



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT GARISSA

ELECTION PETITION NO. 4 OF 2013

ADEN YUSUF BUTE.....PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

RETURNING OFFICER GARISSA COUNTY.....2ND RESPONDENT

ABDIRAHMAN ABDULLAHI OMAR.....3RD RESPONDENT

R U L I N G

This ruling is in respect of Election Petition No. 4 of 2013. This petition was filed 8th April 2013 by one Aden Yusuf Bute against the respondents herein arising out of the election of 4th March 2013 against the election of Abdirahman Abdullahi Omar as the county representative for Saka ward in Balambala Constituency. The respondents filed their responses thereto and subsequently two interlocutory applications were also filed one dated 3rd May 2013 and another 8th of May 2013.

On 9th May 2013 the parties appeared before me for directions. It will be noted that on that date counsels for the 1st, 2nd and 3rd respondents were present in court.

The petitioner was present in person but his counsel did not appear. The court was however informed by the other counsel that Mr. Anyegah for the petitioner had called the other counsels indicating that he was stuck along the way. The counsels had however consulted and had agreed to deal with all interlocutory applications before commencing directions for the full trial. It was agreed that both the applications dated 3rd and 8th May respectively be heard together and on 20th May date was then taken. It is important here to mention that the gist of the two applications was that they sought to have the petition struck out for want of compliance with the rules.

Come 20th May 2013 all the counsels were present before court whereby Mr. Ondieki for the petitioner produced as deposit receipt in regard to the motion dated 8th May and the other counsels therefore conceded to have it deemed that deposit money had been paid in time. That effectively dealt with the motion dated 8th May 2013.

On the motion dated 3rd May 2013 counsel for the petitioner indicated that he was not ready to proceed, that he needed time to file response. Amidst protest by the respondents the court allowed the petitioner (seven) 7 days to file and serve his response and it was agreed by consent that the application dated 3rd May 2013 would be heard on 14th June 2013.

I also directed that on that date (14th June 2013) the petitioners would avail the process server in court for cross examination (if need arose) since the gist of the application is that the 1st and 2nd respondents sought to have the petition dated 5th April 2013 dismissed with costs interalia for want of any service on the 2nd respondent.

Come 14th of June 2013, this matter was called out in court for hearing. The respondents and their advocates were present in court. The petitioner and his advocate were however nowhere to be seen. It was already 11.00am. It was submitted by Mr. Keronga for the 1st and 2nd respondents that the other parties had not heard from the petitioner and his advocate, that date was taken by consent for the hearing of the application dated 3rd May 2013.

Further counsel added that in any event he had not been served with any replying affidavit. Also no grounds of opposition were filed. That the application sought to have the petition struck out with costs for want of service on the 2nd respondent. Secondly that it does not disclose any cause of action against the 2nd respondent. The application is also supported by the affidavit of Titus Kitheka Mutemi. He states that he was the returning officer for Balambala constituency and by extension the returning officer for all the wards in that constituency including Saka which is the subject matter of this petition. That under the law the returning officer is a necessary party in the election petition. That the returning officer has not been joined as a party to these proceedings and that for this reason the petition is incompetent and is good for striking out.

Mr. Kerongo stated that there is in the petition a person who has been sued who is called the returning officer Garissa county in that the work of the returning officer of a county is limited to supervising the election of Governor's only and for that reason the petition is incompetent since the returning officer for the constituency was never served with this petition. The evidence of the returning officer who has sworn an affidavit in support of the present application remains uncontroverted.

Mr. Keronga invited me to be persuaded by the ruling of the Chief Magistrate J. G. Kingori in ***Election Petition No 1 of 2013 at Maua***. Also article 87 (2) of the constitution of Kenya 2010 and also section 77 (2) and Rule 13 (1) of the election petitions rule and to make finding that service of an election petition must be direct or through advertisement in a newspaper with national circulation. That the petitioner in this case has not brought a date of service direct or through advertisement. That service of election on a respondent is a legal requirement and is not a technicality. Where a petition is not served on any one of the respondents, that that whole petition must be struck out with costs, and that in this case service has not been effected on the 2nd respondent herein and the petition must be struck out with costs.

I have addressed myself to the issues herein; First the petitioner has always dragged himself in this matter. During the initial appearance on 9/05/2013 the court noted that the petitioners advocated was absent although the petitioner was present in person. On that date the court heard from Mr. Keronga that counsel for the petitioner had called the other advocate saying he was struck on the way and his car had broken down. Counsels had however consulted and agreed to deal with all interlocutory applications before taking directions for the full trial. Thereafter it was still the petitioner who had not paid the deposit fee and made necessary the motion dated 8th May. They subsequently produced a deposit receipt making unnecessary that motion of 8th May. Now comes the motion of 3rd May and the allegation is that the petition was indeed never served on the 2nd respondent. On the date of the motion neither the petitioner nor his counsel attended. Guided by ***Election Petition No. 4 of 2013 (In the High Court of Kenya at Nyeri)*** Wakianga I make the observation that under the overriding objection of the election (***parliamentary and county elections***) petitions rule 2013 provides 4 (1) the overriding objective of these rules is to facilitate the just expeditious proportionate and affordable resolution of election petitions under the constitution and the Act (3). A party to an election petition or an advocate for the party shall

have an obligation to assist the court to further the overriding objective and to that effect to participate in the process of the court and to comply with directions and rules of court. The petitioner has all along dragged his feet together with his advocate. There is no word sent as to their absence from court on 14th June. On the authority of ***Jyoti Basu & others Vs. Debi Ghosal & others AIR 983 SCR (3) 318*** relied on also by Wekiaga in ***Election Petition No. 4 of 2013 Nyeri High Court*** this court ought to act within the statutory time limits provided as regards right to settlement of election disputes. The petitioner's absence from court together with his advocate frustrates the speedy disposal of election disputes. It is on this basis that I allowed the motion dated 3rd May to proceed despite the absence of the petitioner and his advocate. The result is that the motion dated 3rd May remains uncontroverted.

