NAIROBI JR MISC. PETITION NUMBER 292 OF 2008

IN THE MATTER OF S. 84 (1) CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER S. 70 OF THE CONSTITUTION OF KENYA

BETWEEN

ESPOSITO FRANCO..... PETITIONER

AND

AMASON JEFFAH KINGI..... 1ST RESPONDENT

AMINA KALE..... 2ND RESPONDENT

ELECTORAL COMMISSION KENYA.....3RDRESPONDENT

JUDGMENT

The petitioner, Esposito Franco has filed the petition dated 20/5/09 against Amason Kingi Jeffah, Amina Anna Kale and the Electoral Commission of Kenya. The petition is brought under S 84 (1) of the Constitution. The petitioner alleges contravention of his fundamental rights and freedoms under S 70 of the Constitution. He therefore seeks the following declarations

(a) A declaration do issue that all persons are entitled to equal protection of the law within Kenya;

(b) A declaration that the provisions of S 21 of the National Assembly and Presidential (Elections) Act, Cap. 7 Laws of Kenya, hereinafter referred to as Cap. 7, are inconsistent with the provision of S 44 as read with S 60 of the Constitution;

(c) A declaration that the provision of S 21 of Cap. 7 is null and void to the extent of its said inconsistency with S 44 as read with S 60 of the Constitution;

(d) Pending the hearing and determination of the petition, the court do grant an interim order and stay the proceedings in Election Petition 1 of 2008, Malindi;

(e) The costs of this petition be awarded to the petitioner;

(f) Any other orders as the court may deem fit to grant;

The petition is supported by a supporting and supplementary affidavit dated 21/8/08 and 15/6/09 respectively, sworn by the Petitioner and a list of authorities dated 16/6/09. Mr. Miller Advocate represented the Petitioner. The petition was vehemently opposed. Mr. Ahmed Issack Hassan swore an affidavit dated 12/6/09 on behalf of the Interim Independent Electoral Commission in place of the 3rd Defendant and a list of authorities dated 12/6/09 was filed. The 2nd and 3rd Respondents were represented by Mr. Kithi, Advocate and the 1st Respondent also filed a replying affidavit dated 13/5/09 and list of authorities dated 15/5/09 and was represented by Waloba Advocate.

A brief background of this case is that the Petitioner vied for the parliamentary seat Magarini Constituency in the 2007 General Elections but was unsuccessful. He filed Election Petition No.1 of 2008 in the High Court, Malindi seeking to nullify results of that election (EX - A). The 1st Respondent won the elections. He contends that his Advocate was denied an opportunity to deposit with the court Kshs.250,000 as security for costs which is required to be paid within 3 days of filing of the petition by virtue of S 21 of the National Assembly and Presidential Elections, Act Cap. 21 Laws of Kenya. The Registry listed the matter before the judge on 21/2/08 for mention and directions. On 21/2/08, J. Ombija had been gazetted to hear the petition and the petitioner filed an application (Exh C) in which he sought the court's disrection to extend the period within which the security for costs could be paid. The Respondent opposed the application (Ex D) and it was heard on 8/2/08 and on 24/4/08 a ruling was delivered dismissing the application (Ex. E). On 8/2/08, the Respondent filed an application seeking to have the petition struck out on grounds of non-payment of security for costs (Ex G). The same was fixed for hearing on 22/5/08 and the petitioner's fear is that the petition will be struck out on that basis and the Constitutional reference would be rendered nugatory. That this reference raises serious constitutional issues touching on the conflict between S 21 of Cap. 7 as read with S 44 of the Constitution. The petitioner denies having slept on his rights as alleged by the Respondents and the fact that he has filed a civil suit against his former Advocates Ms Kitony Maina Karanja Advocate for negligence can not be a bar to his filing of this Constitutional reference. Mr. Miller relied on the following decision. 1. ***NDYANABO V AG (2001) 2 EA 385*** a Tanzanian case where a person who lost the elections challenged the clause requiring payment of security as being discriminatory on account of the amount that had been required to be paid as security. The Court of Appeal found the clause on security of costs (S 111 (2) to be discriminative and therefore unconstitutional because it classified people into those who would be able to have their petitions heard and those of whom as a result of poverty, the doors of justice were closed on them. Counsel submitted that S 21 is arbitrary and discriminative on some petitioners because if one does not have Kshs.250,000/= the doors of the court are shut on him. That the section was passed by the law makers to protect themselves and counsel urged this court to rescue the poor majority of Kenyans who cannot afford that sum.

Counsel also relied on ***ELECTION PETITION NO.4/03 JACKSON EKARU NAKUSA V PAUL K***

TOROREI where the court observed that it is possible to discriminate on the basis of economic status and that S 21 of the Constitution does discriminate on that basis. Counsel also urged that the issue for determination herein is not whether he paid the security for costs as that is before the Court of Appeal and that the Respondents have missed the point as they have addressed the merits of the petition. He urged this court to move and declare S 21 to be unconstitutional.

The 1st Respondent deponed that he vied for the Magarini Constituency in the 2007 General Elections and worn the seat as the member of parliament while the petitioner lost. On 28/1/08, he read from the press that a petition had been filed against him and he instructed his counsel to take up the matter. That upon perusal of the court file, the Advocates found that security for costs had not been paid as required, that the deposit should have been made within 3 days. The petitioner filed an application to be allowed to pay the security out of time but the same was dismissed and the petitioner filed a notice of Appeal on 2/5/08 and a Notice of Motion dated 4/9/08 seeking the said extension. That on 8/2/08, the 1st Respondent filed a Notice of Motion seeking to strike out the petition for want of service of the petition on him within 28 days as stipulated by the law. That the said application has already been heard and a ruling delivered on 10/7/08 dismissing the entire petition for want of service rendering this reference a mere academic exercise and that the petitioner seeks to revive the petition through this application. In addition, Mr. Weloba submitted that the petitioner has generally departed from his pleadings in the petition. That the Petitioner alleged that he has been denied due process of the law under S 70 of the Constitution which is the provision requiring him to deposit security within 3 days. But that S 60 which gives the court jurisdiction provides that the jurisdiction is conferred by the Constitution and any other laws. That Cap. 7 Laws of Kenya is a special regime of law with special rights and one coming under that regime must conform to the regulations. He submitted that there has been no infringement of any Constitutional right and that granting any of the prayers to the Applicant would open the courts to a multiplicity of suits. That the applicant's conduct would not call for grant of the orders because he had displayed indolence, double standards and contradiction. That the petition does not mention the unreasonableness of the amount of security required but it is challenging the principle of requiring security to be paid. That the requirement of payment of security is not unconstitutional. That the ***NDYANABO*** case turned on the requirement of security and the court did not find the requirement unconstitutional but the sums required were too high and hence unconstitutional because they locked out many. Counsel further urged that S 70 recognises the fact that rights are not absolute but have to be balanced with rights of others and public interest and urged court to take judicial notice of the fact that the interests in an election are wider than those of an individual. That the Legislature makes laws and leaving election petitions open ended would lead to a flood gate of petitions by any loser even if not warranted. That the limitation in S 21 is a protection against such abuse

Counsel also submitted that the sum required as security is not unreasonable considering the Applicant's economic status. Counsel said that Parliament had good reason for including the security for costs in the law to ensure that the petitioner was committed to the process and after the petition is concluded, the Petitioner can be able to pay the costs. That in the ***DYANABO*** case the issue was the arbitrariness of the security which is not a ground in this petition. It is the arbitrariness of the security that rendered the petitioner unable to access the court but in this case, it is the petitioner's indolence that caused him not to access the court. Mr Weloba was of the view that this petition is meant to take the place of the election petition and it has not been shown that the sum Kshs.250,000/= is out of reach of the average Kenyan. That the sum is presumed to be reasonable unless proved otherwise. Counsel relied on ***CA 273/03 ROTICH SAMUEL KIMUTAI V EZEKIEL LENYONGOPETA*** the court of Appeal said that security for costs is important and the court held that S 21 of Cap 7 Laws of Kenya was not discriminatory nor was it unconstitutional.

