



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Election Petition 10 of 2008**

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT, CHAPTER 7 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS REGULATIONS**

**AND**

**IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION (ELECTION PETITION RULES)**

**AND**

**IN THE MATTER OF THE ELECTION OFFENCES ACT, CHAPTER 66 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ELECTION FOR JUJA CONSTITUENCY**

**WILLIAM KABOGO GITAU ..... PETITIONER**

**VERSUS**

**GEORGE THUO ..... 1ST RESPONDENT**

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

**WATSON MAHINDA ..... 3RD RESPONDENT**

**RULING**

The application dated 11th March 2008 seeks Court's leave to inspect:

(a) Register of electors

(b) Forms 9,10, 13, 16A and 17A

(c) Reports made by the Presiding Officers, the Returning Officer and other election officials

(d) Returns or any returns made by the Presiding Officers, Returning Officer and other election officials and

(e) All other documents in the ballot boxes pertaining to the Parliamentary election for Juja Constituency.

The 1st Respondent on 17th March 2008 filed a Notice of Preliminary Objection dated 13th March 2008. The objection states:

(1) The application offends the express and implied provisions of inter alia Rule 19 of the National Assembly and Presidential elections (Election Petition Rule) and is, to that extent misconceived, incompetent and fatally defective

(2) The Applicant (and the entire Petition) offends the express and implied provisions of inter alia, sections 44 and 20 of the Constitution of Kenya and the National Assembly and Presidential Elections Act

(3) The application (and the entire Petition) is prima facie unripe, anticipatory and or speculative and to that extent misconceived, incompetent and fatally defective.

(4) The application is a fishing expedition aimed at gathering possible evidence for use at the trial of the Petition

(5) Some of the documents in respect of which the orders of the court are sought are either public documents obtainable without court orders and or extraneous to the issues raised in the petition and

(6) The application is manifestly vitiated by either perjury or want of material particulars and hence fatally defective.

The Petitioner's counsel has argued:

(a) that an application cannot be speculative and it is the responsibility of the court to determine the issues raised. This cannot be the basis of a preliminary objection.

(b) That *Sir Charles Newbold President and Law JA* observations in the case of *MUKISA BISCUITS CO v WESTEND DISTRIBUTION 1960, EA 606 at 700* were against this type of objection. In particular Law JA stated:-

"... so far I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection on jurisdiction of the court or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration."

At page 701 Sir Charles Newbold (President of the Court) observed:

"A Preliminary Objection is in the nature of what used to be a demmurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by then other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and or confuse the issues. This improper practice should stop."

The Applicant/Petitioner contends that the Preliminary Objection as framed raises disputes, facts and

also anticipates the grounds raised in the petition itself which a matter for determination on merit by the court. He has argued that the Respondents' (P.O.) contradicts *MUKISA* principle and a substantive part of the Preliminary Objection is argumentative. The Petitioner relied on *HCCC 46/2005 LAXMICHAD v EA DEVELOPMENT BANK & OTHERS, ORARO v MBAJA [2005] KLRI 141.*

(d) That rule 19 of the Election Rules, has nothing to do with inspection and that the rule only deals with the custody of documents which must be given to the Registrar of the High Court where a date of hearing of an Election Petition has been appointed. The rule makes no mention of inspection at all. It is not for the Respondents' Counsel to put forward their own opinion about the rule.

(e) That it is not logical for the Respondents to allege admission in the pleadings. He argued that they have confused the validity of the grounds raised with the manner of proving the grounds since it is not the Respondents to determine validity - this is the role of the court.

(f) S 44 of the Constitution does not bar inspection. Validity is established at the end of the hearing of a petition. The means of proving the ground or verifying it have nothing to do with the validity of the grounds. In any case, the validity of the petitioner's grounds has nothing to do with inspection. An election petition is not private litigation. The Court retains control all the time and it cannot cede control to any of the parties eg even where a Petitioner seeks to withdraw the Court must vet the grounds for withdrawal and even then an ordinary elector or voter may still take over the petition.

(g) The fact that the objector's counsel took 2 hours to argue the P.O. demonstrates it was not well grounded.

(h) Section 20 of the National Assembly and Presidential Elections Act Cap 7 does not bar an inspection. It deals with *presentation* of petitions.

(i) The need to inspect the election forms starting with Form 10 is a highly relevant factor.

(j) Verification of documents is a matter of evidence including what the agents or the Returning Officers did or did not do.

(k)That the purpose of inspection is to allow a party to know the case and the state of documents of the opposite party and for that reason the Petitioner is entitled to inspect.

(l) That opposition by the Respondent of the right of inspection goes against the principle and the jurisprudence of an open trial.

(m) It is the marked register which has the relevance of showing if the election was duly held and procedurally held and that the existence of any unlawful acts, commission of election offences etc are matters of evidence - see Election Offences Act Cap 66 - in particular s 4. The Respondents have themselves requested for particulars concerning the alleged offences.

(n) That the holdings and observations in the EP1 1998 - *SAID HEMED SAID v KARISA MAITHA* support inspection as follows:-

· It is not bar that evidence would be used at the hearing of the petition.

· In United Kingdom documents are preserved for 2 years.

· Inspection is not barred after petition is filed.

· Findings in the case support inspection.

· Case in existence for over 10 years and is there on the internet or online but conveniently avoided to be cited to the court by the Respondents. It is in the Digest of Election Commission of Kenya.

(o) Submissions on Regulation 42:

· Regulation 42(2) does not apply to this application by reasons of Reg 42(4).

· The application falls within Regulation 42(4) because it concerns documents that concern a pending petition.

· Reg 42(4) does not apply to us because there was no prior court order granting authority ... A court order granting authority to inspect is necessary Reg.42(4) does not concern documents concerning the petition. There is no such order or previous court order as set out in s 42(2) and therefore the provision of Reg 42(4) apply and the provisions of the whole of Reg 42 do not apply to the application. It is mandatory that it should not apply and it is not a matter of discretion.

· Reg 42(4) is consistent with the scheme of the rest of the Election laws because in an election it is the election petition rules which determine who are the parties to the petition. Respondents under Rule 2 are those whose conduct is complained of and not all candidates as contended by the Respondents on the issue of service of notice. And therefore the P.O. is misconceived and does not fit into the scheme of the rest of the Election Laws. Once Petition has been filed Reg 42 does not apply. Instead court's supervisory process apply.

(p) The Electoral Commission of Kenya is a custodian of documents and ought not to obstruct their inspection. As a body it should be disinterested and should never withhold evidence. In this regard the Electoral Commission of Kenya had asked the Petitioner to seek a court order. They cannot now rightly backout from that position in court.

On the other hand the Respondents have contended:

(1) That the application is incompetent and misconceived in that although based on Regulation 42 of the Presidential and Parliamentary Election Regulations, the application offends and contradicts Rule 19 of the National Assembly Elections (Elections Petition) Rules. In particular that it violates the express and/or implied provisions of Rule 19 in that the Returning Officers are required, under the rule to avail the Register to the Court at least 48 hours before the date of trial the documents described in the rule and therefore the documents sought to be inspected are the same ones covered by the Rule. For this reason the respondents have argued that the application is unripe, speculative and misconceived

(2) That Rule 19 anticipates that the inspection or scrutiny is to be conducted at the trial and not before trial and that this is the clear meaning of the rule. And that there is no provision for inspection by one of the parties

(3) That the application offends s 44 of the Constitution and s 20 of the National Assembly and Presidential election Act Cap 7 because ground 3 of the application constitutes an admission that the petitioner has no tangible grounds upon which the petition is based. The two provisions anticipate that Petitioners who come to court to challenge an election must have valid grounds for so doing. A challenger is not permitted to file a petition without valid grounds and expect to fill in the gaps after inspection.

(4) Forms 9, 10 and 13 sought are extraneous to the petition for the following reasons:

(i) Form 9 is the nomination form for

Parliamentary candidates.

(ii) Form 10 is the Statutory Declaration for nomination for Parliamentary seats.

(iii) Form 13 is the statement of persons nominated as Members of Parliament.

(5) Again Form 16A is the form for Declaration of Results at the Polling station and Form 17A is used to provide summary of Form 16As results and if these are being sought for the purpose of Ground 2(b) it is not the 3rd Respondent (Returning Officer) who procures the attendance of the candidates agents - this is a responsibility of the candidates to procure their agents at the counting, tallying and verification see Rules 34(2), 35 A(1), 35 A(4) and Rules 40(1). And finally that forms 16A and 17A were available at the polling stations and therefore the inspection sought on these two forms is misconceived. In addition there is no challenge in the Petition concerning the nomination process.

(6)That following LN 178/07 amendments, the Applicant should have served notice on all the candidates as per the express terms of the sub-regulation and failure to serve is fatal to the application. And the applicant has not demonstrated that this has been done.

· It was not necessary for Respondent's Counsel in the submissions to have mentioned sub-regulation 42(4) since the application in question is based on the entire Regulation 42 and no notice has been served on all the candidates.

· And that the Petitioner/Applicant has taken conflicting positions in submitting that Regulation 42 does not apply to the application yet the application is grounded on the regulation as per its heading.

· If according to the petitioner's advocates submission Reg 42 does not apply due to his interpretation 42(4) then on what legal provision is the application grounded.

· That there is no other right of inspection in the Election laws apart from Regulation 42 and what is implied under Rule 19.

· That Election Laws Rules and Regulations constitute a complete code and Civil Procedure Act and Rules do not apply to Election matters.

