



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 268 OF 2017

IN THE MATTER OF ARTICLES 3, 10, 22, 23, 73, 75 AND 80 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES ACT NO. 9 OF 2011

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT, NO. 11 OF 2011

AND

IN THE MATTER OF THE ELECTIONS ACT, ACT NUMBER 24 OF 2011

AND

IN THE MATTER OF THE ETHICS AND ANTI-CORRUPTION ACT NO. 22 OF 2011

AND

IN THE MATTER OF PUBLIC OFFICERS ETHICS ACT NO. 4 OF 2013

AND

IN THE MATTER OF A BREACH OF SECTIONS 29 AND 30 OF THE LEADERSHIP AND INTEGRITY ACT NO. 19 OF 2012

AND

IN THE MATTER OF THE SUITABILITY OF HON. OSCAR SUDI TO CONTEST FOR SEAT OF MEMBER OF PARLIAMENT FOR KAPSERET CONSTITUENCY, UASIN GISHU COUNTY IN THE GENERAL ELECTIONS OF 8TH AUGUST 2017

AND

IN THE MATTER OF THE PETITION BY DAN NJUGUNA NGUGI, PAUL KIPKEMBOI NG'ISIREI AND JOSEPH KIPCHUMBA KITUR SEEKING TO BAR HON. OSCAR SUDI FROM CONTESTING FOR THE SEAT OF MEMBER OF PARLIAMENT FOR KAPSERET CONSTITUENCY, UASIN GISHU COUNTY IN THE GENERAL ELECTIONS OF 8TH AUGUST 2017 FOR FAILING THE LEADERSHIP AND INTEGRITY TEST UNDER CHAPTER SIX OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

DAN NJUGUNA NGUGI

PAUL KIPKEMBOI NG'ISIREI

JOSEPH KIPUCHUMBA KITUR.....PETITIONERS

AND

HON. OSCAR SUDI.....RESPONDENT

AND

ETHICS & ANTI CORRUPTION COMMISSION.....1ST INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

HIGHWAY SECONDARY SCHOOL.....3RD INTERESTED PARTY

KENYA NATIONAL EXAMINATIONS COUNCIL...4TH INTERESTED PARTY

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....5TH INTERESTED PARTY

JUBILEE PARTY.....6TH INTERESTED PARTY

RULING

1. The Petitioners filed a Petition dated 31st May 2017 and Supporting Affidavit sworn by Dan Njuguna Ngugi on the same date, alleging that the Respondent has fraudulently obtained academic papers being a KCSE School Leaving Certificate and KCSE Results Certificate from the 3rd Interested Party and 4th Interested Party respectively. The Petitioners' allegations are premised on the investigation of the 1st Interested Party into the authenticity of the Respondent's documents.

2. The Petitioners assert that the Respondent has failed to comply with and/or breached the provisions of *Chapter 6 of the Constitution of Kenya 2010*, and *Sections 29 and 30 of the Leadership and Integrity Act* and hence he is unfit to hold public office.

RESPONDENT/APPLICANT'S APPLICATION

3. The Respondent/Applicant filed a Notice of Motion dated 27th May 2019 under *Order 19 Rule 2 (1) of the Civil Procedure Rules, Section 1A, B and 3A of the Civil Procedure Act, Article 47, 48 and 50 of the Constitution of Kenya 2010* and all enabling provisions of the law. The Applicant seeks grant of the following orders:-

i. THAT this Application be certified as Urgent and a date be given on priority basis;

ii. THAT the 1st Petitioner/Respondent herein Mr. Dan Njuguna Ngugi be summoned to appear before the court for cross-examination on facts he deponed in his Affidavit dated 31st May 2017;

iii. THAT any other order this Court deems just and fair to issue;

iv. THAT costs be provided for.

4. The Application is based on the grounds that the Petitioner/Respondent has not disclosed the source of the information informing his decision on the authenticity of the documents presented by the Applicant. The Petitioner/Respondent is accused of failing to disclose true facts and supporting his averments.

5. It is further asserted that the Petitioner/Respondent has attached documents which are private and subject to investigations without disclosing his source of information, and thus the Applicant stands prejudiced if the Petition proceeds to full hearing without an opportunity of being accorded a fair, just and impartial hearing.

6. The Application is supported by the Affidavit of the Applicant dated 27th May 2019 in which the Applicant raises a question as to whether the Petitioner/Respondent is a voter or resident of Kapseret Constituency.

1ST INTERESTED PARTY'S RESPONSE

7. The 1st Interested Party filed a Replying Affidavit dated 5th September 2019 in opposition to the Application. It is deponed that in a constitutional petition there is no requirement that a person lodging the Petition must establish that he/she is a constituent of the said constituency.

8. It is deponed that the Petition seeks to determine the question of breach of **Chapter 6 of the Constitution** by an elected member of parliament within the meaning of **Article 26**. Furthermore, the Petitioner has a Constitutional right to institute court proceedings claiming breach of **Chapter 6**.

9. It is further averred that the documents annexed to the Petitioner's affidavit have been in the public domain and accessible to all in view of the court cases (Constitutional Petition No. 11 of 2017 and CM ACC No. 14 of 2016) involving the Respondent and the Commission in relation to the subject matter herein. Moreover, the records contained in IEBC, KNEC and Highway Secondary School are public records accessible to any private citizen as of right under.

10. The 1st Interested Party alleges that the Application is thereby brought in bad faith.

ANALYSIS AND DETERMINATION

11. I have very carefully considered the Respondent's application and affidavit in support thereto; the Replying affidavit by 1st Interested Party, parties rival submission and authorities in support and from the above the issues arising for consideration are as follows:-

- a) *Whether the Petitioner has locus standi to institute these proceedings?*
- b) *Whether the documents relied on by the Petitioner in support of the Petition are private and subject to investigations?*
- c) *Whether in the circumstances there is a justification of cross-examination of the Petitioner?*

A. WHETHER THE PETITIONER HAS LOCUS STANDI TO INSTITUTE THESE PROCEEDINGS?

12. Under **Article 22 and 258 of the Constitution of Kenya 2010** on enforcement of Bill of Rights and enforcement of the Constitution it is explicitly clear that any person has the right to institute proceedings where there is an allegation of contravention or threat of contravention of the Bill of Rights or the Constitution. It is expressly provided that such a person can bring proceedings in his own interest or in public interest as long as the interest falls squarely with the provisions set out under the two Articles.

13. **Article 22 of the Constitution** gives right to every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied; violated or infringed or threatened. It therefore does not matter whether the Petitioner herein is a resident of Kapseret Constituency or not and further whether he is a voter of the Kapseret Constituency or not. What is before this Court is a constitutional Petition alleging breach of **Chapter Six of the Constitution**, which pursuant to **Articles 258 of the Constitution** gives every person the right to institute court proceedings claiming that the constitution has been contravened, or is threatened with contravention. The Petitioner can act in his own interest or can act on behalf of another person who cannot act in his own name or as a member of or in the interest of a group or class of persons or in the public interest. I find that this being a constitutional matter what the Petitioner is required to satisfy are the conditions set out under **Article 22 and 258 of the Constitution** and not the Requirement that he is a constituent of Kapseret Constituency.

14. The Petitioner has clearly demonstrated that the substratum of this Petition is a question of integrity of a member of Parliament, a state officer, pursuant to **Article 260 of the Constitution**. The Respondent is an holder of a State Office established by the Constitution of Kenya, vested with legislative authority and salaried by public funds. The authority assigned to state officer is a public trust as stipulated in **Article 73(1) (a) of the Constitution**. The Conduct of the Respondent as a State Officer, whether in public or official life or private life is regulated by the **Constitution in Article 75**. The Petition by its very nature raises an issue of public interest and the Petitioner has a locus standi in bringing up this Petition under **Article 22 and 258 of the Constitution of Kenya 2010**.

15. In determining an issue of locus standi the court in the case of **Mumo Matemu v. Trusted society of Human Rights Alliance & 5 others [2013] eKLR** held as follows regarding the question of locus standi in constitutional proceedings:

“(27) Moreover, we taken note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the Petition was field before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st Respondent had the locus stand to file the petition...”(Emphasis added)

16. In the instant Petition the Respondent has not adduced evidence to demonstrate that there exists bad faith, malice, personal gain or private project to be derived by the Petitioner by bringing up this Petition against the Respondent. I therefore find that the Petitioner has demonstrated that he has locus standi to bring up this Petition in Public Interest.

B. WHETHER THE DOCUMENTS RELIED ON BY THE PETITIONER IN SUPPORT OF THE PETITION ARE PRIVATE AND SUBJECT TO INVESTIGATIONS?

