



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
ELECTION PETITION 2 of 2008

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 17TH July, 2008, **Francis Nyabuto Nyangwara**, also referred to as PW5, read his affidavit which he had delivered to court as his substantive evidence in support of the petition filed herein. That was in accordance with the provisions of **rule 18(3)** of the **National Assembly Elections (Election Petition) rules**, hereinafter referred to as "**Election Petition Rules**". He was thereafter cross-examined on the same by both Mr. Nyakeno for the first respondent and by Mr. Omwanza for the second and third respondents. He was also re-examined by Mr. Katwa for the Petitioners.

On 18th July, 2008 Mr. Nyakeno made an oral application seeking an order to strike out the said affidavit because, in his view, the same offends the provisions of rule 18 of the Election Petition Rules. He argued that the affidavit was not delivered to the deputy registrar of this court in a sealed envelope as required under rule 18(2). Instead, it was presented to the High Court registry on 6th June, 2008 and was stamped at the said registry.

Mr. Nyakeno further argued that the affidavit had not been filed at least 48 hours before the date that had been fixed by this court for the trial of the election petition. He submitted that the contents of the said affidavit were very prejudicial to the first respondent's case, since the affidavit was filed after some witnesses had testified. Earlier, scrutiny of the ballot boxes had been done and the deponent must have known the status of the ballot boxes before he prepared and filed the affidavit. Counsel added that the affidavit was an afterthought and urged the court to strike it out.

Mr. Omwanza had nothing to say regarding the said affidavit.

Mr. Katwa responded that on 28th May, 2008 he was granted leave to present that affidavit. He said that he brought the affidavit and copies thereof to court in a sealed envelope but the registry staff said that the same could not be filed unless it was paid for. Consequently, he opened the envelope, paid for the affidavits, had them court stamped and thereafter he put them in other envelopes which he sealed and presented to the deputy registrar. Counsel added that the National Assembly and Presidential Elections Act does not state how such affidavits are to be paid for and in the circumstances, resort must be had to the provisions of the **Civil Procedure Act** and **Rules** which require that affidavits be paid for.

Mr. Katwa further denied that the affidavit by PW5 was an afterthought and that it was deliberately prepared and filed after the witness had observed the ballot boxes.

In reply, Mr. Nyakeno reiterated that **rule 18(1)** of the Election Petition Rules requires that affidavits be filed at least 48 hours before the hearing of a petition commences. If the affidavits had to be paid for, that could only be done after the sealed envelopes had been opened up in court and the affidavits read; he added. He further stated that the National Assembly and Presidential Elections Act was a complete legal regime and provisions of the **Civil Procedure Rules**

were not applicable under the said Act.

I have duly considered the above submissions. **Rule 18(1)** of the Election Petition Rules states as follows:

“18(1) Not less than forty-eight hours before the time fixed by the election court for the trial of an election petition the petitioner shall deliver at the office of the Registrar an affidavit sworn by each witness whom the petitioner intends to call at the trial, setting out the substance of his evidence.”

Subsection (2) thereof states the mode of presentation of the aforesaid affidavit in the following terms:

“(2) Each affidavit shall be enclosed in a sealed envelope together with sufficient certified true copies for each of the judges, all other petitioners in the same petition and the respondents, and shall be opened by the election court when the witness who has sworn the affidavit is called to give evidence.”

Regarding the provisions of **subsection (1) of rule 18**, it is clear that the law requires the petitioner to deliver to court an affidavit for each and every witness who shall be called during the hearing of the petition. That should be done not less than 48 hours before the time fixed for commencement of the trial. However, the court can grant leave to a witness to testify notwithstanding that he has not delivered such an affidavit within the period as stated above. With respect to the affidavit by PW5, this court granted leave for his affidavit to be filed after commencement of the hearing. His affidavit cannot therefore be struck out as having been filed outside the 48 hours requirement before commencement of the trial.

On the allegation that the witness swore the affidavit as an afterthought, having seen the condition of the ballot boxes during the

scrutiny exercise, there was nothing to suggest that was case. And even if PW5 saw the condition of the ballot boxes, the court is well able to take that into consideration and weigh the credibility of such evidence. I will not therefore strike out the said affidavit for the aforesaid reasons.

I now turn to Mr. Nyakeno's argument that the affidavits should be presented to the Registrar (deputy registrar) in sealed envelopes and should not be opened even for purposes of stamping and paying for them. I believe the object of **rule 18(1)** and **(2)** was to ensure that the affidavits to be relied upon by each witness to be called remains secret, secure and confidential until the same is opened by the election court when the witness who has sworn it is called to testify. Once the petitioner and/or his/her advocate has put that affidavit in an envelope, sealed it and presented it to the Registrar or a deputy registrar, no one is supposed to tamper with that sealed envelope, not even the trial judge, until the particular witness who has sworn it is in the witness box ready to testify. In my view, there is no point of unsealing such an envelope, having been presented to court, for purpose of stamping the enclosed affidavit and paying for the same and then put it in another envelope and seal it again. That kind of procedure is likely to compromise the objective of secrecy and confidentiality aforesaid. It is common practice that before documents are paid for at any court registry, they are first assessed to determine the court fees payable then they are handed over for stamping, payment and issue of an official receipt. If an affidavit will have to take all these rounds, there is no telling on whose hands it may land on or what may be done to such an affidavit.

It has to be borne in mind that in an election petition, a witness gives his evidence in chief by reading his own affidavit which has been presented to court in advance. Alternatively, the affidavit may be read to the witness. Thereafter the witness may be cross examined by the respondents and re-examined by the petitioner. The witness has no

room to wander out of his affidavit in his examination in chief, all he does is to read the same. It is therefore important to ensure that the affidavit which is read in court is the same one which the witness swore and that it remains in the same state and condition it was in when the witness appended his signature to it.

In this regard, the deputy registrar should refrain from insisting on such an affidavit being stamped and paid for. If court fees has to be collected for the same, then it may be paid after the opening of the sealed envelop by the election court and after a witness has read the affidavit.

I will not fault Mr. Katwa or the petitioners herein for having various affidavits exposed to some registry staff when they were paying for the same since Mr. Katwa was complying with a directive that had been given to him, which I believe is not correct.

DATED, SIGNED and DELIVERED at KISII this 30th day of July, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Ochwangi HB for Mr. Katwa for the Petitioners.

Mr. Anyona HB for Mr. Nyakeno for the 1st Respondent

Mr. Sagwe HB for Mr. Omwanza for the 2nd and
3rd Respondents.

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE