



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**ELECTION PETITION NO. 2 OF 2017**

**FRANCIS MWANGANGI KILONZO.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER YATTA CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**CHARLES MUTAVI KILONZO.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Kenya held its general election on 8<sup>th</sup> August 2017. It was infact six elections in one. The elections included the parliamentary elections, one of which was the Yatta constituency parliamentary election. The elections were conducted by the Independent Electoral and Boundaries Commission (IEBC) (the 1<sup>st</sup> respondent). The returning officer for the Yatta election was the 2<sup>nd</sup> respondent. The petitioner Francis Mwangangi Kilonzo and the 3<sup>rd</sup> respondent Charles Mutavi Kilonzo were contestants in the election. When the results were declared, the 3<sup>rd</sup> respondent had won with 17,888 votes while the petitioner was second with 11,350 votes. There were nine (9) contestants in all.

2. The petitioner was dissatisfied with the conduct of the election, and the declaration of the results. His case was that election was marred with illegalities and irregularities, and that there was substantial non-compliance with the constitutional and statutory provisions that affected the results. On 7<sup>th</sup> September 2017 he filed this petition seeking the declaration that the declaration of the results was invalid, null and void.

3. The respondents filed respective responses denying the allegations in the petition, and stated that the election was conducted in accordance with the Constitution and the law, and that the results declared were valid.

4. On 19<sup>th</sup> September 2017 the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a notice of preliminary objection whose ground was that the petition was fatally defective as it had not been filed within 28 days as was required by **sections 76 and 77** of the **Elections Act No. 24 of 2011**. They sought striking out and costs. On 28<sup>th</sup> September 2017 the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a motion under **Articles 38, 87(2) and 105** of the Constitution of Kenya 2010 and **sections 76 and 77** of the **Elections Act** seeking that the petition be struck out with costs for being filed out of time. It was deponed by the returning officer Nicholas Kalimi

(2<sup>nd</sup> respondent) that the declaration of results having been done on 9<sup>th</sup> August 2017 at about 2100 – 2200 hours the petition ought to have been filed on 6<sup>th</sup> September 2017; that when it was filed on 7<sup>th</sup> September 2017 that was one day late, and therefore out of time. He annexed a copy of the certificate of elected member of National Assembly (Form 35C – **NK1** – dated 9<sup>th</sup> August 2017).

5. The 3<sup>rd</sup> respondent supported the objection and motion, while the petitioner opposed both by filing an affidavit to state that the declaration was on 10<sup>th</sup> August 2017, and therefore that the petition had been filed within time. He got Samwel Mulei and Titus Ngungi Joseph to each swear an affidavit to state that the declaration was on 10<sup>th</sup> August 2017.

6. The respective counsel filed written submissions on the objection and motion and addressed the court on the same. I have considered the objection, motion and the submissions.

7. The court was left to determine whether the petition should be struck out on the basis of the preliminary objection, and whether the date of the declaration of the results of the Yatta parliamentary election could be determined at this interlocutory stage to be able to strike out the petition.

8. The electoral disputes resolution timelines are prescribed under the Constitution of Kenya 2010 and the **Elections Act**. Under **Article 87(2)** of the Constitution: -

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

**Sections 76(1)(a)** of the **Elections Act** states that:

“A petition—

**(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election and served within fifteen days of presentation.”**

9. In the case of **Lemanken Aramat –v- Harun Meitamei Lampaka & 2 Others [2014]eKLR** the Supreme Court stressed the importance of complying with timelines in election disputes when it observed that: -

**“(69) We have to note that the electoral process, and the electoral dispute – resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes that dispute from the jurisdiction of the court. This recognition is already well recorded in this court’s decisions in the Joho case and the Mary Wambui case.”**

10. In **Raila Odinga –v- IEBC & 3 others, Supreme Court Petition No. 5 of 2013** it was held that the constitutional timelines were not negotiable. It is therefore accepted that the timelines relating to the filing of election petitions are inflexible and inextensible. They cannot be extended by the court through craft or innovation.

11. The rationale for strict timelines lies in the constitutional requirement under **Article 87(1)** which provides that –

**“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”**

This legislation enacted was the **Elections Act**. In **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 2B of 2014**, the Court stated as follows regarding the rationale:

**“It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.”**

12. Regarding the preliminary objection, it is now accepted that such an objection consists of a point of law which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit (**Mukisa Biscuits Manufacturing C. Ltd –v- West End Distributors [1969]E.A 696**). In the words of Sir Charles Newbold P. at page 701 of the case:-

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

13. A preliminary objection must not deal with disputed facts. In other words, a respondent’s preliminary objection has to be based on commonly accepted set of facts (**EI-Busaidy –v- Commissioner of Lands & 2 Others [2002] IKLR 508**). A preliminary objection should not be based on factual information which stands to be tested by normal rules of evidence.

14. There is no dispute that the date of the declaration of the results of the Yatta parliamentary election is a disputed fact. The petitioner and his witnesses have stated that the declaration was on 10<sup>th</sup> August 2017, whereas the respondents and their witnesses have stated that it was on 9<sup>th</sup> August 2017. The only way to resolve this issue would be to subject all this contested evidence to scrutiny during the hearing of the petition. Indeed, all parties were alive to the fact that the date of the declaration of results for Yatta constituency was contested. This is why during the pretrial conference held on 18<sup>th</sup> October, 2017, they agreed on the issues for determination. One of the issues was (a) as follows:-

**“(a) Is there a competent petition: when was the declaration of the results made”**

They could not have asked that the court determines the issue during trial if the date of declaration of the results was a settled matter.

15. I hasten to add that striking out a petition is a drastic action that can only be done on clear and certain facts and circumstances. In this petition, it is alleged that the petitioner came to court one day late. This is disputed. If the court finds that the petition was filed late it would be struck out with costs, without having to hear the petitioner on the merits of his case. It is therefore critically important that it be found when it is that the declaration was made.

16. I hope I have said enough to show that:

(a) the preliminary objection by the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot be sustained because it is founded on contested factual information which has to be tested by normal rules of evidence; and

(b) because the date of the declaration of the results of the Yatta parliamentary election is a contested issue the matter cannot be determined at this interlocutory stage.

17. Consequently, the preliminary objection dated 17<sup>th</sup> September 2017 and the motion dated 27<sup>th</sup> September 2017, both by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, are dismissed with costs.

**DATED and DELIVERED at MACHAKOS on the 6<sup>TH</sup> day of NOVEMBER 2017.**

**A. O. MUCHELULE**

**JUDGE**



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