17. The Respondent herein in his application pray that the 1st Petitioner be summoned to appear before this Court for the purposes of being cross-examined on facts he deponed in his affidavit dated 31st May 2017. In justifying his prayer for cross-examination the Respondent contend that the Petitioner's affidavit contains matters that are scandalous and oppressive based on hearsay and that the same was prepared with intent to mislead the court and disparage his image.

18. The Respondent urge the Petitioner's affidavit makes very grievous allegations against the Respondent by alleging the Respondent/Applicant fraudulently obtained academic credentials with the sole purpose of hoodwinking the 5th Interested Party to clear him and/or authorising him to participate and contest the parliamentary elections in Kapseret Constituency during the 2017 General Elections.

19. It is Respondent/Applicant's contention that the Petitioner herein in support of his allegations, proceeded to produce documentary evidence without disclosing the source of such information. It is further averred the documents as produced are personal to the Applicant and are equally subject to investigation and on inconcluded matter before the Anti-Corruption Court.

20. The petitioner in response urges that the impugned documents relied on by the Petitioner have been in the Public domain prior to the lodging of the Petition by virtue of their forming part of the Court records accessible to any member of public. It is further stated that when this Petition was filed on 31st May 2017 the investigation by the commission was complete; the file forwarded to the 2nd Interested Party; Director of Public Prosecution; and the Respondent charged in 2016 in CM Acc No. 14 of 2016. It is further stated the Respondent had also instituted a Constitutional Petition ACEC Pet No. 11 of 2017 seeking inter alia; to quash the criminal charges against him. That the commission responded to the said Petition on 20th April 2017 vide a Replying Affidavit in which it annexed a bundle of documents (annexture DJK1 of the affidavit of Derrick Kaisha Jumba sworn on 5th September 2019). The impugned documents annexed to the Petition are copies of documents already in the Court record by virtue of ACEC Petition No. 11 of 2017.

21. It should be noted that records from public institutions including the 3rd, 4th and 5th Interested Parties are Public records which are duly accessible by any private citizen as of right under **Article 35 of the Constitution of Kenya 2010** which provides:-

“35. Access to information

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”

22. Further inspite of pending Criminal and Civil Proceedings **Section 193A of the Criminal Procedure Code** clearly provides that a pending criminal case is not a bar to any pending civil proceedings where an issue is directly or substantially in issue in both proceedings. I therefore find that the pending proceedings before the Chief Magistrates Anti-Corruption Court is not a bar to the proceedings before the High Court. **Section 193 A** provides that:

“193A. Concurrent Criminal and Civil Proceedings Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

23. In view of the foregoing I find that the documents relied upon by the Petitioner in support of the Petition and subject of investigations are not private documents as they have been issued by public institutions and being public documents are accessible by any member of public as of right under **Article 35 of the Constitution** including the ones held by 3rd, 4th and 5th Interested Parties in the matter.

C. WHETHER IN THE CIRCUMSTANCES THERE IS A JUSTIFICATION OF CROSS-EXAMINATION OF THE PETITIONER?

24. The Respondent/applicant urge that should the Court proceed to determine the said application and Petition as a whole by taking consideration of the evidence before it, it will be prejudicial to the Applicant herein and would be synonymous with condemning him unheard. It is Applicant's position that it is important that the Petitioner is first cross-examined on his deposition in the supporting affidavit and in particular paragraph 4 to 20 thereof. It is contended that the Petitioner is purveying falsehoods and should be cross-examined to establish if he is guilty of perjury as the Applicant states the subject affidavits contain matters that are not only scandalous but also oppressive to the applicant, based on hearsay and in an affidavit which was prepared with an intent to mislead the Court and damage the Applicant's image.

25. It is Applicant's case that the cross-examination of the Petitioner on the matters deponed in his Affidavit will give the court an early chance to get glimpse of what to expect during the substantive hearing and equally test the veracity of the petitioner's averments. To buttress this point the Applicant sought to rely on the principles set out in the case of **G.G.R v H.P.S (2012) eKLR** in which the Court stressed that it is trite that an application for cross-examination ought to state clearly the paragraphs in the affidavit on which it is intended to cross-examine the deponent on.

26. Under **Order 19 Rule 2 of the Civil Procedure Rules, 2010** it is specifically provided thus:-

“Upon any Application, evidence may be given by Affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent. Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.”