Ahmed Isaack Hassan, Chairman of the Interim Independent Electoral Commission reiterated what the 1st Respondent deponed to in his affidavit. Mr Kithi counsel for the 2nd and 3rd Respondents submitted that since the Petitioner alleges that S 21 is unconstitutional then the Respondents who are private individuals have nothing to do with law making but that is the work of legislature. That the Attorney General represents the Government and therefore he is the party that should have replied to the above allegations. That on that ground alone, the petition should fail.

Counsel also urged that this petition was pegged on the existence of the election petition. That S 70 of the Constitution can only be invoked where a breach is subsisting, where a breach is anticipated or where a breach is committed. That it is upon the petitioner to prove that his rights are likely, are being, or have been breached. In this case however, the Election petition has already been dismissed and this petition is overtaken by events.

Mr Kithi also submitted that the petitioner alleges discrimination and that he has to bring himself within the pigeon holes in S 82 (3) of the Constitution that is, that the discrimination is based on tribe, religion, sex etc, but he has not attempted to do so. That in the ***JACKSON NAKUSA*** case (supra) the three judges held that a person had to bring himself within the pigeon holes of S 82 (3) of the Constitution and agreed that the list may not be exhaustive but added that economic status as a likely category though no such category as economic status exists as of now. ThaT the petitioner is one of the richest people in Kenya as he can afford to pay a lawyer Kshs 9 million and discrimination on the basis of economic status does not arise.

Mr. Kithi also urged that the petitioner knew of the amount of security, submitted himself to the jurisdiction of the court by attempting to deposit the required sums and having failed to deposit it out of time, he can not turn round and allege that the requirement for security is unconstitutional. That the claim that the requirement to deposit Kshs.250,000/= is unconstitutional only arose after the Petitioner's application was rejected. And therefore this petition was made in bad faith.

Mr. Kithi also submitted that Rule 23 of the Rules made under S 84 (6) of the Constitution require the petitioner to raise any Constitutional issues arising during proceedings before the presiding court. The court seized of the matter may then treat it as a preliminary issue and determine it. That these issues arose during the pendency of the Election petition and should have been raised there. That the rationale is so that the outcome of the petition should not contradict the outcome of the main suit or election petition and also for purposes of expediting the matter.

The other argument raised by Mr. Kithi is that the petitioner has not demonstrated that any of his rights have been infringed. That every right has an obligation and S 21 does not limit the jurisdiction of the High Court but creates a security not an absurdity. That if the section were to be removed, it would lead to absurdity. That parliament which made the law represents the people and it is the Attorney General who should have been called upon to explain how that figure of Kshs.250,000/= was arrived at. That in the ***NDYANABO*** case, the security was revised from TZ Sh.500/= to TZ Sh.5 million which was found to be unreasonable. In Kenya, it was increased from Kshs.50,000/= to 250,000/= and the intention of S 21 was to control litigation so that only one who is committed could pay such sums. The effect of the revision upwards from Kshs.50,000/= to Kshs.250,000/= saw a reduction in the number of election petitions that were filed.

Mr. Kithi observed that the 2nd and 3rd Respondents filed an application to strike out the petition on 20/5/08 and the petitioner filed this petition on 21/5/08. That it is clear that the petition was meant to stall the petitioner's notice of motion dated 20/5/05 and therefore made in bad faith. Counsel also submitted that the petitioner has sued his former advocates for professional negligence in that they failed to deposit the security with the court in time and he can not turn around and claim that S 21 is unconstitutional.

Counsel also contended that the Electoral Commission of Kenya no longer exists and was wrongly sued. Lastly, Since Kittony and Maina Advocates are still on record for the Petitioner, Mr. Miller can only be heard if he filed a notice of change.

Having considered the pleadings and having heard counsel on their submissions, we consider that the issues that lend themselves for determination are:

(1) whether this petition is properly before this court.

(i) what is the effect of non joinder of AG to the petition

(ii) what is the effect of Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006.

(2) Whether S 21 of Cap. 7 Laws of Kenya is an attempt by parliament to limit the jurisdiction of the High court as enabled by S 44 and 60 of the Constitution.

(3) Whether S 21 is inconsistent with provisions of the Constitution and therefore null and void (S 3).

(4) Whether the requirement of payment of Kshs. 250,000/= as security within 3 days of filing the Election Petition is unreasonable.

(5) Whether S 21 is unconstitutional.

(6) What is the effect of the suit filed against Kittony Maina Karanja Advocates by the Applicant.

(7) Whether the Electoral Commission of Kenya is properly enjoined.

(8) Whether the Applicant is entitled to the prayers sought.

(9) Who bears the costs of this petition?

1. Of Competency of the Petition:-

It is trite law that it is the Government which guarantees the fundamental rights and freedoms of the individual. An individual or group of individuals can not do that. This court has severally held so. In the decision of ***KENYA BUS SERVICE V AG HCMIS. APP. 413/05,*** NYAMU J adopted the decision by Maxwell CJ in ***TEITWNNANG V ARIONG (1987) LRC CONST 517*** in which it was said

"***Dealing now with the question can a private individual maintain an action for declaration against another the private individual or individuals for breach of fundamental rights provisions of the***

Constitution. The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It follows therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the Governed. I am of the opinion that an individual or a group of individuals as in this case can not owe a duty un to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or a group of individuals to another individual under the fundamental rights provisions of the Constitution."

We accept the above stated position as the law in Kenya and has been adopted by courts in many other cases. See ***RICHARD NDUATI KARIUKI V HON LEONARD NDUATI KARIUKI H. MISC APP. 7/06 and HON. MARTHA KARUA V RADIO AFRICA LTD ELC KISS FM***. Even in the Tanzanian case of ***NDYANABO*** which was a challenge to section 111 of the Tanzanian Constitution which is similar to S 21 of our Constitution, the application was made against the Attorney General. The petitioner's complaint is that S 21 is unconstitutional and it is Parliament, not the Respondent who made that law. The AG should be answerable as the legal advisor of Government. Failure to enjoin the AG to this petition renders it fatally incompetent. The 1st, and 2nd Respondents are private individuals and Electoral Commission of Kenya though a Government body, was not charged with law making and no such declaration can be made against it.

2. Of rule 23 (Supervisory Jurisdiction and protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006.

This petition was filed in court on 21/5/08 during the pendency of the Election Petition No.1/08 Malindi High Court, in which the Notice of Motion seeking to strike out the Election petition was due for hearing on 22/5/08. Rule 23 of the Constitution of Kenya (supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 requires that a Constitutional issue arising in a matter pending before the High Court be treated as a preliminary issue by the court seized of the matter and be heard and determined there.

The Rule reads —

"***Rule 23 where a Constitutional issue arises in a matter before the High court, the court seized of the matter may treat such issues as a preliminary point and shall hear and determine the same."***

In our view, rule 23 means that the issue must be raised before the court seized of the matter and the court may decide to hear and determine the issue or refer it elsewhere. Failure to let the court seized of the matter have the first go may lead to conflicting or embarrasing decisions by different courts on the same issue. The Petitioner was required to raise the Constitutional issue within the Election Petition. Failure to comply with that procedure renders this application incompetent. The Rule was put in place to cub duplicity, abuse of court process and unnecessary delays. That rule must be complied with. We do agree with the Court of Appeal's decision in ***JAMES NJENGA KARUME V SPEAKER OF NATIONAL ASSEMBLY 192/1992***. that when the Constitution or statute provides a procedure for doing a particular act, that procedure should be strictly observed. The petitioner has no explanation why he skipped that procedure.

3. Whether S. 21 limits the courts jurisdiction under S 44 and 60 of the Constitution

The petitioner has alleged breach of his right to secure protection of the law by virtue of S 70 of the Constitution. At paras 7 and 8 ((XII) and XIII), of the petition, he alleges that S 21 of Cap. 7 denied the Petitioner his right to natural justice and the due process of the law that is guaranteed under S 70 and that S 21 that requires that the security be paid within 3 days is unfair and offends the equal protection provided under S 70 of the Constitution. It is trite law that an aggrieved person who moves the court under the Constitutional Provisions should plead with reasonable precision the provisions allegedly breached and the nature or manner of the breach he complains of.

