



REPUBLIC OF KENYA

Magistrate Courts

Election Petition 3 of 2013

EDWARD AKONGO OYUGI.....PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

JAIRUS OBAGA.....2ND RESPONDENT

ZAKARIAH OKOTH OBADO.....3RD RESPONDENT

RULING

1. This is a ruling on the objection taken by Mr. Sagana, Advocate, for the 3rd Respondent in regard to the reception of the evidence of Jared Billy Otieno in this Petition.
2. The Objection is premised on Rule 12 of the Election Petition Rules.
3. Mr. Sagana the Advocate for the 3rd Respondent submits that the said witness only has an affidavit that has been used as an annexure and thus the said witness has not sworn an affidavit in support of this petition.
4. Counsel relied on the checklist by the petitioner at page 6 where the Petitioner has listed only seven witnesses who all filed direct witness affidavit and that all the seven have been called before this court.
5. On his part Mr. Murugu Counsel for the 1st and 2nd Respondents has fully associated himself with the objection of Mr. Sagana, and submits that there is no affidavit to sustain cross-examination.
6. On her part Miss Ogutu, Counsel for the Petitioner submitted that the affidavit of Jared Billy Otieno contained on page 132 of the Petition was sworn for purposes of this petition and the rules say that a witness who has sworn affidavit may be allowed to give evidence.
7. She submits that it was inadvertent error that they did not place him as a witness. However, on page 4 of the pre-trial checklist his name was clearly indicated as one of those the petitioner relies on to support his case. That, the witness will be restricted to the contents of affidavit on page 132. She argues that the information therein will not prejudice the Respondents in anyway.
8. In his reply, Mr. Sagana argues that this is not inadvertent error on part of the Petitioner. That there is an annexure indicating all the witnesses they intend to call. Further, the petitioner filed further

affidavits and introduced new witnesses and Jared Billy Otieno was one part of the witnesses. He contends that the petitioner deliberately called Peter Njaga who swore an affidavit notwithstanding that his affidavit had been used as annexure by Jared Omach. We did not address the evidence introduced by this annexure, and so it will be a great prejudice.

9. To make a determination in this matter, the court will be guided by Rule 12 of the Election Petition Rules which provides guidance on witness affidavits. The said rule 12 provides at sub rule (1) thus:

(1) Every petitioner shall at the time of filling the petition also file an affidavit sworn by each witness whom the petitioner intends to call at the trial, setting out the substance of the evidence.

13. The said rule further provides that the affidavit shall form part of the trial and a deponent may be cross-examined by the Respondents. In absence of such affidavit being filed as is required the court will be reluctant to allow such evidence.

I note that no sufficient reason has been given as to failure to deliver the said affidavit. Miss Ogutu has merely stated that the failure to file the witness affidavit was inadvertent on their part. I am not persuaded that that is the case. A list of the witnesses for the petitioner is provided at page 6 of the pre-trial checklist filed in this court on 21.5.2013 and clearly Jared Bill Otieno is not in the list. His affidavit at page 132 of the Petitioner's document is an annexure and is not an affidavit such as is envisaged under Rule 12 of the Election Petition Rules.

14. Consequently, the said witness is not permitted to give evidence. Had leave of this court been sought and with sufficient reason given then court would have considered the application. The upshot of this is that the said Jared Billy Otieno is not permitted to give evidence in support of the petition herein. He is not properly before court. The law does not operate in a vacuum, and Rule 12(4) precludes a witness who has not sworn an affidavit setting out the substance of the evidence, from giving evidence.

It is accordingly ordered.

**E.N. MAINA
JUDGE**

Dated, delivered and signed at Homa Bay this 11th day of June 2013

In presence of:

Mr. Mwenesi & Miss Ogutu Advocates for the Petitioner

Mr. Murugu Advocate for the 1st and 2nd Respondents

Mr Sagana Advocate for the 3rd Respondent

Risper Court Interpreter.