



REPUBLIC OF KENYA

High Court at Bungoma

Petition 5 of 2013

**PHILIP MUKWE WASIKE.....PETITIONER
AND**

JAMES LUSWETI MUKWE.....1ST RESPONDENT

IEBC.....2ND RESPONDENT

SILAS ROTICH.....3RD RESPONDENT

RULING

This application is brought pursuant to the provisions of **Article 35** of the **Constitution of Kenya 2010**, as read with **Section 80(3)** of the **Elections Act 2011** and **Rules 17(1) (1) and (2)** of the **Elections (Parliamentary and County Elections) Petition Rules 2013**). it seeks leave

a) to file further affidavit(s);

b) to adduce further evidence namely OB 25/26/02/2013 at 1117 hrs, Jackets and clothing, sim cards, mobile phones and Ford Kenya Membership cards and witchcraft paraphenalia, assault case file No.911/--/2013 at Bungoma police station and work ticket for 26.2.2013 in respect of the 3rd respondents's movements.

The petitioner also seeks an order directing the 3rd respondent to provide better particulars regarding errors mentioned in paragraph 67 of his affidavit, sworn on 18.4.2013.

The application supported by the petitioner's affidavit sworn on 12.5.2013 and is premised on the grounds that affidavits filed in response to the petition raise several factual issues which needs to be responded to;

a) that the respondents have annexed documents to their affidavits which can only be challenged through filing of further affidavits and/or documents;

b) that there are crucial documents in the hands of third parties which can only be availed as evidence in the petition if there is a court order for their production or release to petitioner,

c) that it is the petitioner's Constitutional right and freedom to access information and correction or

deletion of untrue or misleading information;

d)that the 3rd respondent has conceded that there were minor arithmetical errors which need to be particularized.

The application is opposed through grounds of opposition filed by the 2nd and 3rd respondents, dated 14.5.2013 and filed on 15.5.2013. It is opposed through the affidavit of David Simiyu Khaoya sworn on 14.5.2013 and grounds of opposition in support of 1st respondent.

In the grounds of opposition filed by the 2nd and 3rd respondent it is contended

a) that the petitioner has not given sufficient reason(s) for failing to file affidavits setting out the substance of evidence of all witnesses to be called at trial;

b) the application is designed to permit the petitioner panel beat and rectify his case in reaction to the responses filed by the respondents;

c) any contradiction in evidence cannot be legally remedied through filing of further affidavits;

d) the orders sought are not suitable or effective in getting or securing evidence in the hands of third parties;

e) the errors alluded to or any contradictions in evidence can be explained fully through cross examination which is available to the petitioner and all other parties;

f)that the application is incurably defective as enforcement of rights under Article 35 of the Constitution may not be achieved through an election petition.

The 1st respondent also contends that the application is an attempt by the petitioner to amend the petition through the back door contrary to **Article 87(2)** of the **Constitution**; that provisions of **Article 35** of the **Constitution** in relation to access of information is not absolute and as such cannot be used by petitioner to interfere with private affairs of persons who are not parties to the petition.

Reference is made to **Rule 17(1)** of **Election Rules, 2013** regarding giving directions and it is contended that it does not confer a right to introduce evidence with the effect of effectively amending the petition. Further the application is a mere side show aimed at derailing the hearing the petition which is already slated for hearing on 20.4.2013. The deponent had also averred that the orders sought shall greatly prejudice the 1st respondent but the court expunged that portion of the affidavit following a preliminary objection by the petitioner's counsel regarding the propriety or otherwise of the affidavit sworn by David Simiyu Khaoya, in opposition to the petitioner's application.

Mr. Wanyonyi, counsel for the petitioner submitted that the orders sought are necessary for production in court of evidence which is crucial for proof to the required standard of the petitioner's petition. His contention is that such evidence is in possession of third parties who can only produce it if an order is issued for its production in court or release to the petitioner. He pointed out the particular pieces of evidence sought to be procured through the orders sought are not NEW as they are mentioned in the petition. He further submitted that certain issues have emerged from the responses filed by the respondents which issues could only be addressed by filling of further affidavits. His argument is that **Rule 17(1) (1)** of the **Elections (Parliamentary and County) Petition Rules** offer refuge to petitioner. He cited two authorities in support of his case; **Raila Odinga & 5 others V. IEBC & 3 others Supreme Court of Kenya at Nairobi Petition No.5, 3, & 4 of 2013**. He maintained that the application was neither intended at introducing new evidence nor amending the petition.

While admitting that this court has wide discretionary powers to allow the petitioner file further affidavits, Counsel for 1st respondent, Mr. Makokha, submitted that such discretion has to be exercised judiciously; that before the discretion can be exercised in favour of the petitioner the petitioner has to

prove that:-

1. The evidence sought to be introduced is relevant to the matters in issue.
2. The evidence was not in their possession or could not be accessed at the time of filing the petition.
3. He contended that the petitioner has not fulfilled the foregoing conditions.

Respondent's counsel submitted that the information sought to be introduced was within the petitioner's knowledge; and the petitioner ought to have been vigilant to obtain the information. He submitted that the right to access of information under Article 35 of the Constitution is not absolute but subject to rights of others under Article 31, that an election court is not suited to issue the orders sought as they touch on fundamental rights of private citizens which rights could only be properly adjudicated on by a Constitutional Court, with involvement of all the parties. Further it would be in breach of the rules of natural justice to issue the orders sought against persons who are neither parties to the petition nor represented in the petition or application.

In reply to the the submissions counsel for petitioner, Mr. Ocharo (petitioner's assisting counsel) submitted that the petitioner's right to access to information under Article 35 of the Constitution is not limited and that the information sought although in the petitioner's knowledge at the time of filing the petition was never in his possession.

I have considered the submissions made by counsels both in support and against the application together with the authorities cited. The issues for determination are:-

- 1) Whether the orders sought can issue given that they affect persons who are neither parties to the application nor represented in the application?
- 2) Whether the petitioner has made a case for granting the orders sought?
- 3) What orders should the court make?

As regards the first issue, which is capable of preliminarily determining the application, it is trite law that the rule of *audi alteram partem*, which means "hear the other side," is an indispensable requirement of justice. It demands that the party who has to make a decision shall hear both sides, giving each an opportunity of being heard on what is urged against him. See **Pashito Holdings & another v. Ndugu & 2 others** where the Court of Appeal held:-

"The rule of *audi alteram partem*, which means "hear the other side," is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him.....The gravamen of the respondent's suit was that the Commissioner had no right to alienate public land to any person for any user other than that for which it had been reserved. The respondents could not have established a prima facie case with probability of success which is an essential legal requirement in order to be entitled to interlocutory injunction unless the Commissioner was a party to the proceedings..... The High Court should have directed that the Commissioner was a proper party without whom the relief sought against him could not be granted."

Whereas the application by the petitioner is addressed to the 1st, 2nd and 3rd respondent it is clear that the orders sought are substantially addressed to some persons or entities who are not parties to the suit. For instance the DC Bungoma District and access to information contained in the sim cards and mobile phones. It is also notable that the petitioner has not particularly prayed for production of the evidence by the alleged third parties or for release of the said evidence to him. This aspect only plays itself out in the submissions made by the petitioner's counsel

In my view, it was incumbent upon the petitioner to enjoin, the third persons (especially the private

individuals) in the application, to accord them a chance to be heard on the case levelled against them. It was also incumbent on the petitioner against to lay a basis for seeking an order against the third parties by at least leading evidence to show that he tried to obtain the said evidence from the persons and the plea was turned down or they failed to cooperate.

I recognise however, that this court is duty bound to dispense justice to the parties without undue regard to procedural technicalities (**Article 159(2) (d)**). So even if I was to hold that the failure to specifically pray for an order that police be directed to produce the items listed is a technical defect capable of being cured under the foregoing provisions of the law, then I must consider which persons would be affected by the orders.

What I understand the petitioners to be saying is that the police have in their possession items relating to witchcraft, bribery and assault, and that such occurrence was recorded in the OB held at Kimilili Police Station.

I think Rule 17(1) (1) clearly contemplates a situation where the court can allow parties to file further affidavits and introduce further evidence if a basis is laid. I am persuaded that so as to give the petitioner a just opportunity to ventilate its case, he should be allowed to file a further affidavit to introduce the OB containing such information. The only caveat I will place is that such affidavit must be sworn either by the OCS or Investigating Officer in the matter, because this will then make the police officer into a compellable witness. It would otherwise be pointless ordering for the production of the OB, if the makers have not sworn affidavits which would form a basis for their coming to court to testify. In fact the reason why election petitions proceed by way of affidavit is because there is a presumption that the deponents are witnesses who can be called to testify and have their evidence tested on cross-examination. This affidavit shall be limited to the issues raised regarding witchcraft, bribery and assault.

As for the evidence regarding movement of the DC's official motor vehicle, surely this is a generalised request with no specificities – which is the DC's official motor vehicle, what is the registration number? This limb is a net cast in the lake on a fishing trip with hopes of netting some object.

