REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Civil Appeal 272 & 275 of 2008

ELECTORAL COMMISSION OF KENYA.....APPELLANT

AND

1. AYUB JUMA MWAKWESI

2. MWAKWERE CHIRAU ALI.....RESPONDENTS

CONSOLIDATED WITH

CIVIL APPEAL NO. 275 OF 2008

BETWEEN

MWAKWERE CHIRAU ALI.....APPELLANT

AND

AYUB JUMA MWAKWESI.....1ST RESPONDENT

THE ELECTORAL COMMISSION OF KENYA .....2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Mombasa

(Sergon, J) dated 4th December, 2008

in

ELECTION PETITION NO. 1 OF 2008

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JUDGMENT OF THE COURT

These two appeals which we have consolidated for convenient disposal arise from an interlocutory ruling of the High Court of Kenya at Mombasa (Sergon J) given on 4th December 2008 by which the learned Judge refused to admit to hearing and instead, struck out two identical notices of motion filed by Electoral Commission of Kenya, the 1st appellant, and Mwakwere Chirau Ali, the 2nd appellant, under **section 23(2)** of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya, **sections 44** and **60** of the Constitution of Kenya and which motions sought the election petition filed against them by Ayub Juma Mwakwesi, the 1st respondent, to be struck out.

The 2nd appellant was declared the duly elected Member of Parliament for the Matuga Constituency during the 2007 Parliamentary and Presidential Elections. However, the 1st respondent, a registered voter, was dissatisfied and filed an election petition pursuant to the provisions of **section 44** of the Constitution challenging the 2nd appellant's election. He named the returning officer, Ali Maalim Hassan, as the 2nd respondent in the petition. The main complaints by the petitioner were: firstly, that the election was irregularly conducted; secondly, that the votes were either tampered with or manipulated to the benefit of the 1st appellant; thirdly, that the 2nd respondent was openly biased in favour of the 2nd appellant; and fourthly, that the 1st appellant transported voters to the polling stations; and also, bribed them. The respondent sought, inter alia, orders for a scrutiny and recount of all the ballot papers and nullification of the election of the 1st appellant as the Member of Parliament for Matuga Constituency.

Pursuant to the rulings made by the learned Judge on 21st April, 2008 and on 30th June, 2008 the 1st appellant and the 2nd respondent, preferred Civil Appeals Nos. 80 and 136 of 2008 on the ground, mainly, that there was no proper service upon them of the election petition. This Court on 21st November, 2008 ordered as follows:

"

"1. Civil Appeal No. 80 of 2008 Mwakwere Chirau Ali vs Ayub Juma Mwakwesi and two others be and is hereby dismissed with costs to the first respondent, Ayub Juma Mwakwesi. Such costs to be paid by Mwakwere Chirau Ali.

2. Civil Appeal No. 136 of 2008 Ali Maalim Hassan

vs Ayub Juma Mwakwesi and two others be and is hereby allowed. His notice of motion dated 19th May, 2008 is allowed and the petition by Ayub Juma Mwakwesi against him, Ali Maalim Hassan, is struck out with costs to the same Ali Maalim Hassan to be paid by Ayub Juma Mwakwesi."

In allowing Civil Appeal No. 136 of 2008 this Court held that no diligence was exercised to serve the returning officer, the 2nd respondent in the petition, and consequently the petition against him was struck out. Thus, the returning officer ceased to be a party to the petition.

The records laid before us show that by 7th November 2008 when the petition was next due for hearing the 1st respondent had closed his case after five witnesses had testified in support of the petition. Six witnesses had testified on behalf of the 2nd appellant and his learned counsel Mr. Mabeya had indicated to the election court that the 2nd appellant was the sole remaining witness before he rested his case.

By his motion dated 2nd December 2008, the 2nd appellant sought two orders: a stay of further proceedings pending the hearing and determination of the application and striking out of the petition on the grounds that the appeal by the 2nd respondent, the returning officer, having been allowed and consequently ceasing to be a party to the petition, the inevitable consequence is that a petition cannot be sustained in view of the fact that an important and absolutely necessary party to the petition having been removed from it, and that allowing the respondent herein to proceed any further with the balance of the petition would be prejudicial to the 2nd appellant in that it would be tantamount to asking the court to adjudicate upon the petition against the 1st appellant on the basis of unproved wrongs or mistakes allegedly committed by a party not before it.

The 1st appellant, the Electoral Commission of Kenya, also, in its motion lodged on the same day with that of its co-appellant sought an order that the petition against it be struck out on the ground that the returning officer having been removed from the petition any further proceedings against it in the absence of the returning officer who is alleged to have perpetrated the omissions and the irregularities the subject matter of the petition would be prejudicial to it and would be contrary to natural justice.

Mr Buti, learned counsel for the two appellants, urged the learned Judge to admit the two motions to hearing on priority as against the continued hearing of the petition. He submitted that the petition court has inherent and residual power to admit and hear such applications at that late stage of the proceedings. He underpinned his submissions on **rule 22** of the National Assembly Election [Election Petition] Rules 1993 which he contended is a permissive rule.

While resisting the application Mr. Balala, learned counsel for the respondent, submitted that the motions were filed in bad faith and that to allow them would prolong the hearing of the petition.

The learned Judge in a well-reasoned ruling held:

"By the time the petition against the 2nd respondent was struck out, this court had already formed the opinion that the petition should proceed for hearing pursuant to the provisions of section 22 of the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya. I agree with the submissions of Mr. Buti that this court has a wide discretion to admit for hearing certain application in the course of a trial in exercise of its inherent residuary power in order to maintain its character as a court of justice. The overriding feature of the inherent residuary power is a part of procedural law, both in civil and criminal matters it however does not form part of the substantive law"

And also that:

"This court has now been told to adjourn the substantive hearing of the petition and proceed to instead, admit the aforesaid motions to hearing."

The learned Judge concluded:-

"The law under S. 22 of the National Assembly and Presidential Elections Act is quite categorical that this court can either summarily reject the petition or in the alternative list it for hearing. That is the substantive law which of course overrides the procedural law set out under rule 22 of the National Assembly Election [Election Petition] Rules 1993. When this court chose to fix the petition for hearing, the law presumed that the court must have perused each and every complaint facing each respondent. In my view, when an election court chooses to list an election petition for hearing it cannot entertain an interlocutory application to have it rejected save for those other applications specified in the rules."

"For the above reasons I decline to admit the aforesaid motions dated 2/12/2008 for hearing. I hereby order them struck out with costs abiding the outcome of the petition. Let the petition proceed for hearing as scheduled."

The crux of the appeal now before us is whether or not the learned Judge erred in not admitting to hearing the two notices of motion. Mr. Buti submitted before us as he did in the election court that **section 22** of the Act was not expressed in mandatory terms and that there was room left for permissiveness in its application so that justice and fairness was achieved. However, Mr. Balala was of the opposite view contending that due to the particular circumstances of the case the learned Judge acted correctly and cannot be faulted.

It cannot be gainsaid that election petition hearings have to be conducted in the manner provided under the Act and regulations made thereunder. **Section 19(4)** thereof mandates that disputes under the Act be heard expeditiously and in priority to other matters and that is why we agree with the learned Judge in not permitting the parties to frustrate the expeditious disposal of the petition.

Under section 22 of the Act the court can summarily reject the petition or in the alternative list it for hearing. The Courts discretion to act either way is wide and unfettered, the main consideration, of course, being the interests of justice. In doing so it may admit to hearing or, reject applications and may also stop an action at an interlocutory stage if it is wantonly brought without a shadow of an excuse, so that to permit such actions to go through their ordinary stages would be to allow a party to be vexed when there could not at any stage be any doubt that the actions were baseless. See the speech of **Fletcher Moulton L.J. in Dyson v Attorney General (1911) KB 418.** The learned Law Lord also held:-

"But from this to the summary dismissal of actions because the Judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in cases where the action is an abuse of legal procedure."

And also: that:

"To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

The applications before the learned Judge were brought after the 2nd appellant had closed his case and the entire petition hearing was about to be concluded it having been substantially heard. The next date for further hearing had been fixed long before this Court struck out the name of the returning officer from the petition. Though the character and the substance of the petition had drastically changed after the appeal, this fact could have been raised during the petition rather than filing fresh motions. The obvious consequence of the course taken by the appellants was to unnecessarily prolong the proceedings. The motions were, in our view wantonly brought without a shadow of an excuse. As the

appellants could still have their day in court, they could not complain that they had been driven from the judgment seat without the court having considered their right to be heard.

Section 22 of the Act and **rule 22** of the National Assembly [Elections Petition] Rules 1993 give power to the election court to admit to hearing certain applications in the course of a trial in exercise of its inherent residuary power in the interest of justice. The Rules further mandate the court to regulate its proceedings, to adjourn or to continue to hear the petition. Further, under **section 22** of the Act the court can either reject the petition or in the alternative list it for hearing. In the particular circumstances of this case, the learned Judge had exercised his discretion judicially and he cannot be faulted.

No doubt it is obvious from the circumstances enumerated in detail by the learned Judge in his ruling that there is evidence of an attempt to buy time and to see that the election petition is rendered meaningless by effluxion of time.

We think that to allow this appeal would in fact be rewarding the appellants' attempt to prevent conclusion of the petition and we would instead be negating the principle that election petitions should be disposed of expeditiously.

For the foregoing reasons, these two consolidated appeals are hereby ordered dismissed with costs to the 1st respondent Ayub Juma Mwakwesi only.

Dated and delivered at Mombasa this 16th day of October2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR