



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
CONSTITUTIONAL & HUMAN RIGHTS DIVISION  
PETITION NO 66 OF 2016

HENRY NJENGA MBOTE.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

1. **Henry Njenga Mbote**, the petitioner, was a candidate for the Gatundu North Constituency Parliamentary seat for the elections held on 4<sup>th</sup> March 2013. He had resigned as the National Sales Manager at Phillips Pharmaceutical Ltd to take part in that year's election. He was nominated by the **SAFINA PARTY** to run on its ticket and indeed he was successfully nominated by the Independent Electoral and Boundaries Commission, the respondent, to run in that election.

2. The petitioner avers that after being nominated by the respondent, he proceeded to conduct his campaigns soliciting for votes throughout the constituency and did a lot in terms of community development activities as a way of soliciting for votes. He contends that the law governing elections required and still do requires the respondent to include candidates' passport size colour photographs in the ballot papers as a way of identifying the candidates. The petitioner states that in violation of the law, the respondent omitted his photograph from the ballot papers. According to the petitioner, the omission of his photo was a negligent act on the part of the respondent and a breach of the law which caused the petitioner to lose that election. The petitioner also claims as a result, he lost Ksh20, 344,000 which he had spent in the campaigns and claims it as special damages. He therefore sought the following reliefs:-

- a. *A declaration that the respondent breached the petitioner's constitutional right by failing to depict his picture on the ballot papers.*
- b. *The respondent be condemned to compensate the petitioner for all the costs sustained relating to the election held on 4<sup>th</sup> March 2013 being the sum of Ksh20, 344,000.*
- c. *The respondent be condemned to compensate the petitioner general damages, exemplary damages and aggravated damages.*
- d. *The respondent do pay petitioner's costs of and incidental to this petition.*
- e. *Such further, other and consequential orders as this Honourable court may lawfully make.*

**Response**

3. The respondent filed a replying affidavit by **Moses Kipkosgei**, the respondent's legal officer, sworn on 2<sup>nd</sup> March 2016 and filed in Court on 7<sup>th</sup> March 2016. **Mr. Kipkosgei** contended that the petition is time barred by virtue of Article 87(2) of the Constitution on the time for filing election petitions; that the petition does not state with precision or at all the constitutional provisions alleged to have been violated or breached; that the petition has merely made allegations without supporting evidence and that the petition is incurably defective, frivolous and constitutes abuse of the process.

**Evidence**

4. The petitioner testified as PW1 relying on his witness statement dated 25<sup>th</sup> November 2016 and told the Court that the respondent acted with impunity which traumatized him. He told the Court that he lost dignity in the eyes of his supporters and had also suffered financial loss having resigned from gainful employment to contest the election.

5. The petitioner further testified that the respondent had in a way removed him from the election by preparing defective ballot papers; that he could not win that election because his photograph was missing from the ballot papers; that he spent a lot of money in the campaigns as well as paying nomination fee and assemble agents but that in the end, his photograph missed on the ballot papers severely compromising his chances of winning the election.

6. The petitioner stated that many of the electorates in the constituency are illiterate and rely on photographs to identify their preferred candidates. He also told the Court that when he noticed the error, he notified the respondent but nothing was done to correct it even after writing a letter to the respondent to that effect. He relied on his list of documents including the letter of complaint to the respondent and copies of campaign materials attached to his witness statement which he produced as PEX1-7. He stated that failure to include his photograph dis organized him and his family.

7. In cross examination, the petitioner told the Court that what he had in court was not an election petition but a constitutional petition on violation of his rights and fundamental freedoms. He stated that he shared some names with other candidates which may have affected his score due to the missing photograph. He testified that his voters had claimed that they thought he had withdrawn from the election and that was why his photo was missing from the ballot papers. He told the Court that he was sure of winning the election because he had spent over 20 million shillings on the campaigns.

8. The petitioner admitted that although there is a law on settlement of electoral disputes, what he has in Court is a constitutional petition and not an election petition. Asked questions regarding the expenditures (PEX 6 and 7), the petitioner stated that PEX 6 contains the breakdown of the expenditure while PEX7 is an invoice. He stated that the missing photograph cost him the election.

#### ***Petitioner's submissions***

9. **Mr. Muli**, learned counsel for the petitioner, submitted highlighting their written submissions dated 24<sup>th</sup> March 2017 and filed in Court on 27<sup>th</sup> March 2017 that the petitioner's case is based on the respondent's failure to ensure that the petitioner's passport size photograph was on the ballot papers as required by law. According to learned counsel, the missing photograph diminished the petitioner's chances of winning the election. It was submitted that the ballot papers are an integral part of an election for it guides voters on who the candidates are and their party symbols.

10. **Mr. Muli** relied on the case of **Ali Omar Julius Daraka Mbuzi & Another** [2006] eKLR in which party symbols for candidates had been mismatched and the Court stated that it could not conceive a more important defect in an election ballot than the fact that instead of guiding voters, the ballot paper misleads them and **Dr. Thuo Mathenge & another v Nderitu Gachagua & 2 others** [2013] eKLR for similar proposition.

11. Finally the petitioner relied on the decision of **Mbote Muruti v Hon Whycliffe Ambatsa Oparanya & 3 others** [2013]eKLR for the submission that the right of a political party is infringed upon when its nominated candidate is prevented from contesting the election and that the party has a right to sue. It was therefore contended that the petitioner has a right to sue because having resigned from employment he could not fully participate in the election due to the defect in the ballot papers.

#### ***Respondent's submissions***

12. **Mr. Kibet**, learned counsel for the respondent, submitted highlighting their written submissions dated 28<sup>th</sup> March 2018 and filed in Court on the same day that the petition is defective because the petitioner only filed a verifying affidavit instead of a supporting affidavit.

13. On the allegations of missing photographs on the ballot papers, learned counsel submitted that the petitioner did not adduce evidence to prove that there was no photograph on the ballot papers. Counsel submitted that no witness was called either to testify that the ballot papers did not have photographs. Counsel contended that the petition as drawn concerns an electoral dispute hence this Court lacks jurisdiction to determine the dispute in that Article 87(1) of the Constitution required Parliament to enact legislation on electoral matters and was complied with when Parliament enacted the Elections Act and the regulations thereto. According to learned counsel, section 75 of the Act confers the jurisdiction of adjudicating electoral disputes to the election Courts.

14. **Mr. Mule** contended that the Act has a time frame for filing election disputes yet this petition was filed in 2016 and before a wrong forum. Mr. Muli relied on the case of **The National Alliance Party and another v Independent Electoral and Boundaries Commission** Petition No 175 of 2013, for the submission that the fact that the issues raised touch on fundamental rights and freedoms does not remove the matter from the ambit of Article 105 and that even in determining the election dispute, the Court is obliged to enforce fundamental rights and freedoms of the parties before it.

15. He also relied on the case of Moses **Mwigi & 14 others v Independent Electoral and Boundaries Commission & 5 others** [2016] eKLR for the submission that an electoral dispute should not be transmuted into a petition for the vindication of fundamental rights under Article 163(3) of the Constitution. He therefore urged the Court to dismiss the petition with costs.

#### ***Determination***

16. I have considered the petition; the response and submissions by counsel for the parties. I have also considered the authorities relied on by both sides. The issue arising for determination in this petition is whether this is a constitutional petition and whether this court can grant

compensation for a claim of violation of rights and fundamental freedoms arising from an election held under the Constitution and the Election Act and Regulations made thereunder.

17. The petitioner contested the position for the seat for member of the National Assembly for Gatundu North Constituency in the general elections held on 4<sup>th</sup> March 2013. He did not make it and has attributed his loss in that election to what he calls the respondent's negligence for failure to include his passport size photograph on the ballot papers. The petitioner contends that the failure to affix his photograph on the ballot papers cost him the election because most of his supporters are illiterate and could not identify him by name since he shared two names with other candidates in the same election. He stated that his supporters could have relied on his photographs to identify him. He also contended that he spent over Kshs. 20 million in the campaigns and that he suffered humiliation having resigned from formal employment where he held a senior position only to lose the election on account of the respondent's mistake. He therefore wants the respondent to compensate him for the amount he spent.