There is reference to other material held by police, namely sim cards and mobile phones belonging to unnamed individuals, Ford Kenya membership cards belonging to unnamed individuals and those are intended to be used to demonstrate that the 1st respondent was involved in acts of bribery and treating of voters. Counsel for petitioner argues that **Article 35(2)** of the **Constitution** is not restricted and the police are not private persons but public officials who should avail whatever information they hold to an individual upon request.

The respondent's counsel concede that police are public servants but argue that **Article 35** of the **Constitution** is qualified by **Article 24** and **31** of the same **Constitution** and the provision is not absolute. This is because there are rights to privacy which cannot be infringed and moreso because Article 31 of the Constitution guarantees the privacy of individuals unless they are first heard.

None of the owners of those sim cards and phones are parties to this suit and none will have an opportunity to be heard, with the result that they will be condemned unheard. I agree.

I concur with 1st respondent's counsel that if there are allegation of bribery then the way to go was to obtain a data print-out from Safaricom or Airtel or Orange or Yu (depending on which service provider was used giving details as to the sender, recipient, date and place. I agree that Safaricom and Airtel and the other mobile network companies are private citizens and their customers are entitled to privacy, unless a basis is first laid for infringing on such privacy. I hold the view that **Article 35** can only be handled by the Constitutional Court and not an Election Court and the request is declined.

The petitioner cannot be allowed unhindered access to all information contained on the mobile phones and sim cards of the unnamed individuals, which information would only come from the service providers and not the police. In fact what purpose will the sim cards and phones serve if they are just presented to court without verification of their content and source. No basis has been laid for that and the

mere fact that police are holding them as exhibits does not bestow an automatic right on the petitioner to get access to the same by virtue of Article 35.

Article 35 (1) (b) of the Constitution provides:-

“Every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom.”

However this right must be considered in the light of **Article 24(1) (d)** which provides that fundamental rights (including the right to privacy) can only be limited to the extent that it is reasonable and justifiable in an open and democratic society, and the nature of that right must be taken into account. Further due consideration must be given to ensure that the enjoyment of such right and fundamental freedom does not produce the rights and fundamental freedoms of others. In this instance, my view is that the right to access the information by petitioner will infringe on the privacy of persons who are not parties to this petition, nor are they named or listed as witnesses. The privacy referred to here is of those phones and sim cards.

This position is clearly stated under **Article 31** of the **Constitution** which provides that:-

“Every person has the right to privacy, which includes the right not to have:-

(d) Privacy of those communications Infringed.

FURTHER AFFIDAVIT AND DOUBLE DEALING WITNESSES Turning to the prayer for leave to file further affidavit(s), counsel for 1st respondent contended that it may open a window for the petitioner to amend the petition or file additional evidence. Countering that contention Counsel for petitioner submitted that the intended further affidavit is intended to clarify certain issues arising from the responses and the affidavits annexed thereto. He, in particular, singled out a situation in which one of the petitioner's witnesses one Allan Wocha Wanyonyi, has sworn an affidavit in favour of the 1st respondent recanting what he swore in support of petitioner's case. He further submitted that even though that is a situation addressable by cross examination of the said Allan Wocha Wanyonyi, he was apprehensive that the said witness may not attend court for cross examination. To be on the safe side, he thought, it was prudent to get another person to swear another affidavit in lieu of the recanted one.

Counsel for 1st respondent, on his part, submitted that the petitioner's concerns were uncalled for as the impugned witness was indicated as one of the witnesses expected to testify in favour of the 1st respondent.

There are two affidavits, one by **ALLAN WOCHWA WANYONYI** and the other by **PAUL KHISA WANJALA** – these two individuals have sworn affidavits in support of the petitioner's cause, then gone round and sworn affidavits supporting the 1st respondent's case – in effect recanting what they deposed in the plaintiff's favour. The petitioner fears that the respondents may opt not to call these persons as witnesses and if that happens they will have lost the opportunity to cross-examine them. This reaction is drawn from the fact that the respondents have contested filing of further affidavits by the petitioner on grounds that the same will have the effect of amending the pleading and this will result in prejudice against the respondents who will not have an opportunity to file a reaction to that. Certainly Election Petition unlike civil suits have a limited life span, which therefore requires parties to act to avoid delays. In this regard then, filing of further affidavits in response to those filed by witnesses or parties is not an automatic provision. A basis has to be laid to the satisfaction of the court as to why such leave should be granted. That is why when the petitioner informally sought leave to file an answer in form of a further affidavit to the respondent's reply, the court declined to grant such an oral request on the basis that there was no provision for such an automatic order.

Rule 17(1) provides that within **7 days** after the receipt of the last response to a petition, the court shall schedule a pre-trial conference with the parties, in which it shall *inter alia*:-

(d) deal with all interlocutory applications and decide on their expeditious disposal.

(1) Give direction to the filing and serving of any further affidavits or the giving of additional evidence.

According to the respondent's counsel, the provision under **Rule 12 of the Elections, (Parliamentary and County Elections) Petition Rules, 2013** the petitioners witnesses' statements and affidavits must be filed at the time of filing the petition. His view on **Rule 17(1) (1)** is that it envisages a situation where a party has already filed affidavits at the time of the pre-trial and the court now gives directions on them and how they are to be served on parties. The petitioner is then allowed to cross-examine any party who will appear on behalf of the respondent without introducing new evidence. While I agree with the observation by counsel as regards rule 12, With the greatest of respect to counsel, I do not share the same view regarding rule 17(1) (1) – that provision does not restrict a party as to who shall file further affidavits or introduce further evidence. In my view it caters for both the petitioner and the respondent.

We cannot restrict ourselves to the view held by the Supreme Court in the **Raila Odinga V IEBC case Election Petition No.5 of 2013**, because:-

1) The court noted that such provision for filing of further affidavit was not provided for in the Supreme Court Act in relation to filing of further response, and 2) that the principal pleadings in a Presidential Election were the petition and the response.

Of course the scenario obtaining here with regarding to the Parliamentary petitions is that the principal pleadings are the petition and response and just like in the Supreme Court the next stage is pre-trial conference under **Rule 17(1) (1)**. It is contemplated that among issues which will arise for directions is the filing of further affidavit and evidence where proper basis has been laid for that. In fact the Supreme Court at holding No.6 indicated it would have exercised its discretion to allow further affidavit or additional evidence if it was specifically applied for.

The petitioner in this case has now specifically applied for filing of further affidavit and it is not even introducing new evidence, but on grounds that since two witnesses have become “**turn coats**”, then there is need to now have another witness depose the similar facts as had been alluded to by PAUL and ALLAN. In my view, this will cause no prejudice to the respondents, so long as the affidavit is limited to deposing to what those two witnesses had alluded to. This prayer is reasonable and I allow it **TO THE EXTENT ALLUDED TO**.

With regard to the prayer for better particulars regarding errors admitted by the 3rd respondent in his witness statement, it was submitted that such a prayer need not be addressed by way of an interlocutory application as it can sufficiently be dealt with at trial by cross examining the 3rd respondent.

Whereas it true that the 3rd respondent has admitted that there were several minor arithmetical errors, I find no new factual or evidential issues raised in the said reply or affidavit to warrant leave being granted for filing of particulars in respect of the admitted errors. In my view, granting the order as sought, would amount to shifting the burden of proof of the allegations made in the petition from the petitioner to the 3rd respondent, which would be unlawful.

It is trite law that the petitioner has the duty to prove that the alleged electoral offences and malpractices affected the election results before the 3rd respondent can be called upon to adduce evidence in rebuttal. In my view, the purpose sought to be addressed by the order under prayer (c) can effectively be achieved by cross examination of the 3rd respondent.

IN conclusion, I direct that:-

a) A further affidavit be sworn to introduce the OB from the Kimilili Police Station and Bungoma Police Station and be filed and served before the close of business today..

b) A further affidavit be filed to support the claims earlier made by ALLAN WOCHANA and PAUL

KHISA (now recanted) be filed and served by the close of business today.

c)The respondents are at liberty to file and serve further affidavits in response by 20/05/2013.

This in effect means that the court (being guided by Provisions of **Rule 20** on extension of time) would have to adjust the beginning of the trial to **21/05/2013** at **9.00 a.m.** at Bungoma High Court sitting in Chief Magistrate's Court 1.

Since this hearing has been disrupted by the petitioner who, although represented by counsel on 03/05/2013 when court ordered all counsels present in court to attend the pre-trial conference. Petitioner's counsel used the excuse that:

a) He did not hear such directions and that "*He was not served with any notice.*" Oddly enough all the other counsels attended the court on 09/05/2013. That however as resolved by a rescheduling of the pre-trial conference.

b)There was some lack of diligence on the petitioners part in gathering the evidence required to support its petition. It is only fair that the petitioner do suffer some penalty by losing one day from the time allocated to it for hearing. This would give effect to the overriding objectives of the Rules (including case management) by facilitating THE JUST, EXPEDITIOUS AND PROPORTIONATE RESOLUTION of this election dispute.

Delivered and dated this 17th day of May, 2013 at Bungoma.

H.A. OMONDI

JUDGE