



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Election Petition 11 of 2008

**REUBEN NYANGINJA NDOLOPETITIONER
VERSUS**

**DICKSON WATHIKA MWANGI.....1ST RESPONDENT
JERUSHA CHEPSAP.....2ND RESPONDENT
THE ELECTORAL COMMISSION OF KENYA....3RD RESPONDENT**

RULING

After the Petitioner's testimony was finalized, Mr. Otiende Amollo, the learned counsel for the Petitioner, made two applications.

First, he sought Court's permission to allow a sealed brown envelope (titled "further Affidavit of Reuben Nyanginja Ndolo") to be opened and read. He submitted that it contains the Petitioner's own observation made by him during entire process of opening the ballot boxes before the court. The said process was presided over by Hon. Lady Justice Wendoh. He however abandoned the application immediately after the counsel for the 1st Respondent rose to object the same and the Counsel for the 2nd and 3rd Respondents left to the Court. The court made the following ruling.

"As Mr. Amollo has abandoned the issue in view of objections from the 1st Respondent, the matter rests there, and the issue be raised during the submissions."

He then raised another issue which he described as more substantive, by way of an oral application. Mr. Otiende Amollo submitted that Hon. Wendoh J. sought from the Returning Officer the documents which are supposed to have been filed with the Registrar of the High Court under Rule 19 of the National Assembly Elections (Election Petition) Rules.

When the Court was given a response by the Returning Officer that the documents, required of her to be produced, were in the ballot boxes, the court ordered that all the ballot boxes be opened to search for those documents.

It was stated that in the course of the said exercise, the court and parties made the notes on various things. The Petitioner filed and served the bundle of typed proceedings along with further written submissions. Mr. Otiende submitted that it was observed by and on behalf of the Petitioner, that;

1. Ballot Boxes bearing serial No. 85892 and No. 85658 were labeled "Presidential" This court's attention was drawn to Ballot box No. PA 85892 and Court's note stating "Presidential" underneath its details (page 155 of the proceedings). The another ballot box to that effect was 85659 (and not 85658) as stated earlier.

I note the above from the written further submission made on 22nd January 2010.

2. A ballot box no. PA 68150 did not fit with the serial nos of other ballot boxes all of which start with figure 85 (on page 151) of the proceedings.

3. Two ballot boxes serial No. 85793 and serial No. 85607 appeared to have materials for stations

different than the one indicated on the box (typed pages 62 – 64).

I note that the first ballot box as per the record, shows Bididi R 14 105 and Bididi Primary School and the second one shows Harambee ward. The constituency on both boxes were showing constituency no. 001, which is, as per the common ground, Makadara constituency.

4. 15 ballot boxes contained Presidential Election Materials. The number thereof are given in the written submissions with a stress on serial No. 85673 on typed page 128 of the proceedings.

5. 15 ballot boxes containing Civil Elections materials with emphasis on ballot box No. 85802 on page 135 and ballot box serial no. 85613 on typed page 39 on the proceedings.

Mr. Otiende further contended that in view of these allegations made by the Petitioner, the court can exercise its power to open and scrutinize the ballot boxes under section 23(d) of the National Assembly and Presidential Election Act (Cap 7).

In support of this application, it was further contended that all parties participated in the exercise of opening the ballot boxes and the Petitioner also witnessed the same. The purpose of the said exercise was to ascertain whether the documents required to be filed by the Returning Officer before the Registrar were so filed. In other words whether the requirement of Rule 19 of the Election Rules was complied with. According to Mr. Otiende, the Hon Wendoh J., on conclusion of the exercise, recorded that the said documents were not found and were not contained in the said ballot boxes. However, as pointed out by Mr. Kilukumi, the learned Counsel for the 1st Respondent, the said remarks were made by the Petitioner's Counsel and not by the Court.

Based on the said observations, it was submitted that a scrutiny of one box each from the above five categories of the ballot boxes be allowed so as to determine the full effect of the complainant on the Respondents' non-compliance of the Electoral Law, procedure and practice.

It is stressed that the purpose of seeking scrutiny of only one ballot box each from the above classes of ballot boxes is to avoid delay which the Petitioner is avoiding.

It was further urged that the Petitioner shall have no problem if his present application for scrutiny be reserved for a later date. The Ruling delivered by Hon. Kihara Kariuki J. in the case of **William Maina Kamanda v. Margaret Wanjiru Kariuki and 2 others** (El. Petition No. 5 of 2008), was relied upon in support of this application.

