



Mogeni v Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E004 & E007 of 2023 (Consolidated)) [2023] KEHC 3193 (KLR) (12 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION APPEAL E004 & E007 OF 2023 (CONSOLIDATED)
HK CHEMITEI, J
APRIL 12, 2023**

BETWEEN

DENNIS MATUNDURA MOGENI APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

ORANGE DEMOCRATIC PARTY 2ND RESPONDENT

DICKSON MACHUNGO MOGAKA 3RD RESPONDENT

RULING

1. In his Notice of Motion dated 13th March 2023, the appellant/applicant herein prays for the following orders;
 - (i) That the honourable court be pleased to take additional documentary evidence limited to the following document;
 - (a) a letter from the National Registration Bureau dated 21st February 2023.
 - (ii) The honourable court be pleased to grant leave that the additional documentary evidence be adduced by way of an affidavit and filed as a supplementary record of appeal.
 - (iii) That the respondents be at liberty to file replying affidavits if any to the supplementary record of appeal.
2. He also prayed that the costs be in the cause.
3. The application is supported by the grounds thereof and the sworn affidavit by the applicant dated the same date as well as further affidavit dated 26th March 2023.



4. The issue which the applicant seeks to have the court determine is whether it should admit the letter from national registration bureau dated 21st February 2023 which clarifies the 3rd respondent's dates of birth. He said that his application is coming late in the day as the same could not be procured within a reasonable time and at any rate the trial court denied him the orders to compel the Director of Criminal Investigation to investigate the two identity cards issued in favour of the 3rd respondent.
5. In essence, had the application been allowed then it could have been easier to appreciate the identity cards relied on by the 2nd respondent when the 3rd respondent made the application. In other words, was he within the youth category or he was already past the 35 years' statutory period. The applicant was challenging the party list relied on by the 2nd respondent in its nomination
6. The document he prays that it be admitted under the provisions of Section 78 of the Civil Procedure Act will go a long way in determining the issues raised in the appeal herein. His other averments in the affidavit essentially attacks and or faults the process taken by the 2nd respondent in its nominations as per the election regulations.
7. Further and contrary to the laid down rules and regulations and despite knowing that the 3rd respondent was not legible went ahead to nominate him as he was above 35 years old. The 3rd respondent without any evidence indicated that on 8th June 2022 he made an application for rectification of his identity card.
8. The applicant then wrote a letter to the bureau which its response is what the applicant seeks to produce and according to him shall clarify material facts pleaded by the 3rd respondent in his pleading and in particular clarify his age.
9. The applicant does pray that in the interest of justice and fair play the application ought to be allowed and that the respondents shall suffer no prejudice.
10. The 3rd respondent *vide* his replying affidavit sworn on 20th March 2023 has refuted the allegations by the applicant on the grounds that the same is not anchored in law as the election petitions and its processes are sui generis in nature and the provisions of the Civil Procedure does not apply.
11. That Section 78 (1) of the Civil Procedure Act dealing with additional evidence does not apply and in any case the Election Act would have clearly stated so. He went on to aver that Section 75(4) Of the Elections Act clearly indicates that the only matter to be handled at this appellate level was the issue of law and not facts.
12. The respondent thus prayed that the application be dismissed arguing that a similar application dated 20th November 2022 had been dismissed by the trial court.
13. The court directed that the application be disposed by way of written submissions which the parties complied.
14. The applicant reiterated the averments in his supporting affidavit and relied on Section 78 of the Civil Procedure Act as well as Order 42 rules 27 ,28 and 29 of the Civil Procedure Rules 2010.
15. The applicant further relied on the Supreme Court of Kenya cases of Mohamed Abdi Mahamud v. Ahmed Abdullah Mohamed & 3 Others (2018) and Raila Odinga v. IEBC & 3 Others, Supreme Court petition number 5 of 2013 both dealing with the guidelines on additional evidence in an election petition.



16. The above cited portions of the law and authorities according to the applicant mandated this court to consider and allow the application herein as the evidence from the registration bureau clearly was new and was not within the reach of the applicant at the time of trial at the lower court.
17. The 3rd respondent basically submitted on two grounds namely on jurisdiction and the issue of law. He submitted that this court was not seized of the matter under the provisions of Section 75(4) of the *Elections Act*. That the issue raised by the applicant was factual and at this juncture the court is precluded from considering it. He cited several authorities including the famous *Lilian's v Caltex oil ltd* (1989) eKLR, as well as *S K Macharia & Another v. KCB Ltd and 2 Others* (2012) eKLR.
18. The respondent submitted that taking the totality of the application the same was an afterthought as the trial court did dismiss a similar application and he therefore prayed for similar orders.

Analysis and determination.

19. There is no doubt that the applicant has gone a long way in an attempt to impugn the nomination by the 2nd respondent of the 3rd respondent during the primaries leading to the August 9th 2022 General Elections. This is exemplified by the correspondence from the registration bureau which seems to suggest that the 3rd respondent is a holder of two national identity cards and which indicates that he was born on 1st January 1987 and or 12th December 1987.
20. The trial court did not allow his application which he had prayed that the Director of criminal investigations be allowed to intervene in the matter. The applicant, it appears soldiered on which culminated into the letter dated 21st February 2023. He now wants the same to be admitted as part of his evidence in this appeal and allow the respondents to challenge it vide affidavits.
21. Does this court have the mandate at this juncture to allow the same? Section 78 of the *Civil Procedure Act* on additional evidence states as follows;

“ Powers of appellate court

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

22. Order 42 of the *Civil Procedure Rules* on its part provides the guidelines on admission of additional evidence on appeal.
23. Obviously and as submitted by both sides the issue before this court is an appeal and not an original trial. The matter precisely is an election appeal and has been stated over and over that the same is sui generis and it therefore stands guided by its own rules and regulations.



24. Is there a provision in the Election Act for admission of additional evidence on appeal stage? I doubt whether it exists. The same is silent and it appears in my view that the court was left to make an appropriate finding. The authorities cited by the appellant of Raila Odinga (*supra*) and the guidance by the Supreme Court of Kenya on additional evidence was basically at the trial stage and not appellate level.
25. Moreover, the jurisdiction of this court at this level is found under section 75(4) of the Election Act. The same states that;
- “4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be –
- (a) filed within thirty days of the decision of the Magistrate’s Court; and
- (b) heard and determined within six months from the date of filing of the appeal.” (underlining mine)
26. Put in simple terms, the only issue at hand is the question of law and not facts or mixed facts and law. To ask the court to introduce new set of evidence is going beyond the above provisions of the law. In other words, Section 78 of the Civil Procedure Act and the rules thereunder does not apply in an election appeal let alone in an election petition.
27. In Election Petition Number 1 of 1998 Stephen Kimani Gakenia v. Francis Mwangi Kimani & 2 Others, the court in distinguishing the two regimes namely the Election Act and the Civil Procedure Act stated thus;
- “This court has remarked that the Civil Procedure Rules, or any other law for that matter, cannot be brought in election petitions to supplement the Act and the Rules. Such were stated in some of the applications as noted above. From the set-up of the election petition legal regime right from the Constitution, to the Act and the Election Petition Rules, this court is of the view that the CPA and CPR are excluded. The only place where rules of Civil Procedure may apply is on the witness affidavits. Witnesses give affidavit evidence in election petitions. The process is clearly set out and rule 18(7) provides:
- “7. The provision of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory Declaration Act shall apply to affidavits under the rule”. That is all. The exclusion of the CPA, CPR and other law from election petition was stated in the past in the following petitions as an example: The Emmanuel Karisa Maitha. Case (*supra*); Martin Kinyanjui Vs Peter Goko & Others Ep 23/93; James Nyamweya Vs Cosmos Oluoch & Others Ep 74/93; Fortunatus Suva Vs George Musaba & Others Ep. 67/83; Daniel Ogutu Matoke Vs Akoi & Others Ep. 68/93 And Dr. Samuel Ogembo Vs Obare & Others Ep. 76/93.”
28. In the premises and taking the totality of the above cited authority and in view of the provisions of the Act this court does not have the jurisdiction to grant the application. The matter squarely laid before the trial court which ought to have given its findings and if the parties were dissatisfied then it would have filed an appeal.
29. Furthermore, the fact that the Act is silent on additional evidence at this appellate stage lance credence to my findings that the legislature had no difficulty in adding an additional clause to that effect seeing



that in all election disputes the courts have the capacity to add additional evidence but under some stringent guidelines as was stated by the Supreme court of Kenya in the Raila Odinga case(*supra*). I doubt whether the silence was deliberate.

30. The issue in any case is factual and not legal. In other words, whether the 3rd respondent is a holder of two identity cards is a factual issue which ought to have been raised before the 2nd respondent or at least the trial court. The matter being raised now is too late in the day and at the wrong forum. As found above it goes contrary to the provisions of Section 75(4) of the [Election Act](#).
31. The application is otherwise dismissed. The costs shall await the outcome of the appeal.

DATED SIGNED AND DELIVERED AT NYAMIRA THIS 12TH DAY OF APRIL 2023.

H. K. CHEMITEI.

JUDGE.

