



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT MARSABIT

ELECTION PETITION 3/2017

ZEYNAB ALLYOW ISSACK-----PETITIONER

VS

1.INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION-----1ST RESPONDENT

2. JUBILEE PARTY-----2ND RESPONDENT

3. OSMAN ARARU SAADIA-----3RD RESPONDENT

RULING

The Petitioner Zeynab Allyow Issack filed an Election Petition dated 13/10/2017 on 16/10/2017 against Independent Electoral and Boundaries Commission (I.E.B.C) (1st Respondent), Jubilee Party (2nd Respondent) and Osman Araru Saadia (3rd Respondent) seeking the following orders:-

- (a) An order directing that the nomination of the 3rd Respondent as a member of county assembly Marsabit County is null and void.
- (b) An order directing that Your Petitioner be duly nominated as a member of County Assembly to represent the marginalized ethnic tribe of the Sakuye.
- (c) Any other order that this honorable court deems fit to grant.

The Petition is supported by the Affidavit of the Petitioner sworn on 13/10/2017. The 3rd Respondent subsequently filed a Notice of Preliminary Objection which was then served upon the Petitioner, 1st and 2nd Respondents. When the preliminary objection came up for hearing on 27/11/2017 only the 3rd Respondent and her counsel were present. The other parties were absent despite having been served.

The Preliminary Objection is premised on the following grounds:

1. THAT this Honorable Tribunal lacks jurisdiction to hear and determine this Election Petition filed therein on grounds that:

- a) This election petition offends the provisions of Sections 75 1(A) and 77 of the Election Act no. 24 of 2011, which out rightly stipulates that questions as to the validity of the election of a member of a County Assembly shall be filed within twenty eight days of declaration of results of the

election or as is the case in this instance twenty eight days after gazettelement of the party nomination list by the Independent Electoral and Boundaries Commission.

b) That the date for filing the Election Petition number 3 of 2017 was the 15th of October, 2017. The gazettelement of the party list was on 20th April, 2017 therefore, the petition should have been filed within twenty eight days after the date of gazettelement by the Independent Electoral and Boundaries Commission.

c) The Petitioner has filed this petition out of the statutorily required timeline, therefore this Honorable Court lacks jurisdiction to hear and determine the dispute as there is no valid election petition before this court.

2. THAT further this Honorable Court does not have the powers under the Elections (Parliamentary and County Elections) Petitions Rules, 2017, specifically Rule 8 to grant the orders sought in the petition, owing to the fact that such orders on the one hand are not provided for in Rule 7 Election (Parliamentary and County Elections) Petitions Rules, 2017 and on the other hand, it would have the adverse effect of violating on the 3rd Respondent's constitutional rights guaranteed under Article 38 of the Constitution as read with Section 36 of the Election Act.

3. THAT no proper service has been effected upon the 3rd Respondent as the Petitioner has failed to comply with Rule 10 of the Elections (Parliamentary and County Elections) Petitions Rules 2017, which provides that within a statutory stipulated timeframe, the Petitioner shall serve the Petition on the Respondent by either direct service or an advertisement published in a daily newspaper of national circulation.

4. THAT the Petitioner has failed to comply with Rule 7(b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, which provides that an election petition shall be in Form 1 set out in the First Schedule as read with Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, which makes provision for the contents and form of a petition. Instead the Petitioner has filed together with the petition a verifying affidavit sworn by the Petitioner herself, a list of documents and list of witnesses all of which offend the rules laid out by the Elections (Parliamentary and County Elections) Petition Rules, 2017.

5. THAT the Election Petitions are sui generis and governed by the provisions of the Constitution and specific electoral laws, and this petition as filed offends the said laws and/or regulations and ought to be struck out.

The issues for determination are:

1. whether this Petition was filed out of time provided by the law and is so, what is the effect thereof,
2. Whether this court has power to grant to grant the orders sought in the petition,
3. Whether no proper service was effected upon the 3rd Respondent, and if so, what is the effect thereof,
4. Whether the Petition as presented does not meet prescribed format for filing Election Petitions.

The constitution provides for two modes of election. The first is election by universal suffrage and the second is election by way of nomination through the Party list. This instant election Petition revolves around the legality or otherwise of the nomination made in regard to the 3rd Respondent as a member of county assembly of Marsabit County.

This Petition dated 13/10/2017 was filed on 16/10/2017 and not 15/10/17 as indicated by the 3rd

Respondent. The gazette Notice No. 8380 gazetted the nomination of the 3rd Respondent as a member of county assembly of Marsabit County was issued on 28/8/2017. The Petition was therefore filed about 48 days after the gazette notice.

Article 87(2) of the Constitution provides that petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by Independent Electoral and Boundaries Commission.

Section 76 (1) (a) of the Elections Act provides that a petition to question the validity of an election shall be filed within 28 days after the date of declaration of the results of the election and served within 15 days of presentation.

It is clear therefore that the Petition was filed outside the time frame provided for by the law. Article 87 (2) of the constitution and section 76(1) (a) of the Elections Act are couched in mandatory terms.

The Supreme Court in the case of **Moses Mwicigi and 14 others -V- Independent Electoral and Boundaries Commission and 5 others (2016) eKLR** stated thus:

“The gazette Notice in this case signifies the completion of the “election through nomination”, and finalizes the process of constituting the assembly in question.

It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election courts. The Gazette Notice also serves to notify the public of those who have been elected “to serve as nominated member of a County Assembly”

In **Anami Silverse Lisamula – VS – Independent Electoral and Boundaries Commission and 3 others (2014) eKLR** the Supreme Court, upheld the principle that an election petition must be filed within the timelines prescribed by the constitution by saying *“It is clear to us that the main issue this court was called upon to determine in the Mary Wambui case, is the one we are now asked to determine, which is whether the petition filed in the High Court outside the 28 days prescribed by Article 87(2) of the Constitution is a nullity. We find that the decision in the Joho case directly applies in the instant matter and so does that jurisprudence in the Mary Wambui case”*

It is clear from the above decisions that election petitions must be filed within the time frame provided by the law. I am bound by the authorities cited above.

Further, Rule 19 of the Elections (Parliamentary and County Elections) Petition Rules 2017 provides as follows:-

“19(1) where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard and determined.

It is clear that the electoral dispute resolution timelines prescribed under the Constitution and the Elections Act especially those relating to filing and service of election petitions are inflexible and inextensible. This was made clear by the Supreme Court in the case of **Lemanken Aramat –v- Harun Meitamei Lempaka & 2 Others, Supreme Court Petition No. 5 of 2014.**

From the foregoing, it is clear that this court lacks the jurisdiction to hear and determine this Petition challenging the validity of nomination of 3rd Respondent to the county assembly of Marsabit County on the ground that the same was filed outside the mandatory constitutional and statutory timeframe. The

Petition is incompetent and fatally defective.

As to whether this court has powers to grant orders sought as they are not provided for in Rule 7 Elections (Parliamentary and County Elections) Petitions Rules, it is my considered view that the court has powers to grant such orders. The said rule does not prescribe the orders the court may grant. Further Rule 8(3) of Elections (Parliamentary and County Elections) Petitions Rules is not exhaustive on the particulars of relief a petitioner may seek.

Counsel for 3rd Respondent also raised the issue that no proper service was effected on the 3rd Respondent. According to her, they learnt of this Petition when they checked at this court's Registry after having been told to do so by the Registry at Milimani Commercial Court in Nairobi. They informed the 3rd Respondent about the Petition who instructed them to respond.

Article 87 (3) provides that service of a petition may be direct or by advertisement in a newspaper with national circulation. Section 77(2) of the Elections Act also provides that "A petition may be served personally upon a respondent or by advertisement in a newspaper with National circulation.

The Petitioner has not responded to the claim that no proper service was effected on the 3rd Respondent which ought to have been done within 15 days.

I hold and find that no proper service was effected on the 3rd Respondent. This offends the provisions of Article 87(3) of the constitution, section 77(2) of the Election Act and Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules. The failure to serve the 3rd Respondent is fatal.

I am guided by the decision in the case of **Patrick Ngeta kimanzi –v- Marcus Mutua Muluvi & 2 Others, Election Petition (Machakos) No. 8 of 2013**, in which the court explained the importance of service in electoral dispute resolution as follows:

"Although the regime of service of election petitions has been liberalized, the requirement of service was not dispensed with. Service of the petition is still a requirement under the Constitution, the Act and Rules. Without service, the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which is underpinned by the well-worn rules of natural justice. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against him. Elementary justice demands that a person be given full information on the case against him and given reasonable opportunity to present a response..Any pleadings filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it....Failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away....service of the petition is a mandatory requirement and a petition that has not been served cannot proceed for hearing as the respondent is denied the opportunity to contest the facts of the petition.

Mere knowledge of the existence of a petition by the respondent can neither cure want of service nor discharge the burden of service imposed on the petitioner by the law...service of the petition is not a mere procedural requirement that can be dispensed with but is a mandatory requirement that must be complied with....It is not a mere technicality that can be swept aside by application of the provisions of Article 159(2) (d) and overriding objective set out in the rules 4 and 5 of the rules. Unless waived by the respondent, service must be effected as it is an essential and mandatory step and an affected party is entitled to apply to the court to strike out the petition for want of service"

The 3rd Respondent further raised the issue that this Petition is not presented in the prescribed format which requires that an election petition shall be in Form 1 set out in the First Schedule (Rule 7 of the Elections(Parliamentary and County Election) Petitions Rules).

Under Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, every Election

Petition must state:

1. The name and address of the petitioner;
2. The date when the election in dispute was conducted;
3. The results of the election, if any. and however declared;
4. The date of the declaration of the results of the election;
5. The grounds on which the petition is presented; and
6. The name and address of the advocate, if any, for the petitioner which shall be the address for service.

Further, every Election Petition must:

1. Be signed by the petitioner or by a person duly authorized by the petitioner;
2. Be supported by an affidavit by the petitioner containing the grounds on which relief is sought and setting out the facts relied on by the petitioner;
3. Be in such number of copies as would be sufficient for the court and all respondents named in the petition, and
4. Conclude with a prayer requesting the court to grant appropriate relief.

I have perused the Petition. It does not indicate the gazette notice through which the 3rd Respondent was nominated. It also does not indicate the date of the gazette notice which is equivalent to the date of the declaration of the election results. In the circumstances, I hold and find that this Petition is deficient in form and content required of an election petition which deficiency is fatal.

In the upshot, I allow the preliminary objection and strike out this Election Petition with costs to the 3rd Respondent. I hereby cap costs at shs 50,000/= excluding disbursements which must be proved by way of receipts.

Orders accordingly.

Dated and delivered at Marsabit this 1ST day of December 2017

Hon B. Ombewa

In the presence of:-

- 1.
- 2.