



REPUBLIC OF KENYA

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

ELECTION PETITION 13 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 DAGORETTI PARLIAMENTARY CONSTITUENCY

AND

IN THE MATTER OF: THE PETITION OF JOHN KIARIE WAWERU

BETWEEN

BETH WAMBUI MUGO.....1ST RESPONDENT

S. K. NJUGUNA.....2ND RESPONDENT

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

RULING

The Petitioner, John Kiarie Waweru filed a petition under **Section 44** of the **Constitution** and the **National Assembly and Presidential Election Act (Cap. 7 Laws of Kenya)** seeking to have the election of Beth Wambui Mugo as a Member of Parliament of Dagoretti Constituency nullified on account of certain electoral malpractices. The thrust of the petitioner's complaint was that the malpractices and contravention of electoral law witnessed in the conduct of the said election rendered the said election null and void and therefore subject to impeachment by the electoral court. Upon being served with the petition, the respondent made request for particulars of the complaints and allegations of malpractices contained in the petition pursuant to **Rule 5** of the **National Assembly Elections (Election Petition) Rules, 1993**. This court ordered the petitioner to supply the particulars requested by the respondents. The petitioner duly complied with the order of the court and has supplied the respondents with the particulars requested.

The 1st respondent was however dissatisfied with the particulars supplied. On 11th April, 2008, the 1st respondent brought a notice of motion pursuant to the provisions of **Sections 22(a)** and **28** of the **National Assembly and Presidential Elections Act** and **Rule 5** of the **National Assembly Elections (Election Petitions) Rules** seeking essentially two orders of the court; the 1st respondent sought to have the petition struck out and/or be summarily dismissed on account of failure by the petitioner to provide

reasonable and sufficient particulars which would establish the complaint by the petitioner that there were electoral malpractices. The 1st respondent was of the view that particulars supplied, taken as a whole, were scanty, vague and evasive and did not disclose any electoral malpractice capable of being referred by this court to full trial.

In the alternative, the 1st respondent sought an order of this court to compel the petitioner to furnish her with further and better particulars as per the “*Request for further and better particulars*” annexed to the supporting affidavit. The said request for further and better particulars was however not annexed to the supporting affidavit. In particular, the 1st respondent sought further and better particulars in respect of allegations of fraud, undue influence, illegality and election offences made in paragraphs 7, 11, 13, 14, 15, 16, 17, 18, 23, 24 and 26 of the petition. The application is supported by the annexed affidavit of Beth Wambui Mugo, the 1st respondent. She contends *inter alia*, that the grounds raised in the petition did not prima facie disclose sufficient grounds for granting the reliefs sought in the petition.

The application is opposed. The petitioner filed seven grounds in opposition to the application. The petitioner contends that what the 1st respondent was seeking was not supported by credible evidence known to law. He stated that the conclusions drawn by the 1st respondent in respect of the particulars supplied could only be reached after the substantive petition was heard in full hearing. He contended that the particulars supplied were in strict compliance with **Rule 5 of the National Assembly Elections (Election Petitions) Rules, 1993**. He further stated that the malpractices, irregularities and offences pleaded in the petition prima facie affected the election result and the same should be allowed to be proved at the trial. The Petitioner was of the view that the application was filed in abuse of the process of court process and was solely intended to delay the hearing and determination of the petition.

At the hearing of the application, Mr. Muthomi counsel for the 1st respondent reiterated the contents of the application and the affidavit in support thereof. He submitted that the particulars supplied by the petitioner were vague and evasive and fell below the standard contemplated by **Rule 5 of the Election Petition Rules**. He maintained that this court had jurisdiction pursuant to **Section 22 (a) of the National Assembly and Presidential Elections Act** to summarily dismiss a petition that did not disclose sufficient grounds for granting the reliefs sought in the petition. He reiterated that the facts that there were irregularities in the conduct of the elections did not *ipso facto* mean that such irregularities would lead to the invalidation of the election.

Mr. Muthomi submitted that **Section 28 of the Act** recognize that irregularities might be inevitable in the electoral process; the issue that an election court is required to determine is whether the said irregularities or non-compliance with the law in the conduct of the election were of such fundamental nature that it affected the results or the outcome of the elections. He submitted that the overriding principle which the court ought to consider is whether the elections were conducted under free and fair conditions as contemplated by **Section 42 A (c) of the Constitution**. He maintained that if it was established that the elections were conducted transparently, freely and fairly then any minor irregularities which did not affect the outcome of the election should not be taken into consideration.

Mr. Muthomi was of the view that the particulars supplied by the petitioner did not meet this threshold of establishing that the irregularities and non-compliance with the law were of such a nature that it would lead to the invalidation of the results of the election. He submitted that the particulars supplied were not sufficient to enable the 1st respondent defend the petition without being subjected to surprise and unnecessary expense. He reiterated that the 1st respondent would be put in a position where it would be unable to adequately and appropriately defend the petition. Mr. Muthomi gave several instances of the allegations made in the petition and the particulars supplied which in his opinion were of such a nature that it could be concluded that the allegations made by the petitioner were of such a minor nature that it could not affect the overall validity of the election. He reiterated that the grievances set out by the petitioner in his petition read either singly or cumulatively could not warrant intervention by the court in view of the provisions of **Section 28 of the National Assembly and Presidential Elections Act**. He urged the court to find that the particulars supplied by the petitioner did not meet the threshold contemplated by **Rule 5 of the Petition Rules** and the petitioner should therefore be compelled to supply

further and better particulars. Otherwise, the 1st respondent urged the court to summarily dismiss the petition pursuant to **Section 22** of the **National Assembly and Presidential Elections Act**.

Miss Kamende for the 2nd and 3rd respondents associated herself with the submissions made on behalf of the 1st respondent. She stated that the 2nd and 3rd respondents were in the process of filing a similar application to the present one. She urged the court to allow the application.

Mr. Ongoya for the petitioner opposed the application. He relied on the grounds of opposition filed on behalf of the petitioner in opposition to the application. He maintained that the petitioner had supplied all the particulars requested by the 1st respondent as contemplated by **Rule 5** of the **Petition Rules**. He submitted that the application brought by the 1st respondent was misconceived as it was meant to delay the hearing and determination of the substantive petition. Mr. Ongoya pointed out that although the 1st respondent claimed that the particulars supplied were inadequate, the 1st respondent did not annex to her application the further and better particulars that she required supplied. He submitted **Rule 5** of the **Petition Rules** did not require that the petitioner supplies particulars in the nature of evidence but rather particulars which would ensure that the respondent is not surprised or ambushed. He maintained that failure by the 1st respondent to annex a request for further and better particulars meant that the application before the court was incompetent and should be dismissed.

Mr. Ongoya reiterated that the decision by the court to strike out or summarily dismiss a petition was such a drastic and draconian remedy that could only be invoked in circumstances where it is established that the petition was so hopeless as to be unsustainable in law. He submitted that the allegations made by the petitioner in the petition were of such a serious nature that the only way it would be resolved is by the election court hearing the petition. Mr. Ongoya took a contrary view to that of Mr. Muthomi when he submitted that the principles of transparent, free and fair elections could not be separated from the manner in which the elections were conducted. He reiterated that where there were infraction of the electoral law, the same would affect the outcome of the elections in the sense that the said election would not be said to be free, transparent and fair. He maintained that the particulars supplied by the petitioner were adequate and fulfilled the requirements of the law.

Mr. Ongoya submitted that the thrust of the 1st respondent argument was actually seeking the petitioner to supply evidence in form of particulars which is not contemplated by **Rule 5** of the **Petition Rules**. He submitted that **Section 28** of the **National Assembly and Presidential Elections Act** came into play after the petition had been heard and not at the interlocutory stage in an interlocutory application. He submitted that the petitioner had raised grounds in his petition which could result in the invalidation of the election of the 1st respondent. He urged the court to dismiss the application with costs.

I have carefully considered the rival submissions made by counsel for the 1st respondent and counsel for the petitioner. I have also read the pleadings filed by the parties to this application in support of their respect positions. Due to the nature of the application, I have also read the petition, the request for particulars and the particulars supplied. The 1st respondent's application is based upon on **Rule 5** of the **National Assembly Elections (Election Petition) Rules, 1993**. The said **Rule** provides as hereunder:

“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.”

In **Simon Kuria Kanyingi vs. George Boniface Njau Mbugua Nyanja & 2 others C.A. Civil Appeal No. 168 of 2003 (Nairobi) (unreported)**, the Court of Appeal held at page 9 as regard the manner in which particulars may be supplied in an election petition as follows:

“The rule mandates that the request for particulars has to be channeled through the court and it is the court which decides whether the particulars sought are necessary before making an order and whether the application for their request should be granted or not.”

In the same case, the court of appeal stated at page 8 as regard the legal regime to be considered by the court when determining whether or not particulars have been supplied as follows:

“Again, we need only to reiterate that election petitions are governed by a special regime of rules and they follow a strict and rigid time table under constant supervision of the court. See Alicen Chelaite vs. Njuki & 2 Others C.A. No.150 of 1998 (unreported). It is also manifest that a request for particulars in an election petition cannot be dealt with within the frame work of Order 6 of the Civil Procedure Rules.”

In Yusuf Issa Abdi vs. Enow Adawa & 2 others, Nairobi HC Election Petition No.9 of 1998 (unreported), O’kubasu J (as he was then) while ruling on a similar application regarding the supply of particulars quoted with approval the case of Phillips vs. Phillips [1978] 4QB 127 where Bramwell L J held as follows:

“What particulars are to be stated must depend on the facts of each case ... it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will be put to the defendants on their guard and tell them what they have to meet when the case comes on for trial.”

The court held that the essence of particulars is to avoid the element of surprise at the trial and avoid embarrassment to the defendants. In Robert Nelson Ng’ethe vs. Mbogholi Njeru & another Nairobi HC Election Petition No.5 of 2003 [2006] eKLR, Ojwang J deprecated the practice where the respondents in an election petition requested for particulars whose effect was to require evidence before the hearing of the petition and whose further effect was to undermine the merits of the petition. In that case, the respondents had requested for particulars inform of 501 questions challenging the request for particulars supplied by the petitioner. The application was disallowed.

