



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Election Petition 9 of 2013**

**WILSON MBITHI MUNGUTI KABUTI.....1<sup>ST</sup> PETITIONER**

**PHILIP MUTUA KILONZO.....2<sup>ND</sup> PETITIONER**

**STEPHEN MUTHOKA.....3<sup>RD</sup> PETITIONER**

**JOHN KALATA MALII .....4<sup>TH</sup> PETITIONER**

**JOSEPH MUTUKU MUSAU.....5<sup>TH</sup> PETITIONER**

**SOLOMON KIMUYU.....6<sup>TH</sup> PETITIONER**

**VERSUS**

**PATRICK MAKAU KING'OLA.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL BOUNDARIES & COMMISSION ....2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The application herein emanates from the general election that was conducted on the 4<sup>th</sup> March 2013. Voters exercised their constitutional rights by electing their representatives. The Petitioners herein were aspirants for the Mavoko Constituency County Elections. The election was conducted by the 2<sup>nd</sup> Respondent who declared the 1<sup>st</sup> Respondent the duly elected Member of Parliament.

2. The Petitioners herein have challenged the election of the 1<sup>st</sup> Respondent. When the matter came up for pre-trial Conference, the 1<sup>st</sup> Respondent herein raised a Preliminary Objection on a point of law on the grounds that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Petitioners failed to comply with Rule (10)

(31)(b) of the elections (*Parliamentary and County Elections*) Petition Rules 2013 (hereinafter "*Petition Rules*"). Only the 1<sup>st</sup> Petitioner herein filed a supporting affidavit to the petition. A supporting affidavit would disclose their evidence in support of the Petition. Failure to file any express authority authorizing the 1<sup>st</sup> Petitioner to swear the affidavit on their behalf was fatal. The 1<sup>st</sup> Respondent called for dismissal of their Petition.

3. The 2<sup>nd</sup> Respondent supporting the Preliminary Objection raised was of the view that the said omission and/or deficiency was fatal in nature which rendered the petition void, invalid and defective.

4. In reply thereto the 1<sup>st</sup> Petitioner stated that he swore an affidavit in support of the petition on his own behalf and on behalf of his Co-Petitioners having been authorised hence the petition itself did not contravene Rule 10(3) (b) of the Petition Rules. He stated that his co-petitioners had indeed given him the authority in writing but his advocate omitted to include it in the supporting document which was an oversight. In his view the omission was not fatal to the petition.

## SUBMISSIONS

5. It was the submission of counsel for the 1<sup>st</sup> Respondent, **Mr. Mutinda** that each Petitioner was required to file a supporting affidavit setting out grounds they were to rely on. Failure to do so meant that they had no evidence to offer. This was the only way the Respondent would know the nature of evidence they were to adduce.

6. **Mr. Ogwe** for the Petitioners on the other hand argued that the 1<sup>st</sup> Respondent had stated that he had authority from his co-petitioners to swear the affidavit. Having had common grounds and prayers they automatically donated authority to one of them to swear the affidavit. He argued that the situation envisaged by Rule 10(3) (b) was captured in the affidavit sworn by the 1<sup>st</sup> Petitioner. He argued that no prejudice would be suffered by the 1<sup>st</sup> Respondent.

## ANALYSIS

7. It is not in dispute that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Petitioners did not depose affidavits in support of the petition which is a mandatory requirement by the Petition Rules (*see Rule 10(3) (b)*).

8. However, the 1<sup>st</sup> Petitioner swore an affidavit stating that he had authority to depose the affidavit on behalf of his Co-Petitioners. He avers in paragraph 1 as follows:-

***“THAT I am a male adult of sound mind and one of the Petitioners herein duly authorised by the rest of my co-petitioners to swear this affidavit on their behalf and on my own behalf and therefore competent to swear this affidavit.”***

9. The requirement of a plaintiff swearing an affidavit on behalf of Co-plaintiffs procuring written authority is provided by Order 1 rule 13 (2) of the Civil Procedure Rules which states as follows :-

***“(2) The authority shall be in writing signed by the party giving it and shall be filed in the case”.***

10. It is important to note that Civil Procedure Rules are not applicable to Election Petitions unless expressly stated by statute. A good example is Rule 12 (6) of the Petition Rules which provides-

***“The provision or Order 19 of the Civil procedure rules, 2010 and the Oaths and Statutory Declaration Act shall apply to the affidavit under this rule.***

11. The 1<sup>st</sup> Petitioner stated that he was authorised by his Co-Petitioners to make deposition on their behalf. He acted pursuant to rule 10 (3) (b) of the Petition Rules.

12. Rules being procedural in nature the issue to be determined will be whether the omission alluded to if any, can be cured by article 159 (2) of the constitution which provides as follows:

***“Justice shall be administered without undue regard to procedural technicalities”.***

13. Article 159(2) (b) requires this court to administer justice without considering technicalities.

14. The Election Act also requires the Election Court to decide all matters that are before it without regard to technicalities (*see section 80(1) (d)*).

15. In this case all the six petitioners acted jointly by instructing their advocate who acted pursuant to Rule 10 (3) (a) of the Petition on their behalf. They caused one of them (the 1<sup>st</sup> Petitioner) to swear an affidavit in support of the Petition. The question to be answered is whether in the circumstances the Petition in respect of the 2<sup>nd</sup> – 6<sup>th</sup> Petitioners can be struck out because they did not individually depose affidavits as required?

16. The Court of Appeal was confronted with a situation where 5 applicants filed an application but not all of them swore an affidavit in support of the motion. The affidavit was sworn by only one of them (**Joseph Kamau Musa**). In his affidavit he did not even say that he deposed on behalf of others (see **Joseph Kamau Musa & Others versus Ereri Co. Ltd and Others [2006] eKLR**). In the case the applicant stated as follows:-

***“I am the first applicant in this application with instructions to make this affidavit on behalf of others”***. The court then stated that;-

***“Our understanding of the averment is that the first applicant was saying he had instructions from the other applicants to swear the affidavit on their behalf. If the first applicant had instructions to swear on behalf of the other applicants, then clearly he had authority to swear on behalf of the others for how else could they instruct him and yet at the same time not authorize him to act on their behalf?”***

17. The petition having been instituted jointly they did not have to give any authority in writing. The 1<sup>st</sup> Petitioner having averred that he had authority from his co-petitioners was sufficient.

18. It was upon the Respondents to demonstrate what prejudice they would suffer as a result. The Petitioners caused their witnesses to depose affidavits detailing the evidence to be adduced. The Respondents did file their response to the Petition based on the said evidence. There is nothing prejudicial in the circumstances.

19. This being an Election Petition where voters exercised their constitutional rights, the question the court should pose is whether it will uphold procedural technicalities and let the meritorious matter be decided by being thrown out instead of letting the threshold and cause of justice win.

20. Substantial justice must be preferred against technical consideration.

## **CONCLUSION**

21. The court having decided to render substantial justice pursuant to the overriding objective of the Petition Rules; in exercise of the powers under rule 4(2) of the Petition Rules, I find that failure to annex written authority which has since been annexed to the affidavit was not a defect as alleged because there is no requirement under the Petition Rules.

22. In the premises the Preliminary Objection is not meritorious. The same is dismissed.

23. Costs shall be in the petition.

**DATED, SIGNED and DELIVERED at MACHAKOS this 23<sup>RD</sup> day of MAY 2013.**

**L.N. MUTENDE**

**JUDGE**