Service is denied by the 2nd respondent. It is incumbent upon the petitioner to prove service on the respondent. The application is not opposed. The petitioner and his advocate have not appeared in court. Mr. Keronge has submitted that he is not served with any replying affidavit. No grounds of opposition either as filed. The law on service of election petitions is well set out in the constitution of Kenya Article 87 (2) which provides "***service of a petition may be direct or by advertisement in a newspaper with national circulation***".

The Elections Act 2011 section 77 (2) also provides; "***A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation***"

The election petition includes rules in section 13 (1) states: "An election petition shall be served by the petitioner in the respondent by:-

- a. Direct service.....The rules in the interpretation section define a "respondent" in relation to an election petition to mean
 - a. A person whose election petition is complained of
 - b. The returning officer
 - c. The commission and
 - d. Any other person whose conduct is complained of in relation to an election persuaded by the ruling of my brother ***J. G. Kingori CM Maua Election Petition 1 of 2013 Maua*** the petitioner had under the constitution to serve the respondent directly or by advertisement.

The returning officer is under the law a necessary party in the election petition. The applicants have stated that the returning officer for the constituency was never served with this petition and there being no evidence to the contrary I am satisfied above the balance of probabilities and below beyond reasonable doubt (the standard of prove in election disputes) that indeed the 2nd respondent was never served with this petition and the petition is good for striking out with costs on the grounds of want of any service on the 2nd respondent.

The notice of motion has further sought orders that the name of the 2nd respondent herein should be struck out as the petition does not disclose any cause of action against the 2nd respondent. Towards this ground, the application is supported by the affidavit of Titus Kitheka Mutemi. He states that he was the returning officer of Balambala constituency and by extension the returning officer for all the wards in that constituency including Saka ward which is the subject of this petition. It has been submitted that in these proceedings the returning officer has not been joined as a party and that for this reason also the petition is incompetent and good for striking out. That we have in the petition a person who has been sued who is called the returning officer Garissa County.

The work of the returning officer for a county is limited to supervise the elections of Governors only, and

that for that reason the petition is incompetent. On this part I am in full agreement with the submissions by Mr. Keronga. The returning officer for the constituency and by extension for a ward are approved under rule 3 of the Elections Regulations 2012. The County returning officer on the other hand is appointed under Rule 4. Under the above provisions their duties are also clearly spelt out. The 2nd respondent has successfully contented that the returning officer for the constituency was never served with this petition. Indeed there is no affidavit of service filed, the petitioner did not appear in court and has made no attempt to defend the allegation for non service filed. As I have stated earlier did not appear in court and has made no attempt to service of election petitions on a respondent is a legal requirement and not a technicality. Where a petition has not been served on any one of the respondents that whole petition must be struck out with costs. I am guided by **Ayub Juma Wakesi Vs. Mwakwere Chirau Ali and 2 others (2008) KLR Sergon** I stated "In my view all the respondents must be served according to the manner prescribed. The fact that the Electoral Commission has been served does not matter. The returning officer must equally be served.....the returning officer is no less a respondent than the electoral commission, he must be served. If the petition is not properly served in all the respondents named, then the entire petition will be rendered incompetent" And I must add here that service on the wrong parties is a non service.

In conclusion this petition is good for striking out, the petitioner not only showed disinterest in it by failing to present himself in court personally or by advocate and also failed to effect service as by law required. There is also no cause of action disclosed against the 2nd respondent and I do hereby strike out this petition with costs to the respondents who were dragged into court by a non serious petitioner.

NDUNG'U H. N. (MISS) CM

1/07/13

Delivered in open court in presence of Keronga for 1st and 2nd respondents and holding brief for Kibongei for 3rd respondent. No appearance for petitioner. 3rd respondent present in person.

NDUNG'U H. N. (MISS) CM

1/07/13

KERONGA: I apply that the security for costs held by court in the sum of Kshs. 100,000/= be released to the advocates of the 1st and 2nd respondents so that the advocates for the 1st and 2nd respondents get Kshs. 50,000/= and for the 3rd respondent Kshs. 50,000/=.

NDUNG'U H. N. (MISS) CM

1/07/13

ORDER: The security for costs held by the court in the sum of Kshs. 100,000/= to be released to the advocates of the respondents in the terms proposed by Mr. Keronga above.

NDUNG'U H. N. (MISS) CM

1/07/13

ORDER: Proceedings and ruling to be typed with sufficient copies by each of the parties and their advocates.

NDUNG'U H. N. (MISS) CM

1/07/13



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