

NXXXX

**PAPA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]**

EP No. 17 of 2017

**In the Matter of the Organic Law on National and Local-Level Government
Elections and In the Matter of Disputed Returns for the Hela Provincial Seat**

BETWEEN

MAI DOP
Petitioner

And

WAKE GOI
First Respondent

And

ELECTORAL COMMISSION OF PAPUA NEW GUINEA
Second Respondent

Waigani: Batari, J.
2018: January

***ELECTION PETITION** – Objection to competency of – Organic Law on National and Local-Level Government Elections - s.208 (d) requirement that a petition shall be attested by two witnesses whose occupations and addresses are stated – attestation form – filing in different form not authorized by Election Petition Rules 2017 - whether filing of attestation form in compliance with Election Petition Rules 2017 – whether requirement of Organic Law is complied with – Election Petition dismissed for want of form.*

Cases cited:

Albert Karo v Lady Kidu (1997) N1626.
Delba Biri v Bill Ninkama [1982] PNGLR 342;
James Ekip -v- Gordon Wimb & Anor (2012) N 4899
Kikala v Electoral Commission (2013) SC 1295;
Kimave v Tore (2013) SC 1303.
Kuijk v Kuijk [1977] PNGLR 253
Malcolm Smith-Kela v Peti Lafanama [1997] PNGLR 151;
Nomane v Mori & Electoral Commission (2013) SC 12 42;
Paru Aihi v Sir Moi Avei (2003) SC720;
Raymond Agonia v Albert Karo [1992] PNGLR 463;
Talita v Ipatas [2016] PGSC 89; SC1603;

Counsel:

Mr. P. Ame for the Petitioner
Mr. P.H. Pato for the First Respondent
Mr. M. Pokia with *Mr. D. Dupre* for the Second Respondent

RULING ON OBJECTION TO COMPETENCY OF PETITION

- 1. BATARI J:** In 2017 National General Elections, the Petitioner and the First Respondent vied for the Jimi Open Electorate seat. The First Respondent polled 14,460 ahead of 25 other candidates and was declared duly elected. The Petitioner polled second with 12,438 votes.
- 2.** Aggrieved by the declaration of the winning candidate, Mai Dope seeks to invalidate the election result or return in this Petition. The matter before the Court in this ruling is objections to competency of the Petition.
- 3.** Mr. Mai Dope seeks a relief in the invalidation of the elections results or return on two broad grounds that –

1) The First Respondent committed illegal Practices in all polling places with the result that the illegal practices were likely to affect the result of the elections.

2) The Returning Officer committed illegal practices at scrutiny by failing to seek directions of the Electoral Commission to set aside ballot boxes from a number of named polling places and proceeded to make false declarations and completed false returns thereby contravening the provisions of s.191 of the *Organic Law*.

4. These grounds relate to illegal practices. The full text is set out on pages 10, 11 and 12 under paragraph, "*C Grounds*" of the Petition. The Objections to Competency of the Petition are premised on the grounds that:

1) The Petition is not filed in compliance with s. 208(a) of the *Organic Law* in pleadings of the facts to support a ground for invalidation of the election result or return.

2) The Petition is not filed in compliance with s. 208(d) of the *Organic Law*.

5. It is convenient to deal with the competency issue raised under s 208(d) first because it is brief and may decide early, the competency of the Petition one way or another. Counsel also agreed s. 208 (d) of the *Organic Law* raises a pivotal issue that should precede the hearings on competency of pleadings of the facts supporting the grounds to invalidate an election result or return.

6. Section 208 (d) states in mandatory terms that a petition must be attested by two witnesses whose addresses and occupations are stated. This provision has been the subject of many past judicial pronouncements and I refer to those. The rationale and purpose for strict compliance with s. 208 is captured in the following passage from the Supreme Court case of *Paru Aihi v Sir Moi Avei*(2003) SC720;

"The purpose of the requirement in s. 208 is to retain the genuineness or veracity of a petition. This is necessary to protect the completed election process from being abused by disgruntled candidates or electors, agitated by the election results for all manner of political or personal reasons; by

using the court to have another re-run of the election process....The importance of the requirement in s.208 (d) to state the attesting witness ' occupation and his address is to satisfy the court and the affected parties that the petition is genuine."

7. Section 208 (a) has only one requirement. A petition must plead the facts. The term "fact" is not defined and hence giving the court wider discretion to decide whether material facts are pleaded to support a ground to invalidate an election result or return and sufficiency thereof. Section 208 (d) on the other hand, sets out a number of matters the petitioner must comply with. They are defined and specific requirements. The elements of s. 208 (d) are that a petition :-

- (1) be attested,
- (2) by two witnesses
- (3) stated addresses
- (4) stated occupations

8. The extent to which or the sufficiency of the information that ought to be provided for each of those required matters is well settled. Under s. 208 (d), the attesting witnesses to an election petition must sign the petition, state their names and their occupations in the context of what they do for a living and their addresses being, their postal or residential addresses.

