



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE’S COURT OF KENYA AT WAJIR

ELECTION PETITION NO. 1 OF 2013

MOHAMED DAGANE OSMAN1ST PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

ABDI OSMAN HASSAN.....2ND RESPONDENT

RULING

The petitioners advocate Mr. Arthur Ingutya came to this court by notice of motion dated 23/5/2013 seeking the following prayers:

- a. That the answers filed by the respondents herein together with the affidavits attached hereto as well as any other documents filed by the respondents be struck out.
- b. That both the respondents be excluded from the proceedings herein and the petition proceeds to hearing ex parte and costs to be paid to the respondent.

The advocate for the first respondent filed a replying affidavit and explained that the delay was as a result of logistic issues and the distance between Nairobi and Wajir. He further explained that the returning officers who were travelling to Nairobi were involved in an accident at Tula, 33 kms from Garissa and were not able to make it to Nairobi on 25 May 2013. Mr. Mwangi further explained that because of the heavy rains that cut off some parts of Wajir – Nairobi road, their defence arrived in Wajir on 3rd June (sic) and were filed on the same day.

On his part, the second respondent said that upon being served, he was unable to comprehend that there was limitation of time. He added that he went to attend to his sick mother who had been hospitalized and that since the petition came immediately after the elections he did not have money to afford paying advocate services. Mr. Abdi Osman said that he personally prepared his response but was advised by the court clerk that it was not properly done and this forced him to travel to Nairobi so as to engage services of an advocate.

I have read the submissions and authorities cited by advocates to the parties were rule 4 (1) of the election acts state as follows:

“The overriding objectives of this rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the constitution and the act 4 (2). The court shall, in the exercise of

its powers under the constitution and the act or in the interpretation of any of the provisions in these rules seek to give effect to the overriding objective specified in sub rule (1) 5(1) for the purpose of the furthering the overriding objectives specified in rule 4 the court and all parties before it shall conduct the proceedings for the purpose of attaining the following aims:

- a. The just determination of the proceedings.
- b. The efficient and expeditious disposal of the petition and in any case not beyond the timelines provided in the constitution and the act with respect to election petitions.

Section 14 (1) upon being served with an election petition under rule 13 to respondent may oppose the petition by filing and serving a response within a period of not more than 14 days upon service of the petition.

Sections 4, 5 and 14 largely touches into the heart of the petitioners application. It is not in dispute that the respondents did not comply with section 14 of the elections rules. Both the respondents exceeds the required 14 days for response and delayed for around 14 days. The test that is commonly applicable when deciding if a response filed out of time should be admitted or not varies and depends on the circumstances. The 1st respondent advocate told the court that he had to interview returning officers of IEBC and so he waited for them to Nairobi. It is estimated that Wajir is 800 kms from Nairobi. Section 20 of the same acts provides as follows. “Where any matter is to be done within such time as provided for the rules or granted by the court, the court may for purposes of ensuring that no injustice is done to any party extend the time within which the thing shall be done with such conditions as it may consider fit over even though the period initially provided or granted may have expired. **In Potronilla versus Kidogo Basi and 31 others (2005) KLR the court held that “.....** That for an applicant to succeed he must satisfy the court that the delay was not inordinate and that the delay has been sufficiently explained.

According to the petitioners advocate rule 20 of the elections rules does not apply where another rule puts forth a sanction that clearly removes the courts discretion. I do not agree on this section 20 clearly uses the words “as provided for in these rules” which means that it cuts across all rules in the act. If the parliament intended to exclude rule 14 of the act they would have done it by adding words such as “subject to or by use of any words to make rule 14 exceptional.

The delay hearing is around 14 days. The time set by the act to conclude election petition cases is six months. The question is can the delay of 14 days substantially affect the capacity of a judge or a magistrate to finalize the case within six months? So the answer is no. The strict time provided by section 14 is meant put on check supposed respondents who might have reason to delay the case as it has been in the past. There an election petition is determined after five years.

The second issue is whether filing response out of time shall prejudice the petitioner. The answer here is no. The court still has five months or so to determine his case. There is no prove on record that the petitioner will suffer any prejudice. In fact he will gain more because he will be accorded humble time during hearing to prove his case and get the justice he is pursuing.

Taking into account the distance between Wajir and Nairobi, it is clear that the delay of 14 days was not intentional. It is true that the roads were affected by the April – May rains and in the process of informing advocates about the pretrial hearing of 27 May 2013, I remember advising them to use a plane to Wajir. The respondent gave convincing reasons for the delay in their replying affidavits. I am convinced that the delay has been explained and is not fatal to cause this case to collapse at this juncture. The overriding objectives of the rules are to ensure that justice is done and that the case is disposed off expeditiously. To dismiss the application is to allow a full hearing of the petition that would lead to just determination of the petition. The expeditious disposition of the case has not been affected by the delay of 14 days because the petition can be disposed off even earlier than the six months period given. As a result I hereby dismiss the application. Costs to be course. Read before Ingutya for petitioner, Wanyoike for 1st respondent and Mwangi for 2nd respondent.

Linus Kassar – PM

3/6/2013