IN THE SUPREME COURT OF NAURU

COURT OF DISPUTED RETURN
YAREN

MISCELLANEOUS CAUSE No 68 of 2016

IN THE MATTER OF THE ELECTORAL ACT 2016

IN THE MATTER OF AN ELECTION IN THE CONSTITUENCY OF UBENIDE

IN THE MATTER OF PETITION BY:

ALOYSIUS AMWANO	Petitioner
AND	
DAVID ADEANG, VALDIN DOWIYOGO AND	
RANIN AKUA	First Respondent
THE ELECTORAL COMMISSIONER	Second Respondent

Before:	Khan ACJ
Date of Hearing:	1 December 2016
Date of Ruling:	7 December 2016
Case may be cited as:	Amwano –v- Adeang and others

CATCHWORDS:

Election Petitions-service of documents should be in accordance with the provisions of the Electoral Petition Rules 2016 and not under the provisions of section 101(e) of the Interpretation Act 2011.

APPEARANCES:

For the Petitioner:	Mr. V Clodumar (Pleader)
For the first respondent:	No appearance
For the second respondent:	Ms. A Lakenua
Amicus Curiae:	Mr. J Udit (Solicitor General)

RULING

BACKGROUND

1. A General Election was held in the Republic of Nauru on 9 July 2016 and the results in the Constituency of Boe (Boe), Meneng (Meneng) were subject to a challenge by way of election petitions under the Electoral Act 2016 (the Act) in the Miscellaneous Action Nos 69 of 2016 and 70 of 2016 respectively. I heard the 2 petitions on 7 September 2016 and gave my ruling on 12 September 2016.

2. In both matters the respondents were not served and the petitioner had made an application for an extension of time to serve the petition and the security for costs. I held that there were strict timelines provided for in the Act and the Election Petition Rules 2016 (the Rules) which were mandatory and the petitioners' failure to comply with those time lines had rendered the proceedings to be a nullity and the petitions were struck out. See Dabwido –v- Aingimea and others, Miscellaneous Cause No. 70 of 2016 at [18] 2016 NRSC 22.

3. The petitions in the Boe and Meneng were filed on 5 August 2016, and the petitioners did not name the elected members of Parliament as the respondents, and, notwithstanding that failure both the petitioners made an application for extension of time for service in Boe and Meneng on Baron Divavesi Waqa and Lionel Aingimea, Tawaki Kam and Hescekai Follape respectively: Both the petitioners were represented by Mr Clodumar.

4. On 11 August 2016 Mr F Jitoko (Registrar) prepared a Notice of Payment of Security in respect of two matters as follows:

> *"(i) Notice is hereby given in the matter of election petition Misc. Cause No. 69/2016 Dale Cecil –v- Baron Divavesi Waqa that the security for costs has been duly paid on the date of the filing of the said petition as required under Rule 7 of the Election Petition Rules 2016.*
>
> *(ii) Notice is hereby given in the matter of election petition Misc. Cause No. 70/2016 Sprent Dabwido –v- Lionel Aingimea and Tawaki Cam. The security for costs has been duly paid on the date of the filing of said petition as required under Rule 7 of the Election Petition Rules 2016."*

This Petition

5. The petition in this matter was also filed on 5 August 2016. The opening passage of the petition reads:

> *"TAKE NOTICE that Aloysius Amwano of the Constituency of Ubenide (the Petitioner) petitions the Court for an Order in validating the election in the Constituency of Ubenide held on 9 July 2016."*

6. The first respondents were the elected members of the Parliament in the Constituency of Ubenide (Ubenide) and like the respondents in Boe and Meneng, they were not named as the respondents in this petition. Although the first respondents were not named as the respondents in the petition I have listed their names as first respondents in the title to this ruling purely for the sake of clarity and I would clarify that the naming of their names as respondents is a contested issue for determination which will be addressed later.

7. In this matter the Registrar prepared a Notice of Payment of Costs on 11 August 2016 which reads as follows:-

> *"Notice is hereby given in the matter of Election Petition Misc. Cause No. 68/2016 Aloysius Amwano –v- Valdin Dowiyogo, Ranin Akua and David Adeang that the security for costs has been duly paid on the date of the filing of the said petition as required under Rule 7 of the Election Petition Rules 2016."*

8. When this matter came before the Registrar on 22 September 2016, issues were raised as to the service of the election petition on the first respondents and he made an order for the petitioner to file an affidavit of service.

9. This matter was next called before the Registrar on 4 November 2016. The petitioner did not file the affidavit of service as ordered on 22 September 2016. Another order was made for it to be filed within 7 days and the matter was adjourned to 11 November 2016. When the matter was called on 11 November 2016, the petitioner still had not filed an affidavit of service despite two previous orders. Mr Clodumar informed the Registrar that the process server was to have attended court to give evidence as to service but he failed to do so. The Registrar then made a further order for the filing of the affidavit of service by 14 November 2016.

10. On 18 November 2016 the petitioner filed an acknowledgement of service that the petition was served on the respondents on by Danard Dongibir on 12 August 2016 as follows:-

> *(i) On Hon. David Adeang MP an election petition was served on 12 August 2016 at 7.14pm;*

(ii) *On Hon. Valdin Dowiyogo MP an election petition was served on 12 August 2016 at 7.07pm;*

(iii) *On Hon Ranin Akua MP an election petition was served on 12 August 2016 at 6.30pm.*

11. Despite the petitioner filing the acknowledgement of service on 18 November 2016 the Registrar was informed that the respondents were not personally served. He made an order for the process server to attend the court on 24 November 2016 to clarify the issues relating to the service of the election petition.

12. On 24 November 2016, the process server attended court and before he could clarify issues relating to service, Mr Clodumar informed the court that the first respondents were not served personally and that the election petitions were left with persons who were at their residences. He nevertheless submitted that the first respondents were served under the provisions of Section 101(e) of the *Interpretation Act 2011* and he was of the view that it was sufficient service.

13. On 28 November 2016 Mr Clodumar and Mr Udit filed agreed issues for determination relating to the service on the first respondents. The issues for determination are as follows:-

> *"A conference was held between the Counsel for the petitioner and Counsel appearing for Amicus Curiae to identify and settle the preliminary issues for the hearing of the petition.*
>
> *The petitioner admits that the election petition was not personally served on any of the named respondents as the latter were not in the country. Pursuant to this admission the following arise for the Court's determination: "*

a) *The petitioner contends that although the service was not effected personally, nevertheless service of the residences of the respondents constitutes personal service under Section 101(e) of the Interpretation Act 2011. The election petition Rules 2016 requires personal service. In the case of inconsistency, which shall prevail; the Interpretation Act or the Election Petition Rules 2016?*

b) *Whether the Registrar was correct in identifying or naming the respondents when the same were not named as parties in the petition as the respondents?*

c) *Whether the failure to comply with the requirements of personal service as prescribed by the Rules is a mere technicality or goes*

to the substantive justice of the petition as required by the Electoral Act?"

Submissions

14. Mr Clodumar and Mr Udit filed very comprehensive and helpful written submissions and subsequently made oral submissions, whilst Ms Lekenua only made oral submissions at the hearing.

15. Instead of dealing with the issues in the order in which it is presented by the parties, I shall deal with Issue (b). Mr Clodumar submission on this issue is as follows:

> *"The petitioner will deal with Question (b) first because it is established that the Registrar had ultra vires to the Act in nominating specific persons to be the respondents, then the petitioner is not required to serve anyone until and unless due process has been undertaken by those wishing to be heard as a Respondent.*
>
> *It is submitted that the only reference to "Respondent" under Part B of the Act is in Sections 98 and 99(2). The Electoral Commission would be deemed to be the Respondent to the petition only by complying with s99 (1). That is, by leave of the Court, to enter an appearance "in any proceedings before the Court relating to the petition to be presented and had in these proceedings".*
>
> *It is only logical to conclude that once EC has filed its Memorandum of Appearance, it is deemed to be the Respondent and it is the Respondent referred to s.98.*
>
> *How is the EC to be informed of the Petition? Rule 5(1) of the Court Rules 2016 (the Rules) states that the Registrar upon the filing of the petition must send a copy of the petition to the Electoral Commissioner.*
>
> *Rule 5(2) requires the EC to "immediately publish the petition by posting it up in a prominent place in the constituency of the elected member against whom the election petition is presented".*
>
> *It is very clear that the Act only deals with the admission of EC to be the Respondent. The Registrar is to serve the petition to the EC. It is the EC's responsibility to notify the concern constituency of the petition.*
>
> *How can others be admitted as respondents? The only reference to admission of persons to the respondent is under Rule 36(1) of*

the Rules. It is clear that the petition is not abated if a respondent dies, vacates his seat in Parliament or gives notice of intention not to oppose the petition and the petition continues "whether or not any person applies to be admitted as a respondent as hereafter provided".

It is submitted that the above rule applies that a sitting Member of Parliament of the concerned constituency by word "vacates his or her seat in Parliament" should be a respondent but it is denied that he should automatically by a respondent. Then how does he become a respondent? How does he apply! The application is in the form of Form 8 of the Rules.

*Under sub-rule 2 of Rule 36 the latest time that a person is to be admitted as a respondent to oppose the petition is "**6 clear days before the hearing**"*

*Under sub-rule 7 the number of persons to be admitted as **a respondent must not exceed 3.***

It was clear during a call-over of the petitions before the Registrar, that the respondents were selected by him rather than admitted by application under the Rules cited above.

*Therefore it is respectfully submitted that the Registrar **has acted ultra vires of the Court** and secondly the Act only recognised the Electoral Commission as being entitled to be admitted as a respondent per se by leave of the Court by filing a Memorandum of Appearance. Refer to s99 of the Act.*

Accordingly,Rule 9 of the Rules is ultra vires the Act as the petitioner is not required to serve any respondents or any parties in general. The Registrar is to serve a copy of the petition on the EC and the EC is to make public the petition so that any person who wishes to oppose the petition is to apply to be admitted as a respondent not less than 6 days before the hearings."

14. Mr J Udit in his written submissions at [26] submitted as follows:-

*"Although the Rule is silent on the naming of a Respondent, it is submitted that the reference the "**the Respondents**" in as early as Rule 9 of the Election Petition Rules 2016 **(the Rules)** implies that the naming of the respondent was necessary. It was the Registrar's obligation to publish an Election Petition List with the names of the Petitioner and Respondents on it. Rule 6 (1b) requires the publication of "the names of the Respondents". The Registrar is not a party to the petition. He has no knowledge of who should or should not be a party. The word "**the**" in the ordinary English language, denotes **one or more people or thing already mentioned or assumed to be common knowledge".** The listing*

of Petition cases is one of the first things which is done after the presentation of the petition. It clearly denotes that it was incumbent upon the Petitioner to name the Respondent(s) in the petition. It follows then if no respondent was named in the petition, it is a defective petition. In that case the petition ought to be struck out as a time for amending it to join the Respondent(s) as a party has already lapsed under s88 of the Electoral Act".

Consideration

15. Under Rule 6 of the Rules the Registrar is required to prepare an Election Petition List containing the names of the petitioner and their agents and the names of the respondents and their agents. The key word here is *"the List"* which in everyday language used in the Court means *"cause list"* and the Registrar obtained the details of the names of the petitioner and respondent from the petition by going through the petition. He obviously has no powers to name the respondents but he has powers to identify the respondents which in any court document should be listed in the title to the claim.

16. It is Mr Clodumar's submission that the petitioner in this case was not required to name or serve any respondent.

17. I turn to discuss the sections of the Act relating to the Election Petition. In the *Interpretation Act* s.3 of the Act, "petition" means a petition under s.93.

18. Section 93 reads as follows:-

"Election Petitions

1) No result of an election published under s.88 may be challenged except by an Election Petition:

a) by a candidate; or
b) by a person who is qualified to vote in the election the subject of the election.

2) A petition may be represented in accordance with the provisions of this part.

19. Section 94 states as follows:

The status of persons elected

Where the validity of an election or declaration of an election is disputed, and pending a declaration by the Supreme Court in accordance with s.100 (f), (g) and (h), the person or persons named in the Electoral Commissioner's notice published under s.88 of this Act as

the candidate or candidates elected are for all purposes deemed to be a member or members of Parliament as the case may be, duly elected.

20. Section 96 states as follows:

Contents of Petition

A petition disputing an election or a declaration of an election must:

a) *Set out the facts relied on to invalidate the election or declaration of the election;*
b) *Contain a prayer asking for relief to which the petitioner claims to be entitled.*

21. Section 98 reads as follows:

Proceedings may be stayed unless contents complied with

The Court of Disputed Returns may, upon the application of ***a respondent to a petition,*** *order a stay of proceedings if the petitioner has failed to comply with s.96 or s.97.*

22. Section 93 mentions that the election result may be challenged; while in s.96(a) it is stated:

"To invalidate the election on or the declaration of the election"; and s.98 unequivocally states "that the Court on the application of a respondent to a petition ....." .

23. Mr Clodumar in reference to s98 has submitted : ''*It is only logical to conclude that once Electoral Commissioner has filed its memorandum of appearance it is deemed the Respondent and is the Respondent referred to in s98''*. With respect Mr Clodumar's , interpretation of s98 is flawed, as it clearly states: The Court of Disputed Return may on the **application of a respondent to a petition** (*emphasis added*) order a stay of the proceedings if the petitioner has failed to comply with sections 96 and 97. The key word is "**on the application of a respondent to a petition**'' and that only means one thing and, that is, the respondent refers to the successful candidate whose election is under challenge and not the **Electoral Commissioner** as he is **not a respondent to the petition** at that stage and only becomes a respondent upon application to the court under s99 of the Act.

24. Mr Clodumar's submissions are that all that a petitioner has to do is to file a petition and there is no onus on him to name or serve the respondent. He submits that after petition has been filed and the Registrar is required to serve a copy on the Electoral Commissioner, who is to thereafter post it in conspicuous place in the constituency and the respondent has the options of joining the proceedings some 6 days prior to the date of hearing under Rule 26(2) of the Rules. Rule 26(2) has no application as it talks about death, resignation and giving of the notice by the respondent not to oppose the petition and this in itself suggests that the respondent

is already a party to the proceedings at that stage to be able to resign or give notice that he will not oppose the petition.

What is the effect of the petitioner's failure to name the respondents?

25. The petitioner's failure to name the respondent as a party to the proceedings means that the petition was defective and the Registrar could have rejected the petition. He accepted it in the form it was presented and assisted the petitioner in identifying the respondents by obtaining the information from the body of the petition. He was obviously under no obligation to do so. He did not make any orders that the respondents be named as parties as he had no powers to do so. He only listed the names of the parties in the notice of security of costs.

Issue No (a)

26. Issue (a) is as follows:

> *(a) "The petitioner contends that although service was not effected personally, nevertheless service at the residence of the Respondents constitutes personal service under Section 101 (e) of the Interpretation Act 2011. The Electoral Petition Rules 2016 requires personal service. In case of inconsistency, which shall prevail: the Interpretation Act or the Electoral Petition Rules 2016?"*

27. Section 107 of the Act gives powers to the Chief Justice to make the Rules of the Court relating to the practice and procedure to be used. The Chief Justice made the Rules accordingly.

28. Mr Clodumar submits that there is no "contrary intention" in the Act that gave power to the Chief Justice to override s3 of the Interpretation Act, which states that:" This Act applies, subject to a contrary intention, to all written laws (including this Act) except the Constitution. Mr Udit submitted that Mr Clodumar's contention is an inaccurate statement of law and he relied on the case of on Barker v Edger(1898) NZPCC 422;[1898] AC 748 at 754 where it was stated as follows:

> *"When the **Legislature** has given its attention **to a separate subject**, and made provision for it, the presumption is that **a subsequent general enactment is not intended to interfere with the special provision** unless it manifests that intention very clearly. Each **enactment must be construed in that respect according to its own subject matter and its own terms"***

29. I refer to the 3rd edition of Statutory Interpretation in Australia by D C Pearce & R S Geddes and to page 109 where it is stated:

> "A reader of legislation must be familiar with both general Act and any particular definitions included in the legislation under consideration. But it is also necessary to bear in mind that virtually all interpretation provisions apply 'unless the contrary intention appears'. Even if the Act in which appear does not include such a phrase, it will be implied: In the Matter of *The Fourth South Melbourne Building Society (1883) 9 VLR (Eq) 54.*" In

the head note to this case it is stated that: "Interpretation clauses in statutes must be interpreted reasonably to promote, and not to defeat, the purposes of the statute; and the restriction, "unless there be something in the subject or context repugnant to such construction," must always of necessity be implied therein."

30. Further on the meaning of expressions in regulations, the case of *Birch v Allen (1942) 65 CLR 621* was discussed at pages 122 and 123 and at page 123 it was stated as follows; "Regulation 42 of the National Security (General) Regulations made it an offence for a person to endeavour to influence public opinion in Australia or elsewhere in a manner likely to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. In 1942 the defendant asked various persons to sign a petition calling upon the prime minister to negotiate a peace settlement with Japan. He was charged under the second part of reg 42, namely, with endeavouring to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war. The question that arose for decision by the court was what did the words 'the war' as used in the regulations mean? The National Security (General) Regulations contained a definition which provided that '"the war" means 'the present war'. The Regulations had been made under the National Security Act 1939. That Act had defined 'the present war' as the war between His Majesty the King and Germany. It was thus clear that when the National Security (General) Regulations were originally made in 1939, the expression 'the war' meant the war with Germany. It was argued for the defendant that that was still meaning of the expression. However, the prosecution pointed out that the National Security Act 1939 had been amended in 1940 to omit the definition of 'the present war'. The Act had also been amended to provide that it applied to 'any war in which His Majesty is or may be engaged'. In these circumstances, the prosecution argued, the expression 'the war' in the regulations should have the same connotation as in the Act. Accordingly, it covered any war in which His Majesty was engaged, thereby including the war against Japan. Latham CJ (with whom the other members of the court agreed) accepted this argument. His Honour said at 626-7:

> It is the duty of the Court to construe [the regulations] in their legal setting as it exists. What is that legal setting? The regulations refer to the National Security Act as amended from time to time. That Act has been amended, and the regulations must, in my opinion, be regarded as regulations which are made under and by virtue of the Act as amended and not merely by virtue of the original Act. Any other view would lead to a possible diversity of interpretation if identical words or phrases in the different regulations…I approach the matter from this point of view: either there is an Act conferring the power to make these regulations, or there is no such Act. In my opinion there is such an Act and that Act is the National Security Act 1939-1940- that is, the original Act as amended. The regulations must be real in the setting of that Act, and words and phrases such as "the war" must be construed having regard to the provisions as they existed at the time of the offence.

These statements seem to make it clear that in his Honour's view one regards the Act and the regulations as a composite piece of legislation. When the meaning of an expression appearing in the parent Act is changed, that change flows through to the regulations without the need for amendment."

31. I therefore hold that the Interpretation Act and in particular s 101 does not override rule 9 and the service of documents has to be in accordance with the provisions of that rule and not s 101.

32. Although Mr Clodumar was relying heavily on s101 (e) of the Interpretation Act he still fell short of meeting the requirements set out therein; for the reasons that there is no evidence before me that the election petition was left addressed to the first respondents, nor is there any evidence that the security for costs was served, or that the person with whom it was left with was 16 years of age and those persons lived at the addresses of the first respondents.

Issue No C

33. The failure to comply with the requirements of service of the petition is not a mere technicality and goes to the substantive justice of the petition. If the service is not effected in the strict timelines and this issue was canvassed at length in the case *Dabwido v Aingimea* (supra) then the whole proceedings is a nullity.

Conclusion

34. I make the following findings:

(i) The petition was defective when it was filed in that the first respondents were not named as parties in the petition;

(ii) But even if it was not, the petition was not served in accordance with rule 9 of the Rules, and thus the proceedings were a nullity when the timelines in rule 9 was not complied with;

(iii) The petition is hereby struck out.

DATED this 7 day of December 2016

Mohammed Shafiullah Khan

Acting Chief Justice

SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU