



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Election Petition 1 of 2003

STEPHEN KINYANJUI MBURUPETITIONER

VERSUS

SIMON RUBIRU GAKUHA

ELECTORAL COMMISSIONER OF KENYA

WAIHAKA MWANGIRESPONDENTS

RULING

The petitioner filed a Petition herein seeking to have declared null and void the parliamentary election in the Kinangop Constituency on the grounds set out in this Ruling

The Petition came for hearing before Mr. Justice Juma who heard witnesses in support of the Petition. The Petitioner sought directions from the Learned Judge who delivered a Ruling on the 15.5.2003. In that ruling he struck out the request for particulars by the 1st and 2nd Respondents as they had not complied with a court order and filed the request for particulars within 14 days. During the course of the submission the Respondents sought an order that the Petition was incurably defective as some of the prayers were directed against the 2nd Respondent, the Electoral Commission. The

Respondents referred to prayer (f) in the Petition, which states: -

“that the said election of the second Respondent to the National Assembly he declared null and void”.

The Learned Judge pointed out that the reference to the 2nd Respondent was intended to refer to 3rd Respondent. In his ruling he stated: -

“It cannot be denied © and (d) of the Petition are defective as drawn in so far as they refer to the Electoral Commission instead of Waithaka Mwangi K, the 3rd Respondent. I have perused the Petition and I am satisfied that even without the two offending prayers, the Petition is capable of being sustained. It can stand without those two paragraph”

Later in his ruling he states: -

“The upshot is that the Respondents have raised serious issues in their application, issues, however, that cannot be determined at this stage for reasons given earlier”

He then declined to rule on the submission.

On Mr. Justice Juma's suspension the hearing of the Petition was referred to me by the Chief Justice.

It was agreed that the Petition should continue from the point where the Learned Justice has completed part of the hearing.

When they appeared before me counsel for the Petitioner informed the court that they had completed their case.

The 1st and 2nd Respondent filed a Notice of Motion on the 11.3.2005 seeking the following orders: -

- (1) **THAT** the Petition be struck out as the same is incurably defective;
- (2) **THAT** the said Petition be struck out as it does not disclose any or any reasonable cause;
- (3) **THAT** the Petitioners witnesses' affidavits are all incurably defective and the same should be expunged from the record.
- (4) **THAT** the Court Record purporting to be Examination in Chief of the Petitioners witnesses be expunged from the said record.
- (5) **THAT** the costs of this application be provided for.

The 3rd Respondent also filed a Notice of Motion on the 15.3.2005 seeking the same relief.

Mr. Muhoro for the 2nd and 3rd Respondents referred to section 44 (1) of the Constitution, which gives the High Court jurisdiction to determine whether a person has been validly elected and as the Petition in prayer (f) above referred to the 2nd Respondent which is the Electoral Commission of Kenya this is not a person within the meaning of section 44 of course as Mr. Justice Juma pointed out the reference to the 3rd Respondent was meant to be reference to the 2nd Respondent. The question is does the court have power to amend the Petition or is it stuck in stone.

Mr. Muhoro also submitted that the Petitioner had exhausted his remedies. This is because the issue of the recounting of the votes had been carried out and the alternative prayers in the Petition have been overtaken by events.

The prayers in the Petition are as follows: -

- (a) That it be ordered that there be a scrutiny of the votes recorded as having been cast in the Civic, Parliamentary and Presidential elections in the Constituency; (b) That it be ordered that there be a scrutiny of the rejected and spoilt ballot papers in the Civic, Parliamentary and Presidential elections in the constituency;
- (c) that it be ordered that there be a recount of the ballot papers cast at the elections in the Constituency and in case your Petitioner is then found to have received the highest number of votes he be declared duly nominated and elected as the member of the National Assembly in place of the Second Respondent;
- (d) that there be a scrutiny of the Forms 16A submitted by the various Presiding Officers in the Constituency to the First and Second Respondents to determine their validity or otherwise;
- (e) that alternatively the said Parliamentary elections in Kinangop Constituency be determined and declared null and void;
- (f) that the said election of second Respondents to the National Assembly be declared null and void;

(g) that the Respondents be condemned to pay your Petitioner's costs of this Petition and matters incidental thereto;

(h) that such other or further orders be made as this Honorable Court may deem just.

As prayer (e) is in the alternative and prayer (f) cannot be granted there is nothing also for the court to determine.

The last submission by Mr. Muhoro was that the affidavit in support of the Petitioner's contention that there had been irregularities in the election process was defective as they failed to state by whom they were drawn. During the course of hearing of the evidence the advocates for the Respondents objected to the affidavits being put in evidence on the grounds that the same did not state by whom they were drawn in contravention of section 34 and 35 of the Advocates Act.

Mr. Justice Juma dealt with this question on objection being raised by the Respondent on 7.8.2003 in which he held that the failure to state by whom the affidavit was drawn was an irregularity in the form and the court could receive such affidavit in evidence.

In my view this last objection cannot be sustained, as the matter having been determined by Mr. Justice Juma their only remedy is to appeal against his decision.

Turning to the other matters raised namely whether the undoubted mistake in prayer (f) in which reference is made to the 2nd Respondent can be overlooked or amended.

National Assembly and Presidential Elections (Cap 7) (The Act) provides in section 20. (1) (a)

That A Petition: -

(a) to question the validity of an election, shall be presented and served within twenty-eight days after the date of publication of the result of the election in the Gazette

The Act further provides in section 20 (2)

A petition presented in due time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented"

The Application to amend must therefore be made within 28 days as specified.

I note that even now no application has been made to amend prayer (c) and (d) of the Petition.

In **Stephen Kimani Gakenya versus Francis Mwangi Kimani & Two others. Election Petition No.1 of 1998** Mr. Justice Mwera dealt with a Notice of Motion to amend the Petition. In that case he held that the only provision in the Act dealing with an amendment is section 20(2) referred to above and in page 226 he stated: -

"Lastly on amending an election petition generally, this court is of the mind that the same is not allowed by the Act or the Election Petition Rules. The only amendment allowed, albeit in a limited way falls under Section 20 (2) of the Act and that has been disposed of"

I would with respect agree with the Learned Judge and hold that in this case as no application to amend the Petition was made within the 28 days period stipulated the Petition must stand as it is drawn.

The result is that as Mr. Muhoro and Mr. Cerere submitted, "no person" is referred to in prayer (f) and as such it cannot be granted."

The prayers were granted in terms prayer (a) (b) (c) and (d).

Prayer (c) is a prayer in the alternative. Mr. Muhoro and Mr. Cerere submitted that this prayer was defective as it did not refer to a person and was not therefore a matter which could be raised under the provision of the constitution set out above.

Although I think it might have been possible to raise as an issue in a Petition that a named person had not been elected due to election irregularities and offences the prayer as drawn in the Petition does not meet the requirements of the Constitution.

I am therefore of the view that the prayers of the Petition which are capable of being granted have now been spent and as such I dismiss this Petition with costs to the Respondent.

Dated and delivered at Nairobi this 13th .day of July 2005

P.J. RANSLEY

JUDGE