



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 5 OF 2003

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
(CHAPTER 7, LAWS OF KENYA)**

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

1. Background, the Application and the Depositions

M/s. Ogeto, Kerongo & Company Advocates filed on behalf of the second respondent, on 30th April, 2003 a Notice of Motion brought under rule 5 of the National Assembly Elections Petition Rules, 1993, and Orders VI rule 8 and L rule 1 of the Civil Procedure Rules.

The prayers in the 2nd respondent's application are as follows:

- a. that the Petitioner/respondent furnish the 2nd respondent/applicant with particulars in this matter as per the annexed request for particulars;
- b. that the Petitioner/respondent do furnish and serve the 2nd respondent/applicant with the requested particulars within 7 days, failing which the Petition and the applicable paragraphs thereof, be struck out.

This application was premised on the grounds that the second respondent/applicant required the said particulars *to enable him to prepare his response to the petition*, and that the petition was vague and lacked material particulars.

The petitioner filed his *answer* to the 2nd respondent's request for particulars on 30th May, 2003. The 26-page answer addressed the request for particulars on a paragraph-by-paragraph basis focussed on the Petition para.3; para.9; para.10; para.11; para.12; para.13; para.14; para. 15; para.16; para.17; para.18; para.19; para. 20; para.21; para.22; para. 23; para.24; para.25; para.26; para.27; para.28; para.29; and para.31.

There was then a *Notice of Motion application by the 2nd respondent*, dated 5th June, 2003. This application was brought under rule 5 of the National Assembly Elections (Election Petition) Rules, and Order VI, rule 13 of the Civil Procedure Rules. The prayers were, firstly, that paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Petition be struck out; and secondly that the "*purported particulars in respect of the above paragraphs of the Petition, filed and served on 30th May, 2003 be struck out;*" and lastly, that the Petition as a whole be struck out.

The said application, which is the *subject of the instant Ruling*, is premised on the following grounds:

- i. that the petitioner has failed to comply with the Court order of 30th April, 2003;
- ii. that the purported particulars supplied are grossly insufficient, evasive and an abuse of Court process;
- iii. that the particulars supplied are scandalous, frivolous and vexatious;
- iv. that the particulars supplied may prejudice, embarrass or delay the fair trial of the petition;
- v. that, without the particulars requested, the petition filed is without merit and is an abuse of Court process;
- vi. that, the 2nd respondent is unable to prepare his defence for the petition.

The supporting affidavit of **James Njenga Karume**, the 2nd respondent, may be summarised as follows. He deposes that he believes the information from his advocates, that the petitioner had, on 30th April, 2003 been requested to provide particulars under rule 5 of the National Assembly and Presidential Elections (Election Petition) Rules, and that this request had been incorporated in orders made by the **Honourable Mr. Justice Aganyanya** on that same day, 30th April, 2003. The deponent averred that the answer to the request for particulars, dated 30th May, 2003 was "*evasive and not in compliance with the request and the Court Order of 30th April, 2003.*" The deponent did not, however, state the basis of his belief that the said answer was evasive and not in compliance with the Court order of 30th April, 2003.

The Court record shows no *submissions* to have been made in Court on 30th April, 2003; but it is recorded that **Mr. Ndambiri**, **Ms. Thongori** and **Mr. Ngaira** (for petitioner), **Mrs Sitati** (for 1st respondent) and

Mr. Monari and **Mr. Ogeto** (for 2nd respondent) had on that occasion *appeared* before the **Honourable Mr. Justice D.K.S. Aganyanya**. The relevant entry in the record is a short one: “*particulars to be supplied within 30 days from today*”. Compliance with that concise direction is what the 2nd respondent presents as *the basis for challenging the petition*.

Mr. Alfred Njeru Ndambiri, counsel for the petitioner, did on 24th June, 2003 swear a replying affidavit, the essence of which may be set out as follows. It is averred that the applicant’s Notice of Motion of 5th June, 2003 was not signed by the applicant or his Advocate; that the firm of Ogeto, Kerongo & Co. Advocates which filed and served the same was a stranger to the petition; and that only **Mr. E.N. Monari**, Advocate had been on record as counsel for the 2nd respondent. It is averred that on 30th May, 2003 the petitioner had duly filed and served on the 2nd respondent’s counsel on record, M/s. E.N. Monari & Co., the petitioner’s answer to the 2nd respondent’s request for particulars dated 30th May, 2003. The said answer, it is averred, is in full compliance with the Court order of 30th April, 2003 and also in accordance with the requirements of rule 5 of the National Assembly Elections (Election Petition) Rules. The deponent avers that the answer to the request for particulars, as filed and served, does not in any way prejudice or embarrass the fair trial of the petition.

