



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
ELECTION PETITION NO. 1 OF 2005

HASSAN ALI JOHO.....PETITIONER

VERSUS

HOTHAM NYANGE.....1ST RESPONDENT

ANANIA MWASAMBU MWABOZA.....2ND RESPONDENT

RULING

By his Notice of Motion dated and filed on 11th April 2005 and brought under the provisions of Section 3A of the Civil Procedure Act, Order L Rule 1 of the Civil Procedure Rules and sections 23(1)(d) and 26 of the National Assembly and Presidential Elections Act the Petitioner seeks the following orders: -

- “(1) That this honourable court do order for a recount of all the ballot papers, counterfoils and register of all votes cast in the By-Election in Kisauni Constituency on the 16th December 2004.**
- (2) That upon the conclusion of the said security (sic) and recount, this court do order that the aforesaid election be declared null and void and that your petitioner was indeed the actual winner of the said election.**
- (3) That the petitioner herein be declared by the honourable court as the Member of Parliament for Kisauni Constituency and such result of the recount and scrutiny be satisfied (sic) as the actual result of the By-Election.**
- (4) That the costs of this application be provided for.”**

The Application is supported by his affidavit in which he deposes that the election process was marred by irregularities in the polling stations during the voting exercise as well as in counting of ballot papers; that if the scrutiny and recount are ordered he is sure of being declared the winner and that inspite of his written demand to the Electoral Commission the same has failed to supply him with a number of documents that he wishes to scrutinize. Two exhibits are stated in the affidavit as having been annexed thereto but they are not.

In response the first Respondent, Hotham Nyange, swore a replying affidavit in which he deposed that the Petitioner is not only abusing the court process by making a plethora of applications but also that this application itself is premature for having been made before the petition is conclusively heard.

Though there are four prayers in the application Mr. Nyaberi teaming up with Mr. Khagram for the

Petitioner argued only the first prayer and applied to be allowed to argue the rest after a ruling is made on the first prayer.

Arguing the Application itself Mr. Nyaberi submitted that the whole by-election was riddled with irregularities and that is why out of 48 grounds in the petition 14 are on irregularities. He submitted that scrutiny and recount will not only crystallize the issues but will also shorten the hearing of this petition. He said that as stated in several grounds in the petition the Petitioner requested for a recount in the polling stations in vain.

Referring to the copies of the election forms and documents filed in court on 30th November 2005 by the Electoral Commission, Mr. Nyaberi submitted that there are innumerable glaring irregularities that make scrutiny and recount imperative. He referred me to several authorities, in which scrutiny and recount were ordered and urged me to likewise order one in this petition. After taking his client's instructions Mr. Nyaberi stated that if scrutiny and recount is ordered and the second Respondent is vindicated his client will abandon this petition.

Mr. Asige, counsel for the first Respondent, supported the application. He said the Electoral Commission has nothing to hide and will abide by the result of the scrutiny.

The second Respondent on his part strongly opposed the application. His counsel Mr. Buti, teaming up with Messrs Munyithya, Ngugi and Were, submitted that the bringing of this application under provisions of the Civil Procedure Act and Civil Procedure Rules is irregular, though that is not fatal to the application. Relying on the decision of Justice Mwera in **Roshad Hamid Ahmed – Vs – Fatum Yasin Twaha & others Election Petition No. 4 of 2003**, he submitted that election law is a special regime to which neither the Civil Procedure Rules nor the Civil Procedure Act applies.

As regards the Petitioner's reservation of two prayers in the application for later argument Mr. Buti said that is a unilateral decision and that the Petitioner should be deemed to have abandoned those prayers.

On the application itself, while conceding that in some cases a petitioner need not lay a basis for an order of scrutiny and recount, Mr. Buti submitted that in this petition the Petitioner has to first adduce evidence and lay a basis before scrutiny is ordered. This, he said, is because all the authorities relied upon by counsel for the Petitioner had narrow margins and were based on the old procedure when counting in any one constituency was done in one counting hall. In this case counting was done in polling stations and the margin is over 1000 votes. He cited cases where bases were laid before scrutiny was ordered.

As regards the documents filed in court by the Electoral Commission and on which counsel for the Petitioner placed great reliance, Mr. Buti demanded their expunction from the court record. He said they are not pleadings and they are not annexures to any affidavit and were therefore irregularly filed.

The rejoinders by counsel for the Respondents were mainly on the propriety of the Electoral Commission's filing of the said documents. Mr. Asige counsel for the first Respondent said the Commission filed the documents on 30th November 2005 following the Petitioner's request for them vide his letter of 30th January 2005.

For his part Mr. Nyaberi counsel for the Petitioner could not understand the reason for the hullabaloo about the filing by the Electoral Commission of the election documents. According to him the Commission should be commended for complying with the law instead of being condemned. He said Rule 19 of the Election Petition Rules (the Rules) requires the Returning Officer to deliver to the Registrar the election documents and that is what the Commission did by filing the documents. He concluded that the examination of those documents confirms the Petitioner's complaint that there are numerous irregularities in the election and that lays a basis for an order of scrutiny, if any basis is required.

I have anxiously considered these rival submissions. If I understand them well they raise three main issues. The first issue is whether or not the Civil Procedure Act and Rules apply to election petitions.

Secondly, whether or not the copies of the election documents filed by the Electoral Commission should be expunged from the court record for having been irregularly filed. And thirdly, whether or not scrutiny and recount should be ordered. I will deal with them in that order. Before I do that I want to dispose of the issue as to whether the Petitioner should be taken to have abandoned the rest of the prayers in this application. I do not think there is any basis for that assumption. His advocate clearly stated that he wishes to reserve to a later date the arguments on those prayers. I see nothing wrong with that. I therefore order that the Petitioner can argue the remaining prayers later on if he so wishes.

It is, in my view, now well established that the jurisdiction conferred upon the High Court by section 44 of the Constitution to hear and determine election petitions is a special jurisdiction. The National Assembly and Presidential Elections Act Cap 7 of the Laws of Kenya (the Act) and the rules made thereunder form a complete legal regime with its elaborate procedure concerning the filing, serving, hearing and determination of election petitions. Save where the regime expressly admits and incorporates the provisions of other law it is a complete code of its own.

The Civil Procedure Act and the Rules made thereunder do not therefore apply to election petitions save where they are expressly incorporated. If any authorities are required for this proposition the Court of Appeal decisions in **David Wakairu Murathe – Vs – Samuel Kamau Macharia, Civil Appeal No. 171 of 1998** and **Mwai Kibaki – Vs – Daniel Arap Moi, Civil Appeal No. 172 of 1999** suffice it. It follows therefore that the bringing of this application under the provisions of the Civil Procedure Act and Rules, though not fatal, was irregular.

The filing in court by the Electoral Commission of election document was also irregular. It is said that they were filed pursuant to a request made by letter. Rule 5 of the Election Petition Rules is clear as to the procedure to be followed by a respondent seeking particulars of a petition. It states:-

“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.”

This provision is quite clear. Unlike under the Civil Procedure Rules where the matter is left entirely in the hands of the parties who only enlist the intervention of the court as a last resort in event of default or refusal, in election petitions requests for particulars are channelled through the court. This is because election petitions have to be under the constant supervision of the court. That is why even a petitioner who wishes to withdraw his petition has to make a formal application to court to be allowed to withdraw it.

