REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

officials;

(d) Returns or any returns made by the presiding officers Returning Officers and other election officials; and

(e) All other documents in the ballot boxes pertaining to the Parliamentary Election for Juja Constituency".

On 17th March, 2008 the 1st respondent filed a notice of preliminary objection to the application containing six grounds, namely:

1. The Application offends the express and implied provision of *inter alia***, Rule 19 of the National Assembly and Presidential Elections (Election of Petition Rules) and is, to that extent, misconceived incompetent and fatally defective;**

2. The application (and the entire Petition) offends the express and implied provisions of, *inter alia***, section 44 and 20 of the Constitution of Kenya and the National Assembly and Presidential Elections Act;**

3. The application and the entire Petition is prima facie, unripe anticipatory and or speculative and to that extent, misconceived, incompetent and fatally defective;

4. The Application is a fishing expedition aimed at gathering possible evidence for use at the trial of the petition;

5. Some of the documents in respect of which the orders of the court are sought are either public documents obtainable without court orders and or extraneous to the issues raised in the petition; and

6. The Application is manifestly vitiated by either perjury or want of material particulars and hence fatally defective".

At the hearing of the application, the election court directed that the preliminary objection should be argued first as the contents of the preliminary objection "*raise or touch on some points of law"* which should be disposed of first.

The preliminary objection was heard in full. The 2nd and 3rd respondents were even heard in support of the preliminary objection. Mr. Nowrojee who appeared for the petitioner (appellant herein) in the superior court vehemently and exhaustively opposed the preliminary objection. He beseeched the election court to dismiss it and hear the application for leave to inspect documents on merit.

The election court ultimately upheld the preliminary objection in a lengthy ruling and struck out the application with costs thereby precipitating this appeal.

The election court made several findings of law in its impugned ruling. It construed the law relating to inspection of election materials in Presidential and Parliamentary elections both before and after the filing of an election petition thus:

"**This application having been expressly grounded on Reg 42, is incompetent because the documents sought (after the admission by Counsel for the Applicant that the Applicant seeks the marked register instead of the Register of Electors) relate to a pending Election Petition and are specifically excluded from inspection by Reg 42(4). An Electors register is publicly available in the D.O.'s office as per the Registration Rules. It is available for inspection even before elections are held. The Applicant Counsel has contradicted himself concerning Reg 42 upon which the entire application is grounded.**

He has submitted at some point that Reg 42 does not apply. This Court must hold him to his bargain. If Reg 42 does not apply then on what provision is the application grounded. If he is seeking court's authority for the first time and Reg 42(2) does not apply to him what is the basis for seeking the authority of the Court to inspect. He has not laid that basis at all and even if he did, such request flies in the face of the only other Rule in the Electoral Law which concerns documents relating to a pending petition namely Rule 19. I find that since Rule 19 makes available to court all the documents sought to be inspected there cannot be any valid basis for the application. Reg 42(4) and Rule 19 are fairly consistent. The regulation excludes all documents in a pending petition and the Rule makes them available at the trial. Regulation 42 as a whole provides for limited inspection before destruction within 3 months. It provides for public inspection of documents, except ballot papers and their counterfoils. If the petitioner under the description of "any person" purports to apply under the provisions of Reg 42(2) he must bring himself within all the requirements of the provisions which are:

(i) give notice to all candidates in the election.

(ii) apply to the High Court.

(iii) Documents are to be inspected before the Returning Officer and other candidates, and give notice as per Reg 42(3).

These are pure points of law and are not dependent on any disputed facts.

The applicant has failed to prove compliance. It is as clear as day that the inspection embraced by the provisions of Reg 42 is not done under the supervision of the Court. An Applicant only seeks court's authority to inspect, yet what is contemplated by the application was inspection by an order of this Court. A court order granting authority to a Petitioner under Reg 42(4) would be superfluous in that Reg 19 avails the documents required in an Election Petition. There cannot be any basis for granting that authority.

I agree with the Respondents' Counsel contention that inspection has, over the years been progressively restricted by electoral law as is clear from the provisions of Legal Notice 122/02 and LN 178/07 and the case law relied on by the Applicant Counsel goes counter to the restriction and is no longer good law".

The superior court continued:

"**There is nothing in the election law that provides the basis for the claimed wider right of inspection as in the Civil Procedure Rules. Nearly all the documents are in the custody of the Electoral Commission and the production of documents is covered by Rule 19".**

There are ten grounds of appeal which we would for convenience classify into two broad categories. The first category comprises grounds 1, 2, 6 and 9 in which the appellant complains that the Judge overlooked principles of Preliminary Objection, that the preliminary objection did not raise pure points of law but contested issues of fact and law, and, that, the trial Judge erred in law in determining the entire application without hearing it.

The second category comprises grounds 3, 4, 5, 7, 8, 10 in which the appellant complains that the trial Judge misconstrued both the substantive and procedural law relating to the inspection of documents concerning an election.

Mr. Nowrojee, learned counsel for the appellant contended in support of the grounds in the first category, *inter alia*, that none of the six grounds constituted a Preliminary Objection as defined by Sir Charles Newbold P. in **Mukisa Biscuits Co. vs. West End Distributors** [1969] EA 606 at page 701; that the preliminary objection raised contested matters; that the trial Judge sought

to investigate contested issues and exercised a judicial discretion, and, that the learned Judge proceeded to determine the issues in the application for inspection without hearing the parties.

It is settled law that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained (per Sir **Charles Newbold P in Mukisa Biscuit Co.** (supra) at page 701 paragraphs A – B.

We have perused the six grounds of preliminary objection and the submissions made in support of them in the superior court. It is crystal clear that grounds 2, 3, 4, 5, 6 of the preliminary objection did not raise pure points of law. Rather, they are general grounds raised to oppose the application on the merits. It is also clear that some findings of the superior court touch on the merits of the application for inspection. For instance, the superior court made a finding that the application was an endeavour to fish for evidence. There is considerable justification in the accusation that the learned Judge, in the course of dealing with preliminary objection, in effect determined the entire application. Thus, we find merit in the first category of the grounds of appeal.

However, the 1st ground of preliminary objection, in our view, raises a pure point of law – that is, the competence of the application for inspection based on **Regulation 42** of the *Presidential and Parliamentary Election Regulations* (Reg.) when there was a pending Election Petition and the inter-play between **Regulation 42** and **Rule 19** of the *National Assembly Elections (Election Petition) Rules 1993* (Election Petition Rules). The construction of the two provisions formed the bulk of the ruling of the superior court which construction is challenged in the second category of the grounds of appeal.

It is expedient to set out and consider the two provisions of the law at this stage.

Rule 19 of the *National Assembly Elections (Election petition) Rules* provides:

"The returning officer shall deliver to the Registrar not less than forty-eight hours before the date fixed by the election court for trial the following documents –

(a) Written statements made by the presiding officers under the provisions of regulation 34 of the Presidential and Parliamentary Election Regulations;

(b) Written complaints of candidates and their representations;

(c) The packets of spoilt papers;

(d) The marked copy register;

(e) The packets of counterfoils of used ballot papers;

(f) The packets of rejected ballot papers;

(g) The statements showing the number of rejected ballot papers; and

(i) any statement of the presiding officer made under the provisions of 33 (2) of the Presidential and Parliamentary Election Regulations".

The application for instpection was brought under **Regulation 42**. These regulations are made by Electoral Commission with the approval by resolution of the *National Assembly.* **Regulation 42** as amended by *L.N. No. 172 of 2002*, provided:

"**42. (1) All documents relating to an election shall be retained in safe custody by the**

returning officer for a period of six months after the results of the elections have been declared and shall then, unless the Electoral Commission or an election court otherwise directs, be destroyed.

(2) Documents retained under this regulation, other than ballot papers and their counterfoils, shall be made available for inspection by any member of the public, upon a request made by him, at such time and subject to such conditions as may be decided by the returning officer.

(3) For the purpose of an inspection under paragraph (2), the returning officer shall unseal the documents concerned in the presence of a witness, who shall not be the person making the inspection and the returning officer and the witness shall keep the documents under their scrutiny until they are resealed by the returning officer, in the presence of the witness, after the inspection is completed.

(4) The provisions of this regulation shall not apply to documents that concern a pending election petition unless there is a court order granting such authority".

Regulation 42 was further amended by *L.N. No. 178 of 2007*. By the amendment, the period of six months in **Reg. 42 (1)** for which documents relating to an election could be retained was reduced to three months. The amendment also deleted **Reg. 42 (2)** and substituted a new paragraph, thus:

"**42. (2) Any person may apply to the High Court with**

notice to all candidates in the election concerned for authority to inspect documents under these regulations, other than ballot papers and their counter-foils".

Lastly, **Reg. 42 (3)** was amended to read:

"**For purpose of an inspection under paragraph (2), the returning officer shall unseal the documents concerned in the present of** *candidates or their agents appointed in writing and the returning officer and candidates or their agents* **shall keep the documents under their scrutiny until they are resealed by the returning officer, in the presence of** *candidates or their agents* **after the inspection is completed".**

Mr. Muthomi who appeared for George Thuo (1st respondent) in the election court construed **Rule 19** of the Election Petition Rules to mean that the inspection of the documents listed in that rule which includes documents mentioned in the application for inspection should be inspected at the trial and not before the trial. He further contended in the election court that the appellant had not complied with **Reg. 42 (2)** as he had not served the application on all the candidates who had participated in the election, and, lastly, that the right of inspection had been restricted by **L.N. No. 172 of 2002** and **178 of 2007**.

Mr. Musau who appeared for the 2nd and 3rd respondents in the election court supported those sentiments. Mr. Nowrojee contended in the election court that Rule 19 does not deal with inspection or bar an application for inspection nor stipulate that inspection should be done at the hearing of the petition.

Mr. Nowrojee, further submitted in the election court that **Reg. 42** did not apply to the application and therefore it was not necessary to serve all the other candidates. He reasoned thus. Since the documents referred to in the application for inspection relate to a pending election petition and since the appellant had not already obtained a court order under **Reg. 42 (2)** authorizing inspection, **Reg. 42 (4)** applied to the application with the effect that an order for inspection of documents could not be granted under **Reg. 42**. In his own words:

"**Once petition has been filed Regulation 42 does not apply. Instead court's** '*supervision powers apply*"**.**

Mr. Nowrojee now submits in this appeal that the appellant applied for permission to inspect as provided by **Reg. 42** and that it was a major error of law for the superior court to have found that he should be held to his bargain that **Reg. 42** did not apply.

The Regulations under which **Reg. 42** falls are administrative regulations made by Electoral Commission and approved by National Assembly for better management, conduct and control of Presidential and Parliamentary Elections. The marginal note to **Reg. 42** shows that the purposes of Regulation is to provide for "*Retention and public inspection of documents".* Before *L.N. No. 172 of 2002* was promulgated, **Reg. 42 (2)** gave members of public unrestricted right to inspect all documents relating to an election with the exception of ballot papers and counterfoils upon a request to a returning officer. *L.N. 172 of 2002* by **Reg. 42 (4)** exempted from public inspection documents that concern a pending election petition unless there is a court order granting such authority. That meant that a person who intends to inspect documents concerning a pending election petition had to get a court order authorizing inspection which he would take to the returning officer before the returning officer could allow inspection.

The general right of inspection was further restricted by *L.N. 178 of 2007* which took away the power of the returning officer to allow inspection and vested it in the High Court. **Reg. 42 (2)** now required a person who wanted to inspect the documents to apply to the High Court with notice to all candidates in the election concerned for authority to inspect documents but *L.N. 178 of 2007* did not interfere with **Reg. 42 (4)** introduced by *L.N. 172 of 2002* with the result that documents concerning a pending election petition were protected from inspection unless a court order granting authority to inspect was obtained. Of course inspection of ballot papers and counterfoils are absolutely prohibited.

With all these restrictions the contention by Mr. Nowrojee in the election cour,t and, here that inspection is a normal process and that members of public has unrestricted freedom of inspection of documents concerning an election which are public documents is not entirely correct.

The election court was absolutely right when it held that the inspection embraced by the provisions of **Reg. 42** is not done under the supervision of the court. Rather, it is done under the supervision of the returning officers.

Moreover, the stipulation in **Reg. 42 (2)** that any person is free to make an application for authority to inspect in the "High Court" with *notice to all candidates concerned* and the stipulation in **Reg. 42 (3)** that the inspection, if authority is granted by the High Court, should be done under the supervision of the returning officer implicitly indicates that **Reg. 42** caters for inspection before an election petition is instituted and before the Election court is constituted, that is, pre-petition inspection. If **Reg. 42** was also intended to apply to post – petition inspection it could have restricted the persons who should apply for authority to inspect to the parties to the election petition and could also have provided that the inspection should be done either under the supervision of court or Registrar.

In this case, the appellant filed an interlocutory application for inspection in the petition after Nyamu J. was appointed to preside over the election court in the petition by *Gazette Notice No. 652* of 1st February, 2008. The jurisdiction of the Election Court is circumscribed by the Constitution, the National Assembly and Presidential Elections Act (Act) and by the *Election Petition Rules, 1993*. It is thus obvious that the **Reg. 42** does not apply after the filing of a petition and after the constitution of the election court and cannot confer jurisdiction to the election court to sanction inspection of documents relating to an election. Mr. Nowrojee has quite uncharacteristically wavered in the construction of **Reg. 42.** In the election court, he submitted that **Reg. 42** did not apply but in this Court he submitted that the application for leave

to inspect was properly made under **Reg. 42 (2)**. His construction of **Reg. 42** in the election court that once petition has been filed **Reg. 42** does not apply, is, with respect, the true construction of the Regulation.

The application for inspection was solely brought under **Reg. 42**. The election court posed the question:

"**If Reg. 42 does not apply then on what provision is the application grounded".**

The election court could not find any provisions giving court power to authorize post-petition inspection. The election court quite correctly declined to import the general right of inspection of suit documents under the Civil Procedure Rules. Happily, Mr. Nowrojee submits that he did not seek the application of the Civil Procedure Rules. He is correct. His submission in the superior court was that since **Reg. 42** did not apply court's "*supervisory powers"* applied. The election court observed that by **Rule 19** of Election Petition Rules, documents required are availed at the trial and reasoned that an order granting authority under **Reg. 42 (4)** would be superfluous. The election court did not decline jurisdiction to allow inspection of the documents filed under **Rule 19** at the trial. The respective counsel for the respondents have not doubted that the election court has discretion at the hearing of the petition to order inspection of documents before it.

It is true that neither the Act nor the Election Petition Rules specifically provide for inspection of documents relating to the impugned election after the petition is filed. The only reference to inspection in the Rules is in **Rule 7 (2)** and **8 (2)** relating to a list of voters and list of objections required to be filed by the rules respectively. It is contended that the election court failed to follow the case law cited where inspection had been granted. The appellant mainly relied in the election court on a ruling of Hayanga J. dated 29th September, 1998 in **Said Hemed Said vs. Emmanuel Karisa Maitha & Another** (unreported) where the superior court discussed the reliefs of *Scrutiny, Inspection and Recount*.

In that case however, the applicant sought *Recount* and *Scrutiny* and not *Inspection*. That case is distinguishable from this case because *Scrutiny* in the election court is specifically provided for by **Section 26 (1)** of the Act.

In conclusion, the application for inspection was solely based on **Reg. 42** which, as we have held above does not apply to inspection after a petition is filed. There is no other provision of electoral law, and Mr. Nowrojee, an eminent counsel, has not referred to any, which specifically confers jurisdiction on the election court to order inspection of the documents specified in the application. So, this is not a case of citing the wrong provisions of law. Rather, it is a case where there is no law conferring power on the election court to order inspection. We agree with the interpretation of the law by the election court in the passage quoted hereinbefore. Inevitably, we hold for reasons stated, that, the application for inspection was not maintainable in law and that the election court correctly upheld the first respondent's Preliminary Objection.

In the result, the appeal is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 20th day of March, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR