REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELECTION PETITION NO. 4 OF 2013

RICHARD NCHAPI LEIYAGU ….....….....….....…….....PETITIONER

versus

INDEPENDENT ELECTORAL BOUNDARIES COMMISSION ….....1ST RESPONDENT

ISMAEL HASHIM.....2ND RESPONDENT

MATHEW KIDEME LEMPURKEL.....3RD RESPONDENT

RULING

1. By a notice of motion brought under Articles 50 and 159(2) (d) and (e) of the Constitution and sections 80,1A, 1B and 3A of the Civil Procedure Act order 12 Rule 7 and order 45 Rules 1,2 and 3 and Order 51 of the Civil Procedure Rules the Petitioner/Applicant moved the court for orders that:

1. The order made on 11th June 2013 dismissing the petition herein filed on 10th April 2013 together with all other consequential orders be reviewed and set aside.

2. The Petition be reinstated for hearing.

3. Cost of the application be provided for.

2. The application was based upon the grounds on the face of the application and which for the purposes of this ruling can be summarized as follows:

i) The order of dismissal was occasioned by non-attendance of the Petitioner's counsel in court.

ii) The application is brought without inordinate delay

iii) The Petitioner is willing to prosecute his petition to mitigate the injustice occasioned to him during the election but also to Laikipia North Constituents.

iv) Non-attendance of the Petitioner's counsel was not occasioned by any act of the applicant.

v) The Petitioner is keen to prosecute his application as he is aggrieved by the decision of the judge due to inadvertence.

vi) The mistake of the counsel should not be vested upon the Petitioner.

3. The application was supported by the affidavit of GEOFFREY NGIGI Advocate in which he deponed that he attended court on 22nd May 2013 when the matter was fixed for pretrial and that they suggested that a whole week will be appropriate for trial.
4. That the court expressed itself that it was constrained by time and only would be willing to grant parties three days for trial and that the court clerk indicated that 11th upto 13th June 2013 was available dates but unknown to them the dates included 10th June to 13th June 2013 and that both himself and his client who was present in court diarised 11th to 13th June and not 10th June 2013.

5. He further deponed that on 11th June 2013 the lead counsel Mr. Korir called him and informed him that he had received a call from Nyeri High Court at 11.30 am. Informing him that the petition was coming for hearing on 10th June 2013 and he was required to attend not later than 12 noon and that they tried to get an advocate to hold their brief to no avail and that the confusion on dates would have been eliminated had the registrar issued requisite hearing notice under Rule 19 of Election (Parliamentary and County) Petitions Rules 2013.
6. The application came up before the court under certificate of urgency and I certified the same urgent and directed that he be served for interpartes hearing.
7. The 1st and 2nd Respondents in opposition to the said application filed a replying affidavit sworn by one ISHMAEL HASHIM the 2nd Respondent in which he deponed that the order of review was not available to the Petitioner since there were no new evidence and that the Petitioner had not offered any reasonable excuse for his non-attendance.
8. He further deponed that the Petitioner/Applicant did not comply with the timelines given by the court and that the dates were taken by consent in open court in the presence of the Petitioner and his counsel.
9. He further deponed that the Petition lacks merit and has no triable issues and should therefore not be reinstated and in support thereof annexed an affidavit sworn by one MICHAEL MICHUKI denouncing an affidavit allegedly sworn by him in support of the petition.
10. The 3rd Respondent in reply to the said application filed a notice of preliminary objection on the grounds that:

1***) Election Act 2011 and the Rules and Regulations made there under is a complete and independent code totally distinct from the Civil Procedure Act (Cap 21).***

2) There is no provision either in the Constitution or in the Election Act 2011 or in the Rules and Regulations aforesaid for reinstatement of a petition dismissed for non attendance or want of proof.

11. When the matter came up for interpartes hearing I directed that the 3rd Respondent's preliminary objection be treated as a response to the petition for the sake of time.

SUBMISSIONS

12. At the hearing Mr. Korir appeared for the Petitioner/Applicant and on the issue of jurisdiction submitted that the election court which heard the matter is the only court which can review the decision and in support thereof relied upon the authority of NJERU v MUTURI EP. NO. 13 OF 2003 where Justice Osiemo stated at page 507 that no other court has jurisdiction to hear the matter and that if the election court did not have jurisdiction to review its order Justice Osiemo would have said so.

13. It was submitted that though election petition is a special jurisdiction it can use the Civil Procedure Rules and that in the order they were seeking to review the court imported Rule 12 of the Civil Procedure for non-attendance. He submitted that there are sufficient reasons for the court to review and set aside the decision to dismiss the petition.
14. It was submitted that Rule 19(h) does not oust the provision for notice and that had the registrar issued the requisite notice the confusion on the dates would not have occurred. It was further submitted that the consent order by the Advocates does not oust the requirement of a notice under Rule 19.
15. Mr. Korir submitted that an honest mistake on the part of counsel should not be vested upon the Petitioner who has complied with all the timelines set by the statute and the Rules and therefore the court should exercise its discretion in the interest of justice and to support this he relied upon the authority of SHAH & MBOGO and ELECTION PETITION NO. 8 OF 2013 MOMBASA where Justice Ochieng was of the opinion that if the petition was strike out that would be the end of the petition even if the Court of Appeal upset the ruling and therefore on the basis of other consideration he declined to strike out the petition. He further urged the court to be persuaded by the said authority.
16. Mr. Kibunja for the 1st and 2nd Respondents submitted that the Petitioner failed to explain to the satisfaction of the court and to offer reason why they did not attend court on 10th June 2013 and that this petition was dismissed for want of prosecution and non proof.
17. He submitted that Mr. Ngigi was present in court together with his client and the Advocates for the Respondents and wondered why it is only the Petitioner and his Advocate who got the date wrong while all others got the correct date. He submitted that the matter would have been resolved if Mr. Ngigi and his petitioner would have annexed their diaries to show that they made an honest mistake.
18. He submitted that the application for review can only be allowed if there are discovery of new evidence and that it is a requirement of law that whoever seeks to set aside or review an order must extract a decree and serve the same on parties and in support thereof relied upon the case of CHHAGANLAL ODHAVJUJ VISHRAM VADGAMA vs TRAVIS (EA) LTD NAIROBI HIGH COURT CIVIL CASE NO. 1908 OF 2000(OS) MILIMANI COMMERCIAL wherein Justice Onyango Otieno as he then was quoted with approval case of GM JIVANJI vs M JIVANJI & ANOTHER (1929-30) 12KLR 44 and Justice Mbaluto as he then was in UHURU HIGHWAY DEVELOPMENT LTD vs CENTRAL BANK OF KENYA LTD & 2 OTHERS HCCC No. 29 OF 1995.
19. He further submitted that if the Applicant is aggrieved by the decision of the court then he ought to have lodged an appeal and in support thereof submitted the case of ALPHA LOGISTICS (k) LTD & ANOTHER vs UPLIFT EXPRESS LTD & ANOTHER [2009]eKLR where Kimaru J. quoted with approval the decision in NYAMOGO & NYAMOGO ADVOCATES vs KOGO [2001]EA 174.
20. He further submitted that the petition has no merit as deponed in the affidavit of the 2nd Respondent in respect to the affidavit sworn by one Michael Michuki.
21. Mr. Saitabao submitted that Election Act is a complete code and distinct from the Civil Procedure Rules and in support thereof relied in the case of PATRICK NGETA KIMANZI vs MARCUS MUTUA MULUVI & OTHERS EP NO. 8 OF 2013 MACHAKOS AT Paragraph 23 where the court stated:

"Similarly the Petitioner cannot call in aid the provisions of Civil Procedure Rules. The Election Act 2011 and Rules and the regulations made thereunder is comprehensive code of substantive and procedural election hence the Civil Procedure Act Cap 21 Laws of Kenya and Rules made thereunder do not apply to Election Act 2011 except where expressly provided for in the Act or the rules."

22. He submitted that there is no provision in the Election Act for reinstatement of a petition which has been dismissed or for review since the Act operates on strict timelines. He submitted that if the court was wrong in dismissing the petition by not taking into account the other considerations then under section 85(c) and Rule 35 of the Election Act wherein is an option for appeal.
23. It was submitted that the issue of non-attendance of the hearing by the Petitioner and his Advocate is not a procedural issue but substantive issue because it is only by attending then a party can prove his case. It was submitted that the case of NJERU v MUTURI does not arise since the application herein is not made at an interlocutory stage.

ISSUES FOR DETERMINATION.

