REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Election Petition Cause 2 of 2008

JAYNE NJERI WANJIRU KIHARA……..…….....……PETITIONER

AND

CHRISTOPHER L. AJELE

(Returning Officer of Naivasha Constituency).....1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA…..…..…....…..2ND RESPONDENT

JOHN MICHAEL NJENGA MUTUTHO…….……....…3RD RESPONDENT

RULING

The petitioner was one of the candidates in the election for the National Assembly, Naivasha Constituency during the general elections held on 27th December 2007. In the petition filed on 18 January 2008, the petitioner sought for several orders inter- alia that the election of the 3rd respondent as the member of the National Assembly for Naivasha constituency be declared null and void.

Before the petition was heard, the 3rd respondent filed a notice of motion on 11th February 2008 seeking to be furnished with particulars as per the detailed request for particulars filed in support of the application. This particular application was disposed of by consent recorded on 11th February 2008 to the effect that the petitioner would provide and file the particulars sought within 14 days.

The petitioner filed the answer to the request for particulars on 22nd February 2008. The 1st and 2nd respondents Afiled a notice of motion on 21st February 2008 under the provisions of rule 4 (1) (b) of the National Assembly and Presidential Election Act (Act No. 7) (*hereinafter referred to as the Act*) and Order 50 rule 1 of the Civil Procedure Rules. That application seeks for an order that the petition filed herein be struck off. The 3rd respondent also filed two applications by way of notice of motion. The first is dated 18th February 2008, and expressed to be brought under rule 4(b) of the National Assembly Election Petition Rules, he sought for an order that that petition filed on 18th January 2008 be struck off.

The 3rd respondent filed yet a further notice of motion on the 7th March 2008 under the provisions of Section 23 (b), section 22 of the Act, rule 5 of the Election Petition Rules and Section 44 and 60 of the Constitution of Kenya. The applicant sought in this motion that the petition filed on 18th January 2008 be struck off, and in the alternative, the answer to the request for particulars dated 22nd February 2008 be

struck off as well as the documents attached to the answer for request.

All these applications were argued together. The application by the 1st and 2nd respondent is based on the grounds that the petition is fatally defective for failure to state the holding and the results of the elections. Secondly the facts and the grounds relied upon by the petitioner, in support of the petition are not stated. Thirdly, the names of the candidates who took part in the election, the subject matter of this petition, were not named in the petition. Counsel for the 1st and 2nd respondents relied on the affidavit of Christopher A. Ajele the returning officer sworn on the 21st February 2008. He submitted that under the provisions of rule 4(1) (b) of the Act it is provided that;

"*An election petition shall-*

(a) state whether the petitioner is entitled to petition under section 44 of the constitution; and

(b) State when the election was held and results of the election, and shall state briefly the facts and grounds relied on in support of the petition."

It was argued that the petitioner did not give the names of the candidates who took part in the election. She only stated that she was one of the candidates. The rules are clear that all the names of the candidates must be provided for in the petition. The petitioner also did not include the results of each of the candidates which, according to the applicants, are a mandatory provision of the Act. Counsel made reference to the decision in the case of Luka Kigen vs. Joe Langat Election Petition No. 4 of 2002 where Muga Apondi J. held that:

"*The use of the word 'shall' is mandatory and failure to use the correct name of the respondent as was stated in the Kenya gazette was fatal to the petition which was struck out."*

As regards the format of the petition, rule 4(4) provides the format which provides the names of all the candidates should be stated, and the person who was declared the winner as well as the results. Lastly, according to the 1st and 2nd respondents the petitioner provided facts but did not give the grounds upon which the petition is based. Counsel further made reference to the case of Alicen J. R. Chelaite vs. David Manyara Njuki & 2 others Civil Appeal No. 150 of 1998 where the Court of Appeal held that:

"*Advocates should first of all find out what the law provides before filing the petition and there is no way an important provision such as section 21(1)(a) of the Act could be overlooked."*

In this regard it was Mr. Wamasa's submission that the petition falls short of complying with a legal and mandatory requirements and the same should be struck off.

These arguments were taken further by Mr. Kilonzo on behalf of the 3rd respondent and in support of his application dated 18th February 2008. That application is supported by the affidavit of the 3rd respondent sworn on the same day. Mr Kilonzo emphasized that the word '*shall' under rule 4* is mandatory that the petitioner should have provided the names of other candidates and the results of the election. These rules are made pursuant to the provisions of the Constitution which gives this court the jurisdiction to determine the validity of an election. There cannot be a determination without the results of the elections. An election petition is in respect of the results and that, being the primary focus; the court cannot consider a petition without the results. Since the petition cannot be amended or altered once it is filed, this petition should be struck off.

Mr Kilonzo argued that provision of the result in the answer to the request for particulars cannot cure the defect in the petition. The answer goes to show that the results were available to the petitioner when she filed the petition after the gazzetment of the results. In any event the petitioner annexed a letter written by herself on 30th January 2007 which clearly shows that she was aware of the results. In this case, the petition does not disclose a cause of action which is the results. Counsel relied on several authorities in respect of election petitions to support the contention that the courts always focused on the results to

determine election disputes. The petitioner must be dissatisfied with the results to move the court and the court relied on the results to determine the dispute. The law governing the election petitions has provided a prescribed format which must be followed but was not followed in this case.

In the second notice of motion by the 3rd respondent, Counsel relied on the affidavit of the 3rd respondent sworn on 6th March 2008. The 3rd respondent had sought for particulars pursuant to the provisions of rule 5 which states that;

"*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 expenses and to ensure a fair and effectual trial, upon such terms as to costs and otherwise as may be ordered.*"

The essence of seeking for particulars is to avoid a surprise and to allow a fair and effectual trial. Particularly where the petition does not disclose a cause of action and the particulars fail to support the cause of action the same should be struck off Counsel urged the court to strike out prayer number two and three in the answer provided by the petitioner in which she annexed exhibits such as the tabulation of the election results. These are not documents under oath nor are they legal documents as they are not signed or dated.

Regulation 35 (a) require all election results be in a specific form 16A which should contain the total number of results, the names of the candidates and the signature of the returning officer and agents of all the candidates. Consequently the paragraphs which are not substantiated by the particulars should be struck off. The answers are vague and ambiguous thus the petitioner has not complied with the request for particulars. Mr. Kilonzo further urged the court to expunge paragraph 7 of the petition which has nothing to do with the 3rd respondent. It deals with the presidential elections which are different from the National Assembly. The paragraph is irrelevant and the particulars provided are contradictory. It was further submitted that paragraph 10 of the petition is not substantiated by the particulars provided which are by way of evidence, the petitioner was aware of the results when the petition was filed and failure to state the results invalidates the petition.

On the part of the petitioners, these applications were strenuously opposed. Mr. C. N. Kihara teaming up with Mr Waithaka Mwangi, submitted that this court has a duty to find out whether the elections for the Naivasha constituency were conducted in accordance with the provisions of sections 30, section 31 and 32 of the Constitution of Kenya which envisages a democratic election in accordance with the law. The petitioner clearly stated in the petition that she was a candidate in the Naivasha parliamentary elections held on 27th December 2007. The petitioner complained of two fundamental issues, firstly, there are allegations that some polling stations were not provided with sufficient ballot papers. Those allegations should be investigated to find out whether there were bonafide voters whose constitutional right to vote was breached.

The other complaint in the petition is that there was no declaration of a winner as understood by the petitioner and as provided for under the Act. The 2nd respondent abandoned tallying half way and did not declare the results as provided for under regulation 40 of the Act. It was the petitioner's view that the applications are meant to scuttle her petition and prevent these fundamental allegations from being investigated. Under section 23 (1) (d) of the Act it is provided that;

"*The court is supposed to decide all election matters without undue regard to technicalities.*"

It was further argued that a party seeking to strike a petition has a duty to show to the court what happened. In this particular case, the 1st respondent who had the duty of conducting the tallying of votes abandoned his duty and even in his replying affidavit there is no explanation of what happened. The petitioner therefore should be given her day in court so that what transpired during the tallying may be exposed.

The only results that were published in the Kenya Gazette were the results that the petitioner relied

upon. These were not particularised results. They only show the person who was elected for the Naivasha constituency. Regulation 40 spells out the procedure to be followed when the results from the polling station have been received by the Returning Officer. This is the crux of the complaints by the petitioner that the procedure was not followed by the 1st respondent. Even the law did not envisage a situation where a returning officer would blatantly disregard the law. The petitioner stated the declared results by the 1st respondent in the same words that he used that is; "*the old man had won by 100 votes against the Mrs"*. In the absence of viva voce evidence and cross examination of witnesses, justice can not be done to the Naivasha Constituents.

Mr Kihara submitted that, the authorities that were cited to show that the focus of an election court was the results were distinguished because in this matter the tallying was not finalised as opposed to the authorities where the petitions were fully heard by way of oral evidence. When dealing with the results, in those decisions the courts were informed by the evidence.

It was the petitioners case that, the petition complied with rule 4(1) (a) and the word '*shall'* which appears in the rules of procedure, should not be construed as mandatory but merely directory. This is because there is no penalty clause which should have directed that if the petition was not in compliance with rule 4, a party can apply for its striking. If that was the intention of the legislature, that petitions be struck off for failure to comply with the provisions of rule 4, nothing would have been easier than to provide for the penalty clause. Counsel made reference to several authorities especially the text book on Administrative Law by *Sir William Ward 8th edition page 227*. On the allegation that particulars were not provided, counsel submitted that, if the court were to find that the particulars provided are not sufficient, the remedy is to order the petitioner to provide further and better particulars but not to strike the petition. Counsel argued that they did their best to respond to all the requests even what was in knowledge and possession of 2nd and 3rd respondents was all responded to. Some documents were bulky especially the various forms which were attached as annexure. The petition also complies with the format that is provided for in the rules. The petition names two candidates and states that there were others. In the request for particulars the information regarding the other candidates was provided.

These arguments were further elaborated by Mr. Waithaka Mwangi who urged the court to set the petition down for hearing in order to investigate the various complaints as opposed to determining a petition through an interlocutory application. The allegations that the returning officer did not complete tallying of the results from the polling stations, he did not announce the results as required under reg. 40 and did not complete the forms are very serious allegations that call for an in-depth investigation. In the supporting affidavit by the 1st respondent, he has not at all taken trouble to respond to those allegations; he just filed an application to strike the petition on technicalities. Even as at the time of filing the particulars, the only results available were downloaded from the website of the Electoral Commission of Kenya and they were *titled provisional results.* The said results are not supported by the documents especially forms 17 and 16 from the polling stations which clearly demonstrates an anomaly and glaring mistakes which require to the examined at the hearing. Even where such forms are attached there are contradictions with the results provided by the Electoral Commission of Kenya website.

I have considered all the applications, the affidavits on record and the extensive submissions and authorities cited by all the parties. I appreciate the extensive research by all the counsel in this matter, although l may not make reference to all the authorities, l have found myself helped by their research. These applications are brought under the provisions of section 23(2) which provides that all interlocutory matters in connection with a petition may be dealt with and decided by any judge.

In the course of the hearing, l sought to be addressed on this issue of interlocutory matters. The procedure of striking a petition is not provided for under the National Assembly and Presidential Elections Act, or the rules thereto. It is accepted that the Act is wholesome, complete with its own rules of procedure and regulations and unless where the provisions of the civil procedure are specifically imported into the Act, the civil procedure is not applicable. That is why l requested counsel to address this issue while bearing in mind these motions are brought under the provisions of order 50 rules 1 of the civil procedure rules which is not imported in the Act.

Applications to strike petitions are also an everyday fare in the courts. The courts have routinely struck petitions where it was found that they were in breach of the particular provisions of the law. This is pursuant to the inherent powers of the court to prevent the abuse of the court process and in order to safeguard the ends of justice. In my humble opinion, it would have been preferable if the Act provided for the procedure to be followed when striking a petition which is not in compliance with the particular law or procedure just like detailed procedure is provided for in the civil procedure rules. By providing the penalty clauses, this procedure will also provide uniformity, predictability of the law and the courts will be less prone to criticism.

Exercise of inherent powers of the court to strike a pleading is exercised with utmost caution, it can only be done on a purely point of law as l have pointed out to prevent abuse of the court in matters such as *res judicata* and those that go to the jurisdiction of the court. When the facts need to be ascertained, judicial discretion cannot be invoked. The matters to bring to bear, is whether failure by the petitioner to provide the results in the petition, and to provide the names of the other candidates who took part in the election takes away the jurisdiction of this court to hear the petition.

The petition was criticized for failing to comply with rule 4(1) (d) and in particular for failing to state the results of the election. In response to this the petitioner states that in paragraph 6 of the petition the results as announced by the returning officer are provided as follows:

"*After counting and part tallying of the votes cast in some of the polling centres in the election for the constituency the 1st respondent uttered the words to the effect that 'this old man was ahead of Mrs by 100 votes'.*

Nothing more was said there. The petitioner argued that this is what she heard. This is what was announced and this is what she perceived as a candidate to be the results so declared. According to the petitioner, these were the same results declared by the returning officer which were later published and announced by Bahasha FM and were apparently sent to the Electoral Commission of Kenya headquarters and taken to be the results for the Naivasha Constituency.

I find this a serious allegation which requires to be investigated because these are the results that the petitioner heard and perceived. This is the petitioner's complaint that proper tallying and announcement of the results was not done. There are allegations that the provisions of regulation 40 were not followed by the returning officer. This is a serious allegation that requires an inquiry that can only be done by setting the petition down for hearing.

The allegation that the petition did not comply with the format provided for under rule 4(4) for failing to state the other candidates deserves to be mentioned. The petitioner stated in the petition that she was a candidate as well as the 3rd respondent. Although she did not give the names of the other candidates in the petition, I do not think that this is an anomaly that goes to the substance of the petition and takes away the jurisdiction of this court. This is a mere deviation from the format which does not go to the jurisdiction of the court. It does not also prejudice any of the parties, this is an instance which the court can disregard as a mere technicality as envisaged under section 23 (d) of the Act.

Moreover, the names of other candidates and even the results that were gazetted and those which were found in the Electoral Commission of Kenya website have been provided for in the answer to the particulars. The request and answer to the particulars is meant to prevent surprise and unnecessary expenses and to ensure a fair and effectual trial. If the respondent wanted the names of the candidates and the results, they have been furnished in the particulars. I have read through the answer to the request for particulars. The petitioner contends that she responded to the questions to the best of her ability and at this stage, it may be very difficult to establish the credibility of those answers until the matter is heard. I am also in agreement with counsel for the petitioner that if the respondent found the answers not adequate, the remedy would have been to seek for further and better particulars and not to seek to strike the petition.

The primary duty of this court is to do justice to all the parties and to enquire into the allegations without

undue regard to technicalities. I find the omissions complained about as mere oversight and irregularities which are merely technical and do not deserve the drastic penalty of striking a petition. For those reasons, all the applications to strike the petition by the respondents are all disallowed; costs of the applications shall be in the cause. The petition should proceed to a full hearing as set out under section 23 of the Act.

It is so ordered.

Ruling read and signed on 30th day of April, 2008

M. KOOME

JUDGE