



REPUBLIC OF KENYA

IN THE ELECTION COURT

AT MALINDI

ELECTION PETITION CAUSE NO. 2 OF 2017

JOHNSON MUTHAWALI.....1ST PETITIONER

BORNIFACE TSUMA NZAI.....2ND PETITIONER

VERSUS

KINGI MICHAEL THOYAH.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

RAYMOND MAKAZI.....3RD RESPONDENT

R U L I N G

Introduction and outline

1. This petition was filed, based on the date stamp, on the 6/9/2017 and disclosed to challenge the election of the 1st respondent as the member of National Assembly for Magarini Constituency as declared on the 10/8/2017.

2. The election pleaded to have been held on 8/8/2017, attracted 8 candidates and this petition was initially filed by two people;- Johnson Muthawali and Boniface Tsuma Nzai. Those two petitioners filed an application dated 5/10/2017 seeking to withdraw the petition. One Samson Kazungu Mwakaya also brought an application dated 5/10/2017 and sought to be substituted as the petitioner. The two applications and another by the Respondent seeking to strike out names of interested parties from the petition were heard together and a ruling dated 2/11/2017 was given by the court which allowed the initial petitioners to withdraw and the said Mr. Samson Kazungu Mwakaya to be substituted as the Petitioner. Consequently even though the petition was never amended to reflect the substitution, which amendment I considered not necessary by dint of Rule 24(5) of the Election (Parliamentary and County) Petition Rules, the ruling by the court dated 2/11/2017 disclose that the petitioner is currently SAMSON KAZUNGU MWAKAYA while the respondents remain the initial three after the interested parties were struck out the petition by the same ruling.

Application to strike out Petition

3. By a Notice of Motion dated the 23/10/2017 and filed on the same day, the 1st Respondent, KINGI MICHAEL THOYA, has moved the court and sought the striking out of the petition on a raft of grounds among them failure to comply with the provisions of Rules 8 and 12 of Election (Parliamentary and County) Petition Rules 2017 for failure to disclose, with precision and at all, the date of the elections, the votes garnered by each candidate and the results as declared by the Returning Officer. The affidavit in support of the petition is also faulted for failure of the same kind, to give the particulars. The 1st Respondent /Applicant contend and aver that the petition is incompetent and is in contravention of the law and is a candidate of striking out on that score.

4. The motion was supported by the affidavit of the 1st Respondent which reiterates that there has been failure to comply with and outright violation of the dictates of the Rules hence the petition need not consume court's time by taking of evidence but should be struck out. Based on information and advice by counsel, the 1st Respondent/Applicant contends, adds and depones that the particulars regarding the date of election, the votes cast, the results declared and the date of such declaration are central and inevitable contents of the petition without which the court has nothing to consider or determine.

5. The Petitioner did oppose the application by a Replying affidavit sworn on the 7th November 2017. That affidavit faults the application for being grounded on falsehood and untruths in that the petitioner contend and insist that the petition disclose the full names of the candidates who participated at the election and also discloses the 1st Respondent as the returned duly elected member of the National Assembly representing Magarini Constituency. The petitioner then contend that having gone through the entire corpus of the Elections (Parliamentary and County) Petition Rules, the petition was drawn and filed in full compliance therewith and that nothing in the Rules mandate that a petition do particularize the votes cast in favour of each candidate and that the results if any, is enough to be stated. To the petitioner, the application does not lie and has been overtaken by events and is grounded upon non-existent facts hence should be dismissed.

6. The 2nd and 3rd Respondent did not file any responses to the Application and are deemed to support it or just have nothing to say about it. The 1st Respondent/Applicant and the Petitioner/Respondent both filed written submissions and attended court to highlight the same submissions.

Submissions by the 1st Respondent/Applicant

7. In the submissions dated 20/11/2017 and filed in court the same day, the 1st Respondent/Applicant, took the position that Article 87(2) of the Constitution set strict time for filing an election petition predicated upon the date of declaration of the results. Reliance was then placed on the provisions of Section 2 Elections Act, on the definition of election results and section 96 empowering the Rules Committee to make Election Petition Rules. Regulations 87(2) c of the Election (General) Regulations 2012 and Rule 8 & 12 of the Election (Parliamentary and County) Petition Rules are then quoted for the proposition that the declaration of results as tallied by the Returning Officer shall be declared publicly and made the contents of a petition and the Affidavit in support. Those are the provision of law the 1st Respondent alleged to have been contravened by the petition on the basis that the votes garnered by each candidate and total votes cast have not been stated in the petition.

8. Based on such alleged failure the 1st Respondent contend that there is no valid petition that merits trial by the court in that an election petition challenges the declared outcome which if not pleaded make the petition untriable. Reliance was then placed on decided cases being the decision by the Supreme Court in **HASSAN ALI JOHO & ANOTHER VS SULEIMAN SAID SHAHBOR & 2 OTHERS [2014] eKLR**, the Court of Appeal in **JOHN MUTHITHO VS JANE KIHARA & OTHERS [2008] 1 KLR 10**, as well the High Court decisions in **AMINA HASSAN AHMED VS RETURNING OFFICER, MANDERA COUNTY & 2**

OTHERS, NAIROBI PETITION NO. 4 OF 2013 and **EVANS NYAMBOGO ZEDEKIAH & ANOTHER VS I.E.B.C & 2 OTHERS [2013] eKLR** all for the proposition that the declared results of an election is the very foundation of an election petition and without it a petition has no legs to stand upon and must be struck out.

9. The applicant further relied on the decisions in **NICHOLAS KIPTOO ARAP KORIR SALAT VS I.E.B.C. & 6 OTHERS [2013] eKLR** as well as Mombasa, **ELECTION PETITION NO. 9 OF 2017, JIMMY MKALA KAZUNGU VS I.E.B.C & 2 OTHERS** for the proposition that even a resort to article 159 of the Constitution never comes to the aid of a Petitioner or indeed any litigant who has, for own reasons, opted to side-step the mandatory dictates of the law holding that provision in the constitution never to have been intended or designed to overthrow or destroy of the rules of procedure and thereby enthrone an *'anarchical and free for all kind of scenario in the administration of justice'*. The 1st Respondent even went beyond our borders and cited to court a decision by the Supreme Court of Botswana in **KONO & OTHERS VS THE INDEPENDENT & ELECTORAL COMMISSION [2001]2 BLR** for the proposition that in determining electoral disputes, courts do not employ any inherent jurisdiction nor are they allowed to resort to common law but must confine its jurisdiction as established and donated by the electoral law for which reason one has to meticulously comply with the provisions of such law.

10. Those written submissions by the 1st Respondent/Applicant were briefly highlighted by the counsel orally without any much addition or underscoring save that it was asserted that a petition which does not disclose the results of the election challenged is incurably defective and faces only one deserved fate, being struck out.

Submissions by the Petitioner/Respondent

11. The first salvo against the application from the petitioner was that the application was misconceived and bad in law for it sought to attack a petition by JOHNSON MUTHAWALI and BORNIFACE NZAI when those two had, by mere perused of the court record, withdrawn from the petition. To the petitioner the moment the ruling was rendered allowing the original petitioners to withdraw from the petition, the petition that now subsist is not by them but by the substituted petitioner SAMSON KAZUNGU MWAKAYA and that to order the petition by original petitioners struck out would be to act in vain.

12. On the allegations that the petition fails to comply with the provisions of the Act and the Rules made thereunder, the petitioner contend that the petition is fully compliant with the Rules in that it says the Returning Officer returned the 1st Respondent as being duly elected and states that the declaration was made on the 10/9/2017.

13. It is equally and additionally submitted that there is no specific provision in the Rules that mandate that the results be particularized and that the use of the words "if any" are permissive that a petition can proceed without the results being particularized and set out. To the petitioner Rules 8(1) and 12 only require a petitioner to state the date of the disputed elections, the results, if any, howsoever declared, and the date of the Declaration of the election results.

14. Whether failure to particularized the results render the petition defective and a nullity, the petitioner contend and submit that so long as the respondents understand the basis upon which the election is disputed the court should strive to sustain it rather than have it struck out. There is then cited to court a decision by Justice W. Korir in Malindi Election Petition No. 4 of 2017, **SAMSON KAZUNGU KAMBI VS I.E.B.C & 3 OTHERS** for the need to sustain a petition. To the petitioner, the petition is understandable by the respondents who have all responded to it without raising the issue of failure to disclose the results as capable of visiting any prejudice upon them.

15. It is those written submissions Mr. Otara highlighted orally and only added that the petition conforms to the template provided as **form 1** made pursuant to Rule 7(c) of the Rules.

16. On the actual quantitative figure declared, Mr. Otara submitted that the petitioner did not have the actual numerical results but knows who was declared as winner. To the counsel declaration of figures is a procedural technicality taken well care of by the provisions of Article 159(2) d of the Constitution so that the merits be gone into rather than terminating the petition before evidence is led. For those reasons the petitioner prayed that the Application be dismissed for lack of merits.

17. For the 2nd and 3rd Respondents Mr. Lumatete who did not file any papers in respect of the application opted to side with the 1st Respondent/Applicant in faulting the petition and submitted that an election petition tests the accuracy of the declared winner and therefore the declaration and the figures thereof are fundamental to make the petition triable hence a petitioner has the singular duty to set out the results as declared by the Returning Officer and to set out the grounds upon which such results are not accurate or genuine. He contended that without due declaration of the outcome of the elections in the petition, there is nothing for the court to undertake an inquiry upon and that the current petition has no legs to stand upon.

18. In her closing submission, Miss Aoko counsel for the 1st Respondent/applicant added that by dint of section 2 of the elections Act, an election result must be the results declared by the Returning Officer and that the petitioner in the petition says there was indeed a declaration on the 10/8/2017 hence the particulars of the declaration ought to have been given in the petition.

19. On the decision by W. Korir J. in Petition No. 9 of 2017, Malindi Counsel said that a reading of the decision reveal that there was something to show the results as declared in that a gazette notice was exhibited. On the proper petition sought to be struck out the counsel said that there is only one petition in the file being the petition dated 5/9/2017 filed by the original petitioners who were allowed to withdraw and in their place substituted one SAMSON KAZUNGU MWAKWAYA and that the Application was filed before the substitution was ordered.

Issues for determination

20. When the rivaling arguments by counsel are put in perspective, the only substantive issues for determination by the court are whether :-

i) It is mandatory, in law, to set out the results as declared by the Returning Officer in an election petition"

ii) The petition herein set out such results"

iii) If (ii) above is answered in the negative, what is the effect or consequence of such failure"

21. However there is the less substantive question as to the prayers in the application seeking to strike out the petition said to be by Johnson Muthawali and Borniface Tsuma Nzai. I consider it less substantive because my perusal of the entire record in this matter reveal that there is only one petition dated the 5/9/2017 which has never been amended but was filed by the two petitioners who by own choice opted to withdraw from the petition and a person qualified to bring the petition substituted. The order allowing the application to withdraw and substitution was expressed in the following words:-

"Having allowed the application by the petitioners to withdraw, the next question that begs

determination is whether the applicant, **SAMSON KAZUNGU MWAKAYA**, is a person qualified to be a petitioner. I have been unable to lay my hands on any definition of the term 'a person qualified to be a petitioner' in the Act and the Rules. However, by appreciating the Constitutional Principle and Purpose of Representation of the People under Articles 94(1) and 95(1) it is not difficult to state that any resident of Magarini Constituency whose interests would be represented by the Member of National Assembly, representing the Constituency, has an obvious say in the representative and the manner such representative gets elected to represent the Constituency.

In the application by the proposed petitioner, there has been an assertion that he is both a resident and a voter of the Constituency and no rebuttal has been mounted against such assertion. To this court the exhibited National Identity Card showing that he was born in the year 1953 in the Malindi District, and his known residence disclosed as Ramada SubLocation, Adu Location, Marafa Division of Magarini District^[1] are enough to cloth him with sufficient interest to participate at an election of a representative of the area and even after the election question the representation of such a representative using the lawful and constitutional channel provided including, an election petition. That the applicant has added on oath that beyond being a resident of Magarini is also a voter, a fact that has also not been controverted by the 2nd Respondent, only enhances, prima facie, proof that he indeed is a man clothed with the right to participate at the decision making process about the happenings of Magarini Constituency including the choice of their representative to the National Assembly. It is from the foregoing reasons that I am convinced that the applicant SAMSON KAZUNGU MWAKAYA is a person qualified to bring the election petition and having applied to be substituted in place of the initial petitioners, who have withdrawn, his application is clearly merited and ought to be allowed".