As stated in Rule 5 a respondent requiring particulars has to make a formal application to court and once the court is satisfied that he is not seeking matters of evidence in the guise of particulars and that the particulars sought are necessary it will allow the application. I cannot therefore accept that particulars can be sought by mere letter and be filed without the knowledge of the court. Rule 19 of the Election Petition Rules does not state that the documents enumerated therein are to be filed. They are to be delivered to the Registrar and safely kept for easy access by the court during the hearing of the petition. If election documents including ballot papers were to be filed or made readily available to the parties as contended by Mr. Nyaberi they would not only be tampered with but that will obviate the necessity for applications for scrutiny. In the circumstances I find that the filing by the Electoral Commission of some election documents was highly irregular and I therefore order their expunction from the court file. I will not base the remaining part of this ruling on any submissions made on them.

That brings me to the main issue in this application and that is whether or not I should order scrutiny and

recount.

In his application the Petitioner seeks an order for a recount, scrutiny and reconciliation. Although there is no express provision for a recount I concur with the decisions of the election courts in **Said Hemed Said – Vs – Ibrahim Salim Abdalla Mwarua, Election Petition No. 1 of 1983** and **Said – Vs – Maitha & Another, Election Petition No. 1 of 1998** that the scrutiny provided for under section 26 of the Act invariably includes a recount.

An order for scrutiny can be made when it is prayed in the petition itself and when reason for it exists. As stated in **15 Halsburys Laws of England 4th Edition paragraph 846** it is not made as a matter of course. It is made when there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the Returning Officer or other election officials. Mr. Nyaberi submitted that out of 48 paragraphs in the petition 14 are on irregularities. He said that together with the fact that scrutiny and recount will most likely shorten the hearing of this petition, or even determine it, are grounds for granting the application without requiring the Petitioner to first lay a basis by calling evidence. Mr. Buti holds a contrary view. He said that the Petitioner must first lay a basis before scrutiny is ordered.

I have read the authorities cited by counsel for both the parties on this point. The common thread that runs through all of them is that there is no rule that a petitioner must first call evidence and lay a basis before scrutiny is ordered. Nor is there one that scrutiny will always be ordered whether or not a basis has been laid. However, where the vote margins are narrow like in **Onamu – Vs – Maitisi Election Petition No. 2 of 1983** where the margin was only 30, **Kirwa – Vs – Muliro Election Petition No. 13 of 1988** where the margin was only 7 and **Hemed Said – Vs – Ibrahim Mwaruwa Election Petition No. 1 of 1983** where the margin was only 62, scrutiny was ordered without laying any foundation.

Scrutiny has also been ordered without laying foundations even where the margins are wide on the ground that a recount may lead to an expeditious disposal of the petition. **Burundi Nabwera – Vs – Joshua Angatia Election Petition No. 4 of 1983** and **Said – Vs – Maitha & Another Election Petition No. 1 of 1998** where the margins were 521 and 534 respectively as cases on the point.

I concur with the holding in **Onamu – Vs – Maitisi Election Petition No. 2 of 1983** that where the margin is very narrow justice will be done and seen to be done if scrutiny and recount is ordered right from the word go. However, where the margins are high I am unable to agree that scrutiny should be ordered without laying a foundation simply to expeditiously dispose of petitions and save the time which would otherwise have been spent on full hearing. For my part I will not agree that expediency should be the sole or main factor in ordering scrutiny. Courts are there to hear cases including election petitions and should not resort to short cuts for their own expediency.

The cases cited herein above were prior to the year 2002 when counting was done in one counting hall for each constituency and sometimes went on throughout the night for even upto two or three days. In such cases one would expect mistakes arising from sheer fatigue. In this petition that was not the case. As we all know counting was done in polling stations and the Returning Officers collated the figures. Though counting mistakes cannot be ruled out they are, in my view, minimal.

With a margin of 1061 votes in this petition I am not persuaded that an order of scrutiny and recount should be made before a foundation is laid. I therefore decline to grant the order for scrutiny at this stage and order that the Petitioner can renew the application after adducing evidence and laying a foundation. Costs in cause.

DATED and delivered this 3rd day of February 2006.

D. K. MARAGA

JUDGE