9. The attesting witnesses are obliged to provide clear and succinct information and descriptions on those requirements as their personal circumstances may permit. If a villager, the name of his village and District within the electorate would be sufficient. Where a town address is given, a postal address is sufficient. If a residential address is given, it is useful to state the section and allotment numbers and suburb or settlement. The essence of requiring precise details of occupation and address is so that the attesting witness can be able to be easily located. It also makes the petition genuine. Failure to comply with one or a number of those specific matters will render the petition incompetent.

10. For instance, where the names or description of addresses or occupations are unclear, incomplete, inadequate, or given by some other description, or are

confusing or falsified, the proof of attestation may be rejected. Consequently, the petition will be ruled invalid. This is a matter of court discretion to be exercised on a quick perusal and assessment of the information then available. See, *Talita v Ipatas* [2016] PGSC 89; SC1603; *Delba Biri v Bill Ninkama* [1982] PNGLR 342; *Raymond Agonia v Albert Karo* [1992] PNGLR 463; *Malcolm Smith-Kela v Peti Lafanama* [1997] PNGLR 151; *Albert Karo v Lady Kidu* (1997) N1626.

11. In another development on the definition of “attesting witness,” one view is that anyone can sign as an attesting witness for the purpose of s. 208 (d) of the *Organic Law*: *Nomane v Mori & Electoral Commission* (2013) SC 12 42; *Kikala v Electoral Commission* (2013) SC 1295; *Kimave v Tore* (2013) SC 1303. In those cases, the Supreme Court held for the purpose of s. 208 (d) of the *Organic Law*, that the attesting witness is a witness to the execution of the election petition document and not a witness to the truth of the contents of the document based on the normal and natural meaning of the word “attest”.

12. The opposing view in, *James Ekip -v- Gordon Wimb & Anor* (2012) N4899 favour the strict approach of attesting to the signature as well as the fact that the EP is as attested by the petitioner. The Supreme Court in *Talita v Ipatas* [2016] PGSC 89; SC1603 held that an attesting witness to a petition should be able to attest to the signing of the petition and to the facts pleaded in the petition. The Court there did not follow the proposition in *Nomane v Mori & Electoral Commission* (supra); *Kikala v Electoral Commission* (supra) and *Kimave v Tore* (supra).

13. For a number of reasons set out in, *Talita v Ipatas* one of them is based on the affirmative clause in the Attestation form which read; “...this day witnessed the signing of this petition by the petitioner and attest to the matters contained in the petition” (emphasis added).

14. The Court held that the phrase, “... *witnessed the signing of this petition and attest to the matters contained in the petition*” clearly defines two roles of the attesting witness: (i) to witness the petitioner sign the petition; (ii) to attest to the matters contained in the petition. The Court viewed the Attestation Clause, as a valid statement of rule of practice authorized by s. 208 (d) of the *Organic Law* such that, it should be given fair and liberal meaning pursuant to Sch. 1.5 of the *Constitution*. Hence, the form conveyed an ordinary and fair inference of having personal knowledge or some knowledge of what is contained in the petition.

15. That view may now be irrelevant. It is superseded by the Attestation form in the *Election Petition Rules 2017*. That Form is under scrutiny in this objection to the competency of the Petition.

16. *Form 1* in *Schedule 2* in the *Election Petition Rules 2017* implements s. 208 (d) of the *Organic Law* in regard to the manner and form the attestations of a petition must take. It reads;

“IN THE PRESENCE OF:

FIRST ATTESTING WITNESS:

*I, (insert name of first attesting witness),
..... (insert occupation of first attesting witness), of
..... (insert address of first attesting witness: state address
precisely by section and lot number or where no section and lot number by
street name or in the case of a village or settlement, state name of place
precisely by referring to province, district and nearest town), WHOSE
SIGNATURE APPEARS BELOW, ATTEST THAT I HAVE WITNESSED
THE SIGNING OF THE PETITION BY THE PETITIONER.*

*.....
(signature of first attesting witness)*

SECOND ATTESTING WITNESS:

*I, (insert name of first attesting witness),
..... (insert occupation of first attesting witness), of
..... (insert address of first attesting witness: state address
precisely by section and lot number or where no section and lot number by
street name or in the case of a village or settlement, state name of place
precisely by referring to province, district and nearest town), WHOSE
SIGNATURE APPEARS BELOW, ATTEST THAT I HAVE WITNESSED
THE SIGNING OF THE PETITION BY THE PETITIONER.*

*.....
(signature of first attesting witness)”*

17. The first requirement of s.208 (d) is in the phrase, “*be attested by.*” That, in relation to an election petition means, a witness to the signing of the petition. As to who should attest is now clarified in the phrase in capital letters;

“...*WHOSE SIGNATURE APPEARS BELOW, ATTEST THAT I HAVE WITNESSED THE SIGNING OF THE PETITION BY THE PETITIONER.*”

18. The new form, as is with other rules in the *Election Petition Rules, 2017* expressed in mandatory terms, exists for compliance. Rules are promulgated not to decorate pages and shelves. Rules of practice authorized under legislative and constitutional laws exist to guide and safeguard law enforcement and court processes against tardiness, frivolous and vexatious causes. Rules also exist to enhance judicial governance, promote efficient and speedy disposition of cases. Compliance with the rule of practice is desirable to give meaning to and enhance the purpose for which the rules exist to serve.