22. One need not say much but it may be necessary to point out that the application to strike out was filed in court on the 23/10/2017 while substitution was ordered on the 2/11/2017. Maybe Mr. Otara takes the view that the order that his client be substituted for the withdrawing petitioners was not enough and ought to have been bolstered with an additional order that the petition be amended to reflect the substitution. Such a view would be self-defeating and of no benefit at all to the current petitioner after the order for substitution. I view it counterproductive in two respects:-

a) It would amount one would saying that since the original petitioners withdrew their complaint in the petition, there is no petition pending before court hence the substituted petitioner would have to file own fresh petition. That would meet the challenge of strict timelines to file petitions.

b) Ordering an amendment of the petition would also invite challenges as to whether an election petition would be procedurally and legally amended after the time for lodging the petition has lapsed.

23. It is for such challenges that I hold the view that the Rules Committee in its fair mindedness did frame and couch Rule 26(5) in the manner it exists in our statute books today. The Rule reads,

"Subject to subrule (2) and (3), a substituted petitioner shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner".

24. I read and understand the expression, "shall stand in the same position" to mean that the substituted petitioner takes over all the rights and obligations of the original petitioner and to that extent adopts the petition as filed. I derive that understanding from **Cambridge English Dictionary** which defines the verb substitute to mean "*use something or somebody instead of another thing or person*".

25. I therefore conclude and find that when the order for substitution was made, Mr. Samson Kazungu Mwakaya was ordered to come into the petition in place of and instead of Johnson Muthawali and Borniface Tsuma Nzai.

26. That understanding was well captured by this court in this petition in the ruling of 2/11/2017 when the court said:-

“.....I appreciate election petitions and electoral dispute resolution mechanisms to be not purely personal disputes or to be viewed as choses of action in persona unique to the individual petitioner. Rather, elections petitions are in the nature of representative actions or public interest litigation in that the outcome of a decision affect other persons other than and beyond the actual disputants in court”

27. To that extent the contention by Mr. Otara that the orders if granted as prayed would be in vain is not tenable and cannot be upheld. I disregard such submissions as not well founded in law.

28. On the more substantive issues for determination, the answer must be found upon the perusal and keen study and reading of the challenged petition. I have done so, and I consider the petitioner to have been truncated into three parts namely; an introduction, grounds of the petitions and the prayers sought. As concerns the pertinent question of whether or not the declared results were pleaded only the introduction part of the petition is of assistance to the court.

29. That part has five short paragraphs each consisting of a single sentence.

Those paragraphs indeed disclose the electoral area the petition relates to, the names of the petitioners, the names of the candidates who took part at the elections, the date of declaration of results and an introduction of what the petitioners say to challenge those elections.

30. From that portion and indeed the entire petition there is no disclosure of what was the detailed results declared by Magarini Constituency Returning Officer as contemplated by the Regulation 83(1) e & f of the Election (General) Regulations 2012 as amended by legal notice No. 22 of 21/4/2017.

31. To this Court, it is the forms completed by the Returning Officer pursuant to Regulation 83(1) (e) iii and declared publicly pursuant to Regulation 83(1)f that constitute the result of elections. It is such results the law under Rule 8, Elections (parliamentary and county) Petition Rules demand to be made as an integral part of an election petition. I may repeat that my reading and re-reading of the petition herein dated 5/9/2017 has not disclosed the results the petitioner says were declared on the 10/8/2017.

32. It is therefore not out of the blues to say that the petitioner knew of the declaration made, he does not contend that the declaration was never in accordance with the law, but has opted for own reasons, maybe based on legal advice, not to state the details of that declaration in his petition. That there is not pleaded the declared results is not deniable and I must now find and hold that the petition dated 5/9/2017 does not disclose the elections results sought to be challenged. The petition therefore, as much as it adopts the **form 1** in the FIRST SCHEDULE, has not pleaded an integral and all important content of an election petition. I do find that it is mandatory to plead in details the results as declared by the Returning Officer and that in this petition that has not been done.

33. With that finding, the next question and issue is what would be the effect of failure to plead the declared results.

34. Indeed, Mr. Otara is perfectly right to observe and submit that the Rules do not specifically require that the figures declared be pleaded in the petition. However, I have said that the General regulations state what must be declared to include the votes as garnered by each candidate in an election.

35. And the question is not mute nor novel. The superior courts in this country have repeatedly held that an election petition challenge the results declared and that such results are known to be quantitative in nature. I understand the quantitative nature of election results as declared to mean the numerical figures so publicly declared by the Returning Officer pursuant to Regulations 83(1)(f)ii.

36. The Appex Court in this county in the case of ***Hassan Ali Joho & Another –vs- Suleiman Said Shahbal & 2 Others (Supra)***, said; and I am bound to follow its finding that:-

“Bearing in mind the nature of election Petitions, the declared election results, enumerated in the forms provided, are quantitative and involved numerical composition. It would be safe to assume, therefore, that where the candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner and the loser(s) in an election are”.

37. I am in no doubt that the results, if any, as anticipated by Rule 8(1) c are the quantitative and numerical breakdown of the total votes cast and ought to include the number of votes cast in the respective electoral area, the total rejected votes and votes garnered by each candidate. This to the court is not merely to use ink and paper provided for an election process, NO. These are some of the parameters capable of assisting an onlooker or indeed an arbiter like this court, who did not participate at the election to discern and decipher if the elections subject matter of the petition was ever conducted in accordance with the constitutional dictates under Article 81(e) v. They are the same parameters to guide the court in determining how Section 83, Elections Act, applies to the Petition.

38. It must be the same reasoning that the court of appeal in ***John Mututho vs Jayne Kiara and Others (Supra)*** had to find, even though it was clear on the pleadings and evidence that there was never a declaration made, that a petition which fails to disclose the results so declared is defective. The court said:-

“Particulars furnished count if the petition itself is competent or not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading...

Besides, the petitioner does not have the results even now. Her advocate stated as much. If she does not have the Results, what is she challenging" The issues she raises are meant to nullify a particular result. But if she has not given any results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities effected the outcome of the elections, but without the results it might not be possible to relate the irregularities to the result”.

39. I am bound by the rules of *stare decisis* to follow these findings by the two superior courts and I must now find and hold that the effect of failure to plead the declared results has the very grave and unenviable result that the petition is defective and fatally defective to the extent that it is not capable of being tried by a court of law. If that be the face and character of the petition before me then the petition invite only one result, that it be struck out. I do strike it out, even though I deeply appreciate that the grievance by the petitioner shall remain untested by evidence. That however will be the burden of and a lesson for the future to the petitioner and his counsel because this must remain a court of law applying the law as is enacted by parliament without the need to tinker with the words and intent of a statute.

40. As undesirable as it may appear, ultimately all must be subject to the law and its dictates. I hear a loud voice dictating to me that a defective petition by virtue of failure to plead the results declared is unfit to be heard and I therefore strike out the petition dated 5/9/2017 initially bought by JOHNSON MUTHAWALI & BORNIFACE TSUMA NZAI with costs to the Respondents who, I have noted, were substituted with SAMSON KAZUNGU MWAKWAYA.

41. Having struck it out with costs, I award to the Respondent costs in an aggregate sum of Kenya Shillings Three Million [**Kshs.3,000,000/=**] payable by the petitioner to them as follows:-

- . 1st Respondent - Kshs.1,700,000/=
- . 2nd & 3rd Respondents - Kshs.1,300,000/=

42. It is so ordered.

Dated and delivered at **Malindi** this 17th day of **January 2018**.

P.J.O. OTIENO

JUDGE

[1] Annexure SKM 1



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