



REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIMILILI
ELECTION PETITION NO. 1 OF 2017
IN THE MATTER OF THE ELECTIONS ACT NO. 2011
IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS
AND
IN THE MATTER OF THE ELECTIONS (PARLIAMENT AND COUNTY ELECTIONS)
PETITION RULES
PETITION
IN THE MATTER OF THE MEMBER OF COUNTY ASSEMBLY ELECTIONS FOR KIMILILI
WARD OF KIMILILI CONSTITUENCY, BUNGOMA COUNTY,

THE HUMBLE PETITION OF
MAKHAPILA J. E MWANGALE.....PETITIONER

VERSUS

BARASA DAVID MABONGA.....1ST RESPONDENT
DAVID NYONGESA NAMUTALI2ND RESPONDENT
MOSES LOKUWOM MUNYES.....3RD RSPONDENT
INDEPENDENT ELECTROAL AND BOUNDARIES
COMMISSION4TH RESPONDENT

RULING

MAKHAPILA J. E MWANGALE hereinafter called the Petitioner filed this petition on the 6.9.2017 against BARASA DAVID MABONGA, DAVID NYONGESA NAMUTALI, MOSES LOKUWOM MUNYES AND INDEPENDENT ELECTROAL AND BOUNDARIES COMMISSION herein after called 1st , 2nd ,3d and 4th Respondents respectively. The petitioner was challenging the declaration of the 1st Respondent as the duly elected member of County Assembly for Kimilili Ward following the general elections held on the 8th August, 2017.

Upon filing the petition, no steps were taken by the Petitioner and this prompted the court to issue a notice to show cause dated 17.10.2017 and which was served on the petitioner on the 18.10.2017 asking him to show cause why the petition should not be dismissed for failure to comply with Rules 11 and 12 of The Elections (Parliamentary and County) Petitions Rules 2017.

On the 23.10.2017, the petitioner appeared in court and made an oral application to have the petition withdrawn. He stated that he had not served the same and neither had he furnished security as is required. The court directed the petitioner to file a formal application within 7 days from the 23.10.2017.

On the 30.10.2017, the petitioner indeed filed a notice of motion seeking to withdraw the petition. In support of the application he states that he is no longer interested in pursuing the same petition and that he was unable to effect service on the Respondent within the stipulated time. He further deponed that the Respondents will not suffer any prejudice as they were not served.

I have carefully considered the application seeking to withdraw the petition. I have considered the petition as a whole. It is instructive to note that this application was only filed after the court issued a notice to the petitioner to show cause why the petition should not be dismissed.

From the record herein, it is not disputed that the petitioner failed to serve the Respondents with the petition within the period prescribed or at all. It is further not disputed that the petitioner has not furnished security as required by law.

Section 78 of the Elections Act provides that a petitioner shall deposit security for payment of costs that may be come payable by the petitioner not more than 10 days after presentation of petition. A person who presents a petition in challenge of an Election shall deposit one hundred thousand shillings in the cause of the petition against a member of a County Assembly. Rule 11 of The Elections (Parliamentary and County) Petition Rules, 2017 hereinafter called The Election Rules provides the manner of deposit of such security.

Rule 12 of The Election Rules provides that the Petitioner shall serve the petition on the respondent within 7 days after filing a petition.

Rule 23 (i) of the Election Rules provide that a petition shall not be withdrawn without leave of the court.

Rule 24 (2) of The Election Rules provides that the petitioner shall, publish in a newspaper of national circulation, a notice of intention to withdraw the petition, in the format provided at the petitioner's own expenses.

Though the petitioner has failed to comply with the provision of Rule 24 (2) of the Election Rules, I have considered the entire circumstances of this petition.

Rule 5 of the Election Rules provides;

“ The effect of any failure to comply with those rules shall be a matter for determination at the courts discretion subject to the provisions of Article 159 (2) (d) of the constitution”.

The petition herein was not served upon the respondents at all. Further, the petitioner failed to furnish security as is mandatorily required by The Election Act. Even if the court were to decline to allow withdrawal of the petition for want of compliance with Rule 24 of Election Rules, it is my considered view that the entire petition stand no chance of survival. In the case of Chelaite -vs Njuki & Others No. 3 2008 2KLR 2009 Poll 5A (as he then was) stated.

“ once the election court is satisfied that due to failure to serve the petition within the time prescribed by the law, the petition has become a nullity it surely has the power to strike it down without any mere ado”.

And in the cases of Fatuma Zainabu Mohammed –VS Ghati Dennitali & 10 Others Kisii Election Petition No. 6 Of 2013, Murithi J. Stated;

“Accordingly security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited then the petition and other proceedings though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited”.

The upshot of the above findings is that this petition whether withdrawn or not cannot stand the test of time. I find the application for withdrawal incompetent due to failure to comply with Rule 24 of the election rules.

CONCLUSION

In the case of Raila Odinga & others Vs Independent Electoral and Boundaries Commission and 3 others , Nairobi Petition No. 5 of 2013 (2013) e KLR the supreme court stated;

“ the court as an agency processor of justice is called upon to appreciate all the relevant circumstances and requirements of a particular case and conscientiously determine the best course of action”.

I have come to the conclusion that service of the petition was not affected upon any of the respondents as required by law. Service of Election Petition is so vital to the petition and non service as required by law is not an omission that can be excused under Article 159 (2) (d) of the Constitution.

I have also reached the conclusion that the security by deposit of money was not made at all, though this is a mandatory requirement . For the two foregoing reasons I find the petition herein liable to be struck out and it is accordingly struck out.

As none of the respondents appeared, the court makes no order as to costs.

A certificate of this determination in accordance with section 86 (1) of the Elections Act shall issue to the Independent Boundaries and Electoral Commission and Speaker of the relevant assembly .

DATED AND DELIVERED THIS 16TH DAY OF NOVEMBER, 2017

D. O. ONYANGO,

SENIOR PRINCIPAL MAGISTRATE

16TH NOVEMBER, 2017