



REPUBLIC OF KENYA
IN THE MAGISTRATE'S COURT AT MALINDI
ELECTIONS ACT 2011
ELECTION PETITION NUMBER 002 OF 2013

BAKARI HASSAN JUMA.....PETITIONER

=VERSUS=

INDEPENDENT ELECTROL AND BOUNDARIES COMMISSION

(IEBC).....1ST RESPONDENT

HAMISI HALFAN TSUMA.....2ND RESPONDENT

MWATHE THE ADMSON KADENGE.....3RD RESPONDENT

RULING

The nature of election petitions in the country is that they have their own twists and turns and therefore the present matter is no exception.

The court converged on 2/5/13 in compliance with the provisions of Rule 4 of the Election (Parliamentary and Country Elections) petition Rules 2013.

Shortly thereafter an application dated the same day to withdraw the election petition was filed.

The applicant denied having signed or filed the election petition. His contention was that he was approached to be a witness only to learn later that his name had been used as a petitioner.

Other parties to this petition were given an opportunity to respond to the issues raised and they accordingly filed replying affidavits.

A notice of intention to be substituted as a petitioner was also filed on 6/5/2013 by one Twahir Abdulkarim Mohammed along the petitioner to be substituted as a petitioner.

The grounds set out in the application are that Bakari Hassan Juma has given notice of his intention to withdraw the petition and he had actually not signed the petition. That it is in the interest of justice that the applicant be substituted as a petitioner.

The respondents replied to the application; and an order was made by the court that since both applications are related, they be heard together.

It is clear that the respondents are not opposed to the withdrawal of the petition perse, but the main contention is that now that the petitioner has denounced, having signed the Petition, there is no petition before the court and therefor the issue of substitution does not arise.

There are accusations and counter accusations between the petitioner and the person intended to be substituted as the petitioner namely TWAHIR ABDULKARIM MOHAMMED.

I have considered the application in question, the replying affidavits and the submissions made by all the learned counsel in this matter.

The petitioners identity card copy is annexed on the petition. However it does not bear the petitioners identification mark or signature by virtue of which the court would have been able to compare and make a finding on whether or not he is the one who had signed the election petition.

The party intended to be substituted insists that indeed the petitioner signed the petition whereas he alleges otherwise.

However from the depositions by the petitioner it is clear that he was aware of an intended petition and it would appear that he only accepted to being a witness and not a petitioner in the strict sense.

It is also alleged that the petitioner and the person who seeks leave, to be substituted are known to each other. The petitioner was the chief campaigner and agent for the applicant who seeks to be substituted.

Looking at the record, the deposit for security was made by a different person altogether.

On the face of it, it is not possible to ascertain all the allegations being raised in this matter by all the parties against each other. It would consume a lot of time and make the court lose track of the spirit and intendment of Rule 4 and 5 of the Election Petition Rules.

In my considered view, proceedings in an election petition are proceedings *sui generis*, they cannot be looked at with the same pair of spectacles like ordinary civil proceedings.

My understanding of an election petition is that its life is not hinged on the existence of an individual. It is a matter of public interest.

Indeed that is why Rule 26 provides for substitution of the petitioner, Rule 27 deals with the death of a petitioner and Rule 2 provides for an application to be substituted as a petitioner.

In the case of **PETER NGUNJU GAKUNGA & DEDAN KIRAGU KINGORI VS FREDRICK MAINA & JOSEPH A. GATHENJI E.P NO. 47/1993**, the court had this to say about election petitions:-

“The power vested in the court for striking out a petition as a whole thereby driving a party away form the seat of justice is a draconian remedy. It should therefore be used sparingly and in plain cases”.

That authority was cited with approval in the subsequent case of **ROBERT NELSON NGETHE VS MBOGORI NJERU & ANOTHER [2005] E KLR.**

The circumstances presented herein are not plain. The time frame for filing of Election Petitions came to an end. The result of striking out is that there would be no other forum to ventilate this issue even if there was a person who wished to be heard.

Due to the reasons I have already alluded to, I will allow the applications dated 2/5/13 and the one dated 6/5/13.

There should be an order for costs to the 1st, 2nd and 3rd respondents in respect of both applications.

The said costs shall be borne by the new petitioner Twaher, Abdulkarim Mohamed and to be drawn from the security of costs already deposited in court upon finalization of this matter.

An order is made that the substituted petitioner deposits in court a fresh security of costs in the sum of Kshs.100,000/- on or before 17/5/13 in default of which the respondents will be at liberty to apply for striking out of the petition.

The 1st respondent is also ordered to move with speed and comply with Rule 2 of election petition rules requiring the filing in court of the result of the election by 17/5/013.

The substituted petitioner, will also file and serve any further witness affidavits upon the respondents on or before 17/5/2013.

The parties to agree on the petitioners application dated 10/4/13 in default to file responses thereto and a hearing date to be given on 20/5/2013. Mention on 20/5/13.

N.SHIUNDU

Ag. SENIOR PRINCIPAL MAGISTRATE

14/5/13

Ruling delivered and signed by me Nathan shiundu Ag. SPM this 14/5/13 in open court at 4.00 pm.

Coram

Petitioner -Present

1st Respondent-present

2nd Respondent-present

3rd Respondent-present

Mr. Abubakar present for the substituted petitioner

Mr. Katsole present for previous petitioner

Ms Ngugi present for the 1st and 2nd Respondents

Mr. Mouko present for the 3rd Respondent alongside Mr. Gicharu who is also present.

Mr. Mouko: I apply that we be supplied with the certified copies of the proceedings and ruling delivered in court today.

Ms Ngugi: I also have a similar application.

Court: The respondents to be supplied with certified copies of the proceedings and ruling delivered herein upon payment of the requisite court fees.

N. SHIUNDU-Ag. SPM