In the case of ***MATIBA V AG. MISC APP. 666/1990*** the court held:

"***An Applicant in an application under S 84 (1) of the Constitution is obliged to state his complaint, the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement."***

In ***ANARITA KARIMI NJERU V REP (NoI) (1979) IKLR 154*** Travelyan and Hancox JJ held:

"***we would however again stress that if a person is seeking redress from the High court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."***

In ***CYPRIAN KUBAI V STANLEY KANYONGA MWENDA HMISC 612/02*** J Khamoni went further to say that the Applicant in such application must state with precision the section, paragraph and even sub-paragraph allegedly infringed to enable the Respondent prepare his case.

Section 70 of the Constitution is made up of three paragraphs, (a), (b) and (c). The Petitioner has not shown under which paragraph of S 70 he comes under and the Respondent would not have known how to respond.

In any event, we are of the view that S 70 is the foundation of all fundamental rights provisions. It provides generally for the rights of the individual and generally states that they are not absolute but subject to the rights of others and public interest. However, it is the specific sections 71 to 83 which provide for specific protections and the limitations thereto. We think that S 70 should not be pleaded alone but must be invoked together with another section. For instance, in this case, he should have invoked S 70 with S 77 which relates to fair hearing or S 82 which offers protection against discrimination. On the alleged breach of the right to fair hearing, the petitioner was also required to plead specifically, whether it was under S 77 (2) which relates to fair hearing in criminal cases or (9) which relates to fair hearing in civil cases. Under S 82, the petitioner is required to plead specifically under

what category of discrimination he brings himself, was he discriminated on account of race, tribe, sex etc. As pleaded, the pleadings have not disclosed breach of any fundamental rights and we find that no cause of action has been disclosed.

Under S 21 of the National Assembly and Presidential Elections Act Cap.7 Laws of Kenya, the Petitioner was required to remit to the court within 3 days of filing the petition, a sum of Kshs. 250,000/= as security for costs. S 21 of the Act reads:-

"***21 (1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.***

(2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.

(3) if no security is given as required by this section or if an objection is allowed and not reviewed, no further pleading shall be heard on the petition and the Respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the Respondent's costs and costs of hearing and deciding that application shall be paid as ordered by the Election Court, or if no order is made shall form part of the general costs of the petition."

The Election Petition Malindi, 1/2008 was filed on 11/1/08. The petitioner did not comply with S 21 of Cap 7. He blames the High Court Registry for denying him the opportunity to deposit the security. It is however evident that the petitioner has sued his former Advocates Kittony Maina Karanja Advocates in ***HCC 27/09 Esposito Franco V Caroline Jepkemoi Kittony Wanyeki and Maina Karanja and Co. Advocate***s for negligence in that they failed to deposit security for costs within the prescribed period in law. The petitioner claims the whole legal fee paid to the said Advocates and damages. It is our view that though the Petitioner tends to lay blame on the Court Registry staff, he actually blames his advocates for failing to deposit the sums within the prescribed period yet he had deposited the money with them. It seems the court registry was not to blame for the petitioners failure to deposit the security but his advocates are.

We do agree with the Respondent's submission that the Petitioner was aware of the requirement to deposit the security for costs, he forwarded the money to his Advocates to proceed and deposit the security with the court as per law required. When the Advocates did not deposit the money, he even sought the discretion of the Court to have more time for remitting the said monies extended vide his Notice of Motion dated 8/2/08 but the court delivered its ruling on 24/4/08 dismissing the said application. The Petitioner had been given a hearing within the due process of the law and one wonders at what stage he was denied access and when the said section 21 became unconstitutional.

