



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Election Petition 1 of 2008**

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL**

**ELECTIONS ACT CHAPTER 7 LAWS OF KENYA**

**AND REGULATIONS MADE THEREUNDER**

**AND**

**IN THE MATTER OF: ELECTION FOR THE MATUGA CONSTITUENCY**

**AYUB JUMA MWAKESI .....PETITIONER**

**VERSUS**

**MWAKWERE CHIRAU ALI .....1<sup>ST</sup> RESPONDENT**

**ALI MAALIM HASSAN .....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup> RESPONDENT**

**RULING**

Mwakwere Chirau Ali, the 1<sup>st</sup> Respondent herein, took out a motion dated 4<sup>th</sup> August 2008 pursuant to the provisions of section 23(2) of the National Assembly and Presidential Elections Act and under rule 5 of the National Assembly Elections [Election Petition] Rules in which he prayed for an order to direct Ayub Juma Mwakesi, the petitioner herein to supply further and better particulars in terms of the request attached to the application. The motion is supported by the affidavit of Alfred Mabeya sworn on an unspecified date. The petitioner opposed the motion by filing a replying affidavit he swore on 11<sup>th</sup> August 2008.

It is the submission of the 1<sup>st</sup> Respondent that the particulars supplied by the petitioner pursuant to the court order of 11<sup>th</sup> July 2008 are inadequate, insufficient, evasive and inconclusive. The 1<sup>st</sup> Respondent complained that he is likely to be prejudiced in that he will not be in a position to effectively defend himself due to the element of surprise and that he is likely to incur a huge expense. Mr. Mabeya, learned advocate for the 1<sup>st</sup> Respondent urged this court to grant the order because the 1<sup>st</sup> Respondent as of now does not know the kind of case he is going to face at the trial.

Mr. Mabeya, learned advocate for the petitioner urged this court to dismiss the motion for various reasons. First, is that the affidavit in support of the motion is sworn by an advocate contrary to rule 9 of the Advocates (Practice) Rules. It is the argument of the learned advocate that Mr. Mabeya swore an affidavit in respect of contentions matters. In response to this submission, Mr. Mabeya informed this court that Rule 9 of the Advocates (Practice) Rules do not apply to these proceedings. Secondly, the application is said to be incompetent because it is asking for particulars of the particulars which is not envisaged under section 23 of the National Assembly and Presidential Elections Act. On this account the 1<sup>st</sup> Respondent has been accused for being in a fishing expedition and for seeking to be supplied with evidence. Thirdly, it is also argued that the particulars requested are not within the knowledge of the petitioner.

I have taken into account the arguments for and against the motion tendered by learned advocates. I have also perused the grounds set out on the face of the motion and the facts deponed in the affidavit of support and in the replying affidavit. In short the 1<sup>st</sup> Respondent is saying he doesn't know the case he is going to face when the petition is finally is called out for hearing. The latest request arises from the particulars supplied to the 1<sup>st</sup> Respondent dated 24<sup>th</sup> July 2008. The particulars were on the basis of a consent order given to compromise the notice of motion dated 8<sup>th</sup> July, 2008. I have perused the request for the supply of particulars attached to the aforesaid motion. It is clear that the 1<sup>st</sup> Respondent had requested to be given particulars in respect of the allegations made paragraphs 11,12,13,14,15,16,17,18,19,20,22,23,26,28,29,30 and 31 of the petition. The answer to the requested of particulars dated 24<sup>th</sup> July 2008 shows that all the particulars were supplied as requested. The 1<sup>st</sup> Respondent is now complaining that the particulars supplied are evasive, insufficient and inconclusive. For the above reasons he as applied to be given further and better particulars over the allegations contained in paragraphs 11, 13,15,16,18,19,22,23,28,29,30 and 31 of the petition. I have compared the two requests for particulars. It is clear that the 1<sup>st</sup> Respondent has introduced new request for particulars which were not made in the first request. It would also appear from the request that the Respondent is seeking to be supplied with specific evidence. From the latest request it is clear that the 1<sup>st</sup> Respondent understands the case that he will face at the trial of this petition. The law is quite categorical on what particulars should be requested and supplied. The 1<sup>st</sup> Respondent has not specifically pointed out in the affidavit of Mr. Alfred Mabeya the particulars which were evasive, inclusive and insufficient. The basis of the 1<sup>st</sup> Respondent's application is rule 5 of the National Assembly Elections (Election Petition) Rules 1993 which provides as follows:

**“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.”**

Justice Kimaru in his ruling of 16<sup>th</sup> May 2008 in Nairobi H.C. E.P. No. 12 of 2008 between John Kiarie Waweru and Beth Mugo & 2 others stated as follows:

“It is therefore evident that from the above decisions that particulars are supplied for the purpose of ensuring clarity and in order to avoid trial by ambush. It is further meant to avoid surprise to the opposing party during trial. The opposing party must of the opponent's case in order to prepare adequately to address the issues that will be raised during the hearing of the petition. Further, supply of particulars meant to weed out petitions which do not disclose reasonable causes of action so that the court may be able to summarily deal with petitions as provided under section 22 (a) .....

A request for particulars should not be made for purposes of fishing evidence from the opponent of for purposes of cross-examining the opponent before the actual trial of the petitioner. A request for particulars should not be an opportunity for the respondents to frustrate or intimidate the petitioner so that he is prevented from presenting his case before the election court.”

I entirely agree with the sentiments expressed by my learned brother.

A close perusal of the request for particulars will show that the 1<sup>st</sup> Respondent has sought to be supplied with interalia particulars of the names of presiding and Deputy presiding officers, the names of persons who allegedly committed election offences, names of agents the station, the figures altered etc. I have looked at the particulars already supplied and it is obvious that some of those queries were answered. I am satisfied that the petitioner supplied adequate and sufficient particulars hence the current application should not have filed because the petitioner is clear on what the petitioner's complaint is all about and hence he does not need a further clarity by the supply of further and better particulars. He will not be surprised not ambushed by the petitioner's evidence when the petition comes up for hearing.

Mr. Balala has attacked the affidavit of Mr. Alfred Mabeya. It is the submission of Mr. Balala that the same was sworn contrary to the provisions of Rule 9 of the Advocates (Practice) Rules. Mr. Mabeya is of the contrary view that rule 9 does not apply. The law under rule 9 bars advocates from deponing affidavits on contested facts. It is not denied that the facts deponed by Mr. Mabeya are contentious. Rule 9 of the Advocates (Practice) Rules apply to these proceedings hence with respect; I overrule Mr. Mabeya over this issue. I am convinced Mr. Mabeya entered into the centre of the dispute by deponing on contentious facts. The learned advocate should have secured his client to depone the affidavit instead. For this reason I strike out his affidavit, thus leaving the motion unsupported. So that in the end even if the motion was meritorious, the same shall stand unsupported by affidavit evidence.

In the end and for the above reasons I dismiss the motion with costs to the petitioner.

**Dated and delivered at Mombasa this 10<sup>th</sup> day of September 2008.**

**J. K. SERGON**

**J U D G E**