On 24th June, 2003 the petitioner filed grounds of opposition to the 2nd respondent’s Notice of Motion of 5th June, 2003. He asserts thus:

- i. that, the application is incurably defective and does not lie in law;
- ii. that, the application has no merits;
- iii. that, the petitioner has answered the 2nd respondent’s request for particulars;
- iv. that, the petitioner has duly complied with the Court order of 30th April, 2003;
- v. that, the 2nd respondent’s Notice of Motion of 5th June, 2003 is premature and is intended to delay the trial and prosecution of the petition;
- vi. that, the 2nd respondent’s Notice of Motion of 5th June, 2003 is frivolous, vexatious and an abuse of the process of the Court.

2. Submissions for the 2nd Respondent [Applicant in Notice of Motion of 5th June, 2003]

Learned counsel for the 2nd respondent, **Mr. Monari** submitted that his client’s request for particulars, which had been comprehensive and specific, had not been answered in the manner specified; and that on this account he was seeking the striking out, in the first place, of certain particulars paragraphs, and in the second place, of the entire petition. Relying on the second respondent’s affidavit of 5th June, 2003, counsel submitted that the petitioner had not complied with the order made by **Mr. Justice Aganyanya** on 30th April, 2003, as the particulars supplied in response were “*evasive, insufficient, scandalous, frivolous, vexatious and an abuse of Court process.*” **Mr. Monari** urged that the particulars requested were essential for determining the merits of the petition itself; and the 2nd respondent could not properly conduct his case in the absence of the petitioner’s answers *in the manner in which the same had been requested*.

Learned counsel’s contention was that the order made by **Mr. Justice Aganyanya** on 30th April, 2003 was the full expression of the petitioner’s task in answering to the request for particulars; and as the petitioner had neither appealed against that order nor sought its review, his petition could not be allowed to proceed unless he provided particulars to the satisfaction of the 2nd respondent. Advancing that line of argument, **Mr. Monari** remarked: “*Court orders are not made in jest, but are intended to be complied with by both parties.*”

On the question of representation, **Mr. Monari** averred that M/s. Ogeto Kerongo & Co. Advocates had, on 14th April, 2003 notified their acceptance of instructions and thus, that firm properly came on the record. He submitted that a party was at liberty to choose any number of advocates to represent it, and thus actions taken by M/s. Ogeto Kerongo & Co. Advocates were not improper in any respect.

Counsel objected to the petitioner's answer to the request for particulars, with regard to paragraph 9 of the petition. In the said answer dated 30th May, 2003 and with regard to the said paragraph 9 of the petition, the petitioner thus states:

“The full particulars requested by the 2nd respondent as to diverse breaches of law cannot be provided as this would be in contravention of rule 5 of the National Assembly Elections (Election Petition) Rules and the petitioner is not required to plead law.”

This response, **Mr. Monari** contended, evades the request made. He contended that in like manner, particulars had not been supplied in respect of paragraphs 10 – 31 of the petition. He stated that under rule 5 of National Assembly Elections (Election Petition) Rules the Court may order responses to requests for particulars, for the purpose of preventing a surprise to one of the parties, where an application in that behalf is made. Counsel proceeded to submit that such an order had, indeed, been made by the Court on 30th April, 2003. He went on to urge: “*Therefore it cannot be said that such particulars cannot be provided.*”

Mr. Monari stated that one of the particulars sought was in respect of paragraph 10 of the petition which had referred to the “*political atmosphere in Kiambaa Constituency,*” and the petitioner had been asked to provide details of the “*highly charged political environment at election time.*” The response, which has been impugned in the instant application, was as follows:

“The particulars of the ‘highly charged political environment in the constituency’ are well known to the 2nd respondent and the facts are as stated in paragraph 10 of the petition. The 2nd respondent was, prior to his defection, a leading member of the Democratic Party. His defection to KANU received wide media coverage. There were several questions asked by the constituents about his defection.”

Counsel contended that the particulars thus supplied were “*mere jargon*”, and not particulars at all. So he urged that paragraph 10 of the petition be struck out.

Other objections of a similar kind, in relation to the petition, were raised as well. And then **Mr. Monari** resorted to authorities, one of these being ***Halsbury's Laws of England***, 4th ed., Vol.36 (1981), para. 59, where it is thus stated:

“If an order for service of particulars is made, the respondent to the application for the order may have to pay the costs of the application, and may be subjected to an order that unless the particulars are served within a specified time the action is to stand dismissed or the defence struck out, as the case may be, or that the allegation of which particulars were ordered should be struck out from the pleadings. The Court may refuse particulars in an appropriate case until after discovery. Further and better particulars of the defence should not normally be ordered before the hearing of the summons for directions, but an order may be made earlier if the defence is totally lacking in relevant detail.”

As I indicated earlier, the order made by the learned Judge on 30th April, 2003 was short and merely directed the petitioner to give particulars; it was not preceded by recorded representations of counsel; it did not make any reference at all to the *content of the particulars demanded*; it did not name any particular matters as the ones to feature in such answer as might be made by the petitioner. It was a blanket order: “*particulars to be supplied within 30 days from today.*”

Mr. Monari also sought to rely on ***Biwott v. Finance Institute Ltd & Another*** [1998] LLR 998 (HCK),

and on ***Bandari v. Bandari & Another*** [1995] LLR 4745 (HCK), and the relevant point is concisely stated in the judgement of ***Onyancha, J*** in the latter case:

“The defendants’ defence and counterclaim filed herein dated 28th July, 1995 be struck out for failure on the part of the defendant to comply with the order made by the Honourable Hayanga, J dated 24th October, 2000.”

Learned counsel proceeded to urge that the prayers in the 2nd respondent’s Notice of Motion of 5th June, 2003 be granted; that the various paragraphs, and in particular paragraph 9 of the petition, be struck out; and that the petition itself be struck out with costs.

3. Submissions for the Petitioner [Respondent in Notice of Motion of 5th June, 2003]

Learned counsel, ***Mr. Ndambiri***, recalled that at his request, a specific order had been made on 30th April, 2003 by ***Aganyanya, J*** regarding the representation of 2nd respondent. That order says:

“Replying affidavit to the application to be filed and served on Messrs Monari & Co. Advocates by 9th May, 2003.”

This was the basis of counsel’s objection to the 2nd respondent’s Notice of Motion of 5th June, 2003 being filed by M/s. Kerongo & Ogeto Advocates. Before ***Aganyanya, J*** the question raised was whether two different firms could represent a party in an election petition. ***Mr. Ndambiri*** submitted that M/s. Kerongo & Ogeto Advocates had had no authority to file documents relating to the 2nd respondent, or to prosecute any application filed by the 2nd respondent. Counsel stated further that ***Mr. Monari*** was moreover appearing on behalf of a different firm, M/s. Daly & Figgis Advocates, which had filed the notice of appointment of advocates, on 19th March, 2004. Hence, if ***E.N. Monari*** Advocate was on record for the 2nd respondent, then it would have been necessary to file a notice of change of advocates, which would indicate who was being replaced. Counsel submitted that M/s. Daly & Figgis Advocates had no right to prosecute the application or to respond to the petition. Counsel submitted that the application was defective because there was no notice from the Registrar showing who was representing the 2nd respondent.

On the question whether the petitioner had disobeyed a Court order, ***Mr. Ndambiri*** recalled the content of the order made by ***Aganyanya, J*** on 30th April, 2003: “*particulars to be supplied within 30 days from today.*” Counsel submitted that this order was *not specific on the type of particulars*; did not set any *parameters of the response* to the request for particulars; it was *not a consent order*; it was *not an order made on merits*, on the basis of the particulars sought by the 2nd respondent.

Counsel submitted that the petitioner had duly complied with the order made by ***Aganyanya, J*** on 30th April, 2003 – for he had provided answers within 30 days as ordered. Under rule 5 of the National Assembly Elections (Election Petition) Rules, counsel submitted, the petitioner had “*fully and comprehensively given particulars relating to the various paragraphs of the petition, and to the requests made by the 2nd respondent.*” Counsel stated that particulars had not been supplied in all cases, as, for some of the requests, “*it was impossible to give answers*”. ***Mr. Ndambiri*** submitted that it was not required under rule 5 of the National Assembly Elections (Election Petition) Rules that the petition itself should carry evidence, save that the Court may order such particulars as may be necessary. He submitted that the petitioner, by his answer of 30th May, 2003 had adequately complied with the Court’s order of 30th April, 2003; *each and every request had been particularised, and specific answers given*. For example, paragraph 1 of the request for particulars, which related to paragraph 9 of the petition, was elaborated in as many as 23 sentences; and the answer had specifically addressed all those sentences. And when those answers had been served on the 2nd respondent, there had been *no note or demand founded on any allegation that the answer was inadequate*. Counsel disputed the claim that the answers thus provided were in any manner elusive.

Mr. Ndambiri submitted that some of the items in the 2nd respondent's request for particulars appeared to be intended purely to cause delay in the trial of the petition (and he cited the request relating to paragraph 1 of the petition, in this respect). So segmented and numerous were such requests, counsel submitted, that they could only have been intended to frustrate and delay the trial process. Counsel considered such requests to be unreasonable, unrealistic and unnecessary, while a response to some of these requests would be tantamount to giving evidence. For some of the particulars requested, **Mr. Ndambiri** submitted, it was quite impossible to answer without beginning to adduce evidence in respect of the claims in the petition.

Learned counsel relied on the decision of this Court in *Mugo Mutothori v. Peter Gakure Kibe & Isaiah Mathenge*, E.P. No. 56 of 1993 to support his argument. The three-Judge Bench stated the Court's position as follows:

“We wish to recall that it is not the practice of election Courts to strike out petitions or parts thereof except in very clear instances. It is also not the practice of the election Courts to strike out particulars if they could be amended or if further and better particulars could be supplied. Indeed, the learned authors of Vol. 4 of the 3rd edition of *Halsbury's Laws of England* state as follows at page 279:

‘It is not usual to order particulars to be struck out before the trial merely on the ground of being insufficient. If the petitioner obtains further information by the time of the trial, he may with leave, supply the deficiencies in the particulars supplied; if not, the insufficient particulars will be struck out at the trial.’”

The Court in that case went on to outline what are the most material matters to which attention should be accorded, should an application be made by one party for the striking out of a petition on the ground that insufficient particulars have been supplied:

“The main issue in our view ...is whether this petition raises a reasonable cause of action in view of its prayers and/or as it makes no allegations of irregularities on counting, for which the petitioner could be entitled to the prayers sought. On looking at the provisions of rule 4(3) of the National Assembly and Presidential Elections (Election Petition) Rules, it is observed that all that is required is that the petition should end with the prayer such as that some specified person be declared duly elected or nominated or that the election be declared void.”

Mr. Ndambiri, on the strength of the *Mutothori* ruling, submitted thus: *“Answers were given, and the same were not challenged. Even if an order were issued that there be further particulars, this would not be good grounds for striking out the petition. Particulars can be given during the trial itself.”* To buttress the thrust of this submission, counsel cited the ruling of a three-Judge Bench of this Court in *Peter Ngunju Gakunga & Dedan Kiragu Kingori v. Frederick Maina & Joseph A. Gathenji*, E.P. No. 47 of 1993. The learned Judges there stated:

“In this application, we need not concern ourselves with breach of a Court order. The Court order was complied with and what we have to determine is whether or not we should in the circumstances of this case, allow further and better particulars, a matter which, in our view, is at the discretion of the Court, which discretion must of course be judicially exercised.”

They went on to remark:

“...the power vested in the Court of striking out a petition as a whole, thereby driving a party away from the seat of justice, is a draconian remedy. It should therefore be used sparingly and in plain cases.”

On the basis of the foregoing judicial opinions, **Mr. Ndambiri** urged upon the Court the position that every cause of action be regarded as a serious one, and that the inclination on the part of counsel to seek a striking out of a matter such as the present petition, be turned down. Counsel submitted that the petition in

hand raises a reasonable cause of action; and the paragraphs thereof in respect of which particulars had been requested, also raise serious causes of action. He contended that the answer to the request for particulars was sufficient, and did meet all requirements of the law. He urged that the 2nd respondent's application be dismissed.

4. Submissions for the 2nd Respondent in Response

Learned counsel, **Mr. Monari** submitted that the state of representation for the 2nd respondent was in every respect in order, and that M/s. Ogeto Kerongo & Co. Advocates were properly on record. He stated that the first notice of appointment from the 2nd respondent had been filed by M/s. Kilonzo & Co. Advocates on 3rd March, 2003; and then both E.N. Monari, Advocate and M/s. Ogeto, Kerongo & Co. Advocates had filed their acceptance of instructions on 15th April, 2003.

Mr. Monari then submitted that a substantive order of the Court, in respect of the request for particulars, has not been complied with and thus, the petitioner had deliberately disobeyed a Court order made by **Aganyanya, J** on 30th April, 2003.

5. Analysis and Final Orders

The reference-point in the 2nd respondent's Notice of Motion application of 5th June, 2003 was a 35-page document, bearing the title "*2nd respondent's request for particulars of petition*", and appended to the 2nd respondent's supporting affidavit attached to his earlier Notice of Motion of 30th April, 2003. This earlier Notice of Motion was a request for particulars; and the particulars themselves were elaborated as aforesaid.

The first item of the request for particulars carries 23 separate questions; the second carries seven; the third carries 60; the fourth carries 53; the fifth carries 12; the sixth carries 22; the seventh carries 37; the eighth carries 11; the ninth carries 69; the tenth carries 5; the eleventh carries 18; the twelfth carries 9; the thirteenth carries 8; the fourteenth carries 71; the fifteenth carries 48; the sixteenth carries 9; the seventeenth carries 7; the eighteenth carries 7; the nineteenth carries 9; the twentieth carries 9; the twenty-first carries one; the twenty-second carries 6.

This is, in my view, *an inordinately large number of questions*, coming to a total of 501 questions. Such a number of questions is, in my view, so large that *if each were to be answered in a perfect manner and its degree of perfection checked accurately by the Court, it would take a long time, probably much longer than it would take to hear the petition on the several issues of merit and to determine the whole matter*. It follows that *prolixity in the framing of particulars for response by a party, in this case the petitioner, cannot be allowed by the Court as it will tend to undermine the merits of the petition and the very reason why the petitioner has come before the Court in quest of justice. Any time such inordinate prolixity is apparent, the Court will subject the request for particulars to a strict test of justification; and unjustifiably lengthy requests for particulars will, in general, not be allowed, as their design cannot be anything but to create technical and artificial delays, and thus to defeat the ends of justice*.

A sampling of the numerous questions framed by the 2nd respondent shows, in my view, quite clearly that they are intended to be essentially abstract, and not amenable to accurate answers of any materiality to the trial process.

One requested particular, for instance, is as follows:

"State full particulars of the alleged diverse breaches of the Election Offences Act."

This is an inappropriate demand; for, what it is demanding can only be responded to by giving *the very evidence which will have to be produced at the hearing stage*.

Another question is:

“State the sections of the Act which were not complied with in the conduct of the parliamentary election in the constituency.”

Is the petitioner required to start making his legal submissions at this early stage? I would not accept a question of such a kind as a proper one in a request for particulars.

Yet another question:

“Give details of the ‘highly charged political environment in the constituency’ following the defection of the 2nd defendant.”

So broad is the matter in respect of which the question is asked; and so *dependent on individual opinion* is it, that it is not a proper question to pose to the petitioner, and to require that he do answer it upon pains of having his petition struck out. What is more, it is not clear what contribution the answer to such a question would make to the resolution of the gravamen raised by the petitioner.

Numerous other questions are equally unrelated to the resolution of the issues in the petition, and a large amount of them is purely academic and, in this mode, *capable of serving no dispute-resolution purpose*, and, clearly designed for no object other than delay and defeat of the purpose of the petition.

For the reasons above-stated, I would not accept the “2nd respondent’s request for particulars of petition” as a document that is in all respects helpful to this Court.

Considering that the 2nd respondent distinctly sets store by the fact that on 30th April, 2003 the Court had made an order that “*particulars to be supplied within 30 days from today*,” I will address the true nature and effect of such an order.

What kind of obligation did such an order place on the petitioner, considering that the particulars, many of which were essentially academic, had been set out in more than 500 questions, in a lengthy document of some 35 pages?

Where a Court order is clear and has a vital significance, such as where compliance or non-compliance therewith leads to proceeding with, or termination *in limine* of proceedings, the order *must have contemplated such a consequence, and must have addressed in some detail the nature of the application brought before the Court. The order must make specific reference to the prayers and must be clearly expressed on the mode of compliance required.* Such an order may not proceed purely *by reference* to whatever prayers the applicant may have made, simply ordaining compliance without examining the *character of those prayers.*

On those principles, I now hold that no binding obligation had been placed on the petitioner, by the general order of 30th April, 2003 to answer in any specific manner the 2nd respondent’s “*request for particulars of petition.*” In the generic manner in which the said order was expressed, it carried no specific obligation; and the 2nd respondent’s attempt to rely upon it to obtain a striking out of the petition, is in my view an inappropriate invocation of that order; an illegitimate resort to legal technicality; and an attempt to defeat the ends of justice.

I therefore refuse the 2nd respondent’s entire application by his Notice of Motion of 5th June, 2003 and mulct him in costs, in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the 2nd Respondent/Applicant: Mr. E.N. Monari, instructed by M/s. Daly & Figgis Advocates

**For the Petitioner/Respondent: Ms. Thongori, instructed by M/s. Judy Thongori & Co. Advocates;
Mr. A. Ndambiri, instructed by M/s. A.N. Ndambiri & Co. Advocates**

For the 1st Respondent: Mr. Kulecho, instructed by M/s. Kulecho & Co. Advocates