REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 30 OF 1979

MOHAMED MWINYIMTWANA JAHAZI.....PETITIONER

VERSUS

1. FRANCIS CHEROGONY

2. SHARIFF NASSIR TAIB.....RESPONDENTS

JUDGMENT

At the commencement of the hearing of this petition, both respondents have raised a preliminary objection, notice of which has been given to the petitioner, that there is no valid petition before the court, with the result that the court is precluded from adjudicating upon the matters complained of by the petitioner. An objection, made on the same grounds, is taken in Election Petition No 31 of 1979, *Ibrahim Salim Abdalla Mwaruwa V Cherogony and Said Hemed Said*, which is now before us for hearing and in which the representation by counsel is also same, it was agreed that the submissions and decision in this case be followed as if it was the hearing of that case. Mr Kivuitu and Mr Masike appear for the petitioner, Mr Shields with Miss Matu and Mr Sharma appear for the 1st respondent, returning officer and Mr Nagpal with Mr Oraro appear for the 2nd respondent. Section 44 of the Constitution of Kenya has conferred upon the High Court jurisdiction to determine election petitions, and more particularly section 44(3) has empowered Parliament to make provision with respect to

> "(a) the circumstances and manner in which, the time within which the conditions upon which an application may be made to the High Court for the determination of a question under this section;
>
> and
>
> (b) the powers, practice and procedure of the High Court in relation to any such application."

Parliament made such provisions in the National Assembly and Presidential Elections Act, cap 7, (hereinafter referred to as "the Act"). Section 19 of the Act provides for the bringing of petitions and the constitution of an election court, and section 20 deals with the presentation of petitions, including the time limited for their filing. Section 22 provides for the procedure to be followed on receipt of the petition and section 23 is concerned with the procedure to be followed by an election court, including a provision that

> "the Rules Committee may make rules of court regulating the practice and procedure concerning petitions."

Such rules have been made in the National Assembly Elections (Election Petitions) Rules (hereinafter referred to as “the Rules”) and Rule 4(3), which is relevant to the objection provides:

“The petition shall conclude with a prayer as for instance, that some specified person should be declared duly elected or nominated or that the election should be declared void, and shall be signed by all the petitioners.”

We have underlined the relevant words. The petition before us is endorsed: “ADAMBESA & CO ADVOCATES FOR THE PETITIONER” with Mr Adambesa’s signature above it.

It is the submissions of both respondents that the omission by the petitioner personally to have signed the petition as required by the rule we have set out above is fatal, that no valid petition is before the court, and the court has no jurisdiction to examine the validity of the election.

In support of his submission that no petition is before the court Mr Shields draws our attention to the ruling of the election court in Election Petition No 3 of 1970 *Okova v Nyarangi & Tsuma* (unreported) in which the petitioner sought to enlarge the time for service of an election petition on the respondents. The court refused the application holding that the provisions of rule 15, requiring in effect the service of the petition upon the respondent within 10 days of its presentment, were mandatory, and that the court had no jurisdiction to extend the time for service. We will have occasion to refer to this ruling in some detail later. Mr Shields also submitted that the Civil Procedure Act and Rules do not apply for the reason that there is specific provision in the Rules for signature of petitions.

Mr Nagpal supported Mr Shields’ arguments, and referred us to the judgment of the Court of Appeal in Election Petition No 30 of 1981, *Karanja v Kabugi and Magugu* (unreported) where it was held that the Civil Procedure Rules applied where there was no specific legislation covering the practice and procedure to be followed. Mr Nagpal also drew our attention to an Australian case, *In Re Porter’s Petition*, reported in the Commonwealth Law Reports, volume 31 at page 600. Section 185 of the Commonwealth Electoral Act 1918 – 1922 provides, *inter alia*, that every petition disputing an election or return shall be signed by a candidate at the election in dispute or by A person who was qualified to vote thereat, and be attested by 2 witnesses and be filed in the Principal Registry of the High Court within 40 days of the return of the writ. The petitioner was at Darwin within 40 days of the return of the writ. The petitioner was at Darwin in the Northern Territory, while the Principal Registry of the High Court was in Melbourne. The petitioner sent a petition to the Principal Registrar by telegram within the stipulated time. In the telegram the petitioner stated the grounds of the petition and that he had signed it and that it had been attested by 2 witnesses whose names and addresses he gave. Section 187 of the Act (above) provided that

“no proceedings shall be had on the petition unless the requirements of the preceding sections (including section 185) are complied with.”

The Principal Registrar filed the petition subject to determination by court of question whether receipt thereof by telegram was sufficient compliance with section 185 of the Act (above). The matter came for determination before a full court of 5 judges and was presided over by Knox CJ. On behalf of the petitioner it was argued that the section 185 did not require personal signature by the petitioner or the attesting witnesses and that signature by an agent was sufficient and that the officer of the Post and Telegraph Department was, for that purpose, an agent. Knox CJ delivering the leading judgment of the court, with which the other members agreed, is reported to have said:

“It is obvious that the signature of the petitioner and the attestation by the witnesses are required for the

purpose of authenticating the petition and of identifying the person responsible for its presentation. The Act, as one would expect does not provide that the signature of the petitioner or of an attesting witness may be written by anyone other than the person whose signature it purports to be. In the absence of such a provision it is necessary that the petition should be actually signed by these persons respectively, and the only question is whether the Act requires that the petition so signed and attested shall be filed or whether the filing of a copy of a petition so signed and attested not itself actually signed by those persons is a sufficient compliance with the requirements of section 185. On this point the words of the section are clear and unambiguous. They provide that every petition shall be (a) signed, (b) attested and (c) filed, clearly indicating that the petition to be filed is that which had been actually signed and attested – the identical document and not a mere copy. The only document in the form of a petition received by the Registrar was neither signed by the petitioner nor by witnesses whose names it bore – the names of the petitioner and the witnesses being typewritten, presumably by a clerk in the Telegraph Office. Consequently it does not, in my opinion, conform to the requirements of section 185 of the Act. By section 187 it is provided that no proceedings shall be had on the petition unless the requirements of (*inter alia*) section 185 are complied with. It follows that no proceedings can be had on this petition, and that the application should be dismissed."

Mr Nagpal also referred us to *In re Price Blucher* [1931] 2 Ch D 70, a bankruptcy matter, the head-note of which is:

"By s 16 sub-s 1 , of the Bankruptcy Act, 1914, where a debtor intends to make a proposal for a scheme of composition in satisfaction of his debts, he shall within the time thereby limited lodge with the Official Receiver "a proposal in writing signed by him" embodying the terms of the scheme of composition which he is desirous of submitting for the consideration of his creditors. At a meeting of creditors of a debtor against whom a receiving order had been made a proposal for a scheme of composition was submitted on behalf of the debtor. The proposal was not signed by the debtor himself but by his solicitors. On behalf of the debtor a certificate by an eminent physician was exhibited to an affidavit, in which it was stated that the debtor was "still so seriously ill as to make it quite impossible for him to discuss any matters of business, and that any attempt to explain to him business details or proceedings would have serious and possibly a fatal effect upon him- Held, affirming the decision of the Registrar, that no proposal for a composition had been lodged by the debtor within section 16, sub section 1, of the Act; that the words "signed by him" were explicit; and that there was no ground for altering the words of the statute or giving to the statute a judicial interpretation which would in effect be an amendment or alteration of its plain terms. *In re Whitney Partners Ltd* (1886) 32 Ch D 337: *Hyde v Johnson* (1836) 2 Bing NC 776 applied."

In agreeing with the judgment of Lord Hanworth MR, Slesser LJ stated at page 75 –

"Mr Tindale Davis's argument amounts to this, that some injustice or inconvenience would arise in the circumstances of the case if some one other than the debtor were prevented from signing on his behalf. But it was laid down many years ago, and was followed in *Warburton v Loveland* (1) that: 'Where the language of the act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the legislature.' I find myself quite unable to think here that the words are other than explicit. The language of the statue is 'signed by him', and as my Lord has pointed out in considering very similar words in a writing or letter of acknowledgment under Lord Tenterdens's Act, it was held by the court that the words 'signed by him' could not be extended to signed by an agent or some other person on behalf of the required signatory. Other statutes than the Statutes of Frauds contain specific provisions where it is required that an agent may sign on behalf of a sick person. Under the Bills of Exchange Act, 1882, by s 91, sub-s 1, it is provided specifically: 'Where, by this Act any instrument or writing is required to be signed by any person, it is not necessary that he

should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.' In the present case it is clear that no such permission is given directly or can properly be read into the language of the statute. I think that the words are clear and explicit, and that the intention of the Legislature is so expressed that the signing must be by the debtor, and as the debtor here for some reason or other is unable to sign, it follows he is unable to avail himself of the benefits of the section. I therefore agree that the appeal should be dismissed."

Mr Nagpal also drew our attention to the case *Orpen v Celliers* [1903] 20 SE 261, a digest of which appears in para 992, volume 20 of the *English & Empire Digest*. This is a South African case decided when that country was a part of the Commonwealth. Unfortunately Mr Nagpal has not been able to obtain the full report, nor have we been able to discover it. The paragraph in the digest is as follows:

"992. Signature by agent alone – Act 9 of 1883, s 4, provides that where an election petition is presented it 'shall be signed by petitioner or all of petitioners, if more than one.' Held: The provision was peremptory and a petition signed by the agent of petitioner, and not by petitioner personally, was invalid."

Mr Kivuitu said that it was unfortunate that the then advocate for the petitioner had seen fit to sign the petition, but added that there was no other irregularity which was complained against, and submitted that the omission to comply with sub-rule 4(3) of the Rules was not fatal, and did not even need amendment, that sub-rule 4(3) did not exclude a pleader duly appointed, and that while he conceded that a petitioner first signs the petition and then signs a document appointing an advocate under rule 9, the petitioner, having appointed Mr Adembesa, the matter (of signature) is technical.

Mr Kivuitu submitted that the Australian case of *In re Porter's Election Petition* was distinguishable in that the petition was sent by telegram and was not signed at all, and furthermore, there was not peremptive provision like section 187 of the Australian Act in our laws. As to the South African decision, a full report was not available and it was difficult to rely on it as we do not know if the agent was a lawyer duly appointed, as here.

Referring to the judgment of Harris J in *Prabhudas (N) & Co v Standard Bank* [1968] EA 670, Mr Kivuitu submitted that the test to be applied was whether there had been any failure of justice because of the irregularity applied in this case it would deny the petitioner natural justice. Mr Kivuitu also referred us to the decision of the Judicial Committee of the Privy Council in *Marsh v Marsh* [1945] AC 21 (quoted by Harris J at page 676 *supra*) where, in considering whether an order making absolute a *decree nisi* of divorce pronounced before the time allowed by the rules for showing cause had elapsed was a nullity, the Board said at p 284:

"But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v Praetorious* (1888), 20 QBD 764, and *Smurthwaite v Hannay*, [1894] AC 494, are leading examples of the former, while *Fry v Moore (supra)* may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry v Moore (supra)*, there has been a defect in the service but the writ has come to the knowledge of

the defendant."

Mr Kivuitu also contended that even where the word "shall" had been used by the legislature, the courts have held that it was not necessarily mandatory. In *Abeid v Badbes* [1968] E A 598 Mosdell J held that a notice given under the Landlords and Tenants (Shops, Hotels and Catering Establishments) Act was valid because it contained all that was required under the Act and the Regulations which were directory. Mosdell J went on to state, at pages 601 and 602 :

"Mr Pandya was at pains to show that the provisions of the Act were mandatory. Mr Inamdar, for the plaintiff, did not, nor does this court, cavil with this submission. To quote but one of the authorities cited by Mr Pandya, namely, *Odgers Construction of Deeds and Statutes* (4th Edn), at p 186:

'VIII. Statute if clear must be enforced. If the language of a statute is clear, it must be enforced though the result may seem harsh or unfair and inconvenient. It is, again, only when there are alternative methods of construction that notions of injustice and inconvenience may be allowed scope.'

and the words of Tindal CJ in *Warburton v Loveland* (1831), 2 Dow & Cl (HL) at p 489, quoted at p 187 *op cit*.-

'Where the language of an Act is clear and explicit we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.'

Of course the clear language of a statute must be complied with. But, submitted Mr Inamdar, that does not necessitate the slavish adherence to the words used in the statute or in the form contained in Regulations made under the statute, if the provisions of the statute in question and the requirements of such regulations be complied with, albeit by means of the use of different words. Indeed, were Mr Pandya's thesis to be carried to its logical conclusion, a document would have to be held invalid where the "i's" not dotted or the "t's" not crossed."

This authority is distinguishable from the case before us. As Mr Kivuitu has very properly informed us, it was not followed in the case *Lall v Jeypee Investments Ltd* (1972) EA 512, the head-note of which is as follows-

"Every statute must be interpreted on the basis of its own language since words derive their colour and content from the context and the object of the statute is a paramount consideration (*Attorney-General v Prince Arnest Augustus of Hanover (3)* followed;

(ii) the act is for the protection of tenants and the provisions for notice are mandatory and not directory (*Price v West London Investment Building Society* (4) followed; *Abeid v Badbes* (5) not followed);

(iii) a notice not in accordance with the Act is ineffective even if it follows a prescribed form."

In the course of the judgment of the court, Madan J (as he then was) pointed out at page 514:

"There could be no doubt that the act is an especially enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of the Act are observed to the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this fashion the Act must be construed strictly no matter how harsh the result.I am of the opinion that the provisions of section 4(5)are peremptory and imperative, and any

notice givenby a landlord pursuant thereto must comply with itsrequirements absolutely and without any deviation. Theimportance of this is obvious to my mind. A tenantwho is sought to be ousted from his place of businesswhere he has been carrying on his trade and is earning his livelihood must be informed in the clearest possible terms of his right to resist ejectment under and in accordance with the provisions of the Act. I am also of the opinion that the notice served by the landlord was not in conformity with the mandatory provisions of section 4(5) inasmuch as it did not require the tenant to serve a counter notice within one month after the date of receipt of the landlord's notice. Subsection (5) states that a tenancy notice shall not be effective for any purposes of the Act unless … In the words of Viscount *Dilhorne in Kammins Ballrooms Co Ltd, v Zenith Investments (Torquay) Ltd.,* [1971] AC 850 at p 869, it is language which is 'emphatic and which is clear and explicit has been used, and language which can leave no doubt in the mind of anyone who reads it that an application to be effective must comply with the time limits imposed … The Landlord and Tenant Act 1954 laid down a code which parliament intended to be followed. If a landlord does not give notice of termination as prescribed, the notice will be ineffectual." I would also respectively adopt the following words of Lord Reid, at p 859:

'This may seem a technical and unmeritorious defence, but there is no doubt that the Court has no power to dispense with these time limits if the defendant chooses to object at the proper time…

If the words of an Act are so inflexible that they are incapable in any context of having any but one meaning, then the court must apply that meaning, no matter how unreasonable the result – it cannot insert other words.'

I think Parliament deliberately altered the expression "after the giving of this notice' to "after receipt of this notice", in an attempt to bring the new prescribed form in conformity with sub-section (5). It was not a meaningless or accidental alteration. In my opinion "giving" is not synonymous with receiving or "receipt'; the "giving" is not the same as the "receipt" of a notice. The difference between the two could lead to annihilation of the the rights of a tenant. I therefore think the tribunal erred in holding that because the notice was served on the same day as it was written the use of the word "receipt" or "giving" made no difference. I do not accept the argument that the landlord should be exonerated because he used the form that was available to him at the time he gave his notice. In my opinion it matters not that at the time of giving of notice by a landlord no service has been prescribed or there is in existence a prescribed form which is not in conformity with the provision of the Act. It is quite useless to serve a notice which is not in conformity with the provisions of the Act. A landlord giving notice must strictly comply with subsection (5). If I may use a word from the judgment of Plowman J, in *Zenith Investments (Torquay) Ltd v Kammins Ballrooms Co Ltd* (No 2), [1971] 1 WLR, 1032 at p 1056 the court is forbidden by subsection (5) to enforce any notice which is not given in strict conformity with the provisions of the Act.

In *Kammins* the tenants' application was made less than two months after the request for a new tenancy, contrary to section 29 (3) of the Landlord and Tenant Act, 1954: it was contended that the application could not be entertained by the court. The House of Lords upheld the objection and dismissed the appeal. As is well known many of the provisions of our Act are modelled on the Landlord and Tenant Act 1954.

My attention has been drawn to the reported case of *Abeid v Badbes*, [1968] EA 598 which was decided by Mosdell J. In that case the Landlord's notice was given when the original form "A" prescribed by LN 19 of 1966 was in force. Instead of requiring the tenant to serve his counter-notice within one month after the giving of the landlord's notice as laid down in section 4(3), the landlord called upon the tenant to notify him within one month of the date of the receipt of the landlord's letter whether or not the tenant agreed to the termination of his tenancy. Mosdell J held that the notice was valid because it contained all

that was required under the Act and the Regulations which were directory; that although there was a variation between the wording in the form “A” in the Regulations and the Act itself, the form was not *ultra vires* the Act.

During the course of his judgment the judge said, at p 603:

“The real question here, as submitted by Mr Pandya, is- Is regulation 4 of the Regulations imperative or directory" If the former, then Mr Pandya’s submission must carry the day. If on the other hand regulation 4 is directory only, then Mr Inamdar’s submissions must succeed.

For some reason or other authority on this point is extraordinarily sparse. Neither Mr Pandya nor Mr Inamdar could cite me an authority directly in point.”

Mosdell J went on to refer to and he relied heavily on the English case of the *The King v Lincolnshire Appeal Tribunal, ex p Stubbins*, [1917] 1 KB 1. In that case the Court of Appeal held that while the statute gave an absolute right of appeal, the provisions as to procedure (relating to the filing of an appeal) were directory only and not imperative, and that non-compliance with them had not deprived the military representative of his right of appeal.

Mosdell J’s *ratio decidendi* is to be found in the following passage in his judgment at p 605, or so I think: “In the instant case the notice given by the plaintiff contained all that was required substantively both by the Act and the Regulations and the contentions of the defendant here appear to me as devoid of merit as were those of Mr Stubbins in *R v Lincolnshire Appeal Tribunal.* In my view the plaintiff by using the expression ‘within one month of the date of the receipt of this letter’ conveyed the same meaning as would have been conveyed had he used the words ‘within one month of the date of the giving of this letter’ or within one month of the giving of this letter.’”

I think it is recognized that each statute has to be interpreted on the basis of its own language for, as Viscount Simmonds said in *Attorney-General v Prince Ernest Augusts of Hanover* [1957] AC 436 at p 461 words derive their colour and content from their context; secondly, the object of the legislation is a paramount consideration. If the Court of Appeal in *ex p Stubbins* regarded the provisions as to procedure referred to by them as directory, I have no quarrel. In any event I have no quarrel with the English Court of Appeal. No doubt those provisions permitted of such an interpretation. The object must have been to ensure that the absolute right of appeal given by the statute was neither impaired nor whittled down and also the object of the legislation was not submerged or destroyed; or, stated simply, the end of justice were not defeated.

I think the correct manner of interpreting section 4(5) in its context is to see whether the notice is in conformity with the express mandatory provisions of the Act. If it is not so in conformity then it is a bad notice. With respect, it is not enough that it contains, as Mosdell J held, all that is required substantively by the Act and the Regulations. This is an Act which requires, insofar as the giving of the notice is concerned, absolute and complete not merely substantive compliance with its peremptory provisions.

I also think that Mosdell J was not well served. He said authority on the point was sparse. His attention might for example have been drawn to *Orman Brothers Ltd v Greenbaum* [1955] 1 All ER 610 in which case the Court of Appeal held that a notice to quit which was not in the prescribed form was ineffective; or to the decision, again the Court of Appeal, in *Price v West London Investment Building Society,* [1964] 2 All ER 318, which held that in so far as the form of notice by a landlord to a tenant terminating his tenancy of business premises under section 25(1) of the Landlord and Tenant Act 1954, as prescribed under section 66 of the Act purported to alter the effect of section 20 (3) by stating that a counter-notice

might be given within two months of the tenant's receiving the landlord's notice instead of within two months of the landlord's giving it, it is *ultra vires.*

Dankwerts LJ said at p 322:

"The word received" is used. A reference is plainly intended to section 29 of the Landlord and Tenant Act 1954, in which the word is not "received', but "giving". It seems to me to be quite plain that neither the form nor the notes can alter the provisions of the Act. In so far as there is an attempt to provide for a different situation from that contained in the sections of the Act to which I have referred, which use the word "give", giving" or "given", the form and these notes are *ultra vires*, because the regulations cannot enlarge the jurisdiction of the Court as conferred by the Landlord and Tenant Act 1954."

The courts have not been inactive in England since *Abeid v Badbas* was decided. In *R v Pontypool Gaming Licensing Committee, ex p Risca Cinemas Ltd,* [1970] 1 WLR 129 which is yet one more illustration of interpretation of a statute in its own context which is in direct contrast with *R v Lincolnshire Appeal Tribunal ex p Stubbins*, it was held that the code in paragraphs 8 to 11 of schedules 2 to the Gaming Act 1968 must be treated as a whole, and in it Parliament has laid down the entire procedure, with specific limits of time prescribed in respect of each of the steps in that process and these time limits are mandatory.

Risca Cinemas Ltd was referred to with approval by Widgery LCJ and Ashworth and Swanwick JJ. In *R v Leicester Gaming Licensing Committee, Ex p Shine* (Times May 27, 1971). The Lord Chief justice said that the view underlying the decision in *Risca Cinemas Ltd* was that paragraphs 8 to 11 of Schedule 2 contained a code in relation to time which was intended to be strictly enforced. His lordship thought that the same view should be taken of the code relating to general provisions for "application for grant of licence" contained in paragraphs 5 to 7. Any departure from the code *prima facie* rendered ineffective a step in the procedure in which an error was made. Parliament intended the code to be strictly enforced.

In *ex p Shine* a notice published in accordance with paragraph 6(2) of Schedule 2 to the Gaming Act 1963 by mistake contained some additional matter contrary to paragraph 6(4) which required that "a notice published … under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it." The court held that the Committee's decision that therefore they had no jurisdiction to hear the application was correct in law."

Mr Kivuitu drew our attention to *In re Wallace* [1884-85] volume 14, Law Reports, QBD 22 where it was argued that under the Bankruptcy Rules a bankruptcy petition must be signed by the creditor himself. By a power of attorney a creditor had authorized his attorney (*inter alia*) "to commence and carry on, or to defend, at law or in equity, all actions, suits or other proceedings, touching anything in which I or may ships or other personal estate may be in anywise concerned." The Court of Appeal held that this power authorized the attorney to sign on behalf of his principal a bankruptcy petition against a debtor of the principal. In our view the cases of powers of attorney are clearly distinguishable from the instant matter; what an attorney can or cannot do for his principal will obviously depend on the extent and scope of the power of attorney and the law governing powers of attorney, The petition not having been signed by the holder of a power of attorney, it is not necessary for us to consider whether or not an attorney can sign an election petition. A somewhat similar situation arose in *Abdalla Walji Hirji v Dhanji Bhimji & Co* [1919-1921] volume VIII, EALR 206, *Ex parte Hobson*, 70 LT 817 and in *De Souza v De Souza* (1938), volume 5, EALR 22. Where it was held that a solicitor or an advocate could sign a petition on behalf on his client, subject to the necessary affidavits being sworn by parties themselves, but again advocates have such power conferred on them by the Civil Procedure Rules in particular cases. As we have said the matter of signature to a petition having been dealt with specifically in the Rules the Civil

Procedure Rules do not apply.

Finally Mr Kivuitu referred us to *R v Garreth Pagge & others* [1911] volume 104, LT 649, in which a summons for assault had been issued and signed by a justice of the peace but not sealed. It was held that even if the omission of the seal from the summons was a defect, it was defect in form within the meaning of section 1 of the Summary Jurisdiction Act 1848, which provides that no objection shall be taken or allowed to any summons for any alleged defect in substance or in form, and that therefore the objection that the summons was not sealed could not be taken. This case clearly depended upon the provisions of a particular statute.

Mr Kivuitu submitted that the circumstances of election petitions had to be considered in interpreting the statute, that the issues raised are not between the parties alone, that allegations such as bribery needed investigation, that the right to petition is intended to ensure that the country has clean leaders; leaders who are properly elected, that the hearing of petitions was of such interest that even GSU is brought in to control the public when judgments are delivered by the courts. We agree with Mr Kivuitu on all that he has stated regarding the importance of petitions, but consideration must be given to the observation by Mr Shields that the requirement that a petition be signed by a petitioner is not a formality but necessary requirement demonstrating that the petitioner assumes personal responsibility for the grave averments which a petition normally contains and a petitioner should not be allowed to assume a position from which he can blame his counsel for allegations which he is unable to substantiate, or which might turn out to be embarrassing to the petitioner himself. Although not directly on the issue before us, in the Court of Appeal, Civil Appeal No 8 of 1981 *Virji Mawji v Harji Karson Patel and Vishram Karsan* (unreported) Madan JA disapproved of the practice of affidavits being sworn by advocates on behalf of their clients, and expressed the hope that such practice will not spread, and that parties themselves should speak about their actions and intentions.

In order to determine the intention and purport of legislation it is imperative to look at the legislation as a whole (see *R v Pontypool Gaming Licensing Committee Es P Risca Cinema Ltd* [1970] 1 WLR 1299). As Mr Nagpal points out that where the rules intend certain acts to be done by a petitioner alone, that is stated expressly, and where it is intended that certain acts are to be done by advocates or agents again that is stated expressly. For instance, rule 22 (1) provides:

“An application for leave to withdraw a petition shall be in writing signed by the petitioner or petitioners or his or their advocate or advocates, and shall state the grounds on which the application is supported.”

Again rule 24 provides:

“Any person who might have been a petitioner in respect of the election to which the petition relates may, within seven days after such notice is published by the petitioner, give notice in writing signed by him or his behalf….”

Conversely rule 29 (4) requires a notice that a respondent does not intend to contest a petition to be signed by the respondent himself.

Mr Kivuitu draws our attention to rule 4(4), which provides that

“The following form, or one to the like effect, shall be sufficient.” Then the petitioner is described as “A” and if there is a second petitioner, he is described as “B” and the form shows the petition to be “[signed] A B”.”

Rule 9 is as follows:

"With the petition the petitioner or petitioners shall leave at the office of the Registrar a writing, signed by him or them, giving the name of an advocate whom he or they authorize to act as his or their advocate or stating that he or they act for himself or themselves, as the case may be, and in the either case giving an address in Kenya at which notices may be left; and if no such writing is left all notices may be given by leaving the same at the Office of the Registrar."

Mr Kivuitu submits that the employment of the words "or one to the like effect, shall be sufficient", in rule 4(4) makes the form permissive, and by giving notice under rule 9, appointing Messrs Adembesa & Company his advocates the petitioner had appointed that firm of advocates as his agents for all the purposes of his petition, and he can sign it on behalf of the petitioner. Mr Nagpal contends that that is not so, and is an impossibility, for the reason that there is no advocate for the petitioner until he files the petition and at the time of doing so appoints an advocate. That if Mr Kivuitu is correct the advocate would be signing the petition before he is appointed.

It is not disputed that the Civil Procedure Rules can be called in aid where the Act or the rules are silent (*Karanja's* appeal, *supra*), Mr Shields draws our attention to order 3, rule 1 of the Civil Procedure Rules which is:

"Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person , or by his recognized agent, or by an advocate duly appointed to act on his behalf……"

The underlining is ours; and submits that Rule 4(3) expressly providing for a petition to be signed by the petitioner, this falls within the exception contained in order 3 rule 1 and the Civil Procedure Rules cannot be called in aid.

Mr Shields refers us to *Okora's* petition No 3 of 1970 (above), where the election court followed the dicta of the Judicial Committee of the Privy Council in *Devan Nair v Yong Kwen Toik* LR [1967] LR 2 AC 31 and especially that of Lord Upjohn at page 44 where four circumstances were set out as weighing heavily with the court in favour of a mandatory construction of rule 15, and we consider it relevant to set out those considerations:

"(1) The need in an election petition for a speedy determination of the controversy, a matter already emphasized by their Lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interest of the public that the matter should be speedily determined.

(2) In contrast, for example, to the Rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend the time on the ground of irregularity. Their Lordships think this omission was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceedings or postpone the inquiry it was expressly conferred upon him; see for example, rules 7, 8 and 19.

(3) If there is more than one election petition relating to the same election or return, they are to be dealt with as one (rule 6). It would be manifestly inconvenient and against the public interest if by late service in one case and subsequent delay in those proceedings the hearing of other petitions could be held up.

(4) Respondents may deliver recriminatory cases (rule 8) and speedy service, in order that the respondent may know the case against him, is obviously desirable so that he may collect his evidence as soon as possible.

Mr Shields then referred us to *Mudavadi v Kibisu* (1970) EA 585 where the election court held that a returning officer, as party to a petition must necessarily be made a respondent and service on him must be effected in accordance with rules 10 and 15 of the rules. The returning officer was not made a respondent to the petition and the service on the named respondent was not served on the returning officer. That making the returning officer a respondent being an amendment to the petition, and the time for amending the petition having expired before the named respondent was served, the returning officer could neither be said to be a party to the petition, nor could he then be made a party to the petition. In the consequent appeal the then Court of Appeal upheld the decision of the election court and dismissed the appeal with costs, holding that noncompliance with the Rules was fatal in the circumstances.

Mr Kivuitu submits that the petitioner should not be denied justice because of a technical over-sight, which only related to the form of the petition and not to its substance. Mr Nagpal does not agree submitting that the provision in rule 4(3) “THAT THE PETITION” shall be signed by the petitioners is mandatory, and that the legislature intended that the appending of signatures of petitioners to petitions was condition precedent to the lodging of petitions. That this requirement is not a mere technicality or provision as to form within the ambit of section 23(1)(d) of the Act and its non-compliance results in there being no valid petition before the court. That, although based on the application of the Gaming Act of 1968 of England, a case to the point is *R v Leicester Gaming Licensing Committee, Ex p Shine* (Times, 27 May 1971) there is a notice published under that Act by mistake contained some additional matter, the relevant section providing that

“a notice published … under this paragraph shall not include any matter which is not required by the preceding provisions of this paragraph to be included in it.”

The Lord Chief Justice said that any departure from the code *prima facie* rendered ineffective a step in the procedure in which an error was made, and the court held that the Committee’s decision that they had no jurisdiction to hear the application was correct in law.

