



REPUBLIC OF KENYA
IN THE SENIOR RESIDENT MAGISTRATE'S COURT

AT NAROK

ELECTION PETITION NUMBER 1 OF 2013

**IN THE MATTER OF THE ELECTION OF MEMBER OF COUNTY ASSEMBLY IN
OLOKURTO WARD**

LAMBESHUA REUBEN MORIASO OLE.....PETITIONER

-AND-

KOOL JULIUS OLE.....1ST RESPONDENT

ISAAC KUNTAI KOOL.....2ND RESPONDENT

MOHAMMED RAKA.....3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....4TH RESPONDENT

RULING

This ruling relates to 2 competing applications filed by both sides of the contest.

The first application is the Notice of Preliminary Objection dated 26-08-2013 by the Petitioner. The objection seeks the striking out of the 1st and 2nd Respondents' Response to Petition and related affidavits on the main ground that those pleadings were filed out of time without leave of the Court thus offending Rule 14 of the Elections (Parliamentary and County Assembly Elections) Petition Rules, 2013. The objection was canvassed by Mr. Geoffrey Otieno, Advocate for the Petitioner.

The second interlocutory application is the one dated 20-AUG-2013, a Motion on Notice dated 20-AUG-2013 seeking a dismissal of the Amended Petition filed on 25-MAR-2013 on the main ground that the said Amended Petition offended the mandatory statutory requirements in the following 4 major respects:

- i. The election petition was not served personally on the 1st and 2nd Respondents.
- ii. The election petition is not supported by any affidavit.
- iii. The petition is not founded on laws currently governing the election petition.

iv. Non-disclosure of material facts.

That Motion on Notice was lodged by the 1st and 2nd Respondents who are represented by Mr. Topoti, Advocate.

The 3rd and 4th Respondents through their counsel Miss Ndegwa associated themselves with the prayers by the 1st and 2nd Respondents.

The 2 conflicting applications were argued in open Court on 29-AUG-2013. The Court directed that the order of hearing the interlocutory applications would be first the Preliminary Objection and then followed by the Notice of Motion seeking a dismissal of the Petition.

In his oral arguments, Mr. Otieno submitted that by filing their Response to Petition out of time without first obtaining the leave of the Court, the 1st and 2nd Respondents had offended Rule 14 of the Elections (Parliamentary and County Assembly Elections) Petition Rules, 2013. This defect rendered their responses improperly on record.

In reply to the Preliminary Objection, Mr. Topoti contended that if there was a late filing of the Response to Petition, the same lateness was precipitated by the Petitioner's own initial failure to formally and legally serve the Petition so as to enable the 1st and 2nd Respondents' filing of their responses within 14 days as contemplated by Rule 14(1) of the Elections (Parliamentary and County Assembly Elections) Petition Rules, 2013 (hereinafter referred to as the Petition Rules, 2013). The learned counsel further argued that the Preliminary Objection was not a proper objection since it was based on a question of fact and not on a question of law. He further pointed out that the Court was clothed with power to permit the extension of filing of pleadings under Rule 20 of the Petition Rules, 2013).

On her part, Miss Ndegwa clarified that though her clients were not the target of the Preliminary Objection, it would be nonetheless important for the Court to disregard the Preliminary Objection because it was not a proper objection on a pure point of law as was expected. Additionally, if there was late filing, the same was curable by extension of time for filing documents.

In his rejoinder to the respondents' submissions, the learned counsel for the petitioner reiterated his earlier arguments and fortified the same by adding that a respondents who wished to be accommodated for lateness in filing a response must of legal necessity explain the cause of the delay; in the present case, there was a 4months' delay in filing their responses and this had not been explained. The counsel submitted that theirs was a preliminary objection proper and if the same was not, then that status could be cured by Article 159 of the Constitution enjoining the Court to apply substantive, as opposed to technical and procedural, justice to the parties before it.

Having heard the Petitioner on his Notice of Preliminary Objection, the Court turned its attention to the Motion on Notice by the 1st and 2nd Respondents dated 26-AUG-2013.

Mr. Topoti built up on the grounds set out on the face of the motion and addressed the 4 major issues in turns as follows:

- i. Service of the petition or Amended Petition was never effected either personally or through an advertisement in the newspapers as required by Rule 13 of the Petition Rules, 2013 and Section 77(2) of Act No. 24/2011.

The counsel pointed out that his clients were only served with the interlocutory application that had sought the injunction to prevent the swearing-in of the 2nd Respondent into office; the service of those documents in a bundle of containing application for stay of swearing-in and an Amended Petition were first served on the County Assembly Clerk who made a phone call to the Respondents alerting them of the filed orders prohibiting their being sworn-in into office.

Had service of the Petition and Amended Petition taken place, an affidavit of service ought to

have been filed as proof of this, and since no affidavit of service was on record there was no proof of service of the petition or amended petition their filing of responses notwithstanding.

- ii. The petition or amended petition is not supported by any affidavit. This rendered the Petition as founded on no evidence as it is the affidavit of support that adduces evidence sought to be called by the petitioner.
- iii. The Petition was incompetent for placing reliance on a repealed Constitution. In para. 7 of the Amended petition, reference was made to the now repealed Constitution as enabling the petitioner launch his claim as set out in the mentioned paragraph.

On that basis, Mr. Topoti urged the Court to be guided by the list of Authorities and dismiss the petition as filed.

For the 3rd and 4th Respondents, Miss Ndegwa ascribed her position to their Replying Affidavit dated 29-AUG-2013 and the further List of Authorities filed therewith. The learned counsel reiterated that the petition is not supported by any affidavit and the said petition had not been served on the Respondents. She further contended that the Petition was lodged on the premise of obsolete law notably Section 44 of the repealed Constitution and this reference to repealed law rendered the petition incompetent. The Court and the Respondents would be embarrassed if called upon to adjudicate on a claim founded on repealed law.

The learned counsel did not fail to point out that it was fatal to have a petition that bore no supporting affidavit as required by Rule 10(3)(b) of the the Petition Rules, 2013. The only supporting affidavit on record had already been spent in aiding the petitioner obtain *ex parte* temporary injunctions against the swearing-in of the 2nd Respondent into office. This meant that there as no evidence tendered in support of the petition and the petition thus became frivolous and constituted an abuse of the court process because the Court was being called upon to decide on mere allegations without accompanying evidence.

Miss Ndegwa urged the Court to invoke its powers under **Section 79(a) of the Elections Act** and summarily dismiss the petition for non-disclosure of sufficient material for the grant of the reliefs sought. A petition filed without evidence was incapable of disclosing a reasonable or sufficient cause for adjudication – so Miss Ndegwa argued. Filed authorities were relied on by the advocate.

In his reply to these contentions, Mr. Otieno, learned counsel for the Petitioner, tackled the respective issues raised by Mr. Topoti and Miss Ndegwa thus:

- i. Shortly after the filing of the original Petition, the Petition was amended on 25-03-2013 and thereafter the Amended Petition was served on the Respondents together with the interlocutory order for stay of swearing-in and the interlocutory application for stay of swearing-in. The proof of this was in a yet to be filed affidavit of service which was going to be filed shortly after the hearing of the parties on their interlocutories on 29-08-2013.
- ii. It was admitted that the Amended Petition does not cross-reference to any supporting affidavit but this failure was not by itself sufficient to shut out the Petitioner from his day in Court.
- iii. The reference to Section 44 of the repealed Constitution was erroneous because the original petition dated 20-03-2013 in paras. 6, 7 and 8 made no such reference to Section 44 of the Repealed Constitution while the Amended Petition's inclusion of the impugned Section 44 was clearly an error and the same was negligible. Human is to error, so Mr. Otieno argued.
- iv. The cure for questions of service was to call the deponent of the return of service and have him cross-examined.

Mr. Otieno also beseeched the Court to disregard the notion that the Affidavit of Service must be filed before the hearing of the interlocutory application upon which the return of service is challenged. He thus

called upon the Court to dismiss the contentions of the 4 Respondents.

In his brief reply, Mr. Topoti asked the Court to prevent what was clearly stealing a march on the Respondents by the Petitioner's intimation that he was going to file the affidavit of service shortly after the day's hearing on the notice of motion for dismissing the Petition (Amended Petition). He then recapitulated in summary his earlier contentions. He particularly emphasized the case of **NAOMI CIDI – Vs- THE COUNTY RETURNING OFFICER KILIFI & 3 OTHERS, MALINDI ELECTION PETITION 13/2013** wherein the superior court ruled that a petition filed but not served was no petition at all. That decision was rendered by Muchemi J. and cited with approval by Githua J. The petition as filed was vexatious and ought to be dismissed because of the admitted fatal error by the Petitioner's counsel in failing to accord the Amended Petition an affidavit of support. Article 159 of the Constitution could not cure substantive omissions as argued by Mr. Otieno.

From the preceding proceedings, it is clear to the Court that the aftermath of the cooling of arguments by the jousting parties has now crystallized into 5 major issues. These 5 crystals must be taken up in order of priority beginning with the most primal to the least primal with primal indicating that the issue on top of the list is capable of obviating the need to determine the next issue if the earlier one succeeds. These 5 major touchstones are what the Court must decide to finally dispose of the interlocutory applications. But before setting out the 5 contested issues for determination, it would be prudent to first set out the non-contested issues in the matter and these total 4 issues:

- i. The Amended Petition dated 25-03-2013 is not supported by any affidavit.
- ii. As at the time of arguing the Notice of Preliminary Objection and the Notice of Motion – both were argued on 29-08-2013- there was no affidavit of service filed in the Court record.
- iii. Paragraphs 6, 7 and 9 of the Amended Petition make reference to repealed election laws and regime.
- iv. The time for serving an Amended Petition on the Respondents is limited by law.
- v. The time for filing of a response to a Petition is limited by law.

Having set out the non-contested issues the Court proceeds to list the 5 contested issues in order of priority as earlier stated:

- i. Whether or not the Amended Petition bearing no affidavit of support should be rejected under Section 79(a) of the Elections Act No. 24 of 2011. If the answer to this question is in the affirmative, there would be no need to consider the interlocutory applications at all;
- ii. If the answer to (i) above is in the negative, whether or not the Amended petition was served at all; if no service took place, then there would be no need to proceed with the trial at all and the Amended Petition would be dismissed;
- iii. If service of the Amended Petition took place in (ii) above, whether or not the 1st and 2nd Respondents filed their responses within the stipulated time in law; if they filed their responses within the prescribed time, the notice of preliminary objection would stand dismissed.
- iv. If their responses in (iii) above were filed out of time without leave, whether or not the preliminary objection by the Petitioner was a proper preliminary objection on a pure point of law;
- v. Who should pay costs on the outcomes in (i), (ii), (iii) or (iv) above?

ISSUE 1: SUMMARY REJECTION OF THE AMENDED PETITION UNDER SECTION 79(a) OF THE ELECTIONS ACT NO. 24 OF 2011

Section 79(a) of the Elections Act No. 24 of 2011 provides:

79. Upon receipt of the election petition, the 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; or***

(b). ***fix a date for the trial of the petition.***

The original petition dated 19-03-2013 was filed on 21-03-2013. It was supported by an affidavit dated 20-03-2013 filed on 20-03-2013.

4 days later i.e.e on 25-03-2013 the Petitioner filed an "Amended Petition". I note that although the amendment was within the time limited by Section 76(4) of the Elections Act No. 24 of 2011, that amendment was effected without the leave of the Court. The power to grant or refuse such amendments, however, is a discretionary power under Section 76(4) of the Elections Act No. 24 of 2011. And having necessitated a filing of various responses to the Amended Petition, the Court will not punish the petitioner for failing to obtain the leave because there would be injustice of unfathomable proportions visited upon the Respondents who, in response to the Amended Petition, filed written responses and thereby accrued to themselves not only time but also various legal defences in law with specific regard to the said Amended Petition. I would thus regard the omission to obtain leave upon a discretionary power as a curable omission. None of the Respondents was prejudiced by that omission.

It is this Amended Petition that bore no supporting affidavit. It is settled law that the filing of an amended pleading extinguishes the earlier pleading. Therefore, by filing the present Amended Petition the original Petition became extinct as a *dodo*. ***It would be untenable in law, as the Petitioner sought to do, to rely both on the original Petition and the Amended petition. If the Court was to permit this position, the Court would end up with a bicephalous petition in its hands; a strange creature unknown to the election regime and law but probably known in Greek Mythology as Orthros: a two headed canine beast whose mythical role ended prematurely when Hercules clobbered it out of existence. A two-headed petition? Not in the Kenya election law and regime.***

Only the Amended petition will be considered by the Court and since the same was unsupported by affidavit the same remained mere allegations filed in the Petition file.

I agree with the Respondents' counsels that a Petition proper- in this case the Amended Petition proper- is one that must as of necessity be accompanied with a supporting affidavit bearing the evidence to be called in support of the grounds borne of of the petition. ***The Amended Petition cannot be legally bifurcated from its supporting affidavit.*** A Petitioner must of necessity accompany his Petition with the affidavit of support at the time of filing the Amended Petition and at the time of serving it. This is mandatory.

A Petition could not be complete without an affidavit of support of the Petition; there are also no witnesses' affidavits. Rule 10(3)(b) of the Elections (Parliamentary and County Assembly Elections) petition Rules, 2013 is couched in mandatory terms and this was not complied with. With that omission, the Petition failed to attain the basic minimum threshold of law for disclosing sufficient facts and grounds for granting the reliefs sought in the petition because no evidence was attached to the form the substratum for the grant of the reliefs. It is a frivolous Amended Petition and it would be an embarrassment to the Respondents and to the Court to be called upon to determine a petition unfounded on evidence and facts relied on.

The Court exercises its power under **Section 79(a) of the Elections Act No. 24 of 2011** and summarily rejects the Amended Petition as disclosing no sufficient ground for granting the reliefs sought.

Even if the court was to regard that omission as negligible, there was no evidence of either personal service or service by advertisement of the said Amended Petition. At the time of hearing the parties, there was no proof of service on the record to confirm service. On that basis, taking into account the authorities cited especially that of **KUMBATHA NAOMI CIDI –Vs- THE RETURNING OFFICER , KILIFI & 3 OTHERS** already cited earlier, I find that there was no service at all; with no evidence for service, the Amended Petition was a petition that never was. The filing of the Return of Service after the parties had

closed their respective arguments and presentation of evidence on their interlocutory applications was a filing after the horse had bolted from the stable and it would be stealing a march for this Honourable Court to permit such evidence at this late stage of the proceedings. As Lady Justice Achode ruled in Eldoret **Election Petition Number 1 of 2013 CHARLES KAMUREN –Vs- GRACE JELAGAT & 2 OTHERS**, *equity aids the diligent, not the indolent*.

This outcome makes it moot for the Court to proceed to decide on the remaining 4 contested issues. I, therefore, uphold the 2nd Respondent's election as the elected representative for the County Assembly Ward of Olokurto in Narok County. The objections by the Respondents have been successful.

Costs follow the event and in the present case the petitioner shall bear the entire cost of the Petition because of the frivolous amended petition.

Right of appeal to the superior court is 30 days.

DATED, READ AND SIGNED AT NAROK THIS 6TH DAY OF September, 2013

TEMBA A. SITATI

AG. SENIOR RESIDENT MAGISTRATE

NAROK