



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Election Petition 2 of 2008

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT, CHAPTER 7, LAWS OF KENYA

AND

IN THE MATTER OF THE ELECTION OFFENCES ACT, CHAPTER 66 OF THE LAWS OF KENYA

AND IN THE MATTER OF THE ELECTION FOR IKOLOMANI CONSTITUENCY

BENARD SHINALI MASAKA PETITIONER

VERSUS

DR. BONI KHALWALEFIRST RESPONDENT

ELECTORAL COMMISSION OF KENYA SECOND RESPONDENT

JANE WASILWA THIRD RESPONDENT

RULING

Introduction

1. The Notice of Motion dated 26.7.2010 is premised on the following provisions of the law;

“Section 44 (1) (a) (b), 60 (1), 123 (8) of the Constitution of Kenya; Section 19, 20 (1) (a) (c), 23 (1) (d), 23 (2) and 28 of the National Assembly and Presidential Elections Act Cap 7 of the Laws of Kenya and Regulations 35 A and 40 of the National Assembly and Presidential Elections Regulations and Rule 17 of the National Assembly of the National Assembly Elections (Election Petition) Rules and by reference to Order XII Rule 6 of the Civil Procedure Rules, Cap 21 Laws of Kenya.]”

2. Pages 1 and 2 are superfluous having been overtaken by events but prayers 3-8 are as follows;

“1

2

3 That the Petitioner is entitled to judgment and a declaration that the Ikolomani Constituency Parliamentary elections held on 27th December 2007 are declared null and void.

4. That the Petitioner is entitled to judgment that the 1st Respondent Dr. Boni Khalwale was not validly elected as the member of the National Assembly for Ikolomani Constituency.

5. That the Petitioner is entitled to judgment and a declaration that the election of the 1st Respondent as the Member of the National Assembly for Ikolomani Constituency is null and void.

6. That the Petitioner is entitled to judgment and a report to the Speaker of the National Assembly that the seat in the National Assembly for the Ikolomani Constituency is declared vacant and a by-election should be organized and held forthwith.

7. That the Respondent shall pay the Petitioner's costs of this application for judgment on admissions and the costs involved in the Petition and matters incidental to the Petition.

8. Any other orders the Honourable court may deem just to grant in the circumstances of this Application.”
Case for the Applicant

3. I have read the grounds in support of the Application as well as the detailed Affidavit sworn on 26.7.2010 by the Applicant, Bernard Shisaka Shinali, and I note that his case is as follows;

4. That on 11.11.2009, a Ruling was delivered in this Election Petition and it is stated by the Applicant that the court “**approved as sufficient**,” certain particulars of irregularities in the tallying of votes for the Ikolomani Constituency Elections in the 2007 General Elections.

5. That on 9.6.2010, this court granted the Petitioner leave to inspect the originals of Form 16A for all the polling stations in Ikolomani Constituency. That upon the inspection being conducted, certain “**glaring**” anomalies and irregularities in the elections were found. The alleged “**irregularities**” are contained at paragraph 14 of the Supporting Affidavit and I deem it appropriate to reproduce them;

That:-

- “i) 7 Polling Stations lacking Form 16A's. these are-
- (a) 161/005 Malinya “A”
 - (b) 161/015 Shamusinjiri
 - (c) 161/021 Savane
 - (d) 161/028 Madivini
 - (e) 161/044 Shihalia
 - (f) 161/056 Iremele
 - (g) 161/059 Ibuka”

I am informed by my Advocates on record which information I believe to be correct that this is in breach of Regulation 35A (4) of the Election's Regulations.

ii) *Nine Form 16A's for polling stations in Ikolomani Constituency were not signed by the respective Presiding Officers as mandatorily required by regulation 35A (6) which my Advocates on record inform and advise me, make the signature of the Presiding Officer mandatory and if that signature is missing the result can be invalidated on a petition such as this one of mine. The affected polling stations are:-*

- (a) 161/005 Malinya B
- (b) 161/059 Malinya C
- (c) 161/011 Shichinji
- (d) 161/014 Shiduha
- (e) 161/020 Imuliru
- (f) 161/026 Lirhembe B
- (g) 161/036 Shitechia
- (h) 161/051 Shikondi
- (i) 161/053 Masiyenze

iii) *65 Form 16A's revealed that either no candidates or their agents signed Form 16A or less than 12 candidates or their agents signed Form 16A. This is in breach of Regulation 35A (5)(b) of the Presidential and Parliamentary Elections Regulations. The affected polling stations are:-*

- | | |
|----------------------------|----------------------------|
| i. 161/00 Musoli | xxxvi. 161/031 Imalaba |
| ii. 161/002 Bushaingala A | xxxvii. 161/032 Shijiko |
| iii. 161/002 Bushaingala B | xxxviii. 161/033 Shanjetso |
| iv. 161/003 Matundu | xxxix. 161/034 Ikhulili |
| v. 161/004 Ichina | xl. 161/035 Lwanaswa |
| vi. 161/005 Malinya A | xli. 161/035 Shavihiga |
| vii. 161/005 Malinya B | xlii. 161/038 Shisere |

viii. 161/006 Shirumba	xliii. 161/039 Iluya
ix. 161/007 Isulu A	xliv. 161/040 Ishieywe
x. 161/007 Isulu B	xlvi. 161/041 Eregi
xi. 161/010 Burendwa	xlvi. 161/042 Busilwa
xii. 161/011 Shichinji	xlvi. 161/042 Shirandalo
xiii. 161/012 Mutaho	xlvi. 161/042 Shirandalo
xiv. 161/013 Imbale	xlvi. 161/042 Shirandalo
xv. 161/014 Shiduha	xlviii. 161/045 Mukoyani
xvi. 161/016 Shimanyiro A li.	xlix. 161/046 Ibwali
xvii. 161/016 Shimanyiro B lii.	xl. 161/047 Shikhomboro
xviii. 161/017 Imulama	li. 161/047 Mumbetsa
xix. 161/018 Makhokho	lii. 161/047 Mumbetsa
xx. 161/019 Ivonda A	lii. 161/050 Shivagala
xxi. 161/019 Ivonda B	liii. 161/051 Shikondi
xxii. 161/020 Imuliru	liv. 161/053 Masiyenze
xxiii. 161/022 Kimingini	lv. 161/054 Musasa
xxiv. 161/023 Shiveye	lvi. 161/055 Shiseno
xxv. 161/024 Lwenya	lvii. 161/057 Lusiola
xxvi. 161/025 Shitoli	lviii. 161/060 Shibwe
xxvii. 161/026 Lirhembe A	lx. 161/036 Shitechia
xxviii. 161/027 Shikokho	lxi. 161/048 Mwikhomo
xxix. 161/030 Lubambo	lxii. 161/052 Lusui
xxx. 161/008 Shibunama	lxiii. 161/058 Irechelo
xxxi. 161/009 Shikumu	lxiv. 161/063 Ituluvini
xxxii. 161/012 Mutaho	lxv. 161/032 Shijiko
xxxiii. 161/026 Lirhembe	
xxxiv. 161/028 Madivini	
xxxv. 161/029 Kaluni	

iv) *Of the polling stations where the Form 16A was not signed by the candidates or the candidates' agents the following had no Presiding Officer's signature; 161/005 Malinya B; 161/011 Shichinji; 161/014 Shiduha; 161/020 Imuliru; 161/026 Lirhembe A; 161/051 Shikondi; 161/053 Masiyenze; 161/036 Shitechia. I believe that under Regulation 35A (6) read together with Regulation 35A (4) as my Advocates have shown and read and explained to me, the results in these polling stations are for invalidating.*

v) *If the results for the polling stations where the presiding officers did not sign are invalidated the 1st Respondent and the Petitioner would respectively lose 1,213 votes and 978 votes according to the Returning Officer's tallies:*

<u>POLLING STATION</u>	<u>KHALWALE VOTES</u>	<u>SHINALI VOTES</u>
Malinya B	300	14
Malinya C	242	22
Shichinji	234	37
Shiduha	205	45
Imuliru	21	69
Lirhembe A	23	284
Shitechia	130	91
Shikondi	37	221
Masiyenze	21	185
<u>TOTAL</u>	<u>1,213</u>	<u>978</u>

vi) *If we deduct the above invalidated results from the announced results the difference in vote tally would be Khalwale 8,386 – 1,213 = 7,173 and Shinali 8,121 – 978 = 7,143. There is a major shift in the result and 2191 voters would have irregularly lost their cherished right to vote and participate in a free and fair election under section 42A of the Constitution.*

vii) *In Matundu polling station there were two streams. The inspection produced two Form 16As with identical results. The results as recorded on Form 17A were for one stream. The total votes cast according to the Form 16As kept by the 2nd and 3rd Respondent shows a total that far exceeded the total number of registered voters*

for the polling station. This is at page 8 of the inspection report. This is an anomaly that would affect the result of the election because if the court were to nullify the result for that polling station then it would mean that the 1st Respondent would lose 420 votes and the Petitioner by 17 votes. Taking the tally at subparagraph (vi) above and deducting this loss the result would be Khalwale 7,173 – 420 = 6,753 and Shinali 7,143 – 17 = 7,126.

viii) The 1st Respondent allegedly won the election with a margin of 265 votes in the results announced and published by the 2nd and 3rd Respondent respectively. This was too close a call. The irregularities revealed on the inspection are too glaring to warrant a further trial of issues of fact or law.

ix) 15 Form 16A's had no information of total registered voters, total votes cast and total rejected votes. This is in breach of 35(a) (4) of the Presidential and Parliamentary Elections Regulations.

