



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 4 OF 2017

(CONSOLIDATED WITH ELECTION PETITION NO. 5 OF 2017)

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF SECTION 75 (1) (2) AND (3) OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2017**

AND

IN THE MATTER OF THE ELECTION OF THE GOVERNOR KILIFI COUNTY

AND

**IN THE MATTER OF ELECTION OF HON. KINGI AMAZON JEFFAH AS THE GOVERNOR
KILIFI COUNTY**

BETWEEN

SAMUEL KAZUNGU KAMBI.....1ST PETITIONER

WILLIAM KAHINDI MGANGA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION..1ST RESPONDENT

NELLY ILONGO THE COUNTY

RETURNING OFFICER, KILIFI COUNTY.....2ND RESPONDENT

KINGI AMASON JEFFAH.....3RD RESPONDENT

RULING NO. 2

(THE 1ST AND 2ND RESPONDENTS' NOTICE OF MOTION DATED 2ND OCTOBER, 2017)

1. In the General Election held on 8th August, 2017, the 2nd Respondent Nelly Ilongo, the Returning Officer for the County of Kilifi and the 1st Respondent the Independent Electoral and Boundaries Commission (IEBC) declared the 3rd Respondent Amason Jeffah Kingi and the 4th Respondent Gideon Edmund Saburi as the persons elected Governor and Deputy Governor respectively for the County of Kilifi.
2. Samwel Kazungu Kambi who was one of the candidates in the gubernatorial race subsequently filed Malindi High Court Election Petition No. 4 of 2017 seeking to invalidate the election of the 3rd Respondent. On 6th September, 2017, William Kahindi Mganga who identifies himself as a voter registered in Kilifi County and the Chief Agent for Jubilee Party and more so for Hon. Maitha Gideon Mung'aro the Jubilee Party aspirant for the Kilifi County gubernatorial race filed Malindi High Court Election Petition No. 5 of 2017 questioning the validity of the election of the 4th Respondent, Amason Jeffah Kingi as the Governor of the County of Kilifi. He named Gideon Edmund Saburi as the 5th Respondent.
3. When both petitions came up for pre-trial directions on 29th September, 2017, this court acting in compliance with Rule 17 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (hereinafter simply referred to as the Elections Petitions Rules, 2017) consolidated the two petitions as a matter of course.
4. Housecleaning done with the consent of the parties led to the removal from these proceedings of Wafula Chebukati who had been named in Petition No. 5 of 2017 as the 2nd Respondent in his capacity as the Returning Officer of the National Tallying Centre.
5. As a result of the consolidation and housecleaning, Petition No. 4 of 2017 is now the lead file with Samwel Kazungu Kambi being the 1st Petitioner and William Kahindi Mganga being the 2nd Petitioner. The IEBC and Nelly Ilongo the Kilifi County Returning Officer are the 1st Respondent and 2nd Respondent respectively. Amason Jeffah Kingi is the 3rd Respondent and Gideon Edmund Saburi is the 4th Respondent.
6. The parties thereafter filed several interlocutory applications, one of them being the application to which this ruling relates. In view of the diverse nature of the applications, I have opted to write separate rulings for the applications save for those based on the same grounds.
7. The 1st and 2nd respondents have brought the Notice of Motion dated 2nd October, 2017 under Article 87(1) of the Constitution; Rule 12 of the Elections Petitions Rules, 2017; and Section 4 of the Oaths and Statutory Declarations Act, Cap. 15. They pray for orders that:
 - “1. THAT the purported Affidavits filed in support of the Petition and which offend the provisions of the Oaths and Statutory Declarations Act be expunged from the record and this Petition be struck out and/or dismissed for want of compliance with the mandatory provisions of Rule 12 of the Election Petition Rules 2017.**
 - 2. THAT the costs of this Application and this Petition be awarded to the First and Second Respondents.”**
8. The application is supported by the grounds on its face as follows:

“a) the purported Affidavits filed in support of the Petition do not specify the parties in the heading or, indeed, what petitions they actually refer to in contravention of The Oaths and Statutory Declarations Act;

b) in the premises, they ought to be expunged from the record and the Petition struck out for want of material evidence; and

c) the petitioner has and continues to abuse the process of this Honourable Court.”

9. The 2nd Petitioner opposed the application through grounds of opposition dated 19th October, 2017 as reproduced hereunder:

“1. The application is incompetent and bad in law as it is not supported by an affidavit and therefore is not predicated on any facts.

