

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL PETITION NO. 4 OF 2014

JOEL ONSARE ::::::::::::::::::::::::::::::::::::::: 1ST PETITIONER

VERSUS

THE GOVERNOR TRANS NZOIA COUNTY

& FOUR OTHERS ::::::::::::::::::::::::::::::::::::::: RESPONDENTS

AND

KOROS KIPSEREM TIMON

**& ELEVEN OTHERS ::::::::::::::::::::::::::::::::::::::: INTERESTED
PARTIES**

RULING

Constitutional Petition's involve special proceedings that are deemed to be neither civil nor criminal hence "sui-generis".

The oral application made herein by the petitioner tends to lean towards the provisions of the Civil Procedure Act and Rules. The petitioner thus applies that paragraphs 13, 14, 23, 25 and 26 of the third and Fourth Respondents replying affidavit dated 30th May, 2014 and paragraph 8 of the first Respondent replying affidavit dated 28th July, 2014 be struck out for being irrelevant, scandalous and oppressive to the application. The application is grounded on **Order 19 Rule 6** of the Civil Procedure Rules which provides that:-

"The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive".

Ideally, the application ought to have been made in a formal way and after the filing of a further affidavit by the petitioner in response to the disputed paragraphs of the Respondent's replying affidavit. It may be noted that the petitioner did not deem it fit to respond to matters raised in the replying affidavits thereby implying that the averments therein were neither oppressive nor scandalous to him and should be left to the court in arriving at its determination on the application dated 14th May, 2014. His oral application at a time when the application dated 14th May, 2014 was due to inter-partes hearing may well be treated as an afterthought. Be that as it may, a matter or averment which may be considered to be scandalous irrelevant or oppressive to any party in a dispute ought not be left to stand and would thus be fit for striking out so that reference to it may be avoided at the hearing of any application.

Herein, the petitioner contends that the disputed paragraphs of the replying affidavits are scandalous in as much as they depict the petitioner as a tribal chauvinist who is out to promote tribal agenda in this petition. It is without doubt that in a society such as ours no room should be given to persons who preach and promote tribalism especially negative tribalism or ethnicity. Unfortunately, the trend has been that quite a number of people who are enlightened and reasonably educated holding responsible public positions in the country have taken upon themselves to misinterpret the concept of devolution or promote negative ethnicity thereby leading to numerous petitions such as the present one for the sole purpose of upholding and defending the

constitution as stipulated in Article 3 of the constitution. Indeed, every person has the right to institute court proceedings claiming that the constitution has been contravened or is threatened with contravention.

This is the more reason why the petitioner found it necessary to file this petition. He was within this constitutional rights to do so and the fact that he is concerned that a minority group in this Trans-Nzoia County was left out or discriminated in the appointment to public offices did not have to attract disgraceful and negative remarks which are not only argumentative. Such remarks would include those found in paragraphs 14, 23, 25 and 26 of the 3rd and 4th Respondents replying affidavit dated 30th May, 2014 and paragraph 8 of the 1st Respondent's replying affidavit dated 28th July, 2014. The present application is therefore allowed to the extent that the aforementioned paragraphs in the Respondents replying affidavits be and are hereby struck out or expunged from the record.

J. R. KARANJA

JUDGE

[Read & signed this 26th day of November, 2014]