



REPUBLIC OF KENYA

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

ELECTION PETITION 5 OF 2003

IN THE MATTER OF THE NATIONAL ASSEMBLY AND
PRESIDENTIAL ELECTIONS ACT CHAPTER 7

AND

THE PRESIDENTIAL AND PARLIAMENTARY REGULATIONS AND THE RULES MADE
THEREUNDER

AND

IN THE ELECTION PETITION REGULATIONS

AND

IN THE ELECTION OFFENCES ACT CAP 66

AND

IN THE MATTER OF THE ELECTION FOR THE KIAMBAA CONSTITUENCY

THE HUMBLE PETITION OF

ROBERT NELSON NGETHE PETITIONER

VERSUS

MBOGORI NJERU 1ST RESPONDENT

JAMES NJENGA KARUME 2ND RESPONDENT

RULING

This rather unusual application before me is for an Order that this Election Petition is “untriabable and undeterminable” and for the Electoral Commission of Kenya (ECK) and its Returning Officer, the 1st Respondent, to “be condemned to pay the costs of the Petition”.

It arises out of equally unusual circumstances leading to the loss or misplacement of election materials and records for the Kiambaa Constituency, in respect of which this Petition was filed. By an affidavit sworn the 6th March, 2006, Mr Daniel Mosomi, Procurement and Supplies Manager with the Electoral Commission of Kenya, has deponed that the relevant records and materials have been lost. The Petitioner now says that in the absence of those materials, he is unable to prosecute this Petition, and it is not possible for this Court to arrive at a fair and just decision. The ECK's inability to present these materials before the Court, in accordance with Rule 19 of the National Assembly Elections (Election Petition) Rules, 1993 (Cap 7) (hereinafter "the Rules") has considerably prejudiced his case, and accordingly it is his submission that this trial cannot, and should not be allowed to proceed, and that the ECK, in whose custody these materials were placed, and who negligently lost the same, should be called upon to pay the costs of this petition.

As it was not clear to this Court, exactly what documents and materials were lost, and their precise relevance to the Petition herein, the Court invited the 1st Respondent to file a further deposition detailing the nature of these materials, and providing the Court with an inventory. He did so, and the other parties filed additional affidavits explaining the relevance of the missing documents.

The hearing of the application resumed on 6th October, 2006, now with the benefit of additional depositions ordered by this Court.

According to Mr Mosomi's further affidavit sworn on 7th August, 2006, 18 sealed ballot boxes containing the following documents have been lost, and are unavailable to this Court:

- (a) ***Election results from all the Polling Stations within Kiambaa Constituency***
- (b) ***Declaration forms which indicate how elections were conducted (sic)***
- (c) ***Complaints Statements (if any)***
- (d) ***Ballot Papers (used and unused)***
- (e) ***Counter Foils***
- (f) ***Spoilt Ballot Papers***
- (g) ***Elections Marked Copy Register.***

In his submissions before this Court, Mr Ndamberi, Counsel for the Petitioner, argued that without these materials the witnesses would not be able to prove that they were voters in this Constituency; the Petitioner would be unable to lead evidence about the alleged misconduct of the Returning Officer and the irregularities witnessed on polling day; and finally that the Petitioner would not be able to cross-examine witnesses relating to the number of votes cast. Mr Ndamberi closed his submissions by arguing that Rule 19 (supra) makes it mandatory for the Returning Officer to deliver to the Court the aforesaid missing documents "not less than 48 hours before trial".

Mr Ngatia, Counsel for the 2nd Respondent, submitted that his client too would suffer prejudice should this trial proceed without the relevant documents. For example, he argued, that in the absence of the Election Register, it would not be possible to demonstrate whether the voter had a right to vote in that Constituency. Without items (b) and (c) of the list of missing documents, he submitted that it would not be possible to examine witnesses on the incidents recorded. He agreed with Mr Ndamberi that Rule 19 aforesaid makes it obligatory for the Returning Officer to deliver these documents to the Court before trial, and without them this trial cannot proceed.

Relying on the grounds of opposition filed on 19th June, 2006, Mr Kulecho, Counsel for the 1st Respondent (Returning Officer) argued that Rules 18 to 20 of the Rules (under which this application has

been brought) do not permit the Court to make the Orders sought, and to that extent this application was incompetently before the Court. He submitted that there were indeed no rules provided for the eventuality before the Court presently. In his view, the Petition cannot be said to be “untriable” simply because election documents are unavailable. For example, he argued, that the Petitioner does not pray for recount of votes, nor for the scrutiny of votes, and hence the absence of votes is not fatal. In his view, the Petition was based mainly on allegations of bribery and corrupt practices before the elections, and is unrelated to the missing documents.

Having heard submissions, and perused carefully the documents filed in Court, I believe the issue essentially before this Court is whether this trial can and should proceed in the absence of documents and materials required by Rule 19 of the Rules to be placed before the Court, and if it cannot, who should bear the costs of the Petition so far.

I am satisfied that this application is properly before this Court. The fact that the Rules do not cover for this specific event, does not, and cannot leave a litigant without a remedy. Rules 18 and 19 of the Rules require certain parties to do certain things. If those things are not done, or cannot be done, the Court can certainly invoke its original and interest powers to make such orders as are necessary for the ends of justice, or to prevent abuse of the process of the Court.

I find also that this Election Petition is based on diverse breaches of the Election Offences Act and several irregularities and malpractices set out in the Petition of things and events that occurred both before the day of elections and on the day itself. Paragraphs 9 to 24 of the Petition outline allegations of irregularities before the polling day, while paragraphs 25 to 31 allege events that took place on the polling day.

Having read the Petition in its entirety, and having considered the nature of the documents that are missing and unavailable to this Court, I am satisfied with the contention of the Petitioner, supported by the 2nd Respondent, that this case cannot be heard and determined in a fair and just manner, in the absence of those vital documents required by law to be placed before this Court 48 hours before the hearing of the Petition. The materials that are unavailable have been outlined in the affidavit of Mr Mosomi. I agree with the Petitioner that in the absence of these materials, it is not possible for him to properly prosecute this Petition, as he would be unable to say with certainty whether the witnesses were voters in that Constituency; he would be unable to lead evidence about the alleged misconduct of the Returning Officer and about other irregularities. Likewise, the 2nd Respondent would not be able to examine witnesses regarding the incidents and events recorded in the missing documents, and whether the voters had indeed the right to vote in that Constituency.

Although Mr Kulecho has argued that the Petitioner does not seek a recount or scrutiny of votes, it is important to note that a recount is a remedy available, and for the Court to order so, in appropriate circumstances. In any event, votes (ballot papers) were not the only item lost. It is only one of the many items missing.

All in all, I am satisfied that the Petitioner has made out a fair case that this trial cannot proceed in the absence of the documents and materials lost, and I so Order.

With regard to costs, the blame here lies squarely with the 1st Respondent in whose custody these documents were placed, and because of whose negligence they disappeared. Accordingly, I order that the 1st Respondent bear the costs of all the parties to this Petition.

Dated and delivered at Nairobi this 6th day of November, 2006.

ALNASHIR VISRAM

JUDGE