



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELECTION PETITION NO. 6 OF 2017

DANIEL ONGONG'A ABWAO.....1ST PETITIONER

VERSUS

MOHAMED ALI MOHAMED.....1ST RESPONDENT

MWANAJUMA GANDANI.....2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. The Application for determination before the Court was made orally in Court by Mr. Balala learned counsel for the Petitioner seeking for witness summons to issue to the Regional Director of Criminal Investigations (DCIO) Mombasa. According to Mr. Balala the application arises in view of the evidence that was given by PW1 and PW10 relating to the shooting incident that took place at Frere Town on the evening of 8th August, 2017. Counsel opines that the events of the shooting can only be brought into this court through the evidence of the DCIO which is the body that investigated the matter.

2. Further that uniformed police officers were assigned to protect Mr. Mohammed Ali during that election period while other candidates were not afforded similar treatment. He refers to item 6 on the 1st Respondent's list of documents which is a letter from the office of the President to the Regional DCIO confirming that some officers were assigned to Mr. Mohammed Ali and that they acted within the law during the shooting.

3. Mr. Balala argues that the DCIO who was investigating the matter stopped the investigation upon receiving the letter from the office of the president that this Court has immense powers under section 80 of the Elections Act to summon witnesses it deems necessary. He prays for the Application to be allowed.

4. Mr. Chacha Odera for the 1st Respondent on the other hand contends that the nature of the Application is such that it ought to be brought by way of formal application, laying a basis for the prayers sought, to enable them respond appropriately. That at the pre-trial case conferencing the list and bundle of documents being referred to had already been served and the Petitioner thus knew the nature of the Respondent's evidence from the onset and should have made this application at that stage. Further that the Court did specifically ask during the pre-trial case conference whether any of the parties would require to call additional evidence and all parties responded in the negative.

5. Both Mr. Chacha Odera and Mr. Tony Odera for the Respondents had argued that 8th January, 2018, when Mr. Tony Odera applied for leave to file further affidavits as a result of particulars which Mr. Balala advocate for the Petitioner had supplied. Mr. Balala vehemently opposed the application, stating that the Respondents were seeking to introduce new evidence. That in any case the particulars did not introduce any new information as it had been within their knowledge all along.

6. Mr. Tony Odera submits for the 2nd and 3rd Respondent that this is a Court of specialized jurisdiction as an election Court, whereas there is a Criminal Court with general jurisdiction to address the Petitioner's complaints. He prays that if the Court is inclined to hear the application the Petitioner be ordered to file a formal application to enable them obtain instructions from their clients.

7. Mr. Tony Odera pointed out that the previous day he had applied of leave to file one more affidavit to introduce a copy of the

polling station diary for station no. 4 where the witness said he was stationed all day on the polling day. Mr. Balala objected to the said application stating that it would be unfair for the Respondent to be allowed to bring in new evidence at that point to answer the evidence of a witness he had heard testify. The Court agreed with Mr. Balala and declined to grant the order sought. He said that the same reasoning should apply to Mr. Balala's current application.

Disposition:

8. I have considered the oral arguments made by counsel for the Petitioner and the Respondents on the application before the Court. The issue for determination before the Court is whether summons should issue to the Director of Criminal Investigations(DCIO) Mombasa to produce evidence of the investigation concerning the shooting incident at Frere Town in Nyali on the evening of 8th August, 2017.

9. **Section 80 (1) of the Elections Act** under which the application is brought provides as follows with regards to this this Court's powers to summon witnesses:

“(1) An election court may, in the exercise of its jurisdiction—

(a) summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;

(b) 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;

(c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and

(d) decide all matters that come before it without undue regard to technicalities.”

From a cursory reading of the above section 80 it is deduced that the summons thereunder can either issue to witnesses sought to be called by the parties, or to any person who appears to the Court to have been concerned in the elections in question.

10. In my view this impression that a person was concerned in the elections can only be established by way of evidence that is brought before the Court, and a party who wishes to call a person who is not his witness to give evidence in an election petition must first establish a basis by showing their involvement in the elections.

11. Mr. Balala for the petitioner states that PW1 and PW10 gave evidence of a shooting incident. Further that item 6 on the 1st Respondent's bundle of documents is a letter confirming that the said Respondent received police protection during the Election Day which was not so for other candidates. On that basis therefore the Regional DCIO should be summoned in Court to elaborate on this.

12. The two witnesses PW1 and PW10 both gave primary evidence regarding a shooting. The DCIO and his officers are not said to have been at the scene and would be coming to tell this court of reports they received. The police are not even said to have responded to the fracas anytime during the fateful night. In the case of **Thomas MatwetweNyamache v Independent Electoral and Boundaries Commission & 2 others, [2017] eKLR**; a similar application was made by the counsel for the Petitioner therein. Omondi J. in allowing the application held as follows in as regards the application of section 80(1)(b) of the Elections Act:

“11...In my honest view evidence has been led by PW4 regarding recovery of the ballot papers and that the same were handed over to the OCS KENYANYA police station, who then passed them on to the DCO KENYANYA and that the police still have the same in their custody. It would be totally myopic of me to ignore this assertion; indeed I find that it appears the police were mentioned as having dealt with a complaint regarding the conduct of the elections and under circumstances which necessitate their attendance to confirm what PW4 claims. It is necessary that the relevant police officer do attend court and confirm whether there were any ballot papers handed over to them and under what circumstances.”

12. In so attending, he will not be appearing as a witness for the petitioner, but as one who has been summoned by the court to shed light on some areas of concern by the court. This means it will not be open to the petitioner to lead any evidence in chief-the court will lead the officer on areas it seeks clarification confirm whether there were any ballot papers handed over to them and under what circumstances, and whether any action has been taken with regard to that report. The parties will be limited in their cross examination of the officer(s) to only the areas specified by the court because he is after-all, the court's witness NOT the petitioner's witness.”

13. The distinction is that in the above case the Petitioner established that the Police was in possession of election material. The Court needed to satisfy itself on the circumstances under which they came into possession of this election material as this would have a direct impact on the election. In the instant case the evidence of PW1 and PW10 is that the incident took place between 7.30pm and 8.00pm and from the beginning to the end it does not appear to have involved the IEBC officials nor did the police come to the scene.

14.In this regard I align myself with the ruling of **Majanja J. in Odera Arthur Papa vs. Oku Edward Kaunya & 2 Others, Busia Election No. 2 of 2017**, wherein the learned Judge emphasized that the Petitioner's allegations are proved by primary evidence of witnesses which are set out in the affidavits filed together with the petition. Further, that police investigation reports are secondary evidence of what was reported by other witnesses to the police, and in the absence of primary evidence, such a report is either hearsay, or opinion evidence and only proves that an offence was reported.

15.Indeed the powers of the Court under section 80 Elections Act are immense but they should be exercised judiciously and not capriciously. It is my finding that for the proper application of the Court's powers under section 80(1) of the Elections Act, the Petitioner should first demonstrate the need for the exercise by this Court of the powers to summon a person who is not his witness. To this extent the need to summon the Regional DCIO has not been established and allowing the application at this stage may also result in granting an opportunity to the Petitioner to present new evidence to answer the evidence that has been adduced.

16.I also find that the letter to the DCIO from the Office of the President was available to the Petitioner from the date of filing and if they required summons to be issued to an officer in the said Department they ought to have done so during the pre-trial conferencing. It would be prejudicial to the Respondents to allow the Petitioner to bring in new witnesses to answer to evidence raised during the trial and yet the information they are basing the application on was in their possession all along.

17.In the circumstances of this case, the application by the counsel for the Petitioner is found to be without merit and I decline to grant it. The oral application is accordingly dismissed, and the costs of the application shall abide the outcome of the Petition.

DATED, SIGNED and DELIVERED at MOMBASA this 12th DAY OF January 2018.

L. A. ACHODE

JUDGE

In the presence of: Mr. Mohamed Ali for the 1st Petitioner

In the presence of : Mr. Chacha Odera for the 1st Respondent

In the presence of: Mr. Tony Odera for the 2nd and 3rd Respondent