Mr Shields said that there cannot but be sympathy for the petitioner but as stated by Gove J in *Williams v Tenby Corporation* (1879) 5 CPD 135 (referred to in *Okoya’s* petition above) the petitioners “were advised by competent persons and ought to pursue the provisions of the Act”. In *Maxwell on Interpretation of Statutes* 12th edition at pages 1 and 2 it is stated:

Granted that a document which is presented to it as a statute is an authentic expression of the legislative will, the function of a court is to interpret that document ‘according to the intent of them that made it’. From that function the court may not resile: however ambiguous or difficult of application the words of an Act of Parliament may be, the court is bound to endeavour to place some meaning upon them. In so doing it gives effect, as the judges have repeatedly declared to the intention of Parliament, but it may only elicit that intention form the actual words of the statute. “If”, said Lord Greene MR, “there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used.” If language is clear and explicit, the court must give effect to it, ‘for in that case the words of the statute speak the intention of the legislature’. And in so doing it must bear in mind that its function is *jus dicere*, not *jus dare*: the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament.”

Mr Shields submits that in the circumstances of election petitions, it matters not whether the

mandatory provision is embodied in the statute or in rules made thereunder. Section 33 of the Interpretation and General Provisions Act (cap 2) provides that –

"An Act shall be deemed to be done under any Act or by virtue of powers conferred by an Act or in pursuance or execution of the powers of or under the authority of any Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under any power contained in that Act."

Then it is stated in *Jowitt's Dictionary of English Law* volume 2 (LZ) at page 1699 in regard to statutory rules and orders, that –

"Most modern Acts of Parliament contain provisions authorising the Crown in Council, a Minister, a Local authority, a corporation, or some other body to make rules, orders and regulations on particular subjects. The Rules of the Supreme Court and the orders which have been made with regard to diseases of animals are instances of the result of this delegation of authority. Such rules, orders and regulations, if validly made, have the same effect as if they were expressly enacted by Parliament."

Mr Kivuitu's final submission was that even if compliance with rule 4(3) was mandatory, the respondents were guilty of undue delay of over 2 years, and that by asking for particulars and not taking any objection to it until January 11, 1982, the respondents should be taken to have waived their right to object at this late stage. Mr Shields however contends that no estoppel can legitimate an action which is contrary to any law or which is *ultra vires*. That a person who holds a public office or quasi public status (such as the vicar of a parish) cannot waive or divest himself of the rights incident to his office by conduct which, in the case of a private person, would amount to estoppel (See *Jowitt's Dictionary of English Law*, 2nd edition, volume 1, page 726). That the representative of the Attorney General, holder of a public office, is a necessary party to any election petition as laid down in section 24 of the Act. In *Destro & Others v Attorney General*, Civil Case No 2424 of 1979 Simpson J dealt with a similar objection as follows at page 8 of his judgment –

"There is no doubt on the evidence that the plaintiffs were quite satisfied with and accepted the award. There has been no offer to bring the money back into Kenya or to refund it. The idea of questioning its validity only occurred to them seven years later when they heard of the enormous profits made by two speculators. Are they now estopped from doing so" A number of authorities were cited by both Mr Dobry and Mr Shields but I think it sufficient to quote the following passages from Wade's *Administrative Law* (4th Edition) –

'In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. In other words no estoppel can legitimate action which is *ultra vires* (p 220).'

As an example the learned author cited *Swallow and Pearson v Middlesex County Council* [1953] 1 WLR 442 where the defendant had served on the plaintiffs an invalid notice requiring them to discontinue work on their premises. It was held by Parker J (as he then was) that no amount of so-called waiver or approbation could make it a valid document and the plaintiffs were not estopped from disputing its validity."

The Petition is not signed by the Petitioner.

Allegations of gross mismanagement of the election and of personal misconduct are made against the First Respondent and allegations of election offences are made against the Second Respondent, yet the Petitioner does not take responsibility of the allegations, he assumes no burden should the

allegations prove to be unfounded. The Petition is signed by Adembesa & Co purporting to be advocates for the Petitioner. It is difficult to envisage how that could validly be so. An advocate, should a petitioner decide to engage one, is appointed in writing when the Petitioner files his petition. The requirement that a Petition be signed by a Petitioner is not a formality. Equity demands that a Petitioner assumes responsibility for his Petition by signing it.

We are satisfied and find that the provision contained in rule 4(3) that a Petition shall be signed by the Petitioner is mandatory and that this Petition not having been signed by the Petitioner it is not properly before the court. The Petition is dismissed. The Petitioner is to pay the costs of the First Respondent and the Second Respondent.

Dated and Delivered at Nairobi this 20th day of January 1982.

S.J.WICKS	**S.K.SACHDEVA**	**P.S.BRAR**
CHIEF JUSTICE	**JUDGE**	**JUDGE**