



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

**Election Petition 11 of 2008**

**REUBEN NYANGINJA NDOLO.....  
.....PETITIONER**

**Versus**

**DICKSON WATHIKA MWANGI & OTHERS.....RESPONDENTS**

**RULING**

The Respondents have raised an objection to an affidavit sworn by Joseph Okwar Wandolo whom the Petitioner intends to call as a witness. Mr. Kilukumi argued that the statement intended to be produced has no relevance to the petition because the statement raises three important allegations not covered in the petition or the particulars that were supplied.

- (1) That the statement alleges that Mukuru Primary School tent was the gazetted polling station but not the Headmistress's office or the school but that nowhere does the petition deal with that aspect and that there is no reference to Mukuru polling station anywhere in the petition;
- (2) That the statement seeks to prove that there were 3 doubtful boxes outside the tallying hall but that there is no such pleading in the petition;
- (3) That he was an agent yet he was not given the requisite forms to complete at the commencement, during or after the polling exercise; but that the same is not raised anywhere in the petition or the particulars.

Counsel also submitted that paragraph 9 and 11 of that affidavit is hearsay as the source of his belief is not disclosed and it violates Order 18 Civil Procedure Rules. In respect of paragraph 11 Makongeni Polling station is not one of the polling stations complained of. In respect of paragraph 12 Counsel said it is an opinion and speculative and of no evidential value.

Mr. Lubulellah Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents agreed with the 1<sup>st</sup> Respondents submissions and added that it is a cardinal rule in election petitions that evidence to be adduced should be within the ambit of the pleadings, issues raised, particulars and responses thereto. That under S. 5 of the Evidence Act, for evidence to be admissible it has to be relevant but that the affidavit sought to be produced is not relevant and should not be admitted in evidence.

Mr. Ongoya in reply opposed the objection to the affidavit and urged that the objection is a ploy by the Respondents to delay the would be expeditious disposal of this petition by engaging in side shows. Counsel submitted that S. 63 of the Evidence Act spells out the kind of evidence to be adduced. Direct evidence, which includes what one saw, what one heard or perceived or opinion held and that the affidavit

of Wandolo falls within that Section and that it is founded on the petition.

Counsel also submitted that in paragraph 13 of the petition, they have alleged that the Respondents committed offences and breached the code of conduct and it will be upto the court to determine whether the Returning and Presiding officers conducted himself well. That evidence has to be adduced in proof of that allegation. That at paragraph 26 and 30 grievances of the Petitioner relate to statutory documents and forms and that this affidavit contains evidence impugning the manner in which the forms were handled or tampered with.

In relation to paragraph 9 of the affidavit, Counsel urged that the evidence is direct as it is the witness who found boxes and that the evidence can only be tested on cross examination. That paragraph 11 is direct evidence because it is the witness who learnt and that paragraph 12 is an opinion but should be tested in cross examination. Counsel also referred to paragraph 15 of the petition which raises the issue of suspect ballot boxes at the Tallying centre and that the paragraph is relevant in that regard. Mr. Ongoya also said that under Rule 18 (3) of the Election Petition Rules, once the affidavit is read, it becomes part of the record of the trial and can only be discredited through cross examination. He added that because of the objection the Respondents had raised they had waived their right to cross examine the witness.

In reply to the Petitioner's submission Mr. Kilukumi urged this court to look at the particulars supplied in respect of paragraph 13 and 23 of the petition and submitted that the Petitioner cannot purport to enlarge those particulars in the evidence of this witness. Mr. Lubulellah in reply asked the court to look at paragraph 15 of the petition and stressed the principles behind the need for seeking particulars, ie to avoid surprise and delay at the trial.

I have considered the objection raised by the Respondents and the reply thereto. I wish to start by disagreeing with Mr. Ongoya's interpretation of rule 18 (3) of the National Assembly Elections (Elections Petition) Rules, 1993 which reads;

**“The affidavit shall be read by or on behalf of the witness and shall form part of the record of the trial and a deponent may be cross examined by the Respondents and re examined by the Petitioner.”**

There is nowhere the rule states that once the affidavit is read to the court it becomes part of the record of the trial. Just like oral evidence, if it is irrelevant or contains hearsay or the evidence therein is inadmissible, it may be objected to before it forms part of the record. It can only form part of the record if it complies with order 18 Civil Procedure Rules and is relevant.

I do agree with the submission that it is a cardinal rule in Election petitions that the issues in issue in the petition be identified in the petition itself, and the particulars supplied upon request and replies. It is to help concretize the issues, avoid surprise in order to expedite the hearing of the election petition. Rule 5 of the Rules specifically states that particulars are to help prevent surprise or unnecessary expenses and ensure a fair and effectual trial and therefore minimize costs. The Rules also go ahead to limit the period within which certain things are to done or pleadings filed, to save on time. Indeed S. 19 (4) of the National Assembly and presidential Elections Act provides that petitions should be heard and determined on priority basis. This is considering the fact that a member of Parliament is in parliament for 5 years and if not expedited the petition may be rendered nugatory. Bearing the above in mind, I will therefore consider the objections raised in respect of the affidavit in issue.

Order 18 Civil Procedure Rules applies to affidavits sworn in Election Petitions by virtue of S. 18 (7) of the Rules made pursuant to Cap 7 Laws of Kenya. Order 18 Rule 3(1) Civil Procedure Rules provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

In respect of the 1<sup>st</sup> objection that is contained at paragraph 3 and 4 of the affidavit that the polling was

carried out at a non gazetted area, I do agree that there is no such complaint raised in the petition and indeed there is no complaint emanating from Mukuru polling station. In the petition there are specific complaints relating to the various polling stations at paragraphs 15, 16, 17, 19, 20. Introducing complaints about Mukuru Polling Station at this stage is surprise to the Respondents that cannot be allowed.

At paragraph 9 the deponent alleges that he saw three boxes outside the tallying station which were in the hands of people who he believed were not ECK officials but other contestant's Agents and that he brought that to the attention of ECK officers who took the boxes to the hall. For one to form an opinion there must be grounds or a basis for doing so. The deponent has not indicated why he believed the people with ballot boxes were contestant's Agents. Even if that paragraph were to remain, I would strike out part of the 1<sup>st</sup> sentence which reads that the boxes were in the hands of people he believed to be other contestant's agents.

At paragraph 11, it is deponed that the deponent learnt that the boxes were from Makongeni Polling Station. The deponent did not however disclose the source of that information as required by Order 18 Rule (3) Civil Procedure Rules.

At paragraph 12 of the Affidavit, the deponent states that he believed that the boxes may have been diverted to the tallying centre for purposes of vote stuffing or otherwise compromise. He did not however state the basis of his belief and I will find that paragraph to be speculative.

The deponent blames the Returning Officer, at para 6 and 7, for failing to allow him access to the various statutory forms to fill either before the voting exercise or after, which includes Form 16 A.

In the petition, at paragraph 13, the petitioner generally blames the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that their officers and agents committed election offences by failing to serve impartially and independently and performing their duties under the influence of the first Respondent and his political party. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents requested for particulars as follows;

**“(i) State the particular incidences of failure to act impartially and independently in the performance of duty, and the manner and to whom the alleged failure of impartiality and lack of independence was exhibited.**

**(ii) State the manner in which the 1<sup>st</sup> Respondent influenced the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the name of the 1<sup>st</sup> Respondent's party and the particular party official that was involved in the alleged acts of influence.”**

The reply to that request was made on 22<sup>nd</sup> February 2008 and filed in court on 4<sup>th</sup> March 2008 as follows;

**(a) The 2<sup>nd</sup> Respondent called in security personnel to arrest the petitioner when the petitioner asked a question regarding the disputed ballot boxes.**

**(b) The 2<sup>nd</sup> Respondent declined to answer any question from the petitioner's agents present after the arrest of the petitioner while allowing the 1<sup>st</sup> Respondent's agents to ask questions freely.**

**(c) The 1<sup>st</sup> Respondent's Agent's present at the Tallying centre were allowed by the Tallying clerks to get access to the Tallying table whereas other agents were not allowed.**

**(d) The 1<sup>st</sup> Respondent's agents demanded that one of the ECK Officials steps down from the Tallying Table which demand was acceded to by the 2<sup>nd</sup> Respondent without question.**

**(e) A Mr. Mutunga, the 1<sup>st</sup> Respondent's agent from Mbotela stood on a chair and commanded**

**the Tallying Clerks and the 2<sup>nd</sup> Respondent on the figure to be indicated or else she would know whom they (1<sup>st</sup> Respondent's agents) were, yet the 2<sup>nd</sup> Respondent did not alert the security personnel to take any action on him."**

After these particulars were given specifying how the Respondents allegedly failed to perform their duties, fresh incidents of failure to perform cannot be raised at this stage and cross examination of the witnesses cannot generally wonder away from the said petition and particulars.

Further to the above, at paragraph 26 of the petition, the petitioner alleges that the statutory documents and forms which the Presiding and Returning officers were supposed to keep were altered and the number of votes changed without any countersigning by any of the presiding officers or the Returning Officer. Again the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents requested for particulars, that the petitioner should specify the statutory documents and forms and the alleged changes made. In reply the petitioner indicated that the forms were 16 A. There was no allegation that any of the petitioner's agents had been refused to sign any of the forms. The allegation in Mr. Wandolo's affidavit brings in a new angle to the petition and since the petitioner is bound by his pleadings, that kind of evidence is not acceptable at this stage.

For the foregoing reasons and observations, I will strike out the following paragraphs from the affidavit of Joseph Wandolo i.e. paragraphs 4, 6, 7 part of paragraph 9 that reads "**.....who I believed were not ECK Officials but other contestants Agents.**", paragraph 11, 12, 13 (1) and (ii). I allow the Respondents' objection to that extent.

To allow the said paragraphs to remain would be adding to the petitioner's pleadings as the case proceeds, and will delay the hearing of this petition. I urge the Petitioner to look at their affidavits and consider which ones conform to provisions of Order 18 Civil Procedure Rules and proceed to call the witnesses in respect thereof to avoid further delays.

Dated and delivered this 10<sup>th</sup> day of November 2008.

R.P.V. WENDOH

JUDGE

**Read in open Court**

**Present:**

Mr. Amolo)

Mr. Ongoya)

Ms Nungo) for Petitioner

Mr. Kilukumi for 1<sup>st</sup> Respondent

Mr. Mugo

Mr. Nderitu Wachira

Mr. Lubulellah for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

Mr. Onyiso for Attorney General

Daniel: Court Clerk