REPUBLIC OF KENYA

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

Election Petition 11 of 2008

IN THE MATTER OF SECTION 44 OF THE CONSTITUTION OF

THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL

ELECTIONS ACT AND THE REGULATIONS MADE THEREUNDER

AND

IN THE MATTER OF THE PARLIAMENT ELECTION FOR MAKADARA

CONSTITUENCY

BETWEEN

REUBEN NYANGINJA NDOLO ………………………………PETITIONER

AND

DICKSON WATHIKA MWANGI ……………..…………..1ST RESPONDENT

JERUSHA CHEPSAP ………………...…………………..2ND RESPONDENT

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

RULING

After the fourth witness from the Petitioner Mr. Eriq Stanley Saburi Omino submitted his affidavit, sworn on 8th May, 2009 and filed on 9th May, 2009, as evidence on reading the same, some objections were raised as to its admissibility and relevance.

Mr. Lubullellah, the learned counsel for the 2nd and 3rd Respondents submitted that Annexutres to the

affidavit are secondary evidence but conceded that he was mindful of the process of evidence in the hearing of election petition which is governed by order XVIII of the Civil Procedure Rules. However, he stressed that the affidavit is oppressive to the 2nd and 3rd Respondents in that the annextures and affidavit is in breach of the Service Agreement and that it discloses the confidential information which is prohibited as per the Service Agreement. I may also add here that the reasons for the submissions that the contents of the affidavit are oppressive were not contended before the court.

As for the annextures not being original, I shall simply state that they are the print out from the computer which the witness avers he printed himself. The Service Agreement is executed by him and ECK. Furthermore, the evidence is presented by way of an affidavit and as per Order XVIII of Civil Procedure Rules and well established procedure, the affidavits do not contain original, documents.

I shall not thus hesitate to find that this aspect of objections is not validly before the court.

As regards the averment of breach of oath of secrecy, I shall do no better than to adopt some observations made by Hon. Wendo J. as regards similar objections raised earlier in her ruling delivered on 25th November, 2009.

She observed that Sec. 54 (4) of the Election Offences Act (Cap 66 Laws of Kenya) "***basically forbids the divulging any information relating to voting and counting of votes before the closure of polls".***

After considering relevant provisions of the laws, she held:-

"***Otherwise my understanding of all the above sections referred to, is that an officer of the ECK is a competent witness under Sec. 125 of the Evidence Act. Elections are supposed to be open, done in good faith, without fear or favour and I am of the view that it is in public interest that a person who took part in Election process should be free to come and tell the truth about what transpired during the polling".***

I also agree that if the witness is before the court to testify on what he saw or did himself there is no bar to him to come before the court and tell his version of the events of election process.

Thus I shall also find that there is nothing alarming or scandalous in his evidence which would oppress the 2nd and 3rd Defendants. A witness who gives evidence on what happened as per his knowledge during the relevant phase of election process, if stamped as on oppressive witness, then in any proceedings before the court, whether be civil or criminal, the witness of opposite side would be termed as such.

I thus do not allow the objections raised by Mr. Lubullellah and can only direct that the cross-examination to proceed or this witness if that is the final order in this Ruling.

Mr. Kilukumi, the learned counsel for the 1st Defendant, raised objections on the relevance and hence the admissibility of the evidence of this witness. He contended that in any of the 30 paragraphs of the Petition, or the particulars provided by the petitioner, there is an averment that there was an alteration of the election results, which is basically averred in this affidavit in question. If there is no pledding to stand on, the averments made therein are not relevant and not admissible.

It was further contended that the 1st Respondent is caught up with surprise and as per Rule 5 of the Election Rules that eventuality has to be prevented.

He relied on following authorities:

(1) "***Odger's Principles of Pleading and Practice, 19th Edition Giles Francis Harwood"***

On page 409 it is stated that "the prime requirement of anything sought to be admitted in evidence is

that it is of sufficient relevance. What is relevant (namely, what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience…………..

Admissible evidence is thus that which is (1) relevant and (2) not excluded by any rule of law or practice"

(2) <u>Halsbury's Laws of England – fourth Edition Vol. 36(1)</u> On page 7 – paragraph 5, it is observed that the purpose of Rules of Pleadings is to compel each party to state clearly and intelligibly the material on which he relies and which need to be denied thus it enables the parties to decide in advance of the trial what evidence will be adduced.

(3) <u>Esso Petroleum Co. Ltd. & Another –vs- Southport Corporation (1955) 3 All E.R. 864.</u>

On page 868 (between H and I), it was observed:-

"***The foundation of pleadings is to give <u>fair notice</u> of the case which has to be met so that the opposing party may direct his evidence to the <u>issue disclosed by them".</u>***

(4) Section 5 of the Evidence Act was also relied upon.

With these submissions and citations, it was urged that the affidavit be expunged in its entirety.

Mr. Amollo, the learned counsel for the Petitioner, opposed the objections raised. I shall not deal with his submission in opposition to those raised by Mr. Lubullellah as I have incorporated them in the earlier part of this rulings.

In response to Mr. Kilukumi's submissions, he lamented at the outset that the Respondents have been consistent in avoidance of this petition being heard on substance. There has been 15 objections from the Respondents. He did point out the observations made by Hon. Wendo J. in her Ruling delivered on 25th November, 2009, which I have cited with approval hereinbefore.

He contended that Sec. 5 has exceptions to its application when it stipulates that it is '***subject to the provisions of this Act and of any other law'.***

I may just point out that Sec. 5 provides that "***no evidence shall be given in any suit or proceedings except evidence of the existence or non-existence of a fact in issue",*** of course, subject to the exceptions observed hereinbefore.

Coming back to the submissions made by Mr. Amollo, it was stressed that 'The Notional Assembly and Presidential Elections Act (Cap7) (hereinafter referred to as "the Act") vide Sec. 23 (c) and (d) does provide the contrary provisions Man Mose provided in Sec. 5 of the Evidence Act.

In short, Sec. 23 (c) donates the court with power to examine a witness who the court, in its discretion, thinks to have been concerned in the election etc.

Sec. 23 (d) enjoins the election court to decide all the matters that come before it without undue regard to technicalities.

He further submitted that, in any event, the evidence of this witness is relevant and thus admissible.

He pointed out paragraphs 3, 7, 13, 14(a), 14(b), 22, 23, 25, 26, 27, 29 and 30 of the petition and contended that the evidence of the witness is soundly based on the averments made in those paragraphs of the petition.

In brief, those paragraphs are averring on irregularities of electoral process in votes counting. Paragraph 14 avers about declaring results which were false, paragraph 13 avers about failure to act impartially by

the ECK officials, paragraph 22 avers that at the end of vote counting the Petitioner was announced to be the winner which result was later changed, paragraph 23 and 25, avers the discrepancy in total numbers of votes cast and the announcement of the votes so cast at the Tallying centre, paragraph 26 avers the alteration of the statutory documents and forms, paragraph 30 avers the alteration of Forms 16A, paragraph 29 avers the interference by *"orders from above"*.

The affidavit in question, it was stressed, avers similar occurrences, like, initial result showing the Petitioner as winner, the total numbers cast, obliteration of the initial results, unavailability of the physical file held at KICC etc.

Moreover, what the affidavit avers is simply what the deponent witnessed and did and Mr. Amollo contended that whether it is true or not, can be tested by cross-examination and eventually be determined by the court.

It was thus urged that the objections be dismissed.

In rejoinder Mr. Kilukumi rose to submit that the application was specifically made on the grounds that the affidavit was not related to the petition as particularized. In response to the application, Mr. Amollo only restricted to the general averments made in the petition and in view of that restricted response, he is entitled to give the response by referring to the particulars.

Mr. Ongoya who was the counsel present for the Petitioner, objected to the procedure Mr. Kilukumi intended to take. He in brief submitted that the rejoinder to the reply should be limited to either distinguish or explain any points of law raised and cannot be extended to open up the case by introducing new facts.

When the court asked Mr. Kilukumi under which procedural or substantive law, he intends to now show all the particulars which he only referred to in general while making the application

At that point, Mr. Kilukumi left the matter to the court in protest.

Without going to any specific law, it is trite law that the applicant cannot bring in new facts in response (rejoinder) to the submissions in opposition. The right to rejoin is simply to give comments on point s of law, and not to begin submissions *de novo,* so to speak.

However, I had perused the particulars supplied.

Those supplied to 1st Respondent on 10th March, 2007 are in respect of paragraph 1(a), 1(b), 1(c), 2(a), 2(b), 2(c), 3(a), 3(b), 4(a), 4(b), 5, 6, 7(a), 7(b), 8(a), 8(b), 8(c), 9(a), 9(b), 10(a), 10(b), 11(a), 11(b), 11(c),11(d), 12, 13(a), 13(b), 13(c), 13(d), 14(a), 14(b), 14(c), 14(d), 15(a) and 15(b).

The supplementary request for particulars were in respect of paragraph 17, 19, 26, 28 and 30 of the Petition.

As regards alteration of votes the particulars requested only sought the explanation by what margin the votes were altered in respect of paragraph 26 and 30 of the Petition.

The only particulars requested as to manner of alteration was in respect of paragraph 19 of the petition, and that was restricted to Form 16A from Plains View Polling station.

In respect of the particulars sought for by the 2nd and 3rd Respondent no particulars of the manner in which the election result was altered was sought for except of paragraph 19 seeking the exact nature of alteration in Form 16A and whether it increased or reduced the votes cast.

I made the efforts to look at the request for particulars from the Respondents mainly to satisfy the court whether the affidavit avers irrelevant matter in respect of this petition.

The particulars were supplied as per the request from the Respondents as per Rule 5 of the Election Rules, and no more.

The said rule stipulates:

"***Evidence need not be stated in the petition, but the election Court may, upon application in writing by a respondent order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial, upon such terms as to costs and otherwise as may be ordered."***

The election laws are complete code, it has, for good reasons as well to expedite the hearing of the election petition, prescribed special procedure for hearing the same. Evidently there are no pleadings in election petition except the Petition itself as opposed to what are prescribed in other suits and proceedings. The Respondents are not required to file their response. They are only required to call witnesses in response at the close of the Petitioner's case by presenting affidavits before they are permitted to testify.

The question of issues to be determined thus does not arise in the Election Petition process.

Furthermore, the court is also given discretion to compel attendance of any witness who, in its opinion, appears to have been concerned in the election.

This witness, as per his averments, is directly concerned in the election. He has averred certain facts which he witnessed and is offered for cross-examination to test its veracity.

This Court sitting as an election court is entitled to know the truth surrounding the election in question.

I also add that in my considered view, his averments are not in the realm of total surprise looking to the general averments in the petition and as per Rule 5 evidence is not expected to be given in the petition. I have dealt with the issue of particulars as per reasons stated hereinbefore.

In view of the premises aforesaid, I reject the objections made and direct that the Respondents, if deemed fit, shall proceed to cross-examine the witness.

I will not make any order on costs.

Dated, Signed and **delivered** at Nairobi this **4th** day of **December, 2009.**

K. H. RAWAL

JUDGE

4.12.2009