



REPUBLIC OF KENYA

High Court at Machakos

Petition 2 of 2013

THOMAS MALINDA MUSAU.....1<sup>ST</sup> PETITIONER

STEPHEN NDAMBUKI MULI.....2<sup>ND</sup> PETITIONER

JOHN NTHULI MAKENZI. ....3<sup>RD</sup> PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT

LEONARD OKEMWA (RETURNING OFFICER) .....2<sup>ND</sup> RESPONDENT

STEPHEN MUTINDA MULLE.....3<sup>RD</sup> RESPONDENT

RULING

Introduction

1. Petitioners herein have petitioned this court for orders declaring the Parliamentary Elections in Matungulu Constituency *null and void* which would pave way for fresh elections being held. When the matter came up for Pre-Trial Conference, Counsels on record agreed on preliminary issues to be determined at the interlocutory stage as hereunder:-

*i. “Whether the Petitioners have complied with the provisions of Rule 11(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013, and if not, what Orders should the court make in that respect?*

*ii. Whether there are valid grounds pleaded or at all to warrant an order for scrutiny of the votes recorded in Matungulu Constituency in the elections for the member of National Assembly?*

*iii. Whether there are valid grounds pleaded or at all to warrant an order for recount of the ballot papers cast in the elections held on 4<sup>th</sup> March, 2013 in Matungulu Constituency for the elections of the members of National Assembly?*

*iv. Whether the hearing of the petition filed should be heard by way of viva voce evidence or by affidavit evidence”.*

## 2. Submissions

- i. The 3<sup>rd</sup> Respondent raised a Preliminary Objection on the Petitioners' joint supporting affidavit dated 18<sup>th</sup> March, 2013 to the Petition for contravening the Civil Procedure Rules 2010 and the Oaths and Statutory Declaration Act. He called upon the Court to strike it out, consequently dismiss the Petition.
- ii. All respondents were of the view that Petitioners herein, having contested independently for election as members of the National Assembly, Matungulu Constituency and lost, they challenged the outcome in individual capacities hence should have deposited the prerequisite security of costs within (10) days pursuant to Rule 11(1) of the Elections (*Parliamentary and County*) Petition Rules 2013. (*Hereinafter "the rules"*). They urged the Court to find that this was in breach of the mandatory requirement of the law and strike out the whole Petition or alternatively strike out the petition in respect of 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners.
- iii. It was argued that the irregularities alluded to in polling stations had been explained by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents hence did not warrant an order for scrutiny of votes and recount of ballot papers.
- iv. It was the contention of the Respondents that affidavit evidence on record was sufficient to dispose of the matter.
- v. The Petitioners' Counsel on the other hand in response argued that petitioners herein had filed a single petition hence were entitled to pay security for costs for one petition.
- vi. With regard to the issue of scrutiny of votes and recount of ballot papers, it was submitted that reasons advanced warranted granting of the orders sought.
- vii. It was submitted further that the right to call witnesses was provided by statute. The petitioner's right could only be waived by consent of parties.
- viii. The petitioners called upon the court to disregard technicalities in regard to the Preliminary Objection raised and uphold the affidavit jointly sworn.

### Analysis

I have considered submissions by all counsels, alongside authorities cited.

3. With regard to the Preliminary Objection raised, it is a requirement for a petition to be supported by an affidavit sworn by the petitioner containing the grounds upon which relief is sought and facts to be relied on. (*vide rule 10 (3)(b) of the Rules*).

4. The affidavit dated 18<sup>th</sup> March, in support of the Petition is deponed by three petitioners jointly. It commences as follows:-

***"We, Thomas Malinda Musau, Stephen Ndambuki Muli, John Nthuli Makenzi of P.O. Box 305-00600 Nairobi do hereby make oath and state as follows;-***

***That we are adults of sound mind and petitioners herein..."***

Order 19 of the Civil Procedure Rules & Oaths and Statutory Declarations Act apply to affidavits under the Rule. (*See Rule 12 (6) of the Rules.*)

Order 19 rule 5 of the Civil Procedure Rules provides as follows:-

***"Every affidavit shall be drawn in first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to distinct portion of the subject."***

What the law requires here is for an affidavit to be sworn in the first person. A singular form of first person is 'I' and the plural form is 'we'

5. It is however argued by counsel for the Petitioner that the irregularity can be cured by Order 19 rule 7 of the Civil Procedure Rules. This means that he is in agreement that the affidavit is defective in form. Order 19 rule 7 civil procedure Rules provide as follows;-

***“The court may receive any affidavit sworn for the purposes of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any technicality”.***

He also alluded to Article 159(2) (d) of the Constitution. The said Article provides;-

***“Justice shall be administered without undue regard to procedural technicalities”.***

6. The issue to be determined is whether the irregularity alluded to can be cured. To answer the question posed I must consider the purpose of an affidavit. An affidavit basically presents facts. Facts are usually within personal knowledge. It is for this reason that every affidavit must be expressed in the first person. The question I must pose at this point is whether more than one person can swear an affidavit? It is possible for more than one person to swear an affidavit jointly especially so when they are deposing to the same facts. However, cases would differ depending on their circumstances.

7. I have perused the affidavit filed. It is apparent that some averments are peculiar to individual deponents. This means that the averments deposed do not belong to other deponents who have appended their signatures thereon. The averments clearly show that not all deponents have the same perception or belief. When it comes to cross-examination it may create some difficulty and/or embarrassment. This may result into an injustice being done because there will be frustration on the part of the party cross-examining.

8. Justice ought to be administered without undue regard to technicalities but – the overriding objectives of the Election Rules – is to facilitate a just resolution of election petition. (*vide rule 4(2)*).

9. Order 19 of the Civil Procedure Rules requires an affidavit to be drawn in first person form. Allowing a plural affidavit like the one deposed herein will be doing an injustice to the Respondents. The mischief cannot be cured by Article 159 (2) (d) of the Constitution. This would call for striking out of the affidavit.

However, this is an election petition, an important case not only for litigants herein but to the public at large who turned out in large numbers to exercise their constitutional rights. The legislation would not have intended to have an election petition dismissed following filing of such an irregular affidavit. If that was the case parliament would have expressly stated so.

Whether there was compliance with Rule 11(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2013

10. It is a requirement for a petitioner to deposit security for costs within 10 days of filing of an election petition. (*Vide Rule 11(1)) of the Rules and Section 78 of the Election Act*).

It is not in dispute that Kshs. 500,000/= was deposited with the registrar as payment for costs, charges and /or any other expenses that would be payable by the petitioners. A receipt was duly issued to that effect.

This issue has been raised by the respondents because in their opinion, each petitioner herein should have deposited security for costs individually.

11. Looking at the petition, the petitioners formed a common intention and presented the petition jointly. It is true that each petitioner states that due to malpractices on the part of the respondents all petitioners were denied an opportunity to be elected as members of the National Assembly Matungulu

Constituency. This means that Petitioners herein are seeking a relief following an act that arose from an election in the same Constituency. Had they brought different petitions the same question to be determined would have arisen, the law allows them to be joined as petitioners.

12. A petition is defined by the Election Petition Act as an application to the Elections Court under the constitution or under the Act. The Election Act being silent on whether or not parties can file petitions jointly or singularly. We revert to rules regarding filing of applications or suits.

13. An Application may be filed by parties jointly. The prayers sought are sought by petitioners as joint petitioners. They have filed a single Petition therefore they would not be expected to pay costs individually.

14. In the case of **Samuel Kimutai vs Ezekiel Lenyongopeta & 2 Others [2005] eKLR** the Petition was dismissed for failure to comply with the requirement of making a deposit for security of costs. Parliament had indeed enacted a time limit for the same.

In this case the rules are clear there is indeed a time limit within which the security for costs should be deposited. The Petitioner did comply with the law.

