



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

ELECTION PETITION NO. 1 OF 2013

CHARLES NYAGA NJERUPETITIONER

=VERSUS=

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

NEVERT NTWIGA.....2ND RESPONDENT

RULING

This ruling follows a notice of motion application filed by the petitioner through his advocates Wambugu Kariuki & Associates. The applicant has sought the following orders;

1. THAT this Honourable court be pleased to grant the petitioner leave to amend his petition already filed as in the draft amended petition marked "CNN-1".
2. THAT, upon grant of orders No. 1 above, the draft amended petition be deemed as duly filed upon payment of any necessary court filing fees.
3. THAT, the costs of this application abide the results and/or determination of the main petition herein.

The application is supported by the affidavit of Charles Nyaga Njeru sworn on 17/05/2013 forthwith the annextures thereto and on the following grounds;

- i. On 10/05/2013 the petitioner vide letter filed in court on the same day sought the court to order the 1st respondent to fully comply with Section 21 (b) of the election petition rules by filing and serving all forms No. 35 of all the 28 polling stations in Mitheru ward.
- ii. On 14/05/2013 the said forms No. 35 were supplied by the 1st respondent to the petitioner.
- iii. It has since become clear that most of the recorded details of the election have alterations in favour of the 2nd respondent particularly in Kiini Primary School, Ikame Primary School, Mugona Primary School, Kiamuchumbi Tea Buying Centre, Giampampo Primary School, Gaketha Primary School, Muthenge Apostolic Church grounds, Kathangawe Primary School, Igangara Secondary School, Kaganjo Primary School, Muragara Primary School, Ndumbini Primary School, Kagongo Gacheke Primary School, Nkururu Nursery School, Magundu Primary School, Magundu Secondary School, Gintutu Primary School and the already demonstrated Kamachuku Primary School.
- iv. It is therefore necessary to plead in the main petition that there be actual retallying of votes cast and valid ones to determine what the 2nd respondent got viz-a-viz what the petitioner got as in the draft amended petition.

- v. That the retallying of votes ought to be welcome by the respondents because it serves even to confirm the elections may have been fair and the 2nd respondent won squarely perhaps contrary to this petition.

The petitioner/applicant in making his application relied on Section 80 (1)

(d) 3 of the elections act 2011. The application was duly served upon the respondents and upon receipt the 1st respondent through its counsel through its counsel Iseme Kamau and Maema Advocates filed grounds of opposition whereas the 2nd respondent through his counsel Kinyua Murithi & Company Advocates filed a replying affidavit.

The application was ably argued before me on 21/05/2013. I have carefully considered the application, supporting affidavit forthwith the annexures. I have also perused all the pleadings filed so far including the respondents respective reply to the application. I have also paid regard to learned counsels rival arguments and submissions. In my view the issue that arises for determination is whether this Honourable court has jurisdiction to grant the petitioner leave to amend his petition.

Before proceeding to address the issue at hand, I wish to state briefly that the facts culminating the filing of the instant application are that during the pre-trial conference held on 14/05/2013 while framing issues a contention between the petitioner's counsel and the respondents counsels arose. Issue number 2 as drafted by the 1st respondent's counsel and initially adopted by the petitioner's counsel before changing mind reads "whether there were any errors of entry of form 35s and 36 in respect of Kamachuku Primary School polling station and Mugona Primary School and if so, whether the errors materially affected the outcome of the elections."

The 2nd respondent's counsel was comfortable with all the issues as framed by the 1st respondent's counsel and in fact adopted them word for word. All the counsels were in consensus that issue number 3 which reads "whether there were instances of disenfranchisement of voters and if so, whether the said irregularity materially affected the outcome of the election?" be dropped as it is no longer for determination by this honourable court.

Essentially at the first instance the petitioner's counsel and the 2nd respondents counsel agreed to adopt the 1st respondent's issues except issue number 3. However when Mr. Nyaburi counsel for the 1st respondent stood up to thank his senior colleague Mr. Kariuki for agreeing with him as far as the issues for determination were concerned he withdrew his earlier position and stated that in respect to issue number 2, the other polling stations should be included to enable the court reach a just and fair conclusion. He stated that he had not initially framed his issues because he had just been supplied with the forms 35 and noted some alterations. In a quick rejoinder Mr. Nyaburi stated that parties were bound by their pleadings and issues are crafted from pleadings and not from forms 35. The petitioner's counsel then sought for more time to re look at the case and consider whether it was necessary to file an application seeking leave to amend the petition, which he did.