19. For election petitions, the general feel and common emphasis is strict compliance with provisions of the *Organic Law on National and Local-Level Government Elections* and the *National Court Election Petition Rules* and the *Supreme Court Election Petition Review Rules*. This is because as has been held over time, a challenge to an election result or return is such a serious matter that the petitioner must in essence be efficient in his or her approach and compliances to ensure his or her petition is properly drafted, filed and prosecuted. An intending petitioner has that onerous burden in filing and prosecuting his or her petition. Failure to comply may result in the summary dismissal of the petition, unless good cause is shown for exercise of judicial discretion to extend time or waive the rule.

20. In this case, the respondents’ contention is that the Petition is incompetent for being filed in contravention of Form 1 in the *Election Petition Rules, 2017*. Mr Ame for the Petitioner on the other hand argued that his client has substantially complied with the attestation requirement and that the objections by the respondents are misconceived. The court has discretion to accept his client’s Election Petition as for all intents and purpose; the attestation form substantially complies with s. 208 (d) that it is in order. Counsel did not rely on any case precedent on the issue of compliances with the rules on election petitions.

21. The Petitioner is asking the Court to accept the Petition on face value and not closely scrutinize the petition for compliance. It is generally accepted that

substantial compliance may sway exercise of judicial discretion in favour of the person seeking exception, in the interest of justice. The case of, *Kuijk v Kuijk* [1977] PNGLR 253, is on point where it stated;

“If the Court is satisfied that the purpose of a rule has been substantially fulfilled, the Court has an inherent jurisdiction under s 155(4) of the Constitution, in the interests of justice to waive strict compliance with the rule.”

22. Each case of compliance must however be decided on its facts and circumstances. In this case, Rule 4 of the *Election Petition Rules 2017* is in mandatory terms. It states, *“The petition must be in accordance with Form 1.”*

23. Here, the attestations section of the Petition is signed by two witnesses. Their occupations and addresses are also sufficiently set out. The Attestations clause signed by the two witnesses in this Petition reads;

“IN THE PRESENCE OF:

FIRST ATTESTING WITNESS:

I, John Konwai, Male Nursing Officer, Bumbi village, Middle Jimi, Tabibuga, Jimi District, Jiwaka Province.

.....

(Signature of First Attesting Witness)

SECOND ATTESTING WITNESS:

I, Daniel Warak, Carpenter of Korunju village, Middle Jimi, Jiwaka Province.

.....

(Signature of Second Attesting Witness) ”

24. There is no reference to compliance with the substantive requirement in the *Election Petition Rules 2017*. The crucial omission is the assertive phrase, “...*WHOSE SIGNATURE APPEARS BELOW, ATTEST THAT I HAVE WITNESSED THE SIGNING OF THE PETITION BY THE PETITIONER.*” The requirement to clearly state the act of witnessing the signing of the petition is in compliance with s. 208 of the *Organic Law*. The purpose is to retain the genuineness or veracity of a petition. The new rules have seen it fit to spell this out as a measure to safeguard the completed election process from being abused with unmeritorious claims by disgruntled candidates or electors, seeking to have another re-run of the election process. The important purpose of that assertive clause is to satisfy the court and the affected parties that the petition is genuine: *Paru Aihi v Sir Moi Avei* (2003) SC720.

25. The non-compliance in this case is serious. The omission does not make the attestation form genuine. The onus is on the Petitioner to sway the court’s discretion in his favour. He must show why the rules of practice should not operate against him. His contention is merely that his client’s attestation form is sufficient to invoke the jurisdiction of this court.

26. If that were to be the case, then the rules will not be serving any useful purpose. He has not sought dispensation with compliance with Rule 4 under Rule 22 of the *Election Petition Rules, 2017*. The rules are there to be followed; not flouted. His client’s attestation is vastly different from the required standard. It fails to meet the standard of competency. It is on that basis that I will rule the Petition incompetent as to form.

ORDERS

1. The Petition is incompetent. It is not necessary to decide the competency of the pleadings in the body of the petition.
2. The Petition is dismissed for want of form.
3. The respondents are awarded the costs

4. The deposit as to costs are to be shared by the respondents on portions as agreed to by those two parties.

<i>Mr. P. Ame</i>	:	<i>Lawyer for the Petitioner</i>
<i>Mr. P.H. Pato</i>	:	<i>Lawyers for the 1st Respondent</i>
<i>Mr. M. Pokia with Mr. D. Dupre</i>	:	<i>Lawyer for the 2nd Respondent</i>