



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO.3 OF 2017

(CONSOLIDATED WITH ELECTION PETITION NO.7 OF 2017)

IN THE MATTER OF ELECTIONS ACT, NO.24 OF 2011, LAWS OF KENYA

AND

THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

AND

**IN THE MATTER OF GUBERNATORIAL ELECTIONS FOR KISII COUNTY, COUNTY
NO.045 HELD ON 8TH AUGUST, 2017**

JOEL MAKORI ONSANDO.....1ST PETITIONER

FRANCIS MOCHOGE OMAO 2ND PETITIONER

JUSTRY P. LUMUMBA NYABERI3RD PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

ROBERT ISAAC SIDNEY NAMULUNGU.....2ND RESPONDENT

JAMES ELVIS OMARIBA ONGWAE3RD RESPONDENT

JOASH ARTHUR MAANGI GONGERA4TH RESPONDENT

NAFTAL OBWOCHA ORINA5TH RESPONDENT

RULING

1. This matter had proceeded to hearing of the 1st Petitioner's evidence where he was cross examined and re-examined and in fact the petitioner's counsel had indicated an intention to call another witness at about 5.20 p.m., when Senior Counsel **MR. OKONGO OMOGENI** addressed the court with regard to certain documents annexed to the Petitioner's affidavit, and which he said differed from what had been served on

the 3rd -5th Respondent's counsel.

2. I think what irked counsel was the Petitioner's disowning the documents served on the 3rd – 5th Respondent's counsel saying he did not know where they got the same (suggesting that what the 3rd – 5th respondent's counsel had were forgeries).

3. **MR. OMOGENI** pointed out that the documents served on them, and which he gave the court to peruse bore the stamp of the High Court of Kenya at Kisii and referred to the maker of an affidavit by one **JAMES MAKORI ONSANDO** whereas the petitioner is **JOEL MAKORI ONSANDO**.

4. Indeed at the beginning of cross examination of the witness, he was asked to confirm whether he had or used any other names but he was categorical that he was only known by the names **JOEL MAKORI ONSANDO**. When he was shown the documents which referred to **JAMES MAKORI ONSANDO**, he said he was not such a person.

5. **MR. WANYAMA** who received the documents and acknowledged signing for them explained to this court that he signed all the copies in the belief and presumption that the contents were the same and the petitioner cannot file different documents in different sets of booklets then insist that because they were signed for they must have been complete.

6. There is also the 2nd issued regarding two documents marked **JMO – 17** and **JMO – 18** which the petitioner has and are also contained in the court file, but the respondents say they were not part of the annexures served on them.

7. The petitioner's counsel **MR. BEGI** pointed out that indeed the issue of mismatched markings had arisen earlier in the proceedings and he had even suggested that they be given time to try and harmonize the markings but **MR. OMOGENI** said the matter could proceed and he would address it on his submissions. This must not be confused with the records from Hennepin County Court in the U.S.A. which **MR. OMOGENI** had interjected and objected to when **MR. OBONDI** was cross examining saying it was obtained from the internet.

8. He also drew to the court's attention the fact that the petitioner had been cross examined and re-examined on the said documents and it was a little late in the day to now ask the court to expunge the same from the record.

He also blamed the respondent's counsel for lack of diligence saying they ought to have checked to confirm that what was served on them was similar in all content to what the petitioners retained.

9. **MR. BEGI** argued that this is not a preliminary objection as contemplated by the decision in **MUKISA BISCUITS –VS- WESTEND DISTRIBUTORS** as there are certain disputed facts regarding what was served.

He also sought to distinguish this case from the decision by Makau (J) in **NYAMIRA ELECTION PETITION NO.1 OF 2017 – WALTER ENOCK NYAMBATI –VS- IEBC & 2 OTHERS** pointing out that in that case the affidavit was not dated and therefore grossly offended the provisions of the Oaths and Statutory Declarations Act. It is his contention that the mismatched markings and the reference to an individual as maker of an affidavit who is not known does not go to the root of the matter and can easily be resolved by taking into consideration that the anomaly does not go to the substance of the petition. He urges the court to be guided by **Article 159 (2) (d)** of the **Constitution** that behoves court not to allow procedural technicalities to hamper substantive justice.

