



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Election Petition 8 of 2013**

**BENJAMIN OGUNYO ANDAMA.....  
PETITIONER**

**V E R S U S**

**1. BENJAMIN ANDOLA ANDAYI..... 1<sup>ST</sup>  
RESPONDENT**

**2. SELLY CHESANG, (RETURNING OFFICER)..... 2<sup>ND</sup>  
RESPONDENT**

**3. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ..... 3<sup>RD</sup>  
RESPONDENT**

**R U L I N G**

**Background**

1. On the 14<sup>th</sup> May 2013 when this Petition came up in court, for pre-trial conference, the parties counsel present, Mr. Simiyu for the petitioner, Mr. Mamba for the 1<sup>st</sup> Respondent and Mr. Odhiambo for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents agreed that counsel for the petitioner be granted leave to file and serve 4 further affidavits, so long as the said affidavits did not materially change the position of the petition.

2. As a consequence of the above consent by counsel for the parties, the court ordered as follows –

- i) Petitioner granted four (4) days to file and serve further affidavits.
- ii) Respondents granted four (4) days from service to file and serve their responses.

3. The Pre-trial conference was then set for 22/05/2013 at 9.30 a.m., by which time parties counsel were to file the pre-trial questionnaire forms.

4. When the matter came up on 22/05/2013, none of the parties counsel had filed the pre-trial questionnaire forms, and the court was informed that an application dated 21/05/2013 had just been filed on the 22/05/2013 by counsel for the 1<sup>st</sup> respondent. After some brief explanations were given to the court on the prevailing situation of the matter by the counsel for the parties, it was agreed that the said application be canvassed through written submissions.

5. Mr. Kiarie, learned counsel who appeared for the 1<sup>st</sup> respondent, who had filed the application in question, agreed that the submissions should only relate to the ground that the further affidavits materially changed the position of the petition, and that the applicant would not pursue the ground that the further affidavits were not served within the time allowed by the court. The court then allowed the parties counsel to canvass the application through written submissions. The matter was put for mention on 30<sup>th</sup> May, 2013. The parties counsel thereafter duly filed their respective written submissions.

**1<sup>st</sup> Respondent's Application.**

6. The application filed by the 1<sup>st</sup> respondent by way of Notice of Motion was filed under **Section 76 (3) and (4) of the Election Act (Cap. 24) and Rules 10 (1) (e), & 3 (b) of the Election (Parliamentary and County Elections) Petition Rules 2013** (herein the Election Petition Rules 2013). It sought one substantive order as follows –

**THAT the court be pleased to strike out and/or expunge the further affidavits filed by the petitioner pursuant to leave granted on the 14<sup>th</sup> of May 2013 (that is) –**

**(a) further affidavit of the petitioner filed on 17<sup>th</sup> May 2013;**

**(b) an affidavit of Zedekia Eshitika Okuyumbi filed on 15<sup>th</sup> May 2013;**

**(c) an affidavit of Stephen Amani Ebitaro filed on 15<sup>th</sup> May 2013;**

**(d) an affidavit of Peninah L. Otuma filed on 15<sup>th</sup> May, 2013.**

It also seeks that costs of the application be provided for.

7. The main grounds in support of the application, in my view, are that the said four affidavits, introduced new evidence and grounds which had not been pleaded in the petition through the back door; that if allowed to stand, the said affidavits would materially alter the nature of the petition to the prejudice of the 1<sup>st</sup> respondent; that if allowed such amendment to the petition would have been done without leave of the court; and the said amendments to the petition would have been done outside the time allowed under the Election Act.

8. The application was supported by an affidavit sworn by the 1<sup>st</sup> respondent **Benjamin Andola Andanyi** on 21<sup>st</sup> May 2013. In the said affidavit, it was deponed *inter-alia* that the said further affidavits were an amendment to the petition as they contained matters that were not pleaded in the petition. Examples of such expansion deponed to were the allegations of bribery to voters contained in the affidavits of **Stephen Amani Ebitaro** and **Zedekiah Eshitika Okuyumbi**; and the allegation of the Presiding Officer at Mwihila Hospital polling station tricking illiterate voters to vote for the 1<sup>st</sup> respondent. It was also deponed that the further affidavit of the petitioner sought to introduce allegations of election irregularities in new polling stations that is **Emeene Nursery School (059), Shirali Primary School (072), Emalindi Primary School (024), Mwikalikha Primary School (008), Elukanji Primary School (013), Mulwanda Primary School (63), Emanyata Tea Buying School (032), Shiongo Primary School (057) and Enyanga Primary school.**

9. It was emphasized in the affidavit that under **rule 10 (e) of the Election Petition Rules 2013**, an election petition should contain all grounds to be relied upon. In addition, under **rule 10 (2) (b) of the Election Petition Rules 2013**, the supporting affidavit of the petitioner and his witnesses filed with the petition were required to contain all the grounds and facts to be relied upon. Consequently, introducing new disputes and evidence through further affidavits would have the effect of amending the petition through the back door.

10. It was lastly deponed that the time allowed for emending or filing a supplementary petition

had already lapsed in accordance with the provisions of **section 76 (3) and (4)** of the **Election Act**.

### **Submissions in support of the Application.**

11. In the written submissions in support of the application, counsel for the 1<sup>st</sup> respondent, after summarizing the complaints raised in the application, urged three issues for this courts determination.

12. Firstly, counsel addressed the issue as to whether allegations of fraud, voter bribery and collusion which were raised in the four further affidavits should have been specifically pleaded in the petition. In counsel's view, that is the position. Counsel relied on the provisions of **Rule 10 (1)** of the **Election Petition Rules 2013** which states under item (e) that the grounds on which the petition is presented must be stated in the petition. Counsel further relied on the Ugandan High Court case of **Ongole James Michael -vs- Electoral Commission & Ebukalin Sam – Election Petition No.0008 of 2006** – where the court stated that an allegation of fraud must be specifically pleaded. Reliance was also placed on the Nigerian Supreme Court case of **Chief Onwuka Kalu (a.k.a.) Okpuzu -vs- Dr. Kai Orji Johnson Uzor & Others – suit No. CA/PH/EPT/3/7/05** where the court emphasized that parties were bound by their pleadings and would not be allowed to set up in court a case which was at variance with the pleadings.

13. Reliance was also placed on the English case of **Piche vs Big C First Nation 1994 Canlii 5005 (SK QB)** in which **Genein , J.** stated that conspiracy must be pleaded with clarity. Lastly, on this point, reliance was placed on the British Columbian Supreme Court case of **Wakabayash -vs- Towing, 1990 Canlii 1798** wherein it was held that parties were bound by their pleadings and could not be allowed to raise a different case without amendment.

14. The second issue argued by counsel for the 1<sup>st</sup> respondent was on whether the affidavits that alleged fraud, voter bribery, collusion and conspiracy should be struck out, as according to counsel, these allegations were not pleaded in the petition. Reliance was placed on the Ugandan case of **Ongole James** (supra). Reliance was also placed on the case of **Wakayabash** (supra) and the case of **Chief Onwuka Kalu (a.k.a.) Okpuzu –vs- Dr. Kalu Orji Uzor** (supra).

15. Thirdly, counsel addressed the issue of whether evidence in an election petition can be called without the complaint or allegations being specifically pleaded in the petition. On this issue, counsel relied upon the case of **Mwakileo -vs- Mwamzandi & Another – High Court Election Petition No. 25 of 1979 – [2008] I KLR 231** where the court held that evidence of allegations not pleaded will not be allowed. Reliance was also placed on the Supreme Court of Nigeria case of **Kalu Njoku -vs- Ukwu Eme – suit No. 154/1967** where the court held that evidence that was at variance with the pleadings should be disregarded by the court. Reliance was also placed on another Nigerian Supreme Court case of **Comrade Adama Aliyu Oshiombe –vs- Charles Ehigie & Others – suit No. SC. 473/2013** wherein it was held that where a petitioner relied on a ground to question a petition, it would amount to substantial injustice to the adverse party to a petition if the court was to go looking for other grounds to question the petition, as the court had a duty to ensure that parties were at all times on a level playing field. Counsel was of the view that the four further affidavits should not be allowed to stand on this ground.

### **Petitioner's Response -**

16. The petitioner through counsel, in his written submissions in opposition to the application, started by highlighting the substance of the petition. Counsel then went on to compare what was in the subject affidavits sworn by **Benjamin Andama** (the petitioner), **Zedekiah Eshitika Okuyumbi**, **Stephen Amani Ebitaro** and **Peninah Otuma** with what was contained in the petition.

17. Counsel relied on **Rule 12** of the **Elections Petition Rules 2013** which states that affidavits should contain the substance of the evidence. Counsel submitted that once an affidavit was filed in an election petition, it becomes part of the inseparable court record as contemplated by **Rule 12 (2) (c)**, and the court could therefore not dismember it by striking it out. In counsel's view, the only ground upon which an affidavit filed might be struck out by the court was for being scandalous, irrelevant or oppressive. In this regard, counsel relied on **rule 12 (6) of the Election Petition Rules 2013 and Order**

## **10 rule 6 of the Civil Procedure Rules.**

18. Counsel submitted also that the case authorities relied upon by the 1<sup>st</sup> respondent, especially the Nigerian decisions, were not applicable to the present case, as they were based on the 1999 Constitution of the Federal Republic of Nigeria which was materially different from the Kenyan situation under **Article 159 of the Constitution of Kenya 2010**, which enjoined courts to apply substantive justice without undue regard to procedural technicalities. Reliance was also placed on the case of **Multiserve Oasis Co. Ltd. –vs- Kenya Ports Authority & Another [2012] eKLR**.

19. Counsel further relied on **Article 81 of the Constitution of Kenya 2010** which underpinned the freedom of citizens to exercise their political rights under **Article 38**. Counsel also argued that **Article 86 of the Constitution of Kenya 2010** imposed a duty on the 3<sup>rd</sup> respondent, the Independent Electoral and Boundaries Commission to ensure that the system used in elections was impartial, neutral, efficient, accurate, and accountable. Counsel emphasized that Article 159 of the Constitution of Kenya 2010 enjoined courts to administer substantive rather than procedural justice.

20. Lastly, counsel for the petitioner submitted that the 1<sup>st</sup> respondent should have applied to the court to be provided with particulars of the averments in the petition which they thought were unclear, instead of resorting to this present application. Reliance was placed on **Halsbury's Laws of England fourth edition page 877**.

## **2<sup>nd</sup> and 3<sup>rd</sup> Respondents Response -**

21. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their counsel's written submissions, supported the application. Counsel highlighted the new facts or disputes raised in the further affidavits as follows –

- a) the allegation of failure to extract the right statistics to the disadvantage of the petitioner – in paragraph 8 of the petitioner's further affidavit;
- b) the introduction of new disputed polling stations in paragraph 10 of the petitioner's further affidavit;
- c) the allegation of the demotion of an electoral official due to illegal practices at Enyanya polling station – in paragraph 12 of petitioner's further affidavit.
- d) the allegation of collusion to defeat the will of the voters at Mwhila Hospital polling station – in the affidavit of Penina Otuma;
- e) the allegations of vote bribery in the affidavits of Zedekiah Eshitika and Stephen Amani.

22. On whether the new matters raised in the further affidavits were proper vide the leave granted by the court on 14<sup>th</sup> May 2013, counsel submitted that **rule 10 (3) of the Election Petition Rules 2013** provided that a petition must be filed with an affidavit containing the facts and grounds relied upon. In addition, under **rule 12 (1)** the affidavits of each intended witness were to be filed with the petition. Counsel relied on the English case of **Cremer –vs- Lowles [1986] CA** and submitted that in that case, the court struck out additional particulars based on general offences pleaded in the petition. Counsel emphasized that the general reliance by the petitioner to violations relating to form 35, could not validate or cure the filing of further affidavits which contained further facts or disputes, unless leave was sought and obtained from court under **rule 20 of the Election Petition Rules 2013**. Counsel urged the court to find that the further affidavits contravened the leave granted by the court.

23. On whether a supporting affidavit by a witness in an election petition could contain grounds which amended the petition, counsel relied on **rule 12 (2) (a) of the Election Petition Rules 2013** which provided that the affidavit should merely state the substance of the evidence. Therefore, in counsel's view, a witness affidavit in an election petition cannot contain grounds. Counsel cited the affidavit of Peninah Otuma on collusion in marking illiterate voters ballot papers against their wishes, which in

counsel's view, was a new ground. Also, the allegation of voter bribery of 200/= contained in the affidavit of Amani Ebitaro is a new ground. The allegation in paragraph 12 of the affidavit of Zedekiah Eshitaka Okuyumbi of bribery to voters of Kshs.700/= was also, in counsel's view, a new ground.

24. Counsel emphasized that affidavits were meant to contain evidence, not grounds. The court was urged to strike out the further affidavits, as well as the affidavits filed in support of the petition, as the said affidavits had illegally expanded the scope of the petition.

25. The counsel who appeared in court on the 30<sup>th</sup> May 2013, Mr. Omwanza and Mr. Mamba for the 1<sup>st</sup> respondent, Mr. Kiveu for the petitioner, and Mr. Masake for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, adopted the written submissions filed and elected not to make oral highlights. .

### **Court's Decision.**

26. Arising from the above, the court now proceeds to consider and make its decision.

### **General observations**

27. This is an application that seeks the striking out of further affidavits filed by the petitioner. The said four affidavits were filed following a court order made on 14<sup>th</sup> May 2013 by consent of the parties. The contents of the further affidavits filed are however alleged to have contravened the terms of the said court order.

28. Courts have been slow to strike out documents filed in court proceedings – see **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd. [2011] KLR** where *Ringera, J.* as he then was, stated that –

***“deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not be treated as nullifying the legal instrument so effected.”***

29. In addition, this is a matter that relates to an election petition and the courts have held that elections petitions are not ordinary private disputes between the parties, since elections are an exercise in the facilitation of the democratic rights of the people to choose persons of their choice to represent them – see **John Kiarie Waweru -vs- Beth Mugo & 2 Others [2008] eKLR**. Therefore, in making its decision in election petitions, the court has to bear in mind the effects that the decision will have on the exercise of the democratic right of the people to choose a representative of their choice as enshrined under **Article 38 of the Constitution of Kenya 2010**.

### **Whether Affidavits once filed in an Election Petition form an Integral part of the Record of the Trial and Cannot be Struck Out.**

30. Counsel for the petitioner has strongly argued this point and relied on **rule 12 (2) (c) of the Elections Petition Rules 2013**. His view is that they form part of the record and cannot be struck out. I have perused the rule. It states as follows -

**12 (2) The affidavit under sub-rule (1) shall –**

- (a) .....
- (b) .....

**( 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 issue.**

31. The first point to note here is that, the above provisions of the rules relates to the affidavits filed with the petition and not affidavits filed by the petitioner subsequent to filing the petition like in the

present case. Secondly, the above rule appears to be almost a reproduction of **Rule 18 (3) of the former National Assembly Elections (Election Petition) Rules 1993** which reads –

***“The affidavit shall be read by or on behalf of the witness and shall form part of the record of the trial and a deponent may be cross-examined by the petitioner.”*** (underlining mine).

32. The court has had occasion, under the 1993 Rules, to consider whether it could strike out such an affidavit filed in an election petition or parts of the same. In the case of **Reuben Nyanginja Ndolo - vs- Dickson Wathika and Others [2008] eKLR Wendoh, J.** stated –

***“There is nowhere the rule states that once the affidavit is read to the court it becomes part of the record of the trial. Just like oral evidence, if it is irrelevant or contains hearsay or the evidence is inadmissible, it may be objected to before it forms part of the court record. It can only form part of the record if it complies with Order 18 Civil Procedure Rules and is relevant.”***

33. The petitioner’s counsel himself has stated in submissions herein, that an affidavit that is scandalous, irrelevant and oppressive can be struck out. I hold that in appropriate cases, an affidavit filed either with the petition or subsequent thereto can be struck out by the court. Each case has to be considered on its own merits.

