



- 1) **Election Petition**
- 2) **National Assembly**
- 3) **FIFA constituency**
- 4) **Application by 1st Respondent**

Notice of Motion dated the 21st June 2003 and filed on the 23.06.2003.

- I) **Stay of the hearing of the election petition fixed for 1.14.7.03**
- II) **Stay of all proceeding to the election petition pending the hearing and determination of the appeal filed in the court of appeal against ruling of 27 May 2003 on service.**
- 5) **Whether the applicant 1st respondent is stopped from seeking the same prayers of stay when they opposed similar prayers in another election petition.**

6) **Cases Law:-**

a) **Mwai Kibaki v Daniel Torotich Arap Moi**

CA 172/99

b) **Ruling in Lorna Chepkemoi Laboso Vs Anthony Kipkoske Kimeto & 2 Others**

Nakuru EP2/2003,

Oppondi,j.

7) **Statute Law**

a) **The Natural assembly and Presidential Act Cap.7.**

8) **Advocates:**

Applicant/1st respondent

-E.N. Monari

-Mutula Kilonzo Jr

-K.Ogeto – absent

Respondent/Petitioner

-P.M. Wamae

- S. Adere

-A. Nyaencha.

2nd and 3rd Respondent.

-Electoral Commission

- J. Waweru

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION NO. 2 OF 2003

IN THE MATTER OF THE NATIONAL ASSEMBLY AND

PRESIDENTIAL ELECTION ACT CAP 7 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTION FOR FAFI CONSTITUENCY

THE PETITION OF ELIAS BARE SHILL

BETWEEN

ELIAS BARE SHILL.....PETITIONER

AND

ADEN SUGOW AHMED.....1ST RESPONDENT

JAMA HASSAN GINNI

(RETURNING OFFICER FAFI CONSTITUENCY).....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

RULING

ON THE ISSUE OF STAY OF PROCEEDINGS

1) Brief Background

An Election Petition was filed contesting the election of the 1st respondent to the FAFI seat by the petitioner. The 1st respondent at once raised the issue that he was indeed never served. Following the authority laid down in the case of Mwai Kibaki V Daniel Arap Moi CA 127/99 that in an election petition service on a respondent must be personal, the 1st respondent applied by way of an application dated 25th March 2003 seeking for the whole petition to be struck out on the grounds that the 1st respondent was

never served personally.

After this court cross-examined the deponents including the process server and after hearing submission of the parties I held that service upon the 1st respondent was indeed effected. The application of 25.3.03 was duly dismissed on the 27.5.03.

The 1st resident being dissatisfied with the ruling of this court filed a notice of appeal and later filed an appeal to the Court of Appeal on the 20.6.03 being CA 141/03.

In the meantime the date for hearing the main Election Appeal was fast approaching. These dates were taken by consent of the parties on the 24th day of March 2003. The hearing was set for the 1st of July 2003 to the 14th of July, 2003.

By an application dated the 23.6.03 under certificate of urgency the 1st respondent prayed for orders of the hearing of the Election Petition and any subsequent proceedings stayed pending the hearing of the appeal lodged in the court of appeal. It is this application that it is the subject matter of this ruling.

2) The main application

dated the 23.6.03

The notice of motion sought orders inter alia:-

- "a) That the hearing of the High Court Election Petition number 2 of 2003 fixed for the 1st to 14th of July 2003 be stayed pending the determination of the appeal.
- b) That all proceeding relative to High Court Election Petition number 2 of 2003 be stayed pending the hearing and determination of the appeal."

The applicant/1st respondents arguments is that his appeal would be rendered nugatory if the hearing of the Election Petition is not stayed. That in the interest of Justice the issue of service requires to be determined conclusively before any hearing commences.

The advocate for the Electoral Commission brought out the point that before a hearing date commences, there requires to be a gazette notice in the gazette papers, that she had just filed letter and further particulars; that she supported the submission of the stay of proceeding submitted by the 1st respondent/applicant.

In reply to these submissions, the respondent/petitioner objected to the application for stay. They recently obtained a ruling from the High Court of Kenya at Nakuru being:-

Lorna Chepkemai Laboso

V

Anthony Kipkoske Kimeto & 2 Others

EP2/2003

Opondi, J.

The facts leading to the ruling in question was not clearly given to me as the 1st respondent objected to

this ruling being referred. What it is seen from the little given is that the petitioner in the above case sought a stay of some sort. The respondent objected to this stay pending the hearing of some appeal matters.

What is interesting about the above case is that there are the same advocates representing the petitioner as is in this case and the 1st respondent as is in this case. The advocate for the petitioner stated that the 1st respondent through Mutula Kilonzo Jr should not indeed apply double standard. The respondent in the above case refused that a stay be given and yet in this case is insisting that a stay be given and yet in this case is insisting that stay be now given to him. The case law of Mwai Kibaki v Daniel Arap Moi (supra) was referred to on this point.

Further the Electoral Commission is required to be impartial. In the Mwai Kibaki case (supra) this point, too was brought out. It is only logic that the Electoral Commission must all times be impartial considering the role it plays.

The issues raised by the advocate for the electoral Commission on regulation 11, 17, and 21 dealing with service and postponement of trial, requires to be clarified.

Under rule 10 all the advocates on records are registered in a book held by the registrar. This book contains her addresses of the said advocates. At any time that service is required the registrar would use the address in the book to issue notice. Where no address is available then the Registrar is required to issue a notice in the Kenya gazette of any hearing or postponement.

I do not agree with the advocate for the Electoral Commission that indeed every time there is a hearing a notice in the Kenya gazette requires to be issued.

Looking at the main application herein, should a stay be issued as prayed by the applicant? The respondent/Petitioner in his replying affidavit to the application implied that there was no merit as to the stay.

It is important that a party should be heard.

The applicant/1st respondent is of the view that indeed if he is successful in his appeal and the petition is struck out there would be no need for a trial. This was proved when no action by the respondent 1, 2 and 3 was made to prepare for this trial. It was not until 30.6.03 that they filed pre-trial requirements when they knew as far back as March that the trial was to proceed.

I would in the circumstances and in the interest of the 1st respondent wishing to be heard in appeal grant the application for stay of the proceeding of this High Court till the determination of the appeal.

I would also stay the trial of this Election Petition until the determination of the appeal in the court of appeal. The application be and is hereby allowed.

As to costs, I would award costs of this application to the petitioners, the respondent in this application.

Dated this 2nd day of July 2003 at Nairobi.

M.A. Ang'awa

Judge

2.7.03

Advocates:

M/s P.M. Wamae & Co. Advocates for Petitioner

Mutula Kilonzo & Co. Advocate for 1st Respondent

K. Mwaura & Co. Advocates for the 2nd and 3rd Respondent