REPUBLIC OF KENYA

High Court at Bungoma

Election Petition 2 of 2013

IN THE MATTER OF THE ELECTIONS ACT AND THE REGULATIONS

AND

IN THE MATTER OF THE ELECTION FOR MEMBER OF THE NATIONAL ASSEMBLY FOR WEBUYE EAST CONSTITUENCY

AND

MOSES WANJALA LUKOYE.....PETITIONER

Versus

BENARD ALFRED WEKESA SAMBU.....1ST RESPONDENT

JOYCE WAMALWA RETURNING OFFICER, WEBUYE EAST CONSTITUENCY.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

THE FUND MANAGER, WEBUYE CONSTITUTENCY DEVELOPMENT FUND.....4TH RESPONDENT

RULING

Preliminary objections: **Four in number**

[1] Four points were raised as Preliminary Objections herein:

a) One, that the 4th Respondent is wrongly enjoined in these proceedings,

b) Two that the evidence by the Petitioner annexed to his affidavit and marked 2A, 3, 5, 6 & 7 be expunged from record for it offends the provisions of the Evidence Act, particularly section 65;

c) Three, that the firm of ***Onsando Ogonji & Tiego Advocates*** is not properly on record as representing the 1st Respondent.

d) Four, an objection by Prof. Situma; that the Preliminary Objection by Mr Onsando is not a Preliminary Objection

[2] Arguments were ably presented to court by Prof. Sifuna, Mr Onsando and Mr Ojuru, advocates for the Petitioner, 1st Respondent and 4th Respondent, respectively. I have considered all of them. But due to the nature of the task I have been called upon to discharge- determine preliminary objections- I should not engage all the arguments for fear of making findings or statements which could produce or be taken to produce some prejudice in the trial which is yet to start. I should also mention that I will proceed on the premises that a preliminary objection should be easily discernible.

Threshold for Preliminary Objection

[3] The legal delimitations for a preliminary objection were set a long time ago in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*** **[1969] E.A 696**. The principle (preliminary objection) is not in dispute and I do not think anything novel could be said about it. It has been and continues to be quoted and reinforced by the superior courts including the Court of Appeal, and recently by the Supreme Court. I did not, therefore, understand why Mr Onsando wanted to re-invent the wheel. Nonetheless, I shall restate the principle for purposes of clarity.

As per Law J.A:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

As per Sir Charles Newbold P:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

As per our own J.B. Ojwang J (as he then was) in a simple and clear manner in the case of ***Oraro v Mbajja*** **[2005] e KLR** that:

'' I think the principle is abundantly clear. A '' preliminary objection'', correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle , a true preliminary objection which the Court should allow to proceed. I am in agreement...that ''where a court needs to investigate facts, a matter cannot be raised as a preliminary point.''

[4] At this point, I do not wish to make any judicial comment on the submissions by Mr Onsando on

the thresholds of what constitutes a preliminary objection except, that those arguments are not entirely defensible.

[5] Having restated the obvious, I wish to point out and I hereby hold that the Preliminary Objection by Mr Onsando is not a true Preliminary Objection in the sense of the law. He has questioned the admissibility of the evidence presented in the affidavit of the Petitioner on grounds which are quite plausible. However, the objection he raised is a legal ground for objection of admission of evidence in the trial; it is incapable of being dealt with *in limine*.

[6] The jurisdiction of the court in entertaining a preliminary objection is a limited one to the test set in ***Mukisa Biscuits' case*** and, any issue that will require probing for it to be proved is not a preliminary objection. Admissibility of evidence is a matter for trial and is done in the purview of the entire evidence being presented at the hearing. This is so because there could be a basis why primary evidence has not been produced or the maker of a document is not being called. And, it is not uncommon that independent evidence may exist in the petition that could remove the lapses or improprieties on the evidence being impugned by Mr Onsando. Those matters are an integral part of the issues the court is obliged to determine at the hearing and not *in limine*. I agree with the Professor that the objection is best dealt with at the point of production of evidence by the witness or in the submissions of the parties in the main case.

[6] Further, the Preliminary Objection by Mr Onsando is incapable of disposing of the entire suit as a Preliminary Objection should. Mr Onsando has suggested that the court would save time if it determined *in limine*, the probative value of the impugned evidence instead of waiting until trial. I have well founded quarrel with that suggestion. First, the evidence in question must be subjected to due process before it is discarded or excluded by the court. Second, the suggestion as a way of saving courts time is not only inappropriate but a distortion of due process of the law. On the contrary, as it has been stated often before, what would save court's precious time is to refrain from raising contorted issues by way of a preliminary objection. The reverse position is the kind of practice that Sir. Charles Newbold P. registered a strong deprecation on when he said in the ***Mukisa Buscuits case*** that:

"That the improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

[7] For those reasons I dismiss the Preliminary Objection by Mr Onsando. I will not comment on the authorities filed by Mr Onsando as they touch on the substantive issue of production of evidence. Let those issues be canvassed at the trial and in the submissions by the parties.

ON JOINDER OF 4TH RESPONDENT

[8] Mr Ojuru argued that the 4th Respondent is wrongly joined. He cited section 5, 49(5) and 52 of the Constituency Development Fund Act, 2007. His main argument is that members of the Constituency Development Fund Board (hereafter the Board) cannot be sued in their personal capacity as the Board is a body corporate.

[9] The reaction by Professor Sifuna to the submissions by the counsel for the 4th Respondent was unusually strong, and he accused the distinguished counsel of quoting a non-existent law i.e. the Constituency Development Fund Act, 2007 and its sections. To him, the Act was repealed and was replaced with the Constituency Development Fund Act, 2013 (hereafter the CDF Act). Sure enough, the Professor cited the correct statute and sections; nonetheless and equally, counsel for the 4th Respondent

in his reply, respectfully stated the corrected status of the law thereby correcting the earlier impression.

[10] Professor Sifuna continued. He urged that the 4th Respondent is sued for committing electoral malpractices within the Elections act and Regulations, and not under the CDF Act. The CDF Act only deals with matters which are purely on the Fund as laid down in the CDF Act. He also quoted Rule 2 (d) of Elections (Parliamentary and County Elections) Petition Rules, 2013 on who should be a Respondent.

Analysis by court on joinder of parties

[11] In a proceeding, only right parties should be joined. This question of joinder is most apt dealt with at this stage, except, I decry when it is raised without proper basis. A conscientious decision should be made by carefully looking at the provisions of the law against the issues at hand before the issue could be raised. An issue of joinder of parties *per se* will at first instance be one of law, particularly when it is hinged on corporate veil of the CDF Board. It relates to a statutory interpretation on whether or not a member of CDF Board could be sued in person on matters of the Board. But, when coupled with the allegations against the 4th Respondent, in an election petition, one should have little trouble to see the plane has drifted to the airspace of the Elections Act. The allegations in the petition have been legally made against the 4th Respondent as a person. Some border on election offences and in law criminal culpability, except in the few cases where corporate criminal liability is permissible, can only be personal. I should add here that I am not determining the culpability of the 1st Respondent as the Petitioner will still have to prove to the required standards all the allegations made against the 4thh Respondent. I am just deciding on bona fide of joinder of the 4th Respondent in the proceeding.

[12] The apt answer to this question is Rule 2(d) of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Rule 2(d) provides that:

> ‘’***Respondent’’ in relation to an election petition, means-***
>
> ***a) …….***
>
> ***b) …….***
>
> ***c) …….***
>
> ***d) any other person whose conduct is complained of in relation to an election.***

[13] The 4th Respondent is alleged to have committed some electoral malpractices, and offences under Part VI of the Elections Act in relation the election in dispute herein. The dispute involving or complaints against the 4th Respondent are, therefore, governed by the Elections Act and not the CDF Act. They are also not matters which the Board can be held accountable for as a body corporate or collectively.

[14] Let it be known also that the CDF Board does not have jurisdiction to deal with electoral disputes. Their jurisdiction- loosely used- is circumscribed within its statutory functions prescribed under section 6 of the CDF Act. Accordingly, complaints and disputes which the CDF Board is competent to receive and determine under section 6(1) (e) of the CDF Act are those within the specific functions of the Board and not just any dispute. See the elucidation of this by Mumbi J in the case of ***Hon James Ondicho Gesami v. Kenya Anti-Corruption Commission & Others*** **[2012] eKLR.** For the avoidance of doubt I reproduce section 6 of the CDF Act below:

6. *(1) The functions of the Board shall be to -*

(a) to ensure timely and efficient disbursement of funds to every constituency;

(b) to ensure efficient management of the Fund;

(c) to receive and discuss annual reports and returns from the constituencies;

(d) ensure the compilation of proper records, returns and reports from the constituencies;

(e) receive and address complaints and disputes and take any appropriate action;

(f) consider project proposals submitted from various constituencies in accordance with the Act, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects;

(g) perform such other duties as the Board may deem necessary from time to time for the proper management of the Fund.

(2) Where any issues of policy arise in the course of the performance of its functions under this Act, the Board shall refer the same to the Cabinet Secretary.

[15] It makes sense to state the statutory anchorage of Rule 2 (d) of the Elections (Parliamentary and County Elections) Petition Rules, 2013. The anchor is placed solidly on the provisions of the Constitution especially on electoral process; the Elections Act, particularly Part VI and Part VII.

[16] On the basis of the foregoing, I hold that the 4th Respondent is properly joined as a Respondent in these proceedings. I dismiss the Preliminary Objection by Mr Ojuro. I will not address the other issues canvassed by the Professor on the probity of the responses filed by the 4th Respondent as that is a substantive matter that should be determined on a substantive motion and evidence.

ON LEGAL REPRESENTATION

[17] Before I address this issue, let me first establish the constitutional framework within which I should determine the matter. My decision should very much reverberate the constitutional dimensions on the nature of election petitions, and the principles on resolution of disputes cast in Article 159 of the Constitution of Kenya, 2010. Consider what the court said in the case of ***BGM HC ELECTION PETITION NO 1 OF 2013*** that:

Election disputes are... not purely private disputes to be confined to strict rules which apply to private disputes; but should be seen as public-election disputes; falling under the league of sui generis proceedings. Since such disputes carry remedies of a public character, they, in all civilized legal systems, enjoy a degree of liberal approach under the Constitution and the laws of the nation.

[18] Looking at the above constitutional dimensions on election disputes and the principles on resolution of disputes in Article 159 of the Constitution, it becomes very clear that the question of legal representation, as raised by Professor Sifuna, is matter of great concern to the court. This case is challenging the election of the 1st Respondent who will be completely shut out of justice if we do what the Professor Sifuna is asking the court to do. It will be quite invidious to expunge all pleadings filed by

Onsando Ogonji & Tiego Advocates, and forbid the firm form representing the 1st Respondent as the strict constitutional and statutory timeline on filing responses would confront the 1st Respondent. The act of excluding a party from justice, in an adversarial system such as ours, will not only prejudice the 1st Respondent, but will also deny the public the right to a complete and effectual resolution of the dispute.

Cases quoted are distinguishable

[19] I wish to distinguish the cases filed by the Professor on the issue at hand, that they were decided before the promulgation of the Constitution of Kenya, 2010. They were also determined under a very different set of election laws and rules. Needless to state they are of persuasive value to this court which is of concurrent jurisdiction. The fundamental distinguishing factor is, however, the Constitution of Kenya, 2010 which laid invincible beacon for jurisprudence-building by the courts. It removed strict enforcement of procedural requirements in favour of substantial justice. It entrenched a live and robust human rights charter, and decreed that parties should have unhindered access to justice *et al.* The following magnificent observations made by Justice Ojwang [as he then was], while serving as a judge of the High Court, in ***Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another,*** **Mombasa HCCC No. 190 of 2010,** authoritatively defines this marked departure, that**:**

"I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010."

[20] I find more trouble to fathom that the Professor wants the court to shut the doors of justice on the 1st Respondent *in limine*. That is a cruel proposition, and would be an extravagant exercise of discretion by the court, which, I do not think, will find any grounding in the current constitutional structure of our nation.

[21] That aside, I highly doubt if there is any serious issue of legal representation determinable *in limine*, especially that the firm of advocates whose status is being questioned, has filed papers on behalf of the Respondent. All the papers filed indicate that the 1st Respondent is being represented by the firm of ***Onsando Ogonji & Tiego Advocates***. The objection herein involves much more: the constitutional right of the 1st Respondent to legal representation; the legal tenor of the pleadings filed by the advocate; the question of expunging the documents, if at all, and the effect of such action, and so on. This would certainly involve contestations and require the court to examine those documents and other pleadings to establish their legal tenor. See the case of ***Oraro v Mbajja*** above.

[22] I therefore disallow the objection by Professor Sifuna and hold that the firm of ***Onsando Ogonji & Tiego Advocates*** are properly on record.

Up-beat: Meticulous pleading

[23] But before I close let me say one important thing; that it is most desirable for advocates as the experts in legal matters, should be careful to familiarize themselves with rules of procedure and strive to fasten meticulous drafting of pleadings which display individual and collective prowess of the noble

profession of law. You will agree with me that Article 159, particularly (2) (d) of the Constitution was not enacted to promote voluntary or careless lapses by advocates or parties in a proceeding. Without doubt, a contrary view would completely diminish the elegant provisions of that Article.

CONCLUSION

[24] The court makes the following findings and orders:

a) That the 4th Respondent is properly enjoined in these proceedings,

b) That the objection to the evidence by the Petitioner annexed to his affidavit and marked 2A, 3, 5, 6 & 7 shall not and cannot be expunged from record: the objections to be determined in the trial.

c) That the firm of Onsando Ogonji & Tiego Advocates is properly on record as representing the 1st Respondent.

d) That no order as to cost on all the preliminary objections.

Dated, signed and delivered in open court at Bungoma this 17th day of May, 2013

F. GIKONYO

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT:E. Khisa

Prof. Sifuna for Petitioner

Kituyi for Onsando for the 1st Respondent

Kituyi for Ojuro for 4th Respondent

PROF.SIFUNA: I apply for certified copies of the ruling.

COURT: Certified copies of ruling to be supplied to parties on payment of requisite fees.

PROF. SIFUNA: We wish to file a request for certain documents from 1st Respondent, 3rd Respondent and 4th Respondent.

COURT: Prof. Sifuna to file and serve request for documents. Parties are at liberty to file any objection to one or more of the particulars or documents requested for by the Petitioner.

F.GIKONYO

JUDGE