



IN THE PRINCIPAL MAGISTRATE'S COURT

AT KILGORIS

ELECTION PETITION NUMBER NO. 1 OF 2017

IN THE MATTER OF ELECTIONS ACT CAP 7 LAWS OF KENYA

AND IN THE MATTER OF SECTIONS 58 AND 59 OF CAP 7 LAWS OF KENYA

**AND IN THE MATTER OF VIOLATION OF ARTICLE 81 OF THE CONSTITUTION OF
KENYA 2010**

**AND IN THE MATTER OF ELECTIONS FOR MEMBERS OF COUNTY ASSEMBLY-
ANGATA WARD**

AND IN THE MATTER OF

JOSEPH KIBIEGO KOECH.....PETITIONER.

AND

1. GABRIEL MIBEL.

**2. THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION**

3. THE RETURNING OFFICER

KILGORIS CONSTITUENCY.....RESPONDENTS

RULING

Introduction.

1. The Petitioner on the 22nd day of August, 2017 filed this Petition and prays for the following;- a declaration that the first Respondent was invalidly elected a member of County Assembly Angata Ward during the General Elections of 8.8.2017, That the ballots cast be recounted in relation to Oldoinyo Orok Primary School Polling Station No.067 within Kilgoris Constituency. The 1st Respondent filed Response on 4th September, 2017. The 2nd and 3rd Respondents filed theirs on 6th September, 2017.

2. On 29th September 2017, the 2nd and 3rd Respondents filed Notice of Motion under Article 159(2)d and 50 of the Constitution, Section 80.(1)(d) and 80.3 of the Elections Act and Rules 15 and 19 of the Elections Parliamentary and County Elections Petition Rules 2017. They seek Orders that this court be pleased to extend time to file and serve the Response to the Petition and witness affidavits out of time.

That their joint answer to the Petition and Replying affidavits filed and served out of time be deemed to have been properly filed.

3. On 10th October, 2017, the Petitioner through Messers Josiah Abobo and Co. Advocates filed application seeking leave to amend the Petition. The application for extension of time as filed by 2nd and 3rd Respondents was not opposed and was allowed by consent of parties before court. The 1st Respondent is opposed to the application for amendment of petition.

4. This is a ruling on application as argued before me on 16th November, 2017 when the same came for hearing before this court when the matter was scheduled for Pre-trial directions hearing.

The Application.

5. The application is on the amendment of Petition as urged by Mr. Abobo advocate for the Petitioner is premised on grounds that the amendment is aimed at bringing the real issues in controversy and that the omissions made were minor and that they needed to be corrected to expedite hearing of the petition.

6. The application is supported by the affidavit sworn by the Petitioner. He depones that here was an error in the number of votes garnered by myself and the 1st Respondent and which needed correction. He also depones that, in his Petition forms 36A were mistakenly stated as 34A and hence the application for leave to amend. He has annexed draft amended Petition.

The Response.

7. The 1st Respondent in their response as urged by Mr. Kiprotich advocate and in their Replying affidavit dated 12th October, 2017 opposed the application for amendment. The 1st Respondent has deponed that that the proposed amendment goes to the substratum of the petition and will affect the substantive nature of the Petition. That the amendment seek to change the stated Form 34A to Form 36A and that would change the cause and nature of the particulars of the irregularities as outlined in Paragraph 21 of the petition which alleged the petitioners agents were denied chance to sign Form 34A. And that the agent demanded to sign Form 34A and failed to sign Form 36A. He depones that granting the application is granting the petitioner opportunity to file Petition afresh.

8. On the proposed amendment on total number of votes garnered, the Petitioner depones that the disparity was huge. Mr. Kiprotich emphasizes on the objection stating that the Civil Procedure rules were not applicable. That the applicable law was Section 76 (4) of the Elections Act, 2011. And consequently the current application was filed after lapse of time contrary to the said section. That the applicant is seeking to amend petition more than 60 days after the declaration of results as opposed to that prescribed that it be done within 28 days. And that the application was bad in law and that the same should be struck out/ dismissed.

Issues for determination.

9. The main issues for the determination of this court are as follows;

- 1) Whether the application is grounded on sound provisions of law.
- 2) Whether the proposed amendment changes the substratum of the Petition.
- 3) What consequential orders, declarations and reliefs should the court grant in the circumstances?

Analysis and Determination

10. On the first issue whether the application is grounded in law, it is submitted for the Respondent that the application was out of time and that the applicant was guilty of delay. The 1st Respondent also attack

the Procedure used. That amendment can only be through electoral laws and Regulations and not the Civil Procedure rules.

11. On the question of time, I agree with Mr. Kiprotich advocate for the 1st Respondent that rules applicable for amendment of election Petitions are governed by Section 76(4) of the Elections Act, 2011 which states....

