REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

Election Petition 11 of 2008

IN THE MATTER OF SECTION 44 OF THE CONSTITION OF THE REPUBLIC OF KENYA

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL

ELECTIONS ACT AND THE REGUALTIONS MADE THEREUNDER

AND

IN THE MATTER OF THE PARLIAMENT ELECTION FOR MAKADARA CONSTITUENCY

BETWEEN

REUBEN NYANGINJA NDOLO …… PETITIONER

VERSUS

DICKSON WATHIKA MWANGI …… 1ST RESPONDENT

JERUSHA CHEPSAP …… 2ND RESPONDENT

THE ELECTORAL COMMISSION OF KENYA …3RD RESPONDENT

RULING

After my Ruling delivered on 26th October 2009 refusing to stay the proceedings pending Appeal to be filed by the 1st Respondent against my previous Ruling delivered on 14th October 2009, the Petitioner herein filed a Notice of Motion dated 28th October 2009.

It is premised under section 44 of the Constitution of Kenya, section 19 of the National Assembly and Presidential Elections Act, the inherent power of the Court and all other statutes of provisions of the Law (*Sic).*

It seeks mainly directions from the court that the trial process, that is the calling of witnesses and taking of their evidence, in this election do start ***de novo***.

The application is supported by grounds on the face thereof and on the supporting affidavit

sworn by the Petitioner on 28th October 2009.

The Petitioner avers in paragraphs 3, 4 and 5 of his affidavits namely;

3. **That the following certain developments in the hearing of the Petition, namely;**

a) My discovery of the nature of the relationship that existed between the trial judge and one of the defence counsel, and

b) My realization that the trial judge had made inconsistent rulings and directions on the question of when the trial in this matter had in fact commenced;

I instructed my advocates on record to make an application for the Hon. Lady Justice RPV Wendoh to disqualify herself from further hearing this petition which she did.

4. **That the alleged grounds of apparent bias had prevailed throughout the trial that had so far been conducted before her and, I therefore, verily believe that the entire trial so far undertaken by the Hon. Lady Justice Wendo had been tainted by the same.**

5. **That I verily believe that with the recursal of the initial trial judge from these proceedings, her judicial decisions, so tainted stood impugned and the current trial court is entitled to reconsider the entire case and come to its own findings on every aspect of the said trial.**

Thereafter the averments of demonours of witnesses which this court has had no opportunity to examine were made. It is also averred that the nature of Election Proceedings are '*sui generis'* and more akin to Criminal proceedings than the Civil Proceeding.

It is also placed before the court that in order to avoid delay, the Petitioner has instructed his counsel to limit the number of witnesses to maximum of five in case ***de novo*** trial is ordered. I do not understand this averment of offering a discount to this court!!!

After all these averments he avers that he has sworn the affidavit in support of application for **trial of this Petition to start afresh!**

This averments do differ in its extent from what is prayed in his application.

Mr. Ongoya the Learned Counsel appearing for the Petitioner reiterated the above averments and stressed that predecessor Hon Wendoh J had seen the demeanors of the witnesses so far called and I did not have the same opportunity.

He cited the authorities to guide me on the principles of law as regards exercise of discretion by the court to order the hearing of a trial *de novo* namely;

1) **Mandavia V. Rattan Singh** (1968) E.A. L.R. 146.

2) **Farmwine Distributors Ltd** versus **Simeon John Muthuma** H.C.C.S no. 1095/1987 unreported).

In **Mandavia's case** (*Supra)* at page 149, Duffus JA. Observed;

"**There appears to be no authority on the application of the rule, but it seems to me that the proper test is whether the successor Judge is in as good a position as his predecessor would have been in to evaluate the evidence and submissions which have already put forward and to continue the hearing on that basis."**

In Farmwine's case (*Supra)* Justice Kubo adopted the above observation of Duffus J. A. I also note that in the said case, the witnesses in the part-heard case were fully cross-examined and the court observed that as long as the defendant is of the perception that his opponent had an unfair advantage over him, having started his testimony way back in 1995 nearer the time of events in question, the defendant will not see the justice as being done.

It was urged by Mr. Ongoya, the learned counsel for the Petitioner, that the Respondents would have an advantage of his witness being heard by this court. He relied on paragraph 3(b) of the supporting affidavit which I have already detailed hereinbefore.

I may however place on record that the Petitioner has fell short of giving details of the bias which he perceived from the record of this case. He has not averred that the record is scanty or not properly taken. He also failed to disclose that what he avers as inconsistent decisions are being tested by the Court of Appeal.

When confronted of these appeals, the court was told without hesitation that if this court grants the order of trial to proceed ***de novo***, the decisions of the Court of Appeal will be **purely academic**!!! It was also submitted that if the court grants the prayer of trial to proceed de novo, this court would expedite this trial as the court would not have to take the evidence of remaining witnesses and await the decisions of the Court of Appeal.

In opposition, Mr. Lubulellah and Mr. Kilukumi, the learned Counsel for the three respondents, made their submissions as a common front.

They stressed that the grant of order of trial ***de novo*** will entail great amount of delay as lot of exercise has been undertaken and added that opening of ballot boxes would be a part of trial ***de novo***. They contended that if the Petitioner has indicated that his prayer is only limited to calling of witnesses, he cannot pick and choose.

Mr. Lubelellah submitted that the Election Petitions are litigations Re generis – (Public domains) and that is the reason affidavits are required of the witnesses before he/she takes the witness stand and after reading thereof he/she is cross-examined in response. Mr. Kilukumi brought to the notice of this court that only one witness namely Joseph Okwar Wandolo has given evidence and he was not cross-examined. Thus the issue of advantage of demeanours of the witness does not arise in this case.

