REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
NAKURU ELECTION PETITION NO.4 OF 2003

KIGEN LUKA KIPKORIR……..……PETITIONER

AND

JOEL LANGAT…….FIRST RESPONDENT

CHELAITE ALICEN RONOH……..SECOND RESPONDENT

R U L I N G

The Application has been brought through Notice of Motion. The same relies on the inherent powers of this Honourable Court, National Assembly & Presidential Elections Act, Cap.7. The Presidential & Parliamentary Elections Regulations, National Assembly Elections (Election Petition) Rules, and all other enabling powers and provisions of law. The application seeks the following main orders:-

- That the PETITION herein dated 23rd January, 2003 and filed on 24th January, 2003 be struck out.

- That the Petitioner do pay to the 2nd Respondent the costs of and incidental to the Petition and this application. The application is based on the following grounds:-

(1) The Petition is defective.

(2) The Petition is not against the candidate declared elected as the Member of the National Assembly for the Wrong Constituency in the Kenya Gazette.

(3) The Petition is a nullity

(4) All the matters set out in the documents on the record of this Honourable Court herein.

(5) The Petition is incompetent.

(6) There has been no compliance by the Petitioner with the provisions of the National Assembly and Presidential Elections Act, Cap 7 and the National Assembly Elections (Election Petition) Rules.

(7) All the matters set out in the supporting affidavit of the 2nd Respondent.

In his submissions, Mr. Pheroze Nowrojee explicitly stated that after the hearing of the Petition, this court has to send a certificate to the Speaker of the National Assembly as

provided by Section 30 of the National Assembly and Presidential Elections Act, Cap.7. The same states as follows:-

(1) "At the conclusion of the trial of a Petition, the Election Court shall determine the question raised in the Petition, and shall certify its determination to the Speaker.

(2) Upon receipt of a Certificate under this Section the Speaker shall give the necessary directions for altering or confirming the return, and shall issue any writs which, in pursuance of this Act, may be necessary."

Mr. Pheroze Nowrojee submitted that the Kenya Gazette dated 3rd January, 203, refers to the 2nd Respondent as Alicen Jematia Ronoh Chelaite.However, the Petition itself refers to M.P. for Rongai as Chelaite Alicen Ronoh.

According to Mr. Nowrojee, when the Court sends out a Certificate to the Speaker, the same must relate to the person set out in the Kenya Gazette. He further submitted that the person who has been set out in the Kenya Gazette is not the same person who has been mentioned in the Petition. He explained that a Petition must be related to the person who has been elected to the National Assembly and named in the Kenya Gazette.

Secondly, Mr. Nowrojee submitted that it is Section 44 of the Kenya Constitution that gives the High Court the jurisdiction to hear Election Petitions. In addition to the above, he submitted that Section 44(a) and (b) specifically refers to the person who was purportedly elected to the National Assembly. He concluded that argument by stating that once a person is not an MP – then the Petitioner has not invoked the jurisdiction of the Court.

Thirdly, he submitted that it is a bad pleading which cannot sustain its intended Prayers. Apart from the above, he further added that in Parliament any other person named otherwise would be a "stranger" in the House.

Besides the above, Mr. Nowrojee also submitted that the Petitioner had not complied with Rule 4 of the National Assembly and Presidential Elections Act, Cap.7, Laws of Kenya. The same requires that the Petitioner has to indicate when the election was held and the results therein. In addition to the above, Mr. Nowrojee submitted that the Petitioner must state whether he is entitled to petition under Section 44 of the Constitution. Mr. Nowrojee concluded his arguments by stating that the Petition is fatally bad, incurably misconceived and has been and is a nullity.

In support of his submissions, he relied on the following authorities:-

Stophen Kimani Gaker -vs- Francis Mwangi Kimani

Andrew Kimani Ngumba -vs- Paul Boit

James Dennis Akumu -vs- J.M. Duale

In the above case, the Court held that changing the name of a Polling Station is not a trivial matter.

Mwai Kibaki -vs- Daniel T. Moi

Devan Nair -vs- Yong Kuan Teik.

On the other hand, Mr. Cheruiyot for 1st Respondent submitted that his client is not opposed to the application nor supports the same.

However, Mr. Cheruiyot urged the Court to make an order for costs in favour of his client in the event that I strike out the Petition. He also informed the Court that his client was ready to proceed with the Petition and that he had already delivered all the Ballot papers to the Court. On his part, Mr. Mutula Kilonzo Junior for the Petitioner opposed the application and relied on the affidavit by his client. Apart from the above, he submitted when the court was determining whether the application has merit, I should question the conduct of the 2nd Respondent. He pointed out that in their replying affidavit they had stated that the 2nd Respondent had appointed an Advocate and appended a signature to a name. The same was re-printed and signed by the 2nd Respondent who never protested that the name never belonged to her. Besides the above, Mr. Kilonzo Junior also referred the court to an affidavit made by Mr. Maanzo on behalf of the 2nd Respondent.

In addition to the above, Mr. Kilonzo Junior lamented that the MP for Rongai had waited for over 2 years and waited for the Petition to be fixed for hearing twice and made them call a total of 32 witnesses before she turned around to claim that she had not been described properly.

According to Mr. Kilonzo Junior- no law has been quoted to demonstrate that the Petition:-

- cannot be heard

- that this Court has no jurisdiction to hear the Petition because that person is a stranger in the house.

To support his submissions, Mr. Kilonzo Junior quoted the following authorities:-

Alicen J.R. Chelaite -vs- David Manyara Njuki & 2 Others

Mohamed Jahazi -vs- Shariff Nassir Taib.

The Court held that:-

> **"Equity demands that a Petitioner assumes responsibility for his Petition by signing it."**

Applying the above to this case, he stated that Mrs. Chelaite had owned the process by signing the Notice of Appointment of Advocate. He further urged the Court to find that the MP Rongai had already consented to my jurisdiction to hear the case. He concluded by submitting that if I find them to be wrong then I should apply Rule 34 to deny the MP the costs.

On Section 44 of the Constitution, he submitted that the same provides the Court with the jurisdiction and procedure to be followed and that the substantive law was contained in Cap 7 of the Laws of Kenya.

This Court has carefully perused the applications and the eloquent submissions by both counsels. The Court appreciates the research that was conducted by both Counsels. Having stated the above, the Court will determine two crucial and significant issues. The first issue is whether the Petitioner complied with the law while filing the Petition. Secondly, whether the Petitioner had filed the Petition against the person who was duly elected as the MP for Rongai. At the outset it must be stated that it is the Constitution of Kenya that bestows the High Court with the power and jurisdiction to hear Election Petition. Specifically, Section 44 of the Constitution states as follows:-

> **(1) "The High Court shall have jurisdiction to hear and determine any question whether:-**

(a) A person has been validly elected as a Member of the National Assembly; or

(b) The seat in the National Assembly of a member thereof has become vacant.

(2) An application to the High Court for the determination of a question under subsection 1(a) may be made By ANY PERSON WHO WAS ENTITLED to vote in the election to which the application relates, or by the Attorney General."

Besides giving this Court the jurisdiction to hear the Petition, the above provision also allows any Voter in that particular Constituency or the Attorney General to file a Petition. In this particular Petition, the Petitioner introduced himself as one of candidates in the disputed election. In order to give meaning to the above provision, Parliament in its wisdom promulgated the National Assembly and Presidential Elections Act, Cap.7, Laws of Kenya. The said Act is supported by the National Assembly Elections (Election Petition) Rules. Basically, the Rules give the procedure and guidance on how the Act will be applied. Rule 4 states as follows:-

(1) "An election Petition shall:-

(a) State whether the Petitioner is entitled to petition under Section 44 of the Constitution; and

(b) State when the election was held and results of the election, and shall state briefly the facts and grounds relied on in support of the petition."

Unfortunately, when Mr. Nowrojee raised the issue contained in Rule 4 1(a) – Mr. Kilonzo Junior never responded specifically to the same.

The Court cannot hazard a guess on the same. Suffice to state the above explicitly uses the word "shall". My interpretation is that the said rule is mandatory and hence must be complied with.

Having read the petition carefully, it is apparent that the Counsel who drew the Petition overlooked the same. From the record, it is apparent that the Petitioner never made any application to amend the Petition to allow him to comply with the law. Since that application was not presented before me, I do not wish to involve myself in a futile academic exercise

Secondly, it is abundantly clear that the correct name of the Petitioner is Alicen Jematia Ronoh Chelaite as reflected in her ID. Card - Exhibit AJRC-2. The same name was also shawn in the Kenya Gazette dated 3rd January, 2003. Unfortunately the Petitioner describes her as Chelaite Alicen Ronoh. That was an elementary mistake that should have been corrected immediately that the results were proclaimed through the Kenya Gazette. Needless to say the importance of proper names of parties to any litigation cannot be over emphasized. All Kenyan lawyers are familiar with the tedious and expensive procedure of changing names through a Deed Poll. That is why the lawyers do not provide that service free of charge. The fact that the 2nd Respondent and Mr. Maanzo also made the same mistake does not absolve the Petitioner from correctly quoting the names of the incumbent MP. Assuming that was the only mistake that the Petitioner had made, then the Court would have weighed its options and considered whether it would have been fair and just to proceed with the Petition. Unfortunately, the Petitioner failed to comply with Rule 4(1)(a) of the National Assembly Elections (Election Petition) Rules, 1993, and also failed to describe his opponent or adversary correctly.

Though the Court was zealous and enthusiastic to her the Petition to its logical conclusion, I cannot overlook the above nor create lame excuses for any litigant. My role is purely to interpret the law and remain neutral up to the end without stooping into the arena of conflict. Though Mr. Nowrojee had invited me to send the Petition to interment and not the mogue or I.C.U., I decline to do so. In view of the above, the Petition dated 23rd January, 2003, is hereby struck out since the same is fatally defective.

Since costs follow the event, the Petitioner will bear the costs of the Petition and the application.

MUGA APONDI

JUDGE

28TH JULY, 2005

Ruling read signed and delivered in open Court in the

presence of Mr. Mongeri for Mr. Mutula Kilonzo Junior for Petitioner. Mr. Maazo for 2nd

Respondent and for Mr. Cheruiyot for 1st Respondent.

MUGA APONDI

JUDGE

28TH JULY, 2005.