



**REPUBLIC OF KENYA**

**Magistrate Courts**

**Election Petition 1 of 2013**

**CHARLES ON'GONGO WERE.....PETITIONER**

**VERSUS.**

**JOSEPH OYUGI MAGWANGA.....1<sup>ST</sup> RESEPDENT**

**RETURNING OFFICER KASIPUL CONST...2<sup>ND</sup> RESPONDENT**

**I.E.B.C.....3<sup>RD</sup> RESPONDENT**

**AND**

**LAMECK OKEYO .....INTERESTED PARTY**

**RULING.**

1. LAMECK OKEYO – The interested party has by a Notice of Motion dated 29.4.2013 filed herein on 2.5.2013 sought leave to participate in these proceedings as the 4<sup>th</sup> Respondent.
2. The application is expressed to be made pursuant to Articles 22 and 50(1) of the Constitution of Kenya (Protection of Rights and Freedoms and Enforcement of the Constitution), Practice and Procedure Rules 2012, sections 2, 17(1) (d), 17(2) of the Election (Parliamentary and County Elections) Petition Rules, 2013 and all other enabling provisions of the law.
3. It is premised on the following 5 grounds:-
  - a. That, the applicant herein has been adversely mentioned in the petition by the petitioner and craves leave of this court under Article 50(1) of the Constitution to be heard in the trial Particularly as regards the role he played in the election and to have a chance to clear his name;
  - b. That the Petitioner has made remarks to the effect that the applicant participated in the elections as a trainer for the Presiding Officers and that he used that opportunity to teach the said official on how to conduct electoral malpractices which they used to bring down the integrity of the exercise;
  - c. That the petitioner now questions the fairness of the elections and attributes any failures on the part of the presiding officers to the applicant as a trainer of the election officials.

d. That since the integrity of the applicant has been questioned in the petition, it is in the interest of justice that the applicant be allowed to participate in these proceedings as a respondent so as to explain his side of the story and demonstrate his role in the electoral process; and

e. That unless this application is heard forthwith owing to time constraints in the determination of election petitions as provided in the Constitution, the applicant may not have time to explain himself and the resultant determination may hang on his neck eternally without a chance to exonerate himself.

4. The application is supported by an affidavit sworn by the applicant on 3.5.2013 in which he deposes inter alia that he was among 16 trainers who were deployed to the Kasipul Constituency to train election officials on the management of the electoral process. That he was appointed based on his qualifications and on merit and not on anybody's intervention. Further that the training was based on pre-determined curriculum developed by IEBC and skills imparted on them during their own training. They trained hundreds of election officials in Kasipul Constituency within the stipulated time framed and since the trainees were drawn from across the constituency and had differing political indications it would not have been possible at all to give any kind of training that would be seen to be partisan.

Further that the training was conducted in open classrooms and halls in broad day light, in the presence of the media, election observers and Senior IEBC Officials.

He also deposes that once the training ended he had no further dealings with the electoral process otherwise than as a voter. That he signed the IEBC electoral code of conduct and swore an oath of secrecy and that he would not jeopardize his illustrious career by acting 'stupid' as the petitioner alleges. That the manner in which his name has been dragged into this petition is full of innuendos and is damaging and so he craves the leave of this court to participate in these proceedings as an interested party so as to state the true position as he knows it.

5. At the pretrial conference this court determined this as one of the issues to be dealt with at the preliminary stage. It therefore directed the Petitioner and the 3 Respondents to put in their responses and set the hearing date as 22.5.2013.

6. Only the petitioner opposed the application. The Advocates for the Respondents – Mr. G.S. Okoth for the 1<sup>st</sup> Respondent and Mrs. Onyango for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did not.

7. The Petitioner filed 4 grounds of opposition which are as follows:-

1. "The application is mischievous and only aimed at intimidating the Petitioner

2. The interested party has no locus standi to be named as a party to this suit as no cause of action has been sought against the interested party

3. There is no legal provision for the interested party to be included as a party to the instant proceedings.

4. The application is thus lacking in merit"

8. The application was argued orally before me on 22.5.2013. In canvassing the application, Mr. Juma, Advocate for the Applicant relied on the grounds on the face of the application and the supporting affidavit. He reiterated that the reason for this application is so that the applicant can clear his name and so that he can be of assistance to this case. He submitted that the applicant has been adversely

mentioned in the petition and this creates the cause of action that the Applicant now has against the petitioner. That there will be no other forum after these proceedings where the Applicant will go to be heard and that this court has jurisdiction to determine such disputes.

On the issue of Locus Standi he submitted that the Applicant's right to clear his much aligned name gives him locus. That moreover Article 22 of the Constitution is clear that a person can go to court to protect the interest of another and so the argument of Locus Standi does not hold.

On authority of the applicant to approach this court he reiterated that Article 22 of the constitution empowers him to do so.

As for the ground that the application is mischievous and only intended to intimidate the petitioner he contended that that is a matter of fact that requires evidence to prove and as there is no replying affidavit there is no evidence to propel that ground.

He urged this court to read the entire application together with his submissions and find that his client requires a forum which is this petition to tell his side of the story and be of assistance to this court.

**9.** Confining himself to issues of law Mr. Nyauke, Advocate for the petitioner submitted that Article 22 of the Constitution only talks about institution of actions and proceedings provided there is a cause of action. That the said right is not available to the applicant as he is not seeking to institute proceedings. Referring to Rule 15(1) of the Election Petition Rules he submitted that the same refers to the manner in which a petition can be filed and how it can be responded to. That generally the Rules do not provide for interested parties. He reckoned that perhaps this is because an Election Petition is a Public Interest litigation and if all were to come they would be very many., He submitted that the correct manner would have been for the applicant to file a witness statement for the 1<sup>st</sup> Respondent or any other party.

He further argued that nothing had been placed before the court to prove that the applicant has been mentioned adversely.

It was also his contention that the application must fail as the applicant has not applied for extension of time to file his response so that even were this application to be allowed the window is already closed for him.

Finally he submitted that the application has no merit and allowing the same would be extremely bad precedent in law and would complicate the time limit set under the rules. That no prejudice is occasioned to the interest party by this petition and there be any he has to seek relief elsewhere. He urged me to dismiss the Petition with costs.

**10.** In reply Mr. Juma Submitted that the fact that the applicant is adversely mentioned is sufficient prejudice. He reiterated that there will be no other petition for him to respond to. On the issue of extension of time he submitted that time limit only binds those who are already parties to the proceedings. That is any case the application was filed on 2.5.2013 and hence within time. On Rule 15 he submitted that there is no provision in law that requires that any person who wishes to come into the proceedings must do so as a witness. That the Applicant is not coming to advance the interest of either the petitioner or the Respondent so as to come as a witness of either side. He cited Rule 2 of the petition Rules to fortify his argument that being mentioned adversely gives the Applicant the right to join as a Co-Respondent. He contended that his client must be heard so that he can say how he participated and what was the effect of that participation to the returns of that election.

11. I have carefully considered the application, the grounds thereon, the affidavit in support and annexures thereto. I have also considered the Grounds of Opposition and the able submissions by the Advocates for the parties. 3 issues arise for determination:-

*i. Has the applicant been adversely mentioned in the petition if at all;*

*ii. Does he have locus standi to bring this application,*

*iii. Is he entitled to the order sought.*

12. It is correct as submitted by Mr. Nyauke that the Applicant did not point to any specific part of the Petition where he is adversely mentioned. Even when this issue was raised during the hearing Mr. Juma tactfully avoided to point out the exact reference to the applicant in the petition. In his supporting affidavit the applicant deposes that he was one among 16 trainers who were deployed to the constituency. If that is the case then the onus was upon him to satisfy this court that he is the person referred to in the petition. I suppose that the offending paragraph is No. 12 of the petitioner's supporting affidavit which states:-

