



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 35 of 2008

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT CAP 7
PARLIAMENTARY AND PRESIDENTIAL ELECTIONS REGULATIONS
AND THE NATIONAL ASSEMBLY ELECTIONS (ELECTION PETITION)
RULES**

AND

IN THE MATTER OF: THE ELECTION PETITION FOR KAMUKUNJI CONSTITUTENCY

BETWEEN

IBRAHIM AHMEDPETITIONER

AND

SIMON MBUGUA1ST RESPONDENT

PRISCYLLAR A. WAWIRU

(RETURNING OFFICER KAMUKUNJI CONSTITUENCY)2ND RESPONDENT

THE ELECTORAL COMMISSION OF KENYA3RD RESPONDENT

RULING ON DIRECTIONS

Before the commencement of hearing of Notice of Motion dated 9th April 2010 filed by the 1st Respondent, his counsel Mr. Kibe sought directions from the court. The said application seeks to strike out the Petition on the ground of non-compliance of Rule 4 of the (National Assembly Elections (Election Petition) Rules.

Mr. Kibe opened his submissions by stating that in the Petition, the 2nd and 3rd Respondents are the ones who are mainly accused of irregularities of the electoral laws, and even if the 1st Respondent is an innocent person, the court still has jurisdiction to nullify the Petition. The 1st Respondent had serious reservation on the approach taken by the 2nd

and 3rd Respondents in previous application. According to Mr. Kibe, though the two respondents are enjoined to defend the validity of the election and not to do otherwise, “they have thrown in the towel” even during the interlocutory application. They have been supporting the Petition in opposition of the application.

It was alleged by Mr. Kibe that the 2nd and 3rd Respondents are either playing games or acting in collusion with the Petitioner to secure advantage for him. He tried to support this allegation on the ground that in the earlier application to strike out the Petition on the ground of service, the two Respondents opposed the same application and prayed for their costs.

Coming to the present application, he pointed out paragraphs 4, 6,7, 9, 10 and 11 of the replying affidavit sworn by the Petitioner on 14th April 2010. He stated that those paragraphs make specific allegations against the 2nd Respondent as regards announcement of the results of the election, to wit, the results were announced on 11th August 2008 on the basis of tallied results compiled on 25th January, 2008 and that he was not aware whether Form 17A was prepared as per law and that he was not given one, in any event.

Mr. Kibe emphasised that in view of the above allegations, the 2nd Respondent is enjoined to file the replying affidavit to controvert the averments. The omission to do so would result in prejudice to the 1st Respondent.

He thus urged that this Court directs the 2nd Respondent to produce Form 17A or in the alternative the 1st Respondent be allowed to do so. I was informed from the Bar by Mr. Kibe that the 1st Respondent has already asked the 3rd Respondent to supply a copy of Form 17A vide a letter dated 16th April, 2010. He agreed that he has omitted to copy the same to Mr. Adere, the learned counsel appearing for 2nd and 3rd Respondents, when Mr. Adere took serious exception to the mode of contacting his clients directly without involving his office.

Mr. Owino opposed the application and alleged that the same is nothing but efforts by the 1st Respondent to delay the process of hearing of the Petition.

He stated that, from the averments made by the 1st Respondent in his further affidavit sworn on 16th April, 2010 (Paragraph 7), it is evident that it avers inter alia that both 1st Respondent and the Petitioner were present when the results were announced on 11th August 2008 and that law entitles all the candidates to get Form 17A. If so, he wondered that the 1st Respondent ought to have a copy thereof and he could have produced it instead of asking a copy thereof from the 3rd Respondent!!!

He pointed out that the 1st Respondent has agreed that the figure of votes shown to have garnered by him are the

same to the figures which were announced on 25th January, 2008 as well as on 11th August, 2008 and that fact tends to support the claim of the petitioner. He also pointed out that, in any event, production of Form 17A before the court at this stage, would not change in any way the averments made by the Petitioner as many questions shall have to be questioned and answered.

Mr. Adere, in opposition to the application for directions, stated that the application before the court is between the 1st Respondent and the Petitioner. The 1st Respondent has not averred in his application that 2nd and 3rd Respondents have colluded with the Petitioner but now it is so alluded orally. Either way the Respondents are accused of collusion and at this stage, the 2nd and 3rd Respondents firmly intends to keep and adhere to their obligations of neutrality and shall defend their case fully at the trial as prescribed in electoral laws. He also stated that, in contradiction to what is now alleged by the 1st Respondent as regards joint responsibility to defend the validity of election, the 2nd and 3rd Respondents were not consulted before filing the application to strike out!!

Both the counsel urged the court to dismiss the application for direction.

Mr. Kibe, I must accept, raised very clever and interesting point, which puts forth the concept of joint responsibility of all the three respondents to defend the validity of election. I have considered the same with all earnestness.

It is my considered view that while submitting as observed hereinbefore, Mr. Kibe, totally omitted to consider the obligations of the 2nd and 3rd Respondents to conduct a free and fair election. That obligation is obviously tagged with the factor of total neutrality on the part of the Electoral commission and its officials. To be so neutral is not the obligation of the 1st Respondent and he is free to make all the efforts to see that the petition is not allowed.

In short I would, without hesitation, not agree that the 2nd and 3rd Respondents have duty to join the 1st Respondent to defend the validity of the election on the terms dictated by him in all the proceedings either initiated by him or otherwise.

That will result in travesy of known principles of pleadings, principles of justice and Rule of Law. I may add here that even in Civil litigation, the court cannot, and I have not come across any order to that effect, impose any obligation on a co-defendant to file pleadings as desired by another co-defendant.

The process of hearing the Election Petition is unique in the sense that the Respondents are not required to file their respective response till the Petitioner closes his/her case. To that extent one may consider this process as giving advantage to the Respondents and disadvantage to the Petitioner who has to present his case without knowing the case of

the other side. The Petition cannot also be amended except under the provisions of law. If any prejudice would be faced by the 1st Respondent, I do not agree that it can happen and he shall still have opportunity to deal with the issue of form 17A at the hearing of the Petition and if successful, will be awarded the costs.

Considering all the aforesaid, I shall refuse to give any direction as proposed by the 1st Respondent. Costs in the cause.

The application of 9th April, 2010 to proceed for hearing.

Dated, Signed and delivered at Nairobi this **21st** day of **April, 2010**.

K. H. RAWAL

JUDGE

21.04.2010