



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NO. 12 OF 2017
(CONSOLIDATED WITH ELECTION PETITION NO. 10 OF 2017)
IN THE MATTER OF ELECTIONS ACT, 2011

AND

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

AND

IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR
NYARIBARI CHACHE CONSTITUENCY

BETWEEN

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

ZAHEER JHANDA.....2ND PETITIONER

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

VERSUS

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

JULIUS MEJA OKEYO (RETURNING OFFICER)..2ND RESPONDENT

RICHARD NYAGAKA TONGI.....3RD RESPONDENT

RULING

In support of the petition herein, the 2nd and 3rd Respondents relied on documents attached to the affidavit and marked “C” and “B1”.

In a matter canvassed before me, those documents were expunged and the court expressed itself thus;

“With the result that documents marked “C” and “B1” do not comply with the mandatory provisions of Rule 9 of the Oaths and Statutory Declarations Rules, the Court makes an order that the same be expunged from the record...”

It goes without saying that those documents are not available in support of the 2nd and 3rd Petitioners case.

Our system of law is adversarial in nature. Whoever alleges proves. I need not belabour the issue of the burden of proof in a matter like the one before Court.

However, in the testing of the veracity, correctness or truth of facts stated, the latitude for cross-examination is wide. Counsel must be accorded the necessary space in cross-examination.

Care must be taken, however, not to introduce through the back door documents already expunged by the Court. The 2nd and 3rd Petitioners cannot use cross-examination to re-introduce documents that were expunged neither can cross-examination be used to require production of documents by the Respondent.

The Law provides adequate and elaborate procedures for discoveries, production and requests for better particulars.

A question arises as to of what probative value be answers given by a witness on a document that is not produced in Court and will not be produced given existing orders will be?

The witness is duty bound to answer all questions on documents he has annexed.

However, what is expunged from the record no longer forms part of the evidence in support of the Petitioner's case. To that extent the witness will be shielded from questions relating to expunged documents as the Court has to restrict itself to evidence offered in support of the Petition. This will be observed without unnecessarily limiting the latitude available in cross-examination.

Dated, Signed and Delivered in Kisii this 19th day of December, 2017.

A. K. NDUNG'U

JUDGE