REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Election Petition 1 OF 1998

THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CAP.7) AND REGULATIONS THEREUNDER AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF THE ELECTION FOR THE OL KALOU PARLIAMENTARY CONSTITUENCY

BETWEEN

STEPHEN KIMANI GAKENIA..... PETITIONER

AND

1. FRANCIS MWANGI KIMANI .....)

2. **KARUE M. MURIUKI.....)..... RESPONDENTS**

3. ELECTORAL COMMISSION OF KENYA)

20.5.98

Coram: ' Before Mwera - J.

Mrs. Kimani, Miss Chege for Petitioner Makau for 1 st & 3rd Respondents Njiru, Ndegwa for 2nd Resondent

Gikaria - c/clerk Eng/Swah.

RULING

The petition herein was filed by one Stephen Kimani Gakenia on 3.2.98 against Francis Mwangi Kimani who was the Returning Officer in the general election which took place on 29.12.97 in the constituency described in the heading of the petition as Ol-Kalou. This was the 1st

respondent. The 2nd respondent was described as one of the candidates in that election whom the 1st respondent-declared the winner of the election. He is the sitting Member of parliament. The 3rd respondent is the Electoral Commission, an independent body established under S.41 (l) of the Constitution of Kenya. Its duty is to organise free and fair elections.

The petition stated among other averments:

"6. That the said parliamentary election for Changamwe constituency

was held on 29th and 30th December 1997..... "

(underlining provided).

It went on to describe that the petitioner stood on a KANU party ticket while the 2nd respondent was on a Democratic Party ticket. The other participants were similarly described.

The result declared after the election by the 1st respondent gave:

(a) The 2nd respondent - 29084 votes

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(b) The Petitioner - 1704 votes

(c) FORD-PEOPLE Candidate - 1436 votes

(d) SAFINA Candidate - 6277 votes

It was pointed out that total valid votes were 37,860 from a total number of 48,588

voters registered. This latter figure needs be noted as it shall be referred to later.

The petition then gave REJECTED VOTES as 541 and votes CAST as 38464.

The petitioner then outlined grounds on which he sought the 2nd respondent's election annulled. They ranged from the failure of the 3rd respondent to facilitate voting at some named stations, intimidation and violence perpetrated by the 2nd respondent and/or with his supporters etc. The petition ended with prayers that this court allow a scrutiny and recount of the votes and that these irregularities complained of marred the election which should be declared invalid. So much for the petition.

On 11.5.98 the petition was mentioned in court. Mr. J.A. Makau of M/S Makau & Co Advocates, Machakos appeared for the 1st and 3rd respondents. Mr. Njiru of M/S Njiru Mbogo & Co. Advocates, Nairobi was present for the 2nd respondent. The petitioner was represented by Mrs. Kimani of M/S L.G. Kimani & Co. Advocates of Nairobi. The court heard that the respondents wished to file some interlocutory applications to strike out the petition while the petitioner's side

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intimated that it would oppose those applications and file its own to amend the petition. All parties were granted opportunity to file whatever applications they had, all of which would be heard on 20.5.98 - the same to be followed by a ruling. The applications to be alluded to below are the said applications and the ruling is this very one.

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The first application was filed by Mr. Makau for the 1 st & 3rd respondent. It was a notice of motion brought under various provisions of the law: O50 r.l Civil Procedure Rules, S.20 of the National Assembly and Presidential Elections Act, herein-after referred to as the Act, as amended by Statute Law Miscellaneous (Amendments) Act 1997, S. 14(1)(2)(sic), the National Assembly Elections (Election Petition) Rules, hereinafter referred to as the Election Petition Rules (EPR), 06 rr.2, 4(1) 6 8 and 13 (1) (b) & (d) Civil Procedure Rules.

The main prayers were, in paraphrase:

(1) That the petition filed on 3.2.98 be struck out for

(a) being filed out of time and

(b) for want of service or for invalid service on the 1st & 3rd respondents.

(2) That in the ALTERNATIVE, that petition be struck out because itwas scandalous, frivolous and vexatious or other-wise" an abuse ofthe process of court as the heading and contents of the body of the

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petition differed in material particulars regarding constituencies in issue.

(3) A further EXTERNATIVE prayer was that the petition could be struck out owing to pleadings which did not support some prayers.

(4) Costs.

Mr. Makau appended his own affidavit wherein he deponed that the election result of Ol Kalou Constituency was published in the official gazette on 6.1.98. So if a petition had to be presented and served, challenging that election, it ought to have been so handled on 2.2.98 at the latest. Having been informed and instructed by his clients that they were never served personally with the notice of presentation and a copy of the petition, herein to be referred to as the principal documents, at a time before 2.2.98, whatever attempt was made thereafter was invalid. This included the publication of the petition in the official gazette of 6.2.98.

It was added that paragraph 6 of the petition (supra) spoke of an election in Changamwe

constituency while the title of the petition described something else -Ol Kalou. This, Mr. Makau deponed, amounted to a scandalous, frivolous vexatious petiton if not an abuse of the process of court - hence the prayer to strike it out. He concluded by saying that there were no allegations of misdeeds or

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defaults claimed against his clients in the pleadings upon which prayers for scrutiny and recount of ballots were based.

In the same or more or less the same vein, Mr. Njiru for the 2nd respondent filed a notice of motion on 15.5.98. It was dated 14.5.98 and brought under S.20(l) of the act, Rules S,6 and 8 of the Election Petition Rules and s.3A CPA. The main prayers were, again in paraphrase:

(1) That this petition be struck out because it was not filed within the time specified in the Act and

(2) That because the allegations set out in the petition did not disclose and/or support the prayers.

(3) Costs.

In support of this application was the 2nd respondent's own affidavit sworn on 15.5.98.

In brief, the 2nd respondent deponed that he was never served with the principal documents at all. He only saw the petition published in the Kenya Gazette of'6.2.98. To him this was no service at all. The petition had been served on him 32 days after he was declared the winner. He seemed to deny the allegations against him in the petition (quite probably in error at this stage) but it was something to the effect that the prayers were not supported by the pleadings in

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the petition at all. This application and the affidavit of the 2nd respondent did not touch on the description of the constituency as Changamwe and not Ol Kalou but all that filtered in i the submissions.

On 18.5.98 Mrs. Kimani filed 7 grounds of opposition to the notices of motion aforementioned. She referred to them as frivolous, vexatious and not worth much. That the 3.2.98 was in last day to present the petition and thus it was in time - i.e. 28 days w.e.f. 6.1.98. That all this was within S.20 (1) (a) of the Act and the Election Petition Rules. It was added that the appearance of Changamwe in paragraph 6 of the petition was a typographical error which the petitioner sought to right by amendment to the oetition. It was no prejudice to the respondents.

The grounds stated that what the respondents thought were vague and general pleadings vis

a vis the prayers could be righted by application for and supply of particulars.

With a view to amend the petition a notice of motion dated 15.5.98 was filed. It was brought under ss.20 (2), 23 and 32 of the Act 06A r 5 Civil Procedure Rules, ss 3A, 100 Civil Procedure Act..

The main prayer was

(1) that leave be granted to amend paragraphs 6, 13 (a) and 14(b)

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of the petition. A draft amended petition was appended to Mrs. Kimani's affidavit sworn on the same 15/5/98. It stated that in paragraph 6 of the petition, the constituency in issue was inadvertently and inaccurately described as Changamwe instead of 01 Kalou. Then reference was made to paragraph 13 (a) which described a certain place as Matindi Primary school and not Matindiri. That paragraph 14(b) described Gichungo and Kieni Primary schools as Gichunjo and Kuni. Mrs. Kimani explained that these errors could not confuse, deceive or prejudice the respondents and the substance of the petition remained the same.

Both the 2 sets of respondents opposed the move by the petitioner to amend the petition in that that move was bad in law and no sufficient reason was shown to warrant the orders sought.

On the 2nd respondent's behalf the grounds opposing the intended amendment(s) said inter alia that S.20 of the Act was not adhered to strictly, and that the law relating to filing and hearing of election petitions did not provide for amendments.

The hearing of these applications was on 20.5.98. The counsel more or less following the patterns of their grounds and affidavits did elucidate points of law and referred to cases in a manner that will be reverted to in the course of this

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ruling. Suffice to say that the submissions of each counsel need not be reproduced in full in the light of the foregoing.

When the court rose to consider its ruling it was its view that the learned arguments brought out some three or so aspects to be resolved:

(1) Whether the petition was presented in time.

(2) Whether the service of the principal documents was valid, or other-wise, on the respondents

(3) The intended amendment of the petition.

Other points may be resolved on the way as ancillary to but still important nonetheless in this matter.

(1) <u>On Presentation (and Service) of Petition</u>: This is contained in

S.20(l) of the Act (as amended by Act 10/97) It reads:

"S.20(l) A petition -

(a) to question the validity of an election shall be presented andserved within twenty eight days after the date of thepublication of the result of the election in the Gazette;

(b) .....

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Mr. Makau and Mr. Njiru were of the view that since the election result for 01 Kalou Constituency, now being questioned, was published on 6.1.98, the petitioner had only up to 2.2.98 to present the petition. Yet he did so on 3.2.98 which was <u>one</u> day outside the stipulated 28 days.

Mrs. Kimani strenuously argued that the petition was presented in time. She cited S.57 interpretation and General Provisions Act (Cap.2) which reads:

"S.57 In computing time for the purpose of any written law unless the

contrary intention appears -

(a) a period of days from the happening of an event or doing of an actor thing shall be deemed to be exclusive of the day on which theevent happens or the act or thing is done;

(b) .....

(c) .....

(d) ..... "

This court takes it that the thing to be done is the publication of the election result in the official gazette. The Act says that the petition to question an election shall be presented within set days <u>after</u> the date of the publication. The publication here was done on 6.1.98. So the 28 days began to run <u>after</u> 6.1.98. That means 7.1.98. If that be the correct understanding of the law, and this court takes it to be so, the last day to present the petition was 3.2.98. That is what was done in this

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petition. Accordingly even quoting S.57(a) of the interpretations and General Provisions Act becomes irrelevant. However had the law stipulated that presentation and service of a petition was to be within 28 days from the date of publication, without a contrary view appearing, exclusion of the day of publication would be considered in the light of the said s.57 (a). The court having found as it does namely that presentation of the petition was within the required 28 days, no more needs be said of the same subject.

(2) Service of Principal Documents in Time and whether the Service was

valid:

Again it is the law in the light of the submissions to bring to the fore what actually happened. It is not in dispute that the respondents were never personally served with these documents i.e. the notice of presentation of the petition plus a copy of the petition. So much as said in the submissions. There are no affidavits of service filed by the petitioner either that the three respondents herein were served personally or as per any other mode envisaged by rule 14(1)(2) of the Election Petition Rules. But there is this gazette notice No. 572 of 6.2.98. It told all and sundry that the petition herein had been presented to the High court challenging the election result in Ol Kalou Constituency which took place on 29.12.97. It added that a true copy of the petition could be obtained on application

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at the office of the Registrar, High Court, Nairobi. It may be clarified at this point that this petition originated as E.P. No. 18/98 at Nairobi, High court. By administrative arrangement it was later transferred for hearing and disposal at this registry. It was then given number EP 1/98 - NYERI High Court

While Messers Makau and Njiru contended that there was no service or even a valid one on their respective clients, Mrs. Kimani insisted that the respondents were validly served by way of the gazette notice dated 6.2.98. That all was within the time i.e. 28 days as required by S.20 (1) (a) of the Act. This, she continued, was by virtue of rule 14(1) (2) of the Election Petition Rules. That provision of the law reads:

"Rule 14(1). Notice of the presentation of a petition accompanied by a copy of the petition, shall, within ten days of the presentation of the petition be, served by the petitioner on the respondent.

(2) Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent under rule 10 or by posting them by a registered letter to the address given under rule 10 so that in the ordinary course of post, the letter would be delivered within the time above mentioned or if no advocate has been appointed or no such address has been given, by a notice published in the gazette stating that the petition has been presented

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and that a copy of it may be obtained by the respondent on application at the office of the Registrar". It may not be very useful to recite rule 10 referred to in the rule 14 (2) (supra). This is so because the court heard that neither respondent had left an address at the office the Registrar after the elections and in case any petitioner desired to use it.

It is however considered that election courts have in the past either in Kenya or elsewhere in common law jurisdictions, come face to face with questions pertaining to service of principal documents in many election petitions and resolved them. One such case is:

C.DEVAN NAIR-VS- YONG KUAN TEIK {1967)2AC 31.

This is a case from Malaysia where an election petition questioning a certain election and centering on service of principal documents went all the way to the Privy Council for determination. Service by gazette publication featured and if found necessary the case shall be reverted to.

But for now reference can be made to one of the many election petitions dealing with service of election petitions and notices of presentation in recent times in Kenya e.g. the case of:

EMMANUEL KARISA MAITHA

vs

JOHN D. YAA & ANOTHER EP.l OF 1993 (unreported)

In that case and by its ruling dated 29.4.93 the court sitting did emphasis the primacy desirability and the importance of personal service of the principal documents on a respondent. The ruling reads in part as regards rule 14(1) (supra): "The subrule sets out the 2 principal documents to be served - the notice of presentation of the petition and a copy of the petition. Not one of them should be served on the respondent and another left. They must be served together and on the respondent. They must be served within 10 days and no more. Even this court cannot extend that time in case of an omission or irregularity. Failure to serve within the stipulated 10 days renders any consequential proceedings a nullity. In our view the sub rule is complete and positively states what to be done by who on who and in which time span. It is no matter that the provision does not specifically incorporate

the words "..... served personally..... ". It is to us enough to

say as it says "..... be served..... on the respondent."

The respondent is the primary party against whom a specific complaint is raised in the petition. Barring all others who may be served on his behalf, he is rightly and naturally the primary or basic party to be served. He must be

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served with the processes against him, and personal service is the best at all times. After being served he can on appreciating the contents of the served papers consider to consult counsel or begin lining up what material he has in defence. Personal service on the respondent in any proceedings is superior and should be the mode of service most valued" (p.22). the court then went on to consider where service under rule 14(1) was not

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feasible. It then moved to subrule (2) (supra), And to this, after it said that subrule

(1) was complete in its requirements, went on to state:

"So is subrule (2). It is complete again by stating what to serve, by on who but still within 10 days. It affords a chance for the petitioner who cannot find his respondent. It is permissible , permissive and possible to serve under subrule (2) but only on the respondent who has in writing left at the registrar's office the name of his appointed advocates and/or his address of service in Kenya. But if such circumstances do not obtain, then the petitioner eager to stay within the stipulated 10-day limit has the facility of putting up a gazette notice. This sub rule as worded says that service "may" be effected "either" and goes on to say, the appointed advocate "or" post to the address and where none of those are available, by gazette notice

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This notice should also be published within 10 days of the

presentation of the petition" (pp.23)

The quotation in extenso above has been necessitated by the arguments of counsel. While the respondents posited that S.20 (1) (a) restricted a petition to present and serve the principal documents within 28 days after the publication of the result of

the election, the petitioner's side was of the view that the presentation within 10

days of presentation of the petition began to run after the presentation. In that regard Mrs. Kimani argued, when the gazette notice appeared on 6.2.98 that it was well within the 10 days after the presentation on 3.2.98. She could see how the legislature in its wisdom, with the Election Petition Rules in place, stating as it did. Anything else could curtail the 10 days by incorporating them in the 28 days if S.20(l) (a) as amended was to be read to mean otherwise

Before the amendment by Act No. 10/97 one would safely read that the 10 days to serve the principal documents began to run after presentation of the petition. In that case then the petition herein appearing as it did on 6.2.98 would be said to be within the 10 days. But the principal law as amended changed and required that both presentation and service shall be within 28 days after the date of the publication of the election result. It shall not avail a petitioner who has

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laboured under the old law to come to court and say that he/she is right to take it that 10 days began to run after the presentation, otherwise the new law is unfair. That it has curtailed the time of 10 days to the disadvantage of the petitioner. It is the duty of litigants to know the law under which they desire to come to court and know it correctly. An error in that knowledge makes the litigation incompetent in law and those are the ways of the law.

Granted, the Rule 14 (1) (2) of the Election Petition Rules clearly states that the principal documents shall be served within 10 days of presentation of the

petition. But according to this court, those days run within the 28 days set out in

the Act. It may sound unfair that the new law has curtailed the good long 10 days

petitioners enjoyed under the old law. But that is not for this court to decide here. The law says that a respondent should be served within 28 days of the presentation of the petition. All alert petitioners should know this and do the needful - even if it may not be fair compared to the past. It may be surmised that the legislature was mindful of the concern and public interest that is involved in election petitions. As long as they last they keep both the petitioner and respondents in suspense. Of more importance the constituents are never sure of who their parliamentary representative is. Accordingly a special legal regime is promulgated and courts set up with special jurisdiction to dispose of election

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petitions on priority basis. True, the old law was favourable in matters of time to serve the principal documents and true rules gave 10 days after presentation of a

petition. But even if it was not ventilated fully before this court, can it be said that the petitioner should be let to go by the Rules, which are said not to have been looked at the time the Act No. 10/97 was passed to change the regime" Not at all. The Rules were existing subsidiary legislation. They cannot in their operation extend outside the principal legislation. Parliament knew or it can be assumed knew what it said. Nonetheless it amended the principal Act under which the Rules were made. Reading the two together does not lead this court to some absurd or inexecutable result. The purpose of such rules is to supply detail and make operation of the principal Act smooth. They are so read. In the result that the notice of the presentation of this petition together with a copy of the petition itself was not served on all the respondents within the 28 days required by law. Any attempt to serve them, here it was by gazette notice of 6.2.98, was 3 days out of time. It can thus be said that there was no service. If there was no service of the principal documents on the respondents then they have nothing to answer before this court. If the petitioner alone remains with his petition in this court then all is in futility. He has failed to comply with. the mandatory provisions of the law applicable. Therefore the pleadings have no purpose to serve and they should be struck out.

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As per the Devan Nair case (above)

"..... that therefore there being no personal service and the

advertisement in the gazette being out of time, the

proceedings were a nullity, no weight could be attributed to the circumstances that the rules contained no express power to strike out a petition for noncompliance (with rule 15) and an election judge had an inherent power to

cleanse his list by striking out, or better by dismissing those petitions which had become nullities by virtue of a failure to serve the petition within the time prescribed by the rules", (pp.34).

All could have ended here except for the next aspect of the the applications:

(3) The Intended amendment to the Petition:

Miss Chege who teamed up with Mrs. Kimani put up a strong case both countering the respondents' pleas that the petition should not be amended and on the petitioners'" own application that the inadvertent and inaccurate description of the subject constituency as Changamwe and not Ol Kalou be rectified by amendment.

Miss Chege relied on s.20 (2) of the Act in this regard. She did not clearly put forth what S. 23 of the Act would aid her with but she alluded to S. 32 which

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states that no misnomer or inaccurate description of any person or place in any order, notice or instrument made under this Act should prejudice its validity.

Lingering on S.32 for a while, the misnomer or inaccurate description to this court refers to people and places in the orders, notices and instruments made under this Act. The petition herein is definitely not is an instrument. It is a basic pleading. So that section can only apply to orders, notices and other related instruments in that line. This court is not convinced that the petition herein is an instrument envisaged by S.32. However even if it were, what does S.20 (2) of the Act say"

S.20 (l).

(2) A petition presented in due time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented". The law in simple language says that a petition alleging an election offence which is presented in time may be amended but with the leave of the court. That amendment however should be within the time within which that petition may be presented. In brief a petitioner may be allowed by an election court to amend a

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petition alleging an election offence only within the 28 days allowed to present (and serve) a petition.

In our current petition there are allegations of intimidation and violence. These are election offences under the Election Offences Act (Cap 66 S.9). It was also submitted that the 2nd respondent did not adhere to the Code of Conduct (as incorporated in the Act by Act 10/97) by denouncing and or preventing violence and intimidation.

So this petition falls for amendment under S.20(2) of the Act. But then were the amendments sought within the time the petition was due for presentation" Not at all. The petition was to be presented within 28 days after 6.1.98. This was up to 3.2.98. No application to amend was brought within that time. It was brought on 18.5.96 - over 105 days later. This is not in accordance with the law and so the amendments should be refused and are hereby refused. What does this refusal mean" This is the next part of the ruling.

The refusal to allow the amendments sought leave our petition looking like this. Beginning from the title:

IN THE MATTER OF THE ELECTION FOR OL KALOU

PARLIAMENTARY CONSTITUENCY.

In paragraph 6 (supra but repeated)

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"That the said parliamentary election for Changamwe Constituency was

held on 29th and 30th January 1997.....

where (as per paragraph 7) the 2nd respondent, Francis M. Muriuki of Democratic Party got 29,084 votes, the petitioner, Stephen Kimani Gakenia of KANU got 1,704 votes, E.K. Ndune of FORD-PEOPLE got 1436 votes and J.I. Wakaba of SAFINA got 6266 votes.

Stopping here for a moment, would one say that if left to go to trial the public, the respondents or even the petitioner himself is certain about what constituency is in question" Not a bit. The election petition published on 6.2.98 exhorted the whole world that it was the election of 01 Kalou being questioned. But then the respondents would go to the office of the Registrar at Nairobi and collect:

"..... a true copy of the petition..... ".

Now assuming that the respondents went to the registrar and collected a true copy of the petition only to find that in the body of the petition it was Changamwe Constituency, can that be said to be a minor thing" Can it be said that after all everybody knows that the constituency is Ol Kalou and not Changamwe" We turn to that issue now, on a case that fortifies this court in making its conclusion.

Once upon a time there was filed an election petition in the High Court at Nairobi. It was between:

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JAMES CHARLES NAKHWANGA OSOGO vs

SIMON CHACHA & ANOTHER EP NO. 8/88 (unreported)

It was in the matter of the Election for BUNYALA CONSTITUENCY. If one is well-acquainted with Kenya's parliamentary Constituency geography, Bunyala falls or in those days fell in Busia District of Western Province. There were claims of undue influence of oathing and other election offences. So under s. 20 (2) of the Act. an amendment was sought. As can be gathered from the long but undated ruling that the 3-judge election court gave, the constituency had been described in the body of the petition as BELGUT. Now, again for those acquainted with Kenya's parliamentary constituency geography, Belgut fell or still falls in the Rift Valley, near Kericho District. It must be a new district now or it falls within a new district hived off the old Kericho District. In between these two name descriptions i.e. Bunyala and Belgut lies the whole or part of Nyanza Province.

Now it transpired that somewhere before the applications upon which that election court ruled, somebody by mischief or otherwise, made some hand-written amendments to some of the

copies of the petition (at the court registry) by amending Belgut to read Bunyala. The learned judges heard all that was said

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against this clandestine move and how the whole court's authority was being undermined. They heard also that the law did not permit amendment of an election petition, once filed except what is permitted in a limited way only under S.20 (2) of the Act. They heard other aspects too. But what concerns us here is the validity or not of amending an election petition. Of course that court declined to effect amendments prayed for which came long after the 28 days (under S.20 (2) of the Act). The ruling said:

"Therefore we have come to the conclusion that the change asked for is an amendment and cannot be allowed by law. It is not whether the respondents were taken by surprise. We are of course bound by s.20 (2) of the National

Assembly and presidential apetition can only be amended within 28 days allowed for the presentation of the petition with leave of the court. As that provision was not followed (and) as no provision is made in the Act for extending that time, if the changes in the petition by particulars amount to amendments, then they cannot be allowed simply (the court) has no jurisdiction to allow an amendment at this stage even when the particulars were supplied". (pp.17). This court also so rules. So much for that.

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Going back to pp.16 of the ruling in that James Osogo petition a pertinent

part of the ruling in EP NO. 11 of 1979.

ANDREW KIMANI NGUMBA

VS

PAUL BOIT

was reproduced. In reproducing it here this court is minded to take it that a

petition once filed cannot be amended unless in accordance with S.20(2) of the Act

only. It reads:

"A member of the court mentioned typographical errors and trivial

mistakes yesterday. We see that the changes applied for now are not of

that sort. They are unfortunately mistakes in naming a specific place. It is always of great importance to respondents to know, where an irregularity or misdeed took place. There is no doubt that in this case it is not a trivial matter to change a complainant ..... It is not an impossible task placed upon the petitioner to phrase his petition so as to avoid these traps".

This Andrew Kimani Ngumba authority was not readily available to this court in its research but the reproduced part of the ruling supports this court's view that an election once filed remains so unless it falls under S.20 (1) (a). The counsel for the petition alluded to typographical errors in paragraph 6 13 (a), and 14 (b). That

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they were minor and no respondent was confused, deceived or predjudised by their appearance especially if they could be amended. This court is of the view that the desired amendments were mistakes in naming specific places - the constituency and some polling stations. It is always of great importance that respondents know exactly where an irregularity or misdeed took place. This is not a trivial matter and a petitioner who is not careful in drafting his petition, itself not an impossible task should not demean the importance or the errors he makes. Once the respondent gets a petition, he embarks on putting together what material he desires in his defence. He should not be confused and thrown in disarray by the unfortunate errors of the petitioner. If this petition remains for hearing as it is, the pleadings will allude to Changamwe while evidence is likely to come from or concern Ol Kalou. This cannot be. It is trite law that pleadings accord with evidence. Nothing less. So this petition must go out. Even had the amendment gone through paragraph 7 would have differed from the original on TOTAL REGISTERED VOTES: 541 or 48589" A sign of further errors

Lastly on amending an election petition generally, this court is of the mind that the same is not allowed by the Act or the Election Petition Rules. The only amendment allowed, albeit in a limited way falls under S.20 (2) of the Act and that has been disposed of.

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As regards the Election Petition Rules (1993) they do not permit amendments. They are a complete legal regime as read with the Act and nothing should be imported from the Civil

Procedure Act or Rules to implement them. The Rules set out the manner of presentation of a petition (R.3), the contents of the petition (R4) and that evidence should not be stated in a petition (R.5). Several petitions against one seat are catered for in Rule 6 and appointment of advocates is in Rules 9 and 10. Security by deposit of money appears in R.12 while service on respondent is in Rule 14. Time and places of trial are set out and affidavit evidence is provided for (R. 18). The rules then talk of time limits, postponement of trial, adjournments and withdrawal of a petition (see rules 23, 24, 25). We see substitution of petitioners and abatement. There is provision for a respondent who

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resigns seat or does not wish to oppose a petition etc. . That legislature did not

provide for general amendment to an election petition can be said *tohave been*

a deliberate act on the part of Parliament. It can thus be considered obiter

dictum that an election petition, not falling under S.20 (2) cannot be amended.

This court has remarked that the Civil Procedure Rules, or any other law for that matter, cannot be brought in election petitions to supplement the Act and the Rules. Such were stated in some of the applications as noted above. From the set up of the election petition legal regime right from the Constitution, to the Act and

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the Election Petition Rules, this court is of the view that the CPA and CPR are excluded. The only place where rules of Civil Procedure may apply is on the witness affidavits. Witnesses give affidavit evidence in election petitions. The process is clearly set out and rule 18(7) provides:

"7. The provision of Order XVIII of the Civil Procedure Rules and the Oaths and Statutory declaration Act shall apply to affidavits under the rule". That is all. The exclusion of the CPA, CPR and other law from election petition was stated in the past in the following petitions as an example: The Emannuel Karisa Maitha. Case (supra); MARTIN KINYANJUI VS PETER GOKO & OTHERS EP 23/93; JAMES NYAMWEYA VS COSMOS OLUOCH & OTHERS EP 74/93; FORTUNATUS SUVA VS GEORGE MUSABA & OTHERS EP. 67/83; DANIEL OGUTU MATOKE VS AKOI & OTHERS EP. 68/93 and DR. SAMUEL OGEMBO VS OBARE & OTHERS EP. 76/93.

But while considering an application to review an earlier ruling in the EP 73/93, JOSEPH MUNYAO VS. LAZARO MUNUVE & OTHERS (unreported), by its ruling of 4.10.94 an election court refused to review an order from one election court by another. One such court had ruled that service effected in an election petition under the civil procedure rules was right. The court which sat on 4.10.94 was asked to declare this invalid: It refused. Part of the ruling reads:

"In our view where two courts of equal jurisdiction apply different laws in similar situations where each of those laws provides for a given mode to do something in such situations it is only by an appeal or for a constitutional court or other tribunal duly constituted, to harmonise and standardise the law applicable in such circumstances. We are in such circumstances here. Our brothers on 30.7.93 applied the Civil Procedure Rules as regards to service of the principal documents in election petitions. We on our part have excluded the aid of the Civil Procedure when it comes to that service and have applied only rule 14 (1) (2).

We cannot say that they were wrong to apply such a law because one could

say that in their interpretation Rule 14 (1) (2) is deficient..... Indeed on

our part we are not in doubt that we read, interpreted and applied that law correctly".

Perhaps the time is come to harmonise or standardise the law on service of the principal documents, in election petitions. Appeals now lie from this court to the Court of Appeal, thanks to the amendments following Act No. 10/97. The correct position will now be authoritatively ruled upon by the highest court in the land.

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It should now be clear from all the foregoing that the conclusion of this court is that this petition be struck out. But it has not been lost on it that striking out a suit, here this petition, is a drastic thing - especially at this stage. Striking out a suit should be done in only very clear and plain cases. It is a power any court should exercise after anxious and deep consideration. It is a step that ought to be very sparingly taken and when taken the court must move with great caution. This is in the light of the principle that when a suit is filed, one party feels

aggrieved and he seeks relief from court, that to attain such relief the court

should, except in clear and plain cases to be struck out, investigate by way of inquiry and evidence the reasons that gave rise to the dispute. So it is the principle of justice that disputes should go to trial. But as pointed out, this is only in litigation that passes the bar. This petition has been considered in the light of this and it does not pass muster. It is struck out with costs to the respondents.

<u>Orders</u>: (1) The petition was presented within the stipulated time. (2) The petition was not served on the respondents within

the set time.

(3) This petition cannot be amended at this stage.

(4) Costs to the respondents.

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Obiter Dicta:

(1) On election petition once filed and unless it falls within S.20 (2) of the Act cannot be amended.

(2) The legal regime set to cover election petitions from the Constitution

of Kenya, to the Act and the Election Petition rules does not envisage application of the Civil Procedure Act, Civil Procedure Rules or any other Act to apply in matters concerning election petitions.

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Finally a due notice will issue to Mr. Speaker of the National Assembly under S.30 of the Act.

Orders accordingly. Delivered on 29th May, 1998.

J.W. MWERA

THE ORIGINAL

JUDGE

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of the petition. A draft amended petition was appended to Mrs. Kimani's affidavit sworn on the same 15/5/98. It stated that in paragraph 6 of the petition, the constituency in issue was in advertently and inaccurately described as Changamwe instead of 01 Kalou. Then reference was made to paragraph 13 (a) which described a certain place as Matindi Primary school and not Matindiri. That paragraph 14(b) described Gichungo and Kieni Primary schools as Gichunjo and Kuni. Mrs. Kimani explained that these errors could not confuse, deceive or prejudice the respondents and the substance of the petition remained the same.

Both the 2 sets of respondents opposed the move by the petitioner to amend the petition in that move was bad in law and no sufficient reason was shown to warrant the orders sought.

On the 2nd respondent's behalf the grounds opposing the intended amendment(s) said inter alia that S.20 of the Act was not adhered to strictly, and that the law relating to filing and hearing of election petitions did not provide for amendments.

The hearing of these applications was on 20.5.98. The counsel more or less following the patterns of their grounds and affidavits did elucidate points of law and referred to cases in a manner that will be reverted to in the course of this