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

12. The other relevant provisions to this issue are those of the Elections Parliamentary and County Elections petition Rules, 2017. Rule 19 thereof provides as follows;-

"Where an act or omission is to be done within such time as may be prescribed in these rules or ordered by an elections court, the election court may, for purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired."

13. Rule 19 Sub-rule 2 of the said Rules exclude the application of sub-rule 1, above, in relation to the period within which the petition is required to be filed, heard or determined.

14. The gist of the positions of law cited above is that it is the discretion of the court to allow or disallow an application for amendment. Discretion must of course be exercised judiciously taking into consideration all the circumstances and justice of the case.

15. What can one make of the Rules applied? Election Petitions are *sui generis*. They have their own unique rules. However just like all rules, they remain handmaidens of justice. The overriding objective is that Rules are meant to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The authority in Bashir Haji Abdullahi v Adan Mohammed Nooru and 3 others 2013 eKLR is instructive. The court admonished applicants against the rush to make applications without looking at the relevant rules. It nonetheless sought to grant orders based on substantive justice.

16. In Raila 2 Petition, 2017-- (Presidential Petition No.1 of 2017in ruling on Notice of motion dated 26th August, 2017 the court dismissed an application that had sought to expunge a number of documents from record on the question of time. The court reasoning was that;

"The nature of this application is such that were it to be granted, it would dispose of the entire case of the 1st 2nd and 3rd respondents at his preliminary stage. Such a drastic consequence in our view cannot be justified if the scales of justice are weighed in favor of all parties to this petition."

Holding that non-applicable law and rules were cited and therefore the application be struck out in my view is absurd. This is not to say a dead Petition should be resuscitated. The current petition is alive and filed within time.

17. On the question whether the amendment goes to the substratum of the Petition, I have looked at the proposed amendment. The amendment touches of Forms 36A erroneously named as 34A. This is an election Petition for County Election. The Rules as to the content of election petitions are instructive. The relevant Forms are 36A. Form 34A are relevant to the Presidential elections. The drafters of the Petition ought to have been keener while at it. Unfortunately, they were not. That error cannot be visited upon the Petitioner. That being the case, I find no harm in the amendment. It would cause no prejudice to anyone of the parties to the present petition.

18. On the question of the disparity in difference in votes that the amendment seeks, it is apparent that the figures earlier quoted did not reflect the true votes garnered by parties. The documents filed by the

Respondents are public documents which none of the parties seems to contest. It would not be of any prejudice to amend the Petition to reflect the votes over which the 1st Respondent was declared winner in the entire ward. Form 35B which carries the results is already part of the Responses as provided by the 2nd and 3rd Respondents to the Petition.

Conclusion.

19. I have considered the application for amendment, the affidavit in support, the affidavit in Reply and in opposition thereto. I have also considered the submissions by advocates for and against the application. I am aware of the holding in the Supreme Court decision in Lemanken Aramat v Harun Meitamei Lempaka and 2 others Supreme Court Petition No. 5 of 2014, and myriad of other authorities the latest, delivered yesterday, being Martha Wangari Karua and another v Independent Electoral and Boundaries Commission and 3 Others (2017) eKLR where the courts have held that prescribed Election Dispute Resolution (EDR) timelines are not mere legal or procedural technicalities within the meaning of Article 159(2)d of the Constitution. I am equally aware of contrary authorities where substantive justice is emphasized. One is Raila 2 Petition (2017).

20. In the end, regard must be had to the circumstances and justice of each case. In the circumstances of this petition, justice requires that I invoke the said Constitutional principle. Pursuant to substantive justice as required under Article 159 of the Constitution and Section 80 (1)(d) of the Election Act, 2011 the application for amendment is hereby allowed. To do otherwise would be drastic, draconian and sure to suffocate the Petition. That runs contrary to right to fair hearing and public interest. For the same reasons extension of time for filing responses was allowed on consent, this application is allowed.

21. For avoidance of doubt the following orders do issue,

- a. The Amended Petition as per draft shall be deemed as filed upon payment of requisite fee and shall be served upon all the parties within 48 hours from today.
- b. The Respondents are granted leave to file response thereto, if need be, within 48 hours of service contemplated in order (a) above.
- c. Costs shall abide in the outcome of the Petition.

Dated and delivered at Kilgoris this 16th day of November, 2017.

By: D.K.Matutu Esq. (Senior Resident Magistrate)

In open court. In the presence of,

1. Mr. Abobo Advocate for the Petitioner,
2. Mr. Kiprotich for the 1st Respondent,
3. Ms. Achieng for the 2nd and 3rd Respondents
4. Mr. Mutai- Court Assistant.

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