18. The respondent has contested this petition arguing that it is not a pure constitutional petition; that there is no precision in the pleading regarding the Articles of the Constitution said to have been violated and how; that the petitioner had a chance to challenge the actions complained of before the election court and that this Court cannot sit on this matter because the petition is pleaded in the manner of an election petition.

19. The petition prays for a declaration that the respondent breached the petitioner's constitutional rights by failing to include his photograph on the ballot papers. The petitioner has generally stated that his constitutional rights were violated but has not stated which particular constitutional provision was violated. I take it, however, that the petitioner pleads generally that the Constitution grants citizens the right to participate in the electoral process. Article 38(2) of the Constitution states that every citizen has the right to free fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the Constitution.

20. The petitioner in contesting the 2013 general elections was exercising his constitutional right. The issue he raises in this petition, however, is that while his name was on the ballot papers, his photograph was missing and therefore this violated his fundamental right. Whereas the right to stand for election is granted by the Constitution there is also a legal requirement by the election laws that a candidate's photograph be on the ballot papers in any electoral process.

21. If the petitioner's photograph was omitted from the ballot papers, did it amount to a violation of his constitutional rights? The answer would possibly be yes, because it would be an irregularity in terms of the electoral laws. This would however entitle the petitioner to file an election petition to challenge that election and raise the missing photograph as a ground thus enable the election court determine whether the omission had in any way affected the validity of that election in that electoral area. The election court would also determine the question of violation of the petitioner's right to participate in a lawfully executed election.

22. To my mind, therefore, the moment that anomaly was identified and raised before the election court that court would have to address it and, where possible, nullify the election and order a fresh one. It cannot be raised as a pure constitutional issue before this court. In that regard, I agree with the court's observation in the case of *The National Alliance Party and another v Independent Electoral and Boundaries Commission* (supra) that;

***“[11] Even in determining election petition the High Court, is obliged not only to enforce fundamental rights and freedoms of the persons before it. The court must also consider the powers exercised by the IEBC in relation to its responsibility when these powers are called in to question... the manner in which a challenge to an election is made is ordained by the Constitution itself.”***

23. In the case of *Ferdinand Waititu v Independent Electoral and Boundaries Commission and Others* [2013] eKLR, the court expressed itself thus;

***“[27]... the provisions of the Elections Act and the Elections Rules which are made pursuant to Article 87 (2) of the Constitution, constitute the constitutionally underpinned Code of Laws for dealing with election petitions. The jurisdiction to hear and determine election petitions is a special jurisdiction that is conferred by the Constitution itself, and the manner in which it is to be exercised is ordained by the Constitution when it donates power to Parliament to enact the requisite laws and regulations for its exercise.”***

24. The petitioner had an opportunity to challenge that election before the election court which had jurisdiction to deal with election disputes. However, having chosen to take the route of a constitutional petition, he had the duty to satisfy this court that indeed this was a constitutional petition that could be prosecuted under Article 165(3) of the Constitution which he did not do. He just filed this petition, pleaded violation of constitutional rights and fundamental freedoms and left it at that. He made no effort to demonstrate why the violations and breaches he alleges could not have been addressed by the election court.

25. To this end I am fortified by the Supreme Court's observation in *Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR that;

***“[119]To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.”***

26. Even if the petitioner had succeeded to show that he had a right to bring this petition against the respondent for violation of

fundamental rights and freedoms for failing to include his photograph on the ballot papers, there was no evidence placed before this court to prove that indeed there was such failure. The petitioner merely pleaded and testified that the respondent did not include his photograph on the ballot papers.

27. I have perused the documents produced as PEX 1-7. There is no sample of the ballot paper complained of to demonstrate that indeed the petitioner's photograph was not on the ballot papers. The copy of the complaint letter the petitioner relies on is dated 5<sup>th</sup> March 2013, a day after the election and does not have a copy of the ballot. The law is clear that a party who desires the court to give judgment in his favour has the burden of proving his case. In that regard, Section 107(1) of the Evidence Act (Cap 80) provides: **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."** Section 109 of the same Act also provides that **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"**

28. In emphasizing on the above provisions, the Court of Appeal stated in the case of **Jenifer Nyambura Kamau v Humprey Mbaka Nandi [2012] eKLR** that under section 108 of the Evidence Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. And in the case of **Kirugi & Another v Kibaya & 3 Others [1987] KLR 347** the same Court stated the fact that the burden of proof is always on the balance of probabilities

29. In the present case, however, the petitioner alleges without proof that his photograph was not on the ballot. He was required by law to discharge the burden of proof which he did not do. He did not even call witnesses to corroborate his evidence that his photograph was missing on the ballot papers. The totality of the evidence in this petition fails to satisfy the legal threshold with regards proof even in civil cases. The court cannot therefore take it merely from pleadings and the petitioner's testimony without more, that what he stated was the truth and proceed to enter judgment on that basis alone.

30. The petitioner has also claimed compensation for Ksh20, 344,000 he used as election expenses. He stated that he used the amount for various activities during the campaign period but all went down the drain due to the respondent's negligence for failing to include his photograph on the ballot papers. This was a political office that the petitioner was seeking and he went into those elections on his own well knowing that he could win or lose. He also knew that he would spend money in the election. It is clear from the prayers in the petition that the petitioner claims this money as special damages because it is the money he spent in that election and wants it refunded. It is in the form of special damages.

31. The law is clear as regards special damages that they should not only be pleaded, but also be specifically proved. In the case of **Capital Fish Kenya Limited v the Kenya Power and Lighting Company Limited [2016]eKLR** the Court of Appeal stated that it is strite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.

32. The Court went on to state that **"The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages."**

33. And in **David Bagine v Martin Bundi (CA No 283 Nbi)**, the Court of Appeal, referring to the judgment of **Lord Goddard, CJ in Bonhan v Hyde Park Hotel Limited [1948]64TLR 177**, observed that **"It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage.,. It is not enough to note down the particulars and so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."**

34. The petitioner pleaded as well as testified that he spent Ksh20, 344,000 for his campaign. However, he only attached a breakdown and an invoice as evidence of that expenditure. There were no receipts for payment and he did not, in my view, prove the expenditure as required by law.

35. Finally, the respondent contended that this petition is defective because it does not have a supporting affidavit but instead, the petitioner filed a verifying affidavit. I do not think this argument is valid at all. Rule 10 of the rules of this Court (**Mutungu rules**) provides for what a petition entails that is; the format of the petition. Rule 11 thereof provides for documents that should accompany the petition. It also states that a petition may be oral but would still have to be reduced into writing by the Court. Rule 11(1) is also permissible that a petition **may be accompanied by an affidavit.**

36. In my view, an affidavit would only be of evidential value where evidence is required. Moreover Article 159 of the Constitution behoves courts to discharge substantive justice without undue regard to technicalities of procedure. In that regard, I do not find merit in the submission that this petition could fail on account of lack of a supporting affidavit.

37. Having given due consideration the pleadings herein, submissions by counsel for the parties, authorities and the law. I am not satisfied that the petitioner has made out a case against the respondent. The issue of missing photographs on the ballot papers was a question for the election court and not this court. If the petitioner wanted to pursue the issue of violation of fundamental rights and freedoms flowing from the conduct of those elections, he had an opportunity to do so before the election court as that is the mechanism provided for resolving electoral disputes.

38. As regards the claim of Ksh20, 344,000 this is a special damages claim which was not proved even if the petitioner had succeeded in persuading this court that it could determine this matter as a normal constitutional petition. Flowing from the above findings, the upshot is that the petition dated 15<sup>th</sup> February 2016 is declined and dismissed with costs

**Dated, Signed and Delivered at Nairobi this 31<sup>st</sup> Day of August 2018**

**E C MWITA**

**JUDGE**