In the present petition, the petitioner raised various allegations of fraud, undue influence, illegality and various election offences. When the 1st respondent requested to be supplied by particulars, the petitioner supplied the particulars. The 1st respondent is however of the view that the said particulars supplied are insufficient, vague, scanty and evasive. The 1st respondent is of the opinion that, on the basis of the particulars supplied, the petition cannot be tried without subjecting the 1st respondent to grave prejudice, surprises, ambush and/or unnecessary expense. As stated earlier in this ruling, the 1st respondent applied for this court to summarily dismiss the petition or alternatively order the petitioner to supply further and better particulars. The 1st respondent did not however annex a copy of the request for further and better particulars to her application. The alternative prayer sought by the 1st respondent cannot therefore be granted.

The issue for determination by this court therefore is whether the 1st respondent has made a case to enable this court summarily dismiss the petition herein for failure by the petitioner to provide particulars, which in the view of the 1st respondent, would disclose that the petitioner raised a prima facie case which would disclose sufficient grounds for the invalidation of the election of the 1st respondent as a Member of Parliament. **Section 22 (a)** of the **National Assembly and Presidential Elections Act** grants this court jurisdiction to summarily reject a petition where upon perusal of the petition, the court considers that no sufficient ground for granting the reliefs claimed is disclosed. A plain reading of the said **Section 22 (a)** clearly shows that the court shall move on its own motion to reject a petition if it forms opinion that the said petition does not disclose sufficient ground for invalidating the election. It is doubtful whether **Section 22 (a)** is available to a party to the petition to invoke so as to have the petition summarily dismissed. It is further doubtful whether the 1st respondent can rely on the said section to seek the summary dismissal of the petition on the grounds that the petitioner did not supply sufficient particulars pursuant to a request for the supply of particulars made.

In his submission before court, Mr. Muthomi for the 1st respondent set out what in his view was failure by the petitioner to provide particulars in respect of paragraphs 7,11, 13, 14, 15, 16, 17, 18, 23, 24 and 26 of the petition. Paragraph 7, 14 and 15 related to complaints made against the 2nd and 3rd respondents. The 1st respondent cannot therefore make request for particulars in respect of complaints

which were not directed at her. The other paragraphs of the petition dealt with allegations by the petitioner that the 1st respondent's conduct during the campaigns, the election and the counting and tallying of votes was fraudulent and tainted by illegality. The petitioner further alleged that the 1st respondent committed election offences which rendered her election as a Member of Parliament invalid, null and void. In the request for particulars which was filed on 18th February 2008, the 1st respondent requested for particulars in respect of paragraphs 7, 11, 12, 13, 14, 15, 16, 17, 18, 23, 24 and 26 of the petition. The petitioner supplied the particulars in respect of the paragraphs requested. What is clear from the response to the request for particulars by the petitioner is that part of the answers to the particulars sought will be availed to the court upon the 2nd and 3rd respondents delivering to the court the election documents as provided by **Rule 19** of the **National Assembly Elections (Election Petition) Rules, 1993**. Having perused the response to the request for particulars provided by the petitioner, it is clear to this court that the petitioner has provided the particulars that are within its possession. The petitioner has also set out the places where alleged electoral irregularities took place. The petitioner further listed the witnesses who saw the alleged electoral malpractices. No doubt the petitioner will call the persons listed in the particulars supplied as witnesses during the hearing of the petition.

It is clear to this court that the basis of the 1st respondent's application is on the premise that the petitioner ought to have supplied particulars which would set out in minute details the alleged electoral malpractices and breach of the law. **Rule 5** of the **Petition Rules** prohibits a petitioner from setting out evidence in the petition. Similarly, the respondent cannot request for the adduction of evidence under the guise of making a request for particulars. The purpose of requesting for the supply of particulars is to prevent surprise and unnecessary expenses and further ensure a fair and effectual trial. A request for particulars was not meant to be an avenue for a respondent to challenge the legality of the petition without the court having the benefit of hearing the complaints raised thereof. I agree with the petitioner's argument that this court can only invoke its jurisdiction under **Section 28** of the **National Assembly and Presidential Elections Act** after hearing the substance of the complaints raised by the petitioner in a full hearing. This court can only invoke its summary jurisdiction under **Section 22 (a)** of the **National Assembly and Presidential Elections Act** if it forms the opinion that the complaints raised in the petition are so hopeless that the same do not constitute sufficient ground to invalidate the election that is being impeached.

In the premises therefore, I do hold that the petitioner has supplied the particulars necessary to prevent the 1st respondent from being ambushed or surprised during the hearing of the petition. The complaints raised by the 1st respondent in her application and the supporting affidavit thereof as regard failure by the petitioner to provide the required particulars have no merit. It is this court's view that the 1st respondent is actually requesting to be supplied with evidence which can only be availed to her during the hearing of the petition. The application dated 27th March, 2008 lacks merit and is hereby dismissed with costs.

DATED at **NAIROBI** this **5th** day of **MAY, 2008**.

L. KIMARU

JUDGE