



## RULING

The 1<sup>st</sup> respondent through and application dated 30<sup>th</sup> April, 2013 brought under Section 1A, 1B and 3A of Civil Procedure Act, Order 51(1) of the Civil Procedure Rules, 2010, Section 80(3) of the Elections Act and Rule 4(1),(2),(3), Rule 5(1) and Rule 17(1),(d) of the Elections (parliamentary and County Elections) Petition Rules of 2013 seek that statement of the witnesses Affidavits of Christine Kananu George be struck out for failure of the deponent to annex exhibit "CKG1".

That affidavit of Stephen Mugambi be struck out for failure to attach the annexure, that affidavit of Esther Kabebi be struck out for failure to attach her appointment letters as TNA party agent. That affidavit of Johnson Gitobu Nkanata be struck out for failure to attach annexure "JGN1". That affidavit of Francis Mutuma be struck out as the persons mentioned in his affidavit cannot be ascertained and as they have not been listed as witnesses. That the alleged disk marked as "DMK5" for being hearsay evidence as the authority of the alleged recording has not been disclosed. That alleged widespread violence under Paragraph 6(b) and (c) of the petition has not been proved by the petitioner's pleadings. That annexures DMK2, DMK3, DMK4, DMK7 and DMK8 for lack of authenticity and thereby being incapable of being relied upon since they have not been authenticated and/or signed by the requisite authors. On paragraph 9(a) of the petition and paragraph 8(a) of the petition claiming that votes cast at listed polling Stations exceeded the number of the registered voters contrary to the relevant Form 35 already in evidence.

The application is based on the grounds on the face of the Notice of Motion and supportive affidavit of Gatirau Peter Munya, the 1<sup>st</sup> respondent.

When the application came for hearing the court heard oral submissions of Mr. Gachugi, learned Advocate for the respondent in support of the application. It also heard the submissions of Mr. Muthomi, learned Advocate for the petitioner in opposition of the application and Mr. Nyaburi, learned Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The court has also considered very carefully the said submissions, the application and affidavit in support and has also considered the witnesses affidavits referred to in this application.

A quick perusal of the affidavit of Christine Kananu, Stephen Mugambi, Esther Kabebi and Johnson Gitobu reveal that the annexures referred to in their respective affidavits have not been attached. That affidavit of Francis Mutuma makes allegations against people referred to by their first names as Mr. Mwaa, Mr. Ibeere and Mr. Mwakiria, who 1<sup>st</sup> respondent contends cannot be ascertained. On annexures DMK2, 3, 4, 7 and 8 he challenges them as not having been authenticated and or signed. On DMK5 he terms the alleged compact disc audio recording as being hearsay. On paragraph 8(a) and 9(a) of the petition he claims the votes cast in polling stations mentioned thereto to be not as alleged by the petitioner and that the same were in conformity with Form 35.

Under Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 it is provided:-

***"An affidavit shall be confirmed to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."***

Under Order 19 Rule 6 Civil Procedure Rules the Court may order to be struck out from any affidavit any matters which is scandalous, irrelevant, or oppressive.

Further under Order 19 Rule 7 of the Civil Procedure Rules it is provided:-

***"7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."***

In the case of **KASSAMALI GULAMTTURSEIN & CO.(KENYA) LTD – V- KYRTATAS BROTHERS LTD(1968) E.A.542**, Court of Appeal held:-

***“The affidavit was an affidavit of information and belief and it was unnecessary for the deponent to state the sources of his information and belief. The affidavit was regular.”***

In the case of **KENYA HORTICULTURAL EXPORTERS (1977) LTD –V- PAPE (TRADING ASIRUA ESTATE) (1986) KLR 705** Court of Appeal held:-

***“Order XVIII Rule 3(1) of Civil Procedure Rules is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts or that such an affidavit may be confined entirely to statements of information and belief even if the source and grounds are shown. The words “may contain” suggest that the main body of such an affidavit has to be confined to facts which deponent is able of his own knowledge to prove.”***

The affidavits in this application have been sworn by various deponents and a close look at the same confirm that they are confined to facts as the deponents are able of their own knowledge to prove. The insufficiency of the affidavit or failure to attach the annexures or description of the deponent in whatever capacity or failure to describe himself or herself in whatever capacity the deponent is making an affidavit, may be a default or irregularity in the form or a technicality and court is not barred from receiving such an affidavit for the purpose of being used in any suit notwithstanding defect.

The court on the other hand may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive. The 1<sup>st</sup> respondent did not demonstrate any part or the whole of the affidavits sought to be struck out to be scandalous, irrelevant or oppressive but in brief was pointing out that the deponents should not be believed by court for various reasons.

That is a matter that the court shall determine upon parties giving evidence and on being cross-examined.

In the circumstances I find that the application dated 30<sup>th</sup> April, 2013 to be without merits and the same is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 3<sup>RD</sup> MAY, 2013.

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

1. Mr. M. Kariuki jointly with Mr. V.P.Gituma for the petitioner
2. Mr. Omogeni jointly with Mr. Gachugi for the 1<sup>st</sup> respondent
3. Mr. H. Nyaburi for 2<sup>nd</sup> and 3<sup>rd</sup> respondent
4. Petitioner – present
5. 1<sup>st</sup> respondent – present
6. 2<sup>nd</sup> and 3<sup>rd</sup> respondents – absent
7. C/clerk Penina/Kathurima

**03/05/2013**

**Coram**

Hon. J. A. Makau, J  
c/clerk Kathurima/Penina

Mr. M. Kariuki jointly with Mr. V. P. Gituma for petitioner

Mr. Omogeni jointly with Mr. A. Gachugi for 1st respondent

Mr. H. Nyaburi for 2<sup>nd</sup> and 3<sup>rd</sup> respondent

petitioner – present

1<sup>st</sup> respondent – absent

2<sup>nd</sup> and 3<sup>rd</sup> respondent – absent

## **COURT**

Ruling delivered in open court in the presence of Counsel

## **COURT**

Pre-trial conference set for 15/5/2013 at 10.00. a.m.

**J. A. MAKAU**  
**JUDGE**