



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

Election Petition 24 of 2008

BERNARD CHEGE MBURU.....PETITIONER

- VERSUS -

CLEMENT KUNGU WAIBARA1ST RESPONDENT

CHARLES MARARO NJOROGE.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

RULING

Before me is the undated Notice of Motion filed by Clement Kungu Waibara the 1st Respondent herein, in which he prays that this court be pleased to recuse itself from these proceedings.

The grounds upon which the application is made are found on the face of the application and the affidavit of the 1st Respondent. This court will deal with each ground, not necessary in the order it appears. It is the 1st Respondent's contention that the Judge is likely to be biased because this court sat on the application to substitute the Petitioner and it granted the application against which an appeal was filed by the 1st Respondent but the same was dismissed by the Court of Appeal on technical grounds. That having heard a matter that went to the Court of Appeal, this court may not be impartial. To that ground, I wish to respond as follows: the application to substitute the Petitioner was allowed in accordance with Rules 23, 24, 25 of the National Assembly Elections (Election Petition) Rules 1993. The 1st Respondent had objected to the substitution but this court allowed it and it was the subject of appeal. I have seen the ruling of the Court of Appeal on the matter. The appeal was struck out for having been filed out of time (i.e. 30 days) and was held to be incompetent. This court can not be blamed for the decision of the Court of Appeal and the mere fact that the 1st Respondent is dissatisfied with the courts' ruling on a preliminary issue is not a basis for this court to recuse itself from this matter. It would be absurd if the court were always asked to step aside from hearing a matter just because it has made a finding that is unfavourable to one of the parties at a preliminary stage.

Besides, this court fixed the hearing of the petition on 10/6/2010 after the Ruling of the Court of Appeal had been made. At no time did the 1st Respondent move this court to recuse itself from the matter because of its ruling allowing the substitution of the Petitioner, that was the subject of Appeal. The petition was fixed for hearing from 21st upto 23rd September and since no such application was made, it is presumed the 1st Respondent was ready to be heard. This allegation of likely bias has come as an afterthought.

The other ground raised by the 1st Respondent is that he is scared that the court will not be impartial because the court warned counsel. The counsel for the 1st Respondent is an officer of this court. He knows how he should conduct himself before the court. This court can not allow an advocate to take over the charge of the court proceedings and use unacceptable and discourteous language bordering

on accusing the court of incompetence when the party has a right of appeal if dissatisfied with the court's decision. This court is supposed to be in charge of the proceedings and it has a right to caution counsel who is disrespectful and discourteous to the court. Besides, the recollection of this court is that the 1st Respondent was not in court at the time the counsel was cautioned and there would be no cause for the 1st Respondent to be scared.

Counsel urged that the 1st Respondent will not get justice because the court heard the counsel in camera and locked out the press and the parties. To this court's recollection, this matter was supposed to be heard in open court and the court was ready when the counsel approached the clerk and requested to be heard in chambers. I can not tell which of the counsel made the request. This court had no idea what was going to be raised. All counsel came to chambers and it is then the former counsel for the Petitioner addressed the court. The 1st Respondent had entered the chambers and I recollect his counsel Mr. Odera telling him to step outside. Having requested to be heard without the press and parties, this court readily obliged – that is not an unusual occurrence. Besides, Mr. Odera never objected to the court hearing them in chambers. If he had a problem with that he should have raised it. Counsel should be candid, and truthful, act in good faith and help uphold the dignity of the court. I find the ground to be mischievous.

The 1st Respondent also questions the fact that the court asked whether the Petitioners served the former counsel on record had been served with the notice personally. This is not just any other civil proceedings. This is an election petition. It is a public interest matter. Infact it is because of that pubic interest that the Petitioner was allowed to come into these proceedings. He has now filed a notice of to act in person and yet he had not attended court. The court had the obligation to enquire as to his whereabouts. This is not only the Petitioner's case but there are other constituents of Gatundu North who may be interested in this matter and the court can not just throw out the matter without establishing the reason why the Petitioner was not before the court.

The 1st Respondent took issue with the court's decision that the Petitioner be served with a summons and that by so doing, the court acted with partiality. As noted above, this is not a simple civil matter which would be thrown out on the absence of the Petitioner. It is public interest litigation in which there are persons that the Petitioner stands in their shoes. If the 1st Respondent was dissatisfied with the court order, he should have appealed as he had indicated. This court has a right to be wrong just as it has a right to be right. If the court is wrong then there is right of appeal. If every order that a court made against a party were held to be due to bias of the Judge or judicial officer, then nothing would proceed before the courts.

As regards the court allowing former counsel for the Petitioner to address the court, first, the Counsel are officers of the court. They had come in with the Respondent's counsel when they sought to be heard in chambers in absence of the parties and the press. Initially, the court was not aware of what counsel wanted to say to the court but even so, having established that the Petitioner was absent the court needed to know why he was not present. The Respondents wanted the petition dismissed due to absence of the Petitioner but the court declined that prayer. As noted in my ruling for that date, hearing of the former counsel for the Petitioner did not affect the decision of the court due to the public interest in this matter and the court would still have arrived at the same decision it arrived at, that is, to summon the Petitioner. That decision is appealable if the 1st Respondent is dissatisfied with it.

The Petitioner in this matter filed a notice to act in person. He only gave a postal address and so it will be difficult for him to be served with any court process or by any other party without unnecessary delay or inconvenience. Infact the summons issued by the court were posted. It is however noteworthy that the 1st Respondent was able to serve the Petitioner within 2 days, as indicated by Mr. Odera. I must stress again that this is a public interest litigation not a civil matter as counsel seemed to be alluding to. It is a special jurisdiction relating to election petitions governed by Cap 7 and the rules made thereunder. CPR only apply where it is specifically provided. One

wonders how come the Petitioner is keeping away from the court yet his whereabouts only seem to be known to the 1st Respondent. I can only conclude there is more to this application than meets the eye.

Having considered all the grounds raised by the 1st Respondent I find no reasonable and substantial grounds raised that should warrant me to step aside from these proceedings. I think this application is made in bad faith, is mischievous and meant to derail and delay the proceedings herein. However, to allay the 1st Respondent's fears, I will step aside, as I have no special interest in this matter having been appointed by the Chief Justice to hear and determine the petition. Since there is another application dated 23/9/2010 by another party seeking to be joined to the proceedings as a Petitioner, the same can not be ignored and I will make no more orders in this matter and I hereby send this file back to the Honourable the Chief Justice to appoint another Judge to hear and determine the petition. Since there has been delay in determination of this petition following the appeal that had been filed by the 1st Respondent, I direct the matter be placed before the Honourable Chief Justice within 7 days for directions.

DATED AND DELIVERED AT

NAIROBI THIS

29TH DAY OF SEPTEMBER 2010

R.P.V. WENDOH

JUDGE

Present:

Mr. Mukuria H/B for Mr. Odera Ober - 1st Respondent/Applicant

Mr. Mukuru - 2nd and 3rd Respondent

Mr. Menge - for Attorney General

Muturi - Court Clerk