



REPUBLIC OF KENYA
COURT OF APPEAL AT NAKURU
CIVIL APPEAL 102 OF 2008

JOHN MICHAEL NJENGA MUTUTHO APPELLANT

AND

JAYNE NJERI WANJIKU KIHARA 1ST RESPONDENT

CHRISTOPHER L. AJELE 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA..... 3RD RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nakuru (Koome, J.) delivered on the 30th of April 2008

in

H.C. ELECTION PETITION NO. 2 OF 2008)

JUDGMENT OF THE COURT

This appeal raises the important question whether in an election petition filed pursuant to the provisions of **Section 44 (1)(a)** of the Constitution and **Section 20 (1) (a)** of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya a petitioner is obliged to particularize in the petition the number of votes each candidate received.

John Michael Njenga Mututho, the appellant herein, was allegedly the successful candidate in the Parliamentary Elections for the Naivasha Constituency held on 27th December 2007. **Jane Njeri Wanjiku Kihara**, the 1st respondent in this appeal, who was one of the candidates in that election was dissatisfied with the result. Consequently she decided to and filed an election petition in the superior court, at Nakuru, challenging the appellant's election as member of Parliament for the aforesaid constituency. She named the Returning Officer, one Christopher L. Ajele, and the Electoral Commission of Kenya, as the 1st and 2nd respondents, respectively, with the appellant as the 3rd respondent.

The main complaint raised in the petition is that the Returning Officer neither declared the results as required under the National Assembly and Presidential Elections Act, nor did he complete the tallying and counting of the votes. He allegedly merely declared that **“this old man was a head of Mrs. by 100 votes.”** For that reason she averred that no true and complete election took place for both Parliamentary and civic seats.

Rule 4 (1) of the Presidential and Parliamentary Elections Regulations, provides as follows:

“An election petition shall –

- (a) State whether the petitioner is entitled to petition under section 44 of the Constitution; and***
- (b) State when the election was held and result of the election, and shall state briefly the facts and grounds relied on in support of the petition.”***

The 1st respondent’s petition was filed and served timeously. Upon service of the petition on the appellant and the Electoral Commission, the two brought separate applications challenging the competence of the petition. The first in time was filed on 20th February 2008 by the appellant and the second one was filed on 21st February 2008, and prayed for, among other orders, an order striking out the petition for among other reasons, that it was fatally defective for failing to state the holding and result of the election. The appellant filed a second motion on 7th March 2008, but before doing so he with the leave of the court, sought for and was furnished with particulars of various matters which he raised in his request for particulars. He did not, however, think the particulars furnished satisfied the provisions of the National Assembly and Presidential Elections Act and Rules made thereunder. Consequently, he moved the superior court for an order striking out the 1st respondent’s petition for among other grounds, that the particulars supplied were vague, evasive and deficient. In **paragraph 11** of the affidavit in support, the appellant deposed as follows:-

“That on page 2 of the said answer to request for particulars, it is apparent that at the time of filing this petition, the petitioner was not aware of the results of the said elections as is required under Rule 4 of the National Assembly Elections (Election Petition Rules.”

And in **paragraph 28** he deposes as follows:-

“28. That paragraph 12 of the petition, states that the petitioner found out about the results on 8th February, 2008 after they had filed the petition. No reasons whatsoever were given on why the petition was filed without disclosing the said results as required by Rule 4 of the National Assembly and Elections (Election Petition)”.

Koome J. became seised of both the petition and the three motions. She directed that the three motions be consolidated and be heard together. The learned Judge heard submissions of counsel appearing for all the parties and rendered her ruling on 30th April 2008 in which she declined to strike out the 1st respondent’s petition, and thus provoked this appeal.

At the beginning of this judgment we set out what we consider to be the central appeal. That was the same issue Koome J. attempted to determine in her ruling from which this appeal arises. Her view on the matter was simply this. The 1st respondent heard results being declared that ***“this old man was ahead of Mrs. by 100 votes.”*** These were the results declared and which the petitioner heard or perceived, and the manner in which they were declared was the basis of the petitioner’s complaint. In her understanding the petitioner was complaining about non-compliance with the provisions of **rule 40** which provides for the manner in which election results are to be declared. It was her view that the 1st respondent’s complaint was serious and needed investigation through the formal hearing of the election petition. She concluded that the failure to give detailed results was a mere irregularity which did not affect the jurisdiction of the court to hear and determine the election petition.

In his submissions before us Mr. Mutula Kilonzo Junior for the appellant stated that **Rule 4 (1)** of the Election Petition Rules, is worded in mandatory terms and that it is so worded because an election petition challenges results. In his view therefore a failure to state the particular number of votes each candidate garnered goes to jurisdiction and renders the petition fatally defective. The defect cannot be cured because the relevant legislation and rules made thereunder do not provide for an amendment of a

petition after **28 days** of the election. A defective petition can only be struck out.

Mr. Kihara for the 1st respondent conceded that detailed results were not included in the petition. In his view the omission occurred because at the time the petition was filed no results had been declared which could then be included in the petition. It was his submission that the term “**shall**” as used in **rule 4(1)** of the Election Petition Rules, is not used in mandatory terms but is merely directory. He declared that even as at the date this appeal came for hearing the 1st respondent did not have the results in *Forms 16 and 17 A*. It was his view that what was published in the Kenya Gazette as results for the 2007 Parliamentary elections constituted the results envisaged under **rule 4** of the Election Petition Rules.

Citing the case of ***SIMON KURIA KANYINGI V. NYANJA AND 2 OTHERS***, Mr. Kihara submitted that the appellant having requested for and been supplied with, among particulars, the results of the **2007** Parliamentary Elections, the particulars supplied became part of the petition and thus cured any defect which might have been there because of their absence. He concluded his submissions with a reference to **S.72** of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, which deals with deviation from the prescribed forms. It was Mr. Kihara’s view that the policy of the law is to look at the substance rather than the form.

In reply Mr. Kilonzo Junior submitted that **section 72**, aforesaid, applies where the form does not affect the result. He further stated that results in an election are central to any election petition.

Rule 40(1) of the *National Assembly, and Presidential Elections Regulations* makes provision for announcements of election results. The returning officer is required first, to tally the results from the polling stations for each candidate without recounting the ballot papers that were not in dispute. Second, examine the ballot papers marked “**rejected**” “**rejection objected to**” and disputed and to confirm or vary the decisions of the presiding officers with regard to the validity of the ballot papers. Thirdly publicly announce to persons present the total number of valid votes cast for each candidate in case of an election for the President. Fourth, do likewise for each Parliamentary candidate. Fifth, declare the candidate who has won. Then complete **Form 17 A** and therein declare the name of the constituency, total number of registered voters, votes cast for each candidate in each polling station, number of rejected votes for each candidate in each polling station, aggregate number of votes cast in the constituency and aggregate number of rejected votes. He is then expected to give each candidate or the candidate’s agent present a copy of the form, and deliver to the Electoral Commission the original of **Form 16 A** together with **Form 17 A** and **Form 18**.

By **Regulation 46** where an act or thing to be done in the presence of the candidates or their counting or polling agents, it shall be regarded as done by a candidate.

The marginal note to **regulation 40**, aforesaid, reads “**Announcements of Election results.**” A careful reading of that regulation clearly suggests that the result is not confined to just declaring who won. The detailed result is what is envisaged. The regulation deals with votes cast, votes spoilt, and those garnered by each candidate. So when **rule 4(1)** of The National Assembly Elections (Election Petition) Rules, provides that the date of the election, the results and the grounds relied on must be stated it does not merely connote stating the name of the winner as Mr. Kihara suggested. It is clear from **rule 4(l)(b)**, above that the issue in any election petition is the result of the election. It should be noted that other than a statement on capacity to bring the petition and the date of the elections, the only other important factor to be included in an election petition is the result. The marginal note of that rule makes the position abundantly clear. It talks about the contents and Form of an election petition. The result does not go to form but to the content of the petition; and in our view **rule 4 (1)**, above is specifically concerned with content. **Rule 4(2), (3) and (4)** are concerned with form.

What would happen where, as here the results as envisaged by **regulation 40**, above are not included in the petition”? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, then the petition would be incurably

defective. For instance, **paragraph (a) of rule 4(1)** deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective. We say so advisedly. The provisions of the National Assembly and Presidential Elections Act, have been held, to provide a complete code of the law and rules on elections and election petitions. As rightly pointed out by Mr. Kilonzo for the appellant, that law has no provision for amendment of pleadings after the 28 days stipulated for lodging petitions. In view of the conclusions we have come to on that aspect, it follows that the term “**shall**” as used in **rule 4**, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose.

An issue was raised regarding the particulars which the appellant requested for and which the 1st respondent says she furnished. Mr. Kihara for the 1st respondent submitted before us that the particulars which his client supplied became part of the pleadings and thus cured any defect that might have been in the petition. Mr. Kilonzo Junior submitted on that score that after the expiry of **28 days** from the date of the elections a petitioner would have no right of amending or adding to his petition because by then the period within which an election petition is to be filed and served would have expired. In his view the particulars the appellant requested for were as a matter of abundant caution and did not cure what in his view is a fatal defect in the petition.

Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it. **Section 20** of the Act is clear that any amendment of a petition can only be legally done within **28 days**. No supplemental petition was filed in terms of **S.20(3)**. Besides, the petitioner does not have results even now. Her advocate stated as much. If she does not have the results, what is she challenging?. The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.

We also do not understand why the 1st respondent says she does not have results. If for any reason either herself or her agents were not given results in **Form 17 A**, as the law requires, that is not a complaint that would be determined through an election petition as election petitions envisage challenging results in an election.

For the reasons we have endeavoured to give, we allow this appeal, set aside the decision of the superior court dated **30th April 2008**, and in consequence thereof allow the appellant’s application dated **20th February 2008** with the result that the **1st respondent’s petition** dated **18th January 2008** and filed in court on the same day is ordered struck out with costs of the appeal, the application to strike out the petition and the petition to the appellant.

Dated and delivered at Nairobi this 14th day of November 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR