



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Election Petition 4 of 2013**

**BETWEEN**

**GIDEON MWANGANGI WAMBUA.....PETITIONER**

**VERSUS**

**1. INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**2. KHATIB ABDALLA MWASHETANI...2<sup>ND</sup> RESPONDENT**

**3. JUMA MUSA (RETURNING OFFICER**

**LUNGA LUNGA CONSTITUENCY).....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. By a Motion on Notice dated 8<sup>th</sup> April 2013 expressed to be brought under the provisions of Regulation 94 of the *Elections (General) Regulations, 2012*, (hereinafter referred to as the Regulations), Part IV of the *Elections (Parliamentary and County Elections) Petition Rules, 2013* (hereinafter referred to as the Rules) and sections 2, 176 through to 181 of the *Evidence Act*, Cap 80 Laws of Kenya (hereinafter referred to as the Act), the petitioner herein, **Gideon Mwangangi Wambua**, seeks the following orders:

- i) At the first instance, service of this application on the respondents is dispensed with, to prevent grave mischief and/or the purpose of this application being defeated, or rendered nugatory;**
- ii) The court by warrant directed to the Manager, First Community Bank, Mombasa Branch authorize S.M. Kimani Advocate, to investigate Account Number 1988640901 held and maintained at First Community Bank, Mombasa Branch, in the name of Mwashetani Foundation; and to lift certified copies of all transactions undertaken in the period between 1<sup>st</sup> November – 31<sup>st</sup> December, 2012 and 1<sup>st</sup> January to 31<sup>st</sup> March, 2013, (both dates inclusive) and entered in the bankers' book maintained for the account;**
- iii) Directions as to preservation of the original banker's record with regard to account number 1988640901, First Community Bank, Mombasa Branch, pending the hearing and determination of this petition are given;**

iv) **Directions on filing and service of additional affidavits, as may become necessary after discovery, in support of the petition may be given;**

v) **Other consequential directions are given.**

### **PETITIONER/APPLICANT'S CASE**

2. The application is supported by an affidavit sworn by the applicant on 8<sup>th</sup> April 2013. According to the applicant, his main complaint in the petition is that the election for national assembly in **Lunga Lunga Constituency** (hereinafter referred to as the Constituency) was marred by many election offences including bribery, threatening, undue influence and other malpractices whose effect invalidated the election. According to him, one aspirant in the Constituency gave out money by way of school fees to Secondary School going students in the said Constituency which payments made close to the election date, amount to bribery and the only way in which he can prove these facts is by obtaining the original banker's book and record of account maintained by the **First Community Bank** (hereinafter referred to as the Bank) in respect of account number 1988640901 in the name of "**Mwashetani Foundation**" (hereinafter referred to as the Foundation).

3. It is however deposed that the keeper of the record sought herein is not a party to these proceedings and hence the Bank has no obligation to discover and provide information on the said account, hence this application.

4. Based on the legal advice received from the applicant's legal advisers, it is averred that the discovery of bank account details is available under equity and Part VII of the Act and that the information sought is necessary to help the court and the parties to adjudicate on the issue of the money paid to various schools stated in his petition from the aforesaid account; and whether or not the said payments were made in contravention of section 63 and 64 of the **Elections Act, 2011**; and whether or not the aspirant referred to earlier in the affidavit signed the cheques, and if so, in what capacity. According to the applicant he is in possession of some of the cheques and a list of the beneficiaries of payments from the Foundation account. To him the warrant to investigate account in discovery is necessary in this case to prevent destruction of the evidentiary material which is only in possession of the adverse party and his banker hence the court ought to exercise its discretion and order discovery at ex parte stage as notice of this application on the bank may defeat the very purpose of seeking interposition of court at filing suit.

5. The applicant further seeks directions on filing additional affidavit or a supplementary petition, depending on the evidence that may emerge on service and execution of the warrant to investigate the account.

6. In his submissions, **Mr Kimani**, learned counsel for the Petitioner while reiterating the contents of the supporting affidavit contended that the account sought to be investigated was used to pay school fees for students in the Constituency by cheques drawn on the subject account hence entries made on banker's books on presentation of the said cheques would be relevant to allegations of corruption and bribery pleaded in the petition. According to counsel, cheques are valuable consideration hence the fact of their payment and credit, of particulars of the payment and parents of the children and time and place of issue and presentation of payment which may emerge if the prayers sought are granted are all relevant. The second relevant fact is whether the same were presented for payment and thirdly that the Bank is not a party to these proceedings and cannot regularly be made a respondent in this petition. Though the maintaining of an account by the Foundation is not illegal, counsel submitted that what is relevant is the purpose, objective and intention of issuance of the cheques during the campaign period to the parents of the students and that that is what forms the subject of the bribery since the documents exhibited show that the cheques were issued between 20<sup>th</sup> February 2013 and 27<sup>th</sup> February 2013 at campaign meetings. It is therefore submitted that the discovery sought would help expose or unearth some of the salient facts since the Bank has the exclusive custody of the Bank Books and the cheques issued.

7. While recognising that the Rules do not address the issue of discovery, **Mr Kimani** submitted that Part VII of the Act codifies the rule on discovery which is an equitable remedy and is available in an election

petition given the objective of our electoral process. While acceding that the remedy of discovery was not available in election petitions in England in the 19<sup>th</sup> Century, counsel submitted relying on Vol. 14 of Halsbury's *Laws of England* 3<sup>rd</sup> Edn. paragraph 496 at page 280, that the Common Law in England has evolved so that by 1908 discovery and inspection of documents other than electoral material in possession of electoral officers was ordered. It was therefore submitted that the position of want of jurisdiction to make orders for discovery cannot be correct and reference was made to Vol. 15 of *Halsbury's Laws of England*, 4<sup>th</sup> Edn. paragraph 881 at page 481. Counsel was however well aware of the fact that the present case is unique in the sense that what is sought to be discovered are materials in possession of a person who is not a party to the proceedings before the court and under Part VII of the Act, the Bank is not compellable witness so that even if the Petitioner had to come with the cheques the Petitioner cannot compel the Bank to attend Court and produce the evidence and reliance was placed on the *Indian Act of 1891* as read with section 3 of the Act.

8. Citing **Norwich Pharmaceutical Co & Ors vs. Commissioner of Customs and Excise [1973] 2 All ER 943 at page 997**, learned counsel submitted that the petitioner would like to rely on certain evidence which he could not come to unless discovery is ordered in this matter. Since the Bank incurs no liability by complying with the order of discovery sought, it was submitted that the Bank is under a duty to give full information to assist the parties by disclosing the information kept by it in regard to the subject account and allow the petition lift the copies due to the unique circumstances of this case despite the possibility that the orders sought may infringe upon the confidentiality rule in light of the allegations of bribery and undue influence taking into account the public interest of the issues involved.

9. While explaining why this application though made earlier could not be prosecuted, **Mr Kimani** submitted that the delay was due to the fact that the judicial officers who were assigned to hear election petitions had not been gazetted.

10. It was submitted that since section 76(5) of the *Elections Act* recognises the fact that a supplementary petition can be filed and that a petition may also be amended to include allegations pertaining to commission of electoral offences, discovery may therefore be ordered hence the orders sought cannot be disallowed based on the fact that the 28 days allowed for presentation of the petition have lapsed more so as the petition was filed way before the lapse of the said 28 days.

### **RESPONDENTS' CASE**

11. Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents, **Ms Kanabar** who was holding brief for **Mr Khagram** informed the Court that the said respondents had no submissions to make on the application since the orders sought therein did not affect them.

12. On behalf of the 2<sup>nd</sup> respondent, however, the following grounds of opposition were filed:

**1. THAT the prayers sought are beyond the scope of the jurisdiction of an election court and not provided for in The Elections (Parliamentary and County Elections).**

**2. THAT Mwashetani Foundation being a separate legal entity is not party to the proceedings before this Honourable Court.**

**3. THAT from the foregoing, the present application is bad in law and an abuse of this Honourable Court's process and ought to be struck out with costs.**

13. In his submission, **Mr Abed** learned counsel for the 2<sup>nd</sup> respondent submitted that apart from the aforesaid grounds, he would rely on the affidavit sworn by **Abubakar Juma Manyenze** on 2<sup>nd</sup> May 2013.

14. According to **Mr Abed**, while conceding that discovery is available as a tool to build the case, the Foundation is a separate legal entity since it is a limited liability company with shareholders and Articles

and Memorandum of Association and not being a party to these proceedings, any order directed to the Bank with respect to the subject account will be a nullity as it would be against the rules of natural justice. It was therefore submitted that the instant application is an abuse of the process of the court which ought to be dismissed with costs.

15. On the authority of **Norwich Pharmaceutical Co & Ors vs. Commissioner of Customs and Excise** (supra), learned counsel submitted that the same was in respect of a public body regarding public documents as opposed to the instant case where the documents sought to be discovered are in respect of the Foundation which is a private entity, hence the need to be afforded an opportunity to explain the circumstances under which the payments were made.

### **PETITIONER'S REJOINDER**

16. In his rejoinder, **Mr Kimani** submitted that equity does not suffer a wrong to be without a remedy hence there is no issue of prejudice to the non-party to this petition be it the Foundation or the Bank.

### **DETERMINATIONS**

17. I have considered the foregoing.

18. The first issue for determination is whether the Court has jurisdiction to grant the remedy of discovery in an election petition. This issue was not seriously contested as Mr Abed learned counsel for the 2<sup>nd</sup> respondent readily and rightly in my view conceded that the Court is properly entitled to grant an order for discovery. Rule 4 and 5 of the Rules provide:

***(1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.***

***(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the specified in sub-rule (1).***

***(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.***

***(1) For the purpose of furthering the overriding objective specified in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims—***

***(a) the just determination of the proceedings; and***

***(b) the efficient and expeditious disposal of the petition and in any case not beyond the timelines provided in the Constitution and the Act with respect to election petitions.***

***(2) The court may, where a party has breached any requirement of these Rules, issue orders, and impose penalties, as the court may consider just and fit including an order for payment of costs.***

19. Dealing with a similar objective the Court of Appeal in **Stephen Boro Gitihia vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, was held *inter alia* that:

**“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and**

expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible”.

20. The same position was taken in the case of John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007, where Waki, JA expressed himself thus:

“Jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court’s view, dealing with a case justly includes inter alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases”.

21. It was, however, emphasised in the case of John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007, that:

“That, however, is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its *application*”.

22. Although election petitions are not civil litigation as such it is my considered view that the principles of overriding objective apply with equal force in election petitions and even in cases where the Rules are silent with respect to a particular procedure the Court may in deserving cases invoke the objective to ensure that the object of election petitions which is to determine the will of the electorates is achieved. One is therefore reminded of Madan, JA (as he then was) in Chase International Investment Corporation and Another vs. Laxman Keshra and Others[1978] KLR 143; [1976-80] 1 KLR 891 to the effect that:

“If the circumstances are such as to raise an equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred”.

23. This is, however, not to say that the Court is entitled to adopt all manner of procedures some of which are contrary to the well known legal principles of justice. An order for discovery can therefore in my view be properly sought and granted under Rule 17(1)(k) of the Rules.

24. Section 178, 179 and 180 of the *Evidence Act* provide:

*178. A banker or officer of a bank shall not, in any proceedings to which the bank is not a party, be compellable to produce any banker’s book the contents of which can be proved under this Chapter or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court made for special cause.*

*179.(1) On the application of any party to proceedings a court may order that such party be at liberty to inspect and take copies of any entries in a banker’s book for any of the purposes, of such proceedings.*

*(2) An order made under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before it is to be obeyed, unless the court*

otherwise directs.

**(3) For the purposes of subsection (1), “proceedings” include any proceedings in Tanzania or Uganda.**

**180.(1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker’s book, and such warrant shall be sufficient authority for the production of any such banker’s book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.**

**(2) Any person who fails to produce any such banker’s book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.**

25. It is clear that under section 180 of the Act the Court is entitled to authorize by way of a warrant a police officer or other person named therein to investigate the account of any specified person in any banker’s book where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence. Therefore before a Court can order the issuance of a warrant of inspection it must be satisfied that the applicant has proved that the warrant is necessary for the purposes of the investigations of an offence. In this case whereas it is alleged that some election offences of fraud and corruption may have been committed, the account whose investigations the warrants are sought does not belong to any of the parties to these proceedings. It is not in dispute that the account belongs to a separate legal entity and unless evidence is adduced to show that the actions of the said legal entity can be traced to any of the parties in these proceedings, which facts cannot be said to have been proved as of now, it would be premature to invoke the provisions of the said section 180 to order for the warrant. In other words, I am not satisfied that the Petitioner has **”proved on oath.....that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence”**.

26. To order that a warrant be issued in the circumstances of this case will in my view be a breach of the rules of natural justice. It requires very strong evidence for the Court to issue warrants of discovery to a non-party where there is no direct evidence that the alleged offence was committed by a party to the proceedings. Whereas in the course of the trial it may well be proved that the alleged criminal offences are attributable to a party to these proceedings, it would be highly speculative and a matter of conjecture to make such a decision at this stage taking into account the fact that ordinarily, a Court order does not bind a non-party. See **Ernest Orwa Mwai vs. Abdul Rashid & Another Civil Appeal No. 39 of 1995.**

27. In **Norwich Pharmaceutical Co & Ors vs. Commissioner of Customs and Excise** (supra), the Lord Reid recognised that:

**“The Chief occasion for its [discovery] being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem the main object in seeking discovery was to find the identity of possible other defendants.....So discovery to find the identity of a wrongdoer is available against anyone whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession”**.

28. In that case however the court found that the respondents were in an intermediate position and that their conduct was entirely innocent being in execution of their statutory duty. That is not the position of the Bank herein whose position is to the contrary statutorily protected. It is also not alleged that the discovery sought is with a view to discovery of other respondents to the petition.

29. Under section 178 of the Act a banker or officer of a bank can only be compelled in these proceedings, where the Bank is not a party to the proceedings, to produce the banker's book in question or to appear as a witness to prove the matters, transactions and accounts therein recorded, where there is a ***special cause***. [Emphasis mine]. That requirement in my view becomes even more necessary where the banker's book relate to transactions allegedly undertaken by a non-party to the proceedings before the court and whose conduct is not *prima facie* under investigation such as the Foundation herein. It must always be remembered that it is a presumption of law that elections were properly conducted and the burden is always upon the Petitioner to prove that they were not so conducted. This is not however to say that the evidential burden of proof does not shift as the same may shift at some point in the proceedings. However as was held by the Court of Appeal in **Hassan Ali Joho & 2 Others vs. Hotham Nyange & Another Civil Appeal No. 198 of 2007**, the burden of proving that the election is liable to be set aside for corrupt practices is heavily on the petitioner because it is he who seeks to have the election declared null and void; the standard of proof has to be to the satisfaction of the court since the court cannot be deemed to be satisfied if it is in doubt.

30. it is therefore my view that the Petitioner has not placed enough material before me to grant the orders sought in the Motion dated 8<sup>th</sup> April 2013 though the Court has jurisdiction to do so. An order for discovery ought not to be made in order to enable a party who does not have sufficient material to prop up his case but ought only to be made where a basis has been properly laid for doing so. As was held by the Court of Appeal with respect to particulars in **Mututho vs. Kihara & Others Civil Appeal No. 102 of [2008] KLR 10**:

**“Election Petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it.”**

31. It is my view that similar reasoning apply *mutatis mutandi* to an application for discovery and issuance of warrants.

## **ORDER**

32. In the result, the Notice of Motion dated 8<sup>th</sup> April 2013 fails and the same is dismissed with costs to the 2<sup>nd</sup> Respondent.

**Dated at Mombasa this 30<sup>th</sup> day of May 2013**

**G V ODUNGA**  
**JUDGE**

**Delivered in the presence of**

**Mr. S.M. Kimani.....for the Petitioner/Applicant.**

**Mr. Abed..... for the 2<sup>nd</sup> Respondent.**

**Ms. Kanabar.....for the 1<sup>st</sup> and 2<sup>nd</sup> Re**