of election and on the date of the Gazettement of the elected Members of County Assembly. The gazette Notice is annexed and so is the declaration form. By gazette Notice number 8240 of 22<sup>nd</sup> August 2017, the 1<sup>st</sup> Respondent was gazetted as declared elected as Member of County Assembly-Narok representing Kilgoris Central Ward.

22. What does one make of this state of affairs? Mr. Muriuki submits that affidavits are not part of pleadings and that the annexures ought to be referred to expressly in the Pleadings. That the annexed Form 36B is not referred to in the Pleadings. Affidavits are not usually deemed as pleadings. However, on authority of Gatirau Peter Munya vs Dickson Mwenda Githinji and 2 Others, Supreme Court Petition No 2B of 2014, the affidavit in support of the Petition and the documents annexed thereto are deemed to be part of the Petition and form part of the pleadings in the Petition. They must therefore be considered.

23. I have considered the Preliminary Objection, the submissions by advocates for and against it, the Pleadings, the affidavit in support and the annexed documentation. I am aware of the holding in the Supreme Court decision in Lemanken Aramat v Harun Meitamei Lempaka and 2 others Supreme Court Petition No. 5 of 2014, a myriad other authorities including the case in MNkiria Petkay Shen Miriti v Ragwa Samwel Mbae and 2 Others, Election Petition Meru No.4 of 2013, Jimmy Mkala Kazungu vs. IEBC 2017 eKLR. And the latest being Martha Wangari Karua and another v Independent Electoral and Boundaries Commission and 3 Others 2017 eKLR where the courts have held that prescribed EDR timelines are not mere legal or procedural technicalities within the meaning of Article 159(2)d of the Constitution.

24. I am equally aware of contrary authorities where substantive justice is emphasized. One is Raila 2 Petition (2017) wherein the court on being called to expunge some documents filed in non-conformity with Rules reasoned and rightly that;

*"The nature of this application is such that were it to be granted, it would dispose of the entire case of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents at his preliminary stage. Such a drastic consequence in our view cannot be justified if the scales of justice are weighed in favor of all parties to this petition."*

25. In Francis Mwangangi Kilonzo vs. Independent Electoral and Boundaries Commission and 2 others 2017 eKLR, Justice Muchelule, drawing from Nicholas Kiptoo Korir Salat v IEBC AND 6 Others 2013 Eklr, Dickson Mwenda Kithinji vs. Gatirau Peter Munya and 2 others Civil Appeal No 38 of 2013 at Nyeri and Evans Odhiambo Kidero and 4 Others vs. Ferdinand Ndungu Waititu and 4 Others Supreme Court Petition No 18 of 2014 stated thus...

*"It is generally accepted that election petitions have to comply with any mandatory provisions of the law and **Rules**, and that the courts may strike out any petition that does not comply. The requirements of **rule 8 and 12(2)** are substantive and go to the root of the petition, and have to be complied with. The effect of non-compliance, however, has to be decided based on the peculiar facts of each case, and while paying attention to the need to do substantive justice to each petition".*

26. All the above are binding authorities. The gist of the positions of law cited above is that it is the discretion of the court to determine whether the non compliance was fatal to the Petition. Discretion must of course be exercised judiciously taking into consideration all the circumstances and justice of the case. A prescription- be it Maasai *sumeita* or *lekidong'o* (herbal) or conventional medicine- acts or reacts differently to ailment. It all depends on, among other things, how chronic the disease is as well as the strength of the patient's body.

27. The cases referred to in support of the P.O can be distinguished from the present. The case in Jimmy Mkala Kazungu (supra) can be distinguished on the fact that court found a myriad of number of other instances of non-compliance. Justice Thande puts it thus;

*"I have carefully looked at the Petition. I do note that the same does not state the date when the election in dispute was conducted. It does not state the results of the election and it does not also*

*state the manner in which the results were declared. I further note that there are other matters stipulated in Rule 8(1) that the Petition fails to state. These include the name and address of the Petitioner as well as the date of the declaration of the results of the election. Also omitted from the body of the Petition is the name and address of the advocate for the Petitioner being the address for service."*

28. The case in Martha Wangare Karua supra can be distinguished in that the Petitioner failed to state the declared results and the date of declaration in both the Petition and the affidavit in support of the Petition.

29. In the instant Petition, there is mention in the main body of Petition of; a) results for two leading contestants in Paragraph 7 and b) In paragraph 19, the declaration form and the discrepancy in the declared votes as garnered. To borrow the language of Mr. Koech for the 1<sup>st</sup> Respondent, this Petition not only has legs to stand on, it also has wings to fly. It has to be heard and determined on the merits.

### **Conclusion and Disposal Orders**

30. I have considered the P.O and the pleadings. I have also considered the submissions by advocates as well as the authorities cited for and against the P.O. The Pleadings are meant to communicate to the opposing party. They are to guard against the element of surprise. The Petition together with affidavit and annexed documents serves that purpose. What is in issue is, among other, the votes between the Petitioner and the 1<sup>st</sup> Respondent. They are stated in the Petition. There is failure to state the votes garnered by the other candidates. That however has been explained in the pleading. I find the explanation sufficient. The votes and how declared is pleaded. What the rest garnered is a question of fact to be established. In any case they are introduced through the annexed Form 36B.

31. I am of the school of thought that the issues raised are not mere procedural issues. The issues are not procedural technicalities either. However, I also subscribe to the school that seeks the cardinal rule to do substantive justice. If the P.O allowed, it will require that this court strikes out the Petition. This will thus determine the Petition in drastic manner. Pursuant to substantive justice as required under Article 159 of the Constitution, the P.O is hereby dismissed.

32. For avoidance of doubt the following orders do issue..

- a. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents Preliminary Objection is hereby dismissed.
- b. Costs shall abide in the Petition.
- c. The hearing of the Petition to commence today and proceed on priority basis as earlier scheduled.

**Dated and delivered at Kilgoris this 6<sup>th</sup> day of December, 2017.**

By: D.K.Matutu Esq. (Senior Resident Magistrate)

In open court in the presence of,

1. Mr. Otieno for the Petitioner,
2. Mr. Muriuki for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents,
3. Mr. Koech for the 1<sup>st</sup> Respondent.
4. Mr. Mutai-Court Assistant.

