



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NAROK

ELECTION PETITION NO. 7 OF 2017

SAMUEL MUNKASIO OLE LEMURT.....PETITIONER

VERSUS

ORANGE DEMOCRATIC MOVEMENTS.....1ST RESPONDENT

ELVIS KIRUI.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....3RD RESPONDENT

8/11/2017

In the civil registry.

Petitioner. Absent

Respondent. Absent

Court

Matter filed for mention on 29/11/2017 for Pre-trial conference.

Executive Officer

For Chief Magistrate

29/11/2017

Before Hon. W. Juma CM

Mr. Jaoko holding brief for Mr. Orwejo for Petitioner.

Respondents all absent.

Mr. Jaoko

Mr. Orwejo is engaged in Petition No. 20 of 2017 in Nairobi. He instructs me to apply for adjournment for 2 weeks. He prays for 11/12/2017. I do not have a brief on whether or not security for costs was

deposited.

I do not know if the respondents were served, I just know that there was an advertisement.

Court

The Petitioner is not handling the matter with the urgency it deserves.

We apologise for late gazettelement of the court but that should not affect issue of deposit of security of costs and service upon respondents or filing of responses.

Order

Mention for pre-trial directions on 11/12/2017. The Petitioner to have filed evidence that costs were paid within the required time and affidavits of service as evidence of the service of petition upon the respondents, before 11/12/2017.

Hon. W. Juma

CM

11/12/2017

Before Hon. W. Juma CM.

Mr. Gacheru for 3rd Respondents.

M/S Orwenjo for Petitioner.

Petitioner. Absent.

Mr. Gacheru

I have the CD, for replying affidavit.

I have been in touch with Petitioner's Advocates and they have sent me an SMS that their client was to send an Advocate to withdraw the matter.

We were ready on our part to take directions and canvass the petition by way of submissions.

We will abide by the court's directions.

Hon. W. Juma

CM

Court

The court served all the parties and only the 3rd Respondent has appeared today.

From what 3rd Respondent's Counsel indicates it is clear that the petitioner was aware of today's date and has chosen to be away.

On 29/11/2017 this court made specific orders which the petitioner was expected to comply with, the petitioner was represented that day.

In the absence of the petitioner and considering that the court will not be able with what would have been the advantage of presence of all parties, take pre-trial directions, I will give a date when I will give find directions on this matter.

Order

Determination on 20/12/2017. The execution officer to serve the parties with the mention date.

Hon. W. Juma

CM

11/12/2017

20/12/2017

Before Hon. W. Juma CM

Petitioner. Present

Ms. Mogere holding brief for Ms. Patricia Kasia for 3rd Respondent.

CC. Jackline.

Petitioner

I was not able to find my Advocate to come. I pray that I be heard in person.

Ms. Mogere

Matter was to be mentioned with a view to confirming if Petitioner complied with orders for depositing of security for costs which have not been done.

The issue has delayed the process. If it is not complied with the court to exercise its discretion and have matter dismissed.

Court

If petitioner wants to act in person he should have filed a notice to that effect.

The matter is still as it was on 29/11/2017. The court has to make a decision on the matter. Since petition is in court, the court can hear what he has to say.

Hon. W. Juma

CM

Petitioner

I have been short of money, if given 3 weeks, I can pay.

Order

Ruling at 2:00 p.m.

Hon. W. Juma

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RULING

The Petitioner filed this matter dated 4/10/2017, on 5/10/2017.

It was after the gazettelement of this court as trial court that matter was fixed for pre-trial directions on 29/11/2017.

On 29/11/2017 only the Petitioner's Counsel appeared in court. This court wanted evidence that Respondents had been served with the process because there were no affidavits of service filed. There was no response to the petition from either of the three respondents. Learned Counsel holding brief for Petitioner's Counsel requested for two weeks to take directions.

He was given a chance to prove that security for costs was deposited. According to this file no such funds have been deposited and neither was a request made for enlargement of time to have the costs deposited.

The matter was placed for pre-trial directions on 11/12/2017.

On 11/12/2017 the parties were all absent with their Counsels, apart from the 3rd Respondent.

Mr. Gacheru who appeared for the 3rd Respondent and who filed the response to the petition this 11/12/2017 received a text from Petitioner's Counsel that they had an intention of withdrawing the matter. Petitioner's Counsel did not attend court.

The third Respondent was prepared to take directions and have the petition canvassed by way of written submissions.

The court fixed the matter for 20/12/2017 as the date for determination and all parties were served with the notice.

Today is 20/12/2017 and the Petitioner is present in court. He was advised that for him to handle the matter himself he ought to have filed a notice to act in person.

The court fixed the matter for a determination on how the matter proceeds based on two serious considerations which are as follows:-

1.The provision of the law in section 78(1) and (2) (C) of the Elections Act which provides thus:-

1. A Petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this part.

2. (C) A person who presents a petition to challenge and election shall deposit.

(C) One hundred thousand shillings, in the case of a petition against a member of a County assembly.

In the instant case we are dealing with a nominated member of the County Assembly and the bottom line here is “member” to my understanding.

The second consideration is that of service of petition. This falls under section 77 of the Election Act. In section 77 (2) the law provides thus:-

“A petition may be served personally

“Upon a respondent or by advertisement in a newspaper with National Circulation”.

Rule 10 of the Elections (Parliamentary and County elections) Petition rules, 2017 deals with service on the Respondent.

Rule 13 of the same Rules provide for deposit of security for costs.

In the instant matter there is no slightest word or affidavit of service showing that the respondents were served with the petition apart from the fact that 3rd respondent has filed their response to the petition on 11/12/2017.

In as much as the 3rd Respondent would want a chance to prosecute their response, their appearance and response comes two months and a week after the petition was filed.

According to Rule 10 of the Elections’ (Parliamentary and County Elections) Petition Rules, 2017, the petitioner was expected to have served the Respondents with the petition within 15 days of filing of the petition. Service should have been done by 20th October, 2017.

As stated earlier, the court does not know when this 3rd Respondent was served.

The response was to be filed and within equal time served upon the other parties. If the respondent were to have been served by 20th October, it took the respondent the whole of November and half another month to file their response. This is out of the timelines.

If the response were filed depending on when the petition was served, the bottom line of the matter is that this response cannot acceptably be accommodated by the timelines in law. The response was filed with a clear sense of justification because no leave was sought to file it out of time.

There was no voice of complainant heard from 3rd Respondent that the petitioner failed to comply with the law on service. The ball still rolls back to the issue of service of the petition evidence of which is lacking.

The petitioner’s counsel, in my view should not have taken a brief they did not intend to execute. They should have signed out if they did not have proper instructions rather than dilly dallying in a situation where the law is clear in its provisions and procedures.

The evidence of service is totally lacking. The law on deposit of security of costs is in mandatory terms

but the court is guided by previous decisions that such time for deposit of costs can be enlarged.

I have in mind the cases of

1. Fatuma Zainabu Mohammed Vs Ghali Dennitah & 10 others. Election Petition No. 6 of 2013 (Kisii) and
2. Charles Mayuwa chedotum and Another Vs IEBC & 2 others Election Petition (Kitale) No.11 of 2013.

In the present case the court was not within reasonable time requested to extend time to deposit that security and the time which has by has inordinately been long. It has been time where a party slept on his chance without making any effort to make up, even when the court topped the party on the back on 29/11/2017, they did nothing about it.

In my considered view the petition herein is a non-starter and even if the court were to give the petitioner a chance to withdraw it, it will take another equal period and the petition can die for being stale.

The court will not allow the situation to reach that level.

The third respondent has come into this matter and whereas they may keep the stem going, the court cannot tell how they will be paid costs at the end of the day. The court finds it difficult to order for costs for the 3rd Respondent because I do not have an explanation from them as to why they have come too late into the matter.

This court finds that the able thing to do is dismiss this petition for want of deposit of security for costs and lack of service or evidence of it, upon the respondents or two of them, (1st and 2nd Respondents) as per the petition.

The petition is for those reasons dismissed with no order as to costs.

Hon. W. Juma

CM

20/12/2017

Court

Ruling read in open court on 20/12/2017 in the presence of the Petitioner, Respondents absent, counsels absent, CC. Kathe.

Hon. W. Juma

Chief Magistrate

20/12/2017