



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
ELECTION PETITION NO. 11 OF 2017

HAMZAN MUSURI KEVOGO.....PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

SARAH MOGATI OGARO.....2ND RESPONDENT

WILBER KHASILWA OTICHILO.....3RD RESPONDENT/APPLICANT

PATRICK LUMUMBA SAISI.....4TH RESPONDENT

R U L I N G

The Application

1. The application for de termination is the Notice of Motion dated 15th September, 2017 brought pursuant to Article 87(1) of the Constitution, Section 5 of the Oaths and Statutory Declarations Act, Sections 75 and 79(a) of the Elections Act 2011, Rule 8(a) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 and all enabling provisions of the law.
2. The application was certified urgent. Amongst the orders sought were that the petition herein, the supporting affidavit together with the annexures be struck out with costs to the Applicant.
3. The application is based on the grounds that the supporting affidavit to the petition violates the mandatory requirements of Section 5 of the Oaths and Statutory Declarations Act because the petitioner signed the affidavit from Nairobi while it was commissioned at Kakamega. Secondly that the petition is not supported by a valid affidavit which is a violation of Article 87 of the Constitution and Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules 2017. Thirdly that the petition has not set out cogent facts and grounds to sustain the reliefs claimed as required under Rule 8(a) of the Election petition Rules and lastly that since Election Petitions are governed by a strictly statutory procedure unknown to common law or the law of equity, the petition is incurably defective and should be summarily dismissed in line with Section 79(a) of the Elections Act 2011.
4. The application is supported by the affidavit sworn by the applicant's advocate in which the deponent expands on the grounds on the face of the application.

Response to the Application

5. The application is opposed. There are three grounds of opposition filed by the petitioner on the 2nd September, 2017:

1. That the application is incompetent and fatally defective as the affidavit in support thereof has been sworn by an advocate who has not exhibited authority to swear the same on behalf of the 3rd respondent.
2. That the prayers sought in this application have no merits and are not sustainable.
3. That the application is an affront to the constitutional principle of the right of access to justice.

Back ground to the Application.

6. The applicant is the current Governor for Vihiga County having been elected as such during the elections held on 8th August, 2017. He was declared the winner on the 11th August, 2017. It is the petitioner's case that the elections for the governor of Vihiga County were poorly conducted and did not comply with the governing principles established under the Constitution of Kenya, the Elections Act and Regulations made thereunder including the Electoral Code of Conduct. These and more are the reasons why the petitioner wants the court to declare that he 3rd Respondent was not validly elected, and there be fresh gubernatorial elections for Vihiga County.

Provisions on which the application is anchored

7. The application herein is brought under Article 87(1) of the Constitution which provides for electoral disputes and which states as follows: "**87(1) Parliament shall enact legislation to establish mechanisms for timely of settling electoral disputes.**" Section 5 of the Oaths and Statutory Declarations Act Cap 15 provides for the particulars to be stated in jurat or attestation clause. The Section provides as follows:-

"5 Every commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

8. The application is also expressed to be brought under Section 75 of the Elections Act 2011. The Section makes provision for the jurisdiction of this court to determine a question as to the validity of an election of a county governor and the timelines within which the petition is to be determined whereas Section 79 of the Act gives the procedure to be followed by an Election Court upon receipt of a petition. Lastly rule 8 of the Election (Parliamentary and County Elections) Petition rules 2017 provides for the content and form of a petition.

Submissions

9. The application herein was canvassed by way of written submissions. The written submissions were highlighted orally. The applicant's written submissions were filed on the 27th of September, 2017 while the petitioner's submissions were filed on the 2nd of October, 2017.

10. Briefly Mr. Sore for the applicant submitted that the affidavit in support of the petition was fatally defective for the fact that while the affidavit was signed in Nairobi, it was commissioned at Kakamega. He submitted that the very fact of the affidavit being signed and commissioned in two different places was fatal to the survival of the petition as a whole, since the provisions of Section 5 of the Oaths and Statutory Declarations Act, Cap 15 have been breached. He further submitted that the mistake committed by the petitioner in this regard was not a mere technicality and that Article 159 of the Constitution does not therefore come to the aid of the petitioner, the applicant's contention being that Article 159 of the Constitution was not enacted for the purpose of setting aside mandatory statutory provisions of the law. Counsel stated that the only technicalities covered by Article 159 would be errors in the title of the affidavit or defects in the description of the parties.

11. With regard to the annexures to the affidavit, Mr. Sore submitted that these have neither been sealed nor certified for attachment to the affidavit and therefore that the same should be struck out. Concerning the petition itself, counsel submitted that the petition is couched in such general terms that the case against the applicant is unclear, and that in the result, the applicant is prejudiced in his case. As to why he swore the affidavit in place of the applicant, Mr. Sore submitted that the points raised in the affidavit are pure points of law and that as advocate, he was better placed than his client to swear the affidavit.

12. The application was vehemently opposed and petitioner's counsel urged the court to find that it has no power to grant the orders sought. He contended that it is only Section 79(a) of the Elections Act which gives this court the power to reject an election petition summarily but that even in such circumstances, the power is to be exercised before any other action is taken by the court. Further, that what the court is now being asked to do through an interlocutory application is so drastic that it ought not to be allowed. Counsel also argued that since the affidavit in support of the application is itself defective, the same having been sworn by an advocate instead of it being sworn by the applicant himself, then the application must fail. To fortify this point, Mr. Kisaka submitted that Mr. Sore had not exhibited any authority from the applicant, giving him the power and authority to swear the affidavit.

13. In his further submissions, Mr. Kisaka contended that as counsel, advocates should never involve themselves in the contentious factual matters of their clients' case by swearing affidavits. He stated that all the matters deponed to in the supporting affidavit to the application are all contentious matters of fact which may require Mr. Sore to take the witness stand for cross examination. To buttress his argument that the petitioner's supporting affidavit should not be struck out, Mr. Kisaka placed reliance on Section 72 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya which generally stipulates that whenever a form is provided by statute, for example the form of a jurat, the document which purports to be in that form shall not be devoid simply by a deviation therefrom unless the deviation goes to the root or the form or the substance of the document, or unless the deviation was intended to mislead the affected party or the court. He averred there was no proof by the applicant of such intentions by the petitioner.

14. In summary, Mr. Kisaka submitted that the petitioner's petition complies with the law and the rules and that at this interlocutory stage, the court should not concern itself with the merits of the petition as the applicant wants it to do. The petitioner cited the following authorities to support his arguments.

- ***ELR cause no. 25 of 2015 at Kericho – Francis Kimutai Bii – vs- Kaisugu (Kenya) Ltd [2016]eKLR***
- ***Nairobi HCCC No. 8 of 2005 – Dishad Hassanali Manji – vs – Hassanali Vasanji Manji [2006] eKLR***
- ***Nairobi HCCA No. 407 of 2004 – Henzlon Kamau Waithaka & another – vs – Registration of Accountants Board [2005]eKLR***

15. All the above cases are only of persuasive authority, but they nonetheless set out the general principles on the matter in controversy. In the ***Henzlon Kamau Waithaka*** case (above) the Court (Visram J as she then was) stated the following concerning the non-compliance with Section 5 of the Oaths and Statutory Declarations Act:-

“ The first and primary function of the court is to seek to do justice to the litigants who come before it. It would be a terrible thing if the court were to stultify that function by resorting to legal technicalities which do not go to its jurisdiction. Yes, although the affidavit complained of does not expressly state where it was sworn in the jurat as required by the strict construction of Section 5 of the Oaths and Statutory Declarations Act, I do not think that that is sufficient ground to entitle this court to expunge it. There is a stamp of the commissioner for oaths before whom the affidavit was sworn which gives his address and it is only natural to assume that it was sworn at the place where the commissioner is based.....Order XVIII Rule 7 of the Rules permits this court to admit any affidavit notwithstanding any defect by misdescription of the parties or otherwise in the

title or other irregularity in the form thereof.”

Analysis and Determination

16. From the outset, it is clear in the mind of the court that at this juncture, the issue before it is not the merits and demerits of the petition as filed. The issue before the court is whether, on the basis of an alleged defective supporting affidavit, the petition as filed, its merits or demerits notwithstanding should be struck out. Upon careful consideration of the rules and the relevant sections of law relied upon by both parties, I do not think that the Applicant’s application has any merit. In the first place, the applicant has asked for so many prayers in one application that it cannot be said that all those prayers raise pure points of law as is understood from the principles of what amounts to points of law in the case of ***Mukisa Biscuit Manufacturing CO. Ltd. – vs – West End Distributors Ltd [1969] EA 696*** at page 701. In the instant case, if the applicant’s application were to be allowed this court would have to uncover the entire petition to find out whether or not the petition has merit. That alone should suffice to dismiss the applicant’s application.

17. Secondly, from the authorities cited, the defects in the supporting affidavit to the petition are curable under Section 72 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya. It is not established by the applicant that the errors in the petitioner’s supporting affidavit are intended to mislead the applicant and to prejudice his defence. In any event, it is also clear to this court that the said defects do not go to the substratum of the petition. This was the position taken by the court in the case of ***Ocean Freight Transport Col Ltd – vs – Purity Gathoni Wamae & another – HCCC NO. 3958 of 1991*** where the court held, inter alia that “the stamp affixed does satisfactorily state the place where the affidavit was sworn and the omission to mention the place in the jurat is not a deviation in substance but is in form and the same is not prejudicial to the opposite side and is not calculated to mislead.” In the instant case, I do not think that swearing the affidavit in Nairobi and having it commissioned in Kakamega is either misleading or prejudicial to the applicant. This Court also notes that in Kenya, there are no statutory limitations as to where a commissioner of oaths can take oath. He/she can do so in any part of the country. In the instant case, the oath was administered in Nairobi though the commissioner’s stamp gives an address in Kakamega.

18. Thirdly, I do agree with Mr. Kisaka, that counsel for the applicant has, by deponing to contested matters of fact, stepped into the battle field of the combatants. This is not good practice and in my considered view, the supporting affidavit for the application is not competent. It was stated in the case of ***Regina Waithera Mwangi Gitau – vs – Bonface Nthenge [2015]eKLR*** that “.....the established principle of law is that advocates should not enter the arena of the disputes by swearing affidavits on contentious matters of fact.....”

19. Before I come to the conclusion, of this ruling, I would like to distinguish the facts in ***Kakamega HC Constitutional petition No. 13 of 2015 – Ainea W. Karanja & 3 others – vs – Rev. Peter Inuani & 3 others [2015] eKLR***, from the facts in this case. In the said case, the affidavit in support of the application did not contain the date on which it was made and that was the reason for the striking out of the affidavit. In the instant case, the only complaint raised by the applicant is that he affidavit was sworn in Nairobi but commissioned in Kakamega. Enough has been said on this issue in the earlier paragraphs of this ruling, and I need not say anything more about it.

Conclusion

20. In light of the foregoing the applicant’s application has no merit and the same be and is hereby dismissed. The costs of the application shall abide the outcome of the petition.

It is so ordered.

Ruling delivered, read and signed in open court at Kakamega this 17th day of October 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Sore (present).....for 3rd Respondent/Applicant

.....Mr. Kisaka(present).....for petitioner/Respondent

.....Mr. Abok for the Chanzu (present)...for 1st and 2nd Respondent

.....Mr. Sorefor 4th Respondent

.....Polycap.....court Assistant