4. Justification of the requirement for security under S 21

What is the spirit of S 21 of Cap 7 Laws of Kenya? We are in agreement with the Respondents that the requirement that an aggrieved party remits security for costs to court upon filing an Election Petition is to restrict the would-be vexatious litigants coming to court and ensure that the party who comes to court is serious and will be able to pay the costs in the event he is required to do so. It is a protection availed by the legislature. So does that section limit the jurisdiction of the High Court to hear and determine Election Petitions? S 44 of the Constitution gives the High Court the jurisdiction to hear and determine Election Petitions. The section creates a special regime in the Constitution for hearing and determination of Election Petitions. That regime can be likened to Judicial Review created under S 8 and 9 of the Law Reform Act and Order 53 Civil Procedure Rules.

S 60 of the Constitution then gives the High Court unlimited original jurisdiction in civil and criminal matters and any other power conferred on it by the Constitution and any other law. It reads

"***60 (1) there shall be a High Court, which shall be a superior court of record and which shall have unlimited original jurisdiction in Civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or by any other law."***

The above Section envisages exercise of other jurisdiction other than under the Constitution by the High Court. The said jurisdiction may be conferred by statute like what we have considered above, under Judicial Review or that under S 44 of the Constitution. The Petitioner has not demonstrated how S 21 limits the right of access to this court under the above section. The legislature had good reason in coming up with the provision. The petitioner did comply with the section and attempted to deposit the security but he was late in doing so. S 21 only ensures that there is some order in parties approaching the High Court and that they take the matters seriously. Filing of a petition is an important and expensive process which has to be taken seriously.

Is there a justification in the payment of Kshs.250,000/= as security within 3 days of filing of Election Petition? It is parliament that enacted that provision and like the court said in the ***NAKUSA*** case, (supra) the court presumes that the legislature acted constitutionally and the laws passed are necessary and reasonable. In that case though the court noted that the sums may be high and can not be afforded by many Kenyans, it said section 21 had helped to check on the escalating number of petitions filed each year and it further noted that the period required to remit the sums was rather short but it did not grant the orders sought because the Applicant had not proved that he was subjected to discrimination or unfair treatment. In the instant, case the Applicant has not demonstrated that the said sums (250,000/=) are out of his reach. He depones in the affidavit in support of the application dated 8/2/06 seeking to extend the time for remitting the security at para. 11 and 12 thereof, that he is a man of means and able to furnish the security. In addition, in the suit against his former Advocates, he is claiming over Kshs. 9 million in form of costs and fees. A person who paid Ksh.9 million as fees and costs can not be a person of lean means who can not be able to access the court for lack of money. In the Tanzanian case of ***NDYANABO,*** (supra) the Applicant challenged the constitutionality of the section requiring payment of security on account of the decision to increase the sums from TZ Tsh.500/= to TShs.5,000,000/= to be arbitrary and discriminatory and contravened the right to equality before the law. The Tanzanian court of Appeal held that the limitation imposing the security to Tsh.5 million was arbitrary and inflicted an unjustified disability on the Petitioner and classified Petitioners into those who would be able to have their petitions heard and those who could not be heard due to poverty. That though it was a principle of law that all laws be of equal application, any classification had to have a rationale nexus to the object sought to be achieved by the legislation in question. The court declared the said section unconstitutional. When the ***NAKUSA*** case was heard, there had been increment of the security for costs from Ksh.50,000/= to Kshs.250,000/=. That increment was challenged but the court did not find the increase to be unconstitutional. In the instant case, the Petitioner was not really challenging the sum imposed as security but the time allowed to deposit the security. But along the way in his submissions, it seems that the Petitioner changed his mind and now challenges even the sum payable as being discriminatory. It was up to him to show that he would suffer loss if asked to pay the Kshs.250,000/=. But from what we have considered above and from his own pleadings, he is a man of means and Kshs. 250,000/= would not cause him any harm nor would he be denied access to court for lack of that sum. The Applicant has failed to demonstrate the unconstitutionality of the said section.

5. Of the Unconstitutionality of S 21 of Cap 7 Laws of Kenya

We have found above that the Petitioner is not a poor man and is able to afford the security sum without any problem. As earlier pointed out, the Applicant failed to plead as required and never came under S 82 of the Constitution. He has not brought himself under any of the categories or pigeon holes listed under S 82 (3) of the Constitution i.e. sex, religion. In the ***NAKUSA*** case, the court seemed to accept the possibility of discrimination on account of economic status, that is, on the basis of income or lack of it. In the instant case, that would not apply because the Applicant is financially able and the section would not operate against him. In fact the Petitioner complied with the due process till he was said to have been time barred in depositing the security with the court. It is only after his application for extension of time was dismissed that he turned round to allege that the section is unconstitutional. The Applicants conduct in that respect seems to be actuated by bad faith.

Whether the 3 days provided for remittance of the security is unconstitutional; The period within which a petition should be filed and served is 28 days of the gazettement of the results of elections and the payment of security is within 3 days of presentation of the petition to the court. As observed in the ***NAKUSA*** case (supra), the said period is very short. However, in this case, the money was available and the Petitioner had even deposited it with the advocate. It is the advocate who failed to deposit the money with the court. Can that be blamed on the Constitutionality or otherwise of section 21? Absolutely not. Under S 70 of the Constitution, the Constitutional rights of the individual are not absolute. They are subject to the rights of others and the public interest. As observed by the court in ***NDYANABO*** case, the rights can be limited but the limits should not be arbitrary, unreasonable or disproportionate to any claim of state interest. Election petitions are supposed to be disposed of expeditiously since the term of office of a serving M.P. is only 5 years. The petitions normally take long to hear and determine. There have to be procedural steps put in place to ensure that petitions are filed promptly and heard and determined expeditiously. The Petitioner was ready with the money for deposit were it not for his advocate's indolence. That negligence can not be attributed to S 21. It is in the public interest that petitions are expedited and the Petitioner has not shown the contrary.

6. The effect of the suit filed against Kittony Maina Karanja Advocate.

It is not disputed that the Petitioner has filed a suit against his former advocates for negligence for failing to deposit security with the court in time. That is telling. It is either the advocates were negligent or the provisions of S 21 are unconstitutional. The Petitioner is blowing hot and cold at the same time. He has not brought this petition in good faith.

In addition to the above, it is noteworthy that the Respondents filed the notice of motion seeking to strike out the petition which was set down for hearing on 22/5/09 but the Petitioner filed this petition on 21/5/09 thus preempting the hearing of the application to strike out the petition. The filing of this application just before the hearing of the application to strike out is indicative of bad faith on the part of the Petitioner. We also wish to point out that there is pending an appeal to the Court of Appeal against the court's ruling of 24/4/09. The notice of appeal is dated 25/4/08 and filed in court on 2/5/08. The Petitioner has challenged the merits of the ruling on the issue of security of costs. It is the same subject matter as what is being canvassed in this petition. The courts may run into the risk of giving contradictory orders from the two different proceedings. The petition is an abuse of the court process.

7. Joinder of the Electoral Commission of Kenya

The 3rd Respondent herein is the Electoral Commission of Kenya. That body was disbanded and no longer exists. The body in place is the Interim Independent Electoral Commission which has taken over the conduct of the matters of the Electoral Commission of Kenya. It was incumbent upon the Petitioner to seek an amendment to substitute the Electoral Commission of Kenya with the new body.

8. Whether any of the prayers can issue.

Prayer (d) of the petition is overtaken by events since the Applicant sought an interim order to stay the Election Petition which has since been struck out. For all the reasons considered in this judgment, we come to the conclusion that apart from the petition being incompetent, for want of joinder of the Attorney General the Petitioner has also not shown that his right of access to the court has been contravened or that he has been discriminated against by virtue of section 21 of Cap 7 Laws of Kenya and the same lacks merit. No specific prayer is sought at prayer (a). Prayer (b) and (c) cannot issue for the above reasons. We therefore dismiss this petition with costs to the Respondents.

Dated and delivered at Nairobi this 16th day of October 2009.

R.P.V. WENDOH

JUDGE

G. DULU

JUDGE

Delivered in the presence of:-

Mr. Miller for the Petitioner

Ms Mburu holding brief for Kithi for the 2nd and 3rd Respondent

Mr. Mwinzi holding brief for Munyithya for 1st Respondent

Muturi – court clerk