Should evidence be presented by way of viva voce or affidavit?

15. Rule 12(1) of the Rules provides as follows:-

***“A petitioner at the time of filing the petition, file an affidavit sworn by each witness whom the petitioner intends to call at the trial”.***

This clearly means that witnesses can be called by a petitioner if he so wishes. Calling a witness simply means availing him/her for clarification of substance of the evidence contained in the affidavit. If need arises such a witness can be cross-examined by the Respondents and be examined by the petitioners. This court will comply with the requirement of rule 12 of the Elections rules. Parties will have discretion of presenting their witness for cross-examination if there will be contested issues. Justice would demand that the law be followed to the letter.

Is there any basis for recount or scrutiny of votes?

16. The Petitioners sought an order for scrutiny of votes and recount of ballot papers. It is pleaded that the tallying of votes was incorrect. Tampering and/or mistakes alluded to have been admitted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents though they claim that they were a few such that they would not affect the outcome of elections results

17. The issue this court should address is whether the irregularities complained about are sufficient to warrant the order sought being granted.

18. According to rule 33(2) of the Rules the duty is upon the petitioner to satisfy the court that there is a plausible reason necessitating the scrutiny/recount of votes. This is done by sufficient reasons being given. A good basis must be laid to that effect.

19. This issue was considered in the case of **Hassan Ali Joho & Others vs Hothem Nyange & others 2007 eKLR** then **William Maina Kamanda vs Margaret Wanjiru Kariuki & Another [2008]**. As correctly stated by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent the court only ordered a scrutiny of votes after the ECK conceded that the mistakes made were material in nature.

20. In the **Joho** case it was stated that a scrutiny could only be made if it was prayed for in the petition and when reason for it existed.

21. In the instant case, scrutiny of votes and recount of ballot papers is pleaded in the petition. A scrutiny

of votes should however take place where results are disputed. (see Rule 33(4) of the Rules).

22. The Petitioners have pleaded in paragraph 11 polling stations where they specifically dispute results. They have pointed out errors noted in some polling stations which were as follows:-

- No. 40 -Kyekoyo SA Primary School
- No. 017 -Donyo Ol Sabuk Primary School
- No. 002 -Tala Boys Primary School
- No. 010 -Ngunda Trading Centre
- No. 035 -Kanzalu Primary School
- No. 047 -Kithaayoni Primary School
- No. 068 -Kwatombe Primary School
- No. 077 -Kalandani Secondary School

23. In paragraph 12 – 23 it is stated that the counting at various polling stations was flawed, agents of most candidates were chased away. It was done in their absence.

24. I have perused copies of forms 36 and 35 from the Matungulu Constituency availed by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. It is evident that most of them have alterations that are not authenticated. Some of them do not have comments from the presiding officers. Needless to add, that most agents did not append their signatures on most of them. These are mistakes that cannot be dismissed as non-consequential.

25. The overriding objective of the rules to be complied with is to ensure justice is done. Justice in this case would call for scrutiny and recount of ballot papers.

#### Conclusion and directions

I have afore found that the provisions of Rule 11(1) of the Elections (*Parliamentary and County Elections*) Petition Rules, 2013 we complied with.

In the premises I do order as follows:-

1. The joint affidavit deponed by the Petitioners herein be and is hereby struck out. They are however granted leave to file a compliant affidavit in support of the Petition within 3 days. Corresponding leave is granted to the Respondents to file responses thereto if need be within three (3) days.
2. In compliance with rule 12 of the Elections (*Parliamentary and County Elections*) Petition Rules, 2013 the Petitioner shall be at liberty to call witnesses who shall give *viva voce* evidence subject to the direction of the Court.
3. Scrutiny of votes and recount of ballot papers shall be done in respect of all polling stations under the supervision of the Deputy Registrar, pursuant to Rule 33(4) of the Rules.
4. Each party shall bear its costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>TH</sup> day of MAY 2013.**

**L.N. MUTENDE**

**JUDGE**