



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appeal 168 of 2003

SIMON KURIA KANYINGI.....APPELLANT

AND

1 GEORGE BONIFACE NJAU MBUGUA NYANJA

2 JOSEPH MWANGI NJOROGE (Returning Officer Limuru Constituency)

3 ELECTORAL COMMISSION OF KENYA.....RESPONDENTS

(Appeal from an order and Ruling of the High Court of Kenya at Nairobi (Mbogholi Msagha, J) dated 19th June, 2003 in respect of the withdrawal by the Petitioner of the Better and Further Particulars date 10th March, 2003 and filed in Court by the Petitioner on the 11th March, 2003) In PETITION CAUSE NO. 27 OF 2003)

JUDGMENT OF THE COURT

1. The decision which we are about to announce, being on an interlocutory appeal, will not at all dispose of the Petition Cause which is still pending hearing and determination in the superior court and it appears that the people of Limuru Constituency will not be able to know whether or not their sitting Member of Parliament was validly elected or not. This is because the natural life of the current Parliament is about to come to an end and it is well nigh impossible to dispose of the petition before then.
2. A combination of forces seem to have colluded to deny the said Constituency its constitutional right so to know. The chief obstacles which have militated against the expeditious disposal of the petition are first, the heavy cause lists both in this Court and in the superior court and secondly; the rigid and sometimes technical rules governing petitions in this country.
3. This is an appeal from the decision of Mbogholi Msagha, J given on 19th June, 2003 by which the learned Judge held that the 1st respondent herein and the petitioner in the Petition Cause, was at liberty to withdraw the particulars supplied in answer to the Request for Better and Further Particulars made by the appellant herein and the 1st respondent in the Petition Cause pursuant to rule 5 of the **National Assembly Elections (Election Petition) Rules** and **Order VI rule 8 of the Civil Procedure Rules**.
4. George Boniface Njau Mbugua Nyanja, the 1st respondent, was a candidate in Limuru Constituency in the General Election held on 27th December, 2002. He contested the seat but lost it to Simon Kanyingi

Kuria, the appellant. On 30th January 2003, the 1st respondent filed a petition alleging a multiplicity of irregularities and offences against the appellant and the 2nd and 3rd respondents and sought an order nullifying the election of the appellant as the Member of Parliament for Limuru Constituency.

5. On 10th February, 2003 the appellant sought from the 1st respondent particulars on 11 paragraphs of the petition which required the 1st respondent to, mainly, state the nature of the offences and irregularities complained of and which specific law or statutes were contravened; the details of names, addresses and identify card numbers of the officers of the Provincial Administration; dates and times of the meetings allegedly organised by the petitioner; the registration numbers and makes of the motor vehicles used in the election; whether any complaints were made about alleged goat eating ceremonies; the names of the alleged bribers of voters; the names of the agents who intimidated voters and how the election results were affected.

6. It is on record that the 1st respondent through his learned senior counsel, Mr Wamae, on 11th March, 2003 supplied what he deemed a detailed “better and further particulars” contained in no less than eleven pages. However, on 28th April, 2003, the appellant moved the superior court by a Notice of Motion for orders that the petition be struck out on the following grounds, inter alia, that:-

- a. *The Petition does not disclose any reasonable cause of action.*
- b. *The acts alleged in the Petition do not amount to any offence or violation of electoral laws.*
- c. *The Particulars filed in court are not in compliance with the law appertaining thereto or the Orders of this Honourable Court.*
- d. *The said particulars amount to, and are, an attempt to amend and enlarge the Petition, which amendment is now not possible at law.*
- e. *The said Particulars are based upon alleged causes of action different from the pleadings in the Petition.*
- f. *The said Particulars are inconsistent with the averments in the petition.*
- g. *The said particulars are not of the contents of the Petition but import new allegations which is not permitted by law.*
- h. *The said particulars are an abuse of the process of the Court.*
- i. *The said particulars do not constitute answers to the request of particulars as by law required.*
- j. *The said particulars are vexatious and/or scandalous and/or frivolous.*
- k. *Contrary to the requirements of law, the said particulars do not disclose the specific provisions of the Election Offences Act, Cap 66 or of the section thereof, alleged to have been breached.*
- l. *The Petition is grounded upon sections of law which have nothing to do with the complaints and averments in the petition and are therefore inconsistent and irrelevant”.*

7 The application was fixed for hearing on 18th June, 2003 wherein Mr Nowrojee, senior counsel for the appellant, submitted in the main that no cause of action was disclosed against the appellant in that the particulars supplied were not consistent with the averments contained in the petition. He contended further that they were so deficient that any party in the petition would be taken by surprise if any evidence were to be led in support of them and that these particulars did not meet the requirements of the law.

