



REPUBLIC OF KENYA



Shafat v Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E001 of 2022) [2023] KEHC 1096 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
ELECTION PETITION APPEAL E001 OF 2022**

M MUYA, J

FEBRUARY 16, 2023

BETWEEN

SALAH HASSAN SHAFAT APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

IBRAHIM ABDI FARAH 2ND RESPONDENT

HASSAN DAHIR NOOR 3RD RESPONDENT

(Being an appeal from the entire ruling of the Chief's magistrate's court at Garissa Hon. H. M. Nyaberi delivered on 15th day of November, 2022 in Garissa Magistrate's Court Election Petition Number E002 of 2022)

RULING

1. Background

1. This appeal is brought pursuant to rule 34, of the [*Elections \(Parliamentary and County Elections\) Petition Rules 2017*](#).

The grounds are that:

- a. The Honourable magistrate erred in both Law and in fact in failing to appreciate the proper effect and purport of the facts and circumstances on record in arriving at a decision which is not supported by the evidence on record, in effect the Hon. Magistrate erroneously struck out the petitioners petition.
- b. The Honourable magistrate erred in law and in fact in failing to appreciate that Mr Shaban Alex advocate was merely holding brief for the Petitioner's advocate on record MMA Advocates LLP and as a result reached an erroneous conclusion.



- c. The Honourable magistrate erred in Law and fact by failing to appreciate that Mr Kipyegon of MMA LLP has been on record and Mr Shabaan Alex was holding brief for Mr. Musota for the Petitioner and appeared alongside Mr Kipyegon and as a result reached an erroneous conclusion.
- d. That the Honourable magistrate erred in law and in fact by failing to appreciate the fact that Mr. Shabaan Alex advocate was holding brief for Mr. Masota for the Petitioner and was appearing alongside Mr. Kipyegon of MMA Advocates LLP.
- e. The Honourable magistrate erred in law and fact by failing to address himself to the fact that no conflict of interest could arise where an Advocate holds brief for another counsel since he does not have an interest on the outcome of the case hence reaching an erroneous conclusion.
- f. The Honourable magistrate misdirected himself in law and fact by failing to appreciate that the impugned affidavits were drawn by MMA Advocates LLP who are the Advocates formally on record for the Petitioner and were commissioned by Shaban Alex advocate a partner at Shaban Alex Advocates LLP and in effect erroneously struck the petition.
- g. The Honourable magistrate misdirected himself in law and fact by failing to appreciate that Mr. Shabaan Alex was not acting for petitioner when he administered the oath and in effect erroneously struck out the petition.
- h. The Honourable magistrate misdirected himself in law and fact by failing to appreciate that Mr. Shabaan Alex was not Acting for the Petitioner when he administered the oath and in effect erroneously struck out the Petition.
- i. The learned magistrate misdirected himself in law and in fact by grossly misinterpreting the provisions of section 4(1) of [Oaths and Statutory Declarations Act](#) with the resultant effect that the whole ruling was erroneous.
- j. That the learned magistrate erred in Law and fact by misapplying the decision in [Stephen Mogaka v IEBC & 2 others](#) (2017) eKLR and [Lee Njiru v JK Lokorio & another](#) (2019) eKLR which dealt with a Commissioner commissioning affidavits drawn by own firm where the Commissioner works unlike the instant case where Mr Shabaan Alex Advocate is not an employee of the Petitioner's firm on record - MMA Advocates LLP and in effect the resultant ruling was erroneous.
- k. The Honourable magistrate misdirected himself in law and in fact by holding that the supporting affidavits and the witness statements are bad in law for offending section 4(1) of the [Oaths and Statutory Declarations Act](#) and in so holding failed to appreciate that the affidavits were commissioned before Mr Shabaan Alex held brief in the matter hence reaching an erroneous conclusion.
- l. That the Honourable magistrate misdirected himself in law and in fact by elevating technical points of Law above the constitutional edict under article 159 (2) (d) of the [Constitution](#) which enjoins the Court To Administer Justice without undue regard to technicalities and in effect the resultant ruling was erroneous.
- m. All in all the Honourable magistrate so misdirected himself on matters of both law and fact by failing to accord the appellant a chance to be heard hence miscarriage of Justice.

