



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELECTION PETITION 5 OF 2008

AMBASSADOR HUSSEIN DADO TUNEYA PETITIONER

A ND

1. DANSON BUYA MUNGATANA

2. ELECTORAL COMMISSION OF KENYA

3. GEORGE NYAWA MWADAI RESPONDENTS

RULING

Ms. Aulo for the petitioner applied orally for inspection of documents as provided in regulation 42 of the Presidential and Parliamentary Elections Regulations.

Mr. Gikandi for the 2nd and 3rd respondents opposed the application on the grounds that a formal application needs to be made before the court can grant the order, and that everybody should be informed. Otherwise, he submitted, the application cannot be made informally and/or orally. Mr. Miller for the 1st respondent stood guided by Mr. Gikandi's submission.

In her reply, Ms. Aulo submitted that the regulation does not require a formal application to be made, and that by telling the other parties that she wished to inspect the documents, she would thereby have given them notice. Such parties would be at liberty to attend, if they so minded to do, and orders can also be made as to supervision during the inspection. Otherwise it is anyone's right to inspect documents, and apart from the issue of notice no reason had been advanced as to why she should not inspect the documents. She urged the court to accede to the inspection.

Under regulation 42 of the aforesaid regulations, all documents relating to an election are required to be retained in safe custody by the returning officer for six months after the results of the elections have been declared, after which they may be destroyed. Other than ballot papers and their counterfoils, documents retained under this regulation should be made available for inspection by any member of the public, upon a request made by him, at such time and subject to such conditions as may be decided by the returning officer. Up to this point, there is no need to involve the court on matters of inspection. Once an election petition is filed, however, matters take a different turn.

Regulation 42(4) states –

“The provisions of this regulation shall not apply to documents that concern a pending election petition unless there is a court order granting such authority.”

Once an election petition has been filed, the matter of inspection of documents is removed from the authority of the returning officer to the jurisdiction of the court.

Before the court can grant an order, there has to be an application. The only issue here is whether the application should be formal or informal. The general rule of practice is that all applications to the court, except where expressly provided for take the form of a motion. This court is, alive, however, to the provisions of section 23(1) (d) of the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya, which enjoins the election court to decide all matters that come before it without undue regard to technicalities. Going by the substance of the applications, in an appropriate case and depending on the nature of the orders sought and the reasons for which they are sought, it may be possible for the court, without much ado, to grant orders on an oral application. Each case will therefore be determined on its own circumstances.

In the instant matter, counsel for the applicant did not disclose what documents she intends to inspect, and the reason for such inspection. I don't think that anyone would set out on such a mission out of academic curiosity.

In those circumstances, I find it prudent to call for a formal application in order to facilitate the making of a formal expression of the decision of the court. I therefore direct that the application for inspection be made by a notice of motion.

It is so ordered.

Dated and delivered at Mombasa this 12th day of March, 2008.

L. NJAGI

JUDGE