24. From the affidavit evidence and the submissions I have identified the following issues for determination

i. Whether there is provision in law allowing the court to review, set aside an order dismissing an election petition for non-attendance and to reinstate the same for hearing.

ii. Whether the Petitioner/Applicant has made up a case for reinstatement of the petition herein.

iii. What order should the court make"

REINSTATEMENT/SETTING ASIDE AND REVIEW

25. It should be noted that the application before the court is brought under the provisions of the Civil Procedure Act and Rules and the Constitution of Kenya 2010 in respect of right to fair hearing.
26. In the case of JOHO vs NYANGE & ANOTHER ELECTION PETITION No. 8 reported in (2006) eKLR it was stated by Maranga J as he then was as follows:

"It is in my view now settled that the jurisdiction conferred upon the High Court by then section 44 of the Constitution to hear and determine election petitions is a special jurisdiction. The National Assembly and Presidential Election Acts Cap 7 of the Laws of Kenya and the rules made there under form a complete legal regime with its elaborate procedure concerning the filing hearing and determination of election petitions save where the regime expressly admits and incorporates the provisions of other law it is a complete code of its own. The Civil Procedure Act and rules made thereunder do not therefore apply to election petitions save where they are expressly incorporated. …. it follows therefore that the bringing of this application under the provisions of the Civil Procedure Act and Rules though not fatal was irregular (emphasis added.)

27. The position finds support in the case of PATRICK NGETA KIMANZI vs MARCUS MUTUA MUTURI & 2 OTHERS MACHAKOS HIGH COURT EP NO. 8 OF 2013 where Justice Majanja at paragraph 23 thereof stated as follows:

"***Similarly the Petitioner cannot call in aid the provisions of Civil Procedure Rules. The Election Act 2011 and Rules and the regulations made thereunder is comprehensive code of substantive and procedural election hence the Civil Procedure Act Cap 21 Laws of Kenya and Rules made thereunder do not apply to Election Act 2011 except where expressly provided for in the Act or the rules."***

28. With the above legal principle in mind a reading of the Election Act, Rules and Regulations made

thereunder clearly shows that there is no express or implied provision for the review, setting aside and or reinstatement of a dismissed petition. This to my mind is founded on the fact that the legislature wanted the petitions to be expeditiously determined within the set timelines with special interest in respect of the application before the court being section 80(2) which reads:

"A person who refuses to obey an order to attend court commits the offence of contempt of court"

29. It should also be noted that Rule 22 of the Election Petitions Rule provide that the court shall conduct trials proceedings as far as reasonably practicable on a day to day basis until trial is concluded and therefore agree with the submissions by the Respondents and as was stated in the SUPREME COURT ELECTION PETITION NO. 5 OF 2013 that any party to an election dispute must adhere to the strict timelines set in the Election Act, Rules and Procedures and also by the court at the pretrial conference.

30. The application herein is brought under the provision of the Constitution and since this court is under obligation to uphold the Constitution it is therefore mandatory that it make reference to the constitutional provisions more so Articles 50 and 159(2).
31. In the case of JYOTI BASU & OTHERS vs DEBI GHOSAL & OTHERS 1982 AIR 983, 1982 SCR 318 The Supreme Court of India had this to say on election Petition:

"A right to elect fundamental though it is to democracy is anomalously neither a fundamental right nor a common law right. It is statutory right. So is the right to be elected and the right to dispute an election. Outside of statute, there is no right to elect no right to be elected and no right to dispute an election, Statutory creations they are and therefore subject to statutory limitations. An election petition is not an action of common law, nor in equity. It is statutory proceedings to which neither common law nor the principles of equity apply but only those which the statutes makes and applies.

It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those relating to the trial of election dispute, is what the statute lays down. In the trial of election disputes court is put in a straight jacket." emphasis added.

32. In the Supreme Court of Kenya Election Petition No. 5 The Supreme Court had this to say on the provisions of Article 159(2)(d)

"Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities the operative word are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements as the expense of substantive justice."

33. This to my mind means that any of constitutional rights available to the Petitioner must be enjoyed within the legal provisions set out in statute which in this case is the Election Act since Article 87 of the Constitution provides that Parliament shall enact legislation to establish mechanism for timely settling of election disputes and as stated in the case of JYOTI BASU supra all rights in respect of election disputes are statutorily given and therefore every petition

must be determined and decided within the statutory provisions contained in the Election Act. It therefore follows that there is no provision contained in the said Act for reinstatement of a dismissed petition and if the Legislature intended to give room for revival of any dismissed petition this would have been enacted therein. The court is therefore put in a straight jacket by statute.

WHETHER PETITIONER/APPLICANT HAS

MADE UP A CASE FOR REINSTATEMENT.

34. I have had occasion to state in Election Petition No. 1 of 2013 Nyeri that the express provisions of the Election Act or lack thereof does not oust the inherent jurisdiction of the court to do justice however that jurisdiction must be exercised only as may be necessary for the end of justice or to prevent abuse of the court process and therefore a look at the back ground leading to this application is necessary.

BACKGROUND

35. As stated herein above the parties appeared before the court on 22nd May 2013 for pretrial conference and direction when the hearing dates herein were agreed upon by consent and the said consent duly signed by the Advocate for the parties for 10th - 13th June 2013 and the number of witnesses agreed upon.
36. On the date set up for hearing that is the 10th of June 2013 neither Mr. Ngigi Advocate for the Petitioner nor the Petitioner was present in court whereas the Respondents and their Advocates, witnesses and supporters of the 3rd Respondent were present in court at the time when the matter was called out for hearing.
37. The court as stated in the ruling under review and in the interest of justice ordered the registry staff to call the Petitioner's Advocates which was done and has been confirmed by Mr. Ngigi in his affidavit in support and there being no reason offered for non- attendance the court proceeded to dismiss the same for non attendance and want of proof as no evidence was tendered by the Petitioner save for the affidavits filed to prove his petition.
38. To enable the court to exercise its discretion to reinstate a dismissed suit or petition the court on the authority of NJAGI KANYUNGUTI alias KARINGI KANYUNGUTI & 4 OTHERS vs DAVID NJERU NJOGU NAIROBI CIVIL APPEAL NO. 181 OF 1994 unreported stated that in an application brought under either order IXA rule 10 or IXB rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The Courts discretion is wide provided it is exercised judicially. The court is also enjoined to consider all the circumstances of the cases both before and after the judgment being challenged before coming to a decision whether or not to vacate the judgment. The Court of Appeal went further to state that it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accidental inadvertence or excusable mistake or error with the main concern to do justice between the parties.
39. The above position is confirmed by the case of SHAH VS MBOGO cited by the Applicant where the court stated that the courts discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not intended to assist a person who has deliberately sought whether by evasion or otherwise to obstruct the cause of justice. However each matter has to be decided in the context of its own particular facts and circumstances.
40. It is against the above legal principles that I now turn to look at the application before the court as

to whether the Applicant has met the requirement to enable the court exercise its discretion in his favour.

41. The petition herein was fixed for hearing by consent of all the parties herein on 20th May 2013 and in offering the reason for their non-attendance Mr. Ngigi Advocate for the Petitioner had this to say in his affidavit in support.

7. That the Court Clerk initially indicated 11th upto 13th June 2013 as available date to which unknown to us, he later included 10th June 2013 to be available.

8. That I honestly dairised the 11th to 13th June as the dates for commencement of the hearing of the petition.

9. That coincidently my client who was present in court also diarised the matter was to commence on 11th June -13th June 2013 and not 10th June 2013.

10. That I inadvertently made the wrong entry in my diary which caused myself and my lead counsel not be able to attend which was pure mistake on my side and the Petitioner should not be visited such mistakes and it is only fair to grant him opportunity to ventilate his case.

13. That any confusion on dates could have been eliminated had the registrar issued the requisite hearing notice pursuant to rule 19 of the Election (Parliamentary and County) Petition Rules 2013 (emphasis added.)

42. In response thereto the second Respondent had this to say in his affidavit.

Paragraph 15 in response to paragraph 5 - 10 I am informed by my advocate which advise I verily believe to be true that this matter came up for pretrial conference on 22nd May 2013 and that the pretrial conference was attended by all advocates on record including the petitioner himself.

16.That after consultation between the advocates including the Petitioner's Advocate, it was agreed that hearing of the petition shall commence on 10th June to 14th June 2013.

17.That the consent was recorded by counsels in court and further pretrial conference the petitioner sought and was given leave to file and serve fresh or further affidavit within the next three (3) days from the date of the said pretrial conference but contrary to those orders he served the same affidavit on 29th May 2013 way beyond the time set.

18.Therefore the allegation that the clerk indicated the dates is open lie as the dates for hearing were taken by consent between the parties and further still the judge confirmed the dates while reading out the order emphasis added.

43. I have deliberately quoted the said affidavits to show the conduct of the Petitioner in respect of the matter and note that the Applicant is blaming everybody else than himself and his Advocate for their non attendance and have noted that the Petitioner has not said anything on the consent order entered on the same and as was stated by Mutuku J in MOHAMED ALI MURSAL vs SAADIA MOHAMED & 2 OTHERS (2013)eKLR

"Consent order is binding on all parties to an action if made in the presence and with consent of counsel. One could not therefore challenge such an order unless it was shown to have been entered into through fraud, collusion or was a misrepresentation."

44. The Petitioner has not produced any evidence to show that there was any fraud collusion or misrepresentation on the part of the court and the Respondents in respect of the matter herein. The date having been taken by consent I take the view that there was therefore no need for the registrar of this court to serve hearing notice under the provision of Rule 19((h) of the Rules as alleged by the Petitioner and it was therefore upon the Petitioner and his Advocates to exercise some due diligence which in this case they failed to do.
45. I have also noted that the Petitioner who was in court at the time when the hearing dates herein were fixed and who is alleged to have also diarized the dates has not sworn any affidavit to explain the reason for his non-attendance and neither has the said diaries been annexed to Mr. Ngigi's affidavit to confirm that indeed it was a mistake which the court should excuse and therefore this is a case where the mistake of counsel or otherwise should be visited upon the petition as the petitioner and his Advocate was well aware that the court was constrained by time as stated in paragraph 6 of Mr. Ngigi's affidavit and in this holding I find support to in the case of MANJI v LALJI & OTHERS CIVIL APP NO. 236 OF 1992 where KWACH JA as he then was quoted with approval the remarks by G Lord Graffith in KETTLEMAN v HANSEL PROPIES LTD (1988)

"Another factor a judge must weigh in the balance is the pressure on courts caused by great increase in litigations and the consequent necessity that in the interest of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigant as was perhaps in the more leisure age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their head"

46. I take the view that election petitions fall under the category stated above the view supported by the Supreme Court of Kenya in ELECTION PETITION NO. 4 OF 2013 RAILA ODINGA vs INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS which I quoted with approval at paragraph 19 of my ruling under review herein as follows:

".... The requirements of such a disciplined trial-framework fully justified the unlimited exercise of the court's discretion in making orders that shape the course of the proceedings..." para 214

"The rigid time-frame for the resolution of presidential-election dispute was not in our opinion, conceived in vain at the time of the constitution making process. It is clear that expedition is of the essence in determining petition...(para 217).

47. The applicant should have taken note that as a result of the election petitions filed out of election of March 4th 2013 the Kenyan court system has come to a stand still and as I stated in the ruling under review while dealing with what has now been called "The tyranny of time" created by Article 105(2) of the Constitution the court will not exercise its discretion in aid of any party who has not complied with timelines set out in fulfillment of the overriding objective set out in Rules 4 and 5 of the Election (Parliamentary and County Elections) Petitions Rules more so when the said party has not exhibited to court that there was a genuine mistake on their part but blames the court for their own mistake.
48. Having looked at the affidavit in support of the application herein and the affidavit in opposition thereto and the submissions by counsels I take the view that the Applicant has not placed before the court sufficient material for the grant of orders sought and I therefore decline to exercise my discretion in his favour.

MERITS

49. Should I be wrong in the above finding then I have looked at the affidavit evidence presented by the Petitioner in support of the petition and the Respondents opposition thereof and would still dismiss the petition herein under the provision of section 79(a) of Election Act.

DETERMINATION

50. I therefore make the following findings:

i. ***That there is no provision under the Election Act which allows for setting aside, review and or reinstatement of a dismissed petition.***

ii. That the Petitioner has not made a case for the exercise of the courts inherent power and or discretion to set aside, review and or reinstate the dismissed petition.

iii. The application herein is therefore dismissed with cost to the Respondents.

Dated and delivered at Nyeri this 8th day of July 2013.

J. WAKIAGA

JUDGE

8/7/2013

Before Hon. Justice J. Wakiaga - Judge

Court clerk - Wanjohi

Mr. Ngigi for Mr. Korir for Petitioner.

Mr. Saitabao for the 3rd Respondent

Hold brief for Mr. Kibunja for 1st and 2nd Respondents.

Court: Court ruling read in open court in the presence of

advocates for the parties with Mr. Kibunja now present. The

Petitioner has right of appeal.

J. WAKIAGA

JUDGE

Mr. Ngigi: I apply for typed proceedings of the ruling and

proceedings made.

Mr. Kibunja: We also seek the copy of ruling for record.

Mr. Saitabao We apply for the copy of the ruling.

Court: The copies of typed proceedings and certified copies of the ruling to be provided to the Advocates and the parties herein upon payment of any requisite fee.

J. WAKIAGA

JUDGE.