



REPUBLIC OF KENYA

High Court at Kakamega

Election Petition 9 of 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTION ACT, 2011

AND

IN THE MATTER OF ELECTIONS (GENERAL) REGULATIONS, 2012

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2013**

AND

**IN THE MATTER OF THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
ACT, 2011**

AND

**IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR
MATUNGU CONSTITUENCY**

THE PETITION FOR PAUL POSH ABWORA

BETWEEN

**PAUL POSH ABWORA.....
.....PETITIONER**

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST
RESPONDENT**

THE RETURNING OFFICER, MICHEAL KOSGEI (RETURNING OFFICER).....2ND

RESPONDENT

DAVID AOKO WERE.....3RD

RESPONDENT

RULING

Pleadings

1. The 1st and 2nd Respondents filed a notice of motion application dated 2/5/2013 seeking orders that:

i) The Court be pleased to expunge paragraphs 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 35, 38, 39, 43(ii – xxiii) of the petition.

ii) The Court be pleased to expunge paragraphs 17, 20, 21, 22, 23, 24, 25 of the Petitioner’s affidavit sworn on 8/4/2013.

iii) The Court be pleased to strike out the affidavits of:

a) Samson Oteu Ngonu sworn on 8/4/2013

b) Mohammed Makokha Murunga sworn on 8/4/2013

c) David Olukuru Okuku sworn on 8/4/2013

d) Paragraph 8 of the affidavit of Mariciana Kunguru sworn on 8/4/2013

e) Alex Ywaya Kwena sworn on 8/4/2013

f) Amina Atsieno Okumu sworn on 8/4/2013

g) Douglas Simboni sworn on 8/4/2013

h) Evans Muchongori Dominic sworn on 8/4/2013

i) Henry Nandwa Sunguti sworn on 8/4/2013

j) Magdaline Opemi sworn on 8/4/2013

k) Magrose AyakoAndersone sworn on 8/4/2013

l) Rashid Indakwa Omukamani sworn on 8/4/2013

m) Philip Nyongesa Mayeki sworn on 8/4/2013

n) Bancras Achami Nasebe sworn on 8/4/2013

o) Augustine Ouma sworn on 8/4/2013

iv) Costs of the application.

2. The application is premised on grounds that the persons whose conduct is complained of are not

respondents, and the period of joining other respondents in the petition has lapsed. Further that the liability of electoral officers is personal as far as their conduct is concerned. Lastly, the resolution of the election petition shall be expedited.

3. The application is supported by an affidavit sworn by the 2nd Respondent, Micheal Kosgei who deposed that he was a Returning Officer of Matungu Constituency. He deposed that his duties as stipulated in the Election Act, inter-alia, include: Conduct elections in the constituency level; Tally results from each polling station in the constituency; Announce constituency results for president, senator, governor, woman representative, member of national assembly and county representatives; and give lawful instructions to the presiding officers. The 3rd Respondent deposed that the presiding officers were appointed with clear mandate to preside elections at polling stations. It was his disposition that all the presiding officers at the 87 polling stations in Matungu constituency made declarations before him as is required by law to the effect that they understood their electoral mandate and would follow the Regulations and any lawful instructions given to them.

4. The deponent stated that the allegations contained in the aforementioned paragraphs of the petition, the petitioner's affidavit and affidavits sworn by witnesses are complaints against presiding officers and other persons who are not respondents in this petition. It is the 1st and 2nd Respondents' claim that any person whose conduct is complained of in relation to an election must be made a respondent to a petition. Further that the complaints are offences under the Elections Act and thus vicarious liability does not arise against the deponent and/or the 1st Respondent. In that regard, the deponent prayed that the aforementioned paragraphs and of the petitions and affidavits be struck out with costs so as to expedite the hearing and determination of this petition.

