



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Election Petition 1 of 2008**

**IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL  
ELECTIONS ACT CHAPTER 7 LAWS OF KENYA  
AND REGULATIONS MADE THEREUNDER**

**AND**

**IN THE MATTER OF: THE ELECTION FOR THE MATUGA  
CONSTITUENCY**

**AYUB JUMA MWAKESI .....PETITIONER**

**VERSUS**

**MWAKWERE CHIRAU ALI .....1<sup>ST</sup> RESPONDENT**

**ALI MAALIM HASSAN .....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

On the 22<sup>nd</sup> day of September 2008, Ayub Juma Mwakesi (P.W.1), the petitioner herein, took the witness stand. He began his testimony by reading the contents of his affidavit pursuant to the provisions of Rule 18 (3) of the National Assembly Election [Election Petition] Rules. The hearing was adjourned to 23<sup>rd</sup> September 2008 for the cross-examination and re-examination of the Petitioner. When the 1<sup>st</sup> Respondent's advocate was called upon to cross-examine the Petitioner, the learned advocate made an oral application under Order XVIII of the Civil Procedure Rules and under the provisions of the Oaths and Statutory Declarations Act to have paragraphs 5,6,7,25 and 27 of the aforesaid affidavit to be struck out. Mr. Mogaka, learned advocate for the 1<sup>st</sup> Respondent, also applied for paragraphs 1,2 and 8 of the affidavit of Juma Hamisi Mwakishando (P.W.2) to be struck out. The learned advocate further applied for the affidavit of Fatuma Hamisi Masito (P.W.3) to be struck out. All the three witnesses were stepped

down for cross-examination and re-examination pending the outcome of the objection.

It is the submission of Mr. Mogaka, that the documents annexed to the affidavits of P.W.1, P.W.2 and P.W.3 were not sealed as stipulated under rule 9 of the Oaths and Statutory Declarations Rules. It is pointed out that the aforesaid annexures were not sealed with the seal of the Commissioner for Oaths. It is also further argued that the affidavits do not state that the annexures are attached as exhibits hence according to Mr. Mogaka, the documents remain as mere pieces of paper. The learned advocate referred to the following decisions i.e.

- (i) **Mombasa H.C.C.C. NO. 11 of 2003 ArunKumar Nanji Vaghela =vs= Barclays Bank (K) Ltd.**
- (ii) **Milimani commercial H.C.C.C. 283 of 2006 Weetabix Ltd =vs= Healthy U Two Thousand Ltd**
- (iii) **Milimani Commercial (H.C.C.C. no. 1251 of 2002 Cowest Trading GMBH. =vs= Specialized Lighting Systems.**
- (iv) **Milimani commercial H.C.C.C. no. 1474 of 2001 Diamond Trust (K) Bank =vs= Garex (K) Ltd and 3 others.**

The second issue raised by Mr. Mogaka, is that the aforesaid

Affidavits were based on information but not knowledge hence they should be disregarded.

Mr. Munyithya, learned advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents adopted the submissions of Mr. Mogaka and urged this court to strike out the aforesaid affidavits.

Mr. Balala, learned advocate for the petitioner urged this court to dismiss the oral application because the affidavits of P.W.1, P.W.2 and P.W.3 were not in contravention of the law. Mr. Balala argued that the authorities relied upon were irrelevant and distinguishable hence inapplicable to this case.

I have considered the able submissions presented by learned Counsels from both sides. I have also perused the affidavits of P.W.1, P.W.2 and P.W.3 plus the authorities tendered to this court. Rule 18 (7) of the National Assembly Election [Election Petition] Rules imports the application of the provisions of order XVIII of the Civil Procedure Rules and the provision of the Oaths and Statutory Declarations Act to the affidavits made under rule 18 of the National Assembly [Election Petition] Rules. This court has been urged to strike out certain paragraphs of the affidavits P.W.1, P.W.2 and P.W.3. It is said the annexures should be expunged because they are not sealed as required under Section 8 of the Oaths and Statutory Declarations Act and under rule 9 of the Oaths and Statutory Declaration Rules. I have perused the aforesaid paragraphs. Section 8 of Oaths and Statutory Declarations Act specifies the form in which an affidavit should be made. Rule 9 of the rules embodied therein states that all exhibits must be securely sealed thereto under the seal of the commissioner. I have critically looked at the affidavits of Ayub Juma Mwakesi, Juma Hamisi Mwakishando and Fatuma Hamisi Masito and I am convinced that the aforesaid affidavits are in the format stated by Section 8 of the Oaths and Statutory Declarations Act and under Rule 10 of the rules herein. I find that the provisions of Section 8 have not been breached. A serious issue which came out for my decision is whether or not the annexures attached to the affidavit comply with the provisions of rule 9 of the Oaths and Statutory Declarations Rules. It is said that the same were not produced as exhibits but were just annexed to the affidavit. It is also said that the same were not sealed. I have anxiously considered these issues. In order to understand the nature of the arguments arguable here, it is necessary to discover the meaning of the words annex, exhibit and seal. I will heavily rely on the meaning given in **Blacks Law Dictionary 8<sup>th</sup> Edition.**

