



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
PETITION NO.1 OF 2017

LESRIMA SIMEON SAIMANGA.....PETITIONER

V E R S U S

INDEPENDENT AND ELECTORAL BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER SAMBURU COUNTY.....2ND RESPONDENT

LENOLKULAL MOSES KASAINIE.....3RD RESPONDENT

R U L I N G(3)

The Notice of Motion dated 12/10/2017 is filed by the 3rd respondent **Lenolkulal Moses Kasainie**, seeking the following prayers:

(1) That the Honourable Court be pleased to strike out and expunge from the court records the affidavit of Jackson Lekersia, Doris Lopatoie and Jaheem Logialae filed in court on 6/9/2017 for being in contravention of Section 4 of the Oaths and Statutory Declaration Act.

(2) That upon the above prayer being granted, this court be pleased to strike out the petition herein for failure to disclose any election irregularity or malpractice capable of affecting the result arising from absence of affidavits containing substance of the evidence.

(3) The costs of the application be borne by the Petitioner/Respondent.

The application is supported by grounds found on the face of the application and the affidavit of the 3rd respondent.

Mr. Karanja, counsel for the 1st and 2nd respondent supported the application. Mr. Mombo counsel for the petition opposed the application and relied on the affidavit of the petitioner undated but filed in court on 23/10/2017 and submissions of the counsel.

The application is anchored on the following grounds:

(1) That the firm of George Gilbert and one Mombo Advocate is on record for the petitioner and Nicholas Mombo is a partner in the said form.

(2) That the firm has drawn and filed on 6/9/2017 three affidavits in support of the petition:

(i) Jackson Lekarsia Chief agent of ODM Party;

(ii) Doris Lopatoie agent of ODM

(iii) Jaheem Logilae agent of petitioner at Moruangibuin Polling Station.

(3) That the said affidavits have been commissioned by Nicholas Mombo in contravention of Section 4 of the Oaths and Statutory Declaration Act;

(4) That the said affidavits are a nullity and not affidavits in law;

(5) That it is the evidence of the agents which assist the court to assess the credibility of the election process when the agents are subjected to cross examination;

(6) That the absence of the said affidavits will render the petition to be a pleading based on hearsay;

(7) That the affidavit by the petitioner pursuant to Rule 12(1) of the Election Petition Rules only contains grounds and the relief sought and does not contain any evidence;

(8) It is only proper that the court do grant the orders sought by striking out the affidavits and the petitioner will not suffer any prejudice.

In addition, Mr. Mwangi, counsel for the 3rd respondent submitted that the impugned affidavits are not affidavits by virtue of Section 4 of Cap.15 which is a statutory provision and non-compliance cannot be cured by invoking Order 19 Rule 7 of the Civil Procedure Rules which is a subsidiary legislation. Counsel further argued that the violation of Section 4 of Cap 15 cannot be described as an error for want of form because it is mandatory that a petition be supported by affidavits and that it goes to the substratum of the petition. He urged that allowing the petition to stand will amount to allowing the petitioner to amend the law with impunity. Mr. Mwangi distinguished the authorities relied upon by the petitioner – **Bwana Mohamed Bwana v Silvano Buku Bonaya and others E.P.7/2013** which he said is irrelevant; that **Henry Okello Nadimo v IEBC and others E.P. 2/2013 (Busia)** is distinguishable from this case because the application to strike out the affidavits was made when the witnesses had already given evidence on oath and cross examined and that the court declared them invalid and struck out the affidavits of the witnesses who had not yet testified.

Mr. Karanja counsel for 1st and 2nd respondent argued that power to commission documents must be exercised in accordance with Section 4 of Cap 15; that the petitioner has relied on the information from the agents whose affidavits are sought to be struck out and therefore the petition cannot stand without them and should be struck out.

In his submission Mr. Mombo contends that an error occurred and has been satisfactorily explained in the affidavit by the petitioner whereby at paragraph 4, he deposed that the affidavits were mistakenly commissioned by his stamp instead of the advocate who actually witnessed and interviewed the witnesses; that in the hurry to prepare the documents errors occurred; counsel argued that the errors were cured under Order 19 Rule 7 Civil Procedure Rules and Section 80(1)(d) of the Elections Act. He urged the court to exercise its discretion without undue regard to technicalities. Counsel further relied on the decision of **Dilshad Hassan v Hassan Ali Vasanji HCC 8/2005** where the court held that failure to state where the affidavit was made was an error of form and curable by filing additional affidavits.

Counsel also argued that under Rule 5(1) as read with Rule 19(1), the court can give directions on filing of further affidavits even where time has expired. Counsel further invoked Article 159 of the Article which enjoins the court to disregard technicalities. Mr. Mombo further said that even if the affidavits were struck out, they are additional and do not form the core of the petition because under Rule 12(3), the petition is supported by an affidavit and other affidavits and that the petition would only be defective if the petitioner's affidavit was defective.

As to the alleged forged affidavit, counsel submitted that it cannot be struck out without them being

allowed to question the maker. Counsel relied on the decision of Washiali v IEBC E.P.3/2017 (Kakamege) where the petitioners affidavit had errors.

I have seen the impugned affidavits sworn by **Doris Lopatoie, Jaheem, Logilae & Jackson Lekarsia**. They are all commissioned by **Nicholas Mombo Advocate**. That fact is not denied by the petitioner. The commissioning is said to have been done in error; that in the hurry of preparing the petition documents, it was commissioned by the advocate stamp instead of the advocate who witnessed it. The counsel did not however disclose which advocate witnessed and interviewed the witnesses. If another advocate did sign the affidavits, I would expect that the advocate would have sworn another affidavit to that effect. If there was a mistake, it has not been satisfactorily explained.

Article 159(2)(d) of the Constitution enjoins the court in exercising judicial authority, to administer justice without undue regard to procedural technicalities. The same principle is incorporated in Section 80(1)(d) of the Elections Act where it states

“A court may in exercise of its jurisdiction decide all the matters before it without undue regard to technicalities.”

Mr. Mombo also invoked Section 72 of the Interpretation and General Provisions Act which echoes the same principle. It states this: ***“save as otherwise expressly provided, whenever a form is prescribed by written law, an instrument or document which purports to be in such form shall not be void by reason of a derivation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead.”***

The impugned affidavits are alleged to offend Section 4(1) the Oaths and Statutory Declarations Act Cap.15 Laws of Kenya. The said section reads as follows:

“Provided that a Commissioner for Oaths shall not exercise of the power given by this section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

In the case Caltex Oil (Kenya) Ltd V Stadium Service Station Ltd & Another (2002) eKLR Justice Onyango Otieno (as he then was) when confronted with an affidavit commissioned by its drawer stated thus:-

“I still stand by what I did say in the case of James Francis Kariuki & another v United Insurance Co. Ltd. HCCC No.1450 of 2000 that such an affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declaration Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.....I feel certain in my mind that whatever way one looks at those affidavits, they were simply not affidavits at or for purposes of the law. I have considered the affidavits in support and I do not think the errors were inadvertent.”

Also see Rajput v Barclays Bank of Kenya Ltd & 3 others (2004) KLR where **J. Emukule** held that failure to comply with Section 4 & 5 of Cap 15 Laws of Kenya is a matter of substance and not form and is not curable. In Ismael Suleiman & others v IEBC E.P. 3/2013 Makau J. struck out a petition where supporting affidavits were not commissioned as required under Cap 15. In the above case however, there were also other reasons for striking out the petition.

I have also considered the case of Dilshad Hassan (Supra) which I find to be irrelevant because the issue therein, was failure of an affidavit to state the place where it was sworn. In the Okelo case the affidavits were commissioned by unqualified advocate but by the time they were brought to the attention of the court, witnesses had already testified but for those who had not testified, their affidavits were struck out.

The key question here is whether the defect in the impugned affidavits is merely procedural or substantive.

Order 19 Rule 7 of the Civil Procedure Rules also provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect, inter alia misdescription of the parties or otherwise in the titles or other irregularity in the form thereof or any other technicality.

In my view however, the above rule cannot act as a cure for the affidavits commissioned contrary to Section 4 of Cap 15 which is a statutory provision while Order 19 is subsidiary legislation. In my considered view, since the affidavits are commissioned in contravention of Section 4 of Cap 15 they do not amount to affidavits known in law.

I agree with the finding in the *Caltex Oil Case* which is on point with this case and find that the defect in the three affidavits goes to the substance and not the form. They contravene Section 4(1) of the Cap 15 and are hereby struck out.

As regards Jackson Larkasia's allegations that his statement was forged, there was no response to his affidavit by the petitioner. After the application was filed, the petitioner never requested to have the said Jackson cross examined on the said affidavit. Jackson's allegations are therefore unchallenged and Jackson's affidavit must be struck off the record for that reason too.

The question is whether the court can allow the petitioner to file other affidavits? Mr. Mombo urged the court to allow the petitioner to file other affidavits or that the affidavits can be treated as signed witness statements as was held in *E.P.2/2013 Henry Okello's case*. However, as observed above, the *Okelo* case is distinguishable in that witnesses had already testified before the defect was noted. The petitioner did not file any application seeking to file other affidavits in place of the impugned affidavits and the court will not allow the filing of other affidavits in place of those that have been struck out.

Having struck off the affidavits, can the court strike out the petition?

I do agree with Mr. Mombo that striking out of a petition is an extreme measure that this court ought to resort to only in exceptional circumstances, when the petition or claim is so hopeless that it cannot be salvaged by way of amendment. This is because the outcome of the petition will affect the whole electorate of Samburu County.

In the *Henry Okelo case*, the court considered the case of *Eng. Peter Kimori Maranga and another v Joel Omwagwa* where the court had been invited to strike out the affidavit in support of the petition and the court found that the petitioners affidavit is not an integral part of the petition and that striking off the affidavit is not fatal to the petition. **J. Tuiyot** agreed with the above decision in the *Okelo case*. However the Court of Appeal found otherwise in *Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others (2013) KLR* when the court held that an affidavit in support of a petition is a mandatory requirement. It said

“Rule 9(3) (now 8(4)(b) of Election Petition Rules provides that an election petition shall be supported by an affidavit of the petitioner containing the grounds on which relief is sought. The plain reading of this rule is that an affidavit in support of the petition is a mandatory requirement....”

In the instant case, the petitioner's affidavit was not impugned and still supports the petition. According to Mr. Mombo the petition is dependent on qualitative aspect of the case meaning that it can still stand without the affidavits. For the above reason, I am of the view that the striking out of the witnesses affidavits will not render the petition incompetent and the prayer for striking out of the petition must fail.

In the end, I make the following orders:

1. The affidavits sworn by:

Doris Lopatoie,

Jackson Lekarsia

Jaheem Logilae, all dated 5/9/2011 are hereby struck out for none compliance with Section 4(1) of Cap 15;

2. The respondent's application dated 12/10/2017 be and is hereby dismissed;

3. Costs to be in the cause.

Dated, Signed and Delivered at **NYAHURURU** this **22nd** day of **November**, 2017.

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R. P. V. Wendoh

JUDGE

Present:

Mr. Mombo for petitioner

Mr. Karanja for 1st & 2nd respondents

Mr. Mwangi & Ms. Peinan for 3rd respondent

Soi – Court Assistant