



REPUBLIC OF KENYA

MILIMANI COMMERCIAL COURT AT NAIROBI

ELECTION PETITION NO.1 OF 2013

WILLIAM KINYANYI ONYANGO..... PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL AND BOUNDARY
COMMISSION...1ST RESPONDENT**

RETURNING OFFICER UHURU WARD.....2ND RESPONDENT

ROBERT MBATIA.....3RD RESPONDENT

RULING

1. The Petitioner, William Kinyanyi Onyango, herein after referred to as the Petitioner filed his Petition on the 14th March, 2013 together with a Notice of Motion following the general elections held on the 4th March, 2013, the Respondents filed their Replies to the Petition on Various dates.

2. The Petitioner at the time of Directions abandoned the application that had been filed together with the Petition and issues of costs of that application shall be determined in this ruling.

3. On the 14th May, 2013 the Petitioner filed a Notice of Motion

wherein he asked for prayer inter alia,

‘ 1. That an order do issue for recounting and scrutiny of the registers and votes cast on the 4th March, 2013 General Elections at Kariobangi South primary school and Uhuru Primary school.

2. That costs of the application be provided for. ’and

4. On the 20th May, 2013 the 3rd Respondent filed a Notice of Motion (Under Rule 10 (1) (c), Rule 17 (1) (g) and (k), Rule 34, The Elections (Parliamentary and County Elections petition rules, 2013 herein after referred to as **Rules**, Section 80 (1) (d), the Elections Act, 2011 herein after referred to as **The Act** for orders;

a) That the Petitioner’s petition dated 11th March,

2013 and filed in court on the 14th March, 2013 questioning the validity of the Election of the County Representative for Kariobangi South Ward

(1429) held on 4th March, 2013 be struck out or dismissed on the grounds;

i) The Petitioner has not complied with rule 10 (1) (c) of the Rules in that the Petition does not state the results of the election declared.

ii) The Petition does not disclose a cause of action.

The 3rd Respondent has also asked for the costs of the petition and that of this application.

5. This application by the 3rd Respondent was supported by the 1st and 2nd Respondent but opposed by the Petitioner. The court gave directions that this application by the 3rd Respondent dated 20th May, 2013 and that by the Petitioner filed on the

14th May, 2013 be heard together. For some reason the application which was argued was that of the 3rd Respondent seeking to be struck out or dismiss the Petition.

6. The petitioner through Wanjohi advocate urged this court to be struck out the petition arguing basically that the petitioner had not complied with the mandatory provisions of Rule 10 (1) (c) of the Rules by failing to state the results of the election declared and that the petition has failed to disclose a cause of action. The petitioner argued that the results had been handed over to the

3rd Respondent which the third Respondent annexed to his affidavit and marked “**RM 1**”

7. The 3rd Respondent further stated that the Petitioner in his own averment stated that the 2nd Respondent had announced and declared the 3rd Respondent as the elected member for the County Assembly for Kariobangi South Ward and further that the Petitioner stated that the results announced were altered and incomplete. The 3rd Respondent stated further that the Petitioner conceded that the results were declared by the 2nd Respondent in his Supporting affidavit paragraph 17. I have looked at the said affidavit sworn on the 12th March, 2013 and at paragraph 17 the Petitioner states thus, “**17. That the results which were read as final results were not true reflection of**

what people got.....given that the final results given to us did not bear the numbers of other streams and annexed

.....are some of the results given to us”

8. The petitioner stated that his position on the declaration of the results was supported by the 2nd Respondent who clearly stated in her replying affidavit sworn on the 18th April, 2013 how they declared the results on 6th March, 2013 at paragraph 24 of the said affidavit the 2nd Respondent states thus “**THAT the results were declared in line with the provisions of the Constitution and all other Electoral Laws.....**” the 2nd Respondent further stated in her affidavit at paragraph 25 as follows, “**THAT the 3rd Respondent was gazetted on the 13th day of March, 2013 vide Gazette Notice number 3155 and subsequently sworn in on the 22nd day of March 2013.**” She annexed a copy of the said gazette notice.

9. It was further the contention of the 3rd Respondent that the

Petitioner did not give his address as is required under Rule 10 (1) (a). Perhaps this is a good time to state what this Rule 10 of the Rules stipulates. The said rules were published and are contained in the Kenya Gazette Legal Notice No. 44 of 2013. Rule

10 (1) thereof states thus;

- “an election petition filed under rule 8 shall state:- a) the name and address of the petitioner;**
- b) the date when the election in dispute was conducted;**
- c) the results of the election, if any, and however declared;**
- d) the date of the declaration of the results of the election;**
- e) the grounds on which the petition is presented;**
- f) the name and address of the advocate, if any, for the petitioner which shall be the address for service.”**

10. Mr. Wanjohi counsel for the 3rd Respondent stated that the

declared results were not mentioned in the body of the Petition. That the petitioner failed to state what was garnered by the Petitioner or any other candidates stating that was what was envisaged in rule 83 (1) (c) of the Elections General Regulations

2012. The results are declared by the returning officer. The 3rd

respondent also stated that the results were central to any election as was held in **MUTUTHO VS KIHARA AND OTHERS** where the Court of Appeal held thus **“in our view an essential element would be missing. The petition shall be incomplete as a basis of any complaint will be absent.”** The 3rd Respondent relied on other authorities

11. The 1st and 2nd Respondents through their counsel Ms Odera

supported the application by the 3rd Respondent. They joined issues with the 3rd Respondent that the Rule 10 had not been complied with. It was their contention that compliance with Rule

10 was mandatory and that failure to comply with the same

rendered the petition fatally defective and ripe for dismissal. She also relied on **MUTUTHO VS KIHARA** as the petition would fail in form and content

12. Counsel Ms Odera also invited the court to the ruling in **AMINA HASSAN AHMED VS RETURNING OFFICER MANDARA COUNTY AND 2 OTHERS** wherein she submitted the court held that compliance to Rule 10 was mandatory. It was also the contention of the 1st and 2nd respondents that Rule 10(1)(c) was not a technical issue as the petition was to challenge the results. Finally Ms Odera stated that the meaning of Article 159 (2) (d) of the Constitution has now been given by the Supreme Court.

13. In reply to the application to struck out or dismiss the Petition by the 3rd Respondent the Petitioner through his counsel Mr. Were opposed the application. He relied on the filed replying affidavit and his submissions. He stated that the affidavits filed formed part of the petition but conceded that this was a grey area and stated that the law was developing and it was our duty to develop jurisprudence.

14. The Petitioner through his counsel stated that they were alleging corruption, that the letters of allotment dished out to voters for favours forms part of the petition. He relied on the authority of **KAMALAM VS DR. V.A. SYED MOHAMAD 1978**

AIR 840, 1978 SCR (3) 446 where it was held inter alia as follows **“The election petition is in truth and reality one document consisting of two parts, one being the election petition proper and the other being the affidavit referred to**

in the proviso.....the context in which the proviso occurs clearly suggests that the affidavit is intended to be regarded as part of the election petition.....”

15. Counsel for the Petitioner further stated that it was not mandatory to have the petition filed only under rule 8, he urged the court to find that Rule 10 (1) (c) was not mandatory once on the issue of result it is stated “if any and however declared.” On the issue of when a result is declared he cited the recent judgments of **Mumbi J.** in the WAITITU case and **Mabea J.** in the Election Petition No. 6 of 2013. In these cases it was decided that the declaration of an election can only be by the gazette. He stated that Independent Electoral and Boundary Commission IEBC had not declared the result.

16. It was also stated by the Petitioner that not all election petition would challenge the results, citing the case **JOSEPH MALOBA vs MUSIKARI KOMBO** that the rest of the grounds failed apart from the one of the issue of witchcraft. Mr. Were stated that they were only challenging the petition on corruption. He stated that corruption would be a ground to challenge the process in that case it is immaterial whether the results are declared or not. He told the court that in the **MUTUTHO** case it was not the process that was being challenged.

17. Mr Were told the Court that there was no provision of striking out the petition once admitted by court pursuant to Section 79 of the Elections Act. The said section states as follows **“Upon**

receipt of a petition, an election court shall peruse the petition and- a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily....”

18. On the issue of address of the petitioner he stated that it was stated to be that of his advocate for the purposes of the petition.

19. This court is called upon to determine;

1) Whether the petitioner has complied with Rule 10.

2) Whether non compliance with Rule 10 renders the Petition incurably defective and fatally incompetent for want of legal format and or legal content as to cause it to be struck out or dismissed.

3) Whether the petition herein fails to disclose any cause of action.

4) Whether the petitioner is challenging the Petition on the grounds of corruption.

20. I have perused all the materials availed to this court and the

written and oral submissions by the able counsels of the respective parties. It is clear that there is a substantive law to govern the conduct of elections in Kenya and envisaged in the constitution the Parliament, now National Assembly, under Article 87(1) of the Constitution is tasked with the responsibility of enacting **“legislation to establish mechanisms for timely settling of electoral disputes.”** Time limits are set both for the filing of the election petition and the determination of the same.

The parliament has done this by the enactment of the statutes that govern elections in this country.

21. In answering the first point of determination I have stated

herein above what Rule 10 entails. I have perused the petition, it is clear that the petitioner did not comply with either the provisions of Rule 10 (1) (a) or (c), counsel for the petitioner though not expressly conceded to this fact. He stated that they were challenging the process. The petitioner thus did not comply with Rule 10. They opted in their response to state that they were challenging the process on the ground that there was bribery.

22. On the second point of determination, which I must say is critical, it's clear that laws have now been enacted on how to go about election petitions, for this court part of the reasons for giving the details on how the petition ought to be filed is to enable the courts adhere to the strict constitutional time lines. Where procedure and format of filing pleadings is stated, it is expected that the parties coming to court should follow the laid down format. I am alive to the provisions of Article 159 (2) (d) of the Constitution, the Supreme Court in the Presidential petition of **RAILA ODINGA & 5 OTHERS VS IEBC AND 3 OTHERS PETITION NO. 5 OF 2013** has given meaning to the provisions in Article 159 (2) (d) by stating as follows

“.....our attention has repeatedly been drawn to the

provisions of Article.....which obliges a court of law to administer justice without undue regard to

procedural technicalities.....the Article 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 courts of law....”

23. It is also stated by the Court of Appeal in **THE SPEAKER OF THE NATIONAL ASSEMBLY VS KARUME, (2008) IKLR 425** as

follows;

“.....where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, the procedure should be followed.”

In this there was no reason why the petitioner did not follow the laid down procedure in Rule 10. On the issue of Rule 10 (1) (a), I do not agree that the address of the advocate was sufficient as that is to be provided in Rule 10 (1) (f). it is the considered view of this court that the petitioner ought to have given his address as is a requirement in Rule 10 (1) (a).

24. Rule 10 (1) (c) is also a mandatory requirement, it is possible to challenge the process but without the result ideally there is nothing to challenge. The process is to be challenged because it would have affected the result, the results therefore in my considered view the crux of any election petition. This

reasoning is buttressed in **JOHN MICHAEL NJENGA MUTUTHO vs JAYNE NJERI WANJIKU KIHARA & 2 OTHERS NAKURU CA No. 102 of 2008** where at page 7 it was held thus;

“what would happen where, as here the result as envisaged by regulation 40

above, are not introduced in the petition? In our view the essential element would be missing. The petition would be incomplete as the basis for any complaint would be absent.....the law has set out what a petition what a petition should contain and if any of the matters supposed to be included is omitted , then the petition would be incurably defective.....” (emphasis by this court)

In the same ruling the court went ahead to make the following observations;

“Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously.....consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it.....if she (petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.” (emphasis by this court)

25. In the view of what I have stated herein above the petition is incurably defective and fatally incompetent for want of legal format and or legal content.

26. Finally, I am to consider whether it is true that the petitioner has filed the petition on account of corruption. I have stated that I perused the petition. In the body of the petition there is no mention of the alleged corruption, the same is however alluded to in the affidavit in support of the petition wherein at paragraph

31 the petitioner has stated as follows;

“31.THAT the 3rd Respondent also gave people allotment letters which were not genuine and I believe this was done to bribe voters and this was also captured by some media houses when the town clerk denied that he did not issue the same and annexed hereto and marked ‘WKO 5’ are some of the allotment letters.”

There is the mention of bribery in this paragraph, however as I have stated herein above the **“Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.”** This court has stated that Rule 10 was critical and made a finding in that. Even though it true the Petitioner has alleged corruption which could be a ground to challenge the process, but the process to be challenged is still linked to the result that being the ultimate goal that would be sought to be nullified. The allegation of bribery cannot cure the non compliance with the mandatory procedure and or format.

27. The upshot of this ruling is that the application to have the petition struck out or dismissed is allowed, the petition is accordingly struck out with costs to the 1st, 2nd and 3rd Respondents.

28. I had stated that I would deal with the issue of the costs on the application withdrawn by the Petitioner on 7th May, 2013. It is clear that the petition together with the said application were filed prior to the gazettelement by Chief Justice of the officers who were to handle the election petitions, the gazettelement came thereafter. Counsel for the petitioner took the earliest opportunity to notify counsels for the Respondents, though verbally of his intention to withdraw the said application. This court is of the view that asking the petitioner to pay those costs would be punitive. I have considered the spirited request by

counsels for the petitioner for the court to award them costs. Each party shall bear their costs in that application.

29. On the costs awarded on striking out the petition the court

shall cap the same to a maximum of the 100,000/- deposited in court as security on cost. The parties shall agree on cost failure to which the Respondents shall file their bills of costs and court shall award an amount not exceeding the 100,000/- deposited in court to defray such costs. The court so orders. The parties have a right of appeal of 14 days

DATED AND DELIVERED THIS 31ST DAY OF MAY 2013

TIMOTHY O. OKELO SENIOR PRINCIPAL MAGISTRATE