- | | |
|------------------------|------------------------|
| i. 161/001 Musoli | ix. 161/028 Madivini |
| ii. 161/003 Matundu | x. 161/030 Lubambo |
| iii. 161/005 Malinya | xi. 161/035 Lwanaswa |
| iv. 161/011 Shichinji | xii. 161/036 Shitechia |
| v. 161/018 Makhokho | xiii. 161/046 Ibwali |
| vi. 161/020 Imuliru | xiv. 161/050 Shivagala |
| vii. 161/021 Savane | xv. 161/055 Shiseno |
| viii. 161/026 Lirhembe | |

x) I believe that the results of these polling stations also stand to be invalidated. They show that the law was not complied with. This seriously affected the election.

xi) 21 Form 16A's had less than 12 candidates on Form 16A. This contravenes Regulation 35A 4(d) of the Presidential Parliamentary Elections Regulations.

- | | | |
|---------------------------|---|---------------|
| i. 161/004 Ichina | - | 11 candidates |
| ii. 161/007 Isulu | - | 11 candidates |
| iii. 161/012 Mutaho A | - | 9 candidates |
| iv. 161/012 Mutaho B | - | 10 candidates |
| v. 161/013 Imbale | - | 11 candidates |
| vi. 161/018 Makhokho A | - | 10 candidates |
| vii. 161/018 Makhokho B | - | 10 candidates |
| viii. 161/018 Makhokho C | - | 10 candidates |
| ix. 161/019 Ivonda | - | 11 candidates |
| x. 161/020 Imuliru | - | 9 candidates |
| xi. 161/021 Savane | - | 11 candidates |
| xii. 161/024 Lwenya | - | 9 candidates |
| xiii. 161/025 Shitoli | - | 10 candidates |
| xiv. 161/028 Madivini | - | 10 candidates |
| xv. 161/032 Shijiko A | - | 11 candidates |
| xvi. 161/032 Shijiko B | - | 10 candidates |
| xvii. 161/034 Ikhulili | - | 9 candidates |
| xviii. 161/037 Shavhihiga | - | 10 candidates |
| xix. 161/038 Shisere | - | 9 candidates |
| xx. 161/052 Lusui | - | 10 candidates |
| xxi. 161/054 Musasa | - | 9 candidates |

I believe that these results also stand to be invalidated. Some 4,480 voters as between Dr. Khalwale and me would not have participated in a free and fair election as their votes would not count. The votes of all others who cast votes for other candidates would also be wasted.

xii) 58 Form 16As had no comments of the respective presiding officers.

- | | |
|--------------------------|--------------------------|
| i. 161/005 Malinya B | xxx. 161/029 Kaluni |
| ii. 161/030 Lubambo | xxxvi. 161/054 Musasa |
| iii. 161/008 Shibunama | xxxvii. 161/031 Imalaba |
| iv. 161/058 Irechelo | xxxviii. 161/060 Shibwe |
| v. 161/012 Mutaho A | xxxix. 161/063 Huluvuni |
| vi. 161/012 Mutaho B | xl. 161/032 Shijiko A |
| vii. 161/011 Shichinji | xli. 161/032 Shijiko B |
| viii. 161/033 Shianjetso | xlii. 161/061 Ivole |
| ix. 161/014 Shiduha | xliiii. 161/034 Ikhulili |
| x. 161/019 Ivonda A | xliiii. Shiseno |
| xi. 161/019 Ivonda B | xli. 161/037 Shavhihiga |
| xii. 161/020 Imuliru | xli. 161/038 Shisere |
| xiii. 161/021 Savane | xlii. 161/041 Ereji |

- | | |
|----------------------------|-----------------------------|
| xiv. 161/022 Kimingini | xlii. 161/042 Busilwa |
| xv. 161/024 Lwenya | xliv. 161/046 Ibwali |
| xvi. 161/026 Lirhembe A | xliv. 161/047 Shikhombero |
| xvii. 161/026 Lirhembe B | xlvi. 161/049 Mumbetsa |
| xviii. 161/027 Shikokho | xlvii. 161/051 Shikondi |
| xix. 161/052 Lusui | xlviii. 161/005 Malinya C |
| xx. 161/001 Musoli A | xliv. 161/002 Bushiangala A |
| xxi. 161/001 Musoli B | l. 161/002 Bushiangala B |
| xxii. 161/003 Matundu A | li. 161/004 Ichina |
| xxiii. 161/003 Matundu B | lii. 161/016 Shimanyiro A |
| xxiv. 161/007 Isulu A | liii. 161/016 Shimanyiro B |
| xxv. 161/007 Isulu B | liv. 161/010 Burendwa |
| xxvi. 161/009 Shikumu | lv. 161/025 Shitoli |
| xxvii. 161/018 Makhokho A | lvi. 161/040 Ishiywe |
| xxviii. 161/018 Makhokho B | lvii. 161/048 Mwikhomo |
| xxix. 161/036 Shitechia | lviii. 161/057 Lusiola |

xii) *In the following polling stations, the total votes in Form 16A did not tally with 17A.*

a. *Bushiangala A: at pg 6 of the inspection report candidate Shitukhu had 0 total valid votes on Form 16A where on Form 17A has 3 votes.*

Bushiangala B: at pg 7 of the inspection report candidate Shitukhu had 1 vote on Form 16A whereas on Form 17A he has 3 votes. There was no comment or counter signature by the returning officer for the variation.

b. *Ichina: at pg 11 candidate Shitukhu has 0 votes on Form 16A where on Form 17A he has 1 vote. There is no comment or counter signature made by the returning officer for this variation.*

c. *Imbale: at pg 22-23 of the Inspection Report candidate Lukunza has 3 votes on Form 16A whereas on Form 17A he has 12 votes. Also, candidate Shitukhu's name and votes are missing on Form 16A whereas on Form 17A he has 3 votes.*

d. *Imulama: at pg 26-27 of the Inspection Report candidate Atema's votes of 77 were crossed and 67 entered on Form 17A. This alteration was not counter signed by the returning officer.*

e. *Shitoli: at pg 37 of the Inspection Report candidate Khamati's votes were altered on Form 17A from 00 to 01 without the countersigning by the Returning Officer.*

f. *Lirhembe A: at pg 38 of the Inspection Report candidate Khalwale has 23 on Form 16A whereas on Form 17A he has 26 votes. Lirhembe B, at pg 39-40 of the Inspection Report candidate Khalwale's votes were altered from 17 votes to 26 votes on Form 17A without countersigning.*

g. *Shisere: at pg 54-55 of the Inspection Report candidate Liyayi has 3 votes on Form 16A whereas on Form 17A he has 0 votes.*

h. *Irecheru ECD: at pg 77-78 of the Inspection Report candidate Kwimba on Form 16A he has dash as the valid votes whereas on Form 17A he has 0 votes. Also, candidate Lukunza has a dash as valid votes whereas on Form 17A he has 0 votes.*

I am informed by my Advocates on record which information I believe to be true that this contravenes Regulations 40 (1)(f) of the Presidential and Parliamentary Elections Regulations and, therefore invalidates the results at the final tally.

xiv) *In 21 polling stations Form 16A's did not carry records of the results of all the 12 candidates who participated in the election. There were less than 12 candidates appearing. There is uncertainty over the total number of votes for the missing candidates in various polling stations that were recorded in Form 17A by the 3rd Respondent. I believe that Form 17A (and especially the original of the form) is supposed to carry the results tallied from the originals of the Form 16A that are kept in the ballot boxes under regulation 34, 35A and 39 of the Presidential and Parliamentary Elections Regulations. It is not clear where the Returning Officer got the missing results from to fill in Form 17A. There is no note of this on the Form 17A shown at the inspection. The affected polling stations are:-*

ii.	161/007 Isulu	-	11 candidates
iii.	161/012 Mutaho A	-	9 candidates
iv.	161/012 Mutaho B	-	10 candidates
v.	161/013 Imbale	-	11 candidates
vi.	161/018 Makhokho A	-	10 candidates
vii.	161/018 Makhokho B	-	10 candidates
viii.	161/018 Makhokho C	-	10 candidates
ix.	161/019 Ivonda A	-	11 candidates
x.	161/020 Imuliru	-	9 candidates
xi.	161/021 Savane	-	11 candidates
xii.	161/024 Lwenya	-	9 candidates
xiii.	161/025 Shitoli	-	10 candidates
xiv.	161/028 Madivini	-	10 candidates
xv.	161/032 Shijiko A	-	11 candidates
xvi.	161/032 Shijiko B	-	10 candidates
xvii.	161/034 Ikhulili	-	9 candidates
xviii.	161/037 Shavihiga	-	10 candidates
xix.	161/038 Shisere	-	9 candidates
xx.	161/052 Lusui	-	10 candidates
xxi.	161/054 Musasa	-	9 candidates.

This discrepancy along with others which I have referred to and which follow invalidate the final result as announced by the Returning Officer. The prescribed requirements for counting and tallying and finalization of the vote in Ikolomani Constituency were not met or followed in letter and spirit. The failure to follow the law and principles badly affected the election and rendered the results announced incredible.

xv) *30 Form 16A's did not have the Electoral Commission of Kenya stamp. The stamp is a mandatory feature of the form as prescribed by law and is not a mere irregularity or variation of the form to suit any special circumstances of the election. My Advocates on record inform me and I believe them that the 2nd and 3rd Respondent with their presiding officers failed the test for regularity of the Form 16A in this respect under section 72 of the Interpretation and General Provisions Act, the affected polling station and their forms are:-*

i.	161/004 Ichina	
ii.	161/005 Malinya	xvii. 161/028 Madivini
iii.	161/007 Isulu A	xviii. 161/032 Shijiko B
iv.	161/007 Isulu B	xix. 161/036 Shitechia
v.	161/009 Shikumu	xx. 161/039 Iluya
vi.	161/012 Mutaho A	xxi. 161/043 Shirandalo
vii.	161/012 Mutaho B	xxii. 161/046 Ibwali
viii.	161/014 Shiduha	xxiii. 161/049 Mumbetsa
ix.	161/016 Shimanyiro A	xxiv. 161/050 Shivagala
x.	161/016 Shimanyiro B	xxv. 161/052 Lusui
xi.	161/018 Makhokho	xxvi. 161/053 Masiyenze
xii.	161/020 Imuliru	xxvii. 161/058 Irechero
xiii.	161/022 Kimingini	xxviii. 161/060 Shibwe
xiv.	161/023 Shiveye	xxix. 161/061 Ivole
xv.	161/054 Musasa	xxx. 161/051 Shikondi
xvi.	161/026 Lirhembe	

xvi) *72 Form 16A's did not have reason for refusal to sign by agent. That contravened section 72 of the Interpretation and General Provisions Act and Regulation 35 (a) (4) although under regulation 35A (6) this default is minor and can be ignored, so my advocates reliably inform me."*

The above "anomalies" and "irregularities" cannot be denied by the Returning Officer and so the Applicant in furtherance of that position, produced a Report and a Notice to Admit Facts which were served upon the Respondents.

6. That the above "anomalies" and "irregularities" cannot be denied by the Returning Officer and so the Applicant in furtherance of that position, produced a Report and a Notice to Admit Facts which were served upon the Respondents.

7. That the Respondents according to the Applicant, in answer to the Notice to Admit Facts have merely responded that there are no facts to be admitted and that any fact on record is a contested issue.

8. The Applicant further argues that because the inspection was meant to expedite the disposal of the case, once the issues raised above were placed before the court upon inspection of the relevant documents, then the Applicant was entitled to a quick resolution of the Petition by the orders sought in this Application being granted as prayed. I should reproduce paragraph 26 of the Supporting Affidavit whereat the Applicant depones as follows;

“26. That I am advised by my Advocates on record and I believe the advice that election courts in Kenya have previously declared parliamentary elections invalid when they have found irregularities and contraventions showing non-compliance of the law to the detriment of the results announced at the election. For instance in MAHAMUD MUHUMED SIRAT VS. ALI HASSAN ABDIRAHMAN & 2 OTHERS, E.P. NO.15 OF 2008, the court nullified the elections because of absence of ballot papers in respect of one stream and other anomalies by the election officers. In MANSON OYONGO NYAMWEYA VS. JAMES OMINGO MAGARA & 2 OTHERS E.P NO. 3 OF 2008, Form 16As were not completed according to the law and neither the presiding officer nor the agents signed the Form 16A’s. The Form 16A’s did not contain the declaration as set out in the law. The results as recorded in Form 16A and 17A varied. The court nullified the election. In WILLIAM KABOGO GITAU VS. GEORGE THUO & 2 OTHERS E.P NO.10 OF 2008, the court found that the 1st Respondent Member of the National Assembly for Juja constituency and a joint Chief Whip of the Coalition Government was not validly elected because of electoral malpractices and tallied Form 16As that did not conform to the law. The election was nullified. In REUBEN NYANGINJA NDOLO VS. DICKSON WATHIKA MWANGI & 2 OTHERS E.P. NO. 11 OF 2008, there were serious anomalies in the process of election that would have affected the election result. Form 17A had arithmetical errors in the results. Form 16As were not signed by the Presiding Officers, the candidates or their agents and there were no reasons for refusal to sign. The Court held that this contravened election regulations and nullified elections. In AYUB JUMA MWAKESI VS. MWAKWERE CHIRAU ALI & 2 OTHERS, the election court found that the arithmetical irregularities as shown in Form 16A at Kombani polling station could affect the final result of the election with an advantage to the petitioner of 142 votes. The court held that the election was much closer than it appeared with the 1st Respondent disadvantaged. The court declared the election null and void. I produce copies of the judgments and mark the bundle as “BMS 8(a), (b), (c), (d) and (e).”

9. In submissions before me, Mr. Mwenesi for the Applicant reiterated the above matters but added partly as follows;

10. That this court is clothed with jurisdiction to try and determine “**any**” question raised in an election petition as is the law in Halsbury’s Laws of England, Vol. 15, page 623 at par.847.

11. On the issue of admission of facts, he relied on the Code of Civil Procedure by Mullah where in reference to Order 12 Rule 6 it is provided that, a judgment on admitted facts can be made at any stage of proceedings.

12. I have taken note of the Further Supporting Affidavit of the Applicant sworn on 20.8.2010 and Mr. Mwenesi’s submissions along the contents thereof that the Civil Procedure Rules apply to this matter and Order VI Rule 13 particularly applies in case where a party seeks summary orders as the Applicant has done.

Case for the Respondent

13. In a Replying Affidavit sworn on 18.8.2010, it is the case for the 1st Respondent that the Application under consideration is bad in law, is frivolous and vexatious and would amount to an abuse of the process of the court apart from also being an attempt at denying him his Constitutional right to a fair and impartial hearing.

14. That this court is devoid of jurisdiction to grant the orders sought and is being called upon to adopt a perplexing and unknown procedure at this stage of the proceedings.

15. That the hearing of the allegations contained in the Election Petition had already begun and the evidence of the Applicant and his witnesses has been recorded and widely publicized. That it would be a travesty of justice to deny him the opportunity to rebut those allegation in the same manner that they were made.

16. That the matters being set out as facts in the Application have not been properly tendered in evidence and that pleadings and a reply to a request for particulars cannot be the evidence that any party should rely upon in getting favourable orders because they are by their nature, one-sided..

17. Regarding the inspection of the documents ordered by the court, the 1st Respondent’s case is that results thereof are not matters properly before the court and the Applicant’s report in that context cannot be admitted as the basis of any facts because the maker thereof is unknown and the same has not undergone the scrutiny of cross-examination.

18. That the “facts” allegedly obtained during inspection of documents would contradict the evidence put forth by the Petitioner and his witnesses and that the 1st Respondent must be allowed the opportunity to indicate so by calling his own evidence in rebuttal.

19. In her submissions, Miss Aulo, learned counsel for the 1st Respondent reiterated all the above issues and added that because the jurisdiction of the election court is special, all other rules of law are inapplicable save where they are specifically invoked through the relevant Act.

20. That unless a petition is struck off or summarily rejected the duty of the court is to hear the Petition and render a decision on the available evidence and the law. After that, a certificate to the speaker must be made. She further argued. To condemn the 1st Respondent without hearing his side of the case would negate and ignore the whole procedure as set out in the law.

21. Further, that the electoral law has no procedure known as summary judgment or grant of summary orders and the invocation of Order 12 of the Civil Procedure Rules was also in error as no facts have been admitted by the 1st Respondent.

22. On inspection of any documents, learned advocate argued that the results of that exercise cannot be evidence properly admissible and inspection is only meant to aid a party to prepare its case.

23. That in any event, whatever is called evidence is not sufficient to warrant summary judgment and the Petitioner’s Report on Inspection must be properly admitted, [and she argues that it has not], for it to be the basis of any adverse finding against the 1st Respondent.

Case for the 2nd and 3rd Respondents

24. The 2nd and 3rd Respondents filed grounds of Opposition on 24.8.2010 and they are as follows;

“1. ***The application is based on the premise that the alleged facts would have been admitted as per Notice to admit dated 7th July 2010 which notice was withdrawn and or abandoned.***

2. ***The application seeks to deny the Respondents the right to be heard, after one side being heard, a practice that is contrary to the established procedure.***

3. ***The applicant’s record of what he observed and noted during the inspection is not necessarily what the Hon. Chief Magistrate and the Respondents observed and noted as there was no evidence as such, taken and tested.***

4. ***Rule 17 of the Election Petition Rules does not apply in this application.***

5. ***The two Respondents pray that the Notice of Motion be struck out with costs.”***

25. In his submissions along the said grounds, Mr. Mukele for the 2nd and 3rd Respondents has added that no fact has been admitted by the 2nd and 3rd Respondents and that the Applicant has cited no legal authority for the proposition that judgment on admission can be entered in an election petition.

26. That the Report on Inspection is merely an opinion of an Interested Party and has not been tendered as evidence before the court.

27. That the 3rd Respondent deserves an opportunity to be heard because she was the “backbone” of the entire electoral process and to shut her out would be improper. Similarly, since allegations have been made about the Returning Officers, they should be allowed an opportunity to address those allegations.

28. That in his view, the Application is a short-cut to attain a victory but no election court has the jurisdiction to grant the orders sought.

Opinion of the court

29. I have summarized the cases for each party and although lengthy submissions were made and a number of authorities cited, the Application before me will be determined on this one single question; does this court have the jurisdiction to entertain and/or grant the Applicant’s prayers? I say this because without jurisdiction, all else that any party may hold as a matter of importance to it, would have no meaning whatsoever.

30. As I understand the decision in David Murathe vs Samuel Macharia C.A.171/2003, Pall J.A. was emphatic that

the “Civil Procedure Rules are made under the Civil Procedure Act (Cap.21). They do not have an automatic application to election petitions. I would agree with the learned Judge that if it was intended that the Civil Procedure Rules would apply to election petitions an express provision would have been made. Significantly Sub-rule (7) of rule 18 of the Rules says that the provisions of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory Declarations Act shall apply to affidavits under the said rule. The practice and procedure concerning election petitions is governed by the Rules made by the Rules Committee under Section 23 (3) of the Act. They are a complete code and the Civil Procedure Rules have no application to this special legal regime. An election court enjoys a special jurisdiction.

31. While I am properly bound by the above holding, the opinion of the learned judge also finds favour in my mind because two expressions of law have been used in the present Application;

- i) “Admission of Facts”
- ii) “Entitlement to judgment” or “summary judgment”

32. Whereas the above terms may be of common parlance to the Civil Procedure Act and particularly in Order VI Rule 13 and Order XII of the Civil Procedure Rules, they have no meaning or application within the National Assembly and Presidential Elections Act, Cap.7 Laws of Kenya. Sections 19 to 31 of the Act provide for the manner in which an election petition shall be heard and determined and nowhere in those sections or in The National Assembly Elections (Election Petition) Rules have the drafters of the law seen it fit to include those important processes into electoral law. There are however certain terminologies that are borrowed from the Civil Procedure Act such as;

- i) “particulars” to prevent surprise and unnecessary expenses – Rule 5 of the Election Petition Rules
- ii) “objections in recriminatory cases” – Rule 8
- iii) “security for payment of costs” – Rule 12
- iv) “postponements” and “adjournments” – Rule 21 and 22

33. However these and other such terminologies and procedures have their own place within the parent Act and I know no procedure where alien processes and terminologies can be imported into a legislation that is self-sufficient such as Cap 7.

34. I am of course aware that the election court has power to summarily reject a petition under section 22 (a) of the Act but in all other instances, it is obligated to fix the same for trial and the matter determined on the merits.

35. If there is no procedure for seeking admission of facts or summary judgment, how should an election court conduct the hearing and determination of an election petition? Section 23 of the Act provides as follows;

“S.23 - (1) In the exercise by an election court of its jurisdiction –

- (a) witnesses shall be summoned and sworn in the same manner as nearly as circumstances admit as in a trial by the High Court in the exercise of its original civil jurisdiction and shall be subject to the same penalties for the giving of false evidence.**
- (b) The election court may compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy, and a person refusing to obey the order shall be guilty of a contempt of court.**
- (c) The election court may examine a witness so compelled to attend or any person in court, although the witness is not called and examined by a party to the petition, and after examination the witness may be cross-examined by or on behalf of the petitioner and respondent, or either of them;**
- (d) The election court shall decide all matters that come before it without undue regard to technicalities.**
- (2) Unless otherwise ordered by the Chief Justice, all interlocutory matters in connection with a petition may be dealt with and decided by any judge.**
- (3) The Rules Committee may make rules of court regulating the practice and procedure concerning petitions.**
- (4) Subject to subsection (5), an appeal shall lie to the Court of Appeal from any decision of an election court, whether the decision be interlocutory or final, within thirty days of the decision.**

- (5) *An appeal from a petition under section 19 (2) shall be heard by a bench of five judges of appeal.*
(6) *An appeal from a petition under this Act, shall be heard and determined on a priority basis.”*

36. To operationalise the above section, Rule 18 of the Election Rules then provides as follows;

Rule 18 - “ (1) Not less than forty-eight hours before the time fixed by the election court for the trial of an election petition the petitioner shall deliver at the office of the Registrar an affidavit sworn by each witness whom the petitioner intends to call at the trial, setting out the substance of his evidence.

(2) Each affidavit shall be enclosed in a sealed envelope together with sufficient certified true copies for each of the judges, all other petitioners in the same petition and the respondents, and shall be opened by the election court when the witness who has sworn the affidavit is called to give evidence.

(3) The affidavit shall be read by or on behalf of the witness and shall form part of the record of the trial and a deponent may be cross-examined by the respondents and re-examined by the petitioner.

(4) Subject to sub-rule (5), a witness shall not be permitted to give evidence for the respondent unless an affidavit sworn by him, setting out the substance of his evidence, together with sufficient certified true copies for the use of the judges and the petitioner is handed to the election court when called to give evidence.

(5) A witness for the petitioner or the respondent who fails to deliver such affidavit under sub-rule (2) or (4) shall not be permitted to give evidence without the leave of the election court, and the election court shall not grant such leave unless sufficient reason is given for the failure.

(6) An affidavit recorded in language other than English shall be accompanied by a translation into English with sufficient copies for the judges and other parties, certified by the person translating it as having been translated to the best of his knowledge and ability.

(7) The provisions of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.”

37. I will pause here and note that rule 18 (7) was deliberately enacted and to make the point by Pall J.A in David Murathe and which I adopt, unless there is express importation of any other Rules, the Rules created under Cap 7 shall be supreme.

38. In any event, I am certain that the procedure set out above is the lawful one and not any other that the Applicant may find attractive to his case.

