Case Number:	Election Petition Cause 10 of 2017
Date Delivered:	02 Nov 2017
Case Class:	Civil
Court:	High Court at Malindi
Case Action:	Ruling
Judge:	Patrick J. Okwaro Otieno
Citation:	Mbaraka Issa Kombo v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ELECTION COURT

AT MALINDI

ELECTION PETITION CAUSE NO. 10 OF 2017

MBARAKA ISSA KOMBO .....PETITIONER

VERSUS

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

2. WAFULA CHEBUKATI.....2ND RESPONDENT

3.THE GANZE SUB-COUNTY RETURNING OFFICER…....3RD RESPONDENT

4. TEDDY MWAMBIRE…….....4TH RESPONDENT

RULING

1. The 4th Respondent has sought by his application dated 28/9/2017 that the petition filed herein on the 6/9/2017 and dated the 6/9/2017 be struck out or dismissed on three principal grounds among others that:-

(i) It contravened the provisions of Article 87(2) for failure to state the date of declaration of results.

(ii) It contravened Rule 8(1) c & d and 12(2)c &d of the Election (Parliamentary and County Elections) Petition Rules by the failure to declare the results.

(iii) The petition is premised upon the Rules applicable for Presidential Election Petition in the Supreme Court and failure to observe the Elections (parliamentary and County Elections) Petition Rules.

2. The 4th Respondent equally prayed that the costs of the application and the petition be awarded to him. The application was wholly grounded on the grounds disclosed in the Notice of Motion without more and therefore one gets the impression that it is solely grounded on the requirements of the law as applied to the petition as filed without any need for finer inspection of any facts therein contained.

3. As it were the application met a challenge from the petitioner who filed grounds of opposition dated 2/10/2017 and filed on the 4/10/17. Those grounds of opposition fault the application for being misconceived, mischievous, made in bad faith, frivolous and vexatious on grounds that there are particulars contained in the affidavits filed in support of the petition and finally that the court is enjoined by the provisions of Article 159(2) d to excuse minor or trivial deviations from the requirements of the Rules made under the Elections Act.

4. There was also a Replying Affidavit filed whose main thrust was that even though in the body of the

petition and affidavit in support thereof there are no results stated, there was annexed to the Affidavit in support of the petition two documents, marked MK 3 and MK 4 which disclose the results returned at the elections and therefore the affidavits complies with the requirements of Rule 12(2) c and d of the Rules as annexure are part of the affidavit which in turn supports the petition and is an integral part of it.

5. The petitioner then caps his opposition by relying upon Article 159(2) d as being a cure for trivial or minor deviation from the Rules. These are the facts which I consider to Reply to the application because in my view paragraphs 1-7 of the same Affidavit address matter that are either largely formal or are of no of assistance to court on the dispute in the application.

6. Both sides, the 4th Respondent and the petitioner equally filed written submissions with lists of authorities. The 4th Respondent/Applicants submissions are dated 6th October 2017 and filed in court the same day and anchored upon the list of authorities dated 12/10/2017 filed in court the same day.

7. For the Petitioner/Respondent, submissions dated 2/10/17 were filed on 4/10/17 and supported by the list of authorities dated and filed on the 10/10/17. It would appear from the record and was confirmed at the hearing by Miss Luganje that the 1st – 3rd Respondent did not file any opposition to the application.

Submissions offered by the 4th Respondent

8. In his submissions made before court, Mr. Mosota, attacked the petition for failure to comply with the provisions of Article 87(2) which confers upon parliament the power to establish mechanism for the timely settlement of electoral disputes and pursuant to which the Election Act and the Rules and Regulations made thereunder have been enacted. In his submissions, Rule 8, Elections(Parliamentary and County Elections) Petition Rules, 2017,(henceforth called the Rules) are derivatives of the Constitution with regard to the principle and need for timely settlement election disputes and therefore anything done contrary to such dictates of the Constitution is by dint of Article 2 on the supremacy of the Constitution null and void. It was then added that by the provisions of Article 3 of the Constitution, every person, including institutions under the Constitution like the court, is bound to give effect to the value and principle of the Constitution hence a petitioner who fails to comply with the norms of the elections Act derived from the Constitution in effect has failed to abide by the dictates of the Article 2 and 3 of the Constitution and therefore in total breach of the Constitution with the inevitable consequence of the application of the constitutional prescription that the petition stands deemed null and void.

9. To the counsel the words of Rules 8 and 12 of the Rules, are mandatory in effect with the only inference being that Parliament intended that the date of election, the date of declaration and the outcome of the election be clearly and specifically pleaded and disclosed in a petition and that without the results sought to be challenged one has no valid petition to merit consideration by the court.

10. Mr. Mosota then added that the Kenyan superior Court have favoured strict compliance with the Rules regarding the form and content of election petitions. He cited ***ALI HASSAN JOHO –VS- SULEIMAN SHABAL & 2 OTHERS (2014) eKLR*** where the Supreme Court held that where a petition is challenging the result of an election the quantative breakdown of the votes cast is a key component in the cause so that at a glance one sees who the winner and losers were and by what number of votes.

11. He further cited the decision of the Court of Appeal in ***John Mututho –vs- Jayne Kihara (2008) 1 KLR*** where the Court of Appeal reversed the decision of the High Court and struck out a petition which did not disclose the results even though the failure to declare results were occasioned by the now well-known post-election violence of 2007 – 2008, admittedly beyond the control of the parties.

12. The 4th Respondent last relied on the decisions in ***Amina Hassan Ahmed –****vs*- Returning Officer, Mandera County & 2 Others (2013)eKLR as well as ***Evans Nyamboso Zedekieah & Another –vs- IEBC & 2 Others (2013) eKLR*** for the proposition that failure to give the particulars of results are not mere technicalities but a defect fatal to the petition.

13. On the invitation of Article 159 (2) d to cure the omissions, the counsel submitted that the transgression complained about and pointed out are not about the form but content and failure to comply with the law prescribing what a petition should contain. He relied on the Court of Appeal decision in ***Nicholas Kipto Arap Korir –vs- IEBC & 6 Others*** for the proposition that Article 159(2) d is not a panacea and cure for all ills because to apply it so would be to create an anarchical 'free for all situation' that would then not be regulated and handled as expected in an orgranised manner. He added that Article 159(2) d should never be employed in order to circumvent the Rules of the court or to render them otiose.

14. For the 1st – 3rd Respondent, having filed no papers in opposition to the application, Ms Luganje attended at the hearing and informed the court that she supported the application without anything to add to the submissions by counsel for the 4th Respondent.

15. For the Petitioner/Respondent, Mr. Gicharu opposed the application and relied on the grounds of opposition, the Replying Affidavit and the written submissions supported with the list of authorities. His first salvo against the application was that being unsupported by any affidavit, it lacked any factual foundation to support it and thus ought to be dismissed.

16. On the merits, Mr. Gicharu referred the court to paragraphs 5 and 11 of the petition which, he contended, disclose when the elections were conducted and who won and added that even if there would be disclosed non-disclosure, Rule 4 of the Rules imports the **oxygen principle** which urges sustenance of disputes for hearing on the merits rather termination on technicalities. In addition, Mr. Gicharu referred the court to the affidavit in support of the petition which had exhibits with the results. The court was then referred to Rule 5 of the Rules as granting the discretion to the court to consider the gravity of any transgression so as to oust the application of Article 159(2) d. It was then added that the threshold for striking out, with the inevitable consequence of shutting out the petitioner from the seat of justice before hearing, had not been made.

17. In order to put his opposition in perspective, Mr. Gicharu relied on his list of authorities and in particular, the decision by lady Justice Lesiit in ***Mercy Kirito Mutegi –vs- Beatrice Nkatha Nyaga (2013) eKLR*** where the Judge declined to strike out the petition because the results were by the Rules obtainable from the 2nd Respondent' (IEBC), hence failure to set out the election results did not visit any prejudice on the Respondent. To Mr. Gicharu the decision by Justice Lesiit was grounded upon the then Rule 21, of the Rules which to him is currently Rule 5 of the 2017, Rules.

18. The decision in ***Bashir Haji Abdullahi –vs- Adan Mohammed Noor and Others (2013) eKLR*** was also cited to have distinguished the decision in ***Amina Hassan Ahmed(supra)*** and ***John Mututho –vs- Jayne Kihara(supra)***

19. Lastly Mr. Gicharu cited to court the decision in ***Hosea M. Kiplagat –vs- Sammy Komen Mwaita & 2 Others*** for the preposition that some errors do not go to the root of a matter so as to render a petition fatally defective in which case the petition ought not to be struck out. In that the same decision the Judge revisited the principles applicable in striking out a pleading. The case of ***DT Dobie –vs- Muchina*** was also cited to underscore the understanding that striking out is a draconian remedy that ought to be employed in the clearest of the clear cases. On those submissions the counsel urged that the

application to strike out be dismissed.

20. In closing submissions, Mr. Mosota sought to stress the point that the requirement under Rule 8 is not a matter of naming the winner and loser, rather it demanded setting out of the entire and complete result of the votes cast and tallied in favour of each candidate and that the decision in Hassan Joho's case was clear that the full results need to be tabulated.

21. On the decision in Mercy Kilito Mutegi (supra) the counsel drew the courts attention that the decision by Lesiit J, was appealed against and overturned in Court of Appeal Civil Appeal NO 48 or 2013, and therefore was not good law as the appellate court agreed with the decision in Hassan Joho on the material particulars to be pleaded in an election petition.

22. On the decision in Hosea Kiplagat (supra), the counsel distinguished the decision as being different from the facts here. To him in that decision the issues were mundane concentrating on the order of names of the petitioner and erroneous stating of the date which the court held did not mislead the opposite side.

23. On DT Dobie –vs- Muchina, Mr. Mosota took the position that it concerned itself with the application of civil procedure Rules and not the special Rules under the elections Act which are those applicable here. On the submissions that no prejudice had been demonstrated to have resulted from the failure to state the results, Mr. Mosota argued that it must not be the Respondent to demonstrate prejudice but that it was the law as enacted by the Kenyan people who would be the casualty. On the fact that form 35B had been exhibited, Mr. Mosofa was of the view that the law mandated that the results be set out in the petition and the affidavit in support thereof and not merely being annexed. And, for failure to support the application with an affidavit, the counsel argued that an affidavit introduces facts but in this case the issue was purely one of law thus making it unnecessary the introduction of facts.

24. The court then allowed Mr. Owour, who appeared with Mr. Mosota to address it purely on points of law. In his short address Mr. Owour urged the court to hold that in an election petition, it is the results which form the cause of action and without such results being declared no cause of action was disclosed.

Issues, Analysis and Determination

25. Having read the application, the responses thereto and the submissions and list of authorities cited and having heard the counsel submit on the application, the following issues have presented themselves as asking the court for resolution and determination:-

(i) *Did the petitioner comply with the dictates of Rule 8 and 12 of the Elections (Parliamentary and County Elections) Petition Rules"*

(ii) *What is the effect and ramification of failure to comply with the said Rules.*

(iii) *What is the fate of the petition upon determination of the two foregoing questions"*

(iv) *What orders need be made on costs.*

26. Before I venture into considering the merits of the application, it is necessary to consider the substantive prayer in the application. It is drafted and worded as follows:-

“a. The Petition of Mbaraka Isaa Kombe dated and filed on the 6/9/2017 be struck out and or be alternatively and without prejudice to the goreging,it be dismissed.”

27. Clearly in law, prior to hearing a matter on the merits the court has no mandate to dismiss a matter. Where the pleading is alleged to be defective and therefore deserving no employment of judicial time by production of evidence, and if the court finds that there is indeed defect that renders the pleading unremitting of a hearing, so as to be terminated before the merits are scrutinized and delved into, the court only strikes out the pleading. The two terms, ‘**dismissal and striking out**’ must therefore be differentiated for their true meaning and import and cannot be used interchangeably nor confused with each other. I hold the view that striking out is a summary procedure that investigates no merit of the dispute but looks at the propriety of the matter as presented and how it sits with the law. Therefore a suit would be struck out on account of facts including; lack of jurisdiction, failure to meet the thresholds of statutory requirement like not revealing a genuine and justiciable cause or for being an abuse of the court process like where it is *res judicata* or merely calculated to achieve a vexation of the defendant. To the contrary dismissal of a cause would follow scrutiny of the merits of the dispute as articulated and after consideration of the facts and evidence grounding the cause.

28. In this matter therefore, the petition is faulted for allegedly not disclosing what results are being challenged and the date of the declaration of the results. What the 4th Respondent seeks from court is not to scrutinize the merits of the complaint and the evidence sought to be offered. Rather, the 4th Respondent contends that as crafted, pleaded and filed, the petition violates the dictates of the law pursuant to which it was brought and therefore it is improperly before the court and need not be interrogated but terminated preliminarily without the need to adduce evidence. If the court was to find for the respondent at this juncture, the merits of the dispute shall not have been gone into and the court would be saying, this is a non-starter, it was a petition that never was and it is struck out, not dismissed, without the need for more.

29. There also exists a distinct difference on the effect and ramification of the orders a court gives when the two terms are employed. A matter that is struck out may be brought properly if it parameters of Limitation Of Action Act do allow. To the contrary, a matter which is dismissed stands dismissed and is not capable of being re-litigated.

30. That being my understanding of the law, I will consider the application by Notice of Motion dated 28/9/2017 to urge the court to consider striking out the petition rather than dismissing it.

Did the petitioner comply with Rule 8 and 12 of the Rules"

31. The two rules are word for word for each other. The only difference being that Rule 8 is on the content of a petition while 12 is on the content of the affidavit in support of the petition.

32. The two provisions do command that the petition and the affidavit “SHALL STATE”…." I do not doubt that the provisions make it mandatory that the particulars so listed be included in both the petition and the affidavit in support. That being the position and the court’s stand, to answer the question, the court merely needs to look at the petition and the affidavit in support thereby to satisfy itself whether compliance was made or not.

33. In opposing the application, Mr. Abubakar referred the court to paragraphs 5 of the petition and stood his ground that there was full compliance with Rule 5. That paragraph together with the sub-heading of the petition Proceeding it reads:-

"BRIEF OVERVIEW OF THE LAW AND GROUNDS OF THE PETITION

5; Your humble petitioner states that the election was held on the 8th day of August 2017, when Peter Safari Shehe, Teddy Ngumbao, Joseph Kingi Kahindi, William Chengo Kenga and Anderson Kenga Mweni were candidates, and the 2nd Respondent returned Teddy Ngumbao Mwambire as the duly elected member of National Assembly for Ganze Constituency purportedly by 36,450 votes which results were published in the Kenya Gazette VOL XIXI NO 121 dated 22nd day of August 2017 being Gazette Notice No 8239."

34. The counsel also referred the court to paragraphs 5 of the affidavit of the petitioner which annexes the two documents being form 35B and the gazette notice of the election results all to support his position that there was full compliance with the dictates of the Rules.

35. Having read the petition and the affidavit of the petitioner in support of the petition, I cannot but hold that there was never compliance with **Rule 8(1) c & d.** This is because the full results are not disclosed anywhere just as there is no date the declaration of the results was made.

36. It is not enough that the petitioner said who won the elections by how many votes. The duty imposed upon him by the law would only be discharged if he set out and tabulated in the petition the complete result of the elections as declared by the Returning Officer. That would entail stating what each of the six(6) candidates garnered at the election so as to meet the requirement of the rule which was interpreted by the Supreme Court in Joho's Case(supra) to mean a 'quantitate and numerical composition'. I understand that to mean an entire breakdown of what the outcome was for every candidate participating at such an election. It is not enough to state that so and so won with so many votes and rest with your full stop.

37. Most importantly, even if there would be excused non-disclosure of full results, the date of declaration must be there for it is the trigger for computation of time so that the court establishes when time to file a petition would start to run and end.

38. It is not in vain that the Rules Committee has devoted two distinct but elaborate rules on what ought and must be stated in a petition and the affidavit. I hold the view that the overriding consideration is that Constitutional principle that election dispute ought to be settled in timely manner. That dictate obliges the parties to a petition to avail all that is needed in a clear and easily discernible manner so that court employs no time in second-guessing or just making assumptions. I hold that the sum total of Article 87(2), Section 76(1) a of the Election Act and the Regulation and Rules made thereunder leave no doubt that a petitioner is obligated to give as much detail as possible and not less than the benchmark at Rules 8(1) and 12(2)

39. If timelines in determination of electoral disputes is a norm and principle of the Constitution then all the rules that further such norms and principles are themselves derivatives of the constitutional ethos and must as of necessity be complied with to the letter. In ***John Mututho –vs- Jaynen Kihara, (supra)*** the Court of Appeal said

"What would happen where, as here, the results as envisaged by regulation 40 above are not included in the petition. In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaint a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then the petition would be incurably defective."(emphasis added)

40. Having found that the petitioner failed to give detailed results and the date of declaration and that such particulars are mandatory, and being bound by the decision of the court of Appeal in Mututho's Case, I have come to the conclusion that the petition filed herein by MBARAKA ISSA KOMBE is incurably defective and being so incurably defective it merits no further scrutiny whether the complaints by him can be proved or supported by evidence. It presents itself to only one fate, having not been heard on it merit, of being struck out. This determination settles the three issue earlier on isolated and therefore passes as full determination.

41. I therefore struck out the petition and award the costs thereto to the Respondents. I cap such costs to an all-inclusive sum of Kshs 2,500,000/= to be paid by the petitioner to the Respondents.

42. As between the Respondents, I note that one set of Response was filed by one firm of Advocates for the 1st – 3rd Respondent while the 4th Respondent had his own advocates. I reckon that the advocates for all the Respondents have given their addresses of service to be in Nairobi, have therefore incurred additional expense in transport costs, and direct that each gets an equal portion of the costs. Each shall therefore get Kenya Shillings One Million, two hundred and fifty thousands (Kshs 1,250,000/=).

It is so ordered.

Dated and delivered at Malindi this 2nd day of November, 2017

P. J. O. OTIENO

JUDGE