Reverting back to the issue for determination that is whether this Honourable court has jurisdiction to grant the petitioner leave to amend his petition, the petitioner's counsel Mr. Kariuki argued that this honourable court has a duty to consider all applications formal or oral without undue regard to technicalities. He stated that the petitioner was seeking to amend the petition in terms of ground number (iii) of the application; He relied on the petitioner's supporting affidavit sworn on 17/05/2013. He stated that after receiving the forms 35 they noted that the forms had alterations which were visible everywhere and hence singled out the polling stations with alterations. He stated that Kamachuku polling station had three forms 35. He referred the court to the serial numbers of the said forms.

He argued that the alterations meant someone had interfered with the forms. He stated that the forms were standard so that if any of them was photocopied. Severally, it ought to have the same contents. He submitted that it was for the benefit of the 2nd respondent to confirm that he had won. In reply to the 2nd respondent's affidavit he stated that they had disclosed the anomalies in the forms and

they only noted the alterations after being supplied with forms 35 after the pre trial conference was adjourned.

In response to the grounds of opposition filed by the 1st respondent's advocate, he stated that Section 76(4) of the election act 2011 says a substantive petition has to be filed within 28 days. He stated that they were not pleading that an offence had been committed. In reply to the cases of Raila Odinga versus Independent Electoral and Boundaries Commission & 3 others [2013] relied upon by the 1st respondents counsel, he stated that they were irrelevant to the instant case because what was before the supreme court for consideration was the 800 pages affidavit filed without leave of the court. For expediency of the moment the affidavit was disallowed.

He further submitted that the case of Gakenia versus Kimani and others also relied upon by the 1st respondent's counsel dealt with election offences and captured the situation as it was then. He stated that the amendment was not seeking to include an election offence as that could be out of order and contrary to section 76 (4) of the election act 2011. He finally submitted that the alterations in the forms were visible and there is no guarantee that the 1st respondent will get less votes.

Mr. Nyaburi counsel for the 1st respondent opposed the application and relied on the grounds of opposition. He stated that the only complaint raised by the petitioner in his petition was in respect to Kamachuku Primary School. He stated that the mandate of the court is based on what the law says especially how parties frame their pleadings . He argued that Section 76(4) of the elections Act 2011 is the only section that states which petitions can be amended with leave of the court. He stated that there was no other provision in the entire electoral regime that talks of amendments. He stated that an amendment under Section 76(4) had to be done within 28 days after publication of the results.

He further stated that the petition was filed in time, the results having been published on 13/3/2013 however what is significant is what the petitioner is seeking to challenge and most importantly the validity of the election and the return of Kamachuku Polling Station. He submitted that the amendment sought by the petitioner is seeking to challenge returns of other polling stations other than what was in the initial petition hence suggesting, in challenging a return a petition ought not to be filed within 28 days. He submitted that the amendment is statute barred and the application is bad in law and incompetent.

In respect to the Supreme Court rulings relied upon he submitted that at page 36 the court held that admission of the further affidavit would lead to a departure from the initial case. He stated that it is trite that parties are bound by their pleadings and an amendment if allowed will bring a new case in respect of the polling stations mentioned in the application.

He stated that the court has jurisdiction to extend time arising from parliamentary and county election rules to be precise rule 20 which provides that where any matter needs to be done the court has jurisdiction to extend time despite the fact that the time had lapsed. He stated that there was no provision in the law allowing the court to allow extension in statutes. He urged the court to dismiss the application.

M/s Muthoni counsel for the 2nd respondent equally opposed the application and relied on the 2nd respondent's affidavit sworn on 20/05/2013. She basically associated herself with the 1st respondent's counsel's submissions and added that the petitioner did not disclose in his application which details were altered in respect to the polling station's mentioned unlike in his initial petition where he was clear about his complaint in respect to Kamachuku Primary school. She stated that the application was not clear as to what alterations were made in favour of the 2nd respondent.

She further argued that by seeking an amendment the petitioner is bringing new issues which will compel the 2nd respondent to call for further and different kind of evidence. She submitted that the exercise would be expensive for their client because he will be forced to adduce evidence in the entire ward by calling witnesses and filing further affidavits.

She argued that the petitioner ought to have filed an application for retallying as provided under rule

32 of the parliamentary and county elections petition rules, 2013. She relied on the case of Gakenia versus Kimani and others at page 9 where it was held that an amendment outside the stipulated 28 days is improper. She submitted that at page 10 of the same ruling Section 20(2) of the act was cited. She stated that there are no cases under the current election act and therefore they relied on the old act. She finally submitted that the application is not based on facts and ought to be dismissed with costs to the respondents.

In a brief reply, the petitioner's counsel submitted that they did not have any precedent under the new act. He stated that everyone was trading on new grounds and that each election court will make its decisions depending on the circumstances of each individual case. He stated that Section 80 (d) of the elections act 2011 allows the election court to hear matters without undue regard to technicalities. He stated that the circumstances at the Supreme Court were quite different. The court had only three days to give a decision and were hence constrained with time. He stated that in the instant case there are still five months that are untouched. The pressure is not there and therefore circumstances are totally different. He urged the court to allow the application for the truth to come out.

The task that has been left to the court is to decide whether the application has merit or not. The petitioner's counsel heavily relied on Section 80 of the elections act 2011 which gives the court jurisdiction to decide all matters that come before it without undue regard to technicalities. I must state that the legal regime and procedural framework of electoral dispute settlement is very strict and unique in many ways.

From the petitioner's counsel's arguments and submissions it is clear that he heavily relies on Section 80 (d) of the election act 2011 which provides that the court shall decide all matters before it without undue regard to technicalities. The proviso is akin to article 159 (2) (d) of the constitution. Once seized of the dispute, the court is enjoined by article 159 (2) (d) of the Constitution to do substantial justice to the parties expeditiously and without undue regard to technicalities. This overriding principle is a guiding beacon to the court.

In the case of Edward Mwangi vs Peter Irungu & 2 others (No. 2) Nairobi High Court ELC 105 of 2011 [2012] e KLR the court had this to say; Rules of procedure have aptly been described as handmaidens of justice: not mistresses. In the case of Hari Sheth Advocate vs Shamas Charania Nairobi, Court of Appeal Civil Appeal 68 of 2008 [2010] e KLR the court held:

"The principal aims of the overriding objective include the need to act justly in every situation, the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as is practicable to place the parties on equal footing." In the case of Raila Odinga versus Independent Electoral Commission the Supreme Court held that Article 159 (2) (d) is not to be held in a manner that ousts the procedural rules as parties seek justice.

This court associates itself with the Supreme Court's holding in respect to the application of article 159 (2) (d) of the constitution. The proviso should not be interpreted to mean that rules or technical rules shall not apply: only that the court should not pay undue regard to them. Indeed if rules were to be done away with, chaos akin to a village baraza would find a way into the courts creating total confusion. That was clearly not the intention of the legislature.

Having said that and after going through the election act and all other electoral laws, I find no provision fully clothing this court with power and discretion to grant an amendment to a petition outside the 28 days provided for in article 76 (1) (b) of the elections act and article 87 (2) of the Constitution. From the reading of the two provisos, it is my opinion that this court has no mandate to grant an amendment of the petition unless an application for the amendment is made within 28 days. In brief this court cannot bring into effect section 80 (1) (d) of the elections act and article 159 (2) (d) of the constitution where it has no mandate in the first place. I do agree with counsel for the 1st respondent that the mandate of the court is based on what the law says on administration of justice.

It is my view that the petitioner is trying to fish for evidence along the way. As I have said electoral disputes are unique in very many ways and the law must be adhered to strictly. The petitioner ought to have sought leave to amend the petition within the stipulated 28 days. He is disputing the return of Kamachuku Primary School and indeed the returns of the entire ward. His argument is that he had not been supplied with forms 35 at the time of filing the petition. He was only served with the forms the morning the case was scheduled for pretrial conference.

The results of the 4th March 2013 elections were published on 13/03/2013. The petitioner waited till 5/4/13 when he filed his petition. The last date which any electoral dispute ought to have been filed was 10/04/2013. Rule 21(b) of the elections (Parliamentary and County elections) petition rules, 2013 provides that the results of the relevant election shall be delivered by the commission to the registrar within fourteen days of being served with the petition.

Since the petitioner waited almost till the last minute, it was up to him to move with speed immediately after serving the petition to ensure that he has been supplied with all the forms 35 in respect of all the 28 polling stations so that if he noted any errors, seek to amend the petition within the 28 days. The petitioner might argue that the election court was not in place as at the end of the 28 days. True that I also agree might be a concern but he never made any effort including moving the highest court in the land to given directions on the issue.

From the petition filed, it is my understanding that all the petitioner wants is the tallying of the votes received by the candidates in all the 28 polling stations of Mitheru ward. Counsel for the 2nd respondent argued that instead of the petitioner seeking leave to amend his petition, he ought to have filed an application for retallying as provided under rule 32 of the elections (parliamentary and county elections) petition rules 2013 to that extend I do agree with counsel. Rule 33 (1) of the same rules provides that “the parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.” Rule 33 (4) further provides “scrutiny shall be confined to the polling stations in which the results are disputed...” The proviso in my understanding is that for as application of scrutiny to succeed, a basis has to be laid. Unfortunately the petitioner went for an amendment instead of making use of the said rules.

All the same, all is not lost. Section 82 (1) of the election’s act 2011 provides “An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such a manner as the election court may determine.” I however have to state that the court will not act on blanket prayers because that will be in vain. The petitioner has to be certain of what he wants as he seeks justice.

As regards to the discretion of the court to extend time under rule 20 of the elections (parliamentary and county elections) petition rules 2013, the same is not available to the petitioner unfortunately. Rule 20 is very clear that time is to be extended where such time has been limited by the rules or by the court. Such extension does to extend to instances where the time is limited by the substantive act or the constitution. In this regard time of filing the petition is limited to 28 days by both Section 76(2) of the elections act and article 87 (2) of the constitution. That time in my view cannot be subject to an extension on a discretion granted by the rules. Accordingly no provision of amending the petition can be available to the petitioner.

I fully associated myself with the holdings at page 8 and 9 in the case of Gakenia versus Kimani and others though delivered under the old act. The provisions of the sections cited are not any different from Section 76 (4) of the election act 2011. Of more recent Justice Onyancha in the case of Amina Hassan Ahmed versus returning officer Mandera County and two others held the opinion that neither the elections act nor the rules donate any proviso for amendment of an election petition except for the limited window found in section 76 (4) of the Elections Act, 2011.

I indeed agree with the learned judge. I appreciate the fact that the election act 2011 is new to most of us and every court might be tempted to have its own interpretation. My own interpretation of the said section which reads “A petition filed 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 within which the petition questioning the return or election upon that ground may be presented” is that an amendment to the petition has to be sought from the election court within the 28 days prescribed by the act for filing an election petition and the election court is willing to exercise its original discretion in favour of granting the amendment sought.

Having said that, I find that the petitioner’s application dated 17/05/2013 has not merit. The same is dismissed with costs to the respondents. Orders

accordingly.

C. K. OBARA – SRM

28/05/13

Ruling read, signed and delivered in open court on 28/05/2013. Mr. Kariuki present for the petitioner, Mr. Nyaburi for the 1st respondent, Ms Muthoni for the 2nd respondent, court clerk Mutua.

C.K. OBARA – SRM

28/05/13

Mr. Kariuki – At this point we wish to make an application for retallying. We shall annex all the evidence.

Mr. Nyaburi – If counsel is able to file his application within a week, I will be able to file a response. The filing of the application does not prejudice the hearing of the case. The application can be filed any time.

C. K. OBARA – SRM

28/05/13

Ms. Muthoni – We can proceed with the pretrial and see if we can be able to agree with the issue in the petition that is Kamachuku and then and then perhaps move forward.

C. K. OBARA – SRM

28/05/13

Mr. Kariuki – I am of the view that our application for re-tally be heard first before the hearing.

Ms. Muthoni – The application can be heard parallel to the petition. We can proceed to frame the issues and fix the matter for hearing.

C. K. OBARA – SRM

28/05/13

Court – I have listened to all the counsels. I direct that matter proceeds for finalization of the pre-trial conference. The petitioner’s counsel can file his application for retallying if he deems if necessary any time during the hearing. That is provided for in the elections rules.

C. K. OBARA – SRM

28/05/13

Ms. Muthoni – I wish to amend paragraph 11. I will need I hour to cross examine each witness.

Mr. Kariuki – I will call 5 witnesses and not 3. I will need an hour for each witness.

Mr. Nyaburi – In that case I will only need an hour or less.

Mr. Kariuki – I will be relying on the forms 35 as documentary. My witnesses will be relying on the affidavits. I pray that the petitioner be allowed to pick typed proceedings of the rulings. I will put in written submissions at the end of the hearing. I will need an hour.

Mr. Nyaburi – I will call one witness. He will adopt the affidavit. She will need one hour. I will then tender her for cross examination. I will put ion written submissions I will need one hour.

C. K. OBARA – SRM

28/05/13

Ms. Muthoni- We will not call any witness. We shall rely on the affidavit and response to the petition. Our main role will be cross –examination of the witnesses placed before us. I will put in written submissions. I might not hope to highlight. I will be taking one hour or less to cross examine the witness. I have to submit I will need an hour or less

C. K. OBARA – SRM

28/05/13

Court – Parties counsels confirm that none of them will be requiring services of an interpreter. Counsels to request their clients to carry their national identity cards. Ballot boxes to be availed in court in the event retally or scrutiny is ordered.

Mr. Nyaburi – I am appearing in election petition No. 1 at Meru High court. The hearing is starting on 3/06/2013 up to 20/06/2013. We have agreed to start on 24/06/2013. I am the only counsel handling that specific election.

C. K. OBARA – SRM

28/05/13

Mr. Kariuki – No objection.

Ms. Muthoni- No objection

Court –Hearing of the petition to start on 24/06/2013 on a day today basis up to 28/06/2013 apart from Saturday , Sunday and public holidays.

C. K. OBARA – SRM

28/05/13