



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

ELECTION PETITION NO 2 OF 2017

DAVID KIPSANG KETERPETITIONER

VERSUS

JOHANA KIPYEGON NGENO1ST RESPONDENT

LILIAN OKOTH (RETURNING OFFICER)2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. This ruling is in response to the adjournment sought by Mr. Bosek for the 1st respondent (Johana Kipyegon Ngeno). The reason advanced for the adjournment is that the 1st respondent is sitting for his Law bar examination at the Kenya School of Law which are scheduled to run until 30/1/2017. I adjourned this matter until 11.30 this morning to enable Mr. Bosek to find out whether his client is available for the trial over this petition. After resuming Mr. Bosek informed the court that his client's phone is off. He then submitted that the 2010 Constitution of Kenya is silent as to when the hearing of a petition is said to commence in terms of Rule 20 (1) and (2) of the Elections (Parliamentary and County Elections) Petition Rules of 2017. He submitted that a hearing of a petition commences where a witness has taken a stand for cross examination. In the instant application, no witness has taken a stand, and for that reason, Mr. Bosek submitted that the 5 days contemplated in Rule 20 is inapplicable.

2. He therefore urged the court to exercise its discretion to adjourn this petition.

3. Mr. Manyange for the petitioner originally did not object to the adjournment but he turned round to oppose it on the following grounds:

1. An application for an adjournment may only be granted if the applicant shows the existence of exceptional circumstances. The fact that the 1st respondent is sitting for his bar examination does not constitute exceptional circumstances.

2. He submitted that the 1st respondent knows the evidence to be relied upon by the petitioner. Additionally, he also submitted that the petitioner has filed additional evidence which the 1st respondent is aware of.

3. Furthermore, he submitted that adjournment is not as of right. He also submitted that if an adjournment is granted, it would go against the rules which provides for an adjournment for a period not

exceeding 5 days, in terms of Rule 20(12) and for that purpose he submitted that no basis was laid by the 1st respondent to warrant the adjournment.

4. Mr. Gathii urged the court to exercise fairness to all parties. He also submitted that the court has discretion to adjourn the matter. More importantly, he submitted that the rules of natural justice demand that a party to a case must be present in court when the case is being heard. He concluded his submission that he was ready to proceed and urged the court to be very vigilant in future.

5. Finally, Mr. Bosek in reply submitted that the fact that his client was sitting for a bar examination constitutes an exceptional circumstances. He further submitted that the hearing of a petition commences when a witness has taken a witness stand and has been sworn. He has therefore submitted that the hearing of this petition has not yet commenced. He apologized to the court for taking this date without consulting his client.

6. He also submitted that if the hearing of the petition commences in the absence of his client, it will be prejudicial to the respondents' case who should be in court to listen to the evidence as it emerges.

7. In the light of the submission of all participating counsel and the applicable law, namely Rule 20(1) & (2) of Elections (Parliamentary and Country Elections) Petitions Rules of 2017, I find the following to be the issues for determination:

1. Whether or not the hearing of this petition has commenced
2. Whether or not the sitting for the bar examinations by the 1st respondent constitutes an exceptional circumstances in terms of Rule 20(1) of the Elections Petitions Rules of 2017.

8. Issue No. 1

The issue as to when the hearing of a petition has commenced, is determinable by the provisions of Rule 20 (1) of the Elections Petitions Rules of 2017. The ordinary meaning to be attached to the provisions of Rule 20(1) is that the hearing commences when a witness has taken a stand and is sworn for cross examination purposes. In the instant application, no witness has taken a stand for purposes of being cross-examined. In the circumstances, if that the hearing of this petition has not commenced. It therefore follows that the adjournment of the hearing of a petition for a period not exceeding 5 days is inapplicable at this stage.

9. Issue No. 2

The issue as to whether the sitting of the 1st respondent for his bar examinations at the Kenya School of Law does not call for a determination because the hearing of a petition has not commenced. Stated differently, it is a moot point.

10. In the light of the foregoing, I hereby reluctantly adjourn this proceedings until 1/12/2017.

11. The cost of this adjournment are to be borne by the 1st respondent in any event.

Ruling delivered in open court this 21st day of November, 2017 in the presence of Mr. Manyange for the Petitioner, Mr Bosek for the 1st Respondent and Mr. Gathi for 2nd and 3rd Respondents.

J. M. Bwonwonga

Judge

21/11/2017



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