



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ELECTION PETITION NO. 1 OF 2017

KIPLANGAT RICHARD SIGEI.....1ST PETITIONER

ELIJA KOECH.....2ND PETITIONER

ALVIN K. KOECH.....3RD PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

HON. JOYCE CHERONO KABOSO.....2ND RESPONDENT

RULING

By way of a Notice of Motion application dated 2nd October 2017 and filed on 3/10/17 and which is expressed to be brought pursuant to order 19 rule 3 and order 51 of the civil procedure rules, Section 3 A of the Civil Procedure Act Sections 77 (i), (ii), 78 (1), (2), b, (3), 79 (a) 80 (3), 84 of Elections Act 2011 and rules 13 of the Election (Parliamentary and County Elections) Petition Rules, 2017 seeks the following orders

- (i) The petition be struck out for being scandalous, frivolous, vexatious and an abuse of the court process
- (ii) The petition be struck out for non compliance with the law and for want of proper service upon the 2nd Respondent/Applicant herein within 28 days after the date of the publication of results of Bomet Gubernatorial Elections (Parliamentary and County) Petition rules 2017.
- (iii) Pending the hearing and determination of this application, the proceedings be stayed.
- (iv) The petitioners do bear the costs of this petition and application

2. The grounds are:-

(a) The petition was not served upon the 2nd Respondent/applicant as required by law.

(b) The petitioners have not complied with the statutory requirements as to deposit of security within 10 days of lodging the petition.

- (c) The 2nd Respondent has been subjected to undue pressure and hanging litigation like the sword of Damocles.
- (d) The petition as drawn is a replica and copy of the presidential petition and is therefore an afterthought and unfounded in law.
- (e) There is no prejudice that the Respondents will suffer since they appear to be out on a fishing expedition and blackmail and not justice as alleged.
- (f) The Election Act and Rules must be followed to the letter in view of the demand for expeditious disposal of such disputes.
- (g) In any event the only competitor with the 2nd Respondent/applicant was Hon. Isaac Kiprono Ruto who conceded defeat and vowed to support the applicant
- (h) Busy bodies must not be allowed to meddle and cause undue disturbance to a successful party after an election
- (i) The petitioners are required by law to deposit the sum of Ksh.500,000/= as security for costs within 10 days from the date of filing the petition since ***Vigilantibus et non dormientibus Jura Subveniunt***. (The law aids the vigilant not those who sleep)
- (j) The petition is made in bad faith and is full of mischief.
- (k) It is fair mete, just and expedient that the petition be dismissed.
- (l) It is in the best interest of justice that this application be allowed as prayed.

PARTIES

3. The first, second and third Petitioners were voters in Bomet County in the election held on 8th August 2017
4. The first Respondent is the Independent Electoral and Boundaries Commission.
5. The second Respondent/Applicant is the duly elected Governor for Bomet County having been so declared on 10th August 2017 and was issued with a certificate by the 1st Respondent's Returning Officer
6. The Petitioners being dissatisfied with the conduct of the Gubernatorial Elections in Bomet County and the Declaration of the 2nd Respondent as the Governor Bomet County filed this petition dated the 6th day of September 2017 seeking the following orders:-
 - (a) A Declaration that the 2nd Respondent was not validly elected to the position of Bomet County Governor and that the Declaration of results for the said position is invalid, null and void.
 - (b) A declaration that non-compliance, irregularities and improprieties in the impugned election for Bomet County Gubernatorial position were substantial and significant and that they affected the integrity and quality of the election and the result thereof.

(c) An order to enable the petitioner herein his advocates, servants, agents, proxies and or information experts to audit the system of the Kenya Intergrated Elections Management Systems and their Servers that were relied upon by the 1st Respondent in the registration and identification of voters and the transmission of results in Bomet County Gubernatorial Elections 2017

(d) An order that the results of the audit as per (c) above do delete form part of the record in these proceedings for the purposes of a fair and just determination of the issues identified above.

(e) An order directing the 2nd Respondent to organize and conduct a fresh election in strict conformity with the constitution and Elections Act 2011.

(f) The Respondents be condemned to pay petitioners' cost of the petition, and

(g) Such further, other and consequential orders as this court may lawfully make.

7. The grounds are given as follows:-

(a) Failure of the Results Transmission System and incorrect tallying

(b) A sample of votes cast exceeded the number of registered voters in some polling stations.

