



REPUBLIC OF KENYA

High Court at Garissa

Election Petition 1 of 2013

MOHAMED ALI MURSAL.....PETITIONER

VERSUS

SAADIA MOHAMED.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

AHMED ABDULLAHI MOHAMAD.....3RD RESPONDENT

RULING

On 13th May 2013 counsels for the three parties in this Petition (the Petitioner, the 1st, 2nd and 3rd Respondents) consented and asked the court to grant the following orders:

- i. That the 1st, 2nd and 3rd Respondents do file further affidavits and serve the same on the Petitioner by 16th May 2013.
- ii. That the 1st and 2nd Respondents do file their respective check lists by the same date.
- iii. That the Petitioner does file any further affidavits and serve the same on the Respondents by 22nd May 2013.

The court accepted the request and recorded the consent order. In addition and upon the application by the counsel for the Petitioner the court directed counsel for the 1st and 2nd Respondents to supply to the Petitioner all Forms 36 in respect of the election results of the Governor Wajir County by 22nd May 2013. The court then fixed the case for the pre-trial conference on 22nd May 2013. At the time of recording that consent the 3rd Respondent was represented by Mr. Mureithi who was holding brief for Mr. Issa.

The Petitioner, through his counsel Mr. Thiga prepared what is referred to as the Petitioner's Supplementary Affidavit Supporting the Petition. He also prepared what is referred to as the Petitioner's Reply to Respondents' Responses and a Supplementary list of witnesses complete with witness affidavits. The latter contains names of four additional witnesses for the Petitioner. All these documents were filed on 22nd May 2013 in the morning. The court and the counsels for the 1st, 2nd and 3rd Respondents were seeing these documents for the first time that morning. There is nothing wrong with this given that the consent order allowed the filing on that day.

It is against these additional documents, filed on 22nd May 2013 that counsels for the Respondents are raising issues with. Mr. Issa for the 3rd Respondent objected to the Supplementary affidavits and submitted that the Elections Rules do not allow for more than the affidavit in support of the petition; that the affidavits of the Petitioner in support of the petition and of the witnesses must be filed at the time of filing the petition within 28 days after the declaration of the election results and not after the expiry of 28 days; that Rule 12 (4) of the Elections (Parliamentary and County Elections) Petition Rules (the Rules) gives court discretion to allow witnesses to file affidavits but not the Petitioner; that after the Respondents file their affidavits with their Responses no other affidavits are allowed; that Petitioner has no right under the law to file further affidavits and he cannot introduce new evidence; that the Petitioner is introducing new evidence to which the Respondents have no right to respond. He asked the court to expunge from the record the offending Supplementary Affidavit and Reply to the Respondents' Response.

Mr. Mwangi for the 1st and 2nd Respondents also objected to the filing by the Petitioner of the two documents and supported Mr. Issa in his submissions. Mr. Mwangi further submitted that the Rules do not allow a petitioner to respond to the respondent's reply; that the Petitioner is introducing new evidence; that the ruling by the Supreme Court in Petition No 5 of 2013 on introduction of new evidence is binding to this court and this court ought to expunge the two documents from the record. Mr. Mwangi however did not oppose the list of additional witnesses subject to their availability for cross examination.

Counsel for the Petitioner, Mr. Thiga replied by submitting that the consent allowing the filing of further affidavits by the Respondents and the Petitioner was entered into by all the three parties through their respective counsels; that Rule 17 (i) and (k) give powers to the court to allow filing of further affidavits and make other orders as may be necessary for fair and effectual trial; that Article 159 (2) (d) of the Constitution and section 80 (1) (d) of the Elections Act allows the courts to decide cases without undue regard to technicalities; that the Supreme Court Ruling was concerned with Presidential elections under the Supreme Court Rules which do not apply to this court.

In response, Mr. Issa submitted that parties cannot consent to an illegality; that the law does not allow filing of new petition; that Rule 17 gives courts powers but does not allow amending of the petition; that further affidavits can be filed but these should not give other facts that seem to amend the petition and that the Supreme Court ruling binds all courts under it.

Simply put the Respondents are asking the court to expunge from the record the Petitioner's Supplementary Affidavit in support of the Petition and the Reply to the Respondents' Response. The reason for this is that the Respondents are of the view that the Petitioner is amending his Petition through the additional evidence. It is also their contention that the law does not allow the Petitioner to file such additional evidence after the Response has been filed.

- i. What does the law say in respect of this issue?
- ii. Is the Petitioner amending his Petitioner by his Supplementary Affidavit?
- iii. Is the consent of the parties an illegality?

Starting with the last question, the record of the court is clear and specific. All the parties to this Petition were represented on 13th May 2013 when the consent order was recorded. I need not belabour the point that this court allowed the consent of the counsels thereby in effect granting leave to the Respondents to file additional affidavits and the Petitioner to respond. If the Respondents are contesting that the consent order is an illegality they ought to have advanced grounds why they think this is the case.

The law is clear on consent orders. Such an order is binding on all parties to the action if it is made in the present and with consent of counsels. One cannot therefore challenge such an order unless it is shown to have been entered into through fraud or collusion or by misrepresentation. On this point please see **Sky Club Restaurant v. Kabudu Holdings Ltd [2004] eKLR and Brooke Bond Liebig (T) Ltd v. Mallay [1975] EA**. It has not been shown that the consent order in issue was entered into through fraud, collusion or is a misrepresentation.

On the issue of amending the Petition, I have patiently and carefully read the two contested documents, that is, the Supplementary Affidavit Supporting the Petition and the Reply to the Respondents' Response. I have compared the contents of these two documents with the grounds of the Petition. The Petitioner is claiming in his Petition that the following, in summary, occurred during the election of the Governor Wajir County:

- i. Arbitrary transfer of polling stations without notice
- ii. Locking out the Petitioner's agents from the polling stations
- iii. Undue and Improper Influence during the election
- iv. Manipulation of voter Register
- v. Voter Bribery
- vi. Mishandling of the Election
- vii. Integrity of the election exercise and the ballot boxes

His affidavit in support of the Petition revolves around these grounds.

My reading of the Petitioner's Reply to the Respondents' Response reveals that the Petitioner is reiterating what he has deposed in his affidavit in support of his Petition. Where he has added a sentence or two, he is expounding on issues about discrepancies in Forms 35 and 36; arbitrary transfer of polling stations and issues on undue influence. In brief there is no new facts whatsoever, as far as I can discern, that the Petitioner has added in his Reply filed on 22nd May 2013 to his earlier depositions.

In regard to the Supplementary Affidavit in Support of the Petition, I have carefully read the same. Paragraph 4 is in response to the Affidavit of the 1st Respondent. It refers to Forms 35 annexed to the affidavit of the 1st Respondent. He is alleging lack of signatures of his agents in some of those forms which he says is an indication that his agents were locked out of the polling station. This is not new material as he has alleged as much in his Petition.

In paragraph 5 the Petitioner is referring to the discrepancies in Forms 35 in respect to the names of the Presiding Officer and the Deputy Presiding Officer. He claims that these differ from the names found in Forms 34 downloaded from the 2nd Respondent's Website.

In paragraph 6 the Petitioner is referring to the discrepancies in Forms 34 and 35 in respect to the agents who signed those forms. In paragraph 7 it is claimed that the listed polling stations tended to favour the 3rd Respondent. The Petitioner does not disclose the source of the information contained in paragraph 7.

In paragraph 8 comparison is drawn between the signatures found in the Forms 35 annexed to the 1st Respondent's affidavit and Forms 34 downloaded from the 2nd Respondent's Website and in paragraph 9 the Petitioner is referring to the affidavit of the 3rd Respondent in respect of the role the Degodia Clan played in the election process. I will determine whether these paragraphs should remain on record in the course of this ruling.

Now I will turn to the first issue, what the law says about this matter. The Respondents are of the view that the law does not allow the Petitioner to file the Supplementary Affidavit and the Reply at this station in the proceedings. It has been submitted that after the Respondents file their Responses, the Petitioner cannot file any further affidavits because the law does not allow this. The law in reference here is the Constitution, the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules 2013. It was submitted that the Elections Act which has been enacted under the Constitution does not allow the Petitioner to file further affidavits outside the 28 days and after the Respondents' have filed

their Responses.

Rules 12 (1) and 15 (1) of the Elections Act allows the Petitioner and the Respondent respectively to file affidavits of every witness each party intends to call in support of his/her case. Rules 12 (2) (c) provides that the affidavit under sub-rule 1 shall form part of the record of the trial and a deponent may be cross-examined by the Respondent and re-examined by the Petitioner on any contested issue. Similar provision in respect of the Respondent is found under Rule 15 (3). The effect of these provisions to my understanding is that it is not mandatory for the Petitioner or the Respondent to file an affidavit in support of the Petition and Response respectively. The emerging practice from the Election Petitions filed in our courts following the 4th March 2013 Elections is that the Petitioners and the Respondents have filed affidavits in support of their pleadings. Is this outside the law given that it is not a requirement? My considered view is that this is not irregular. To my mind, a Petitioner and Respondent are witnesses as of right. They are required under the law to give evidence in support of their course in the similar manner that a Plaintiff and Defendant are witnesses in their course.

Election Petitions are *sui generis* in nature. They are civil cases of a special kind operating under special Rules and Regulations. Given that the affidavit forms the record of the court as evidence in chief of the witnesses it is procedural in my view to have all the witnesses file their affidavits. I want to take the approach that a Petitioner and a Respondent are witnesses like the other witnesses in support of their respective cases. This is one of the tenets of a fair hearing. It also gives effect to the Overriding Objective of the Rules as captured under Rule 4 (1) and (2) that read as follows:

The Overriding Objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and this Act.

The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of these Rules, seek to give effect to the overriding objective specified in sub-rule (1).

The Court of Appeal dealt with this matter of Overriding Objective when it held *inter alia* that:

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner....” (See **Stephen Boro Gitihia vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**)

Bearing in mind the political rights of the individual as guaranteed by the Constitution, Article 38 (2) and (3), and the allowance given by the law to anyone to institute an election petition, it is a fact that election petitions are public interest cases. The issues they raise go beyond Petitioner and Respondent. The current legal dispensation championed by the Constitution and the laws enacted there under lay emphasis on access to and administration of justice. In view of this it is only fair and just to have the Petitioner and the Respondents to lay all the evidence in their possession before the court, of course within the confines of the law, to enable the interrogation of all issues for an informed decision of the court.

Turning on Rule 17 (i) and (k) of the Rules, this court is empowered to give directions as to the filing and serving of any further affidavits or the giving of additional evidence as well as making such other orders as may be necessary to prevent unnecessary expenses and to ensure a fair and effectual trial. This is meant to ensure that the ends of justice are met. Starting with Article 159 (2) (d) of the Constitution and echoing Section 80 (1) (d) of the Elections Act, this court shall endeavour to lay emphasis on the substantive justice as opposed to technicalities. In so doing I agree with the decision in the case of **John Kiarie Waweru v Beth Wambui Mugo & 2 Others [2008] eKLR** that;

....election petitions are not ordinary suits where a party is enforcing a right that accrues to him as a person. The court has to take cognizance of the fact that an election is a signification of the exercise of the democratic rights of the people to have a person of their choice represent them in the National Assembly.

In Milkah Nanyokia Masungu v. Robert Wekesa Mwembe & 2 Others Bungoma Election Petition No. 1 of 2013 the court had this to say on the nature of Election disputes:

Election disputes are, therefore, not purely private disputes to be confined to strict rules which apply to private disputes; but should be seen as public-election disputes; falling under the league of sui generis proceedings. Since such disputes carry remedies of a public character, they, in all civilized legal systems, enjoy a degree of liberal approach under the Constitution and the laws of the nation. And, it is indisputable, the fact that a party has lost interest in a public-election dispute, does not necessarily mean that the remedy cannot be granted.

I couldn't agree more.

I have said enough on the issues before me but before I conclude I wish to comment on the submissions by counsels for the Respondents to the effect that this court is bound by the Supreme Court Ruling on the admissibility of affidavits/evidence filed out of time. I have read the ruling in question, being the Ruling of the Supreme Court Petition No 5 of 2013 delivered on 26th March 2013. The ruling was in respect of three Petitions all consolidated into one. The issue involved the additional lengthy affidavit filed by the Petitioner in Petition No 5. The Respondents opposed it on various grounds including lack of leave of the court to file the affidavit; illegality of filing it outside the time stipulated under the law; introduction of new evidence; time constrains as a result of which the Respondents would not be afforded time to respond and amending the Petition through an affidavit. The court expunged the contentious affidavit from the record.

While I agree with the Counsels for the Respondents that Rulings of the Supreme Court are binding to all courts under it under the doctrine of *stare decisis*, it should be stated that this is applicable where facts and circumstances of the case are similar. I want to distinguish the issues before the Supreme Court with those before this court in that the Supreme Court was operating under very strict timelines and the additional evidence was filed just a day to the hearing. The parties did not have leave of that court to file additional evidence and the law did not allow them to do so as of right. The case before me is different. Firstly the affidavits before this court were filed following a consent order. The Petitioner had leave of this court to file the additional affidavits; likewise the Respondents too had leave to file further affidavits. Secondly the Election Rules treat both the Petitioner and the Respondents in similar manner; it is not mandatory for each to file affidavits in support of their pleadings other than those of their witnesses. However, they have filed them nonetheless. I have reasoned above that in my view this is in order for the ends of justice to be met given that they are witnesses in their course. Thirdly it would be in the interest of justice given the nature of the dispute before this court and this court's approach to lay emphasis on substantive justice rather than the technicalities.

In view of my reasoning above, my conclusion of this matter is this; the Petitioner has not brought in any new matters. I have found that the Petitioner is making references to the affidavits of the Respondents which affidavits are part of this court's record. The only issue I have with the Petitioner's depositions is with respect to paragraphs 5, 6, 7 and 8 of the Supplementary Affidavit. My view in respect to paragraphs 5, 6 and 8 is that it is prejudicial to the Respondents to compare Forms 35 and 34 because the latter is not within this court's jurisdiction to examine. I would rather the Petitioner confine himself to material that is relevant to his case. Let him tender evidence to prove the discrepancies or anomalies in Forms 35 and 36 and how these affected the outcome of the election in respect of the Governor.

Further, the Petitioner has not disclosed or identified the source of the material contained in paragraph 7 of the Supplementary Affidavit and therefore this court or the Respondents are not able to verify the issues the Petitioner is raising in that paragraph.

Having carefully considered this application by the Respondents and the submissions by counsels it is my view that there is no prejudice to the Respondents to allow the Petitioner's Supplementary Affidavit and the Reply to the Respondents Responses save for some of the paragraphs as specified in the following orders:

1. Paragraphs 5, 6, 7 and 8 of the Petitioner's Supplementary Affidavit of the Petition filed on 22nd May 2013 are hereby expunged from the record of this court.
2. The Petitioner's Reply to the Respondents' Response and the Supplementary Affidavit filed on 22nd May 2013 are hereby allowed safe for the paragraphs specified in order 1 above.
3. Costs will be in the cause.

S. N. MUTUKU
JUDGE

Dated and delivered this 3rd June 2013

Mr. Thiga for the Petitioner

Mr. Mwangi for 1st and 2nd Respondents

Mr. Issa for 3rd Respondent