2. The application fails to identify the affidavits intended to be struck out by naming the particular deponents.

3. Rule 12 of the Election (Parliamentary and County Elections) Petitions Rules 2017 only applies with respect to the supporting affidavit of *William Kahindi Mganga* which fully complies with the said rules.

4. The affidavits of the witness to the Petition fully complies with the requirement of rule 12(10) which are:

i. they state the substance of the evidence,

ii. are divided into paragraphs and numbered consecutively,

iii. have been served to all parties to the petition.

5. By virtue of Rule 12(12) of the Election (Parliamentary and County Elections) Petitions Rules, the only ground capable of striking out paragraphs of an affidavit is when they raise scandalous and irrelevant facts which are not grounds relied in the said application.”

10. Submitting in support of the application Mr. Sanjeev Khagram started by disclosing that the affidavits sworn in respect to the 1st Petitioner’s Petition were drawn in the proper manner. His application is therefore targeted at the Petition filed by the 2nd Petitioner. Counsel submitted that the affidavits sworn by the witnesses in support of that Petition do not indicate that they are sworn in respect to the Petition but are instead sworn in the matter of the individual witness.

11. Counsel supported his case by referring to the decision of the Court in **Ismail Suleiman & 9 others v Returning Officer Isiolo County Independent Electoral and Boundaries Commission & 4 others [2013] eKLR** where the Court held that:

“Rule 12(1) of the Petition Rules 2013 makes it mandatory for Petitioner at the time of filing the petition to file witnesses affidavits sworn by each witness whom the petition intends to call at the trial. The affidavits attached of Daniel Sebastian Ekai and Halima Gonjonbe have not been commissioned as required under Section 4 and 5 of the Oaths and Statutory Declaration Act (Cap.15) Laws of Kenya. The two are not affidavits as they have not been commissioned. The other witness’s affidavits have not indicated the petition case number, they referred to, they talk of third parties and have not included the 3rd respondent as a party in this petition. The affidavits by Adan Abukula has no parties on the heading and it is not clear what petition it refers to. The affidavits of Petitioners witnesses Ismail Suleman, Fatima Dahir....have not mentioned the 3rd respondent one of the Respondents in the petition.

The affidavits have no reference to the petition before me and are all expunged from the court record...

Further affidavits by Boku Sora Umba, Agnes Nkirote Mutea, Gedion Kiburuki Kirera and Joyce Karambu do not have a petition case number. It is clear from the above that the Petitioners have no evidence that they can rely on if the petition was to go on. They have just an empty shell as there are no supporting affidavits nor are there witnesses affidavits. The petition is therefore incomplete, incompetent and incurably defective.”

12. On the strength of the cited decision, the 1st and 2nd respondents have urged me to strike out the affidavits in support of the 2nd Petitioner’s Petition.

13. Are the affidavits of the 2nd Petitioner’s witnesses for striking out? Counsel for the 2nd Petitioner, in my view, was spot on when he submitted that the application not having been supported by an affidavit is a pleading without evidence. Without an affidavit to point out the alleged shortcomings in the impugned affidavits, the application lacks foundation and cannot succeed. No specifics have been provided as to which affidavits do not meet the standards set by the law applicable to affidavits.

14. Be that as it may, I will proceed to consider if the application has any merit. I will start by looking at the provisions of the law under which it is brought. Article 87(1) of the Constitution simply provides that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

15. The next provision cited is Rule 12 of the Elections Petitions Rules, 2017 which provides the contents and format of affidavits generally. Nowhere in that rule is it stated that the heading of an affidavit of a witness in an election petition should have the heading of the case number and the names of the parties for the given election petition.

16. It is however important to note that Rule 12(14) provides that the Oaths and Statutory Declarations Act (Cap. 15) and Order 19 of the Civil Procedure Rules, 2010 shall apply to affidavits sworn under the Elections Petitions Rules, 2017.

17. The last provision cited in support of the application is Section 4 of the Oaths and Statutory Declarations Act, Cap. 15 which provides the powers of a commissioner for oaths as follows:

“4. (1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

(2) A commissioner for oaths shall, in the exercise of any of the powers mentioned in subsection (1), be entitled to charge and be paid such fees as may be authorized by any rules of court for the time being.”

The cited section does not in any way state how an affidavit is to be headed.

18. I am therefore at a loss as to why the 1st and 2nd respondents filed the instant application. As correctly stated by counsel for the 2nd Petitioner, the same is not supported by any evidence and neither does it have any basis. I thus agree with him that this is an application for dismissal and it is so dismissed.

19. Costs shall abide the outcome of the Petition and shall follow the cause.

Dated, signed and delivered at Malindi this 31st day of October, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT