REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 1 OF 2004

IN THE MATTER OF

THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT

CHAPTER 7, LAWS OF KENYA

AND REGULATIONS MADE THEREUNDER

-AND-

IN THE MATTER OF

BY-ELECTIONS FOR THE KISAUNI PARLIAMENTARY CONSTITUENCY

-BETWEEN-

HASSAN ALI JOHO……...PETITIONER

-AND-

HOTHAM NYANGE…….1ST RESPONDENT

ANANIA MWASAMBU MWABOZA…… 2ND RESPONDENT

RULING

(a) Prayer for Mistakenly-filed Election Petition to be expunged

Within the framework of his petition dated 17th January, 2005 the petitioner filed a Notice of Motion, of even date, brought under Order L, rule 1 of the Civil Procedure Rules; sections 20 and 24 of the National Assembly and Presidential Elections Act (Cap. 7) and rule 15 of the National Assembly Elections (Petition) Rules; and s. 3A of the Civil Procedure Act (Cap. 21).

The petitioner was seeking orders that —

(i) the petition and all other notices presented to the Court, dated *24th December, 2004* be expunged from the Court records;

(ii) the receipts filed herein, on *24th December, 2004* and signed by the Registrar be expunged from the Court record;

(iii) the sum of Kenya shillings 250,000/= deposited with the said earlier petition, on 24th December, 2004 vide receipt No. B366012) be deemed to be the deposit for the purpose of the petition herein;

(iv) Costs of the application be costs in the cause.

The application was premised on the following grounds:

(a) that, the petition and receipt documents filed on 24th December, 2004 contravenes s.20 of the National Assembly and Presidential Elections Act (Cap.7);

(b) that, the aforesaid documents are a nullity *ab initio* as they were filed outside the 28 days provided for by the Act;

(c) that, another petition has been properly presented and served upon the respondents;

(d) that, the said documents had been filed inadvertently;

(e) that, the mistake in filing the said documents was that of the law firm rather than of the client who had given clear instructions;

(f) that, there is no prejudice suffered by the respondents as they have been served with the proper petition documents;

(g) that, under rule 15 of the National Assembly Elections (Election Petition) Rules a petition becomes answerable after the expiry of 28 days, which days had not yet lapsed as at the time of filing the instant application;

(h) that, the funds deposited had been so deposited as security for costs, and the same should be deemed properly deposited for the purpose of the instant application.

(b) Evidence in Support of the Application

The petitioner's Notice of Motion was supported by several affidavits. The first one is sworn on 17th January, 2005 by ***Edward Oonge***, an advocate with the firm having the conduct of this matter on behalf of the petitioner. He avers that the petitioner had given his firm instructions for the filing of petition following media publication of the outcome of the Kisauni by-election, and thereafter all the required documents were prepared, awaiting the gazettement of the by-election result. On 24th December, 2004 after the firm closed office for the Christmas holiday, the deponent purchased the *Kenya Gazette* and found that the Kisauni by-election outcome had been published as *Gazette Notice* No. 2936. The deponent, without perusing s.20 of the National Assembly and Presidential Elections Act (Cap. 7), inadvertently moved to the High Court Registry and filed the petition that very day, *24th December, 2004*, together with all the other required documents. The deponent avers that he made a mistake, in his anxiety to discharge the last major task of the year, before proceeding on holiday during the Christmas break. When the advocates opened their office in the new year, on *11th January, 2005* the deponent reported on the filing of the petition to the senior partner having the conduct of this matter, ***Mr. Nyaberi***, who immediately realised that a mistake had been made by filing the petition documents on the same day as the gazettement, contrary to the applicable rules. The deponent takes responsibility for the mistake, avers that it was entirely inadvertent, and tenders his apology to the Court.

The second affidavit in support of the Notice of Motion is sworn by the petitioner, ***Hassan Ali Joho***, and also dated 17th January, 2005. He avers that he had instructed M/s. Nyaberi & Co. Advocates on 17th

December, 2004 to prepare the petition documents, and ***Mr. Nyaberi*** had undertaken to file the same upon gazettement of the by-election result. ***Mr. Nyaberi*** thereafter prepared the documents which the deponent signed, ready for lodgement in Court upon publication in the *Kenya Gazette*. On 27th December, 2004 an employee of M/s. Nyaberi & Co. Advocates, ***Mr. Oonge,*** consulted with the deponent on mode of service of the petition and its accompanying papers. The deponent gave indications as to the persons to be served, and they were duly served. But on the opening of the offices of M/s. Nyaberi & Co. Advocates, on 11th January, 2005 ***Mr. Nyaberi*** called the deponent and intimated to him that the petition had mistakenly been filed before the due date, and requested him to sign a fresh petition and other relevant documents for filing. He depones that he did as requested by his advocate, and a new petition was filed in Court within the prescribed time limit.

The third supporting affidavit was sworn by counsel with the conduct of this matter on behalf of the petitioner, ***Mr. Justry P. Lumumba Nyaberi.*** He depones that he has read the affidavits by ***Edward Oonge*** and ***Ali Hassan Joho,*** and he confirms their averments as true. He ascribes the filing mistake entirely to his firm, and pleads that it was inadvertent. He deposes that, by rule 15 of the National Assembly Elections (Petition) Rules, 1993 a petition is deemed to be in issue after the expiration of a defined time limit, namely 28 days as provided in s.20 (1) of the National Assembly and Presidential Elections Act (Cap. 7); and on this account he had advised the petitioner that his petition stood the risk of being struck out, unless a new petition was filed before the expiration of that time-limit. He had advised the petitioner that only the filing of a new petition could cure the mistake which had already been committed by filing on the very day the by-election result had been gazetted.

The deponent averred that the petitioner had paid to his law firm a sum of money which had been deposited as security for costs, on 24th December, 2004; and so he should not be condemned to paying the same amount a second time, to go with the new petition which had now been duly filed within the prescribed time-limit, the original payment being already deposited in Court.

The deponent avers that he verily believes his client's application in no way constitutes abuse of Court process, as the documents first filed were a nullity *ab initio*, and the second set, duly filed within the 28-day limit, is properly on record and may be regarded as the petition now pending for hearing and determination by the Court. He reiterates that the petitioner had himself been diligent all the way, in ensuring his petition was filed; but the mistake was that of the firm of advocates with the conduct of the matter. The deponent avers that the petition in its form as now duly filed, raises important questions related to proper electoral practice which it is in the public interest this Court should fully hear and determine.

(c) Objections to the Application — by the Respondents

Notices of preliminary objection were filed by the respondents: by the 2nd respondent on 27th January, 2005; and by the 1st respondent on 28th January, 2005. However, when this matter came up for hearing on 2nd June, 2005 a consent was recorded: that the preliminary objections raised by the 1st and 2nd respondent be consolidated and heard in the course of the submissions on the application itself.

(d) Expunging or Withdrawal: Submissions for the Applicant

Learned counsel for the petitioner, ***Mr. Nyaberi,*** submitted that the prayer that the original petition and attendant notices, dated 24th December, 2004 be expunged from the Court records to leave in place the later petition dated 17th January, 2005 was *of novel character* and should be heard and determined as an issue of first impression. One of the documents on file, which counsel asked to have expunged from the record was a receipt document issued by the Registrar, and filed on 24th December, 2004. During the filing of the papers on 24th December, 2004 money had been deposited as security for costs, as required under the law, and for this, receipt No. B366012 had been issued. Counsel prayed that the said deposit be deemed to be the required deposit accompanying the second set of petition documents, filed on 18th January, 2005.

