



REPUBLIC OF KENYA



KENYA LAW
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**Pkosing v National Super Alliance & 12 others (Petition 19 of 2017)
[2017] KESC 9 (KLR) (Election Petitions) (14 November 2017) (Ruling)**

David Pkosing v National Super Alliance & 12 others [2017] eKLR

Neutral citation: [2017] KESC 9 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS
PETITION 19 OF 2017**

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP, JB
OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

NOVEMBER 14, 2017

BETWEEN

DAVID PKOSING PETITIONER

AND

NATIONAL SUPER ALLIANCE 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 2ND RESPONDENT

WIPER DEMOCRATIC MOVEMENT KENYA 3RD RESPONDENT

FORD-KENYA PARTY 4TH RESPONDENT

AMANI NATIONAL CONGRESS 5TH RESPONDENT

RAILA AMOLO ODINGA 6TH RESPONDENT

STEPHEN KALONZO MUSYOKA 7TH RESPONDENT

WYCIFFE MUSALIA MUDAVADI 8TH RESPONDENT

WYCLIFFE MASIKA WETANGULA 9TH RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 10TH RESPONDENT**

WAFULA CHEBUKATI 11TH RESPONDENT

REGISTRAR OF POLITICAL PARTIES 12TH RESPONDENT

ATTORNEY GENERAL 13TH RESPONDENT



An application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results did not warrant consolidation with the presidential election petition.

Reported by John Ribia and Robai Nasike

***Electoral Law** – presidential election petition – timelines of a presidential election petition - applications that may be filed under or consolidated with the presidential election petition – application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results - whether an application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results warranted consolidation with the presidential election petition – Constitution of Kenya (2010) article 140; Supreme Court Act (Act No. 7 of 2011), section 24; Supreme Court (Presidential Election Petition)Rules (2017), rule 26*

Brief facts

The petitioner contended that the actions of the 6th and 7th respondents (Raila Amolo Odinga and Stephen Kalonzo Musyoka) to boycott and sabotage the conduct of elections on October 26, 2017 amounted to treason and an attempt to unconstitutionally establish a government in Kenya. Upon perusal of the petition, the Hon Chief Justice directed for the petition to be heard by the court after hearing the time bound presidential election petition. Undeterred, the applicant returned to the Supreme Court with an application under section 24 of the Supreme Court Act and rule 26 of the Supreme Court Rules that sought for the petition to be consolidated and heard together with the presidential election petition.

Issues

- i. Whether an application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results warranted consolidation with the presidential election petition.
- ii. Whether the petition had raised questions with regard to the validity of the presidential election.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 140

140. Questions as to validity of presidential election

(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.

Held

1. The application did not fall within the purview of article 140 of the Constitution which required petitions challenging the election of the president elect to be filed within seven days of the declaration of the results of the presidential election and heard and determined within 14 days of filing.
2. If the Supreme Court lost focus and succumbed to pressure and allowed all cases by parties aggrieved by the conduct of a presidential election to be heard within the period of 14 days allowed by article 140 of the Constitution, it would be swamped by an avalanche of petitions it would not be able to determine within the prescribed time frame and occasion a constitutional crisis. The instant petition was not time bound. It would be heard after the Supreme Court determined the petitions challenging the election of the president.

Application deferred to be determined at a later date after the determination of the presidential election petition.



Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya article 140 - (Interpreted)
2. Supreme Court Act, 2011 (cap 9B) section 24 - (Interpreted)
3. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 26 - (Interpreted)

Advocates

None mentioned

RULING

1. In his petition dated November 1, 2017 Hon David PKosing, the Member of Parliament for Pokot South (the applicant), seeks 16 declarations. The gravamen of his prayers is that the acts of Raila Amolo Odinga, Stephen Kalonzo Musyoka, Wycliffe Musalia Mudavadi and Moses Masika Wetangula together with their political parties, the National Super Alliance; Orange Democratic Movement; Wiper Democratic Movement – Kenya; Ford Kenya Party; and Amani National Congress as well as their supporters, to boycott, sabotage, frustrate and or obstruct the conduct of the October 26, 2017 presidential election, amount to treason and an attempt to establish a government in Kenya other than in accordance with the Constitution. Hon Pkosing seeks a further declaration that Hon Uhuru Muigai Kenyatta was lawfully elected in the fresh presidential election held on October 26, 2017.
2. On November 3, 2017, the Deputy Registrar of this court directed that the petition be served upon all the respondents and that the matter be mentioned before him on November 15, 2017 to determine compliance with those directions before a hearing date is fixed.
3. On November 12, 2017, the Deputy Registrar took the file to the Hon Chief Justice and sought guidance in the matter as Mr Kibe Muigai, learned counsel for the applicant, was demanding that this petition should be heard before the November 17, 2017. Upon perusal of the petition, the Hon Chief Justice directed that “As the Supreme Court is engaged in hearing time bound petitions under article 140 of the Constitution, I direct that this petition be heard by the whole court on priority basis after December 13, 2017”.
4. Undeterred, the applicant has returned to this court with an application under section 24 of the Supreme Court Act and rule 26 of the Supreme Court Rules seeking that his petition be consolidated and heard together with “this petition”. We suppose he is referring to petition Nos 2 and 4 filed by Mr Harun Mwau and Njonjo Mue & another challenging the declaration of Hon Uhuru Muigai Kenyatta and Hon William Samoei Ruto respectively as President and Deputy President elect. We are, this evening, going to give directions and commence the hearing of those petitions tomorrow.
5. Hon Pkosing’s application cannot be granted for the simple reason that it does not fall within the purview of article 140 of the Constitution which requires petitions challenging “the election of the president elect” to be “filed within seven days of the declaration of the results of the presidential election” and heard and determined “within 14 days” of filing.



- 6. Hon Pkosing’s petition is not seeking to challenge the declaration of Hon Uhuru Kenyatta as the president elect. As we have said, Hon. Pkosing’s petition is seeking declarations to the effect that the acts of Hon Raila and Hon Stephen Musyoka and supporters to boycott and their attempts to sabotage the conduct of elections on October 26, 2017 amount to treason and an attempt to unconstitutionally establish a government in Kenya.
- 7. If this court loses focus, succumbs to pressure and allows all cases by parties aggrieved by the conduct of a presidential election to be heard within the period of 14 days allowed by article 140, it will be swamped by an avalanche of petitions it will not be able to determine within that time frame and occasion a constitutional crisis.
- 8. In the circumstances, we decline to grant this application. As we have stated, Hon Pkosing’s petition is not a time bound litigation. It will therefore be heard with others after this court determines the petitions challenging the election of the president.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2017.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....
J. B. OJWANG
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT COURT

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S.N. NDUNGU
JUSTICE OF THE SUPREME COURT COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT COURT

I certify that this is a true copy of the original
DEPUTY REGISTRAR
SUPREME COURT OF KENYA

