



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII
Election Petition 2 of 2008

IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CAP 7)

LAWS OF KENYA AND THE PRESIDENTIAL ELECTIONS REGULATIONS, THE NA

TIONAL ASSEMBLY ELECTIONS (ELECTION PETITION) RULES AND THE

ELECTION OFFENCES ACT (CAP 66) LAWS OF KENYA.

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR BOMACHOGE CONSTITUENCY

BETWEEN

SIMON NYAUNDI OGARI 1ST PETITIONER

ZAPHANIAH MORARO NYANG'WARA 2ND PETITIONER

VERSUS

1. HON. JOEL OMAGWA ONYANCHA..... 1ST RESPONDENT

2. TOBIAS GITAHU MACHARIA..... 2ND RESPONDENT

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

RULING

On 26th May, 2008 this court ordered the second respondent to comply with the provisions of **Rule 19** of **The National Assembly (Election Petition) Rules** by delivering to this court's deputy registrar all the documents enumerated under the said rule on or before 30th May, 2008. The court had to step down some witnesses who were being cross examined because Mr. Nyakeno for the first respondent was unable to continue with their cross examination without having had an opportunity to examine some of those documents, and particularly **forms 16A and 17A**.

On 29th May 2008 or thereabout 151 ballot boxes were delivered to court. The deputy registrar indicated that eight of them were empty. The contents of the rest of the ballot boxes are unknown as the boxes were sealed, though some of the seals were said to have been interfered with.

Upon delivery of the said ballot boxes, the deputy registrar contacted Mr. Omwanza, the second and third respondents' advocate and reminded him that **rule 19** aforesaid required delivery of many other documents, apart from the ballot boxes and requested him to ensure that the same were forwarded to court as soon as possible. The documents referred to under that rule are:

- (a) the written statements made by the presiding officers under the provisions of regulation 34 of the Presidential and Parliamentary Elections Regulations;
- (b) written complaints of the candidates and their representatives;
- (c) the packets of spoilt papers;
- (d) the marked copy register;
- (e) the packets of counterfoils of used ballot papers;
- (f) the packets of counted ballot papers;
- (g) the packets of rejected ballot papers;
- (h) the statements showing the number of rejected ballot papers.

The hearing was adjourned to 9th June, 2008 so that all the parties could be afforded an opportunity to examine the documents aforesaid. When this court reconvened for the hearing on 9th June 2008, Mr. Katwa for the petitioners informed the court that the written statement by the presiding officer and the written complaints of the candidates and their representatives, both referred to in **Rule 19(a)** and **(b)** respectively, had not been availed by the second and third respondents.

Mr. Nyakeno for the first respondent agreed with Mr. Katwa and added that copies of the rest of the documents, including **forms 16A & 17A**, had been brought to court only this morning when copies thereof were also furnished to him.

As such, he was not able to proceed with cross-examination of the witnesses who had been stepped down pending scrutiny of the said forms. He therefore prayed for an adjournment to enable him peruse the said documents. Counsel further indicated that all the advocates in this election petition were due to appear before the Court of Appeal on 10th June, 2008 for the hearing of an application seeking stay of these proceedings pending hearing and determination of an appeal against a ruling of this court.

Mr. Nyakeno further stated that the first respondent had today filed an application seeking, **inter alia**, that the petitioners, their agents and/or witnesses be investigated in relation to destruction of ballots and tampering with seals of ballot boxes.

When the court enquired from Mr. Omwanza why all the necessary documents were not forwarded to court by 30th May, 2008 as earlier ordered, he replied that he had on 28th May 2008 told his clients to comply with the order and had even done a follow up letter on 4th June, 2008. He said that the third respondent delayed in delivering the remaining documents to his office because it did not have sufficient resources to photocopy four set sets of the same. Another reason for the delay was that the third respondent was waiting for some documents which were to be delivered from Gucha District.

I must state that I found the above reasons completely unacceptable to this court. The second and third respondents are well aware of the mandatory Provisions of rule 19, which require the Returning Officer to deliver to the court (deputy registrar) not less than forty-eight hours before the hearing date, all the documents as stipulated under that rule. The Returning Officer did not have to wait to be ordered by this court to comply with the provisions of that rule; it is something that he was under an obligation to do, since he knew the date fixed for the trial. A specific compliance order having been issued by this court, the second respondent should have ensured that there was due compliance. For the second and third respondents to allege that they did not have sufficient resources to photocopy vital documents that are required for this hearing is an insult to the taxpayers of this country and a cheap pretext for their indolence.

It is necessary that all the advocates for the parties be given ample time to carefully examine all the relevant documents so that they can represent their respective clients adequately. The application for adjournment that was sought by Mr. Nyakeno is merited and I grant the same. The second and third respondents shall bear the costs occasioned by this adjournment to the petitioners and the first respondent.

Moving on to another issue, all the advocates for the parties herein have asked this court to give directions regarding scrutiny of the documents referred to in **Rule 19(c) (d) (e) (f) (g) and (h)** which Mr. Omwanza indicated are contained in

the ballot boxes that were delivered to court on 29th May, 2008. Mr. Katwa even urged this court to order a recount of the marked ballot papers during the scrutiny exercise.

It is important that all the aforesaid documents be scrutinized by this court's deputy registrar in the presence of all the parties and/or their representatives before the hearing of this election petition resumes. However, a case for a recount of the ballot papers cast during the elections has so far not been made out and the same cannot be ordered at this stage. If it becomes necessary, the same shall be done at an appropriate time.

I direct the advocates for the parties herein to agree on the issues which they would like the deputy registrar to focus and report on in the scrutiny exercise. The list of the agreed issues should be filed by 13th June, 2008. The scrutiny exercise shall be done from 16th June, 2008 at 9.00 a.m. and proceed until it is finalized, provided the same shall be finalized before 23/6/2008. Thereafter an appropriate report shall be filed by the deputy registrar on or before 23rd June, 2008. The hearing of the petition shall resume on 23rd June, 2008.

DATED, SIGNED and DELIVERED at KISII this 9th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open in the presence of:

Mr. Katwa for the Petitioner.

Mr. Nyakeno & Mr. Osoro for the 1st respondent

Mr. Omwanza for the 2nd & 3rd respondents

D. MUSINGA

JUDGE