



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

ELECTION PETITION NO 1 OF 2003

BENJAMIN KIPCHUMBA BETT PETITIONER

VERSUS

ELECTORAL COMMISSION OF KENYA

JARED CHEBON

HENRY KIPRONO KOSGEY..... RESPONDENT

RULING

Benjamin Kipchumba Bett (the petitioner) is challenging the election of Henry Kiprono Kosgey (3rd respondent) on the 27th December 2002 as a Member of Parliament representing Tinderet Parliamentary Constituency (hereinafter called “the Constituency”). According to the petition filed on the 28th January 2003, the petitioner polled 8,416 votes while the 3rd respondent polled 19,290 votes.

The petitioner has averred in the said petition that the 3rd respondent should not have been declared and returned as elected because of several grounds stated therein, but more particularly that the said election was not conducted and controlled by The Electoral Commission of Kenya (1st respondent) and Jared Chebon (2nd respondent) in accordance with the provisions of the Constitution of Kenya, The National Assembly and Presidential Elections Act and the Rules and Regulations thereunder made or any law relating to such election nor in accordance with the principles of natural justice and fair play; that divers breaches of Election Offences Act were committed by the Respondents and other persons on their behalf and that, by reason of the various breaches, violations and irregularities, the result of the election was gravely and seriously affected to the detriment of the petitioner.

The petitioner is represented in these proceedings by M/s Khamati, Akhaabi & Co Advocates while the first and second respondents are represented by Mr G K Mukele and Mr Kihara Mutu whose brief has been held throughout so far by the law firm of M/s Onyinkwa & Co Advocates of Eldoret. Mr A G N Kamau advocate represents the third respondent.

On the 20th February 2003 the petitioner filed a Notice of Motion under Section 20(1)(a) of the National Assembly and Presidential Elections Act and Rules Chapter 7, the Constitution of Kenya and all other enabling procedures and provisions of the law, seeking an order that the third respondent be deemed to have been duly and properly served as required under section 20(1)(a) of the Act or in the alternative extension of time be granted to enable personal service of this petition to the third respondent.

That motion was fixed for hearing before me on the 28th March 2003. When it was called out for hearing on that 28th March 2003 Mr A G N Kamau informed the court that he had filed a Notice to raise a preliminary objection on points of law which he desired to be disposed off. Counsels for the petitioner and for the first and second respondents not, objecting, the said preliminary objection was heard. This ruling relates only to that preliminary objection.

This Notice of preliminary objection reads as follows:-

“Take notice that the third respondent shall on the 28th March 2003 raise a preliminary objection in these proceedings on the following points of Law:-

(a) The petition having not been signed by the petitioner offends the provisions of rule 4(3) of the National Assembly and Presidential (Election Petition Rules) 1993 which omission is fatal to the validity of the petition.

(b) The Notice of Appointment of Advocate having not been signed by the petitioner offends the provisions of rule 9 of the National Assembly and Presidential Election (Election Petition Rules) 1993 which renders the petition incurably defective.

(c) The affidavit in support of the application before the Court is not signed by the petitioner with consequence that there is no petition before this court”.

Mr A G N Kamau, in his submissions, took up the point that the signatures appearing in the petition, Notice of Appointment of Advocates and in the

Affidavit in support of the Notice of Motion filed on 20th February 2003, purporting to have been signed by the petitioner are not by the same hand and cannot be said to be the petitioner’s signatures. He submitted that they are three different signatures on each of these distinct documents or instruments, none of which is that of the petitioner.

Mr Kamau invited the Court to look at the said signatures, which the

Court obliged, and he further invited the Court to make a finding of fact that they are different.

In his response Mr Akhaabi advocate for the petitioner conceded that the signatures in the petition, Notice of Appointment of Advocates and in the Affidavit supporting the Motion filed on 20th February 2003 are indeed different.

Upon that concession from the petitioner through his advocate, I do make a finding of fact that the signature appearing in the petition, Notice of Appointment of Advocates, and in the Affidavit supporting the motion filed on 20th February 2003, purporting to have been made by the petitioner, are different.

The issue for my determination is whether these three signatures were not made by the petitioner, as strongly submitted by the third respondent through his advocate, or are by his hand as submitted by his advocate.

The law on this matter is now well settled. In an election petition the mandatory requirement that a petitioner shall personally sign a petition is based on the ground that a petitioner must take personal responsibility for all the averments contained in the petition. This was the principle of law embodied in the Court of Appeal (Nairobi) Civil Appeal No 176 of 1993

Daniel Toroitich arap Moi vs Kenneth Stanley Matiba, Electoral Commission and Attorney General in which Gachuhi JA (as he then was) observed at page 14 typed copy):

“The petition contains allegations of serious nature and defamatory statements which only the petitioner should remove any doubt that may be expressed on them by the petitioner’s signature as

having made them himself and nobody else. To stress this point further these authorities impose a duty on the objector himself to signify his objection by his personal signature and not by a signature of an agent. The knowledge of the matters objected to is of personal nature. The matters contained in the petition challenging the validity of the election of the appellant are of a personal nature and it is only the petitioner who can vouch for their truth and it is Bett v Electoral Commission of Kenya & 2 others (Etyang J) personal duty on the petitioner to prove them”.

Mr A G N Kamau advocate submits that, to find a petition and documents annexed thereto or filed bearing three completely different signatures purporting to be that of a petitioner, against the requirement that a petitioner must personally sign his petition, can only mean that these signatures are forged or that the petitioner did not sign them or the petitioner is not a party to these proceedings.

Mr Akhaabi's response is that the person shown to have signed the petition is the petitioner: that he is the same person shown to have signed the Notice of Appointment of advocates and the affidavit in support of the motion dated 20th February 2003. He further submitted that the respondent's are merely having a suspicion that these signatures are not by one hand of the petitioner but that an individual, and the petitioner is such an individual, may have several different signatures and will be perfectly entitled to sign differently on any occasion or at any instance that pleases him. He submitted that there must be proof that the petitioner did not sign these documents, suspicion alone is not enough, and that proof must be forthcoming from the respondents. He submitted that there is no such proof.

With regard to rules 4(3) and 9 of the National Assembly Elections (Election Petition) Rules, Mr Akhaabi has submitted that there is no legal requirement or provision that the signature of the petitioner in the petition must be the same in form and design with the signature in the Notice of Appointment of advocates.

I have given due consideration to the above matters. In my view there is no legal requirement that a petitioner ought to sign a petition, and a Notice of Appointment of advocates as required under the National Assembly Elections (Election Petition) rules 4 and 9 thereof in a particular manner. To give such interpretation to these two rules would require every intending petitioner to supply his specimen signatures to the Registrar of the High Court for scrutiny and safe keeping for purposes of enforcement of such a rule.

Secondly, the petitioner has conceded that he signed the petition, the Notice of Appointment of advocates and the Affidavit in support of his motion.

He thus has accepted personal responsibility for the averments contained in the petition.

Thirdly, the respondents have not placed before me any other proof that the petitioner did not sign this petition and the Notice of Motion of advocates.

Fourthly, and pursuant to the provisions of section 23(1)(d) of the National Assembly and Presidential Elections Act cap 7 Laws of Kenya, an election court shall decide all matters that come before it without undue regard to technicalities.

For the above reasons this preliminary objection is overruled and dismissed with costs. I direct the parties to fix the Notice of Motion dated 10th February 2003 and filed on 20th February 2003 for hearing and disposal.

It is so ordered.

Dated and delivered at Eldoret this 4th day of April, 2003

A.G.A ETYANG

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JUDGE