· That although the application purports to seek inspection its purpose is to fish for evidence after the filing of the Petition - Fishing of evidence should be frowned upon by the Court.

· That the cases cited starting with the *MUKISA BISCUITS, LAXMACHAD, ORARO v MBAJA and HEMED* cases are not relevant. *MUKISA* is about Civil Procedure and Practice, whereas here we are dealing with electoral law s 3 of the Civil Procedure Act recognizes special jurisdiction such as special election law requirements.

· The Respondent has not challenged the facts stated in the challenged application.

· The P.O. does not violate the ratio of the *MUKISA BISCUITS* case for the above reasons. Application of law must be based on some facts and a point of law cannot exist in vacuum.

· The authorities cited in the *HEMED* case go against the position taken by the Applicant. Also specific holdings go against the applicant's position for example there is a holding in the *HEMED* case to the effect that an application for inspection must comply with Reg 41 (now reg.42) and since there has not been compliance the P.O. should be upheld.

· The other holding in the *HEMED* case is that "an absolute enactment must be obeyed or fulfilled" and the Applicant has failed to demonstrate compliance.

· *HEMED* case is distinguishable from this case.

(a) Rule 19 was never raised

(b) *HEMED* case had a consent order for inspection

(c) Issues now being argued in this case, were never canvassed in the *HEMED* case.

(7) That the right of inspection prior to LN 178/2002 was a matter of course, handled by the Returning Officer without resort to court. The right was restricted by LN 172/2002 which made it necessary for an Applicant to have a court order. Under Reg 42(3) the right of inspection does require the presence of a witness. Pursuant to LN 178/07 passed in 2007 more restrictions were imposed and Reg 42(2) and (3) were amended by the Legal Notice to the effect that candidates and agents were to be present during inspection and 42(2) now requires notice to all candidates and not Respondents as contended by the Applicant counsel.

· As a result *HEMED/MAITHA* case applied to a different regime of law and not to the matter before the court

· *HEMED/MAITHA* case is no longer useful as suggested by the Applicant Counsel, in the face of the amendments

· That the court should note the progressive restriction of the right of inspection since 2002 vide the two Legal Notices 172/2002 and LN 178/07 and that this reflects the intention of the Legislature

· The Petitioner/Applicant has no evidence to support the grounds asserted on his own and the court has no business helping any of the parties. The purpose of inspection is to get a glimpse of the other case and it cannot rightly be sought to fish for evidence which is what the Applicant has done

· In Prayer (a) the Applicant seeks the Register of Electors which is a public document yet in his submissions he now says he wants the marked register (which is one of the documents to be availed at the trial under Reg 19). In his submission the Applicant Counsel says that Reg 42 does not apply. What applies?

FINDINGS AND HOLDINGS

This application having been expressly grounded on Reg 42, is incompetent because the documents sought (after the admission by Counsel for the Applicant that the Applicant seeks the marked register instead of the Register of Electors) relate to a pending Election Petition and are specifically excluded from inspection by Reg 42(4). An Electors register is publicly available in the D.O's office as per the Registration Rules. It is available for inspection even before elections are held. The Applicant Counsel has contradicted himself concerning Reg 42 upon which the entire application is grounded. He has submitted at some point that Reg 42 does not apply. This Court must hold him to his bargain. If Reg 42 does not apply then on what provision is the application grounded. If he is seeking court's authority for the first time and Reg 42(2) does not apply to him what is the basis for seeking the authority of the Court to inspect. He has not laid that basis at all and even if he did, such request flies in the face of the only other Rule in the Electoral Law which concerns documents relating to a pending petition namely Rule 19. I find that since Rule 19 makes available to court all the documents sought to be inspected there cannot be any valid basis for the application. Reg 42(4) and Rule 19 are fairly consistent. The regulation excludes all documents in a pending petition and the Rule makes them available at the trial. Regulation 42 as a whole provides for limited inspection before destruction within 3 months. It provides for public inspection of documents, except ballot papers and their counterfoils. If the petitioner under the description of "*any person*" purports to apply under the provisions of Reg 42(2) he must bring himself within all the requirements of the provisions which are:

(i) give notice to all candidates in the election.

(ii) apply to the High Court.

(iii) documents are to be inspected before the Returning Officer and other candidates, and give notice as per Reg 42(3).

These are pure points of law and are not dependent on any disputed facts.

The Applicant has failed to prove compliance. It is as clear as day that the inspection embraced by the provisions of Reg 42 is not done under the supervision of the Court. An Applicant only seeks court's authority to inspect, yet what is contemplated by the application was inspection by an order of this Court. A court order granting authority to a Petitioner under Reg 42(4) would be superfluous in that Reg 19 avails the documents required in an Election Petition. There cannot be any basis for granting that authority.

I agree with the Respondents' Counsel contention that inspection has, over the years been progressively restricted by electoral law as is clear from the provisions of Legal Notice 122/02 and LN 178/07 and the case law relied on by the Applicant Counsel goes counter to the restriction and is no longer good law.

Two good illustrations of the restricted or limited application of Civil Procedure Provisions and rules are:-

(1) S 23(1) of the National Assembly and Presidential Elections Act Cap 7 which provides for the summoning of witnesses as in the trial by the High Court in exercise of its original civil jurisdiction.

(2) Rule 18(7) of the National Assembly Elections (Election Petition) Rules which provides for the application of Order 18 of the Civil Procedure rules and the Oaths and Statutory Declarations Act shall apply to affidavits under the rule.

There is nothing in the election law that provides the basis for the claimed wider right of inspection as in the Civil Procedure Rules. Nearly all the documents are always in the custody of the Electoral commission and the production of the document is covered by Rule 19.

The position I have taken is backed by at least two Court of Appeal decisions to the effect that Election laws constitute complete code. We cannot even in the face of clear restrictions on inspection import the right of inspection as known in Civil Procedure and Practice line, hook and sinker. The Legislature has clearly limited the right in the case of Election Petitions and the relevant provisions are not ambiguous as to justify adding to, subtracting or filling in gaps. Our duty is to implement the intention of the Legislature. Whereas it is permissible to rely on the Civil Procedure Provisions where the Election laws are silent on procedure, in the case of inspection, I find that there are specific provisions on inspection and we are bound by them.

The cases which support this position are *KIPKALIA KONES v REPUBLIC & ANOR ex-parte KIMANI WANYOIKE & 4 OTHERS [2006] KLR, SPEAKER OF THE NATIONAL ASSEMBLY v HON NJENGA KARUME CA Nai 92 of 1992.*

Both these cases established the principle that where there is a clear procedure for the redress of a particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. In the *KONES CASE* it was observed:

"*What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the Court observed in KARUME* case."

In the face of Rule 19, I find that the application has not established a good case for inspection because the test to be applied by the Court is whether it has formed an opinion that inspection will assist the Court to fairly dispose the case before it and also save costs. If the Court forms a negative opinion that no useful purpose will be served, it may decline to order inspection. This is the principle even where inspection is legally permissible under the Civil Procedure Provisions. The discretion of the Court does come in handy and is principally pegged on this principle. Thus, where as in the case of Rule 19, the same documents are automatically availed the need for an order of inspection outside the explicit provisions cannot possibly be met. Similarly the Court's authority under Reg 42 would also turn on the same principle. On the request touching on forms the same reasoning applies. The forms shall be availed as per the rules.

I would disallow this application even on this ground as well.

In my judgment the right of inspection under the Civil Procedure Provisions cannot be imported as argued by the Applicants' Counsel into a special legal regime such as the electoral laws. Section 3 of the Civil Procedure Act recognizes special jurisdiction in these terms:

"*In the absence of any specific provision to the contrary nothing in the Act shall limit or otherwise affect any special jurisdiction on power conferred, or any special form or procedure, prescribed by or under any other law for the time being in force*."

It is quite clear to the Court that the Legislature has under Reg 42 provided for the right of inspection in specific terms. I find that it is the only provision for inspection and I decline to import anything else from Civil Procedure Provisions. I find no basis or any valid reason which could possibly justify that importation of Civil Procedure Provisions on inspection in the face of clear and specific provisions on inspection set out in the Electoral Laws. An applicant must strictly bring himself within the four corners of the specific provisions and this Applicant has miserably failed to do so. He says that the application is grounded on Reg 42 yet in the same breath he contradicts himself that he does not so fall under Reg 42 and at the same time invokes the Civil Procedure Rules on inspection. I find that the Applicant's arguments are, with respect, confused, taking into account that his application is under Reg 42 as per the heading. If the application is under Reg 42, he has failed to satisfy its requirements and his application must fail for this reason as well.

Finally, although the Applicant has argued that he is not by virtue of this application trying to fish for evidence to support the Petition, I find that where a party grounds an inspection application on grounds that are not permitted by the special jurisdiction relating to electoral laws, the net effect on the ground of such an application is an endevour to fish for evidence and the court should stop such an attempt in its tracks. This view is further fortified by the fact that an Applicant who demands scrutiny of the relevant documents as per Rule 19 is entitled to such scrutiny as and when a basis is laid for their scrutiny. The application is calculated or intended to delay the determination of the petition.

The upshot is that I uphold the preliminary objection and I accordingly strike down the application with costs to the Respondents in any event.

**Dated and delivered at Nairobi this 30th day of May 2008.**

**J.G. NYAMU**

**JUDGE**

**Advocates**

Mr F. Nowrejee for the Petitioner/Applicant

Mr Muthomi for the 1st Respondent

Mr B. Musau for the 2nd Respondent