**“That a secretary to the constituency Development fund who is essentially an appointee of the 1<sup>st</sup> Respondent to such position was allowed by the 3<sup>rd</sup> Respondent to act as a trainer of the presiding officers an action which in itself gave the 1<sup>st</sup> Respondent an advantage over the other contestants majority of the presiding officers were either the 1<sup>st</sup> Respondents friends, relatives or associates in one way or the other”.**

The Applicant has at paragraph 15© of his affidavit deponed that:

**“ That the fact that I was serving as CDF Secretary during the time of temporary appointment did in no way affect the electoral process and the results since my duty was simply to teach the election officials on election management process and no more;”**

He has not however demonstrated that he was at the material time serving as CDF secretary. All he attached to his affidavit was a training manual but nothing to prove that he was the secretary of CDF. Had he done so it would not have been difficult for this court to find that he was the person referred to at paragraph 12 of the supporting affidavit of the petitioner and to conclude therefore that he had been pointed in bad light.

13. The answer to the question whether he has locus to bring this application flows from the conclusion of the previous paragraph. It is no. Rule 2 of the petition Rules defines the meaning of Respondent and at paragraph 2(d) provides:-

**“Any other person whose conduct is complained of in relation to an election,”**

As I have already stated the applicant has not demonstrated that he is the person whose conduct is complained of at paragraph 15 (c) of the petitioner's supporting affidavit. That paragraph could be referring to any of the 16 trainers. Had he proved he was the person referred to then Rule 2 (d) would have provided him with the locus to be enjoined to the proceedings. Indeed courts have recognized the right for such parties to be enjoined. Just next door the Hon. Gikonyo J. has in **Bungoma High Court Election Petition No. 3 of 2013** in a ruling delivered on 17.5.2013 held that the Fund Manager Webuye Constituency Development Fund was properly enjoined in the Election Petition as he had been

mentioned in connection to some electoral malpractices. I do not therefore agree with Mr. Nyauke's submission that the only way the applicant would have sought audience would be by being a witness. As matters stand however the applicant not having satisfied this court that he is the person whose conduct has been complained of has no locus.

**14.** Had I found that he was the person referred to adversely would I have granted him the order sought"

Having regard to the overriding objective which under Rule 4(1) is to facilitate the just, expeditious proportionate and affordable resolution of election petitions under the Constitution and the Act and being enjoined under Rule 4(2) seek to give effect to the overriding objective in the exercise of my powers under the constitution and the Act or in the interpretation of any of the provisions in the rules I would have been reluctant to grant the order. This given the time limits set in the constitution for determination of this Election Petition and the time we have left which is now less than 4 months.

In **Isaac Aluch Polo Aluochier and the Independent Electoral and Boundaries Commission and 19 others (2013) eKLR** the Supreme Court rejected a similar application holding that given that time was of the essence the application could only cause unnecessary delay.

I am not saying that the application before me was brought belatedly, it was indeed filed within time but I too must take judicial notice that time is of the essence. Accordingly I would not have allowed the application.

All would not be lost for the applicant as Article 50(1) of the Constitution is given effect in Section 87(2) of the Elections Act which would give him an opportunity to be heard and to give and call evidence to show why he should not be reported.

**15.** The application is dismissed with an order that the applicant shall bear the costs.

**E.N.MAINA**

**JUDGE.**

Signed, dated and delivered this 27<sup>th</sup> day of May, 2013.

In presence of:-

Mr. Nyauke for the petitioner

Mr. G.S. Okoth for 1<sup>st</sup> Respondent.

Mr. Omondi for 2<sup>nd</sup> & 3<sup>rd</sup> Respondent

Mr. Juma for the applicant/interested party

Eudice Okombo – Court interpreter



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