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| Case Number: | Election Petition 1 of 2017 |
| Date Delivered: | 09 Nov 2017 |
| Case Class: | Civil |
| Court: | Election Petition in Magistrate Courts |
| Case Action: | Ruling |
| Judge: | Felix Makoyo - Senior Resident Magistrate |
| Citation: | Mbayi Sayyed Omsiritsa v Nancy Iyadi & 2 others [2017] eKLR |
| Advocates: | Kiveu Advocate for the Petitioner, Namatsi Advocate for the 3rd Respondent |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | - |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | One party or some parties represented |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

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REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT BUTERE

ELECTION PETITION NO 1 OF 2017

**IN THE MATTER OF THE ELECTIONS ACT 2011 (LAWS OF KENYA) AND THE REGULATIONS
MADE THEREUNDER**

AND

**IN THE MATTER OF THE ELECTION FOR MEMBER OF THE COUNTY ASSEMBLY MARAMA
NORTH WARD, BUTERE CONSUENCY**

BETWEEN

MBAYI SAYYED OMSIRITSA.....PETITIONER

-AND-

NANCY IYADI.....1ST RESPONDENT

INDEPENDENT ELECTRAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

NANDWA CHARLES EDWIN LISUNU.....3RD RESPONDENT

RULING

1. The 3rd Respondent/Applicant (herein after referred to as the Applicant) filed a Notice of Motion application dated 9th October 2017 brought under section 77 of the Elections Act and Rule 13 of the Election (Parliamentary and County) Petition Rules 2017 seeking orders;

a) That the Petition herein be dismissed and/or struck out for failure to comply with mandatory provisions of the law;

b) That the paragraph 11 (i-vi) of the Petition be struck out for being vague, nebulous and general;

c) That in the alternative of the foregoing, the following paragraphs of the affidavits below be struck out for being scandalous, frivolous and an abuse of the due process of the Court;

i. Paragraphs 5-10 and 12 of the affidavit of Mbayi Sayyed Omsiritsa deponed on 5th September 2017

ii. Paragraph 3,4 and 7 of the affidavit of Jane Khanda Lumbasi deponed on 5th September 2017

iii. Paragraph 3 of the affidavit of Elijah Maloba Nandwa deponed on 5th September 2017

iv. Paragraph 4 of the affidavit of Gilbert Milton Okaye deponed on 5th September 2017

v. Paragraph 5,6 and 7 of the affidavit of Rose Okwaro Lanya deponed on 5th September 2017

vi. The entire affidavit of Kennedy Amariati

vii. Paragraph 3,4 and 5 of the affidavit of Floice Kuboha Shilindwa deponed on 5th September 2017

viii. The entire affidavit of Repher Aketch Achoki

ix. Paragraphs 4,5,7,9 and 10 of the affidavit of Everlyne Nyongesa deponed on 5th September 2017

x. Paragraph 4,5,6 and 7 of the affidavit of James Asiali deponed on 5th September 2017

2. The application is supported by the grounds on the face of it as well as the applicant's affidavit sworn on 9th October 2017. In brief the applicant's case is that the Petition was served upon him by way of advertisement but that the same was out of time and not within the requirement of Rule 12 of the Election Petition Rules 2012. The applicant further states that the Petition fails to disclose the date of declaration of results as well as the results themselves and that the aforementioned paragraphs of the affidavits in support of the Petition are nebulous, vague and so general that the Respondents are not able to defend themselves. He was of the opinion that the Petition is an abuse of the Court process and ought to be dismissed.

3. The Respondent/Petitioner (herein after referred to as the Respondent) filed his replying affidavit sworn 17th October 2017. The 1st and 2nd Respondents did not file any opposition to the application. The Respondent deponed that the Petition was in strict conformity with the law and that neither paragraph 11 of the Petition nor any paragraphs in the affidavits in support were nebulous, vague or general. According to him the Petition was filed within time and in conformity with the prescribed rules. The Applicant was reluctant to acknowledge receipt of the Petition thus necessitating service by advertisement. He urged the Court to dismiss the application as it fell short of the threshold to strike out an Election Petition.

4. The process server Zablon Ochieng Senge and the applicant Charles Nandwa were cross-examined on 2nd November 2017 by consent of the parties. The process server told the Court that he was instructed by the Petitioner on 11th September 2017 to serve summons to enter appearance, the instant Petition and the affidavits in support upon the respondents. He served the 1st respondent on 11th September 2017 and the 2nd respondent on 15th September 2017.

5. He further told the Court that he attempted service upon the applicant on 11th September 2017 at his Ebutanyi home but was informed that he had travelled to Mombasa on an official trip. He therefore returned to the applicant's Ebutanyi home on 18th September 2017 where he effected service of the aforementioned documents upon the applicant personally. He told the Court that the applicant declined to acknowledge receipt on the basis that he had instructed his lawyer based in Kakamega town to accept service on his behalf.

6. The applicant on his part told the Court that he had seen the process server for the first time in Court and that he was never served with the Petition at any time. He told the Court that he heard from a friend about the Petition and he sent his Counsel to Butere Law Courts where he obtained a copy of the same at his cost. He told the Court that he responded to the Petition out of abundance of caution. He stated that the MCA induction workshop he attended in Mombasa was in the public domain and any person wishing to access him would have been able to do so.

7. In his submissions the applicant argued that following the cross-examination of the process server it was clear that he was never served with the Petition. According to him, the process server had misdescribed the applicant's home in his affidavit of service and in particular, the number of houses, the existence of a gate, the colour and material of the roofing within the said home. The service by advertisement was done since the applicant knew he had not served on 18th September 2017 and that the said service by advertisement was not done in compliance with the format prescribed in Rule 13 (b) of the Elections Petition Rules.

8. The respondent on his part submitted that Article 159(2)(d) of the Constitution of Kenya and section 80(1) (d) of the Elections enjoin Courts to decide matters without undue regard to technicalities. That the Elections Act overriding principle under section 4(1) is to facilitate the just expeditious, proportionate and affordable resolution of election petitions. That the applicant has not set out the mandatory provisions of law alleged to have been offended or demonstrated to the Court the prejudice he has suffered as a result of the shortcomings of the petition. He further argued that the Court has powers to order for additional evidence which would cure the alleged deficiencies of the petition.

Issues for Determination

9. The issue for determination is whether the applicant was served with the petition within time and in the proper form.

10. The issue of service of the petition is dealt with in Article 87 of the Constitution which provides as follows;

Electoral disputes.

87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

11. The provisions of Article 87 are reiterated in section 77 of the Act provides as follows;

77. (1) A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.

(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

12. Article 87 of the Constitution and Section 77 of the Act prescribe the time for filing and the mode of service of the petitioner. These provisions provide the petitioner with two options to effect service; direct or personal service or service through advertisement in a newspaper with national circulation. Rule 10 (1) of the Elections Petitions Rules 2017 provides that a petition shall be served upon the respondent within fifteen days of filing.

13. The petitioner has the right to elect the mode of service and service by advertisement is an independent option and not a last resort when the petitioner has exercised due diligence in effecting

personal service and has failed to do so. In this case, the respondent claims to have effected both personal service as well as service by advertisement. It is not disputed that the 1st and 2nd respondents in the petition were served personally on 11th September 2017 and 15th September 2017 respectively. It is also not disputed that the applicant was served by advertisement on 21st September 2017. The contention is whether the applicant was served on 18th September 2017 and whether service by advertisement was done within time.

14. From the applicant's cross-examination and his documents in support as well as the inconsistencies in the process server's evidence, I am inclined to believe that he was not personally served with the petition on the 18th September 2017 thus necessitating him to procure a copy of the petition on his own initiative on 20th September 2017. However, it is not in dispute that the applicant was served by advertisement on 21st September 2017. According to my computation of time in line with the provisions of Order 50 rule 8 of the Civil Procedure Rules, the respondent had up to 21st September 2017 to serve the petition upon the applicant as all other respondents had been duly served. It is abundantly clear that the respondent met the deadline.

15. I will now move to the issue of the form of the petition. The applicant took issue with the dimensions of the said advertisement on page 44 of the Standard newspaper of 21st September 2017. Rule 10 (3) of the Elections Petitions Rules 2017 requires such an advertisement to be of at least font size twelve and captured in dimensions of not less than ten centimeters by ten centimeters. From a cursory look at the said advertisement, it is evident that it does not meet the said requirements. An in depth examination of the dimensions reveal that it measures seven (7) centimeters by eight point five (8.5) centimeters. It is not in compliance with the set requirements.

16. However, having found that service was proper, I believe it would be unjust to strike out the petition solely on the grounds that the respondent opted to save on a few centimeters in his endeavor to serve. The ends of justice in the circumstances would dictate that the matter be heard and determined on merit. But for the failure to adhere to the law, the respondent would be condemned to costs for this infringement.

17. The applicant seeks to have the petition struck out on the grounds that it did not disclose the date of declaration of the results as well as the results themselves. This particular issue received very little attention from both the applicant and respondent in their respective submissions but thankfully this Court merely needs to look at the petition to satisfy itself that the petition was in compliance with the law and more specifically with Rule 8 of the Elections Petitions Rules 2017.

18. Having read the petition, I find that the respondent did not comply with Rule 8(1) c & d. This is because the full results are not disclosed anywhere just as there is no date when the declaration of the results was made. In his petition the respondent merely made reference to the results of one polling station, that is, Bulanda Primary School. The duty imposed upon him by the law would only be discharged only 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 his opponents garnered in the election so as to meet the requirement of the rule which was interpreted by the Supreme Court in **ALI HASSAN JOHO -VS- SULEIMAN SHABAL & 2 OTHERS (2014) eKLR** where the Court held that where a petition is challenging the result of an election the quantitative 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.

19. Even if the non-disclosure of full results could be excused, 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. I rely on the case of **MBARAKA ISSA KOMBO –VS- I.E.B.C. & 3 OTHERS MALINDI HIGH COURT PETITION NO. 10 OF 2017** where the Court stated, “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 there under 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).”

20. The Court went further to state, “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.” The Court cited the case of **JOHN MUTUTHO –VS- JAYNE KIHARA (2008) 1 KLR**, where 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.”

21. Having found that the respondent failed to give detailed results and the date of declaration and that such particulars are mandatory, and being bound by the decision of the High Court and Court of Appeal, I have no choice but to arrive at the conclusion that the petition filed herein by Mbayi Sayyed Omsiritsa is incurably defective. I therefore strike out the petition and award the costs to the Respondents.

22. Having struck out the petition, I am of the considered opinion that prayers 2 and 3 of the application dated 9th October 2017 have now become moot. It would be superfluous to consider striking out portions of a document the Court has already struck out and I will therefore not address the same.

23. Section 84 of the Elections Act provides that, “An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.” Rule 36 (1) of the Rules provide:

The Court shall, at the conclusion of an election petition, make an order specifying

- a) the total amount of costs payable; and
- b) the person by and to whom the costs shall be paid.

The instant petition has been struck out at the preliminary stage before the pre-trial conference has taken place and therefore the instruction fees for the petition and application as set out, is Kshs. 100,000/= . The other incidental costs shall be assessed and the total costs certified.

24. The final orders of this Court are therefore are follows;

- (a) The petition be and is hereby struck out.
- (b) The respondents are awarded costs of the petition and the application assessed as follows:

- (i) Kshs. 100,000/- as the total instruction fees for the petition for the 1st and 2nd respondents.
- (ii) Kshs. 100,000/- as the total instruction fees for the petition and application for the 3rd respondent.
- (iii) All other incidental costs shall be assessed and the total costs certified.
- (iv) A certificate of this determination in accordance with section 86(1) of the Elections Act, No. 24 of 2011 shall issue to the Chairperson of the Independent Boundaries and Electoral Commission, the Speaker of the County Assembly, Kakamega County and the Hon. Chief Justice of the Republic of Kenya.

Dated, Signed and Delivered at Butere this 9th day of November 2017.

FELIX MAKOYO

SENIOR RESIDENT MAGISTRATE

In open court, in the presence of:

Court Clerk: Doris

Kiveu Advocate for the Petitioner present

No appearance for the 1st and 2nd Respondent

Namatsi Advocate for the 3rd Respondent present

Petitioner present

3rd Respondent present



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