(c) Making false entries

(d) Violence and intimidation of supports of agents of Nasa affiliated parties

(e) Voter bribery and undue influence

THE APPLICANTS/2ND RESPONDENTS CASE.

8. It is the contention by the Applicant that the Petition was not served upon her as is required by law and that the petitioners neglected and or failed the mandatory requirement for depositing security for costs and the petition ought to be struck out and/or dismissed with costs to the applicant.

9. The applicant has framed two main issues for consideration by this court.

(a) Whether the petitioners have failed to comply with the mandatory provisions of section 77 (2) of the Elections Act, 2011 as read together with Rule 10 of the Elections (Parliamentary and County Election) Petition Rules, 2017 in as regards service of the Petition dated 6th September 2017

(b) Whether the petitioners have failed to comply with the mandatory provisions of section 78 (2) of the Elections Act, 2011 as read together with Rule 13 (1) of the Elections (Parliamentary and County Election) Petition Rules 2017 in as regards deposit for security for costs.

(c) Costs – Whether petitioners should be condemned with an order for costs for their blantant abuse of court process.

AS REGARDS THE FIRST ISSUE WHICH IS ON SERVICE.

10. Section 77 (2) of the Elections Act 2011 provides:- “A petition may be served personally upon a Respondent or by advertisement in a Newspaper with national circulation.”

11. Rule 10 of the Elections (Parliamentary and County Election) Petition Rules, 2017 as read together with Legal Notice No. 117 of 2017 provides:- **“Within fifteen days after filing of a petition, the petitioner shall serve the Petition on the Respondent by direct service, or an advertisement that is published in a Newspaper of National circulation”**

The importance of direct service is anchored in Article 87 (3) of the Constitution which provides:- **“Service of a petition may be direct or by advertisement in a Newspaper with national circulation.”**

12. It is the contention by the Applicant that she was never personally served with this petition and further that there is no affidavit of service purporting that there was service on the 2nd Respondent.

13. The applicant further places reliance in the court of appeal case of **Rozaah Akinyi Buyu –V- IEBC & 2 Others Civil Appeal (Kisumu) No 40 of 2013** where the judges observed thus:- **“Service of the petition upon Respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the Respondents went into the root of the petition and the petition could not stand when there was failure to serve the same”**

14. The second issue is whether the petitioners failed to comply with the mandatory provisions of Section 78 (2) of the Elections Act, 2011 as read together with Rule 13 (1) of the Elections (Parliamentary and County Election) Petitions Rules 2017 in as regards deposit for security for costs and thus the petition ought to be dismissed.

Counsel Mr. Mutai for the Applicant cites Section 78 (1) of the Elections Act 20 (1) which provides:-

“A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten (10) days after the presentation of the petition.”

Section 78 (2) (b) of the Election Act provides “A person who presents a petition to challenge an election shall deposit five hundred thousand shillings in case of a petition against a Member of Parliament or a County Governor.

(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the Respondent may apply to the election court for an order to dismiss the petition and for payment of the Respondents costs.

In the present petition dates for a pre-trial conference were duly given and notices to all parties were issued by the DR for 11/10/2017

On the 11/10/2017 neither the Petitioners nor their Advocates were present in court

Counsels for the 1st and 2nd Respondent Mr. Kasimu and Mr. Mutai respectively were present. They did inform the court that the 2nd Respondent had filed an application dated 2nd/10/2017 seeking to strike out the petition. They had also filed their submissions. The first Applicant had filed affidavits and served them. They had been served with the Notice of Motion application dated 2/10/17 and had filed an affidavit in support thereof.

The court was not certain as to whether the petitioners had been served with the Notices for pre-trial conference and reserved its directions and or ruling for 2nd November 2017.

Meanwhile on the 19th day of October 2017, a letter dated 16/10/2017 was relieved from the firm of Sing'oe, Murkomen & Sigei Advocates whose contents were to the effect that a Notice of Change of Advocates had been filed on 11th October 2017 and had been served on all parties and that they had information that an Application dated 2/10/17 filed by the 2nd Respondent was heard on 11/10/17. It was confirmed that the firm hitherto on record had been served with the Application on 4/10/17.

The letter further on went to confirm that it had been established that the firm hitherto on record had not appeared in court to oppose or otherwise proceed in any manner in defending the petition.

Counsel for the petitioner did indicate that they had instruction not to intervene with the matter in its current position and had on principle advised the Petitioners to file an application for leave to withdraw the petition. They did confirm that the petitioner did not object to the grant of the orders as prayed by the applicant save their prayer to be pardoned on costs.

On 2/11/17 the position and the contents of the letter was confirmed by Mr. Sigei Advocate for the petitioners who presented himself in court having been instructed by the petitioners.

Having heard counsels for the Respondents nos. 1 and 2 and perused their submissions, I am satisfied that there was no proper service of this petition on the 2nd Respondent as required under Article 87 (3) of the Constitution and Section 77 (2) of the Elections Act.

Neither was there personal service nor was there advertisement in a Newspaper with a national circulation. Service as alleged on the liason office Bomet County cannot be deemed as personal service.

The court of appeal in the case of **Rozaah Akingyi Buyu – Vs- IEBC & 2 others cited with approve the British case of Craig –Vs- Kansen 1943** 1 KB 256 where it was held

“failure to serve process where service of process is required renders null and void an order made against the party who should have been served. Failure to effect service was fatal. It could not even be cured by waiver because no waiver can give validity a nullity.”

In the present petition there was no proper service. This is fatal to the Petition.

On the second issue on Deposit of security for costs and which is captured under Section 78 of the Elections Act 2011, there was no attempt to pay the same on the part of the petitioners and they have conceded this much. There have been no attempt to apply for extension of time within which to pay and deposit such costs.

Section 78 of the election Act 2011 is couched in mandatory terms thus:

(1) A petitioner “shall” deposit security for payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition.”

This mandatory deposit is meant to discourage frivolous or vexatious litigant from challenging election results.

This was the finding by the court of appeal in the case of **Esposito fanco –Vs- Amazon Kingi faffa & 2 others**.

I find that failure to deposit costs contrary to the provisions of Section 78 of the election Act 2011 is fatal to the petition at hand.

Costs

Section 84 of the Elections Act no. 24 of 2011 provides as follows:- ***“An election court shall award the costs of and incidental to a petition and that such costs shall follow the cause.”***

Rule 30 (1) of the Elections (Parliamentary and County) Election Rules, 2017 provides:- ***“The court shall, at the conclusion of an election petition, make an order specifying:-***

(a) The total amount of costs payable;

(b) The maximum amount of costs payable;

(c) The persons who shall pay the costs under paragraphs (a) or (b) and

(d) The person to whom the costs payable under paragraphs (a) and (b) shall be paid

2. When making an order under sub-rule (1) the court may –

(a) Disallow any prayer for costs which may, in the opinion of the Election court have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent, and

(b) Impose the burden of the payment on the party who has caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.”

This petition was filed by the three Petitioners at Kericho High Court. They style themselves as voters. There are two ways in this matter, either they were genuine voters who were dissatisfied with the outcome of the gubernatorial elections in Bomet or they were proxies or agents of an undisclosed Principal. Either way, they caused the two Respondents IEBC and Hon. Joyce Cherono Laboso to incur expenses by way of instructing counsels to represent them in this petition plus other incidental costs thereto.

Conclusion

This court holds and finds that there was no proper service of this petition on the 2nd Respondent.

Secondly, there was no deposit of costs as required by law.

The court is satisfied that it is the three petitioners who have caused the Respondents to incur expenses.

The omission to serve the Respondents and failure to deposit costs is fatal to this petition.

The application dated 2/10/17 has merit. This petition is dismissed with costs to the Respondents.

At the last stages of this application the petitioners appear to have extended an Olive branch to the Respondents to be pardoned on the issue of costs.

This court has already ordered that they pay costs to the Respondents. This is no bar to settlement out of court failure to which the amount payable as costs to be taxed by the Deputy Registrar of this court.

Ruling delivered dated and signed in open court this 7th day of December 2017

In the presence of;

Learned counsel for the petitioner – Mr. Sigei (Absent).

Learned counsel for the; 1st Respondent – Lukoye

2nd Respondent – Mutai

Court assistant – Mr. Rotich

M. MU YA

JUDGE

7/12/2017

Certified copies of this ruling to be furnished to counsels

M. MU YA

JUDGE

7/12/2017



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