Mr. Nyaberi gave a background to the instant application as follows: the Kisauni by-election had taken place on 16th December, 2004; the outcome was gazetted on 24th December, 2004; the petitioner, who was declared to have lost the election, thereupon instructed counsel to file a petition**.** ***Mr. Nyaberi*** asked the Court to take *judicial notice* of the fact that the two days following the gazettement of the election results were public holidays, being respectively, Christmas Day and Boxing Day. This, of course, is readily done. Under s.20(a) of the National Assembly and Presidential Elections Act (Cap.7), questions regarding the validity of an election are to be brought before the Court and served within 28 days *after* the date of publication of the results in the *Gazette.* Counsel stated, consistently with the depositions on record, that his law office closed for end-of-the-year holiday on 21st December, 2004, but he left the filing of the petition to be conducted by his legal assistant, ***Mr. Edward Oonge.*** Only later did he learn that his legal assistant had filed the petition on *24th December, 2004* when the right date of filing should have been after the date of publication — i.e., *any time from 25th December, 2005*. Soon after ***Mr. Nyaberi's*** office re-opened on 11th January, 2005 he had moved to file the instant application. In the meantime counsel had taken action, within the 28-day period as prescribed to file a fresh petition on 18th January, 2005. The present application was filed within the framework of the new petition; and its concern was that the mere appearance of two petitions on record at the same time, would be an abuse of Court process and the Court could very well strike out both of them. Accompanying the earlier petition had been the payment of a deposit of Kshs.250,000/= which the petitioner was now praying should be re-lodged against the second petition which was the valid petition.

Counsel submitted that, by the National Assembly Elections (Election Petition) Rules, rule 15, a petition was deemed to be in issue after the expiration of the period limited for filing petitions — namely 28 days. Counsel stated that he had moved to Court to have the earlier petition of 24th December, 2004 expunged; so that it is the petition filed on 18th January, 2005 that should be deemed to be in issue.

On the jurisdiction of the Court to hear and determine this matter, counsel submitted that by virtue of s.23 of the National Assembly and Presidential Elections Act (Cap. 7), except where the Chief Justice orders otherwise, all interlocutory matters under a petition are to be heard before *any Judge*. S.60 of the Constitution confers jurisdiction upon the Court to hear civil matters, while s. 44(1) thereof confers the jurisdiction to hear election petitions. Learned counsel submitted that when a Court sits as a petition Court, petition rules apply; but when an issue arises that is not provided for under the petition rules, then the Court *transforms itself into a normal civil Court.*

Counsel submitted that the issue now coming before the Court fell in a grey area; and the question here was: where a petitioner has filed a petition *before the right time*, how is he to correct this mistake? ***Mr. Nyaberi*** submitted, and I think, quite meritoriously, that such a "petitioner" is entitled to *a remedy*.

The respondents have taken the position that the petitioner could have helped himself by *withdrawing* the earlier petition and then filing another in its place. This would not, learned counsel submitted, be an option available to the petitioner in the present matter. This is because while the National Assembly and Presidential Elections Act (Cap.7) provided for withdrawal of a petition, what was required was that the petitioner withdraw the petition *with leave of the Court*. Such leave could not be granted without the depositions of a party and his advocate (rule 24 of the National Assembly Elections (Election Petition) Rules). The petitioner seeking to withdraw the petition was required (rule 25) to pay for a notice to be published in the *Kenya Gazette.* Withdrawal, by rule 26, means that the petitioner *abandons the petition*. Counsel submitted that "withdrawal" under rule 26 means withdrawal of both the petition and the petitioner. He submitted that the rules have a *lacuna*; because it is not possible to withdraw the petition and then substitute it with another petition.

Consequently, ***Mr. Nyaberi*** submitted, it was not possible for the petitioner to withdraw the petition of 24th December 2004 unless he also withdrew *himsel*f from any petition challenging the by-election results. This is the reason why the petitioner has avoided the use of the word "withdrawal" in relation to the object of the instant application; he has instead used the word "expunging" of the earlier petition as filed. Counsel urged: "A petition which is not truly a petition should be expunged". Counsel urged further that the applicant had one petition properly on record, filed on *18th January, 2005.*

Mr. Nyaberi contested the claim by the respondents, that this Court had no powers to deal with petitions. He submitted that the High Court can transform itself as may be necessary, for the purpose of hearing civil matters; and the instant application had been *made under the Civil Procedure Rules*. Can it be said that election rules are comprehensive and self-contained, so that the rules of civil procedure would be entirely kept out of play?

Learned counsel considered this application not subject to a rule stated by ***Mr. Justice Mwera*** in ***Roshad Hamid Ahmed v. Fahim Yasin Twaha & 2 Others***, E.P. No. 4 of 2003:

"**..the High Court exercising its civil jurisdiction and applying the Civil Procedure Act with the rules made thereunder, is not the same High Court when exercising its jurisdiction as an election Court under [the National Assembly and Presidential Elections Act (Cap.7)] and the rules made thereunder. [I]t can be set out…that the civil procedure regime should not be confused and mixed with the election law regime unless of course one regime admits… and incorporates the provisions of the other**…"

Learned counsel submitted that the instant application should be seen as addressing matters not previously provided for; and it had been brought under Order L of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21). He submitted that the Court's ruling should be given under the Court's normal jurisdiction, rather than within the framework of an election Court-setting. In the words of counsel:

"The Court is invited to find that insofar as the issue here is not one provided for by the election rules, the Court do operate as normal, under the rules of civil procedure."

Learned counsel stated that his firm had made a mistake, occasioned by the series of public holidays that occurred immediately, after the date of gazettement of the election results being challenged in the petition. He tendered his apology to the Court, and urged that a rectification of the mistake would cause no prejudice to the respondents — as there was a proper petition filed on 18th January, 2005.

Mr. Nyaberi recalled the provision of Order IV, that when a case is filed it is to be given a separate file number; but in the present matter, *no new matter* was being filed and the documents of 17th January, 2005 and those of 24th December, 2004 merely duplicated each other. Hence, counsel submitted, there was no new cause; and he invited the Court to find that the documents filed on 24th December, 2004 were a nullity *ab initio* and should be expunged.

On the question whether the deposit earlier paid, with the first petition documents, could be lodged against the petition of 17th January, 2005 counsel urged that this be done, as there was a deposit in respect of *one and the same file.* Such an arrangement had been refused by ***Mr. Justice Mwera***, in the ***Roshad Hamid Ahmed*** case, where the deposit had been at the Registry, but made in respect of a civil as distinct from an electoral matter (on a different file).

(e) Petition Process v. Civil Litigation Process: Submissions for the Respondents *Ms. Keli* for the 1st respondent submitted that the petition of 24th December 2004 was bad in law; but she went on to urge that no law existed which allowed the Court to expunge records formally filed.

Learned counsel contested the contention that the instant matter fell within a grey area in terms of law; because the election law was a special regime which was self-contained. She submitted that orders which expunge the papers of 24th December, 2004 would bring about a dismissal, or withdrawal of the petition. She submitted that nothing prohibited filing of a petition upon withdrawal of the first one (rule 23), so long as the 28-day rule is taken into account. Counsel submitted that the motion of expunging the petition first lodged would be an abuse of the process of the Court. She submitted that there was a breach of Order IV, rule 2 of the Civil Procedure Rules; because the 2nd petition filed on 18th January, 2005 ought to have been given its own number, and it could not be the same number as the first one — as it came on a different date. She contended that it was apparent that the petitioner "did not want to file security for

costs"; and urged that no security for costs could be transferred to this second petition. It was contended that the security for costs deposited on 24th December, 2004 had already been exhausted — because the 1st respondent having been served on 29th December, 2004 instructed an advocate on 7th January, 2005; and a request for particulars had already been filed by 1st respondent on 21st January, 2005. Consequently, counsel urged, the 1st respondent was entitled to costs by reason of the papers filed on 24th December, 2004. Counsel stated that the 1st respondent had filed a request for particulars based on the application of 24th December, 2004; and at the time of filing the same he had not been aware of the petition filed on 18th January, 2005.

Ms. Keli submitted that the wording of s.21(1) of the National Assembly and Presidential Elections Act (Cap.7), regarding payment of security by a petitioner, was couched in mandatory terms, and hence the applicant ought to have duly complied. Section 21 of the Act thus provides:

> "**(1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.**
>
> **(2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money**.
>
> **(3) If no security is given as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent's costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition."**

Ms. Keli relied on the persuasive authority of ***Rotich Samuel Kimutai v. Ezekiel Lenyongopeta & 2 Others***, E.P. 2003 to support her contention that the applicant was required to pay the deposit of security within three days of filing the *second* set of petition papers. In the said case ***Omondi Tunya, J*** had stated:

> "**Counsel for both sides addressed me at length on this. The wording of section 21(1)…, in my view, are couched in mandatory terms and are not open to any other interpretation: 'the petitioner shall give security…' That deposit is to be one of money. That's why counsel's personal cheque was rejected… In my considered view, failure to deposit Shs.250,000/= within 3 days of filing the petition, or at all, renders this petition incompetent and must be struck off, as I hereby do. I was told that the delay was acquiesced [in] and that no prejudice has resulted. I find no substance in these arguments. The law as it is requires that section 21 [of the National Assembly and Presidential Elections Act (Cap.7)] be strictly complied with. There was no compliance or acquiescence."**

Learned counsel then contended that M/s. Nyaberi & Co. Advocates were not properly on record as advocates for the petitioner. She contended that, contrary to rule 9 of the National Assembly Elections (Election Petition) Rules, the firm of Nyaberi & Co. Advocates had not been properly appointed; instead, it was contended, the advocates had appointed themselves. The said rule 9 provides:

> "**With the petition the petitioner or petitioners shall leave at the office of the Registrar a notice in writing, signed by him or them, giving the name of an advocate whom he or they authorize to act as his or their advocates or stating that he act for himself or themselves as the case may be, and in 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 them at the office of the Registrar."**

Ms. Keli cited in support of her contention the persuasive authority of ***Makhanu Julius Wamboko v. Dr. Enock Wamalwa Kibunguchi & Another***, E.P. No. 26 of 2003. ***Lady Justice Aluoch*** had in that matter remarked:

> "…**I find that M/s Langat and Wandabwa Advocates filed the petition herein without the authority of the petitioner given in writing as required by Rule 9. What purports to give them authority to act is their own notice of appointment, dated 30th January, 2002; a period of about one year before the elections were held. Is this a mere technicality. I would say no because the advocates having appointed themselves as they did, proceeded to prepare a 'Receipt'… which was presented to the Registrar to sign…"**

Ms. Keli submitted that the documents purporting to authorise ***Mr. Nyaberi*** as advocate for the petitioner were defective; and that consequently all the supporting documents were null and void.

Learned counsel also noted that s.24 of the National Assembly and Presidential Elections Act (Cap.7) was one of the provisions of law cited as a basis for the application, and yet that section had been repealed. She submitted: "This Court cannot act under a repealed law to grant the prayers."

Learned counsel disputed the contention of counsel for the applicant, that the mistake in filing petition papers on 24th December, 2004 was to be attributed to the advocates rather than the petitioner himself; because the petitioner had been negligent in not appointing advocates as required under the law. She contended that the grounds in support of the application were frivolous and vexatious.

Ms. Keli submitted that the 1st respondent would be prejudiced if the application was allowed, as there would be no security for costs lodged by the applicant.

Ms. Keli contended that the application was incompetent because it sought recourse under the Civil Procedure Act (Cap. 21) and its rules, whereas election petitions were provided for in a comprehensive manner under the National Assembly and Presidential Elections Act (Cap.7). Counsel cited in support, on this point, the Court of Appeal decision in ***Speaker of the National Assembly v. Hon. James Njenga Karume,*** Civil Application No. Nai 92 of 1992. The Court in that matter stated:

> "**In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order LIII of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."**

Mr. Kioko for the 2nd respondent adopted ***Ms. Keli's*** submissions, only adding that some other election petition, No. 1 of 2005 had been filed on 17th January, 2005 at a time when the instant application was being filed — but the parties are different, though the content of the petition is similar to that of the petition herein. ***Mr. Kioko*** submitted that the said election petition of No. 1 of 2005 was an abuse of the process of the Court, just as was also the petition by the petitioner herein, dated 17th January, 2005.

(f) The Applicant's Final Submissions in Response

In his response, ***Mr. Nyaberi*** stated that he had no knowledge of the said election petition No. 1 of 2005.

On the question whether Nyaberi & Co. Advocates were properly on record, ***Mr. Nyaberi*** submitted that rule 9 of the National Assembly Elections (Election Petition) Rules does *show where election petition documents were to be served*, but it did not vitiate a petition such as the instant one. He noted that there was on record not only a notice of appointment of advocate, but also a notice of acceptance by the advocates. He submitted that: "Even if the Court were to find that notice was not properly served by the petitioner, there is on record a notice duly signed by the petitioner, even if belated."

The record shows a "Notice of Appointment of Advocates" dated 17th January, 2005 drawn by M/s. Nyaberi & Co. Advocates for the Petitioner, and filed on 18th January, 2005. Bearing the same dates is a "Notice of Acceptance", drawn by M/s. Nyaberi & Co. Advocates.

Mr. Nyaberi then addressed the claim by the respondents, that they had already done work that was compensable in the proceedings, and done it on the strength of the *original petition* filed on 24th December, 2005 — hence the original security deposit of the applicant was already used up. That was not, learned counsel submitted, the correct position in law. It was thus provided in the National Assembly Elections (Election Petition) Rules, rule 5:

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

The point taken here is an important one. It is a point that had also featured in the Court of Appeal decision in ***Alicen J.R. Chelaite v. David Manyara Njuki & 2 Others,*** Civil Appeal No. 150 of 1998. In the words of ***Kwach, JA:***

> "**It is abundantly clear from the wording of rule 5 that the request for particulars has to be *channelled through the Court. The Court has to decide whether the particulars sought are necessary* before making an order. A request for particulars in an election petition cannot be dealt with within the framework of Order VI of the Civil Procedure Rules. Under the Civil procedure Rules, which govern civil suits generally, the initiative is left entirely in the hands of the parties who only enlist the intervention of the Court as a last resort in the event of default or refusal. Election petitions are governed by a special regime and they follow a rigid timetable under constant supervision of the Court. That is why under rule 5 a request for particulars must be made by a formal application to the Court to ensure that there is no delay in dealing with them."**

Mr. Nyaberi's point is, with respect, a valid one. The respondents had *taken it upon themselves* to file and serve their requests for particulars as soon as they saw the original petition of 24th December, 2004. The Court had made no intervention to allow those requests for particulars. So, why should the costs-burden of those particulars be raised in support of a contention that the security deposit which had been lodged in Court by the applicant had already been debited as costs? In the words of counsel: "The particulars now cited are a nullity; they haven't come through the Court; so to claim costs are accruing is a mistake. They are really papers, not particulars."

Learned counsel, furthermore, urged that the security which is required to be paid into Court against costs is not always a full cover for the costs that will arise; and therefore the possible technicality that some debiting against the security would have occurred, is no basis for shutting out the substantive prayer of the applicant: *that on one and the same file in the Court records, the deposit which had been paid be attached to the one single valid petition on file*, once the earlier, mistaken one has been expunged. The application had, moreover, carried the specific prayer that any costs such as may be incurred in the expunging of the petition documents of 24th December, 2004 be costs in the cause.