10. He urged the court to be guided by the Supreme Court decision in **Presidential Petition No.1 of 2017 – RAILA AMOLO ODINGA & ANOTHER –VS- IEBC AND 2 OTHERS** where there was delay in service of affidavit, annexures and responses and court was asked to expunge them.

The Supreme Court declined to grant the orders saying such drastic measures could not be justified if the scores of justice are weighed in favour of all the parties to the petition.

11. **MR. OMOGENI** pointed out that the situation before the Supreme Court was different as it related to late service of documents, not defective documents.

Rule 9 states –

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”

12. Of course the issue of mismatched markings of documents arose during the proceedings, in fact some of the annexures the petitioners had bore different markings from what the 3rd – 5th Respondent had, and also different from what the court had – but they were the same documents – with regard to these mismatch the court noted the markings as appearing on the petitioner’s documents, the 3rd – 5th respondents’ documents and the court records – to that extent there was no prejudice.

13. However there was a larger problem, those were documents marked in reference to an affidavit by **JAMES MAKORI ONDARI** – and not **JOEL MAKORI ONDARI** – in my mind the probability of it is that there was human error in reference to the first name **JAMES** instead of **JOEL**. However the petitioner and his counsel did not want to take that route and instead suggested that if the 3rd – 5th respondent’s counsel had different documents reference to **JAMES**, then those were forgeries which only their counsel could explain their origin. Those documents were duly stamped as received at the High Court registry – these are documents marked **JMO – 6** being Kisii County Discrepancies at page 121 and stamped as being in reference to **JOEL MAKORI ONSANDO** in the court’s copy and the petitioner’s copy, but refers to **JAMES MAKORI ONSANDO**.

The others are **JMO-11, JMO-12, JMO-13, JMO-14, JMO-15, JMO-16**.

Certainly they refer to a different person’s affidavit, although the contents are the same and the petitioner was cross examined on them.

Unlike the **WALTER ENOCK NYAMBATI** case (supra) the issue is not the contents of affidavit itself but the annexures as such section 5 of the Oaths and Statutory declaration Act does not apply – the section reads:-

“Every commission for Oaths before whom any oath or any affidavit is taken or made under this Act shall state truly in the format or alteration at what place and what date the oath or affidavit is taken or made.”

15. If Mr. Omogeni had opted to address the court on the issue before cross examination of the witness, his application would have held water, but I think for him to raise the view after cross examination and re-examination of the witness on these documents is a little too late and the horse has bolted out of the stable. If they were grossly prejudiced then he would not even have begun cross examination on these.

16. However all is not lost because **(a)** the court has noted the anomaly referred to **(b)** he can still address the issue in detail in his submissions.

I decline to expunge the said documents.

17. Finally there are two documents **JMO-17** and **JMO – 18** which were not among the annexures served on the 3rd – 5th respondents – as noted by Makau J in the **NYMABATI CASE** (supra) the one who alleges service has the burden of proving that service. The mere fact that 1st and 2nd respondents were served with all the documents, and that the copy in the court file also has all the documents is no proof that 3rd – 5th respondents were equally served with all the documents.

18. It is not enough for **MR. OMWANZA** on behalf of the petitioner to casually say “**We served all the documents, they signed our copy**” – the quote i.e. were these annextures contained in the set given to the 3rd – 5th respondents.

19. Going by the mix-up demonstrated even in the markings of the annextures, the probability that the same documents were not served is high and real. I hold and find that **JMO-17 and JMO – 18** were not served on the 3rd – 5th respondents and they will be prejudiced. The petitioner cannot be allowed to benefit from such omissions simply on account of having served 1st and 2nd respondents. The same are thus expunged from the record.

Delivered and dated this 22nd day of November, 2017 at Kisii.

H.A. OMONDI

JUDGE