



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NUMBER 12 OF 2017

(Consolidated with No. 10 of 2017)

**IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR NYARIBARI CHACHE
CONSTITUENCY**

CHRIS MUNGA N. BICHAGE.....1ST PETITIONER

ZAHEER JIHANDA.....2ND PETITIONER

JAMES F. O. KENANI.....3RD PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

JULIUS MEUTA OKEYO.....2ND RESPONDENT

RICHARD NYAGAKA TONGI.....3RD RESPONDENT

RULING

- 1) This ruling is in respect of a preliminary objection(p.o) raised by Learned Counsel for the 3rd Respondent from the bar on 17th November, 2017.
- 2) The gist of the objection is that the affidavit in support of the petition by the Petitioner contravenes Section 5 of the Oaths and Statutory Declarations Act since the exhibits annexed to the affidavit of Chris Munga N. Bichage are marked as being in the affidavit of Chris Munga, who it is submitted is a strange person.
- 3) It is the 3rd Respondent's case that the Court cannot admit exhibits that do not belong(sic) to the affidavit of the deponent.
- 4) It is submitted that the person who appeared before the Commissioner of Oaths is Chris Munga N. Bichage who is the Petitioner in Petition No. 12 of 2017 and as such the person who swore the affidavit is different from the one shown in the attestations.
- 5) The paragraphs of the affidavit which make reference to the strange annexure cannot therefore stand and should be struck out. The omission is fatal.

- 6) I am urged to enforce Rule 14 of the Elections (Parliamentary and County Elections) Petitions Rules, Order 19 of the Civil Procedure Rules 2010 and the Provisions of the Oaths and Statutory Declarations Act.
- 7) Learned Counsel made reference to the decision in Petition No. 1 of 2017 at Nyamira where an affidavit that did not comply with the Oaths and Statutory Declarations Act (Cap 15 Laws of Kenya) was struck out.
- 8) It is urged that the anomaly is not curable under Article 159 (2) (d) of the Constitution and reliance is placed on the decision in **Talewa Road Contractors Limited - vs - Kenya National Highways Authority [2014] eKLR**. It is submitted that the name of the Petitioner in an annexure is a substantive issue.
- 9) It is submitted that the fact that the two(2) names differ means that the Petitioner cannot take ownership of the annexures and I am referred to the decision in Succession cause No. 208 of 2014, **In the matter of the Estate of Moses Muta Gathendu (Deceased) [2015] eKLR** where an affidavit was struck off for lack of a signature, the Court indicating that there was no ownership of the affidavit.
- 10) The preliminary objection elicited no comment by way of support or otherwise from the 1st and 2nd Respondents.
- 11) Mr. Ogutu, Learned Counsel for the Petitioner took issue with the p. o. terming it an ambush. He stated that the same defies the objective practice of the Law where the opponent is supposed to be warned of a p. o. A p. o. ought to be crystallized either in a p. o. or in a pleading.
- 12) The manner in which the p. o. is raised, it is urged, amounts to stealing a march and indeed the Petitioner would be entitled to seek an adjournment to ready his arsenal.
- 13) Learned Counsel points out the principle of fair hearing as provided under Article 50(1) of the Constitution. There must be a level playing field so that the field is not tilted in favour of the person who intends to raise the matter hence springing a surprise. I am invited to frown upon such practice. I am asked to take note that election petitions are *sui juris* with their own procedure.
- 14) I am referred to the celebrated case of **Mukisa Biscuits - vs - West End Distributors 1968 EA 701** where it was held that a p. o. should be based on a pure point of Law discernable without need of evidence to prove a fact.
- 15) It is submitted that in our instant case the question is whether Chris Munga N. Bichage and Chris Munga are 2 separate persons. A p. o. can thus not be based on this disputable set of facts.
- 16) Learned Counsel further submitted that when documents are attached to an affidavit those documents form part and parcel of the whole document. He made reference to the decision in **Castellino - vs - Rodrigues (1972) EA 223**. It is urged that the documents are inseparable from the affidavit. The 2 documents are not at variance.
- 17) It is submitted that the affidavit herein complies with Section 5 of the Oaths and Statutory Declarations Act and that is evident at page 20 of the affidavit. It is the same Commissioner who has affixed his signature to the annexures. There is no dispute about the signature.
- 18) It is urged that even if the Court was to be persuaded by the p. o., the same does not vitiate the entire affidavit. The failure to state the full names is stated to be a procedural issue.
- 19) The Court is invited to apply Article 159 (2) (d) of the Constitution and I am urged that Article 159 (2) (d) frowns upon over reliance on procedural issues.
- 20) Counsel submits that Order 19 of the Civil Procedure Rules does not apply to election petitions.

Election petitions are *sui juris*. They have their own provisions borrowed from the Constitution, the Act and the Rules.

21) The authorities cited are distinguished and it is explained that the same related to undated and unsigned affidavits which is not the case in the present case.

I am urged to apply Rules 4 and 5 of the Elections (Parliamentary and County Elections) Petitions Rules and Article 159 (2) (d) of the Constitution which do not envisage over reliance on technicalities.

22) Learned Counsel, Ms Makobu for the 2nd and 3rd Petitioners associated herself with the submissions by Mr. Ogutu. She emphasized the principles of a fair hearing under Article 50 of the Constitution. She states that there is an ambush on the party.

23) She acknowledges that a party can raise an objection or application at anytime but the timing and substance is key.

24) The 3rd Respondent was served in September. Parties came for pre-trials. The parties were duty bound to disclose any interlocutory applications. By the time of the pre-trials the 3rd Respondent was seized of the material complained of. It is unfair that he has waited to raise the issue at this juncture.

25) In rejoinder, Learned Counsel for the 3rd Respondent, Mr. Omogeni(SC) states that the objection was raised when the evidence was tendered.

26) He states that Rule 14 is very clear. The Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules applies to Election Petitions. He refers to Petition No. 1 tendered above where the Court stated that a p. o. on a point of law can be raised anytime.

27) On the submission that the annextures and the affidavit are not separable, Counsel states that the entire document then needs to be struck out.

28) If a document among the annextures was to be found to be a forgery, there will be need for investigations. We must therefore have the right Petitioner, the right deponent. The moment pseudo names or nicknames are allowed there will be anarchy.

29) It is Counsel's submission that it is more fatal to have an affidavit that has a different name in the annextures than having one that is undated. The issue goes to the substance.

ANALYSIS AND DETERMINATION

30) Flowing from the submissions above, the undisputed fact is that the Petitioner Chris Munga N. Bichage swore an affidavit in support of the petition herein on the 6/9/2017. Annexed to the said affidavit are several annextures which are clearly marked and serialized as CMNB1 to CMNB5 and attested to by one Kennedy Bosire Gichana Advocate and Commissioner of Oaths as the exhibits marked in the affidavit of Chris Munga. Thus the names filled by the Advocate in the attestation differ from the names of the person who signed the petition and the affidavit.

31) Of determination:

1. Whether the p.o. offends the principles of a fair hearing.
2. Whether the p.o. meets the threshold in Mukisa Biscuits Case.
3. Whether the appearance of the 2 different names in the affidavit and in the annextures is fatal to the affidavit and/or annextures.

32) On issue No. 1, a point of law can be raised at any time even without having to put in a notice of

preliminary objection. However, at all times, the right to a fair trial as provided for in **Article 50(1)** of the Constitution must be observed. That Article Provides;

“Article 50 (1): Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

33) A fair trial must incorporate adequate notice of what a party is required to answer to, be it on a matter of Law or fact. Granted, the opposite party would ordinarily have the opportunity to seek extension of time to respond. But raising of preliminary points without notice in my view is a bad practice, inconvenient to the Court and parties and very costly in terms of time and Court’s schedules especially in a petition like the one before Court which is time bound by the Constitution.

34) Matters are compounded when as rightly put by Ms Makobu, Learned Counsel for the 2nd and 3rd Petitioners, one looks at Rule 15 of the Elections (Parliamentary and County Elections) Petitions rules relating to pre-trial conference.

35) It was open to the 3rd Respondent to raise the p.o. or at the very least the notice of the p.o. as impugned affidavit was already served and the argument that the 3rd Respondent waited to have the document tendered in Court does not hold water as it was clear from the petition, the affidavit and annexures that the Petitioner would rely on the same.

36) It must be remembered that a trial is not a game of chess where the killer move is concealed stealthily to be unleashed at the most unexpected time.

37) A fair trial demands the placing of all necessary and relevant material on the table to remove the element of surprise. The timing of preliminary objections in the manner done herein must be deprecated.

38) Does the p.o. herein meet the threshold in the Mukisa Biscuit Case? On the facts before me, I am persuaded that the point raised is not a pure point of Law.

39) The Petitioner appears to have used his full names when signing the Petition and swearing the affidavit but for reasons not provided, 2 of his names are indicated in the Commissioner of Oaths attestation stamp. The Petition and the affidavit have the names Chris Munga N. Bichage. The attestation stamp on the annexures has the names Chris Munga.

40) A question arises therefore as to whether Chris Munga N. Bichage and Chris Munga are one and the same person. This is a question of fact.

41) Evidence would be required to prove or disprove that the 2 names relate to the same person. This is more so when one considers that the names in the attestation are actually the first 2 names of the Petitioner. That calls for a more serious interrogation of the case which may include having the Commissioner of Oaths to shed light.

42) To that extent the p.o. would fail on that score.

43) Even if it was to be pure point of Law, would the appearance of the 2 different names be fatal to the affidavit and/or annexures?

44) There certainly is a lapse on the part of the Petitioner and/or the Commissioner of Oaths leading to the discrepancy in the names in the affidavit and annexure.

45) I have agonized over the effect of this lapse. The striking out of a pleading or evidence is a drastic step and in the interests of justice it is a discretion that ought to be exercised very sparingly.

46) To my mind and looking at the affidavit and annexures, there is a clear indication that Chris Munga

N. Bichage and Chris Munga are one and the same person.

47) In the decision in Castellino v Rodrigues (1972) EA at page 225, the Court stated;

“As a general rule, a reference to a document has the effect of incorporating the contents of the annexure in the document.”

48) **Rule 9 of the Oaths and Statutory Declaration Rules** provides that all exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.

49) In our instant suit, the impugned annexures and which are part of the Petitioner’s affidavit and pivotal to the Petition are the same ones referred to in the affidavit and (I add) by the same person. Why?

50) All the annexures are clearly marked CMNB 1, 2, 3 and so on. The CMNB initials obviously stand for the names Chris Munga N. Bichage. The lapse appears where the attestation stamp refers to the affidavit of Chris Munga (notably the first 2 names of the Petitioner).

51) The Commissioner of Oaths has identified each of the exhibits in the same way each is referred in the affidavit, “CMNB”. To my mind there is no room for doubt that the 2 names refer to one and the same person.

52) In Kenya Shell Limited v James Njeru Wilson & 5 Others H.C.C.C. No. 50 of 2003, the Court stated:

“There was failure to comply with rule 9 which constitutes an irregularity. But I don't think it is such a serious irregularity to prejudice the defendants in any way. It is my considered view that this is an innocuous irregularity which is not prejudicial to anyone and in respect of which appropriate steps may be taken to rectify the anomaly.”

53) I also place reliance on the decision in Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others [2013] eKLR where the Court stated;

“The description of a party in a petition, is a substantive and mandatory aspect that if omitted goes to the root of the Petition. A party to any court proceedings must be clearly described. However, in my view, the description of the Petitioner as 'Hosea Mundui Kiplagat' on one hand and 'Hosea Mundui Kiplagati' on the other hand, creates no doubt that it is one and the same person. It has not been argued that there was another contender in the elections known as 'Hosea Mundui Kiplagati' to whom this Petition might refer and therefore raise confusion as to the actual Petitioner. This again, is an error apparent on the face of the record that has no effect on the substance of the Petition and therefore, this ground does not suffice to render the Petition incompetent.”

54) The Court of Appeal too had the opportunity to render itself in similar circumstances in the case of Daniel Elius Mbiti v Philip Makau [2004] eKLR where in an appearance of a conflict of names like in our instant suit the Court stated;

“The Appellant is one Daniel Elius Mbiti. In the pleadings in the lower court, he was referred to as Daniel A. Mbiti or Daniel Mbithi. Infact the process server claims to have served Daniel Mbithi but not Mbiti. It is very crucial that the party's name to a suit be properly spelled. In the present case the names were quite different. Even the middle initial was A instead of E. It would have been possible that these were totally two different people. However, a look at the police abstract gives the appellants address as 1024 Machakos. It is the same address that appears in the purported vehicle purchase agreement dated 30.5.01 that forms defence. In the circumstances, I do find that the appellants name was misspelled and he is the same person named in the lower court pleadings of Daniel Mbithi or Daniel A. Mbithi.”

55) Article 159 (2) (d) of the Constitution, Section 80 (1) (d) of the Elections Act and Rules 4 and 5 (1) of the Elections (Parliamentary and County Elections) Petitions Rules enjoin this Court to do justice without undue regard to technicalities.

56) The provisions require of this Court to rise to its higher calling to do substantive justice to the parties before Court.

57) I am quick to add, however, that this is not a “Carte blanche” for excuse of all manner of indiscretions. Statutes and rules thereunder are not made in vain and it behoves on all parties to meticulously prepare documents presented to Court. Each case will be determined on its own circumstances.

58) And this is as held in the case of **Raila Odinga and Others v IEBC and 3 others** [2013] eKLR where the Court stated;

“...A Court of Law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. The principle or merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause.”

59) For the above stated reasons, I find and hold that the preliminary objection before me is not sustainable and I dismiss the same.

Obviously the Petitioner by the omission noted caused unnecessary anxiety on the part of the 3rd Respondent leading to the p.o. being raised. Noting that the p.o. was not completely without merit, I award costs to the 3rd Respondents.

Dated, Signed and Delivered in Kisii this 30th day of November, 2017.

A. K. NDUNG'U

JUDGE