

EN BANC

[G.R. No. 124033, September 25, 1997]

**ANTONIO T. KHO, PETITIONER, VS. COMMISSION ON ELECTIONS
AND EMILIO A. ESPINOSA, RESPONDENTS.
D E C I S I O N**

TORRES, JR., J.:

May the Commission on Elections entertain a counter-protest filed by a party after the period to file the same has expired? Although a routine issue, it can also have crippling effects.

This is the case before us.

On May 30, 1995, petitioner Kho, a losing candidate in the 1995 gubernatorial elections in Masbate, filed an election protest^[1] against private respondents Espinosa to set aside the proclamation of the latter as the Provincial Governor of Masbate and to declare him instead the winner in the elections.

Summons^[2] was then issued by the Commission on Elections (COMELEC, for brevity) to Espinosa on June 1, 1995 requiring him to answer to Kho's petition of protest within five (5) days from receipt thereof.

It appears that Espinosa received the summons on June 6, 1995,^[3] but, he filed his answer with counter protest only on June 15, 1995.^[4] When Kho received the answer with counter-protest to Espinosa on June 24, 1995, he filed on the same date a motion to expunge the said pleading because it was filed way beyond the reglementary period of five (5) days as provided for under Rule 10, Section 1, Part II in relation to Rule 20, Section 4 of the COMELEC Rules of Procedure.

Way back on June 19, 1995, petitioner Kho also filed an omnibus motion^[5] praying that since five(5) days had elapsed and no answer to the protest had yet been filed by Espinosa, a general denial must be entered into the records in accordance with the COMELEC Rules of Procedure.

The Respondent COMELEC First Division, however, issued an order^[6] dated July 26, 1995 admitting Espinosa's answer with counter-protest and requiring his lawyer to submit a supplemental pleading specifying the numbers of counter-protested precincts listed in the answer with counter protest. Kho received a copy of such order on September 20, 1995.

Following the order dated July 26, 1995, Espinosa filed on September 18, 1995 his compliance specifying therein the counter-protested precincts.

Consequently, the Comelec First Division, through its order dated September 23,

1995, admitted the said compliance, required Espinosa to make a cash deposit of P 40,150.00 for the 73 counter-protested precincts and ordered the collection and delivery of the counter-protested ballot boxes to the Commission for revision.

On September 23, 1995, Kho filed a motion to resolve [7] alleging that he filed a motion to expunge on June 24, 1995 as a result of Espinosa's failure to answer the election protest within the legal period. Since, this motion to expunge had not yet been acted by the Commission, he accordingly, prayed for its resolution.

Acting on the said motion, however, the COMELEC First Division, by its September 26, 1995 order, [8] dismissed the motion to resolve holding that Espinosa's answer with counter-protest which was mailed on June 15, 1995 was filed within the five (5) day reglementary period.

On September 29, 1995, Kho filed a motion for reconsideration [9] of the orders dated September 23 and 26, 1995. Espinosa, on the other hand, filed his opposition thereto arguing that the questioned interlocutory orders dated September 23 and 26, 1995 were mere incidental orders which implemented the earlier order dated July 26, 1995. He asserted that the failure on the part of Kho to seek a first a reconsideration of this July 26, 1995 order which admitted the answer with counter-protest is a fatal and an irreversible procedural infirmity.

In denying the motion for reconsideration of Kho, the COMELEC First Division, through its November 15, 1995 order, [10] held that since Kho did not attempt to file a motion for reconsideration of the July 26, 1995 order, such order can not now be disturbed. The subsequent orders of September 23 and 26, 1995 that carried out the July 26, 1995 order should not be set aside to prevent unnecessary delay in the proceedings of the case.

On December 1, 1995, Kho filed a manifestation and motion, [11] this time addressed to the COMELEC en banc, reiterating the arguments he asserted in his motion for reconsideration and praying at the same time for the elevation of the case to the Commission en banc and the setting aside of the November 15, 1995 order and all other related orders concerning the belated filing of Espinosa's answer with counter-protest.

But the COMELEC First Division, in its order dated February 28, 1996, [12] denied the prayer for the elevation of the case to en banc because the September 23 and 26, 1995 orders were mere interlocutory orders which would not necessitate the elevation of the case to en banc, and merely took note of the other prayers in the manifestation and motion. The dispositive portion of the said order reads as follows:

WHEREFORE, in view of the foregoing, the Commission (First Division) hereby ORDERS, as follows:

1. That the manifestation, as well as the second and third prayers, in protestant's Manifestation and Motion be NOTED;
2. That the prayer for the elevation of the records of this case to the commission en banc be DENIED;

3. That the protestee's prayer for suspension of revision proceedings be declared MOOT.

SO ORDERED." [13]

On March 15, 1995 Kho filed the instant petition [14] arguing that the respondent COMELEC First Division committed grave abuse of discretion or without or in excess of jurisdiction in admitting the belatedly filed answer with counter-protest of Espinosa, and in refusing to elevate the case to the Commission en banc upon the pretext that the COMELEC First Division issued mere interlocutory orders. He prayed for the issuance of a temporary restraining order against the COMELEC to cease and desist from implementing the July 26, 1995 order and all other orders related to it, and that the COMELEC be directed to proceed with the protest case without considering the answer with counter-protest of Espinosa, which should be expunge from the records of the case.

Private respondent Espinosa, on the other hand that the five (5) day period of filing an answer is not jurisdictional because the answer is not initiatory pleading and the time of its filing can be extended either through motion or motu proprio. He added that the COMELEC, in admitting the answer with counter protest, committed no error as it is allowed to suspend its rules in the interest of justice and speedy disposition of matters before it. According to him, the order of the COMELEC dated July 26, 1995 admitting his counter protest is not subjected to a timely motion for reconsideration by petitioner Kho, thus it became final and executory and can no longer be disturb.

Consequently, this Court issued a temporary restraining order on May 28, 1996. [15]

We find the petition meritorious.

It is clear from the records that private respondent Espinosa filed his answer with counter protest way beyond the reglementary period of five (5) days provided for by law. It must be pointed out that Espinosa received the COMELEC summons and the Petition of Protest of Kho on June 6, 1995. Under Section 1, Rule 10 of the COMELEC Rules of Procedure, the answer must be filed within five (5) days from service of summons and a copy of the petition. Private respondent Espinosa, therefore, had until June 11, 1995 within which to file his answer. In violation however of the aforesaid rules, Espinosa filed his answer with counterprotest only on June 15, 1995, obviously beyond the five (5) mandatory period.

It should be stressed that under the COMELEC Rules of Procedure the protestee may incorporate in his answer a counterprotest. [16] It has been said that a counterprotest is tantamount to a counterclaim in a civil action and may be presented as a part of the answer within the time he is required to answer to protest, unless a motion for extension is granted, in which it must be filed before the expiration of the extended time. [17] Apparently, the counterprotest of Espinosa was incorporated in his answer. And as what was revealed, this answer with counterprotest was filed only on June 15, 1995, which was obviously late for four (4) days. It appears that Espinosa did not file a motion for extension of time within which to file his answer with counterprotest. In the absence thereof, there is no basis then for the COMELEC First Division to admit the belatedly filed answer with