



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI.

CORAM: R. MWONGO, P.J.

ELECTION PETITION NUMBER 5 OF 2017

IN THE MATTER OF: ARTICLES 2, 10, 38(2), 50(1), 88(4) OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ACT NO.9 OF 2011

IN THE MATTER OF: THE ELECTIONS ACT NO.24 OF 2011

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017

IN THE MATTER OF: THE ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY FOR RUARAKA CONSTITUENCY (NO.281)

IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS LEGAL NOTICE NUMBER 72 OF 2017.

IN THE MATTER OF: INTERNATIONAL CONVENTIONS AND/OR GOOD PRACTICE.

-BETWEEN-

ELIZABETH ONGORO AMOLLO.....PETITIONER

-VERSUS-

FRANCIS KAJWANG TOM JOSEPH.....1ST RESPONDENT

KAREN WACHERA MWANGI.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....3RD RESPONDENT

RULING ON APPLICATION NO 2

1. Pursuant to directions issued at the Pre Trial conference on 9th October, 2017, it was agreed by consent that each application filed in this petition would be treated separately and determined according to its precedence of filing. At the hearing of the applications indicated at the Pre-Trial conference on 19th

October, 2017, it was also agreed by consent that Applications Nos. 1 and 3 be, and were, allowed with costs. Applications numbers 4 & 5 are dealt with in separate rulings

2. This is the 1st respondent's application dated 5th October, 2017, requesting for further and better particulars from the petitioner. It is made under **Rule 15(1)(e) of The Elections (Parliamentary and County Elections) Petitions Rules, 2017**, which empowers an election court at a pre-trial conference to “give an order, where necessary, for furnishing further and better particulars”

3. The prayers sought in the application are as follows:

“1. That this court gives an order for furnishing of further particulars by the Petitioner in terms of the Request for Particulars attached hereto.

2. That the costs of this application be provided for.”

4. The grounds upon which the application is grounded are as follows:

“a. The Petitioner filed this Petition on the basis of various alleged factual and legal grounds set out in the Petition.

b. Some of the alleged grounds are too general and lacking in specificity hence the necessity for furnishing further particulars.

c. The 1st Respondent has by instrument of an itemized Request for Particulars identified the various general allegations that require specificity.

d. Such further particulars are necessary for purposes of focusing the issues in controversy and the consequent expeditious disposal of the Petition.

It is just and equitable that the Petitioner be ordered to furnish particulars in terms of the said Request for Particulars in the interest of a just, fair, cost effective and expeditious hearing and determination of the Petition”

5. Attached to the applicant's supporting affidavit of 5th October, 2017, is a document marked “**KTJF – 1**” being the itemised Request for Particulars. In it the 1st Respondent requests for particulars in respect of the following paragraphs of the Petition: Paragraphs 6&7; 12; 14; 15; 17; 18(b); 18(c); 18(c)(iii); 18(c)(iv); 18(d)(iii); 18(d)(iv); 18(d)(vi); 18(d)(viii); 18(d)(xi); 18(d)(xii); 18(e)(i); 18(e)(ii); 18(e)(iii); 18(e)(iv); 18(f)(ii); 18(f)(iii); 18(h); 18(i); 18(i)(iv); 18(i)(vi); 18(i)(vii); 18(i)(viii); 18(i)(ix); 18(i)(x); 18(i)(xi); 18(i)(xiv); 18(j)(ii); 18(k)(i); Further, particulars are requested for paragraphs 18(ii); 18(iii) and 21 of the petitioner's affidavit;

6. The request for particulars covers ten (10) pages, relating to 33 paragraphs, each with several specific requests for particulars totalling 96 specific requests. On account of its length and the sheer volume of detail sought in the said request, I shall not replicate the same in this ruling. The applicant also filed written submissions and list of authorities in support of his case.

7. The 2nd and 3rd respondents did not file any response to the application, choosing to leave the decision to the court. The Petitioner opposes the application, and filed written submissions and a list of authorities in support of her case.

Parties' Submissions

8. The applicant submitted that the particulars requested are necessary to enable him to adequately respond to the petition. That in this case the particulars are essential in order to avoid embarrassment to both the court and the defence. Counsel identified various paragraphs of the petition to which responses

could not be given without further particulars. Counsel cited the following examples, amongst many others:

-At Page 8 paragraph vi the petitioner asserts that results were declared without verification in over 80 polling stations representing over 15,000 voters.

-At Page 8 paragraph viii where the petitioner avers that in more than 100 polling stations the data entered in the KIEMS kit was inconsistent with that in Forms 35A, but does not identify the stations.

-At Page 9 paragraph xviii where the petitioner avers that the 2nd respondent did not have at least 110 Forms 35A before declaration of final results, but does not identify the polling stations for which the missing forms are alleged;

-At Page 21ii on Election Offences at paragraph 1 the petitioner alleges fraudulent transmission of the results ***“at the polling stations highlighted herein”*** but fails to highlight the said polling stations.

-At Page 22 ii on Election Offences at paragraph 2 the petitioner alleges that ***“presiding officers in the above highlighted polling station grievous electoral fraud by filling in forged forms 35A and inflating voter turnouts..and transmitting manipulated results”*** but again fails to highlight or identify the alleged polling stations.

9. Further, the applicant pointed out that at Page 39 of the Petitioner’s affidavit in support of the petition paragraph 18 (i), (ii) and (iii) were incomplete where the petitioner has relied on information from her agents that:

“(i) they were harassed by the 1st Respondent and his supporters; and ...denied by various election officials the right to witness and plete/or otherwise fully participate in vote tallying at –”

The foregoing sentence is incomplete and the applicant is unable to respond to it;

“(ii) the 1st Respondent engaged in widespread bribery and unduly influenced voters and election officials at –”

The foregoing sentence is incomplete and the applicant is unable to respond to it;

“(iii) the 1st Respondent engaged in widespread violence intimidation and harassment of voters and election officials at –”

The foregoing sentence is incomplete and the applicant is unable to respond to it.

10. Counsel submitted that the petitioner’s witnesses will be embarrassed because she cannot assert which stations, officials or places were referred to, and the respondent cannot draft a response to the said assertions. Counsel also pointed out that it had been agreed at the pre-trial conference pursuant to the proviso to **Rule 13 of The Elections (Parliamentary and County Elections) Petitions Rules, 2017** that the petitioner was obliged to disclose her entire case to the applicant, either in the petition itself or in the affidavit in support of the petition. Rule 8 is on the contents of a

11. That the parties’ witness statements would be introduced and serve as evidence-in-chief so that the opponent would go straight into cross-examination. Here, counsel argued, the assumption of the petitioner is that their witness statements constituted the entire evidence in chief, and that not being the case the 1st respondent would be embarrassed.

12. This is the gist of the applicant’s submissions throughout his lengthy application and list requesting particulars. I have sampled merely a few of the particulars sought.

13. The 2nd and 3rd respondents opted to leave the matter to the court’s discretion.

14. The petitioner opposes the application and filed a replying affidavit, written submissions and a list of authorities. Through counsel, the petitioner's response is three-pronged.

15. First the petitioner submits that it is impractical to supply all the particulars requested as the material is in the hands of the 3rd respondent and only after an audit of election materials sought by them through a different application, will the particulars be available.

16. Secondly, the petitioner asserts that the information they have provided is adequate for the case; and that some of the particulars requested should in fact have been addressed to the 2nd and 3rd respondent.

17. Thirdly, the petitioner urges that the applicant is on a fishing expedition and some of the requests are frivolous and aimed at delaying the proceedings; that in respect of some of the particulars sought such as the allegedly burnt ballot papers, it is unreasonable for the 1st respondent to expect the petitioner to provide details of these as the matter amounts to an offence in law for which charge sheets are available.

18. The petitioner urges that in respect of other requests, evidence would be adduced in the normal manner, and that any information the applicant feels is insufficient can be obtained through cross-examination. Further, that there is no basis for providing all the evidence in advance; particularly in respect of election petitions where there are strict timelines for filing and serving process.

19. The petitioner relied on a number of authorities...

Analysis and determination

20. The issue for determination is whether in this case there is a good justification for the petitioner to be required to provide further and better particulars in response to the voluminous application of the 1st respondent.

21. As earlier stated, **Rule 15(1)(e) of The Elections (Parliamentary and County Elections) Petitions Rules, 2017** entitles the court to direct a party to provide further and better particulars as follows:

“Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall –

....

(e) give an order, where necessary, for furnishing further particulars” (emphasis supplied)

22. **Rule 4** of the same rules provides that the objective of the rules is:

“...to facilitate the just, expeditious, proportionate and affordable resolution of elections disputes”

This is bolstered by **Rules 15 (i) and (j)** of the said rules which provide as follows in respect of the court's powers to:

“(i) give directions on limiting the volume of any copies of documents that may be required to be filed” and

“(j) make such orders as may be necessary to prevent unnecessary expenses”

23. Clearly, some of the key considerations the court must have in mind when issuing orders in any application, and particularly in an application for further and better particulars is the question whether expedition of the dispute will be served, whether there will be proportionate and affordable resolution of the electoral dispute and whether any resulting documentation may become too voluminous if the

application is granted.

24. This court has already, with the agreement of the parties, fixed the hearing of the main petition for four consecutive days commencing on 30th October, 2017 and ending on 3rd November, 2017. This is a factor to keep keenly in mind, as a demand for a large number of particulars may interfere with the hearing timetable already agreed..

25. In his submissions the applicant argued that the under **Rules 8 and 12 of The Elections (Parliamentary and County Elections) Petitions Rules, 2017**, the petitioner was obliged to disclose her entire case to the applicant, either in the petition itself or in the affidavit in support of the petition. **Rule 8(1)(e)** is on the contents of a petition and requires the petitioner to state the grounds upon which the petition is presented. **Rule 12(1)(a)** concerns the affidavit supporting a petition and requires a petitioner to set out facts and grounds relied upon in the petition, and **Rule 12(10)** of the Rules requires a petitioner's supporting affidavit to:

“(a) state the substance of the evidence;” and

“(c) contain a list of exhibits and copies of any documents which the deponent intends to rely on”.

26. The purpose of an order for furnishing particulars is generally to ensure clarity in issues and to enable parties to know the full case which they must answer, so that surprises are not visited on any of them. In **John Kiarie v Beth Mugo & Others [2008] eKLR**, Kimaru J quoted Bramwell LJ as stating in **Phillips v Phillips [1978] 4QB 127** as saying:

“ What particulars must be stated must depend on the facts of each case...it is absolutely essential that the pleadings, not to be embarrassing to the defendants, should state those facts which will be put to the defendants on their guard and tell them what they have to meet when the case comes on for trial”

27. The court in the **Kiarie case** found as follows:

“It is clear to this court that the basis of the 1st respondent's application is on the premise that the petitioner ought to have supplied particulars which would set out in minute details the alleged electoral malpractices and breach of the law. Rule 5 of the Petition Rules prohibits a petitioner from setting out evidence in the petition. Similarly, the respondent cannot request for the adduction of evidence under the guise of making a request for particulars. The purpose of requesting for the supply of particulars is to prevent surprise and unnecessary expenses and further ensure a fair and effectual trial. A request for particulars was not meant to be an avenue for a respondent to challenge the legality of the petition without the court having the benefit of hearing the complaints raised thereof. (Emphasis supplied).

28. It is thus clear that requests for particulars cannot and should not be used to burden a party with demands for various pieces and aspects of evidence before the hearing. In **Robert Nelson Ng'ethe vs. Mboghoiri Njeru & another Nairobi HC Election Petition No.5 of 2003 [2006] eKLR**, Ojwang J deprecated the practice where the respondents in an election petition requested for particulars whose effect was to require evidence before the hearing of the petition and whose further effect was to undermine the merits of the petition. In that case, the respondents had requested for particulars in form of 501 questions challenging the request for particulars supplied by the petitioner. The application was also for striking out of certain paragraphs of the petition or the whole petition for want of particulars.

29. Disallowing the application in the **Robert Nelson case** Ojwang J graphically described the request for particulars that was before him as follows:

“The first item of the request for particulars carries 23 separate questions; the second carries seven; the third carries 60; the fourth carries 53; the fifth carries 12; the sixth carries 22; the

seventh carries 37; the eighth carries 11; the ninth carries 69; the tenth carries 5; the eleventh carries 18; the twelfth carries 9; the thirteenth carries 8; the fourteenth carries 71; the fifteenth carries 48; the sixteenth carries 9; the seventeenth carries 7; the eighteenth carries 7; the nineteenth carries 9; the twentieth carries 9; the twenty-first carries one; the twenty-second carries 6.

This is, in my view, an inordinately large number of questions, coming to a total of 501 questions. Such a number of questions is, in my view, so large that if each were to be answered in a perfect manner and its degree of perfection checked accurately by the Court, it would take a long time, probably much longer than it would take to hear the petition on the several issues of merit and to determine the whole matter. It follows that prolixity in the framing of particulars for response by a party, in this case the petitioner, cannot be allowed by the Court as it will tend to undermine the merits of the petition and the very reason why the petitioner has come before the Court in quest of justice. Any time such inordinate prolixity is apparent, the Court will subject the request for particulars to a strict test of justification; and unjustifiably lengthy requests for particulars will, in general, not be allowed, as their design cannot be anything but to create technical and artificial delays, and thus to defeat the ends of justice.

A sampling of the numerous questions framed by the 2nd respondent shows, in my view, quite clearly that they are intended to be essentially abstract, and not amenable to accurate answers of any materiality to the trial process.”

30. The phrase used under **Rule 15(1)(e) of The Elections (Parliamentary and County Elections) Petitions Rules, 2017** which empowers the court to exercise its discretion to allow requests for particulars is: **“where necessary”**. The Rule provides as follows:

“Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall –(e) give an order, where necessary, for furnishing further particulars” (emphasis supplied)

31. **Rogets International Thesaurus sixth edition** provides the following synonyms for the word **“necessary”**: **“certain; compulsory; inevitable; obligatory; requisite; urgent”**. Applied to this case, this court is entitled to decipher the phrase **“where necessary”** to mean that requests for particulars will be allowed only in situations where it is exhibited that the request is, or is for something, certain, compulsory, inevitable, obligatory, requisite or urgent. In all other situations where the request for particulars itself does not or the demands it makes do not exhibit those characteristics, the court need not exercise its discretion to allow such requests.

32. In light of all foregoing, I am of the opinion that an election court will only allow an application for request for particulars if: it forms the opinion that the complaints raised in the petition are so hopeless that the same do not constitute sufficient ground to invalidate the election that is being impeached; or that the gap left in the relevant paragraph of the petition or supporting affidavit for which a request for particulars is made is so obvious and glaring that it demands to be filled; or that it is evident that the party to whom the request is addressed had intended to state a particular fact which he has alluded to but either inadvertently by mistake, or negligently, has omitted to state it leaving the sentence hanging. This list is not exhaustive.

Disposition

33. I therefore come to the following conclusions and determination on this application, having carefully interrogated each paragraph and demand in the request for particulars.

34. Where there are paragraphs of the petition or supporting affidavit that are essentially hanging, so that the petition is by all measures incomplete because a sentence will make no sense unless completed, the applicant is entitled to have it completed to make sense of the paragraph. To this end, I hereby order the respondent /petitioner to provide particulars in respect of the following:

- a. Petition Page 21 paragraph ii 1 – the polling stations intended to be highlighted should be indicated (reference item 34(c) of RFP);
- b. Petition Page 22 paragraph ii 2 – the polling stations intended to be highlighted should be indicated (reference item 34(c) of RFP);
- c. Page 39 of the Petitioner’s affidavit in support of the petition at paragraph 18 (i), (ii), (iii) and (v) which paragraphs are incomplete and make no sense unless completed (reference items 35 and 36 RFP), shall be provided;
- d. Page 40 of the Petitioner’s affidavit in support of the petition at paragraph 21 which paragraph is incomplete and makes no sense unless completed (reference item 37 RFP) shall be provided;

35. The particulars ordered under paragraph 34 in this ruling shall be supplied to all parties forthwith and in any event within twenty four hours of delivery of this ruling.

36. Since the burden of proof rests upon the petitioner to prove their case, and the applicant may, if he so desires, use the questions in the request for particulars to formulate his cross-examination, no prejudice will be occasioned him.

37. Orders are declined in respect of all the other items in the request for particulars.

38. Accordingly, as the application has succeeded in part, one quarter of the costs of the application shall be paid by the respondent/petitioner in any event.

39. Orders accordingly

Dated and Delivered at Nairobi this 30th Day of October, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

- 1.for the Petitioner
- 2. for the 1st Respondent
- 3.for the 2nd& 3rd Respondent
- Court Clerk.....