

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO.4 OF 2013**

**JOSEPH AMISI OMUKANDA.....PETITIONER
V E R S U S**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (I.E.B.C.)....1ST
RESPONDENT**

WILSON KIMUTAI KIPCHUMBA.....2ND RESPONDENT

**(RETURNING OFFICER, NAVAKHOLO
CONSTITUENCY)**

EMMANUEL WANGWE.....3RD RESPONDENT

R U L I N G

Before the hearing of the election petition the defence counsels have made an oral application under Order 19 rule 9 seeking to have the entire affidavit of Vance Paul Udoto be struck out or in the alternative some paragraphs thereof be struck out. The basis of the application is that the affidavit which was filed with the leave of the court raises new issues which are not in the petition itself. The witness was also a candidate in the elections and some of the paragraphs in the affidavit advances his own complaints. The witness was free to file his own complaint but he did not. Counsels contend that the affidavit does not comply with the provisions of Order 19. The affidavit has raised issues related to forms 35 yet the petition has not done so. Some of the paragraphs stated that information was given to the witness by his agent whose names are not given. The affidavit raises complaints about forms 35 but the specific polling stations are not given. If the affidavit were to be left the way it is then it raises a new petition. According to the defence counsels the petition is confined to the counting and tallying of the votes and the affidavits should be confined to that. Counsels specifically would like to have paragraphs 3, 6, 8, 9, 11, 12, 13, 14, 16, 19, 24, 25 and 26 to be struck out.

Counsels for the petitioner opposed the application and contend that under Order 19 rule 6 an affidavit can only be struck out if it is oppressive and scandalous. The witness is crucial and will be subjected to cross-examination. The issues being raised by the defence counsels can be taken care by cross-examination. Counsels further contend that the issues being raised are technical in nature and Order 19 of the Civil Procedure Code is not in line with Article 159 of the Constitution which requires that justice should be dispensed without undue regard to technicalities. The affidavit only raises issues of facts and should not be struck out.

The pleadings show that Vance Paul Udoto was one of the candidates for the Navakholo Parliamentary seat. The results provided by the first respondent shows that Vance Udoto got 6,334 votes but after further examination of the votes the results were given as 6,184. It is clear that most of the information given in his affidavit was within his knowledge having participated in the elections. Paragraph 3 of his affidavit is just normal information that he was getting regular updates from his agents. Even if the names of the agents are not given it is clear that the candidate must have had some agents in the polling stations. Paragraph 6 indicates that voting went on well save for a few places which reported some problems. The places where there were problems are not indicated. Since this is crucial information I do find that the words (*save for a few places which reported some problems*) are hereby struck out. The witness ought to have given the specific areas where there were problems. Further the petition does not indicate whether there were problems at the polling stations.

Paragraph 8 of the affidavit indicates that there were problems with forms 35 at the tallying centre and lays the ground for paragraphs 9 to 16. I will not strike out that paragraph. Paragraph 9 indicates that

some agents complained that they were not given forms 35 at the polling stations. This is what the petitioner complains of and the paragraph shall be left intact. Paragraph 10 is also not oppressive and shall be left intact. Paragraph 11 indicates that problems arose when some agents raised alarm that the results that were being announced were not in line with those announced at the polling stations. No specific polling stations are cited and this is a general averment. The paragraph is hereby struck out. Paragraph 12 deals with two different sets of forms 35. The pleadings are closed and I have not seen the two different sets of forms 35. Paragraph 12 is hereby struck out. Paragraph 14 merely expresses the witness's views and he can be cross-examined on that averment. The said paragraph continues giving the same information in paragraph 15.

I have read paragraph 16 of the affidavit and it states that some forms 35 mysteriously disappeared. The petition does not raise such an issue and all the forms have been provided to the court. The paragraph is hereby struck out. Paragraph 19 merely indicates that the defence has given different figures for the witness's number of votes he garnered. This is a factual analysis and not oppressive or scandalous. The rest of the paragraphs in the affidavit specifically paragraphs 24, 25 and 26 are in order and shall be found to be left intact.

Under the Election Petition Rules a witness is only allowed to give evidence after he has sworn an affidavit or if the court grants leave to such a witness to testify. I do agree with the defence counsels that the above paragraphs which have been struck out are mainly advancing the witness's own complaints and are not in line with the petition. Under rule 12 (6) of the Election Petition Rules the provisions of Order 19 relating to affidavits apply to affidavits filed in election petition cases. Under Order 19 (3) affidavits should be confined to such facts as the deponent is able in his own knowledge to prove. In election petition cases the affidavits of the witnesses should be in line with the petition itself. I do find that the above paragraphs which I have ordered struck out are not in line with the petition.

In the end, Vance Paul Udoto shall testify as a witness. However, part of his paragraph 6 of his affidavit as stated hereinabove is hereby struck out. Paragraphs 11, 12 and 16 are hereby struck out. The witness shall testify without referring to the information contained in those paragraphs. The entire affidavit shall not be struck out. The application by the defence partly succeeds as herein above.

Delivered, dated and signed at Kakamega this 19th day of June 2013

SAID J. CHITEMBWE

J U D G E