In the matter referred hereinabove, during the hearing of the Petitioner's case, an application by way of Notice of Motion was filed to seek scrutiny of recount of all the votes recorded. An issue was raised by the Respondent's counsel therein that a clear distinction be made between **scrutiny and recount**, though they may have a convergence in implementation. On this point the court has made following observations; (on page 6 of the typed Ruling) namely;

“With great respect, I am unable to agree with Odera's submission that scrutiny ought and can be ordered only for the purpose of striking off votes as contemplated by section 26 (1) of the Act. That is but one of the purposes of scrutiny which, in absence of any definition in the Act, Court of Appeal in Said v. Martha & another (2000)2 EA 495 at 509 defined as “a reviewing of the ballot papers following a court order.”

It was also found by the Court and I quote:

“But another purpose of scrutiny is to assist the court to investigate if the allegations of irregularities and breaches of the law complained of by the Petitioner are valid.”

The Court also found other purposes of scrutiny which would be to assist the court assess whether there would be just cause to limit the time within which the Petitioner or any of the Respondents should complete his case as envisaged by Rule 20 of the Rules.

The Court in Kamande's case (*supra*) further found that the order of scrutiny can be made at any stage of the hearing before final judgment, whether on the Court's own motion or if a basis laid requires so.

I may note in passing that Mr. Kilukumi, the learned counsel for the 1st Respondent herein, was the Counsel for the Petitioner in the referred case.

I may hastily note also that the counsel is at liberty to make any submissions (though inconsistent with those made in other cases) which enhances his client's case.

I would, so far as the findings made by Hon. Kariuki J in the referred case is concerned, simply state that I would agree with those observations referred to hereinbefore and would add that only because the word **“scrutiny”** is used in sec. 26 of the Act, it does not debar the Court from enlarging the scope thereof in other aspects of the Election Petition to arrive at a just conclusion in the matter.

Thus I would reject Mr. Kilukumi's submissions that the scrutiny of the ballot boxes is not envisaged in the Electoral laws. The court under section 23(d) has power to deal with the issues before it without undue technicality.

Mr. Kilukumi further submitted that the application also cannot be allowed as it seeks the court to check or inspect the ballot boxes whether they contain extraneous materials like the alleged mention of "Presidential" and materials for elections other than the present one.

He referred the court to Rule 19 (h) (i) which mentions Regulation 33 (2) of the Regulation and which is repealed by L.N. 178/07.

The repealed regulation provided for procedure to verify the Identity card and elector's card. I do not think repeal of that provision is relevant to the issue before the court. Be that as it may, it was further submitted that Reg. 34(2) was amended by Legal Notice 172 /02 which removed the provision, to wit, "**of sealing the ballot boxes to prevent the introduction of any matter into boxes or the opening thereof.**"

Relying on the aforesaid repeal, Mr. Kilukumi argued that due to such repeal, the materials which are extraneous, if found in the ballot boxes, cannot be held to be in contravention of the electoral laws. Regulation 39 provides for the procedure of sealing of ballot papers and Regulation 39(3) provides how the ballot boxes will be sealed after placing sealed packets of counted, rejected and disputed ballot papers in an **empty ballot box.**

I thus fail to understand the submissions made by Mr. Kilukumi that despite the requirements of placing the sealed packets of the three categories of ballot papers in an empty ballot box, which needs to be sealed with ECK seal and party's seal if asked for, how the extraneous materials could be contained in the ballot box be not relevant for court's observations?

The Petitioner has, in several paragraphs of his petition, to state a few namely, paragraphs 8, 11 and 13, complained of breach of law and several other irregularities.

Now it is brought to my attention, from the records of the case presided by Hon. Wendoh J., that some of the ballot boxes contained Presidential, Civic or other constituency's materials, and if a party seeks leave of the court to scrutinize its contents, with tremendous respect, it shall not be tantamount to generalization of the trial of the election petition.

I shall like to add in the list of scope of scrutiny a court can undertake in the referred case of Kamande (Supra), an another scope: scrutiny of materials which do not pertain to the election in question.

No one knows what shall be found in those boxes but to stop the Petitioner at this stage shall not be just and lawful. I shall like to give that chance to any party before the court so that the Court can then evaluate whether the result found from the exercise shall have any effect on the election result.

I thus allow the oral application and order that Ballot Boxes with serial Nos. 85892, 85793, 85673 and 85802 be scrutinized.

As regards Ballot box No. PA 68150 is concerned, the issue be raised before, during or after the evidence of 2nd Respondent.

The costs of the application in the cause.

Orders accordingly.

Dated, Signed and delivered at Nairobi this 27th day of January, 2010.

**K. H. RAWAL
JUDGE
27.1.2010**