



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KIAMBU
ELECTION PETITION NO.2 OF 2017
IN THE MATTER OF THE ELECTION ACT, 2011

SUSAN WANGUI NGUGI.....PETITIONER

VERSUS

JUBILEE PARTY OF KENYA.....1ST RESPONDENT

JUBILEE PARTY APPEALS TRIBUNAL.....2ND RESPONDENT

INDEPENDENT ELECTRICAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

JANE WANJIRU GATHIGA.....4TH RESPONDENT

RULING

1. By Notice of Motion dated 21st day of September 2017 brought under Order 51 Rule 1 and Order 8 Rule 3 (1) of the Civil Procedure Rules, Section 1 A , 1B & 3A and all other enabling provisions of the law and the Petitioner seeks orders:

- i. THAT** the Petitioner be and is hereby granted leave to amend her petition filed herein on 7th day of September, 2017 as per the annexed amended petition hereto.
- ii. THAT** in the alternative to prayer (1) above, the Petitioner be and is hereby granted leave to join Lucy Njoki Mugure and Yvonne Wanjiku Waweru to this suit as Interested Parties.
- iii. THAT** upon granting prayer (1) or (2) above, the Respondents, and/or interested parties be at liberty to file a Response to the Petition or the Amended Petition if they so please.
- iv. THAT** a time be fixed for the intended additional Respondents and /or Interested Parties to enter appearance.
- v. THAT** the costs of this application be costs in the cause.

2. The grounds on the face of the application are that:

- i. The ruling of the court in this petition may affect the intended 5th and 6th Respondents or the

intended interested parties.

ii. The intended 5th and 6th Respondents have been mentioned in the Petition but were inadvertently not listed as Respondents or as interested parties in the Petition.

iii. The amendments will enable the intended 5th and 6th respondents or the intended interested parties not to be condemned unheard.

iv. The amendments are necessary and connected with the case for the purposes of determining conclusively the real questions in this Petition that it would be a denial of justice not to include the intended additional parties in the Petition.

v. That the proposed amendments will not occasion any prejudice or injustice to the Respondents.

vi. It is therefore in the interest of justice that the Petitioner be granted leave to amend her Petition filed.

3. The application is supported by the affidavit sworn by Victor Hezekiah Awuor Advocate on 21st September 2017 that:

i. The decision that shall be made by this court may adversely affect the intended additional Respondents/Interested Parties, which reason has necessitated the amendment of the Petition in terms of the annexed draft Petition.

ii. It is therefore necessary for the Petitioner to amend her Petition so as to allow the intended additional Respondents/Interested Parties not to be condemned unheard.

iii. For purposes of determining the issues in controversy it is necessary that the proposed amendments be allowed.

iv. The proposed amendments will not occasion any prejudice to the Respondents

v. The proposed amendments stem from the same facts or substantially the same the same facts in respect of which the relief is claimed by the Petitioner in this Petition.

vi. It is in the interest of justice that the Petitioner be granted leave to amend the Petition before this matter can be set down for hearing so as to enable the intended additional parties not to be condemned unheard.

4. The 6th intended Respondent who was served with the application filed a replying affidavit sworn by Yvonne Wanjiku Waweru on 30th October 2017 and opposed the Petitioner's application and seeks that it be dismissed with costs on the grounds that:

i. The application to amend the Petition is an afterthought in that though it was filed on 25th September she has never been served until 19th October when her counsel was given a copy in court when the matter came for directions.

ii. She applied online for nomination to the Jubilee Party list for the position of the Member of the County Assembly under Gender top up list.

iii. The IEBC designated Jubilee Party Members of County Assembly for Kiambu County from the qualifying list and she was elected under Gender Top- Up list.

iv. The list was properly submitted in line with the provisions of Art. 177 (1) (b) and (c) of the Constitution.

v. Subsequently the 1st Respondent published in the special Gazette Notice Vol. CXIX –No 124 the names of all the validly nominated persons to serve in the County Assembly of Kiambu and she was among the 31 of them.

vi. She has since been sworn in is currently discharging her mandate to the people of Kiambu.

vii. The application is an abuse of the legal regime governing the election disputes has caused and will cause great prejudice to the 6th intended Respondent.

viii. There is no evidence that to demonstrate that IEBC which is responsible for the conduct and supervision of the elections for the seats provided for under Art. 177 (1) (b) and (c) of the Constitution did not validly nominate her to represent the Gender Top List in Kiambu County Assembly.

5. She further asks the court to dismiss the application for being incompetent , bad in law in that:

i. It is brought under the wrong provisions of the Civil Procedure Rules which are inapplicable in election disputes.

ii. The supporting affidavit has been sworn by an advocate which offends the requirement of the law and practice in controversial matters.

iii. The applicable Rules are Election (Parliamentary and county Elections) Petitions Rules 2017 which do not allow the Petitioner to amend the Petition more so to include a Member of the County Assembly for purposes of attempting to question the validity or otherwise of her election.

iv. Under Sec. 76 of the Elections Act a petition to question validity of election of a Member of the County Assembly under must be filed within 28 days of declaration of results and in her case the declaration was on 28th August 2017 when the IEBC published the list hence too late for the Petitioner to amend the Petition and the court cannot extend time.

v. This court lacks jurisdiction to determine this dispute as such a dispute ought to be filed before the 3rd Respondent in the first instance within 24 hours of occurrence of the dispute in accordance with Art. 88 (4) (e) of the Constitution as read with Sec. 74 of the Elections Act and Rules.

6. She further avers that Jubilee Party cannot be compelled to undertake proper nominations as sought in the application for reasons that:

i. Article 88 (4) of the Constitution gives IEBC exclusive jurisdiction to conduct electoral disputes including those relating to or arising from nominations.

ii. Section 74 (2) of the Elections Act provides that a dispute under Art. 88 (4) of the Constitution should be determined within 10 (ten) days of lodging such dispute with the IEBC and the courts can only be sized of jurisdiction in the matter on appeal or judicial review.

iii. Section 34 of the Elections Act is categorical that a party list submitted to the IEBC shall not be amended during the time of Parliament or County Assembly as the case may be for which the candidates are elected.

iv. Reallocation of special seats is contemplated only if a representative from a political party dies, withdraws from the party list, changes political parties resigns or is expelled from the party.

PETITIONER'S SUBMISSIONS

7. The firm of V.H.Awuor & Company Advocates for the Petitioner restated the contents of the

application and affidavit thereto and submitted that:

- i. The applicant inadvertently omitted to the 5th and 6th Respondents in the Petition and therefore the application seeks to rectify that omission.
- ii. The 6th Respondent's claims are misinformed, baseless and unfounded in that is court being an Election Court is properly constituted in accordance with Sec. 75 (1A) of the Elections Act 2012 Rule 6 of The Parliamentary and County) Petition Rules 2017 and is properly moved.
- iii. The application is not brought exclusively under the Civil Procedure Rules but also under all other enabling provisions of the law including but not li8mited to the Elections Act and the Constitution.
- iv. That any omission in the application is a procedural technicality that can be cured by Art. 159 of the Constitution which provision buttresses Sec. 80 (1) (d) of the Elections Act 2011.
- v. The Elections Act, 2012 expressly and unequivocally allows amendment of the Election Petition with leave of the court under Section. 76 (4) of the Act.
- vi. Under Section 76 (1) (a) of the Elections Act 2011 both the original and the amended Petition were filed consecutively on 7/9/2017 and 25/9/2017 being the 10th (tenth) and the twenty eighth day respectively after the publication of the results in gazette on 28/8/2017 thus I compliance with the statutory timelines.
- vii. Upon declaration of results the IEBC is stripped of jurisdiction determine this electoral dispute by Sec. 74 of the Elections Act which buttresses Art. 84 (4) (e) of the Constitution and for this he relies on **Supreme Court of Kenya in Petition No. 1 of 2015 Moses Mwigigi and 14 Others v The Independent Electoral and Boundaries Commission and 5 others [2016] eKLR.**
- viii. The facts presented in the Petition touching on the intended 5th and 6th Respondents are highly controversial and it is only just that the intended new parties be joined in the Petition to have them respond to the issues raised against them in the said Petition, including but not limited to the fact that they were elected as Members of County Assembly when they did not qualify for such election, in blatant contravention of **Section 25 of the Elections Act, 2011.**

SUBMISSIONS BY

6TH INTENDED RESPONDENT/INTERESTED PARTY

8. The firm of Kimotho Njomo & Company Advocates for the 6th intended Respondent/Interested Party maintained the contents of the replying affidavit and submitted that the Petitioner's application should be dismissed for lack of merit in that:

- i. This being an electoral Petition and contentious in nature the Petitioner being the litigant ought to have sworn the Affidavit in support of the Application as opposed to her counsel on record as held in **Hamzan Musuri Kevogo v I.E.B.C & 3 others (2017) eKLR.**
- ii. Leave to amend the Petition to include the two Intended Petitioners/Interested Parties offends the Elections (Parliamentary and County Elections) Petition Rules 2017 and in particular Rule 7 which stipulates the form and contents of the petition and the holding in **Amina Hassan v Returning Officer Mandera County & 2 others [2013] eKLR.**
- iii. The 6th Intended Respondent/Interested Party's submission that the Application to amend the Petition is misguided and an afterthought in light of the provisions of Section 74 (1) and (2) of the Elections Act and more so that the Petition may not be amended as the requirements of the contents

of election petitions has been laid out in the Elections (Parliamentary and County Elections) Petitions Rules 2017.

DETERMINATION

9. When parties appeared before me for directions for the petition on 19/10/2017, the parties agreed that for good order the Petitioner serve the intended 5th and 6th Respondents with this application and for their response which was allowed.

10. On 8th November 2017, Mr Ombasa for the 1st and 2nd Respondents and Mr Wachira for the 3rd Respondent intimated to court that they were not opposed to the application. Mr Njomo for the 4th Respondent also appeared for the intended 6th Respondent. There was no appearance by the intended 5th Respondent.

11. On the same day the 2nd Respondent (Jubilee Party Appeals Tribunal) was struck out from the proceedings with no orders as to costs pursuant to a consent between the Petitioner and the 1st and 2nd Respondent dated 7th November 2017 and filed on 8th November 2017.

12. I have considered the application before me and as shown by the detailed analysis, in their affidavits and submissions, the Petitioner/Applicant and the 6th Intended Respondent seem to encroach and dealt extensively on the merits or otherwise of the Petition filed herein on 7th September 2017 which is premature and improper in an application solely for leave to amend the Petition. In the circumstances I will deal with only the payers sought in this application.

13. This application has been brought under the provisions of the Civil Procedure Rules. The substantive provision being Order 8 Rule 1 (3) which provides:

“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

14. The issue before me is an Election Petition and not an ordinary suit to be governed by rules of procedure on amendment of pleadings. Its procedures are governed by Elections (Parliamentary and County Elections) Petition Rules and the Civil Procedure Rules and Act are not applicable in Election Petitions unless otherwise expressly provided for. This has been the position severally and consistently settled by superior courts.

15. In an application to enjoin an interested party in **Nairobi High Court Election Petition No. 23 of 2017 Japheth Muroko & another Vs IEBC & 3 others and Dr. Evans Kidero** the court emphasized:

“...there is no more to add other than to restate the well settled observations that election petitions are sui generis and are guided by the specialized regime of law. As such the Civil Procedure Rules are not applicable unless expressly provided for. This position has been affirmed over time. This court in Election Petition No. 11 of 1998 Samuel Kamau Macharia & Electoral Commission of Kenya & 3 others upheld that position citing Election Petition No. 1 of 1998 Stephen Kimani Gakenia v. Francis Mwangi kimani and 2 others where the court stated as follows: this court has remarked that Civil Procedure Rules, or any other law for the matter, cannot be brought in Election Petition to supplement the Act and Rules... From this set up of the election petition legal regime right from the Constitution, to the Act and Election Petition Rules, this court is of the view that CPA and CPR are excluded. The only place where the rules of Civil Procedure may apply is on the witness affidavits”