27. The above-mentioned Rule clearly allows a party to apply to Court to cross-examine a deponent of an affidavit on content thereof. However I would wish to point out that the granting of an order for cross-examination is not automatic but discretionary and that such discretion ought not to be exercised whimsically. The deponed facts which found the basis of the application for cross-examination must be disputed. In a situation where these facts are not disputed, then there is no lawful basis or justification to order for cross-examination on the undisputed facts. In the Applicant's application seeking orders to cross-examine the Petitioner, the Applicant has cited paragraphs 4 – 20 of

the supporting Affidavit sworn by the Petitioner on 31st May 2017, as the relevant paragraphs containing averments he wishes to cross examine the Petitioner on.

28. The basis of an application for cross examination must be that the matters deponed upon are disputed by way of filing a Replying Affidavit or supplementary affidavit. It is incumbent that the applicant seeking to cross-examine the deponent ought to have disputed the averments contained in these specified paragraphs 4 – 20 of the Petitioner’s supporting affidavit. This makes it necessary for the Court in order to determine whether Applicant has disputed the averments contained in the Petitioner’s Affidavit in support sworn on 31st May 2017, to examine the responses filed by the applicant in response to the Petition.

29. Considering the pleadings duly filed by the applicant, it is clear that the Applicant filed two responses to the petition herein as follows:-

(i) ***A notice of Preliminary Objection dated and filed on 7th March 2018.***

(ii) ***A Replying Affidavit sworn by the Applicant on 27th May 2019 and filed on 27th May 2019.***

30. This Court has had the opportunity of perusing both the Notice of Preliminary Objection and the Replying Affidavit mentioned herein above and it is noted that the Applicant has not disputed the facts deponed at paragraphs 4 – 20 of the Petitioner’s supporting affidavit sworn on 31st May 2017 whether expressly or impliedly. The Applicant for instance has not specifically denied the contents of paragraph 7 of the Petitioner’s supporting Affidavit to the effect that when vying for the position he currently holds in the 2013 General Elections, the Respondent presented documentation to the 5th Respondent by way of KCSE School leaving certificate and a KCSE Certificate purportedly issued by the 3rd and 4th Respondents respectively to show that he had attended Secondary School at High Way Secondary School in Nairobi between 2003 and 2006.

31. It is further noted that the Applicant has not denied the contents of paragraph 9 of the Affidavit to the effect that he recorded a statement in connection to investigations launched into allegations that he had falsified documents presented to the 5th Interested Party; inter alia stating that he attended Tuopngtuny Primary School between 1995 and 1998. In addition the Applicant has not disputed the contents of paragraph 10 of the Affidavit to the effect that in his statement, he also recorded that he had joined High Way Secondary School in 2004 and concluded his studies in 2005 when he sat for his KCSE Exams; and that in 2006, he joined the Kenya Institute of Management to study a Diploma in Business Management.

32. This Court notes and appreciates that the averments contained in paragraphs 7, 9 and 10 in the Petitioner’s supporting affidavit sworn 31st May 2017 are the bedrock of the Petition herein and the same have been confirmed by the affidavit filed by the 1st Interested Party and 4th Interested Party respectively.

33. The 1st Interested Party invites the Court to juxtapose the Petitioner’s affidavit, and the affidavits sworn by the Derrick Kaisha Jumba on behalf of the Commission and that sworn by Mercy Gathigia Karongo the Ag. CEO of 4th Interested Party prepared and filed by the Attorney General. It is clear that the averments made by the Petitioner are re-affirmed by the Commission being the investigating agency and the 4th Interested Party being the custodian of certificates (in this case (KCSE) pursuant to **Section 10 of the KNEC Act**. Interestingly, the Respondent in his Replying affidavit to the Petition, skirts around the purported scandalous and oppressive averments and does not counter the said averments.

34. The Respondent as regards paragraph 11 of the Petitioner’s affidavit, the Commission re-affirms in paragraphs 5, 6 and 13 of its affidavit sworn on 13th September 2017 and annexure DJK1 of the affidavit sworn on 5th September 2019, and the KNEC re-affirms in paragraph 7 of its affidavit sworn on 17th July 2017 that the certificates presented by the Respondent to the IEBC purportedly issued by KNEC and Highway Secondary School are forgeries and therefore the Respondent was being deceptive about his academic credentials.

35. Upon considering the Respondents’ affidavit, and the 1st and 4th Interested Parties, it turns out that there is no conflict of affidavits on record neither is there a situation where the evidence deponed is conflicting in itself.