2. The Appellants Case

2. It's the appellants case that the impugned affidavits were commissioned by Shabaan Alex Advocate.
3. That at the time he was commissioning the documents he was not an Advocate for the appellant/petitioner. That the Advocate on record for the Petitioner was MMA & Co Advocates. Mr Shabaan



Alex Advocate was practicing under the name of Shaban & Co Advocates LLP. He was not a partner in the firm of MMA & Co Advocate LLP who drew the petition.

4. That during the hearing of the petition he was holding brief for Musota Advocate together with Mr. Kipyegon who was a partner in MMA & Co Advocates.
5. It is submitted that the ruling by the Learned magistrate offends article 159 (2) (d) of the Constitution that invites the courts to give effect to Substantive Justice as opposed to over reliance on technicalities counsel for the petitioner has sought to distinguish the case of: Stephen Mogaka which the Respondents relied on. In that the Mogaka case, the Commissioner of oaths was an Advocate on record and was working for Musyoki and Mogaka Advocates. Shaban does not work for MMA & Co Advocates.

3. Respondents Case.

6. The Appeal is opposed. It is submitted that the affidavits offend section 4 (1) of the Oaths and Statutory Declarartions Act.
7. It is contended that Shaban Advocate appeared in court for the Petitioner alongside Mr Kipyegon.
8. Witnesses testified that their documents were commissioned by Mr Shaban Advocate.
9. That Mr Shaban did concede this fact. It's the Respondents contention that the Advocate Mr Shaban had interest in the Petition as he was holding brief.
10. It is further submitted that article 159 (2) (d) of the Constitution is not a cure in that cap 15 of the Laws of Kenya is a Substantive Act.
11. Further that Mr Shaban was in a very active Participation in the Petition hence exhibiting a lot of interest.

4. Analysis And Determination.

12. This appeal largely revolves around the applicability of the Provisions of Section 4(1) of the Oaths and Statutory Declarations Act Cap 15 of the Law of Kenya which provides;
“(1) A Commissioner for oaths may by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical, and in matters relating in the registration of any instrument whether under an act or otherwise and take any bail or recognizance in the High Court or any sub- ordinate court.
13. Provided that a Commissioner for oaths, shall not exercise any of the powers given by this section in any proceedings or matter in which he is the Advocate or any of the parties in the proceedings or concerned in the matter, or clerk in any such Advocate or in which he is interested.
14. In this appeal it is not denied that one Shaban Alex Advocate Did Commission the Petitioners documents. It is also not denied that he did participate in the hearing of the petition while holding brief and while alongside Mr Kipyegon Advocate. This Mr. Kipyegon is said to be a partner in the firm of MMA & Co Advocates which drew the petition.
15. It is not disputed that Mr. Shaban Alex Advocate runs his own Law firm going by the name of Shaban Alex Advocate & Co LLP.