### **Is there Justification to Strike out the Four Affidavits?**

34. Though it has been suggested in arguments in this application that the affidavits in election petitions may contain both the grounds and substance of the evidence my reading of Rule 12 and 15 of the Election Petition Rules 2013 convinces me that the affidavits from witnesses (except the petitioner) are to contain the substance of the evidence. The relevant parts of the Rules state as follows –

***12 (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.***

***15. (1) A respondent shall at the time of filing a***

***response to the petition file an affidavit sworn by a witness whom the respondent intends to call at the trial, which affidavit shall set out the substance of the evidence.***

35. The deponents are described in the rules as witnesses. They are to give evidence through cross-examination and re-examination on the evidence contained in the respective affidavits. The only affidavit that is to contain grounds and set out the reliefs sought, is that to be filed by the petitioner with the petition under **Rule 10 (2) (b)**. In my view, the four further affidavits could not purport to introduce new parameters in the petition, without leave of the court.

36. The four further affidavits were filed pursuant to an order of the court which was specific **“that they were to be filed provided that they do not materially change the position of the petition”**, and had to comply with this condition.

37. I have perused the four further affidavits filed by the petitioner pursuant to the court order. I agree with the position taken by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the said four (4) affidavits introduce new complaints or disputes which were not pleaded under paragraph 12 of the petition. The new disputes are the alleged failure by the 3<sup>rd</sup> respondent to extract correct statistics; the introduction of additional disputed polling stations; the alleged demotion of an electoral official due to illegal election activities at Enyanya Polling Station; the additional allegation of collusion to defeat the will of voters at Mwhila Hospital Polling Station; and some additional complaints of bribery contained in the affidavits of

Zedekia Eshitika and Stephen Amani.

38. The further affidavits as per the court order, were only meant to clarify or amplify the specific complaints raised under paragraph 12 of the petition, which gives the particulars of the election disputes. They were not meant to materially change the position of the petition. Since the contents of the said further affidavits raise disputes or complaints not contained in paragraph 12 of the petition, if they are allowed to stand, they will have the effect of materially changing the position of the petition. It is therefore my finding that the four further affidavits filed by the petitioner do not comply with the pre-conditions for leave granted by the court to file the same, and they have to be struck out.

**Whether the Affidavits filed with the Petition Should also be Struck Out.**

39. In submissions, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents suggested that, the court should also strike out the affidavits filed with the petition, as they attempted to expand the grounds in the petition. Firstly, there is no such prayer to strike out the said affidavits in the present application. Secondly, I must state that there were no pre-conditions set by the court for filing the said affidavits. Thirdly, the law and rules require that the petition should be filed with affidavits from the petitioner and witnesses giving the substance of the evidence. In my view, the said affidavits which were filed with the petition, broadly complied with the law. As to the relevance of what they contain, that is for the court to determine at the appropriate time in the process of hearing of the petition. It is no ground for striking out the said affidavits filed with the petition merely because a party thinks that the affidavits contain more than what they should contain. Obviously, **Article 159 of the Kenya Constitution 2010**, will require that they stand as filed, for substantive justice to be done to all parties. The relevance of the contents will be tested at the trial. I decline to strike out the affidavits filed with the petition.

40. I wish to acknowledge the case authorities cited to me by counsel for the parties. However, I am of the view that the same might be relevant to the main hearing not at this preliminary stage.

**Conclusion.**

41. In the conclusion, I allow the application and strike out from the record the four affidavits filed by the petitioner pursuant to the leave granted by the court on 14<sup>th</sup> May 2013. Costs of the application will however, follow the decision in the petition.

***Dated and delivered at Kakamega this 6<sup>th</sup> day of June, 2013.***

**George Dulu**

**JUDGE**