- (i) **Annex is stated to mean something that is attached such as a document to a report.**
- (ii) **Exhibit is said to be a document, record or other tangible object formally introduced as**

**evidence in court. An exhibit is also said to be a document attached to and made part of a pleading motion, contract or other instrument.**

**(iii) Seal is said to mean a design embossed or stamped on paper to authenticate, confirm or attest. It is also said to be an impression or sign that has legal consequences when applied to an instrument.**

What happened in this case? The Commissioner for Oaths stamped and signed the jurat of the aforesaid affidavits. In the jurat, the Commissioner has stated the place and the date the affidavit was taken. The jurat also contains the name of the Commissioner. In this respect, the affidavits are in compliance with Section 5 of the Oaths and Statutory Declarations Act. It also conforms with the form given in the third schedule as per rule 10. The annexures are stamped, dated, identified and signed in terms of rule 10. It is said that the same have not been sealed and produced as exhibits. I have already set out the meaning of the word seal. It means to emboss or to stamp on a paper to authenticate, confirm or attest. The Commissioner in this case has stamped which means he has sealed. It is said the annexures have not been produced as exhibits but were instead annexed. It is true that the deponents of the aforesaid affidavits each stated that they annexed the documents marked and identified. I have been urged to find that since the deponents have not exhibited the documents then they should be regarded as hearsay and hence mere pieces of paper. On the face value, that suggestion appear to be attractive. However a critical perusal of the annexures will reveal otherwise. The stamp on the annexures provides as follows:

“This is the exhibit marked ..... referred to in the affidavit/declaration of ..... sworn/declared before me at Mombasa this ... day of ..... 2008.

“COMMISSIONER FOR OATHS”

It is obvious that the documents were marked and produced as exhibits. It would appear Mr. Mogaka did not read the affidavits in conjunction with the annexures. The two documents must be read together and not in exclusion of each other. When the aforesaid documents are read together one will come to the conclusion that the words annexures and exhibits are used.

The other ground raised by the Respondents is to the effect that the affidavit being final evidence, one must rely on facts within his knowledge and not on information or belief. I agree with Mr. Mogaka, that under order XVIII rule 3 (I) of the Civil Procedure rules, affidavits in proceedings such as these must be confined to facts the deponent is able of his own knowledge to prove. However, there is a rider that an affidavit may contain statements of information and belief showing sources and grounds thereof with the permission of court. It would appear therefore that an affidavit may not be rendered fatally defective if it contains statements based on information and belief. The court in receipt retains the sole discretion to accept or reject the same. What did the deponents state in their affidavits? In the last paragraphs of the affidavits of P.W.1, P.W.2 and P.W.3, the deponents stated as follows”

**“That what I have stated hereinabove is true to my own knowledge save otherwise stated and sources disclosed.”**

It is clear from the above revelation that the objection lacks merit.

The last objection which was argued is to the effect that the affidavits were not made in the first person. In other words Mr. Mogaka was of the view that the same were in breach of the provisions of Order XVIII rule 5 of Civil Procedure rules. I have perused at all the paragraphs of the affidavits deponed by P.W.1, P.W.2 and p.w.3. I find that they are made in the first person. It starts with ‘I’ or ‘we’. Perhaps what may have provoked Mr. Mogaka to raise the objection is when a deponent used the plural of “we” instead of ‘I’. With respect, that defect cannot make this court find that the affidavits are not made in the first person. I see no merit in the objection.

Having considered both the oral submissions made by learned counsels from both sides and the material placed before this court plus the authorities cited. I have come to the conclusion that the

objection has no merit. The same is dismissed with costs to the Petitioner. Let the Respondents if they so wish proceed to cross-examine the witnesses who were stepped aside pending the outcome of the objection.

**Dated and delivered at Mombasa this 24<sup>th</sup> day of September 2008.**

**J. K. SERGON**

**J U D G E.**