



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELECTION PETITION NO. 12 OF 2013

**ELECTION FOR THE MEMBER OF THE NATIONAL ASSEMBLY FOR NJORO
CONSTITUENCY**

KARANJA

KABAGE.....PETITIONER

VERSUS

**HON. MR. JOSEPH KIUNA KARIAMBEGU NGANGA.....1ST
RESPONDENT**

**MR. FIDELIS KITILI KIVAYA, RETURNING OFFICER NJORO CONSTITUENCY.....2ND
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD
RESPONDENT**

RULING

In his List of Issues dated 27th June 2013 and filed on 28th June 2013, Mr. Karanja Kabage (*the Petitioner*) gave notice that he would raise a Preliminary Issue for determination of the court by way of a Preliminary Point of Law against the response of Hon. Joseph Kiuna Ng'ang'a Kariambegu (*the 1st Respondent*), that -

- 1. The 1st Respondent's Response filed on 2nd May 2013 and served upon the Petitioner on 3.05.2013 does not comply with Rule 14(2) of the Election (Parliamentary and County Elections) Petition Rules 2013 and Form EP 4 of the First Schedule to the Election Parliamentary and County Elections Petition/Rules 2013.***
- 2. The 1st Respondent's Response filed on 2nd May 2013 and served upon the Petitioner on 3/05/2013 is fatally defective and incompetent for, inter alia, the following reasons -***

(i) it does not comply with Rule 15(7) of the Election (Parliamentary and County Election) Petition Rules 2013. The 1st Respondent's affidavit does not conform to provisions of Order 19 of the Civil Procedure Rules 2010 and the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya.

(ii) *that the said response is neither a response as prescribed nor an affidavit.*

(iii) *that paragraph 1 of the said response describes the response as an affidavit in contravention of Rule 14(1) and (2) and the Form EP 4, set out in the First schedule of the Elections (Parliamentary and County Elections) Petition Rules 2013.*

(iv) *that the First Paragraph of the Response does not state that the said statement is on oath contrary to Section 8 and Schedule of the Oaths and Statutory Declarations Act Chapter 15, Laws of Kenya.*

(v) *that said document does not have a title “Affidavit” or “Statutory Declaration” and hence unknown in law.*

The respective submissions by counsel are set out in the paragraphs following, and answer to the following issues -

1. *whether the application can be raised at this stage,*
2. *whether a formal application ought to have been filed,*
3. *whether the 1st Respondent's Response is in conformity with the provisions of Rule 14(2) of the Election Petition Rules, and,*
4. *whether the said Response is valid and properly on record.*

Before Mr. Gathenji could argue his Preliminary point on a point of law, Mr. Njenga, learned counsel for the 1st Respondent raised his own objection that the Preliminary Objection on point of law (*the objection*) had been raised out of time, and had no basis. He submitted that under Rule 17(1)(d) of the Election Petition Rules any interlocutory application was required to be raised at the pre-trial stage so that the court could give directions under sub-rule 1(g) (of that rule) for the expeditious disposal of the Petition or any outstanding issues; that the Respondent had responded to the issues raised in the 1st Respondent's response and had filed a further affidavit sworn on 22nd May 2013, along with the Further Affidavits of -

(a) *Mary Wanjiku Njenga – sworn on 21st May 2013,*

(b) *James Bono Gitau sworn on 21st May 2013,*

(c) *Muthero Ngugi Edward sworn on 16th April 2013,*

(d) *Charity Kathambi Chepkwony sworn on 20th May 2013,*

(e) *Harrison Kinyanjui sworn on 20th May 2013.*

and that the Petitioner had not in his own, or in any of those further affidavits impugned the 1st Respondents' Response, and that since this was an issue which arose after the pre-trial stage, and therefore ought to have been determined under Rule 17(2) of the Election Petition Rules(*the objection*).

Counsel argued that the Preliminary Objection had been brought irregularly as no formal application had been filed, and ought to have come before court by way of a Notice of Motion supported by an affidavit, and not raise a preliminary objection where the Petitioner is asking the court to strike out a pleading; and that there was no evidence tendered in support of the application, and that counsel for the Petitioner only relied on submissions from the Bar.

However in response thereto, counsel for the Petitioner submitted that the Respondents had been notified of the Preliminary Objection, as the same was contained in the Petitioner's List of Issues. The question therefore to be determined is whether the Preliminary Objection can be raised at this stage. In this regard counsel for the Petitioner relied on the case of **MUKISA BISCUIT MANUFACTURES LTD. VS. WESTEND DISTRIBUTORS LTD, [1969] E.A. 696.** where the court held that where an

application to dismiss a suit for want of prosecution should be made by motion, *(and not disguised as a Preliminary Objection which it was not)*. Discussing what constitutes a true preliminary objection, Law JA said at p. 700 DE -

“... so far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

In the words of Sir Charles Newbold P. at p. 701, B -

“... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In support of this objection, Counsel for the Petitioner cited Rule 14(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (*the Petition Rules*) which says -

“14(1) Upon being served with an Election Petition under Rule 13, the Respondent may oppose the Petition by filing and serving a response within a period of not more than fourteen days upon service of the Petition.

(2) The Response to an Election Petition shall be in form of an answer to the Petition and shall be in Form EP 4 set out in the First Schedule.

(3) A Respondent who has not filed a response as provided under this rule shall not be allowed to appear or act as a party against the Petition in any proceedings.”

It is also, I think, opportune at this stage to cite two more rules under the Election Petition Rules, that is rule 15(1) and (7) which say -

“15(1) A Respondent shall at the time of filing a response to the Petition, file an affidavit sworn by a witness whom the Respondent intends to call at the trial, which affidavit shall set out the substance of the evidence, and

Rule (7) says -

(7) The provisions of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to the Affidavits under this Rule.”

Considerable time was spent by counsel on both sides of the divide in argument that the Preliminary Objection on a point of law was properly raised; that so far as the Petitioner was concerned the arguments were purely legal and no evidence or affidavits were called for, that the 1st Respondent had failed to comply with the requirements of the law, that is to say, rule 14(2) of the Election Petition Rules, in that the response was not in form prescribed in the schedule as Form EP 4.

Counsel for the Petitioner attacked the Response on further grounds that it was a hybrid between a “horse and a donkey”, though it was described as an “Affidavit” and had a “*jurat*” in terms of the Oaths and Statutory Declarations Act (*Cap. 15, Laws of Kenya*), *(and had exhibits annexed thereto)* it was not a Response to the Petition in terms of said Rule 14(2), and should therefore be expunged from the record and the 1st Respondent debarred from participating in the proceedings of the Election Petition.

Counsel submitted that this was not a mere technicality which could be disregarded as a technicality under Article 159(2)(d) of the Constitution of Kenya, 2010. He relied on the decision of the Supreme

Court in **RAILA ODINGA & 5 OTHERS VS. IEBC & 3 OTHERS** [2013] eKLR where the Court struck out affidavits which had been filed out of time.

Counsel also relied on the case of **THOMAS MALINDA MUSAU & 2 OTHERS VS. IEBC & 2 OTHERS** [2013] eKLR. The issue in that case was whether an Affidavit could be sworn by more than one person and the court held, that under Order 19 of the Civil Procedure Rules, an affidavit is required to be drawn in the 1st person form and allowing plural affidavits would be doing injustice to the respondents, and that it was not a mischief which could be cured under Article 159(2) of the Constitution.

Finally Counsel for the Petitioner submitted that Election Petitions are proceedings which are *sui generis* (*special proceedings of their own kind*) and the procedure for conducting them are specifically provided for under the rules. It was therefore not open for the court to indulge a party who fails to comply to the letter with the provisions of the rule. Counsel in support of that proposition relied on the case of **HON. CLEMENT KUNGU WAIBARA & ANOTHER VS. HON. FRANCIS KIGO NJENGA & 4 OTHERS**, [2013] eKLR where the Election Court cited with approval the dicta by the Supreme Court of India in **JYOTI BASU & OTHERS VS. DEBI BHASAL & OTHERS** [1982] AIR SC, 983 – where the court said -

“...An election Petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election law unless statutorily embodied. A court has no right to resort to them in consideration of alleged policy because policy in such matters, are those, relating to the trial of election disputes, is what the statute lays down. In the trial of Election disputes, the court is put in a straight jacket.”

Mr. Njenga, Counsel for the First Respondent was of the opposite view. He submitted at length that the Response by the First Respondent was in accord with the requirements of Rule 14(2) of the Election Petitions Rules and the First Respondent had complied with the requirements of that rule, the sole departure was that the Response had been commissioned and is described as an affidavit. It however fits into the description of a Response and failure to comply with the form of EP 4 Form, did not go to affect the substance of the response. Counsel submitted that were the court to find non-compliance with the rule and proceeded to strike out the 1st Respondent's Response, Counsel urged the court to grant the First Respondent leave to file another response that is in compliance and not exclude the First Respondent from the Hearing of the Petition as he would be greatly prejudiced.

Ms Kambuni, SC, learned counsel for the 2nd and 3rd Respondents associated herself with the submissions by counsel for the First Respondent.

Those in essence were the respective arguments by counsel for the Petitioner and Counsel for the Respondents. I will now go back to the issues first raised -

1. ***whether the Preliminary Objection on a point of law is a true preliminary objection in the sense of the holdings in MUKISA BISCUITS VS. WESTEND DISTRIBUTORS (supra),***
2. ***whether it was necessary to make a formal application,***
3. ***whether the First Respondent's Response is in conformity with the provisions of Rule 14(2) of the Election Petition Rules, and***
4. ***whether the Response is not valid and properly on record.***

On the first question whether the Preliminary Objection should be raised at this stage, my view is that whereas an objection on a point of law can be raised any stage in the course of proceedings, this

objection ought not to have been raised at this stage, and having been first raised it ought not to have been pursued. By raising and pursuing the point the Petitioner was approbating and reprobating his own actions. I say so because, the Petitioner after being served with the Response of the First Respondent proceeded (*with leave of court*) to file Further Affidavits, (*his own and those of his witnesses, Mary Wanjiku Njenga, James Boro Gitau, Mutura Ngugi Edward, Charity Kathambi Chepkwony and Harrison Kinyanjui*). By those affidavits the Petitioner accepted the Response – approbated. By seeking to exclude the response, he is reprobating his own actions. No party can be allowed to approbate and reprobate at the same time.

Secondly, the Preliminary Objection on a point of law is not a true preliminary objection on a point of law, for if allowed, it excludes the First Respondent, but it does not dispose of the Petition, and the First Respondent is an integral party to the Elections Petition proceedings. He is like the Petitioner constitutionally subject to the protection of the law and the right to fair hearing.

Thirdly even if an application had been brought to strike out the First Respondent's Response, I am doubtful, in the circumstances of the Petition that such application would have been followed by an opinion different from the one expressed above.

Fourthly, certainly the First Respondent's Response cannot be said to be on all fours with Form EP 4. It is described by the First Respondent as an “Affidavit” and contained information ordinarily stated in affidavits, and not in the form required by Rule 14(2). Failure to conform with the Rule is not however fatal and does not warrant the drastic order of barring the First Respondent from participating in the Election Petition proceedings. The following reasons guide me in making this conclusion. **Firstly** Section 72 of the Interpretation and General Provisions Act (*Cap. 2, Laws of Kenya*) provides -

“72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”

I am secondly guided by the decision of Ringera J. (*as he then was*) in **MICROSOFT CORPORATION VS. MITSUMI COMPUTER GARAGE LTD & ANOTHER** [2001] KLR 470 when the learned judge held -

“Deviation from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its higher calling to do justice by saving the proceedings in issue.”

And thirdly in **Raila Odinga and Others vs. Independence Electoral and Boundaries Commission and 3 Others** [2013] eKLR (*Nairobi Petition No. 5 of 2013*), the Justices of the Supreme Court observed -

“... A Court of Law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause.”

Form EP 4 requires a party to state the following in its Response and in this order -

- (i) the position for which election the subject matter of the suit concerned and the respective county, constituency, or ward,**
- (ii) the name of the party to whom the response is related,**

(iii) the facts and grounds upon which the Respondent lies,

(iv) a prayer that it be determined that the said (name of candidate) was duly elected and the election was valid (or as the case may be), and

(v) the response should then be dated and signed.

In the present case, all the above information is provided for in the First Respondent's response, although not in the format provided by Form EP 4, and also contains additional information. The Respondent to whom the response relates is not in doubt, the position and constituency which are the subject matter of the response are also clear. The facts and grounds which have been relied on by the First Respondent and the prayer which he seeks are also provided for. The response or document cannot be said to be intended to mislead and the Petitioner has not been in any way prejudiced or suffered any prejudice or been unable to understand the contents of the Response. That is why the Petitioner filed a Further Affidavit in response to the averments contained in the Response by the First Respondent.

The Election (*Parliamentary and County Election*) Petition Rules 2013 were made by the Rules Committee as constituted under the Civil Procedure Act in exercise of the powers given to the Committee by Section 96 (1) of the Elections Act which allowed it to make rules generally to regulate the practice and procedure of filing and the trial of Election Petitions in the High Court.

Parliament in passing Section 96 was exercising the authority conferred upon it under Article 87(1) of the Constitution to enact legislation to establish mechanism for timely settlement of electoral disputes. The Election Petition Rules 2013 is the only document that provides for the procedure for the determination of an election dispute for Parliamentary, and County Elections. In interpreting these Election Petition Rules an Election Court is enjoined to have regard to Rule 4(1) thereof which provides -

“4(1) The overriding objective of the rules shall be to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act,

2. The court, shall, in exercise of its powers under the Constitution and the Act or in the interpretation of the provisions in the Rules, seek to give effect to the overriding objective.”

This objective is an echo of Article 159(2)(d) of the Constitution of Kenya, 2010 that the court shall be guided by the principles that preserve the interests of justice, that justice shall be administered without undue regard to technicalities, and the purpose and principles of this Constitution shall be protected and promoted.

In my humble opinion therefore, and for the reasons set out in the foregoing passages of this Ruling, the only conclusion which lends itself to the promotion of the purposes and principles of the Constitution and the overriding objectives of the Election Petition Rules to do substantive justice to all the parties, is to dismiss with costs to the Respondents, the Petitioner's Preliminary Objection on a Point of Law first raised in the Petitioner's List of Issue dated 27th June 2013 and filed on 28th June 2013.

It is so ordered.

Dated, signed and delivered at Nakuru this 16th day of July, 2013

M.J. ANYARA EMUKULE

JUDGE