



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Petition 5 of 2013**

**PHILIP MUKWE WASIKE.....PETITIONER**

**AND**

**JAMES LUSWETI MUKWE.....1ST RESPONDENT**

**IEBC.....2ND RESPONDENT**

**SILAS ROTICH.....3RD RESPONDENT**

**RULING**

This matter is coming up for hearing of the application filed by the petitioner dated 12<sup>th</sup> May 2013 in which the petitioner seeks:-

a) To be granted leave to file a further affidavit and adduce additional evidence.

(b) Be allowed access to certain information and materials from a Third

At the onset, the petitioner's counsel raised an objection regarding a replying affidavit sworn by **DAVID SIMIYU KHAOYA** in response to the application in response to the application on grounds that:-

a) It is not sworn in the first person as contemplated by Order 19 Civil Procedure Rules regarding making of affidavits.

b) The affidavit is sworn by a party who is not a party to the suit and had not been mentioned in either the application or the supporting affidavit.

c) The deponent is not an agent as contemplated by Order 9 rule 2 of the Civil Procedure Rules.

This is opposed by 1<sup>st</sup> respondent's counsel who submits that the affidavit is in fact competent, it having been filed upon instructions received from the 1<sup>st</sup> respondent. Secondly that what is contested is the form and description in the affidavit, which should not be a basis to strike out an affidavit.

(c) Article 159(1) (d) of the Constitution of Kenya offers refuge to the effect that justice should not be unduly hampered by technicalities and the

court ought to endeavour to address substantive justice.

As regards the affidavit being sworn in the first person, I have read through the affidavit – it begins I **DAVID SIMIYU KHAOYA**, and each subsequent paragraph refers to I, my understanding of the English

language and expression is that satisfied what is described and defined as the first person. To that extent, there is no violation to what is contemplated under **Order 19 Rule 7** of the **Civil Procedure Rules**.

The 2<sup>nd</sup> and 3<sup>rd</sup> reason raised is that the affidavit is sworn by one who is not a party to the application and who has not been referred to in the supporting affidavit. He is said not to be an agent as recognized under the Civil Procedure Rules, and so he ought to have obtained leave from this court before swearing the affidavit.

This affidavit is **NOT** sworn on behalf of the 1<sup>st</sup> respondent, but upon instructions from the 1<sup>st</sup> respondent. This in essence means the 1<sup>st</sup> respondent is the source of the information given. The affidavit is a written statement made under oath – this is an affidavit sworn by one who is a witness in this matter, upon instructions from the person against whom this petition is filed, and he has stated that he is duly authorized to swear the affidavit. Counsel argues that the deponent did not comply with the provisions of **Order 9 rule 2** of the **Civil Procedure Rules** which requires that for such a party to swear an affidavit, he ought to get leave of the court.

Whereas under ordinary civil proceedings the deponent David, would be considered a busy body and who would only be allowed into the proceedings if the 1<sup>st</sup> respondent had sworn an affidavit and mentioned him as his source of information, the scenario here is different. This is because Election Petitions are a public interest litigation in which it is not just the petitioner or the respondent who has an interest at stake. It involves the interest of the people of Kabuchai, and much as the petitioner may be pursuing the interests of his constituents, the respondent also carries with him many other constituents, including the deponent of the affidavit (who is a witness) on his shoulder.

Secondly, apart from para 5, the rest of the contents if the affidavit raise issues of law, such that even if the affidavit were to be struck out, the respondent would still be at liberty to address this court on provisions of **Article 87(2)** of the **Constitution**, **Article 35** of the **Constitution** and **Rule 17 (1)** of the **Election Petition Rules**.

Thirdly, the Civil Procedure Rules do not apply on Election Petitions except for instances where the Rules specifically provide for application of the Civil Procedure. See **Rule 12(6) Election Petition Rules**. In this instance, only **Order 19** of the **Civil Procedure Rules** is applicable and **Cap 15** (i.e. the **Oaths and Statutory Declaration Act**). The provision in **Order 19** deals with affidavits and the issue regarding recognized agents and leave obtained from the court as provided under **Order 9 Rule 2 Civil Procedure Rules** does not apply.

The affidavit is primarily essential for the purpose of veracity and failure by a deponent to disclose with particularity the sources of information has the effect of weakening the probative value of the information and may even render it worthless. In this regard, I find that the information contained in para 5 of David Simiyu Khaoya's affidavit ought to have been deponed to by the 1<sup>st</sup> respondent personally, and that part is worthless and is struck off. See in this regard the case of **HILDA AOKO OWILI V NATIONAL BANK OF KENYA LTD (KSM High Court Civil Case No.411 of 1997)**. Consequently para 5 of that affidavit is struck off, the preliminary objection otherwise has no merit and is dismissed. Now we proceed to hear the application filed.

H.A. OMONDI  
JUDGE  
15/05/2013

All counsel present  
**Mr. Simiyu Makokha**

I pray that we be allowed to also file our grounds of opposition which would bring out the issues.

H.A. OMONDI

JUDGE  
15/05/2013