8 Before Mr. Nowrojee concluded his submissions Mr Wamae raised objection to the manner in which

Mr Nowrojee was prosecuting the application. Mr Wamae contended that Mr. Nowrojee was in fact introducing evidence which was expressly prohibited by the relevant rules. The learned Judge overruled the objection, and Mr Wamae in a surprise move told the court:

“I wish to withdraw my particulars on the ground that they contain evidence. It is being used by the 1st respondent in matters that could be prejudicial to the fair trial of this suit”

9 In opposing this sudden move by Mr Wamae, Mr. Nowrojee argued that there is no such thing as withdrawing the particulars as one can only withdraw a case and that that was not capable of being done. He contended that a party cannot be allowed to withdraw what is unfavourable and keep on record what is only favourable to him.

10 The learned Judge in a short ruling held:-

“Be that as it may, any pleading or document filed in court is the property of the party who files the same in Court. He or she is at liberty to withdraw the same at any time he or she wishes provided no prejudice is occasioned to the other party. None has been alleged at this stage.

Further, just as there is no law cited to oppose the withdrawal, there should be none demanded to show why the particulars should not be withdrawn. I find that the Petitioner is at liberty to withdraw the said particulars dated 11th March 2003, and so allowed. The Petitioner shall however pay the costs so far incurred in respect of the notice of motion.

Orders accordingly.”

11 Being aggrieved by this decision the appellant has filed in this

Court a memorandum of appeal containing fourteen grounds. We, however, do not think that it is necessary for us to consider each and every one of them in order to effectively dispose of this interlocutory appeal.

12 The synopsis of grounds 1, 2, 3 and 5 of the memorandum of

appeal is that it was an error on the part of the learned Judge to hold that any pleading or document filed in court is the property of the party who files the same in court and that party is at liberty to withdraw it at any time he or she wishes and further that the Petitioner was at liberty to withdraw the particulars so filed in court.

13 Mr Nowrojee in agitating on these issues in the appeal, submitted that though the parties to litigation physically own the pleadings what is, however, contained in the court file is the property of the court and not of the parties to the suit. Drawing an analogy, he contended that equally so in a petition cause the court owns what is in the court file. He averred that an election petition is not a private suit as it affects a whole constituency. Moreover, he went on, what is sought in the petition is not a personal relief nor a personal gain. For example, the 1st respondent cannot ask the court to seat him in Parliament and, apart from costs he cannot obtain any other personal relief from the court. To reinforce his submissions Mr Nowrojee pointed out that unlike other ordinary civil suits the resultant decree in a petition cause is only a certificate to the speaker.

14 With respect, we would think that Mr. Nowrojee is right. It is trite law that the court has total control over the whole process of election petitions. For example, parties by themselves cannot set down the petition for hearing. It is only the court which is mandated to do so. Also, a petition may be withdrawn only with the leave of the court and the parties and their advocates must file affidavits in support to the application seeking withdrawal. See **rules 23 and 24 of the National Assembly Election (Election Petition) Rules (the Rules)**. Again, under **rule 25 of the Rules**, copies of and notice of application must be published in the Gazette. It would appear that even the death of the petitioner cannot by itself allow withdrawal save according to the Rules. This sharply contrasts with ordinary suits and appeals of which

there are no hard and fast rules as relates their withdrawal.

15 We hold therefore that election petitions constitute proceedings of a public nature and are not private proceedings. They are in fact proceedings of a special nature.

16 This being the position we subscribe to, it follows that the learned Judge was wrong in holding that any pleading or document filed in a Petition Cause is the property of the party who files the same in court.

17 Again, we need only to reiterate that election petitions are governed by a special regime of rules and they follow a strict and rigid time table under constant supervision of the court. See **Alicen Chelaite v Njuki & 2 Others C.A NO. 150 of 1998 (unreported)**. It is also manifest that a request for particulars in an election petition cannot be dealt with within the frame work of **Order 6 of the Civil Procedure Rules**.

18 As a Petition cause cannot be withdrawn save in accordance with the statutory provisions governing it and as the particulars, so filed, were part of the petition they also fall within the special jurisdiction. We think therefore that there is substance in grounds 5, 6 and 7 of the grounds of appeal.

19 Could the 1st respondent properly withdraw his Particulars in the middle of a part-heard application for striking out the Petition and the said Particulars? Rule 5 of the Rules states:

“5. Evidence need not be stated in the petition, but the election court may, upon application in writing by a respondent order such particulars as may be necessary to prevent surprise and unnecessary expenses and to ensure a fair and effectual trial, upon such terms as to costs and otherwise as may be ordered.”

20 The rule mandates that the request for particulars has to be channeled through the court and it is the court which decides whether the particulars sought are necessary before making an order and whether the application for their request should be granted or not. We think it can reasonably be concluded that equally so, they cannot be withdrawn without the sanction of the court.

21 Herein, the 1st respondent had readily provided the particulars sought by the appellant. After they had been filed, the appellant’s counsel moved the court to have the Petition and the particulars struck out on the ground that the particulars provided are not consistent with the pleadings in the petition and that they amounted to an attempt to add or to have a new petition with fresh offences being alleged against the appellant. The particulars were submitted upon request by the appellant in the motion and they were supplied before the 1st respondent concluded his submissions. In the circumstances the 1st respondent was liable to be cross-examined on the particulars if the court thought it right so to order and he could not be allowed to get out of it by saying that he would withdraw his particulars.

22 In **Comet Products v Hawkex Plastics [1971] 1 ALL ER 141** the plaintiffs brought an action against the defendants for passing off and obtained an interim injunction restraining the defendants from passing off their own hair trimmer, or any other hair cutter or trimmer, as the plaintiffs’ hair cutter “whether by reasons of a similar shape, appearance, get-up, container, pack or price or otherwise”. Both the plaintiffs’ hair cutter and the defendants’ hair trimmer had been packed in similar black and gold cartons. Following the injunction the defendants altered the mould of their hair trimmer and put it on the market in a red and gold carton. On discovering this, the plaintiffs applied to the court for, *inter alia*, the committal of the second defendant to prison for contempt of court. Affidavits were filed by the parties, including the second defendant, and read in court at the hearing of the motion. Objection was taken to cross-examination of the second defendant on his affidavit on the ground that the proceedings were criminal in nature and that he could not be compelled to submit himself to cross-examination. It was held by the Court of Appeal that:

(i) when the second defendant had sworn and filed an affidavit and it had been read to the court as part of the defendants’ case he could not subsequently withdraw it so as to avoid cross-examination thereon;

and that

(ii) in such a case, however, the court had a discretion whether or not to allow cross-examination on the affidavit.

23 In the matter before us, it was not open to the 1st respondent at that stage of court proceedings to elect to withdraw the particulars so as to avoid cross-examination and though the court had a discretion to allow the withdrawal it did not assign any valid reasons for granting leave to do so.

24 Having carefully considered the particulars supplied by the 1st respondent we would think that their withdrawal would gravely affect the proceedings in that it would be prejudicial to the appellant and would constitute an interference with the court process as far as the election petition was concerned since the act would have necessitated postponement of the trial; and consequently, there would have been a delay in the disposition of the petition cause.

25 We would also uphold the holding in Somportex Ltd v Philadelphia Chewing Gum Corporation [1968] 3 All ER 26 by Salmon LJ that:

“if a party, who has had the best professional advice, elects to take a course of this kind, acts on it and that action has the effect of postponing the proceedings for three months, he should not subsequently be able to say that he resiles from what he has done and would now rather elect one of the other courses which had been open to him.”

We therefore allow grounds 10 and 11 of the grounds of appeal.

26. We believe that in taking the course that the 1st respondent did, he had advice from senior counsel who knew of the decision in Chelaite's case, and had the best legal advice on all the matters before the election court but elected to pursue a certain angle. In the circumstances, it was wrong on the part of the learned Judge to allow the 1st respondent to resile from what the 1st respondent had done.

27. As the petition cause is still at its infancy stage, we will not express any firm views on the other aspects of the petition and so we refrain from discussing the other grounds of appeal. For the foregoing reasons we allow the appeal and order that:

1. **The decision of the superior court dated the 19th June 2003 in respect of and allowing the withdrawal by the 1st respondent (Petitioner) of his Better and Further Particulars dated the 10th March 2003 and filed in Court on the 11th March 2003 be set aside.**
2. **The part-heard hearing of the Appellant's application by Notice of Motion dated and filed in Court on the 28th April, 2003 do continue with the 1st respondent's said Better and Further Particulars once more as part of the Court record.**
3. **The 1st respondent do pay the costs of this appeal and of and incidental to his application in the superior court to withdraw the said Better and Further Particulars.**

These shall be our orders.

Dated and delivered at Nairobi this 28TH day of September, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR