



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
ELECTION PETITION NO 10 OF 2017
IN THE MATTER OF THE CONSTITUTION OF KENYA
ELECTIONS (*Parliamentary & County Elections*)

PETITION

HASSAN OMAR HASSAN.....1ST PETITIONER

LINDA MARIWA SHUMA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

NANCY WANJIKU KARIUKI.....2ND RESPONDENT

HASSAN ALI JOHO.....3RD RESPONDENT/APPLICANT

RULING

Background

1. The 3rd Respondent/Applicant moved this Court by way of a Notice of Motion dated 26th September, 2017 under **Article 180(5) & (6) of the Constitution of Kenya, the Elections Act, 2011, the Election General Regulations** and the **Election Petition Rules, 2017** seeking orders **THAT**:

(a) The Petition of Hassan Omar Hassan and Linda Mariwa Shuma dated and filed in Court on the 8th of September, 2017 be struck out, and or, alternatively, be dismissed.

(b) The costs of this application and the Petition be awarded to the 3rd Respondent/Applicant herein.

2. The 3rd Respondent/Applicant herein argued that by the wording of **Article 180(5) & (6) of the Constitution of Kenya**, the deputy governor is described and expected, and does participate in the election as a candidate for deputy governor. The election of the Governor and Deputy County Governor is intertwined, inseparable and both are elected during the same election; therefore, the presentation of this Petition to the exclusion of the running mate of the 3rd Respondent/Applicant is fatally defective and

incompetent.

3. The 3rd Respondent/Applicant contended that both the Constitution and the Election Act limit the period within which an Election Petition can be filed to twenty eight (28) days from the date of declaration of the results. For this reason, the Deputy County Governor has no way of joining and participating in the proceedings. He argued that to proceed with the hearing of this Petition without the participation of the Deputy County Governor will mean that the rights of the Deputy County Governor will stand to suffer, in contravention of **Article 25(c) of the Constitution**; and contrary to the Rule of Natural Justice “*audi alterem partem.*”

4. The 3rd Respondent/Applicant argues that the main ground and basis for which this Petition is brought is the request for a fresh election in the County of Mombasa; and the petitioners cannot, as long as their failure to sue the Deputy County Governor remains unrectified, request this Court to order the holding of a fresh election since **Article 82 of the Constitution** indicates that the Deputy County Governor is to assume office in the event that the Governor is removed from office. The failure by the petitioners to enjoin the Deputy County Governor in this petition is therefore constitutionally fatal to the whole petition.

5. The Application was opposed by the 1st and 2nd Petitioners vide a statement of grounds of opposition dated 2nd October, 2017 on grounds that the application is incompetent and bad in law as it contravenes **Order 51 Rule 13(2) of the Civil Procedure Rules, 2010.**

6. The Petitioners argued that by virtue of **Section 2 of the Elections Act, 2011** the Deputy County Governor is not a candidate in elections and is not nominated by a political party under **Section 13** thereof. That **Section 39 of the Elections Act** nowhere contemplates the election and declaration of results of Deputy County Governor and that there is no provision for the issuance of a certificate for a Deputy County Governor. Therefore the Deputy County Governor is not declared elected and is merely a beneficiary of the votes obtained by the County Governor.

The 3rd Respondent/Applicant’s Case

7. At the hearing, Mr. Buti, Learned Counsel for the 3rd Respondent argued that in Kenya marginal notes are used to interpret legislation and cited the case of **Shamji Visram & Kassam v Bhatt and others (1965) EA pg 790**. In the case it was stated that while in Britain Courts will normally not have regard to marginal notes for assistance in construing the terms of a section due to historical reasons that marginal notes were added after the legislation had passed, in Kenya, however, marginal notes always form part of the bill presented to parliament.

8. It was the submission of Mr. Buti that from the marginal notes of **Article 180**, it is evident that the article in addresses two main issues: the election of a County Governor and the election of a Deputy County Governor. These constitutional provisions underscore the inseparability of the election of the County Governor from that of the Deputy County Governor.

9. Counsel submitted that vide a Gazette Notice dated 18th August, 2017, the Deputy County Governor and County Governor were declared winners and this declaration was to the effect that the Deputy County Governor was also elected in the elections held on 8th August, 2017 and in such election the Deputy County Governor also received a majority of the votes cast in the elections. In support of this submission, the Court was referred to the case of **Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkediye & 3 others [2013] eKLR**, wherein the question whether the post of Deputy Governor is an elective post and therefore subject to an election petition was addressed by Mabeya J and the court held that:

“The Constitution directs the IEBC to declare a Deputy Governor nominated by a person subsequently elected to have been elected Deputy Governor. To my mind, this means that the election of Governor and his Deputy is one ticket. When electing the Governor, the voters likewise elect the Governor’s Deputy.

To my mind therefore the election of Governor cannot be separated from that of his deputy. I therefore hold that the post of Deputy Governor is elective and therefore susceptible to an election petition as is a Governor's seat."

10. It was the 3rd Respondents argument that the Court is barred from removing the Deputy County Governor from office through a petition that has not been filed against him without allowing him an opportunity to be heard contrary to **Article 25(c)** of the **Constitution**. That in the event the matter proceeds to full hearing and the petitioners prove their case, the constitution has expressly banned the granting of the prayer for a fresh election because the Deputy County Governor, who is not a party to the petition, would take over, under **Article 182(2)** of the **Constitution**.

11. It was further submitted that the exclusion of the Deputy County Governor cannot be cured at this stage because the 28 days within which amendment to the petition could have been made has since lapsed. The Respondent cited the case of **Amina Hassan Ahmed V Returning Officer Mandera County & 2 Others [2013] eKLR**.

12. Mr. Balala, learned Counsel for the 3rd Respondent argued that the petitioners have failed to comply with **Rule 8(5)** of the **Election Petition Rules**, thus rendering the petition incompetent. He also cited the case of **Amina Hassan Ahmed V Returning Officer Mandera County & 2 Others [2013] eKLR**.

13. It was also counsel's argument that the acknowledgment of the petition is only signed by Hassan Omar, while the 2nd Petitioner Linda Shuma who has purported to also sign the petition did not sign the acknowledgment. This omission on the part of Linda Shuma vitiated the entire petition and not just her own. He opined that the petition is therefore fatally defective. Counsel made reference to the case **Chelaite v Njuki & 2 others (2008) 2 KLR (EP) 103** wherein the court stated:

"It is a receipt or acknowledgment by the Registrar of the Superior Court that a Petition was presented on such and such a day and it purports to be signed by a Petitioner."

14. The 3rd Respondent's submissions also cite the case of **Rozah Akinyi Buyu v IEBC and Others 2014 eKLR** which reads:

"Where there is a specific rule in the Rules, it alone to the exclusion of the Rules of Civil Procedure shall prevail, and it must be strictly complied with because election petitions are subject of special jurisdiction."

15. Mr. Mosota, Learned Counsel also for the 3rd Respondent submitted that the issues raised are not merely technical objections, but are substantive issues of law. Counsel contended that the remedies sought in the Petition are not compatible with **Article 186** of the **Constitution of Kenya, 2010** and admitting such a petition would be tantamount to admitting an unconstitutional act, contrary to **Article 3** which obligates all persons to at all times uphold the supremacy of the constitution. He argued that the legislature laid emphasis on matters of compliance with regard to election petitions because election petitions are serious matters and persons who wish to challenge an election must comply with the regulations.

1st and 2nd Respondents Case

16. Mr. Nyamodi, learned Counsel for the 1st and 2nd Respondent supported the 3rd Respondent's Application and submitted that whereas the 1st Respondent did not wish to make submissions on issues of fact raised in the Application, it is constitutionally mandated to assist the Honourable Court only in respect of issues of law that arise from the Application. The 1st Respondent as a neutral and impartial arbiter of the election process therefore only submitted on the 1st ground as raised by Mr. Buti with regard to the non-joinder of the Deputy County Governor.

17. Learned Counsel submitted that the Deputy County Governor is elected into office by dint of **Article 180(5) of the Constitution** and upon the election of a Governor, is treated as elected as if he had vied in an election.

18. Mr. Nyamodi averred that as per **Article 100(6) of the Constitution**, the 1st Respondent declared the 3rd Respondent duly elected via Form 37B. Having been declared as such, the Governor and Deputy County Governor were the successful candidates for the seats of Governor and Deputy County Governor respectively, therefore the nonjoinder of the Deputy County Governor to the petition is a fatal flaw. Counsel relied on the case of **Aboub Ali v The IEBC and 2 Others [2013] eKLR** as adopted in **Ismail Suleman & 9 Others v Returning Officer Isiolo County, IEBC and 3 Others [2013] eKLR**.

19. In addressing the question as to whether the nonjoinder is curable by amendment, Counsel cited the case of **Amina Hassan Ahmed V Returning Officer Mandera County & 2 Others [2013] eKLR**, in support of the submission that the non-joinder of the Deputy County Governor cannot be cured by way of an amendment to the petition. He argued that such an action would be tantamount to introducing cause of action not pleaded in the present petition. Counsel averred that causes of action herein are governed by **Article 87 of the Constitution and Section 76(1) of the Elections Act**, which bar the introduction of a cause of action after the lapse of 28 days.

20. Mr. Nyamodi submitted that this is not a mere technicality which **Article 159(2) of the Constitution** informs the Court to disregard. He cited the case of **Kithinji Kiragu v Martin Nyaga Wambora & 2 others [2013] eKLR** in support of his argument that in the instant case, the court is being called upon to consider the position of the Deputy County Governor, who will be required to vacate office unheard if the petition is allowed and urged the Court to strike out the petition.

21. Mr. Nyamodi submitted that **Article 19 of the Constitution** elevates the Bill of Rights against all other constitutional provisions and that **Article 20(1)** has the effect that the Bill of Rights applies to all law and binds all state organs and all persons. Counsel cited the case of **Tinyefuza v the Attorney General Constitutional Appeal 1 of 1997** and submitted that in applying the Law, all courts are mandated to develop the law to the extent that it does not give effect to a right and fundamental freedom.

The Petitioner/Respondent's Case

22. The Petitioners in their submissions addressed the question whether the Deputy County Governor is a necessary party to the election petition and whether the nonjoinder was fatal to the petition. Mr. Aboubakar, Learned Counsel for the Petitioners/Respondents, submitted that the Deputy County Governor is a beneficiary of the Governor. He cited the case of **Kithinji Kiragu v Martin Nyaga Wambora & 2 others [2013] eKLR**, wherein the issue of non-compliance was raised in cross examination. The Court took the view that the proceedings concerned a validly elected party and the Deputy County Governor is a nominated party, not elected.

23. Mr. Aboubakar cited the case of **Dr. Thuo Mathenge & another v Nderitu Gachagua**, wherein the Court held that the constitution shall be interpreted in a manner that promoted the purpose of the constitution. **Article 87 of the Constitution** intended the legislature to enact laws that would challenge elections. It was Counsel's submission that the constitution shall be interpreted in a manner that promotes the rule of law and enhances human rights as it is a human right to challenge elections.

24. It was counsel's submission that **Article 181 and 182 of the Constitution** are only triggered after the Governor legally assumes office via a properly conducted election process. He argued that the rights of a Deputy County Governor only accrue when the person who nominated him is a successful candidate in an election. In the event an election petition is filed challenging the election process, the candidate has not assumed office.

25. Counsel submitted that the instant petition is not against the Deputy County Governor and cited **Section 2, 13, 38 and 39(1)(a) of the Elections Act** which do not make reference to the Deputy County Governor as a candidate in elections. He further argued that the declaration of the results at the polling

station, tallying station and the county do not involve the Deputy County Governor.

26. In addressing the issue as regards non-compliance with **Rule 8(5)** of the **Elections (Parliamentary and County Election) Petition Rules**, Counsel made reference to **Article 159(2)(d)** of the **Constitution, Section 80(d)** of the **Elections Act** and the overriding objectives under **Rule 4 and 5** of the **Elections (Parliamentary and County Election) Rules** and argued that the requirement under **Rule 8(5)** falls under the category of procedural technicalities and does not affect the substance of the petition. He urged that the petitioners were not seeking to amend the petition to enjoin the Deputy County Governor and that the petition is in order.

Issues for Determination

27. From the foregoing I formed the following issues for determination;

- i. Whether the failure to enjoin the Deputy County Governor is fatal to the instant petition.
- ii. Whether the failure to comply with the provisions of Rule 8(5) of the Elections (Parliamentary and County Election) Petition Rules, 2017 renders the petition incompetent

Disposition

28. Indeed, challenge to an election wherein irregularities and or illegalities are alleged is permitted in law. Such a challenge must, however, be prosecuted within strict guidelines and timetables. Failure to follow the deadlines in election laws can be fatal and may invite an interlocutory application to dismiss. The **Constitution of Kenya, 2010** makes provision for electoral disputes other than the presidential election and the deadlines to be adhered to as regards filing. **Article 87(2)** reads as follows:

“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.”

29. The **Elections Act** in **Section 76(4)** provides for the amendment of an election petition, as follows:

“a petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time which the petition questioning the return or the election upon that ground may be presented.”

30. This section is interpreted to mean that the option to amend the Petition, was available before the expiry of the prescribed period for filing the petition that is 28 days. Failure to comply is fatal to the petition rendering it a nullity, unless the court finds that the failure goes only to form. Time and other electoral proceedings statutory requirements are conditions precedent to instituting a proper electoral challenge, which are mandatory and peremptory. The election court cannot therefore extend time or allow amendments filed out of time unless election legislation so provides.

31. The question before the court in the instant application is whether the Deputy County Governor ought to be considered a successful candidate whose involvement in the instant petition is crucial. It is trite law that an omission to include a successful candidate renders a petition defective. In **Aboub Ali v The IEBC and 2 Others [2013] EKLK**, Kimaru J stated that:-

“The Constitution, the Election Act and the Election Petition Rules require that the successful candidate be made a party to the petition because such candidate is the primary target of such election petition. He is the one who will be the first person to suffer the consequences of the nullification of the particular election result. Where the Petitioner does not include the successful candidate as a party in the petition such petition lacks legal substratum and is liable to be struck out.”

32. In the case of **Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkediye & 3 others [2013] eKLR**, Mabeya J addressed the issue whether the post of Deputy County Governor is an elective post and therefore subject of an election petition. I have quoted the case in extensor below:

“Article 180 (6) of the Constitution... In my view... is self-explanatory and only requires a literal interpretation. The 4th Respondent is barred by law from conducting separate elections for the post of deputy governor. It may therefore seem that the position of Deputy Governor is not an elective post per se. A candidate for Deputy Governor only assumes such a position by being a nominee of the successful candidate of County Governor. Under Regulation 51 of the Elections (General) Regulations 2012 the Returning Officer is required to issue a nomination certificate to a candidate who is validly nominated to contest for the County Governor position. No such certificate is given to a running mate. It would seem that the law only contemplates one elective post in the gubernatorial election and that is the post of County Governor. That notwithstanding, however, the Constitution directs the IEBC to declare a Deputy Governor nominated by a person subsequently elected to have been elected Deputy Governor. To my mind, this means that the election of Governor and his Deputy is one ticket. When electing the Governor, the voters likewise elect the Governor’s Deputy. The nomination of the Deputy Governor is prior to and not after election. Although it is not a direct election, it remains an elective post since the name of the Deputy Governor must be in the Ballot paper. A purposive interpretation of the Constitution in my view will lead to no other conclusion than that the Deputy Governor’s position is elective. This is because of the requirement that the deputy’s qualification must be akin to those of the Governor and once a vacancy in the Governors position arises no by election is to be held but automatic assumption of office of Governor by the Deputy. To my mind therefore the election of Governor cannot be separated from that of his deputy. I therefore hold that the post of Deputy Governor is elective and therefore susceptible to an election petition as is a Governor’s seat.”

33. Lessit J also had occasion to address a different aspect of the question whether the presence of the Deputy County Governor is crucial to an election petition, in the case of **M’nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others [2013] eKLR**. The Judge stated that:

“49. Provisions on the election of a Governor and Deputy Governor are contained in Article 180 of the Constitution...

50. From a reading of the provision, it is clear that the Deputy Governor, upon the election of the Governor, is treated as elected, as if he had vied in an election. Upon his declaration, he becomes, by virtue of the Constitution, an elected person.

51. The non-inclusion of the running mate to the 1st Respondent brings to the fore the question of fair hearing as enunciated in Article 50 of the Constitution. Article 25 (c) of the Constitution makes it clear that the right to a fair hearing is one of the rights that cannot be derogated from. The question that then falls for determination is whether or not they are a necessary party in this election Petition.

“52. ... Should the Court find that an offence was committed by a person not made a party to the Petition, section 87 (2) of the Elections Act provides that the court shall give the person an opportunity to be heard and call evidence on why he should not be reported. The section states:

(2) Before a person, not being a party to an election Petition or a candidate on whose behalf the seat is claimed by an election Petition, is reported by an election court, the elections court shall give that person an opportunity to be heard and to give and call evidence to show why he should not be reported.

Prima facie, the non-inclusion of the running mate to the 1st Respondent is not fatal to the

Petition as the court has the power under section 80(1) (b) to compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy. Whether the failure to include the Deputy Governor in this Petition was fatal will be considered fully at a later stage in this Petition.”

34. The issue of the non-joinder of the Deputy County Governor in an election petition was also addressed in **Kithinji Kiragu v Martin Nyaga Wambora & 2 others [2013] eKLR** wherein Ong’udi J held thus:

“Correctly stated, the Deputy Governor is not an elected member but a nominee of the Governor. And that nomination is pegged on the valid election of the nominating Governor. This Court’s view is that the provision of Article 181 and 182 concern a validly elected Governor. If the election is challenged and the Governor is found to have been unlawfully elected, then it means he/she has to vacate office alongside his/her deputy. The Deputy Governor could not therefore be enjoined as a party as his/her nomination is not in question. The question concerns only the election of the Governor. I therefore find the issue of non-joinder to have no basis.”

35. The mode of ascension into office for the Deputy County Governor is provided for under **Article 180 of the Constitution** which states that:

“180. (1) The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.

(5) Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor.

(6) The Independent Electoral and Boundaries Commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.”

36. Based on the provisions of the law cited and the jurisprudence that emerges from the above mentioned cases, it is my view that the joinder of the Deputy County Governor is not crucial to the instant petition. A reading of **Article 180(1)** clearly indicates that it is the County Governor who is elected directly by the voters registered in the County and as such, in the event an election petition against a County Governor results in a nullification of the results, the Deputy County Governor no matter how compelling a case he/she may put forward, suffers the same fate as the Governor by dint of having assumed office through the same irregularly declared ticket.

37. **Article 182(2)** of the **Constitution of Kenya, 2010** provides that in the event a

“vacancy occurs in the office of the County Governor, the Deputy Governor shall assume office as a County Governor for the remainder of the term of the County Governor.”

As when the requirements under **Article 182(2)** are triggered into application, I am of the same mind as Ong’undi J in the case of **Kithinji Kiragu** (supra) where she stated that:

“This Court’s view is that the provision of Article 181 and 182 concern a validly elected Governor. If the election is challenged and the Governor is found to have been unlawfully elected, then it means he/she has to vacate office alongside his/her deputy.”

38. The second issue for determination regards compliance with the provisions of **Rule 8(5)** of the **Elections (Parliamentary and County Election) Petition Rules, 2017**. The Rule reads as follows:

“(5) The Registrar shall acknowledge receipt of the petition in Form 2 set out in the First

Schedule.”

39. Mr. Balala argued for the 3rd Respondent that in the Notice of Motion, the petitioners have failed to comply with **Rule 8(5)** of the **Election Petition Rules** thus rendering the petition incompetent. It was learned counsel’s argument that the only petition which was acknowledged by the Registrar is that of the 1st Petitioner and that there is no acknowledgement of a petition purported to be signed by the 2nd Petitioner. As a result, the omission vitiated the entire petition and not just that of the 2nd Petitioner.

40. On the other hand, Mr. Aboubakar on behalf of the Petitioners, made reference to **Article 159(2)(d)** of the **Constitution, Section 80(d)** of the **Elections Act** and the overriding objectives under **Rule 4 and 5** of the **Elections (Parliamentary and County Election) Rules** and argued that the requirement under **Rule 8(5)** falls under the category of procedural technicalities and does not affect the substance of the petition. He submitted that the petition itself was signed by both the petitioners as well as their advocate. Failure by the Registrar to state that both petitioners had signed the petition does not change the fact that the petition is indeed signed by both petitioners.

41. **Article 159** spells out the principles that guide the exercise of judicial authority. Accordingly, under **Article 159 (2) (d)**.

“in exercising judicial authority, the courts and tribunals shall be guided by the following principles—

...justice shall be administered without undue regard to procedural technicalities”

In this regard, I associate myself with the words of Majanja J. in **Wavinya Ndeti vs Independent Electoral and Boundaries Commission (IEBC) & 4 Others [2013] eKLR**, when he stated that:

“Rule 4 and 5 of the Election Rules is a consideration of the provisions of Article 159 (2) (d) of the constitution which obliges every court to dispense justice without undue regard to technicalitiesthus the essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump over the primary object of dispensing substantive justice to the parties”

42. In interpreting legislation relating to an election, the court must bear in mind that the primary purpose of the said legislation is to provide an electoral system that captures the electoral principles espoused in **Article 81**. In the instant petition the court will be interrogating whether the impugned election was free and fair in accordance with the principle as provided under **Article 81(e)**. If there were irregularities, these ought to be exposed to the view of the general public. In my view therefore the matters raised on the form of acknowledgment of receipt of the Petition fall within the category of technicalities that should not take precedence over substantive matters.

43. In view of the forgoing the 3rd Respondent/ Applicants Application dated 26th September 2017 is lacking in merit and I therefore decline to grant the orders sought therein. The application is hereby dismissed. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER, 2017

L. A. ACHODE

JUDGE

In the presence of Mr. Abubakar for the 1st and 2nd Petitioners

In the presence of M/S Ndong for the 1st and 2nd Respondents

In the presence of Mr. Buti and Mr. Balala for the 3rd Respondent