It was contended by Mr. Lubelellah that the only complaint, the Petitioner has is against the Rulings made by Hon. Wendoh J. and they were appealed against, and if the appeals are disallowed the commencement of ***de novo*** process shall be an exercise in futility. He stressed that the Superior court cannot interfere with substratum of the pending appeals, which are the rulings made by Hon. Wendoh J. on the competence of the affidavits filed by the Petitioner's witnesses.

Mr. Kilukumi, on this contention, added that even in those appeals the prayers sought are to recall those witnesses and thus the Petitioner is asking two Courts to make the same orders which action, he stressed, is an abuse of court process.

It was also brought to attention of the court that out of the three appeals, one appeal being C.A No. 148/08 was struck out on 16th October, 2009 and thus the evidence of one Kitui Joshua Muia cannot be recalled. (See paragraph 8(a) of the Replying affidavit sworn by the Respondent on 30th October 2009)

The other two appeals namely Civil Appeals No. 255/2008 and C. A No. 271/08 in respect of two witnesses of the petitioner, namely Joseph Okwar Wandolo and Ambe Mbarack Ali are heard on merits by Court of Appeal and their Judgments are scheduled to be delivered on 4th

December 2009 and 13th November 2009 respectively. It is thus contended that this court by allowing the prayer of trial to proceed de novo will be removing substratum of those appeals, which shall be improper because this application is a collateral attack on the rulings made by Hon. Wendoh J. under appeal and it is an abuse of court process.

On the issue of bias it is submitted that Hon. Wendoh J. disclosed her relation with one of the Defence counsel and none of the counsel raised any objection to her hearing the Petition. Now that issue is taken as a basis for the application but no attack on record compiled by her on or its accuracy is made. The alleged inconsistencies in her rulings, which is averred before me, has not been made a ground in the appeals before the Court of Appeal. It is taken for the first time in this application and the court cannot encourage that approach it being a court of concurrent Jurisdiction and it was further stressed that in any event, that issue cannot be a ground for hearing the matter ***de novo*** because by doing so, this court shall be dealing with the issue of allegation against the Judge of her impartiality and assuming that materials are placed before the court to show that she has desecrated her oath of office. The Petitioner thus asking this court to tread on a very dangerous path of exercising supervisory or appellate jurisdiction over the matter.

It was further contended that a procedure which allows a party to reconstruct or reconstrue its case before another court on the face of an allegation of bias of a predecessor is an obvious abuse of Court process.

Mr. Kilukumi also contended that apparently neither sec. 44 of the Constitution nor sec. 19 of the Act, provides for a process of hearing the Petition ***De Novo*** and this Court, to do so, shall have to exercise its inherent power which, I also tend to agree, should be used to prevent abuse of the court process and to meet the ends of justice.

They both in unity submitted that this application is not such an application.

Mr. Oyanso in response, submitted that the submission in opposition are based on a fallacy that the application is made to enable the Petitioner to call those witnesses whose evidence are heard and dismissed by my predecessor, and that those averments are speculative and the court cannot accept those submissions.

Secondly, it was stated that the element of bias has two limps – actual and perceived. Disclosing the material facts on the relationships between the Presiding officer and the counsel representing a party tantamounts to the fact that the allegation of bias is made and thus the Petitioner has made case which deserves the grant of the orders prayed for.

I have considered these submissions with very close look and seriousness the same deserves.

Most of the facts are not denied and/or are not deniable. Out of four witnesses who have taken stand in the witness box, the rulings in respect of three of them were challenged before the Court of Appeal. Out of them the Appeal against one Ruling was struck out and other two appeals were heard on merits and dates for their respective Judgments are given by the Court of Appeal

The fourth witness was not cross-examined and thus what remained was his affidavit which does not need any element of observation of demeanours of the deponent.

I also note with curious anxiety the submissions made by the learned counsel for the Petitioner, when it was contended, that it is a fallacy to assume that by this application, the Petitioner wants to recall the four witnesses. Form the facts of this case, if that is not the intention of the applicant, I do fail to see any other reasons for the prayers to hear the Petition ***de novo***. The allegations of inconsistencies and bias are directed only on the decisions so far made in respect of those witnesses. Such also is the case for the submissions of my disadvantage of not

observing the demeanours of those witnesses. In my view, that is not an assumption but the stark truth for filing the Petitioner's application.

I also point out that the Petitioner not having raised issue of bias before the Court of Appeal, has come now to do so before this court and, I am of a very humble opinion, that this court cannot make any assertion and/or assumption on that issue once the Judge has reluctantly disqualified herself after stating:-

"**Though I find the ground upon which the application is made is baseless and made in bad faith this court's conscience is clear and clean."**

Moreover, I do find solace in the fact that the Petitioner has gone to Court of Appeal to ventilate and vindicate his dissatisfaction over these allegedly inconsistent rulings.

Asking then form me, to ignore all these facts and the submissions that this court should take the risk of making the decisions of the Court of Appeal an exercise of futility or academic is, to say the least, not in good faith. I do tend to agree with submissions from learned counsel for the Respondents that I shall be opening a risky path if, under the circumstances of this Petition, I allow the application.

Considering the facts and submissions filed, I do tend to agree with contentions raised by the learned counsel for the Respondents. I state that I should and do refuse to exercise my inherent power in respect to this application as by doing so, I shall not be advancing any need for justice or preventing any abuse of court process and powers.

In short, I shall dismiss the Notice of Motion dated 28 October, 2009 with costs to the Respondents.

Dated, Signed and **delivered** at Nairobi this **11th** day of **November 2009.**

K. H. RAWAL

JUDGE

11.11.2009