16. From the above its evidently clear that Mr Shaban Alex Advocate who commissioned documents for the Petitioner was not the Advocate for the petitioner. He was holding brief. Counsel Mr Musota invites the court to find that Mr Shaban was holding brief for him.
17. It is the Respondents contention that Mr Shaban Alex Advocate extensively participated in the hearing of the petition when at the same time he was the one who had commissioned documents for the Petitioner. It is that role of extensive participation in the hearing of the petition that the Respondents argue made him acquire substantive interest in the matter.
18. The issue of extensive participation in the hearing is denied on the ground that Mr Shaban appeared only twice during the proceedings.
19. Unfortunately, there is no definition of what amounts to “interest” and or “concern” as envisaged under Section 4 (1) of the *Oaths and Statutory Declarations Act* Cap 15 of the Laws of Kenya. What appears clear in my mind is that an Advocate holding brief cannot be said to be the Advocate on record. There have to be an Advocate on record for another one to hold his brief. There ought to be no confusion on their different and distinct roles.
20. As noted above there is no definition of “concern” and or “interest” In the Act, the word “interest” presents very many facades. It includes, pecuniary interest, mutual interest, legal interest, conflict of interest, professional interest and a myriad of other interests.
21. It was incumbent upon the Respondents to establish what interest Mr Shaban Alex had in the matter. This they have failed to do. I have perused the authorities relied upon by the Respondents and I find they are distinguishable from the present election appeal. I do not deem it appropriate to distinguish each of the authorities as they relate to an Advocate on record commissioning documents for his client in the same case.
22. Lastly on the applicability of article 159 (2) (d) of the *Constitution*, the Supreme Court in the Case of: *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* Petition Number 5 of 2014 held

“A court dealing with the question of procedure where jurisdiction is not expressly limited in scope as in the case of articles 87 (2) and 105 (1) (1) of the *Constitution* may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159 is cured.” We agree with the learned counsel that certain procedural, short falls may not have a bearing on the Judicial power to consider a particular matter in most cases procedural shortcomings will only affect the competence of the cause before the court, without in any way affecting that court’s jurisdiction to entertain it. A court so placed, taking into account the relevant facts and circumstances may cure such a defect and the *Constitution* requires such an exercise of discretion in matters of a technical character.”
23. In the High Court case of: *Mbayi Sayyed Onsiritso v Nancy Iyad and 2 others* Kakamega Election Petition Appeal Number 2 of 2017. The Principles of non-conformity with Election Rules were summarized as follows:
 1. The Provisions of Rules of the Election rules are mandatory.
 2. It is of utmost importance that for parties in all Election petitions to comply with the Election Rules
 3. The Provisions of the *Constitution* and the Election Act override the Election Rules.



4. That where there is non-conformity with Election rules an Election Court has the discretion to excuse the Infraction.
 5. The Court could only dismiss a case for non-conformity with the rules when the infraction complained of has caused a prejudice to the other party.
 6. In that case it must be demonstrated that the infraction complained of goes to the root of the dispute that is before the Court.
 7. The Court can dismiss a case for non-conformity with the Election rules in a proper case.
 8. The court should place substantive Justice over procedural considerations especially where the infraction is curable, striking out should be employed sparingly and as a last result.”
24. Rule 12 (4) provides that all witness affidavits used in Electoral dispute resolution must in addition to the Election rules.
 25. Comply with the provisions of the *Oaths and Statutory Declarations Act* and order 19 of the *Civil Procedure Rules 2010*. I have carefully analyzed the evidence placed before the learned magistrate as to the reasons why the provisions of Section 4 (1) of the *Oaths and Statutory Declarations Act* were not in conformity and I find that there was conformity on the part of the petitioner with the Act and there was no good and proper basis to strike out the petition.
 26. Even if there was non-conformity which as stated above was not proved, the court could only strike out or dismiss the case for non-conformity if the infraction complained with of would cause prejudice to the other party.
 27. No prejudice was alluded to in this Petition and none was proved. The upshot is that this appeal has merit and it is allowed.
 28. Accordingly, the ruling and order delivered on November 19, 2022 is hereby set aside.
 29. The petition to proceed to hearing soonest as it has timelines. Cost of the appeal to the appellant.

RULING READ AND DELIVERED IN OPEN COURT THIS 16TH DAY OF FEBRUARY, 2023.

Hon M Muya

JUDGE

16-2-2023

In Open Court.

Before; Muya - JUDGE

In the Presence of:

Mohamud for 1st and 2nd Respondent

Kibyegon for the Appellant

Ndegwa Njiru for the 3rd Respondent.

Mr. Martin - Court Assistant.