36. I find that the averments contained in the Petitioner’s affidavit sworn on 31st May 2017 which the Applicant seeks to cross-examine the Petitioner about have not been disputed. The power to order for cross-examination is discretionary and as clearly established that on all discretions, the same must be exercised judiciously; and where proper basis has been laid and where there are exceptional circumstances (see the case of **Invesco Assurance Co. Ltd vs. Commissioner of Insurance & Others Pet. No. 1178 of 2007 (2016) eKLR**). In the circumstances hereof I am not satisfied the Applicant application has met the threshold for granting an order for cross-examination.

37. The Petitioner in submitting that the Applicant has not met the threshold for granting of the order for cross-examination sought reliance in the case of **SMT Sudha and another vs. Manmohan and others (1996 Rajasthan 59)**, where the Court held as follows:-

“The order for attendance of deponent of the affidavit for cross-examination is absolute discretion of the Courts. It is true that absolute discretion means not arbitrary but judicious discretion having justice oriented approach in summoning the deponent of an affidavit for cross-examination. Order for attendance of the deponent for cross-examination would be ordinarily be made unless the court is satisfied and convinced that application for summoning the deponent for cross-examination is necessary in the interest of justice. Unless both the conditions co-exist the Courts have no jurisdiction to summons deponent for cross-examination.” (Emphasis Added)

38. Further to buttress the aforesaid point the Petitioner referred to the case of **Ahmednassir Abdikadir & Co Advocates v National Bank of Kenya Limited (2) (2006) 2 EA 6**; where the Court held that:-

“As the requisite rules do recognize the use of affidavits as evidence, especially in the course of interlocutory applications, my view is that the courts ought not to readily permit cross-examination of the deponents of affidavits. If the courts became too willing to allow for cross-examinations, the already limited time available for applications would be further curtailed, to the detriment of the wider interests of justice. Therefore, in order to try and ensure that no more time than is really necessary is further taken up by cross-examination, I believe that it is only in instances where the court is satisfied that the cross-examination was essential, in enhancing the course of justice, that the court should allow deponents to be cross-examined.”
(Emphasis added)

39. I find even assuming that the Court was to consider allowing the order for cross-examination of the Petitioner on averments set out from paragraphs 4 – 20 of the Petitioner’s affidavit, the Court would be putting itself in a difficult position as it would be running a real risk of turning the cross examination into mini-trial; which in my view would be going against the principles set out in previous cases where similar orders were sought and denied. IN the case of the *Law Society of Kenya v. Faith Waigwa & 8 Others (2015) eKLR* Court held that:-

“Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness’s averments is tested. Thirdly, the exercise of cross-examination in some cases gives the court an early chance to get the glimpse of what to expect during the substantive hearing. This may assist the court in making the necessary directions at the pre-trial conferences envisaged under Order 11 of the Civil Procedure Rules. However, the process of cross-examination should not be used to convert the hearing of an interlocutory application into a mini or full trial of the suit. It is a difficult balancing act which the court has to live with for a long time. It is also a process which is sparingly used because it may lead to a considerable delay in concluding an otherwise straightforward dispute.” (Emphasis Added).

40. I find that in allowing the cross-examination of the deponent in this matter it would unduly prolong the hearing and determination of this Petition by converting the cross-examination into mini-trial. It is further noted that the issues raised in the Respondents/Applicants application are the same issue raised under paragraph 12 of his replying affidavit sworn on 27th May 2017 in opposition of the main Petition. Without denying or disputing the averments in the Petitioner’s Affidavit sworn on 31st May 2017 as confirmed by the later subsequent Affidavits filed by the 1st and 4th Interested Parties, I find that the need to cross examine the Petitioner on the source of the information is rendered redundant especially taking into account that the information was accessible to the public from public institutions and from Court records as explained herein.

41. It is further noted that there is no dispute that the documents which the Respondent/Applicant wish to cross-examine the deponent on, already make part of the Court record by dint of the affidavit sworn on 5th September 2019, by Derrick Kaisha Jumba on behalf of the 1st Interested Party, one of the public independent bodies with possession and custody of the information and documents which the Applicant seeks to cross-examine the Petitioner on. I find granting the orders sought in the Respondent/Applicant’s application, when the said information and documents in support thereof have been refiled in these proceedings by the 1st Interested Party and which form part of the court record will not serve any useful purpose, other than to cause delay in the hearing of the main Petition on merits which I find would be contrary to **Article 159(2)(b) of the Constitution** which state that justice shall not be delayed.

42. The upshot is that the Respondent/Applicants notice of Motion dated 27th May 2019 is without merits and is dismissed with costs.

Dated, Signed and Delivered at Nairobi on this 17th day of December, 2020.

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J. A. MAKAU

JUDGE