



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

What was to be heard before me on 2nd November, 2005 was an application by Notice of Motion, by the 2nd respondent in this petition,

dated 21st October, 2005, filed on 24th October, 2005 and brought under s.3A of the Civil Procedure Act (Cap.21). Straightaway it can be said that the application sought the *exercise of the Court's discretion* in certain matters which need not be set out here, in the light of the submissions confined to preliminaries which took the attention of the Court, on that occasion.

Appearing for the petitioner were *Ms. Thongori* and *Mr. Ndambiri*; for the 1st respondent, *Mr. Kulecho*; and for the 2nd respondent/applicant, *Mr. Ngatia* and *Mr. Monari*.

It was not possible for *Mr. Ngatia* whose firm had filed the application aforesaid, to present the same, as learned counsel, *Mr. Ndambiri* had preliminary objections to raise. To this objection, learned counsel *Mr. Ngatia* submitted that it should be treated as general ***grounds of opposition***, rather than a ***preliminary objection*** which would hold back the substantive hearing of the 2nd defendant's Notice of Motion. This submission was contested by *Mr. Ndambiri* who contended that the application amounted in the first place to an abuse of the process of the Court, and thus it was important that the preliminary objection be heard and decided upon at the very beginning. I gave a ruling on this preliminary issue as follows:

“The Notice of Motion dated 21st October, 2005 has been filed by M/s. Ngatia & Associates, in the name of the 2nd respondent in the petition herein. To that Notice of Motion counsel for the petitioner, on 31st October, 2005 filed a notice of preliminary objection. While *Mr. Ngatia* urges that that notice of preliminary objection be taken together with the Notice of Motion, *Mr. Ndambiri* urges that the notice is concerned with preliminary legal issues which would dispose of the Notice of Motion *in limine* — and therefore it should be taken first.

“I now direct that the preliminary objection be presented at the very beginning — at the end of which I will give directions regarding the Notice of Motion.”

The instant ruling is on the said preliminary objection.

Mr. Ndambiri stated that his client's application was based on three grounds — all of legal consequence: firstly, that the application was incurably defective; secondly, that the said application had been filed by advocates who were not on record at the time of filing; and thirdly, that the application offends the law relating to elections.

Learned counsel contended that the 2nd respondent had appointed the firms of E.N. Monari, Advocate, and also M/s. Ogeto Kerongo & Co. Advocates by the notice of appointment dated 3rd March, 2003 and there had been no changes in representation, thereafter. Yet another firm, M/s. Daly & Figgis Advocates had also filed a notice of appointment, and this was still on the Court file. Then on 28th October, 2005 M/s. Ngatia & Associates also filed a notice of appointment, a notice which was dated 21st October, 2005. This notice was copied to M/s. A.N. Ndambiri & Co. Advocates; M/s. Kulecho & Co. Advocates; E.N. Monari Advocate; and M/s. Ogeto, Kerongo & Co. Advocates. The notice of appointment by M/s. Ngatia & Associates was filed (28th October, 2005) long after the filing of the 2nd defendant's Notice of Motion (24th October, 2005). On this account, it was contended, M/s. Ngatia & Associates were strangers to the proceedings and could not properly have filed the Notice of Motion which was, consequently, an incompetent application before the Court.

Mr. Ndambiri noted that the procedure for the appointment of advocates, in respect of election petitions, was provided for in the National Assembly Elections (Election Petition) Rules, by rule No. 10 which states:

“A person elected may at any time after he is elected send or leave at the office of the Registrar a notice in writing signed by him or on his behalf, appointing an advocate to act as his advocate in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address in Kenya at which notices addressed to him may be left or if no such writing is left all notices and proceedings may be given or served by leaving them at the office of the Registrar.”

Learned counsel submitted that while the applicant's Notice of Motion had been brought under s.3A of the Civil Procedure Act (Cap.21), that provision was not concerned with the issue of appointment of advocates. He contended that election petition regulations make no provision for the appointment of

another advocate. The contention in this regard, as I see it, is that what the firm of Ngatia & Associates Advocates had done by filing a *notice of change of advocates* on 24th October, 2005 was a nullity in law: because such change and service thereof is only known under Order III rules 6 and 7 of the Civil Procedure Rules and would be of no application under the National Assembly Elections (Election Petition) Rules which have their own provision regarding the *appointment of an advocate*.

Learned counsel, **Mr. Ngatia** contested the submission that his firm is a stranger in the petition proceedings and, therefore, he had no *locus standi* to move the Court by his Notice of Motion of 21st October, 2005.

Mr. Ngatia submitted that what was presented as a preliminary objection herein was not a true *preliminary objection*. The parameters of a preliminary objection had been defined by the former East African Court of Appeal, in *Mukisa Biscuit Manufacturing Co. Ltd. v. West end Distributors Ltd* [1969] E.A. 696. In the words of *Newbold, P* in that case (p.701):

“The first matter [in respect of which I would state the law] relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.”

This was in aid of *factual* questions which, counsel submitted, had to be asked in order to arrive at the object sought in what had been presented as a preliminary objection. The questions were: “Is **Mr. Ngatia** a stranger to these proceedings? Did he have authority from the 2nd respondent, to file the application?” Because these factual matters had to be settled, counsel submitted, the setting did not exist for raising a *preliminary objection* — a pure point of law.

To answer those questions, counsel submitted, it was necessary to *take evidence*; and his evidence was the *supporting affidavit* of his client, with its several annexures. One of the annexures was a letter from M/s. Ngatia & Associates Advocates to the High Court’s Deputy Registrar, dated 29th September, 2005. The first paragraph in this letter, which was copied to M/s. A.N. Ndambiri & Co. Advocates; M/s. Kulecho & Co. Advocates; M/s. Daly & Figgis Advocates, and to the 2nd respondent, thus read: “We act for the 2nd respondent and have been informed that a request has been made for the mention of this petition for the purpose of taking hearing dates.”

Mr. Ngatia submitted that by his firm’s letter to the Deputy Registrar of 29th September, 2005 he had duly *given notice* that he was acting for the 2nd respondent, and that this was consistent with the *notice requirement under rule 10 of the National Assembly Elections (Election Petition) Rules*. He noted that his representation of the 2nd respondent was not new, or hidden from the other parties or from the Court, for on 18th July, 2005 he had appeared in Court, along with **Mr. Monari**, representing the 2nd respondent. The July appearance in Court, **Mr. Ngatia** remarked, was long *before* the Notice of Motion of 21st October, 2005 was filed. **Mr. Ngatia** recalled that he had made a contribution, at the 18th July, 2005 appearance in Court, about delay in the progress of the petition. In his words, on that occasion: “I had made a request for an early mention date.” The record of facts, **Mr. Ngatia** submitted, showed that “It cannot be correct to say I am a stranger to these proceedings.”

Learned counsel, **Mr. Ngatia**, cited the High Court’s decision (**Ibrahim, J**) in a judicial review matter, **David Githanda Wachira v. The Principal Magistrate, Milimani Commercial Courts**, Misc. Case No. 848 of 2005, in aid of the contention that his entitlement to file the Notice of Motion of 21st October, 2005 essentially rested upon the *fact and right of instruction* by the 2nd respondent in the petition. He cited the following passage in that ruling:

“At the hearing of a Notice of Motion, an advocate who is duly instructed by an affected person may file a replying affidavit on behalf of his client and usually such affidavit is required to be endorsed with the name and address of [the person] who filed it. Once this is done, this would be a reasonable notification of the advocate or law firm instructed to act for the affected person or party...”

Mr. Ngatia submitted that under rule 10 of the National Assembly Elections (Election Petition) Rules, it was not required that an advocate should file a notice of appointment in the manner required under the *Civil Procedure Rules*. He urged that his Notice of Motion of 21st October, 2005 was in compliance with the terms of s.35 of the Advocates Act (Cap.16) and was duly endorsed with his firm name.

Learned counsel cited in support of his Notice of Motion of 21st October, 2005, the provision of s.23(1) (d) of the National Assembly and Presidential Elections Act (Cap.7): “*the election court shall decide all matters that come before it without undue regard to technicalities.*” He urged that no legal impediments should be raised as against the Notice of Motion, and that the non-filing or belated filing of the notice of appointment should not invalidate the appointment.

In his rejoinder, learned counsel *Mr. Ndambiri*, urged that the judicial review decision *in David Githanda Wachira v. The Principal Magistrate, Milimani Commercial Courts*, Misc. Case No. 848 of 2005 had little relevance to the instant preliminary objection, because notice of appointment of advocate was not the issue in hand; what is of direct concern is the filing of an application by *an advocate who is not on record*. Besides, learned counsel urged that owing to the *sui generis* character of judicial review, its precedents were ill-adapted to a matter such as the instant one. To illustrate this point, counsel highlighted a passage in the *David Githanda Wachira* case:

“There are several decisions of the Court of Appeal and [of] this Court which have held that strictly...Order LIII [relates to] a special jurisdiction which is neither civil or criminal and that the Civil Procedure Rules do not apply to it. This is despite the fact that there are certain provisions of the Civil Procedure Rules and in particular the rationale and principles behind them which cannot be wholly ignored in judicial review proceedings, e.g. Order XVIII relating to affidavits.”

Learned counsel similarly perceived a parallel *sui generis* element in the electoral law. He urged: “In this petition, there is an advocate appointed and duly approved; so it is clear who is on record.”

Mr. Ndambiri submitted that his objection to *Mr. Ngatia’s* role in representation in the election petition goes to the root of the proceedings, and was not just a *technicality* in the manner contemplated in the National Assembly and Presidential Elections Act (Cap.7), s.23(1)(d). He urged that the applicant’s Notice of Motion of 21st October, 2005 be struck out with costs.

Does rule 10 of the National Assembly Elections (Election Petition) Rules ordain *a specific mode of appointing advocates*, which must be observed in detail? Does that rule set up a special advocate-appointment regime which must be strictly observed?

I have considered the provision in the said rule 10, and I think it carries no *structured regime of law and practice* as such; and that what it requires is that the Registrar’s office be recognised as the central office of record-keeping for the state of representation of parties involved in electoral litigation. From this conclusion it follows that the lodgement of representation information with the Registrar’s office need not comply with any *check-list of processes*, and it is enough that the relevant information has been supplied to the Registrar.

Is it the case that when once an electoral litigant has appointed an advocate through notification to the Registrar, it is *not possible to make a change*? Although one would have got that impression from the submissions of learned counsel for the petitioner, I think such cannot be the case. Analogies can be drawn with hypothetical cases: suppose the duly appointed advocate of an election petitioner becomes incurably ill, or dies, is it tenable in law or principle that the petitioner could not make a substitute appointment? If

he could not, that would be unfair, and would defeat the whole notion of electoral justice. From that position it is, in my view, entirely logical to infer that even where the election petitioner is *dissatisfied with his duly appointed advocate* he could make a change, and notify the appointment of a different one.

As already noted, **Mr. Ngatia** of M/s. Ngatia & Associates Advocates, had first appeared as part of the team of advocates for the 2nd respondent in the petition on 18th July, 2005 and had addressed the Court *in favour of expedited hearing of the petition* proceedings. No objection had at that stage been made to his representation of the 2nd respondent. And he then, on 29th September, 2005 wrote a formal letter to the Deputy Registrar in which he, **Mr. Ngatia**, stated clearly that he was *representing the 2nd respondent*. His notice of appointment dated 21st October, 2005 and filed on 28th October, 2005 and his Notice of Change of Advocates filed on 24th October, 2005 would, I think, amount to effective notice to the Registrar that Ngatia & Associates Advocates were now the duly appointed advocates for the 2nd respondent.

It is correct as a matter of fact, and as learned counsel **Mr. Ndambiri** has noted, that the 2nd defendant's Notice of Motion now due for hearing, was filed by M/s. Ngatia & Associates Advocates on 24th October, 2005 before the filing of the notice of appointment on 28th of October, 2005. But on file is also a notice of change of advocates filed on 24th October, 2005.

If one looks mainly at the substance of the representation process herein, I think it can be said that the representation of the 2nd respondent by M/s. Ngatia & Associates had now gained *sufficient notoriety* in the Registrar's office to deserve treatment as *notice* to the Registrar, of the fact. I would, in the spirit of the National Assembly and Presidential Elections Act (Cap.7), s.23(1)(d), consider that it is only proper that any serious applications made under the umbrella of the election petition, be heard and disposed of *on substance*.

I would, therefore, disallow the petitioner's preliminary objection, with costs to the 2nd respondent, and have the 2nd respondent's Notice of Motion of 21st October, 2005 which is in its appearance a short application, disposed of without delay, to pave the way for the hearing of the petition.

Orders accordingly.

DATED and DELIVERED at Nairobi this 11th day of November, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

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

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

For the 2nd Respondent: Mr. Ngatia, instructed by M/s. Ngatia & Associates Advocates