



REPUBLIC OF KENYA
IN THE SENIOR RESIDENT MAGISTRATE'S COURT

AT NAROK

ELECTION PETITION NUMBER 2 OF 2013

LEMMY SAMATEI KAMUYE.....PETITIONER

-AGAINST-

BORN BOB MAREN.....1ST RESPONDENT

MALONZA M. MULE.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

This ruling relates to two applications filed by the 3 Respondents with both applications seeking to strike out the petition filed against the 3 Respondents.

The first to be filed is the Notice of motion dated 11-04-2013 by the 2nd and 3rd Respondents jointly who are represented by the firm of Sisule Munyi Kilonzo & Associates, Advocates. The second one is dated 08-MAY-2013 by the 1st Respondent represented by Mengich & Company Advocates.

The Petitioner has not, as of the time of drawing up this ruling, filed any formal response to these 2 applications. The Petitioner is represented by Lel & Associates, Advocates.

The main ground relied on by the 2nd and 3rd Respondents in their joint motion on notice is that the petition is fatally defective, incompetent and bad in law for being filed under the following repealed laws:

1. The Constitution of Kenya.
2. The National Assembly & Presidential Elections Act cap 7,
3. The Election Offences Act cap 66
4. The National Assembly (Election Petition) Rules.

Their argument was that the proper enabling laws and statutes in force are:

1. The New Constitution of Kenya 2010.
2. The Elections Act No.24 of 2011.
3. The Elections (General) Regulations 2012.
4. The Elections (parliamentary and County Elections) Petition Rules 2013.

On his part, the 1st Respondent relied on the main grounds that the petition did not conform to Rule 8 of the Petition Rules 2013 providing for standard forms of petitions; the petition relied on a repealed constitution and repealed statutes as pointed out by the 2nd and 3rd Respondents.

Further, the Petitioner's advocates did not have the requisite qualifications of an advocate namely that the petitioner's counsel Mr. Kilele did not have a practising certificate at the time of drawing up and filing of the petition.

As a basis for their contentions, the 3 respondents filed numerous authorities in support of their positions.

The petitioner did attend court on the date fixed for the *inter –partes* hearings of the interlocutory applications. They put up no fight; it was a no contest.

Instead of contesting these 2 interlocutory applications, the petitioner through his advocate sought to have the *inter-partes* hearing adjourned to enable the petitioner lodge an application to withdraw the petition. This request was not met by the Court when I ruled that withdrawal of election petitions was a highly regulated procedure and the court could not be held in abeyance just to enable the petitioner take intended actions.

The Petitioner put up no submissions to the arguments raised by the 3 Respondents.

Later in the day, the Petitioner lodged his formal application to withdraw the petition. This was on 07-JUNE-2013 a few hours after the conclusion of the *inter-partes* hearing.

The Court directed the Petitioner to serve his application for leave to withdraw the Petition on all 3 Respondents for *inter-partes* hearing on 24-JUNE-2013 shortly before the delivery of the Ruling on the striking out.

When the parties returned to court on 24-06-2013, the Court discovered, upon inquiry, that the petitioner had not published a notice of the application for leave to withdraw in the Kenya gazette as required by Rule 24 of the Elections(Parliamentary & County Elections) Petition Rules 2013.

With this failure, the Court opted to proceed with the delivery of the Ruling on the striking out since the legal duty to publish the said notice of an application for leave to withdraw the petition firmly rested with the Petitioner/applicant. The failure to publish the notice in the Kenya Gazette fatally affected the applicant's right to proceed with the withdrawal. He cannot withdraw the petition.

Having considered all the pleadings, arguments, authorities and submissions including the conduct of the parties in petition, the Court finds no difficulty to rule that the petition is fatally defective, incompetent and bad in law for the following 3 major reasons:

1. The Petition was drawn and filed by an advocate who did not have a practising certificate. There is no cure for the filing of pleadings by unauthorized persons other than to strike out the pleadings.
2. The petition and related documents were filed under a repealed Constitution and repealed statutes. The effect of this is that there was no petition at all, in the proper sense of the word, lodged with this court. A petition must be one filed under the new Constitution and the new election regime as elucidated by the 3 Respondents.
3. Even if the Court was to accept the petition filed under the repealed statute as a proper one, those repealed laws conferred no jurisdiction on the subordinate courts to try election petitions for County Assembly elections.

It is clear that this petition, like a still-born child, died even before birth; it died in the advocate's chambers where it was drawn up.

Having perused and considered the numerous authorities cited by the Respondent's counsels- they must be commended for thier diligence and able representations- the Court hereby strikes out in its entirety the petition filed by the Petitioner on 21-MARCH-2013 the same being incurably defective, incompetent and bad in law.

The Costs of the entire petition and related interlocutory applications shall be awarded to the 3 respondents.

The pleadings, documents and/or applications lodged by the petitioner also collapse with the the petition.

Right of appeal to the High Court is 30 days.

DATED, READ AND DELIVERED AT NAROK THIS 24th DAY OF JUNE 2013

TEMBA A. SITATI

AG. SENIOR RESIDENT MAGISTRATE

NAROK