



REPUBLIC OF KENYA

High Court at Machakos

Election Petition 9 of 2013

WILSON MBITHI MUNGUTI KABUTI.....1ST PETITIONER

PHILIP MUTUA KILONZO.....2ND PETITIONER

STEPHEN MUTHOKA.....3RD PETITIONER

JOHN KALATA MALII4TH PETITIONER

JOSEPH MUTUKU MUSAU.....5TH PETITIONER

SOLOMON KIMUYU.....6TH PETITIONER

VERSUS

PATRICK MAKAU KING'OLA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL

BOUNDARIES & COMMISSION2ND RESPONDENT

RULING

1. Application dated 22nd May, 2013 by way of Notice of Motion is brought pursuant to Section 59 of the Elections Act and all enabling laws.
2. In the application the 2nd Respondent seeks to have the petition struck out for failure to enjoin the Returning Officer to the petition as a Respondent. It is stated that failure to enjoin the Returning Officer makes the petition incurably defective.
3. It is premised on grounds that at the time of filing the petition challenging the election conducted on the 4th March, 2013, the petitioner cited the Independent Electoral & Boundaries Commission (IEBC) as the 2nd Respondent but did not enjoin the Returning Officer as a party to the petition. Though not enjoined the Returning Officer has been adversely mentioned in the petition under Section 59 of the Elections Act (*hereinafter "the Act"*), any staff or member of the commission can be held personally liable for election offences committed therefore, failure to enjoin and name the Returning Officer is fatal to the Petition.
4. The application is supported by an affidavit deposed by **Mrs Wambua** an advocate in conduct of the matter in which she reiterated what is stated in the grounds forming the body of the

application.

5. The 1st Respondent supported the application. He filed grounds to that effect. He stated that the petition is directed to the Returning Officer making him answerable and a necessary party to be enjoined in the Petition.

6. The application is opposed by the petitioners who state that the application is ill-fated incontestably bad in law and grossly incompetent; failure to join the Returning Officer is not fatal as there is no provision requiring mandatory joinder of the Returning Officer to an Election Petition. Section 59 of the Elections Act only provides for criminal offences but not the process of hearing of an Election Petition.

7. Learned Counsel for the 2nd Respondent **Mrs Wambua** submitted that a Returning Officer is not an agent perse of the commission. The Returning Officer has specific duties spelt out in Regulation 3(3) of the Election (General) Regulation, 2012, while the commission has its own duties. The Returning Officer having been mentioned adversely must be enjoined as a party so as not to be tried in absentia. She argued further that the law intended to have any person whose conduct had been faulted to be included as a party.

8. Counsel cited the case of **Moses Budamba Mudavadi versus Peter Kibisu, Civil Appeal No. 25/1970** where it was held that; it was necessary and important to enjoin the Returning Officer as a party. Otherwise the petitioner would not be allowed to raise any issues against him.

9. Learned counsel for the 1st Respondent, **Mr. Mutinda** argued that failure to enjoin the Returning Officer was fatal, an issue that he had raised in the Answer to the Petition. The responsibility of the Returning Officer was crucial in the election exercise.

10. Learned counsel for the petitioner **Mr. Ngolya** argued that the application had been brought under the wrong provision of the law which was bad in law and an abuse of the process of the court. He submitted that a party to an election could not purport to invoke a criminal jurisdiction to obtain a reprieve in a civil jurisdiction.

11. Distinguishing the **Mudavadi** authority cited, he argued that the circumstances that prevailed then differed from those of March 2013 when the 1st Respondent was declared the winner.

12. He submitted further that Independent Electoral and Boundaries Commission (IEBC) a body created under the Constitution, 2010 was mandated to supervise and direct all elections in the country; any action under taken by officers subordinate to IEBC were deemed to be the actions of the body. He argued that officers in employment of IEBC were its agents hence liability could only attach to the master but not the servant.

13. Alluding to Rule 9(a) & (b) of the Elections (*Parliamentary and County*) Petition Rule 201, (*“the rules”*) he argued that it was only mandatory for the Petitioner to join IEBC but not any other officer.

The issue for determination herein is whether failure to enjoin the Returning Officer as a respondent is fatal to the Petition.

14. It is not in dispute that the petitioners omitted to include the Returning Officer, Mavoko Constituency as a Respondent in this petition. Rule 2 of the Election(Parliamentary County) Petition Rules 2013 (*“the rules”*) define the term Respondent in relation to an Election Petition as;-

a) *“The person whose election is complained of;*

b) *The returning officer;*

c) *The commission; and*

d) *Any other person whose conduct is complained of in relation to an election.”*

15. Strict interpretation of the definition above would put forward a consideration that parties mentioned in paragraph (a) to (c) must be included in any petition. But, we must note that Rule 2 is a definitive section.

16. The manner of presenting petitions is however provided for in Part IV of the Legislation. Rule 9 (a) of the Rules states thus:-

“The commission shall be a respondent in an election petition filed under the Act”.

17. The rules makes it mandatory for the commission to be included in every petition as a respondent , Rule 2 is a definitive Rule as aforesaid, it may be viewed as one that does not obligate the petitioners to include all the parties mentioned save where the party should be answerable following the relief sought. This would cause one to think that the case here is that (other than the commission) parties may not necessarily be made party to the petition unless circumstances demand. The question posed would then be; what is the importance of a returning officer in an election?

18. A Returning Officer is an appointee of the commission who is responsible for conducting elections at a constituency level. (*see regulations 3 of the Elections (General) Regulations 2012*). All officers who work under him are subject to his control.

19. It has been argued that the name of the returning officer was mentioned adversely. It was hence mandatory for him to be enjoined as a party. **Mrs Wambua’s** argument was pegged to section 59 of the Elections Act which stipulates actions that are criminal in nature.

20. The main concern is that if electoral staff can be held personally responsible for election offences committed then it is a must that the Returning Officer be joined as a respondent.

21. Looking at paragraph 11-19 of the petition, the returning officer has been mentioned adversely as having been in breach /contravention of the law.

22. In the cited case of ***Mudavadi versus Kibisu and Another [1970] E.A.*** it was held that a Returning Officer against whom complaints are made automatically becomes a respondent. Complaints against the Presiding Officer and Deputy Presiding Officers appointed by Returning Officer are complaints against the Returning Officer.

23. Halsbury’s Laws of England, 3rd Edition Vol. 14 page 255 states as follows regarding joinder of Returning Officer in Election Petition.

“Where, however a Parliamentary Election Petition complains of the conduct of a Returning Officer, he will, for all the purposes of the Act, except as regards the admission of respondents in his place, be deemed to be a respondent. The allegation against the Returning Officer need not necessarily be one of wilful misconduct, he may be joined as a respondent where the acts or omissions or negligence complained of are not personal but are those of subordinates.”

24. The case of ***Barrister Paul Ubum & Another versus Nseyeu Anderson Anaka [1999] 6 NWLR (Pt 605)*** also addressed the issue on non-joinder of a necessary party. It emphasised the need to join certain officials in an Election Petition where complaints were raised in respect of their conduct. It was stated as follows:-

“Where an Election Petition complains of the conduct of an Electoral Officer, a Presiding Officer, Returning Officer or any other official of the Commission he shall for all purposes be deemed to be a respondent and joined in the Election Petition as a necessary party...”

25. The authorities cited emphasize the need to join a Returning Officer as a necessary party. However, as correctly submitted by counsel for the Petitioners the position prevailed at the time when there was no legislation clarifying the current position. The **Mudavadi** case was decided when the Old Election Petition Rules were in force. They have since been repealed under Act No. 14 of 1993.

26. The Rules in operation leave it to the discretion of the Petitioner to elect whom to sue depending on the allegations in issue. It is only the Commission that must be a party to the Petition (see Rule 9). This is because it is the one responsible for conducting Elections (vide section 4 of the *Independent Electoral and Boundaries Commission (IEBC) Act, 2011*).

