



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 5 of 2008

IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CHAPTER 7, LAWS OF KENYA) AND THE REGULATIONS MADE THEREUNDER, THE NATIONAL ASSEMBLY ELECTION (ELECTION PETITION) RULES AND THE ELECTION OFFENCES ACT

AND

IN THE MATTER OF: ELECTION FOR STAREHE PARLIAMENTARY CONSTITUENCY

AND

IN THE MATTER OF: THE PETITION OF WILLIAM MAINA KAMANDA

BETWEEN

WILLIAM MAINA KAMANDA PETITIONER

VERSUS

MARGARET WANJIRU KARIUKI 1ST RESPONDENT

MANASSEH MUGASIA 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

RULING

(1) William Maina Kamanda (*hereinafter called* “the Petitioner”) filed this petition on the 14th January, 2008, to contest the validity of the election of the Hon. Margaret Wanjiru Kariuki (“the first Respondent”), as the Member of Parliament for Starehe Constituency at the General Elections held on the 27th December, 2007. In the petition, the Petitioner makes a number of allegations to support his case.

(2) Manasseh Mugasia (“the second Respondent”), was the Returning Officer appointed by the Electoral Commission of Kenya (“the ECK”) to conduct and supervise the elections in the Constituency. He was in that capacity the servant and agent of the ECK, (“the third Respondent”) in this petition.

(3) After being served with the Petition, all the three Respondents sought from the Petitioner further and better particulars of certain allegations made in the Petition. The two Notices of Motion were both

filed on the 19th February, 2008. The supporting affidavit in the Notice of Motion filed by the second and third Respondents was sworn by Manasseh Mugasia on the 10th February, 2008 and the one in support of the first Respondent's application was sworn by herself on even date therewith.

(4) In response to those applications the Petitioner filed an affidavit in each case giving the particulars requested by the Respondents. When the applications came up for hearing on the 24th April, 2008, learned counsel for the Respondents contended that some of the particulars given by the Petitioner were not adequate and urged the court to make an order for further and better particulars.

(5) I have listened to arguments on both applications which are, of course, opposed and I intend in this ruling to deal with each application separately. In doing so, I have to bear in mind, as all learned counsel concede, that the whole purpose of particulars is to ensure clarity in pleadings and to avoid litigation by ambush. Each party should have a clear idea of what the opponent's case is in general terms. It is not however the purposes of particulars to fish for evidence or merely to intimidate the opponent.

(6) I will deal first with the Request made on behalf of the first Respondent. In paragraph 12 of the Petition, it is alleged that there was no elector who voted only for the Presidential candidate because to do so would be a violation of Regulation 29(4) and 30 of the Regulations. And that accordingly, it is not logical for total voter turnout and the total votes cast for the Presidential, Parliamentary and Civil to differ in any way in the absence of gross and criminal manipulation of the electoral process.

In the Request for Particulars of paragraph 12, the first Respondent wants the Petitioner to give details of alleged gross and criminal manipulation of the electoral process and to explain how this affected the results.

In reply the Petitioner referred to regulation 29(4), explained the procedure followed during voting and added that his agents did not see any voter who voted for the Presidential candidate only. Mr. Chacha Odera, learned counsel for the first Respondent, wants the Petitioner to give full details of manipulation and to explain how he knew that no voter voted only for the Presidential candidate. To begin with, the allegation of manipulation made in paragraph 12 was not directed at the first Respondent. But even if it was, the Petitioner has pleaded breach of statutory provisions and also explained why he says so. That, in my view, is adequate and requires no further elaboration.

(7) In paragraph 16 of the Petition, the Petitioner says that in violation of Regulation 34(3) of the Regulations, his agents were not allowed to accompany the ballot boxes and sealed packets from various polling stations when they were being delivered to the second Respondent's office for the purpose of tallying results.

In the Request, the Petitioner is asked to identify his agents who were not allowed to accompany the boxes and sealed packets. In his answer, the Petitioner has filed a complete list of his agents and the polling stations involved. The complaint now is that the agents specifically assigned the task have not been identified. The Petitioner is also asked to give the names of the Presiding Officers in those polling stations.

Presiding Officers in any Parliamentary elections are appointed and assigned by the ECK. And within the constituency they are under the control and supervision of the Returning Officers. That is not the kind of information the Petitioner should be required to give. It can be obtained from the second and third Respondents. I agree with the Petitioner that this particular request amounts to a fishing expedition.

(8) The complaint in paragraph 17 of the Petition is that various polling stations were opened late and the Presiding Officers did not extend time to compensate for the time lost by the delay in opening.

The Petitioner is asked to tell the time the stations were closed and whether there were any electors still queuing to vote. He is also requested to give their names, electors' and ID card numbers.

In response, the Petitioner has listed the six polling stations involved and given the times they opened and closed. And he also says that when the polling stations were closing, there were still people queuing to vote. Mr. Odera says this is not good enough. The first Respondent needs the names of these voters so that she can verify if they are registered voters. With respect, this is not a reasonable or serious request. The answer given by the Petitioner is adequate.

(9) The allegation in paragraph 18 of the Petition is that the Presiding Officers in various polling stations did not provide the Petitioner's agents with serial numbers of ballot papers and boxes.

The Petitioner was asked to identify the polling stations in question, give names of Presiding Officers, his agents and their ID numbers.

The Petitioner gave the names of the polling stations and of his agents who complained to the Presiding Officers. As for the names of the Presiding Officers at those stations, the Petitioner says these can be obtained from the second and third Respondents. I do not believe Mr. Odera's assertion that he cannot obtain these details from the ECK. The answer given by the Petitioner is, therefore, adequate.

(10) I also hold that the Petitioner has adequately answered the request relating to paragraphs 19, 20, 21, 22, 23 and 24 of the Petition. Those details can and should be obtained from the ECK ("the third Respondent").

(11) Under paragraph 30 of the Petition, the Petitioner was asked to identify the polling stations where electors were disfranchised by stating their electors' card numbers, ID cards and where they were registered.

In answer, the Petitioner enumerated the materials not supplied and the polling stations involved. He did not, however, give the names of the electors affected. Mr. Odera now says that the first Respondent needs the names of those electors to determine whether or not they were registered voters. The burden of proving the allegations made in the Petition is on the Petitioner and obviously if a witness comes forward at the trial and says he was not allowed to cast his vote, the registers for the relevant polling stations will be there for everyone to see whether or not he was a registered voter. The Petitioner has furnished adequate particulars. The same applies to particulars supplied under paragraph 31 of the Petition.

(12) In paragraph 35 of the Petition, the Petitioner alleges that the first Respondent's nomination as a candidate did not conform to her sponsoring party's constitution [Orange Democratic Movement (ODM)]. In the Request the Petitioner was asked to explain in what manner the first Respondent's nomination did not conform to the ODM Constitution and why the first Respondent was not qualified to stand as a Parliamentary candidate.

In answer to that request, the Petitioner contended that the request is a fishing expedition and that he is not obliged to supply the evidence. Mr. Odera says that without knowing in what respect the first Respondent was irregularly nominated, she cannot be expected to answer the allegation. I think on this one, Mr. Odera is on a very strong wicket. Nomination and election of a candidate are very crucial matters. If one is not validly nominated, one cannot be validly elected as a Member of Parliament. Accordingly, I hold that the answer given by the Petitioner is totally inadequate and he must furnish the particulars requested.

(13) The Petitioner must also give the particulars requested under paragraph 36 of the Petition.

With regard to the allegations of riotous conduct and violent disruption made in paragraphs 37, 38 and 39 of the Petition, the burden of proof is on the Petitioner and it is sufficient for the first Respondent simply to deny the allegations and leave the rest to the Petitioner. That also applies to the allegations of undue influence made in paragraphs 40, 41 and 42 of the Petition.

(14) Mr. Musyoka Annan, learned counsel for the ECK, identified himself with the submissions of Mr. Odera. Nonetheless, he submitted that the Petitioner should be ordered to provide the details of the

Presiding Officers against whom the Petitioner has made specific complaints. He candidly explained that during the December, 2007 elections, the ECK had created what he called “streams” which resulted in a very large number of officers. Because of that, he submitted, the identity of Presiding Officers becomes very difficult. He also thought that the Petitioner should have provided the registration numbers of the motor vehicles used by the ECK during the election. All I can say about this is to remind Mr. Annan, with great respect, that it was the ECK, his own client in this petition, that was conducting the elections, appointing and assigning Returning and Presiding Officers and hiring vehicles, NOT this Petitioner or anyone else. Unless, of course, he is suggesting, which I do not believe he is, that there were persons who acted as presiding officers who were not appointed and assigned duties by the ECK.

(15) In the end, and except in relation to what I have said regarding the allegations made in paragraphs 35 and 36 of the Petition, the Notices of Motion respectively filed by the Respondents on the 19th February, 2008 both fail and are dismissed accordingly. The Petitioner is hereby ordered to give full particulars under paragraphs 35 and 36 of his Petition within the next seven (7) days from today. In default, those paragraphs to stand struck out and expunged without the necessity of a further order. There will be no order as to costs.

So ordered.

Dated and delivered at Nairobi this Ninth day of May, 2008.

P. Kihara Kariuki

Judge.