16. In his submissions Mr. Awuor Advocate for the Petitioner wishes to seek refuge in Similarly Section 80 (1) (d) of the Elections Act, 2011 which provides that ***“An election court may, in exercise of its jurisdiction decide all matters that come before it without undue regard to technicalities”*** and also on

Article 159 (2) (d) of the Constitution of Kenya which provides that justice shall be administered without undue regard to procedural technicalities but these provisions cannot aid him in the circumstances. The Supreme Court interpretation of the said Article 159 in the *Raila Odinga Vs. I.E.B.C. & Others Petition No. 5 of 2013* stated:

“Article 159 (2) (d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court”.

17. It is therefore clear that the filing of this application under Civil Procedure Act and Rules is not the technicality envisaged in Section 80 (1) (d) of the Elections Act, 2011 and Article 159 of the Constitution and the irregularity cannot be cured by the said provisions.

18. Be that as it may, the application seeks to enjoin Lucy Njoki Mugure and Yvonne Wanjiku Waweru to this petition as Interested Parties. The applicant refers to them in the body of the application and affidavit in support as ***“5th and 6th Respondents or the intended interested parties.”*** In the draft amended Petition annexed, the two are referred to as the ***“5th and 6th Respondents.”*** What is clear then is that the applicant wishes to take a gamble as to the description the court will take and find in his favour. In my view he ought to have made up his mind as to how he wishes the two to participate in these proceedings.

19. If Lucy Njoki Mugure and Yvonne Wanjiku Waweru are intended to be Respondents and the applicant argues that the amendment is made on time and wishes to rely on Section 76(4) of the Election Act, Section 76 deals with presentation of petitions and in sub section 4 provides that:

“A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence the petition 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.”

20. That issue was dealt with in *Amina Hassan v Returning Officer Mandera County & 2 others (2013) eKLR* where the court held:

In my view and finding, neither the Elections Act nor the Rules donate any provision for amendment of an election petition except for the limited window found in Section 76(4) of the Elections Act, 2011 which states:-

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

The court went on to say:

“It is my finding from the above provision that the Elections Act 2011 does not generally allow the amendment except where the following terms are complied with that is to say:

i. The petition to be amended questions a return or an election result upon an allegation of an election offence

ii. The amendment is sought from the election court within 28 days prescribed by the Act for filing an election petition

iii. The election court is willing to exercise its discretion in favour of the amendment sought.”

21. The applicant alleges that failure to include the two persons as Respondents in the original petition is

an inadvertent omission on the part of the petitioner. A look at the original petition dated 7th September 2017 and filed on the same day show that the Petitioner has made reference to the intended Respondents in paragraphs 6, 7 and 8 under the sub heading “**FACTS AND GROUNDS OF THE PETITION**” of the body of the Petition and in prayers (a) , (b) and (c).

22. In paragraph 6, 7 and 8 respectively she states:

“Some of the purported successful and gazetted nominees, including LUCY NJOKI MUGURE and YVONNE WANJIKU WAWERU, the 5th and 6th Respondents herein, do not meet the basic minimum candidature requirements for nominations as a Member of the County Assembly for reasons that they have not been registered as voters in Kiambu County or at all and therefore should not have been gazetted as duly nominated members of the county assembly nominees by the 3rd Respondent.”

The 3rd Respondent knew and/or were reasonably expected to know that that Lucy Njoki Mugure, Yvonne Wanjiku Waweru and Gathiga Jane Wanjiru did not qualify to be candidates for nominations as Members of County Assembly of Kiambu, having not been registered as voters in Kiambu County or at all, which registration was the sole responsibility of the 3rd Respondent and registration details well within its knowledge.

Without exercising due diligence in performing its Constitutional duties enshrined in Article 90(2)(b), the 3rd Respondent fraudulently proceeded to gazette the said Lucy Njoki Mugure, Yvone Wanjiku Waweru and Gathiga Jane Wanjiru, while at all times fully aware of the fact that they were not qualified candidates for such nominations.”

23. In prayer (a) and (b) respectively she seeks:

“A declaration that the inclusion and/or substitution of Gathiga Jane Wanjiru, Lucy Njoki Mugure and Yvonne Wanjiku Waweru for the petitioner and inclusion of Lucy Njoki Mugure and Yvonne Wanjiku Waweru in the final party list submitted to the 3rd Respondent was unfair, irregular and unlawful.

A declaration that the nomination of Gathiga Jane Wanjiru, Lucy Njoki Mugure and Yvonne Wanjiku Waweru by the 1st Respondent to the County Assembly of Kiambu is invalid, null and was void.”

24. The above does not reflect inadvertent omission or error. She clearly chose not to sue the two intended Respondents. It reflects a petitioner who knew what she wanted and against who. That is why she did not sue them and instead focused on the 4th Respondent. If she so desired to sue them at the time nothing would have been easier for them to do.

25. An attempt to join the two now out of all the people in that list on the grounds that the outcome of this petition will affect them lacks logic and is clearly an afterthought. There were several candidates published in the Gazette Notice the subject of this petition. When the petitioner chose to file this petition, she must have well thought against who she was aggrieved and what she wanted.

26. Adding them would mean that they will be filing a new petition contrary to the law. There is no express and unequivocal provision in the Act for the petitioner to amend the petition to add or join more Respondents contrary to the submissions by Mr Awuor. If the legislature so intended there would have been nothing easier for them to put it clearly in the Act. I decline to exercise my discretion in the circumstances.

27. If the Petitioner wishes that the two then be regarded as interested parties, then that is an issue that this court has the discretion to consider. The Supreme court has emphasized the principles to be considered in such an application in **Francis Kariuki Muruatetu & Another v Republic & 5 Others**

Petition No. 15 & 16 of 2016 [2016] eKLR, that where a party seeks to be enjoined in the proceedings:

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

28. In my view it is the party himself who is meant to set out his personal interest or stake in the matter. The application is made by the petitioner not Lucy Njoki Mugure or Yvonne Wanjiku Waweru. Though there is no response from Lucy Njoki Mugure the intended interested party, Yvonne Wanjiku Waweru, is categorical in her affidavit that she is not interested in this petition and indeed she did not seek to be enjoined and is opposed to this application.

29. Besides the affidavit in support of the application herein is not sworn by the petitioner herself but by Mr Awuor Advocate. I believe that the Advocate is not competent to demonstrate the interests of the intended 5th and 6th interested parties in this petition. He is also competent to depone on whether or not two will suffer any prejudice or injustice by not being enjoined. On the contrary the 6th intended interested party has demonstrated that she will suffer great prejudice if included in this petition.

30. Regarding Mr Awuor Advocate swearing this affidavit in support, Mr Njomo Advocate for the 6th intended Respondent/Interested party submits this being an electoral Petition and contentious in nature the Petitioner being the litigant ought to have sworn the Affidavit in support of the Application as opposed to her counsel on record. I agree with him.

31. Dismissing the Application sworn by the Advocate, Sitati J stated in **Hamzan Musuri Kevogo v I.E.B.C & 3 others (2017) eKLR**

“Thirdly, I do agree with Mr. Kisaka, that counsel for the applicant has, by deponing to contested matters of fact, stepped into the battle field of the combatants. This is not good practice and in my considered view, supporting affidavit for the application is not competent. It was stated in the case of Regina Waithera Mwangi Gitau – vs- Boniface Nthenge (2015) eKLR that...the established principle of law is that advocates should not enter the arena of the disputes by swearing affidavits on contentious matters of fact....”

32. In the circumstances I am satisfied that the application dated 21st day of September 2017 is not only incompetent but also lacks merit and is meant to delay the matter. I hereby dismiss the same and order the Petitioner meets the 6th intended Respondent’s costs of the application.

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

P. Gichohi

Chief Magistrate