27. In the case of **Ayub Juma Mwakesi versus Mwakwere Chirau Ali and 2 others [2010] eKLR**, the court held:-

“While the Returning Officer was mandated to carry out the Election, he did that under the general direction and supervision of the ECK. I am of the view that the office of returning Officer is an organ within the ECK. While the Returning Officer discharges his duties independently, he does so in consultation and under the direction of ECK. This court is therefore capable of looking at the allegations against the returning officer not in respect of any wilful misconduct that could attract personal or retribution but which could amount to possible irregularities or improprieties that could give an insight into the way the election process took place in Matuga and whether as a result the ECK carried out its function/duties competently, fairly and freely and to what extent the allegations against ECK itself are true or credible”.

28. The Returning Officer being an appointee of IEBC conducted and supervised elections in Mavoko Constituency on behalf of the commission. It would therefore have been advisable for the Returning Officer to be enjoined as a respondent.

29. With the provision of section 59 of the Elections Act the question to be answered would be what is the effect of non-joinder of the Returning Officer?

30. In paragraph 11-19 of the Petition, the Returning Officer is adversely mentioned. If found guilty he must be penalised. How will he defend himself? Will he be prejudiced?

31. The 2nd Respondent herein filed its Answer to the Petition. The said Answer to the petition is supported by a replying affidavit which is deponed by one **Faith Mugo** who describes herself as the Returning Officer, Mavoko Constituency having been appointed under Regulations 3 of the Regulations. This is a potential witness in this petition. She will be able to answer all questions that will be raised by the petitioners.

32. The duty of the court in Election Petitions is spelt out in Rule 5 of the Rules. Rule 5(1) provides as follows:-

“For the purposes of furthering the overriding objective, specified in rule 4, the court...shall conduct the proceedings for the purpose of attaining the following aims-

a) The just determination of the proceedings

b) The court may, where a party has breached any requirement of these Rules, issue orders, and impose penalties, as the court may consider just and fit including an order for payment of costs”.

33. The question begging is whether justice will be served by this court striking out the petition for non-joinder of a party who is indeed an employee/appointee of the 2nd Respondent?

34. In the case of **Raila Odinga and others versus Independent and Boundaries Commission & 3 others-Nairobi (2013) eKLR** the learned judges of the Supreme Court state thus;-

“The essence of the provision is that a court of law should not allow the prescriptions of procedure and form to trump up the primary object, of dispensing substantive justice to the parties. The principle of merit, however, in our opinion, bears no meaning cast in stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the process of justice, is called upon to appreciate all the relevant circumstances and the requirement of a particular case and conscientiously determine the best course”

35. With this in mind, will justice be served by striking out the petition? This question should be answered by what was stated in the case of ***D.T Dobie & Co. (Kenya) Limited versus Muchina [1982] KLR 19;-***

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for court of justice ought not to act in darkness without the full facts of a case before it.”

36. A perusal of the Petition herein shows that indeed it discloses some reasonable action. It cannot be dismissed as a hopeless case. Failure to enjoin the Returning Officer is not prejudicial to the 2nd Respondent who infact has relied on the Returning Officer to respond to the petition. A quest to have the petition struck out in the circumstances is on mere technicality. Section 80 of the Elections Act gives the Election Court the power to decide matters without undue regard to technicalities.

37. In this case it has been argued that the Returning Officer has been mentioned adversely therefore must be a party to the petition. Pursuant to Rule 87 of the Elections Act, any person who is not a party to the petition who commits an Election offence must be reported to the Director of Public Prosecution. In the past, prior to enactment of the Elections Act, such an individual would be condemned to pay costs hence had to be enjoined as a party. Today such a person would still be given an opportunity to be heard and call witnesses in his defence prior to being reported. Therefore the Returning Officer just like any other party if proved to have committed the offences alluded to in the petition will still be dealt with by this court,

38. The upshot of the above is that the Returning Officer though a necessary party in these proceedings has not been enjoined to the petition. This is however not fatal since it is not a mandatory requirement under the Rules. The application is therefore dismissed. No order as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 5TH day of JUNE, 2013.

L.N. MUTENDE

JUDGE