Learned counsel stated that on one and the same file, there was a sufficient amount of money, deposited by the applicant as security against costs only 21 days prior to the date of filing the valid petition of 17th January, 2005. He contended that it would have been worse if no money at all had been deposited. He urged that the petition be heard. Counsel remarked that the petitioner's application to have the papers filed earlier expunged, had been made timeously. If the petition of 17th January, 2005 had not been filed, counsel argued, this would have been prejudicial to the applicant, as the instant application may not have been heard in good time to enable the filing of a valid petition to take place. If the prayer is not allowed, counsel urged, then there would remain on file two petitions, and this would not help the Court to arrive at an expeditious decision.

(g) Analysis and Orders

What came before this Court was not an election petition, but an application within the framework of an

election petition. Technically speaking, there are two election petitions on file: one filed on 24th December, 2004; the other filed on 18th January, 2005. The reason for filing the later petition, which replicates the earlier one, is that the earlier one had been field prematurely and so was not properly lodged at the Registry. This basic point was not disputed by the respondents. So I take it as a fact that the filing of the petition on 24th December, 2004 was *a mistake*; it should have been filed later. Can this mistake be excused, and the earlier papers expunged from the record? Is there any constraint on the authority of the Court which would take away its competence to exclude the earlier papers?

The applicant cited as the legal bases for the application: Order L rule 1 of the Civil Procedure Rules; Sections 20 and 24 of the National Assembly and Presidential Elections Act (Cap.7) — even though it turns out that s.24 aforesaid had been repealed way back in 1997; Rule 15 of the National Assembly Elections (Election Petition) Rules; and s.3A of the Civil Procedure Act (Cap. 21). But learned counsel, ***Mr. Nyaberi*** submitted that the application brought before the Court was, in every respect, a *civil matter* brought under the Civil Procedure Act (Cap. 21) and the rules made thereunder. He urged that the purpose was to move the Court to exercise its normal powers under the Civil Procedure Rules to make orders of a civil nature — though orders which had a bearing on the subsequent prosecution of an election petition matter.

Firstly, as a case-management question, the applicant pleads mistake in the filing of election petition documents on 24th December, 2004 — with the consequence that the lodgement of the papers was premature and so was a nullity. He prays that the said papers be expunged from the records and substituted with identical ones which had been filed on 18th January, 2005. The filing of the papers on 18th January, 2005, it is apparent, was in exercise of *abundant caution*, as the applicant apprehended that the hearing of an application to exclude the papers of 24th December, 2004 would take long, and time would be lost for filing a proper petition.

Counsel has contended that this is a *matter of first impression*, because it is not the "withdrawal" of a petition as contemplated under rule 26 of the National Assembly Elections (Election Petition) Rules; rather, it is simply the *expunging of papers brought on record in error.*

By contrast, counsel for the respondents have urged that the application be dismissed with costs, in particular because the law relating to parliamentary elections is codified and is to be found in the National Assembly and Presidential Elections Act (Cap. 7) and in the National Assembly Elections (Election Petition) Rules. Counsel for the respondents have thus maintained that it is improper for the petitioner's application to be founded on the Civil Procedure Act, (Cap.21) and that on this account the application is incompetent. Learned counsel for the applicant had a response which I believe to be meritorious: *that the general powers of the Court are regulated under the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules*, and that *whenever there was a gap in the law relating to elections, it was entirely proper for the Court to make recourse to the Civil Procedure Act, (Cap.21) and the rules made under it.*

Now in the case of the application herein, ***Mr. Nyaberi*** contended that there was the novel question: if a party has made a mistaken application, and then he has also made a correct application, can the mistaken one be expunged, or must the two remain on file and become a basis for nullifying the entire cause of the applicant? I would agree with counsel that such an applicant should not be deprived of all remedy, because that would be *unjust*; and I think it is in order for the Court, in such a case, to exercise its *discretion* under the Civil Procedure Act (Cap. 21), s. 3A. Exercising its discretion in this manner, I believe it would be *right and equitable that the mistaken application be expunged from the record*, leaving only the correct one on file. In the present matter, it is the case that the application to be expunged had been accompanied with a deposit of money. I believe the Court would quite properly exercise its discretion, again under s. 3A of the Civil Procedure Act, to dislodge the money paid into Court as security, from the scheme of the expunged application to that of the correct application.

As the petition documents of 24th December, 2004 were not properly filed, I would not regard the applicant herein as a "petitioner" solely by virtue of those mistaken papers; and I would consider that he is coming to Court for an exercise of the Court's ordinary competence under the Civil Procedure Act

(Cap. 21), to dislodge that petition and to prepare the ground for the later petition which, from that moment , can be prosecuted within the framework of the electoral law.

I am not, therefore, persuaded by the contentions made for the respondents, that in the present application, the petitioner could only secure remedy within the framework of the electoral law. Learned counsel, ***Mr. Nyaberi***, did submit that "insofar as the issue here is not one provided for by the election rules, the Court do operate as normal, under the rules of civil procedure."

Although counsel for the respondents considered it improper that the petition papers of 24th December, 2004 and those of 17th January, 2005 were lodged against the *same file number*, they did not expressly ascribe any blame in that regard to the applicant; and so I must take this unity of the file as I find it: and the effect is that the money deposit now sought to be held against the petition of 17th January, 2005 presents no difficulty as the file involved is *one and the same.*

I am not in agreement with counsel for the respondents when they contend that, just because they had filed and served requests for particulars, they had become entitled to costs, to be settled against the money which had been deposited with the petition papers of 24th December, 2004. It is quite clear from the Court of Appeal decision in the ***Alicen Chelaite*** case, that requests for particulars in election matters that have not been sanctioned by the Court, are purely informal and will give no basis for engaging the security-for-costs provisions.

Counsel for the respondents contended that Nyaberi & Co. Advocates had not been properly appointed as advocates with the conduct of petition matters on behalf of the applicant, and that, therefore, the application should be dismissed. It was urged that appointment of advocate by the petitioner was *mandatory*, under the electoral law. However, a careful reading of rule 9 of the National Assembly Elections (Election Petition) Rules, would not give that impression. Even as this rule states that the petitioner "shall leave at the office of the Registrar a notice in writing…giving the name of [his] advocate" it also states that "*if no such writing is left* all notices may be given by leaving them at the office of the Registrar." I think the provision is not really mandatory; and therefore I do not agree that the application merits dismissal on this ground.

I have been unable to appreciate any compelling ground raised by the respondents which should be a basis for debarring the applicant from placing his electoral grievance before the Court. All the grounds brought up by the respondents have little merit, their preoccupation being essentially, to *stop* the applicant's petition. This cannot be allowed; for *it is the primary business of this Court to entertain grievances and to resolve them, in such a manner as dispenses justice to the parties.* Technical pretexts such as those proposed by the respondents, must not be allowed to defeat the broad goal of justice as between litigants.

With a clear mind, informed by the considerations set out in this ruling, I will now make the following Orders:

1. The petition and all other notices presented to this Court, dated 24th December, 2004 are hereby expunged from the Court records.

2. The Receipts filed herein, on 24th December, 2004 and signed by the Registrar are hereby expunged from the Court record.

3. The sum of Kenya Shillings Two Hundred-and-Fifty Thousand deposited herein on 24th December, 2004 (evidenced by Receipt No. B366012) shall be deemed to be the security deposit for costs under s.21 of the National Assembly and Presidential Elections Act (Cap.7), in respect of the petition filed on 18th January, 2005.

4. The costs of this application shall be in the cause.

DATED and **DELIVERED** at Nairobi this 8th of July, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Petitioner/Applicant: Mr. J.P.L. Nyaberi, instructed by M/s. Nyaberi & Co. Advocates

For the 1st Respondent: Ms. Keli, instructed by M/s. Jemimah Keli Advocates;

For the 2nd Respondent: Mr. Kioko, instructed by M/s. Charles Kioko, Munyithya & Co. Advocates