



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Election Petition 4 of 2003**

**KIGEN LUKA KIPKORIR.....PETITIONER**

**VERSUS**

**JOEL LANG'AT.....1<sup>ST</sup> RESPONDENT**

**CHELAITE ALICEN RONO.....2<sup>ND</sup> RESPONDENT**

**RULING**

This Ruling relates to a Notice of Preliminary objection. The grounds on which the objection are based are as follows:-

- That the Notice of Motion was filed contrary to the National Assembly and Presidential Elections Act, Civil Procedure Act in that:

- (i) *The Motion is supported by an affidavit.***
- (ii) *The documents that are said not to have been served are not stated and can only be stated by an Affidavit.***
- (iii) *The ground that the petition is a nullity is a question of fact.***
- (iv) *Ground 6 of the Notice of Motion is also a question of fact, which can only be addressed by way of an Affidavit.***
- (v) *The application is frivolous and will deny the Petitioner an opportunity to respond, it is meant to ambush the Petitioner.***
- (vi) *The 2<sup>nd</sup> Respondent has waited well over two years to file and argue the application.***
- (vii) *The Petition has been set down for hearing by consent of all the parties. This application is an afterthought.***
- (viii) *It does not contain the mandatory phrase:***

*“If any party served does not appear at the time and place above mentioned, such order will be made and proceedings taken as the Court may deem fit and expedient.”*

The application to which the Petitioner has raised a preliminary objection has been brought through Notice of Motion under Sec. 20 (1) (a) National Assembly and Presidential Elections Act, Cap 7, Rules 14 (1) and (2), National Assembly Elections (Election Petition) Rules, and all other enabling powers and provisions of the law. The said application seeks the following orders:

- (A) *That the Petition herein, dated 23<sup>rd</sup> January, 2003 and filed on 24<sup>th</sup> January, 2003 be struck out.*
- (B) *That the Petitioner do pay to the 2<sup>nd</sup> Respondent the costs of and incidental to the petition and this application.*

When dealing with Ground 1, Mr. Mutula Kilonzo Jnr. submitted that the same must be proved by way of evidence to show what documents that they are talking about. Apart from the above, he also submitted that if the 2<sup>nd</sup> Respondent was to challenge service of any particular document – that challenge can only be made by way of an affidavit.

As far as the second ground is concerned, Mr. Mutula Kilonzo Jnr. submitted that if the 2<sup>nd</sup> Respondent says that the cause of action has disappeared, then he should say by evidence so that the Petitioner may challenge him.

Besides the above, as far as the Ground 3 is concerned, he submitted that the same is a question of fact and **not** law and that the same must be supported by way of evidence through an affidavit. Similarly, he submitted that Ground 5 is a question of fact which they are able to challenge. He used the same argument to Ground 6 and also posed the question as to why the application had been filed a year after the Petition had been filed. He further added that in fact, the Petition had already been fixed for hearing by Hon. Justice Visram – though he later on became ill before he was transferred to Nairobi.

Apart from the above, Mr. Kilonzo Jnr. pointed out that the body of the application never complied with the mandatory provisions to include the following phrase:

*“That if any party served does not appear at the time and place above mentioned, such order will be made and proceedings taken as the Court may deem fit and expedient.*

In support of his submissions, Mr. Kilonzo Jnr. quoted the following authorities:

- *Karatina Garments Ltd. Vs. Nyanarua KLR pg. 94*
- *Assanand & Sons (Uganda) Ltd. Vs. East African Records Ltd. EALR pg. 360 and 364.*
- *Mayers & Another Vs. Akira Ranch Ltd. [1974] EALR pg. 169*
- *Martin Wainaina Kinyanjui Vs. Paul K. Muite Election Petition No. 23 of 1993*
- *DT Dobie Vs. Muchina & Another [1978] LLR 9 (CAK)*

On the other hand, Mr. Pheroze Nowrojee for the 2<sup>nd</sup> Respondent prayed for the Court’s leave to withdraw the application. In support of his submissions, Mr. Nowrojee quoted the case of :

***Mwai Kibaki Vs. Daniel Toroitich Moi.***

He further argued that if the Court grants them leave, then Sec. 22 of Cap 7 is **not** a bar.

On the other hand, Mr. Cheruiyot submitted that he had **no** objections to the application for leave to withdraw the application. However, he correctly conceded that the application was between the Petitioner and the 2<sup>nd</sup> Respondent.

This Court has carefully perused the submissions by the learned counsels. From the outset, it is apparent that the application dated 4<sup>th</sup> March, 2004 was filed more than a year after the Petition itself had been filed in Court. Secondly, it is apparent that the Notice of Preliminary objection was filed on 22<sup>nd</sup> February, 2005. Mr. Nowrojee himself conceded that he was served with the same on 1<sup>st</sup> March, 2005. It is also ***not*** in dispute that Mr. Cheruiyot was served on 28<sup>th</sup> February, 2005.

Over and above those obvious delays it is also crystal-clear that the incumbent MP for Rongai viz, Mrs. Chelaite Alicen Ronoh has already served half her term in Parliament. There are only 2 ½ years that are now remaining for her term to be completed. Since her election has been challenged by the Petitioner viz, Luka Kipkorir Kigen, her constituents have a right to know who their validly elected representative is. Of significance is that, Mr. Nowrojee never challenged ***nor*** controverted all the grounds that were raised by Mr. Kilonzo Jnr. In his own celebrated article viz,

*“The Defective Affidavit” Mr. Pheroze Nowrojee has gone into great details to show how a proper affidavit should be drawn. Unfortunately and ironically, he seems to have overlooked some of the requirements of a proper affidavit.*

Besides the above, it would ***not*** be fair, reasonable and prudent to allow the withdrawal of the application after the Petitioner’s counsel has completed his submissions.

In view of the above, I hereby strike out the application dated 4<sup>th</sup> March, 2004 since the same is frivolous and has ***no*** merits at all. This Court also concurs with the sentiments of Mr. Kilonzo Jnr. that the application was an afterthought given the delay in filing the same.

To facilitate the hearing of the Petition, I hereby fix the hearing of the same from 18<sup>th</sup> to 22<sup>nd</sup> July, 2005. The counsels on record are hereby directed to adjust their diaries accordingly. Costs to the Petitioner to be paid by 2<sup>nd</sup> Respondent.

**Those are the orders of the Court.**

**MUGA APONDI**

**JUDGE**

Ruling read, signed and delivered in open court in the presence of Mr. Maanzo for 2<sup>nd</sup> Respondent and for Mr. Cheruiyot for 1<sup>st</sup> Respondent, Mr. Kilonzo Jnr. for Petitioner.

**MUGA APONDI**

**JUDGE**

**22<sup>ND</sup> JUNE, 2005**