39. This court, being faithful to the above procedure begun taking the evidence of the Petitioner on 25.5.2010 and on 7.6.2010, his last witness, PW6, Maurice Hassan Imbeyi testified. Before closing his case, the Applicant made an Application to inspect certain documents and in a Ruling that I delivered on 9.6.2010 I partly rendered myself as follows;

“Inspection of documents” is defined in common legal practice as “the right of a party to inspect and make copies of documents which are essential or material to the maintenance of his cause” – Black’s Law Dictionary. In India, it was categorically held in Hussain Kannil vs Ram Sewak IR 1964 All 86 that “a party to an election petition is entitled to inspect the records before the election Tribunal” and therefore the jurisdiction to order an inspection in these terms is not strange nor misplaced in electoral matters.

“Scrutiny” on the other hand is defined as “critical observation or examination” of something including a document or under the Act, votes – see Concise Oxford Dictionary.

I make the distinction deliberately so that it is clear what the petitioner should do at this stage of the proceedings and to avoid confusion in the future even as the trial of the petition continues.”

40. I was deliberate in my holding as above to avoid a situation where the Petitioner would imagine that inspection of documents would produce such primary evidence as would entitle him to a summary decision. Whatever information he would have obtained at the inspection would be merely ammunition to be used in cross-examination of the Respondent’s witnesses, if any. I reiterate that the best practice in the process of inspection of documents would have been for inspection to be done before the hearing begins, but in this case, the Petitioner chose the tail end of his case to do so. He still had the right to do so nonetheless if only to maintain his cause but then he must, as is now clear, suffer the handicap of what to do with the information obtained during inspection. Rule 18 was complied with up to the date of seeking an inspection and I know no other procedure by which the Petitioner could introduce further evidence including the Report on Inspection. I say this with caution and well aware of the provisions of Rule 18 (5) of the Election Rules

and to answer the question whether in fact the Report on Inspection is evidence before this court. To the extent that it was brought in support of the Application, it is useful only in the Application but not in the context of Rule 18 and as evidence in the Petition and as primary evidence to be considered at the conclusion of the hearing.

41. It will be seen that I have refused to refer to paragraph 14 (above) of the Applicant's Supporting Affidavit and the many issues raised in it. I do so deliberately because those are matters that are not yet properly before the court. They may well find favour in the Applicant's eyes until they are properly introduced in evidence, it would be unseemly of this court to determine the validity or otherwise of the issues that are called "irregularities" and "anomalies" in the Ikolomani Constituency Elections, 2007. That is all I can say on the matter at the moment.

42. I had digressed but turning back to the issue of the procedure for conducting a hearing, Mr. Mwenesi, quoted the following decisions in support of his client's case –

"1. Reuben Nyanginya Ndolo v Dickson Wathika Mwangi & 2 others [2010] eKLR (NAIROBI Election Petition No.11 of 2008).

2. Ali v Gethinji [1984] KLR 511

3. William Kabogo Gitau v George Thuo & 2 others [2010]eKLR (Nairobi Election Petition No.10 of 2008)

4. Ayub Juma Mwakesi v. Chirau Ali Mwakwere & 2 others (Mombasa Election Petition No.1 of 2008)

5. Manson Onyango Nyamweya v Omingo Magara & 2 others [2009]eKLR (Kisii Election Petition No.3 of 2008)

6. Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 others [2010]Eklr (Nairobi Election Petition No.15 of 2008)"

43. I wholly agree with Miss Aulo that whereas the decisions above may be relevant, it is also obvious that those decisions were reached on the merits and after all parties were heard fully and not in a summary manner. They are still useful to the Applicant, if he is minded to invoke them, but only at the conclusion of the hearing.

44. I should now say something about the Notice to Admit Facts. I have alluded to the issue above but my firm holding is that there are no facts which any of the Respondents has admitted. If it is the Report on Inspection, I have said that it is not properly before court and parties cannot be called upon to admit a strange document and facts.

45. Having held that there is no jurisdiction to grant the prayers sought and having held that there are no facts that were admitted by the Respondents in respect of the inspection of documents, it follows that all other issues raised have no merit in the eyes of this court and the Application must collapse.

-

-

-

Conclusion

46. Much time was taken in arguing the present Application. The Applicant has urged me to accede to his request to terminate these proceedings and grant him his prayers. I refuse to do so.

47. Time is of the essence in election petitions. Rule 20 of the Election Rules provides as follows;

Rule 20 – "Where, on application by a party or of its own motion, the election court is satisfied that a petitioner or respondent is unnecessarily prolonging the trial it may limit the time within which that petitioner or respondent shall complete his case."

48. The hearing and determination of the present Petition has been unnecessarily delayed by the Petitioner since I took over the matter, whereas he and other parties have a right to bring interlocutory matters to the attention of the court, often times the court is blamed for the delay in concluding the substantive hearing of the Petition. I refuse to carry that burden and will shortly execute the provisions of Rule 20 aforesaid.

49. In any event, and with respect, the Application before me does not have any merit and for the reasons given above is dismissed with costs to the Respondents.

50. Orders accordingly

Delivered, dated and signed at Kakamega this 18th day of October, 2010

**ISAAC LENAOLA
J U D G E**