



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: E.M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)**

**ELECTION PETITION APPEAL NO. 3 OF 2017**

**IN THE MATTER OF ELECTION FOR THE MEMBER**

**OF PARLIAMENT FOR BUTERE CONSTITUENCY**

**HELD ON 8<sup>TH</sup> AUGUST 2017**

**BETWEEN**

**ANDREW TOBOSO ANYANGA.....1<sup>ST</sup> APPELLANT**

**AND**

**MWALE NICHOLAS SCOTT TINDI.....1<sup>ST</sup> RESPONDENT**

**HABIL NANJENDO BUSHURU.....2<sup>ND</sup> RESPONDENT**

**RETURNING OFFICER (BUTERE CONSTITUENCY)...3<sup>RD</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....4<sup>TH</sup> RESPONDENT**

***(Being an appeal from the Ruling/Order of the High Court of Kenya***

***at Kakamega (Ruth N. Sitati, J.) dated the 23<sup>rd</sup> day of October 2017***

***in***

***Election Petition No. 12 of 2017)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

[1] This is an appeal from the Ruling of the Election Court (**Sitati, J.**) dated 23<sup>rd</sup> October, 2017 upholding a preliminary objection against Kakamega High Court, Election Petition No. 12 of 2017 and striking out the petition with costs.

[2] By an election petition dated 7<sup>th</sup> September 2017 and filed on the same day the appellant challenged the validity of the election of **Nicholas Scott Tindi Mwale** the 1<sup>st</sup> respondent in this appeal as a member of the National Assembly for Butere Constituency in the Parliamentary elections held nationwide on 8<sup>th</sup> August 2017 on various grounds. In total, seven candidates vied for the election including the appellant who was declared to have garnered 11,684 votes; **Mwale Nicholas Scott Tindi** (1<sup>st</sup> respondent) who was declared to have garnered 18,235 votes and **Habil Nanjendo Bushuru** (2<sup>nd</sup> respondent) who garnered 14,658 votes. The **Returning Officer (Butere Constituency)** and the **Independent Electoral and Boundaries Commission (IEBC)**, the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein were joined in the petition as the 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively.

[3] By a notice of motion dated 3<sup>rd</sup> October, 2017 the 3<sup>rd</sup> and 4<sup>th</sup> respondents sought an order that the petition be struck out as invalid on the ground that it was filed outside the twenty eight days stipulated by **Article 87(2)** of the Constitution and **section 77(1)** of the **Elections Act, 2011 (2011 Act)**. The application was supported by the affidavit of **Nancy Iyadi** who was the Returning Officer for Butere Constituency who deponed in paragraphs 2 and 3 thus;

***“2) THAT I know that on 9<sup>th</sup> August 2011 between 10 p.m. and 11 p.m., I declared the 1<sup>st</sup> respondent as the member of Parliament for Butere constituency having garnered a total of 18,235 votes;***

***3) THAT I know that I issued to the said winner the certificate and duly signed form 35B which clearly shows that the election results were declared on 9<sup>th</sup> August, 2017. Annexed hereto and marked N1”1” is a copy of Form 35B)”.***

The said Form 35B showed that the Returning Officer signed the form on 9<sup>th</sup> August 2017 and further that two agents signed the form on 10<sup>th</sup> August 2017.

[4] The 2<sup>nd</sup> respondent herein (**Habil**) filed grounds of opposition contending in essence that the date of the declaration of results was not certain as the agents signed the Form 35B on 10<sup>th</sup> August 2017. Similarly, the appellant filed the following grounds of opposition;

(I) The purported preliminary objection is misconceived and incompetent as it is grounded on contested facts.

(II) The petitioner contends that the declaration of the 1<sup>st</sup> respondent as winner of the contested elections was done on 10<sup>th</sup> August 2017 when Form 35B was signed by the agents and that time started running on 10<sup>th</sup> August 2017 and as such computation of time should be done as from that date.

(III) The validity of the certificate issued to the 1<sup>st</sup> respondent on 9<sup>th</sup> August 2017 by IEBC and whether there was declaration of results at all is disputed and this issue shall require the court to exercise judicial discretion in determination of the same.

(IV) The determination of the question as to whether the petition was filed out of time is thus evidentiary and not purely a point of law.

(V) The purported application is premature and will delay the fair and just determination of the substantive petition herein and should be dismissed with costs.

The respective parties filed written submissions and cited authorities.

[5] The election court considered the grounds of opposition, the respective submissions, the case law, and the relevant constitutional and statutory provisions.

Regarding the ground that time started running on 10<sup>th</sup> August 2017 when the agents signed Form 35B the court said:

***“...such an argument by the petitioner and 2<sup>nd</sup> respondent must fall flat on its face, the position being that since the Returning Officer, who is the only one authorised to declare results, declared the results and issued the certificate to the winner on 09.08.2017, it is immaterial that the agents had not signed Form 36B (sic) or that the agents were not present, nor does it matter that the tally was not correct or that the result is the subject of a contest between the loser and the winner. The only point that matters is that the authorized Returning Officer has declared the results and has issued the winner with a certificate being Form 35C.”***

On the question regarding the date of declaration of results, the court relied on the affidavit of the Returning Officer that she declared the results on 9<sup>th</sup> August, 2017 and said;

***“This court cannot therefore look nowhere else for confirmation of the date on which the declaration of results was made.”***

Lastly, the court held that the time for filing the petition began to run on 9<sup>th</sup> August, 2017 and that the petition had to be filed latest on 6<sup>th</sup> September, 2017 and concluded; that the petition was filed outside the twenty-eight days stipulated by **Article 87(2)** of the Constitution and **Section 77(1)** of the **2011 Act**.

[6] The appeal is brought on six grounds, in summary, that the trial judge erred in law by:

(i) failing to properly exercise her discretion and in failing to find that the preliminary objection was based on contested facts;

(ii) failing to consider the decision of the Supreme Court in **Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others [2015] eKLR** (Wetangula’s case);

(iii) failing to consider that Form 35C is a legal instrument that should be generated from a validly executed Form 35B and that Form 35B contained fundamental irregularities and illegalities which rendered the date of declaration of results uncertain or improbable;

(iv) failing to appreciate that anomalies in the preparation of Form 35B and the validity and authenticity of the issuance of Form 35C were legal issues and were properly before the court and matters for determination by an election court;

(v) failing to apply the provisions in Article 259 of the Constitution in interpreting Article 87(2); and in

(vi) failing to address or make a finding on the issues of tallying, verification and declaration and their relevance.

[7] Article 87(2) of the Constitution provides:

***“Petitions concerning an election other than Presidential election shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”***

The time limit of 28 days is further enacted in section 77(1) of the 2011 Act. As section 85A of the 2011 Act provides, an appeal to this Court in an election petition concerning, *inter alia*, membership of the National Assembly lies on matters of law only. As to computation of time under the Constitution, Article 259(5) of the Constitution provides;

***“In calculating time between two events for any purpose under this Constitution, if the time is expressed –***

***(a) As days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;”***

[8] **Mr. Amasakha**, the learned counsel for the appellant submitted, amongst other things, that the date when the declaration of the winner was made, is a disputed fact and could only be determined by the election court on adduction of evidence at the trial of the petition on merit; the electoral process was completed on 10<sup>th</sup> August 2017 on the signing of Form 35B by the agents and not on 9<sup>th</sup> August, 2017 when Form 35C was dated; that there was no valid declaration as contemplated by the law for proper running of time and that the learned Judge unduly limited her discretion by stating that she had no where else to look except Form 35C and thereby disregarding the provisions of Article 159(2) (d) and (e) of the Constitution.

[9] **Mr. Busiega**, learned counsel for the 1<sup>st</sup> respondent referred to the Supreme Court decision in **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others [2014] eKLR** (Joho’s case), for the meaning of ***“declaration of election results”*** and submitted that any event happening after the declaration is inconsequential, that the role of agents cannot stop the Returning Officer from declaring results; that the contention that agents must sign before the Returning Officer issues a certificate is not based on any law; and that the court is being asked to determine matters of fact.

**Mr. Akusala** for the 2<sup>nd</sup> respondent did not file written submissions or attend the hearing. On his part, **Mr. Odek** for the 3<sup>rd</sup> and 4<sup>th</sup> respondents contended that there is no dispute that the results were declared on 9<sup>th</sup> August, 2017; that the issue raised by the appellant is an interpretational issue; that failure by agents to sign the Form 35B does not invalidate results; that agents witnessed form 35B after declaration of results; that the election court had no discretion as a petition filed outside the 28 days is a nullity.

[10] We have considered the appeal. By Article 86(c) of the Constitution, IEBC is required to ensure that results from polling stations are openly and accurately collated and properly announced by the Returning Officer. **Section 39(A) (i)** of the 2011 Act requires the IEBC to appoint Returning Officers to be responsible for tallying, announcement and declaration in the prescribed form of the final results in a constituency for the election of a member of National Assembly and members of a County Assembly.

**Rule 83 of the Elections (General) Regulations, 2012** prescribes the duties of a Returning Officer upon receipt of the poll from all polling stations in the constituency.

Rule 83(i) states in part that the:

***“returning officer shall, in the presence of candidates or agents and observes, if present - (emphasis added)***

***(e) complete the relevant form 35B and 36B for the respective position in each elective position set out in the schedule in which the returning officer shall declare, as the case may be .... (emphasis added)***

***(f) sign and date the relevant forms and publicly declare the results for the position of –***

***(i) member of County Assembly***

***(ii) Member of the National Assembly.***

***(g) issue certificates to persons elected in the County Assembly and National Assembly elections in forms 36C and 35C respectively set out in the schedule.”***

Form 35B is headed:

**“DECLARATION OF MEMBER OF NATIONAL ASSEMBLY ELECTION RESULTS AT CONSTITUENCY TALLYING**

CENTRE.”

Form 35C is the certificate of a member of National Assembly by which the Returning Officer declares the winner as having been duly elected as a member of the National Assembly.

[11] In **Joho’s case**, the Supreme Court while dealing with the meaning of “declaration of results” in respect of an election of a County Governor said, in part, at para 72 of the judgment;

***“The finality of the set of stages of declaration is depicted in the issuance of a certificate in form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.”***

At para 92, the Supreme Court said in part:

***“We discern from the above regulations that one of the specific mandates of the returning officers is to declare the election results. As we have depicted in the analysis, these officers declare the election results at various stages in the election. For the purposes of computation of time in respect of the filing of the election petition, we hold that the final declaration presents the instrument of declaration in accordance with Article 87(2) of the Constitution.”***

Lastly, at para 95 the Supreme Court said in part:

***“From the above definition, it is clear that an instrument bears legal force particularly because of its content and its formal face of authority and validity. The process of election culminates in the issuance of a certificate which squarely falls within the said definition of an instrument.”***

[12] It is clear from the foregoing that the declaration of election results is both a constitutional and statutory function exclusively conferred on the Returning Officer. The Returning Officer is required to perform that function in the presence of candidates or agents and observers, if present. The corollary is that, if the candidates or agents and observers are absent at the tallying centre, the functions can still be validly carried out. The declaration of results of a member of a National Assembly is done through three mediums, firstly, by Form 35B which the Returning Officer should sign and date, and secondly, by public declaration of results, and, thirdly, by issuance of a certificate in Form 35C declaring the winner.

As the Supreme Court held in **Joho’s case**, those instruments bear legal force and for purposes of computation of time in respect to the filing of an election petition, the final certificate constitutes the declaration of election results in accordance with Article 87(2) of the Constitution.

Moreover, the declaration of results and the certificate in Form 35B and 35C respectively are in the form and were executed in the manner directed by the Elections Act. Such documents are public documents within the meaning of section 79 of the Evidence Act and, as provided by Section 83 of the same Act, are presumed to be genuine and executed by the authorised officer.

[13] In the **Wetangula’s case** relied on by the appellant, the Supreme Court failed to make a finding that the petition was filed out of time because there was an evidentiary dispute as to the date of declaration of the election results. In that case, the declaration form was missing and the two courts below had not made a finding on the issue. In the instant case, Form 35B and 35C, both executed on 9<sup>th</sup> August, 2017 are available and were before the election court. The principle laid by the Supreme Court in the **Wetangula’s case** is that the ascertainment of the date of declaration of election results is vital in the count of time. The Supreme Court did not derogate from the principle laid in **Joho’s case**, that for purposes of computation of time, the final certificate is determinative of the date of the declaration of election results. The mere assertion by the appellant that the declaration of election results was done on 10<sup>th</sup> August, 2017 when the agents signed Form 35B did not present a real dispute as to the official date of the declaration of election results. Furthermore, it is not contended that there was execution of other Form 35B and 35C or public declaration of results by the Returning Officer on 10<sup>th</sup> August, 2017. The official forms being genuine speak for themselves. In addition, they were verified and supported by the affidavit of the Returning Officer.

[14] From the foregoing analysis, we hold that the election court arrived at the correct decision in law that the declaration of the final election results was done by the Returning Officer on 9<sup>th</sup> August 2017 when she signed and dated Form 35B, publicly declared the results, and issued the certificate in Form 35C. We are further satisfied that the election court correctly computed the time for filing the election petition and, correctly, held that the petition filed on 7<sup>th</sup> September, 2017 was filed outside the 28 days allowed by the law.

The election court had no discretion in the matter because the time limit is primarily prescribed by the Constitution with no provision for the extension of time. The Supreme Court in **Mary Wambui Munene v Peter Gichuki King’ara & 2 Others [2014] eKLR** held that an election petition filed outside the 28 days stipulated by **Article 87(2)** of the Constitution is invalid and thus a nullity.

[15] In the premises, the appeal is dismissed with costs to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. We make no orders as to costs regarding the 2<sup>nd</sup> respondent as he did not attend the hearing of the appeal.

***Dated and Delivered at Eldoret this 14<sup>th</sup> day of May, 2018.***

***E. M. GITHINJI***

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**