



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO. 8 OF 2017

HABIL NANJENDO BUSHURUPETITIONER

VERSUS

THE IEBC.....1ST RESPONDENT

BEDI IYADI NANCY.....2ND RESPONDENT

(THE CONSTITUENCY RETURNING OFFICER BUTERE CONSTITUENCY)

MWALE NICHOLAS SCOTT TINDI.....3RD RESPONDENT

ANDREW TOBOSO.....4TH RESPONDENT

R U L I N G

Introduction

1. The petition herein was filed on 06.09.2017 and the same questions the validity of the election of Mwale Nicholas Scott Tindi as Member of the National Assembly for Butere Constituency following the elections of 08.08.2017.

2. The 4th Respondent herein field a Notice of Preliminary Objection dated 26.09.2017 and filed in court on 27.09.2017 challenging the petition raised against him on grounds of want of jurisdiction.

Submissions

3. When the parties appeared before me on 04.10.2017, the court was informed that counsel for the 4th Respondent had not served the Notice of Preliminary Objection upon the respondents. He was ordered to serve immediately. On the same day, parties agreed to canvass the Preliminary Objection by way of written submissions in accordance with the timelines indicated in the directions. All the submissions were filed as ordered. A replying affidavit sworn on 05.10.2017 by Nancy Bedi Iyadi the 2nd Respondent was filed on behalf of the 2nd and 3rd Respondents, in addition to their written submissions dated 12.10.2017 and filed in court on 17.10.2017. The petitioner filed grounds of opposition to the Notice of Preliminary Objection and also filed written submissions both dated 13.10.2017 and filed in court on the same day. There are no written submissions from the 3rd Respondent, Mwale Nicholas Scott Tindi. Counsel informed the court during the appearance on 04.10.2017 that they intended to file grounds of opposition on behalf of the said 3rd Respondent.

4th Respondent's submissions in support of the Notice of Preliminary Objection dated 26.09.2017

4. According to the 4th Respondent, The Notice of the Preliminary Objection was given vide paragraphs 5-8 of the 4th Respondent's response to the petition. The relevant paragraphs state as follows:-

“ 5. THAT the 4th Respondent avers that what was recognized was use of party symbols and that the 4th Respondent's symbol that he used in the elections in question was duly approved by the Registrar of Political Parties and the 1st respondent herein without any objection from the Petitioner.

6. The orange colour is not unique to ODM alone as other parties and independent candidates also have the same color in their symbols.

7. The Petitioner's allegation on colours is therefore an afterthought and that this court does not have jurisdiction to entertain the same issue which should have been heard and determined by the 1st Respondent and or IEBC's Electoral Code of Conduct Enforcement Committee which is the proper jurisdiction to entertain such matters. 8. That the 4th Respondent shall during pretrial raise a preliminary objection on grounds that this honourable court has no jurisdiction to entertain the petitioner's claim herein against the 4th Respondent.”

5. The above paragraphs should be read together with paragraph 70 of the Petition which reads:-

“ 70. The 1st Respondent failed and/or refused to regulate the campaigns and permitted the 4th Respondent to fraudulently use the colours of the Petitioner's political party to wit Orange and Blue thus misleading the Petitioner's supporters that the said 4th Respondent was a member of the ODM Party.”

6. The above paragraphs and paragraph 70 of the petition are also to be read together with paragraph 46 of the Petitioner's supporting affidavit, to the effect:-

“46.THAT the 4th respondent clearing and permitted by the 1st Respondent, an independent candidate in the said elections, to campaign using my party colours to wit orange and blue, thus deceiving my party's supporters that the 4th Respondent was a member of ODM, thus affecting my expected votes [annexed hereto and marked as page 21 of Exhibit HNB – 4 are pictures of the 4th Respondent's campaign merchandise bearing striking similarities with mine]”

7. It is the 4th Respondent's contention that based on paragraphs 7 and 8 of his response to the petition as well as paragraphs 9 – 13 of his replying affidavit the petition against him should be dismissed with costs at this preliminary stage on the basis that this court lacks jurisdiction to determine the petition as against the 4th Respondent, and that such jurisdiction lies with the 1st respondent herein as per the provisions of Section 74 (1) of the Elections Act. It is further contended that under Section 32(2) of the Elections Act, the 1st Respondent is the one clothed with the power to approve or reject a symbol presented by an independent candidate. That if the petitioner was in anyway aggrieved by the colours granted to the 4th respondent, he should have moved the 1st respondent under Section 74(1) of the Elections Act to determine the dispute. The 4th Respondent therefore contends that the issue of colours is not for this election court.

8. The 4th Respondent also submitted that if the petitioner, was so aggrieved, he ought to have exercised his rights under Section 40 (1) of the Political Parties Act to have his grievance sorted out and if it had been necessary to come to the High Court on appeal and not by way of the petition as he has purported to do. The 4th respondent urges this court to make a finding that the petition together with the Notice of Motion dated 06.09.2017 are an abuse of the court process.

9. To Support his arguments, counsel for the 4th Respondent relied on the following authorities;-

*i. Mukisa Biscuits Manufacturing Co Ltd – vs – West End Distributors Ltd [1969] EA 696 as cited in the case of Samuel Waweru – vs – Geoffrey Muhoro Mwangi [2014] eKLR **as to the definition of a preliminary objection.***

ii. Owners of the Motor Vessel “Lillian S” – vs Caltex oil (Kenya) Ltd [1989] KLR 1 as applied in petition No. 11 of 2014, Nick Githinji Ndichu – vs – Clerk Kiambu County Assembly and Another [2014] eKLR, for the proposition that a court should immediately down its tools once it becomes aware that it has no jurisdiction to deal with a matter.

Response of Petitioner

10. The Petitioner’s response to the 4th Respondents notice of preliminary objection is vide grounds of opposition dated 13.10.2017. These are that:-

1. The application defies the procedural rules of a preliminary Objection as encoded in law.

2. The said Preliminary Objection seeks to preliminarily litigate an issue that is in dispute, to wit the electoral malpractice by the 4th Respondent, thus:-

a. The 4th Respondent was the sitting member of Parliament for Butere Constituency under the Orange Democratic Movement,

b. The said Respondent lost in the ODM party primaries to the Petitioner

c. The said Respondent resigned from the ODM party to contest the Butere parliamentary elections as an independent candidate

d. The said Respondent went ahead to get clearance from the 1st Respondent for his symbol

e. However, the 4th Respondent campaigned using ODM party colours in his campaign merchandise, giving the false impression to the electorate that he was still in the said party;

f. The 1st and 2nd Respondents permitted this illegality to persist, either by their own commission, omission or blatant incompetence;

g. This is a crucial issue needful of determination in the petition.

3. The application falls short of the prerequisite thresholds of raising Preliminary Objections.

4. The application be dismissed with costs to the petitioner.

11. The petitioner fortified these grounds of opposition with his brief written submissions, contending therein that the 4th Respondent’s purported Preliminary Objection is not a pure point of law as understood from the principles enunciated in the case of **Mukisa Biscuit Company Ltd – vs – West End Distributors Limited (Supra)**. The Petitioner also placed reliance on the case of **Janet Syokau Kaswii – vs – Kathonzweni Financial Service Association [2014] eKLR** in which the court emphasized the point that a proper preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct, and that a preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion on the part of the court.

12. It was thus argued on behalf of the petitioner that the 4th respondent’s Preliminary Objection does not in fact, raise any point of law and the same ought to be dismissed for raising points of facts instead of

raising points of law. It was also submitted that the alleged preliminary Objection cannot be determined without the court undertaking to ascertain certain facts such as the campaign process in the Butere parliamentary election results. Finally, counsel submitted that what the 4th Respondent is asking this court to do is to exercise judicial discretion in his favour, and that the court cannot do so because the facts as pleaded by the other side are in dispute. The petitioner prays that the notice of Preliminary Objection be dismissed.

Response of the 1st and 2nd Respondents

13. The response of the 1st and 2nd Respondent is contained in both the sworn affidavit of Nancy Bedi Iyadi dated 05.10.2017 and the written submissions dated 12.10.2017. The 1st and 2nd Respondents contend that the Preliminary Objection has no merit and urge for its dismissal. The 1st and 2nd Respondents further contend that since the basis of the Preliminary Objection is alleged abuse and/or misuse of party symbols which amounts to breach of the electoral code of conduct, the 4th Respondent ought to have taken his complaint to the 1st respondent's Electoral Code of Conduct Enforcement Committee for determination, and that this should have been done before the elections were held.

14. Nonetheless, the 1st and 2nd Respondents also submitted that the 4th Respondent's alleged Preliminary Objection falls within the definition of an election offence which this court has the requisite jurisdiction to hear and to determine. In this regard, reliance was placed on Section 20 of the Election Offences Act and Section 87 of the same Act which provides as follows:-

1. An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speakers a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.

2. Before a person, not being a party to an election petition or a candidate on whose behalf the seat is claimed by an election petition, is reported by an election court, the elections court shall give the person an opportunity to be heard and to give and call evidence to show why he should not be reported.

15. In summary the 1st and 2nd Respondents argue that the purported Preliminary Objection by the 4th Respondent is an issue that this court, as an Elections Court has the requisite jurisdiction to deal with and to make a pronouncement on it at the conclusion of hearing the petition as provided by Section 87 of the Elections Act (Supra).

16. Secondly the 1st and 2nd Respondents submitted that the 4th Respondent's Preliminary Objection is frivolous and falls within that category of improper points raised as Preliminary Objections but which should ordinarily be argued in the normal manner. This court was urged to ensure that this improper practice is stopped.

Response by the 3rd Respondent

17. As noted earlier, the 3rd Respondent did not file any response to the 4th respondent's Preliminary Objection.

Analysis and Determination

18. After a careful analysis of the law and the submissions, two issues arise for determination; (a) whether the 4th Respondent's Preliminary Objection falls within the meaning given of a Preliminary Objection as given by Sir Charles Newbold VP in the **Mukisa Biscuits Case** and (b) whether or not this court has the jurisdiction to hear and determine this petition as against the 4th Respondent.

a. Whether the 4th Respondents Preliminary Objection meets the threshold of a preliminary Objection as defined by the Mukisa Biscuit case.

19. A detailed analysis of the 4th Respondent's Preliminary Objection clearly shows that the same falls short of the definition given by Sir Charles Newhold V-P in the **Mukisa Biscuits Case**. The 4th Respondent stated that his preliminary Objection is anchored in paragraphs 5 – 8 of his response to the petition and paragraph 46 of his supporting affidavit. The paragraphs mentioned by the 4th Respondent refer to the actions taken prior to the elections which then means that this court is required to enquire into the facts leading to the approval of the symbols by the 1st Respondent prior to the elections. The law is clear that a Preliminary Objection which is based on facts is not a Preliminary Objection but an improper point that can be determined by the court in the normal manner. The petitioner, the 1st and 2nd Respondents have submitted and quite correctly in my view, that the 4th Respondent's Preliminary Objection is improperly raised and the same should be dismissed.

20. Secondly, it is clear from the submissions and the law that the 4th Respondent's Preliminary Objection does not raise a point of law even if the definition of a Preliminary Objection was given the widest interpretation, the reason being that there is no assumption in this case that all the facts pleaded by the other side are correct. The preliminary Objection in fact raises issues of evidence which require the court to ascertain the facts before coming to a conclusion, for example, the court must receive evidence showing that the 1st and 2nd Respondents allowed the 4th Respondent to confuse the electorate by using colours that belonged to the Petitioner's Party. For this reason also, the Preliminary Objection must fail.

b. Whether this court has jurisdiction to determine the dispute between the Petitioner and the 4th Respondent.

21. While the 4th Respondent says that this court has no such jurisdiction, the Petitioner, the 1st and 2nd Respondents think otherwise. The 1st and 2nd respondents have placed reliance on Section 87 of the Elections Act, 2011 (supra). There is thus clear proof from a reading of this Section of the law that an Election court has the power to recommend to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence contrary to Section 20 of the Election offences Act, has been committed by any person in connection with the election. Such findings are made during the normal course of hearing the election petition and such an issue therefore need not form the basis of a preliminary Objection. On this ground too, I find the 4th Respondent's Preliminary Objection to be without merit.

22. This Court would therefore not be in a hurry to dismiss the petition herein as desired by the 4th Respondent. The duty of this court is to do justice to the litigants by giving each of them an opportunity, all things being equal to be heard in the matter. All the parties in this petition will be given their day in court, and at the end of it all the court will decide who wins the race.

Conclusion

23. From all the foregoing, the 4th Respondent's Preliminary Objection is found to be lacking in merit and is accordingly dismissed. Costs of the Preliminary Objection shall await the outcome of the petition.

Orders accordingly

Ruling delivered, dated and signed in open court at Kakamega this 23rd day of October, 2017

RUTH N.SITATI

JUDGE

In the presence of;-

Mr. Ngome holding brief for Mr. Akusala (present).....for petitioner

Mr. Rono(present).....1st and 2nd Respondents

Mr. Busiega (present).....for 3rd Respondents

Mr. Amasakha & Mrs. Kadenyi.....for 4th Respondent/Objector

Polycap.....Court Assistant