5. This application was opposed by the Petitioner who filed Grounds of Objection dated 13/5/2013. The Petitioner's objection is on the basis that the application is a misunderstanding of electoral law for reasons that the presiding officers are defined under Regulation 3(6) of the Election (General) Regulations, 2012 as 'such other staff' whose legitimate conduct is in law attributed to the Returning Officer. Further that there is no requirement in law to cite presiding officers as Respondents in an election petition. Consequently, the application is misconceived, vexatious and an abuse of the due process of the Court.

Background

6. The Petitioner being aggrieved with the declaration of the 3rd Respondent as the elected member of the National Assembly for Matungu Constituency filed a Petition dated 8/4/2013 together with an Affidavit in support of the petition sworn on the same date. The Petitioner was a candidate in the Parliamentary election. The Petitioner averred that the National Assembly Election for Matungu Constituency was marred with multiplicity of electoral malpractices, violations of Electoral Code of Conduct, commission of a variety of election offences, illegal practices amongst other ills.

7. The Petitioner thus prayed for *inter-alia*, scrutiny of votes cast including those declared rejected, counterfoils, tallying sheets, register of voters; a declaration that the petitioner was validly elected member of National Assembly for Matungu Constituency. In the alternative, the parliamentary election held in Matungu Constituency be determined and declared null and void; a determination that the 3rd Respondent was not validly elected as member of National Assembly for Matungu Constituency; an order be made for holding fresh elections for the said position and the Respondents be condemned to pay costs of the Petitioners and those incidental to the Petition.

8. In this petition, allegations have been made against the named Respondents and other election officers including the presiding officers and clerks who have not been specifically joined as Respondents herein. It is this non-joinder of, in particular, the presiding officers that the 1st and 2nd Respondents have filed this application to have the paragraphs and affidavits that are in respect of complaints against the said presiding officers expunged.

Submissions

9. This application was canvassed by way of oral submissions made in court on 22/5/2013. Mr. Morara Apiemi for the Applicants reiterated the contents of the application. He submitted that a Respondent in relation to an election petition is, pursuant to Rule 2 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (*hereinafter referred to as Election Rules*)

- (a) *the person whose election is complained of;*
- (b) *the returning officer;*
- (c) *the Commission; and*
- (d) *any other person whose conduct is complained of in relation to an election.*

10. Regulation 3(3) of The Elections (General) Regulations, 2012 (*hereinafter referred to as the Election Regulations*) spells out the responsibilities of the returning officers as:

- (a) *conducting elections at the constituency level;*
- (b) *receiving nomination papers in respect of candidates nominated for the post of National Assembly and Ward representative;*
- (c) *the tallying of results from each polling station in the constituency;*
- (d) *announcing results from the constituency for purposes of the election of the President, Senator, Governor, woman representative to the National Assembly, member of National Assembly and county representatives;*
- (e) *the declaration of the results tallied under paragraph (c); and*
- (f) *such other functions as may be assigned by the Commission*

11. Regulation 5 deals with the appointment of presiding officers. Counsel submitted that the presiding officers were the in-charge of polling stations and mandated to carry out duties stated in Regulations 62 – 82 of the Election Regulations. Counsel contrasted the responsibilities given to the presiding officers under the current regulations as compared to the 1992 Regulations wherein the presiding officer then could only conduct an election in a polling station, seal the boxes and deliver the same to the Returning Officers. Under those rules, it was the Returning Officers who supervised the counting and announcement of results. Counsel submitted that in view of the amount of responsibilities afforded to the presiding officers under the current rules they ought to have been joined to the petition as respondents so as to answer precisely to the complaints.

12. In response to the grounds of objection by the Petitioner, Counsel disagreed with the Petitioner's submission that a presiding officer is an agent of the returning officer. He submitted that the counting of votes is a preserve of the presiding officer and he/she therefore must take personal responsibility. Counsel submitted further that there was an autonomy created under Regulation 5(5) of the Election Regulations for the presiding officer to carry out his duties independently. It was his submission that it was for this reason that the definition of a respondent included any other persons whose conduct is complained of in relation to an election. Counsel referred the Court to Section 59 of the Elections Act which spells out offences by members of staff of the 1st Respondent. It was his submission that the misconduct explained in the stated paragraphs are offences for which presiding officers must take personal responsibility.

13. Counsel relied on the following authorities: **Attorney General v Monko (1986 – 1989) EA 1 (CAT); Jahazi v Cherogony (1984) KLR 814; Ramakrishna Raja v Registrar of Companies 2005 123 CompCas 319 Mad; Opinions of House of Lords of Appeal for Judgment in the cause of Majwrowski v Guy's and St. Thomas' NHS Trust (2006) UKHL 34**

14. Mr. Wasilwa for the 3rd Respondent weighed in support of the 1st and 2nd Respondents application. He submitted on behalf of the 3rd Respondent that the present application raises two issues, firstly that the affidavits in support of the petition offends Order 19 of the Civil Procedure Rules, which is applied by virtue of Rule 12(b) of the Election Rules, and thus should be struck out. Secondly, non-joinder of the presiding officers against whom the allegations are made is fatal. Counsel referred the Court to Article 33(3) of the Constitution and submitted that the right of a petitioner to express his rights must express the

rights and reputations of others. The presiding officer has a right to be joined so that they can respond to the claim.

15. Mr. Wasilwa further submitted that general misjoinder does not nullify pleadings. However, the limited time spelt out in the Constitution and Elections Act would be such that irregularities of non-joinder cannot cure the problem. In light of the timeframe under Article 87 (2) of the Constitution, the irregularity is not curable by amendment to join the presiding officers. In respect to affidavit evidence, Counsel submitted Rule 12 (2) (a) limits the right of the Petitioner to substance of evidence only

16. Ms. Mutuku for the Petitioner in response to the Respondents' submissions reiterated that the application is misconceived and an abuse of the Court Process. Counsel referred the Court to the interpretation section of the Elections Regulations which, in respect of an election officer, provides that:

“election officer”, means a person appointed by the Commission to assist in conducting an election under these Regulations and includes a returning officer, deputy returning officer, a presiding officer, a deputy presiding officer, a clerk or an interpreter;

17. Regulation 3 thereto is to the effect that the person responsible for conducting elections in a constituency is the Returning Officer who is empowered to hire staff to assist him. Therefore the conduct of his staff is under the law of agency attributed to the Returning Officer. Counsel referred the Court to Regulation 5(5) which demands that all officers attending to a polling station including the presiding officer and his deputy, clerk, interpreter and authorized agents make a declaration before the Returning Officer that he/she understands his/her mandate and shall strictly follow the provisions of the regulations and any instructions lawfully given to him/her. This, Counsel submitted, depicts that the Returning Officer is in charge.

18. Counsel also submitted that Regulation 64 of the Election Regulations further depicted that the Returning Officer is in charge, for presiding officers cannot do certain duties without consulting the Returning Officer. It was her submission that the presiding officer is not an entity of his own but always acts under the control of the Returning Officer. Counsel referred the Court to Section 15 of the Independent Electoral & Boundaries Commission Act which insulates election officers from personal liability if acts are done in good faith for purposes of executing the mandate as provided by the Constitution and Electoral laws. Counsel submitted that in any event, the Court at the interlocutory stage could not determine whether the acts done by the election officers were in bad faith, for the Court could only do so upon trial.

19. Ms. Mutuku further submitted that it would be uneconomical to join 75 presiding officers, 87 deputy presiding officers and over 600 clerks when there is a Returning Officer who is responsible for their actions. In support of this submission Counsel relied on the decision in the case of **Ayub Juma Mwakesi v Makwere Chirau Ali & Others Mombasa High Court Election Petition No. 1 of 2008**. In conclusion, Counsel asked the Court to dismiss the application for lack of merit and in the alternative, for leave to join the presiding officers should it find that indeed there was need to have them joined. Further that the non-joinder of the presiding officers should not render the petition fatal.

20. Mr. Morara Apiemi responded to the Petitioner's submission stating that Regulation 5(5) gave the presiding officers independence to discharge their duties and that the presiding officer is not accountable to the Returning Officer with the exception of Regulation 64. He submitted further that the Petitioner complained of a few polling stations in the constituency, and therefore there was nothing that would stop them from joining 10 – 15 presiding officers.

21. Mr. Wasilwa in response submitted that Section 15 of the IEBC Act insulates IEBC officials and its organs of vicarious acts but it does not absolve an officer from being joined in the proceedings. In respect of practicability, counsel submitted that no basis had been laid by the Petitioner for not joining the presiding officers.

Issues for Determination

22.I have considered the application carefully, and in my view, the issues for determination before this Court are:

- i) Joinder of presiding officers as respondents to a petition particularly where there are allegations made against them.
- ii) Whether by naming a Returning Officer as a respondent is sufficient to respond to allegations made against presiding officers and other election officers in his Constituency.
- iii) Whether the Court can at this stage make a determination that the actions of the election officers were indeed a fundamental breach of the provisions of the Constitution, Election Act, Rules and Regulations.

23.The 1st and 2nd Respondents herein contend that the presiding officers have been given powers, duties and responsibilities under the Election Rules and Regulations. In that case therefore, where allegations are made against presiding officers the same should be directed to them. It thus necessitates a Petitioner to join the presiding officer as a respondent to afford him/her an opportunity to respond to the any allegations. The Petitioner on the other hand is of the view that all the presiding officers of polling stations forming part of a constituency are accountable to a Constituency Returning Officer. Therefore, the Returning Officer is responsible for the actions of the presiding officers and any other election officer employed to attend to a polling station that forms part of his/her constituency. Consequently, it would not be necessary to join presiding officers and other election officers whereas there is a Returning Officer who is their in-charge.

24.As stated above Rule 2 of the Election Rules outlines who can be a Respondent in an election petition. Sub-rules (a) – (c) are specific persons whereas (d) widens the scope of persons who can be a respondent. In view of the provision in Rule 2(d) certainly, a presiding officer can be enjoined as a respondent in the event an allegation is made against him in relation to an election petition. The question however that arises is whether it is necessary to name presiding officers and/or other election officers as respondents in an election petition.

25.It is without doubt that a presiding officer is the in charge of a polling station. He is an appointee of the 1st Respondent pursuant to Regulation 5(1) of the Election Regulations. The duties of the presiding officer *inter-alia* include: regulating the number of voters to be admitted to the polling stations, keeping order at his/her polling station, sealing the ballot boxes, declaring the polling station closed, in-charge of counting votes for the polling station, sending provisional results to the returning officer before ferrying the actual results to the returning officer. In consultation with the returning officer, the presiding officer has the discretion to adjourn the proceedings of his/her polling station in the event of circumstances stated at Regulation 64 of the Election Regulations.

26.The Constituency Returning Officers are pursuant to Regulation 3 of the Election Regulations appointees of the 1st Respondent in charge of overseeing the election process at the Constituency level. Apart from the duties enumerated in Regulation 3, a Returning Officer pursuant to Regulation 61(1) facilitates the presiding officers by providing them with election materials at each polling station. The Returning Officer also receives actual results of the election from the presiding officers for purposes of tallying and announcement of the results. Evidently, the presiding officers oversee the election process in their respective polling station. However, their mandate is exercised under the control of the Returning Officer. This mandate, in my view, is derived from Regulation 3(3) (a) of the Election Regulation which expressly provides that the Returning Officer shall be responsible for conducting elections at the Constituency level. The provisions of Regulation 5(5) further buttress the position that Returning Officers are the in-charge of the election process in the Constituency.

27. Regulation 5(5) of the Election Regulations provides:

The returning officer shall require every presiding officer, deputy presiding officer, clerk, interpreter and agent authorised to attend at a polling station, as soon as he or she has made the oath of secrecy

prescribed by the Act, to make before the returning officer, a declaration that the officer making the declaration understands that he or she shall not prompt any voter whom he or she is empowered by these Regulations to assist, and shall strictly follow the provisions of these Regulations, and any instructions which may lawfully be given to him or her relating to the election concerned.

28. From the above quoted provision, it is discernible that a presiding officer and all other election officers authorized to attend to a polling station is accountable to the Returning Officer of the respective constituency. This provision, in my view, permits the Returning Officer to issue instructions to the said election officers with which in turn, they are expected to comply. Therefore, I do find that the Constituency Returning Officer and Presiding Officers of the polling stations that form part of his constituency have a principal and agent relationship. *Agency in law is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act. Halsbury's Laws of England 5th (ed.) Vol 1: Agency. K.I. Laibuta Principals of Commercial Law, 2nd (ed.) Pg. 327, compares the status of an agent to that of a servant, as thus: The status of an agent is comparable to that of a servant whose duty is to act within the bounds of his authority in furtherance of the interests of his master while deriving for himself no benefits of the undertaking beyond the agreed wage paid in return for his services. From this analogy, it is observable that the Presiding Officers have authority to act in furtherance of the interests of their master who is the Returning Officer, the interest herein being to conducting elections at the constituency level. In determining the relationship between the Returning Officer and the Electoral Commission of Kenya (now defunct), whether the same is of an agent and principal, and whether a service of petition upon the Electoral Commission of Kenya is in effect service upon the Returning Officer, Mbogholi-Msagha, J. in **Macharia v Electoral Commission of Kenya & 3 others Election Petition No. 11 of 1998 (2008)2 KLR (EP) Pg. 167** held that the *Returning Officer was a necessary party in the petition by virtue of rule 2 of the National Assembly (Election Petition) Rules. That, however, did not affect his position as an appointee of the Electoral Commission. His actions were those of the Commission and the two were inseparable in law. Service of the petition upon the Commission, which was his principal, was effectively service upon the Returning Officer (Emphasis added).* Borrowing from this holding, it can be derived that the relationship between the presiding officers and the Returning officer of the respective constituency is that of a principal and agent.*

29. Pursuant to Section 15 of the IEBC Act, the election officers are insulated from personal liability for any action claim or demand. The Returning Officer being the principal thereby bears the brunt of the actions of the election officers under him. This was rule established in the ratio decidendi in the **Mudavadi v Kibisu** case and restated by Ibrahim J. in **Ayub Juma Mwakesi v Makwere Chirau Ali & Others Mombasa High Court Election Petition No. 1 of 2008** *"The Rule now makes it clear that complaints against any person under the Returning Officer would be complaints against the Returning Officer. There would be no need to enjoin a presiding officer, his deputy, police officers at the police station etc as Respondents. It is enough to name the Returning Officer as the Respondent for him to answer the complaints against himself and/or those under him. This means that the Returning Officer would be held responsible for the conduct of the officer under him provided these complaints are not one of willful misconduct or of a criminal nature that would require the speaker to be notified."*

30. As expressed by the Hon Judge in the Makwere case, the complaints should not be one of willful misconduct or that of a criminal nature. The qualification of this rule, according to Section 15 of the IEBC Act is if the action is done in good faith. Consequently, a Returning Officer, and in turn the Commission can be released from liability to a third party where the acts of the election officers are in fundamental breach of the provisions of the Constitution, Election Act, Rules and Regulations, thereby rendering such election officer personally liable. The question that arises is whether Court can at this stage make a determination as to whether at the time of conducting the election process, the election officers engaged in actions that were a fundamental breach of the provisions of the Constitution, Election Act, Rules and Regulations. Determination on allegations of electoral misconduct on the part of election

officers can only be made upon analyzing evidence adduced in court and the same having been tested through cross-examination. Therefore unless and until the petition proceeds to trial the Court cannot make a determination on this aspect.

31. The upshot of this ruling is that the 1st and 2nd Respondent's application dated 2/5/2013 is dismissed. The costs of the application shall be in the cause.

Dated, Signed and Delivered at **Nairobi** this 29th day of May 2013

E.K.O. OGOLLA

JUDGE

In the Presence of:-

.....For the Petitioner

.....For the 1st and 2nd Respondents

.....For the 3rd Respondents

..... Court Clerk