



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NO 1 OF 2013

MOHAMED ALI MURSAL.....PETITIONER

VERSUS

SAADIA MOHAMED.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...2ND RESPONDENT

AHMED ABDULLAHI MOHAMAD.....3RD RESPONDENT

RULING

In the cause of taking down evidence in respect to Mr. Hassan Mohamed Hassan, witness No. 4 for the Petitioner, an objection was raised. The objection related to the manner in which the witness had veered off the contents of his affidavit. Mr. Issa for the 3rd Respondent the Election Rules were clear on this matter. Mr. Issa was of the view that any evidence outside the affidavit of a witness would be unfair to the other party because the other party will not be in a position to rebut it. He further stated that the Rules do not limit a party to the length of the affidavit and that even under Rule 12 (4) and (5) leave is not given as of right to a party who has failed to file an affidavit as such a party must justify an application for such leave.

Mr. Oriaro for the 1st and 2nd Respondent supported the objection and submitted that the rationale of the Elections (Parliamentary and County Elections) Petition Rules 2013 is to avoid ambush of any party. He stated that the old election rules did not allow parties to see the evidence until the time of the hearing of the Petition and this is the anomaly being addressed by the current Election Rules. He submitted that the Rules preclude calling of witnesses unless they have sworn an affidavit and that if a party leaves out evidence they think is not of substance such a party runs a risk.

In response, Mr. Thiga for the Petitioner submitted that Rule 12 of the Election Rules does not contemplate a situation that the affidavit of a witness is the sole and exclusive evidence of that witness. In his view, the affidavit under Rule 12 (2) forms the basis of the evidence and a witness can expound on it and be cross examined on it. He stated that a witness cannot be limited to the affidavit. He invoked Rule 17 (1) (i) which gives the court power to give directions on the way evidence will be given. He stated that the Court is enjoined by Section 80 (1) Elections Act not to pay undue regard to technicalities and that if the intention of the Rule was to contain the witness to the affidavit there would have been no need to call the witnesses.

The court upheld the objection and directed that the witness confines himself to the contents of his

affidavit and reserved the reasons for the following day, 19th June 2013.

I wish to start by stating that the intention of the current electoral legal regime is to complete departure from the former where the evidence was kept sealed until the time of hearing. Unlike in the past when Elections Petitions could be heard for almost the entire parliamentary life, now the electoral disputes must be decided within strict timelines.

Rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules state as follows:

1. **A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial.**
2. **The affidavit under sub-rule (1) shall—**

(a) state the substance of the evidence;

(b) be served on all parties to the election petition with sufficient copies filed in court; and

(c) form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by the Petitioner on any contested issue.

The Elections Act and the Rules do not define the words “**substance of the evidence.**” The Concise Oxford English Dictionary (11 Edition) defines substance as “**solid basis in reality or fact; dependability or stability; the quality of being important, valid or significant; the most important or essential part.**” Other definitions found online include “**substantial, solid character or quality.**”

My view on the meaning of Rule 12 (2) is that the contemplated affidavit must include all the facts that a party wishes to rely on to establish a point. When the Constitutional provisions setting the time within which the Petitions must be heard and concluded, taken together with the right of access to information under Article 35 (1) (b) of the Constitution and the Overriding Objective of the Rules under Rule 4 the intention of Rule 12 (2) is put into perspective in my view. I want to believe that the Rule 12 (2) (a) and (c) contemplate a situation where the affidavit is detailed enough and discloses all the facts a party intends to rely on so that it can stand alone without expounding on it. Indeed the other party is left with the option to cross examine the witness on such an affidavit and the witness can then be re-examined on any contested issues. To my mind this means that it would suffice to file such an affidavit and perhaps annex to it any relevant material and leave the matter to the other party to cross examine.

Further, the intention of filing such an affidavit and serving it on the other party is to enable the other party enough time to rebut the evidence. If the situation were to be left fluid I doubt whether the determination of election disputes would be as fast as the law contemplates. This is because new matters would crop up every now and then whenever a witness takes to the witness box. This would have the effect of the other party seeking time to consult, seek instructions and prepare for rebuttal of the new evidence thereby derailing the proceedings. In my view this is what the electoral law is trying to address. For instance in this matter the witness had gone beyond his affidavit and started testifying about matters which in the court’s view would have required the Respondents to consult and seek instructions from their clients in order to rebut the evidence. Specifically the witness was talking about the Presiding Officer of Athibole Primary School Polling Station in Wajir West Constituency as being the Headmaster of that school and as coming from the same village as the Governor. This evidence is not in his affidavit and the danger of ambushing the Respondents is obvious. My view is that this is not a mere technicality as Mr. Thiga wants this court to believe.

Rule 12 (4) and (5) allows a witness for the Petitioner who has not filed an affidavit to seek leave by giving sufficient reasons for such an application. I wish to draw the parties’ attention to the fact that we spent the entire month of May 2013 on numerous mentions of this Petition when parties engaged the court on various applications before finally giving its directions on 3rd June 2013 on the way the Petition would proceed. All the parties, therefore, had adequate time to seek to file further or supplementary affidavits. I would therefore urge all the parties to conduct themselves within the provisions of the law in furtherance

of the Overriding Objective of the Election Rules. It is for these reasons that I upheld the objection by counsels for the Respondents.

S.N MUTUKU

JUDGE

Dated, signed and delivered on the 19th day of June 2013.