



IN THE CHIEF MAGISTRATES COURT AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION 2 & 6 OF 2013 (consolidated)

JOEL NYABUTO OMWENGA1ST PETITIONER

DANIEL MUNYAO NZWILI.....2ND PETITIONER

ROSE WAMBUI MUNGAI..... 3RD PETITIONER

VERSUS

THE IEBC1ST RESPONDENT

DANIEL MBUGUA MARI2ND RESPONDENT

RULING

The issue for determination is whether the respondents have the first right of audience during oral submissions following the conclusion of the election petition hearing.

Mr. K. Macharia Advocate for IEBC the 1st respondent submitted that the law reserves the right to begin submissions to the defendant by dint of **Order 18 Rule 2(2) of The Civil Procedure Act and Rules**.

Mrs. Kogweno Advocate for the 1st petitioner and Mr. Thuita Advocate for the 2nd and 3rd petitioners opposed that application. It was argued that the petitioner reserved the right to submit first since this was their case. Mrs. Kogweno argued that the petitioner had the right to present and prove their case whereas the respondent would respond to the issues raised with the petitioner reserving the right to further respond to legal issues raised by the respondent.

Mr. Thuita submitted that election petitions are special in nature and that the civil procedure Act and rules are not applicable. He cited the cases of *Murathe vs Macharia C.A No.171 of 1998*, *Mbuzi vs Omar E.P. 1 of 2003*, *Ahmed vs Twaha & 2 other E.P. 4 of 2003* and the case of *Karauri and Mbogo and E.P. 49 of 1993* in support of his argument. He echoed the sentiments of Mrs. Kogweno.

In rejoinder Mr. Macharia submitted that the right to begin submissions was guaranteed by law. He argued that the petitioners' right to be heard had been exercised through evidence. He said that election petitions like land cases were civil in nature and that the procedure was laid down in the civil procedure Act and rules. He wondered why the Evidence Act was used when the issue of evidence arose and in the same breath submitted the applicability of the Civil Procedure Act and its rules. He distinguished the

decision in **Murathe's** case stating that the timelines had not been set by the Elections Act and basically that where the Elections Act was silent the procedure to be followed is as laid in the Civil Procedure Act and Rules.

Order 18 of the Civil Procedure Act and Rules provides for hearing of suit and examination of witnesses. Rules 1 and 2 state that:-

1. **Right to begin (order 18, rule 1). The plaintiff shall have the right to begin unless the court otherwise orders.**
2. **Statement and productions of evidence (order 18, rule 2).**

Unless the court otherwise orders-

1. **On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.**
2. **The other party shall then state his case and produce his evidence and may then address the court generally on the case. The party beginning may then reply.**
3. **After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.**
4. **The court may in its discretion limit the time allowed for addresses by the parties or their advocates.**

I have had a cursory perusal of the authorities cited for the court's consideration.

In **Karauri's** case the court considered the well settled principle of the applicability of the Civil Procedure Act and rules where no other procedure is provided. It goes on to find that election courts have their own rules and inherent powers to decide cases without undue regard to technicalities; as such elections courts need not therefore call in aid the Civil Procedure Act and Rules in dealing with election cases.

In **Ahmed vs Twaha** case, the court held that the Elections Act was a complete and self contained legal regime in election matters; the import of that being that where the Elections Act provides a rule the civil procedure Act and rules have no place and especially where it's expressly so stated. This was also the holding in **Murathes case**.

In the case of **Mbuzi vs Omar** the issue is articulated with expedition in mind. It states that the intention of the legislature in enacting the statutory provisions regarding election petitions was to provide a quick procedure to enable the elections court hear and determine election petitions speedily. The learned judge found that the legislature did not intend that the hearing and determination of election petitions be protracted or delayed or to enact complex and elaborate rules of civil procedure to govern interlocutory matters in election petitions.

The arguments by counsels are to the effect that whether in the present petition the civil procedure applies, whether in a bid to prove their case the petitions have a right to submit first after the close of the petition hearing, whether it is the exception and not the rule for the respondents to begin the submissions and if the Elections Act provides the rules on presentations of the evidence and specifically the right to submit first.

Election petitions are unique and separate from other proceedings and the civil procedure does not apply except where expressly provided for (see rule 12(6) of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**) which allows the application of **Order 19 of the Civil Procedure Rule, 2010** and the Oaths and Statutory Declarations Act in relation to affidavits.

Section 80 of the Elections Act provides for the powers of an election court. The conduct of trials is in the same manner as nearly as the circumstances admit as in trials by a court in the exercise of its civil jurisdiction. All matters before the election court should be determined without undue regard to technicalities (see **Section 80(1) (d) of the Elections Act**).

The Elections (Parliamentary And County Elections) Petition Rules 2013 provide the rules applicable to election petitions in respect of parliamentary and county elections.

The overriding objective of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Elections Act 2011.

Rule 4(3) obligates a party to an election petition or an advocate for the party to assist the court to further the overriding objective and to that effect participate in the process of the court and comply with the directions and orders of the court.

Part V of the rules provides for case management. The essence is to ensure that election petition are managed and determined expeditiously and within the prescribed six (6) months period.

In this case the pre-trial conference was done on 15.5.2013 and 16.5.2013. The issue of submissions was canvassed and the time allocated on how parties will make submissions after the close of the respondents' case. The general presumption is that the petitioners reserved the right to submit first and the respondents would then respond to their submissions; thereafter the petitioners' counsels would respond to the respondents' response but only on points of law. The respondents therefore cannot be heard to argue that they reserve the first right to submit at this stage when the issue was already settled.

I take the position held in the authorities cited for the court's consideration and respectfully disagree with learned counsel for the 1st respondent Mr. K. Macharia in this respect. The intention of order 18 of the Civil Procedure Rules was not to upset the natural order of things. The principle is still the same, the rule 'he who alleges merit must prove' cannot be overstated. The same principle applies to the provisions of order 18 of the Civil Procedure Rules. In a suit a party may raise an issue and for example an application at the interlocutory stages of trial. That party may be the respondent and to the extent of that application they will have the first right to state their case generally. The other party may or may not respond and if they respond, they may address the court generally. If after their response the party beginning cites cases, the party responding reserves the right to address the issues in such cited cases. We cannot lose sight of the fact that a respondent has to respond to issues raised hence the term respondent or defendant. It would be absurd for the respondent to submit first in any matter where he is not the mover of the motion.

Towards the applicability of the Civil Procedure Act and rules the **High Court in Wilson Mbithi Munguti Kabuti & 5 Others v. Patrick Makau Kingola & Another Machakos Election Petition 9 of 2013** held that the Civil Procedure Rules are not applicable to election petitions unless expressly stated by statute and a good example is **Rule 12(6)** of the petition rules.

In the **Clement Kungu Waibara vs Francis Kigo Njengo and others election petitions 1 of 2013**, Justice Mwongo in his ruling quoted the Indian case of **Jyoti Basu and other vs Debi Bhosal and Others reported in AIR 1982 SC 983** where the court held that:

“An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on consideration of alleged policy because policy in such matters, as those relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the court is put in a straight jacket...”

In this case the court is not bound by the provisions of the Civil Procedure Act and Rules. This court

reserves the discretion to determine who submits first and do so in accordance with the Constitution of Kenya 2010 and Elections Act and rules.

It is therefore the decision of this court that the petitioners reserve the right to make their final submissions first in order to wrap up their case. The respondents will thereafter respond to their submissions and the petitioners will reserve the right to respond to the submission made by the respondents' in points of law and address any issue raised about case law. I remind parties of the overriding objectives of the **Elections (Parliamentary and Courts Election) Petition Rules 2013**.

It is so ordered.

Dated and delivered at Nairobi this 5th day of July 2013 in the presence of :

Mrs Kogweno advocate for the 1st petitioner

Mr. Thuita advocate for the 2nd and 3rd petitioners

Mr. K. Macharia and Mr. Mwangi advocates for the 1st Respondent (IEBC)

Mr. Kulecho advocate for the 2nd Respondent

Joan Gitia-court clerk

A.K MWICIGI (MR)

Ag.PM

5.7.2013