



**REPUBLIC OF KENYA**

**High Court at Meru**

**Election Petition 1 of 2013**

**IN THE MATTER OF: ARTICLES 1, 3, 38, 81, 86 AND 87 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: SECTION 75 AND 76 OF THE ELECTIONS ACT, 2011(ACT.NO. 24 OF 2011)**

**AND**

**IN THE MATTER OF: THE ELECTIONS GENERAL)**

**REGULATIONS,(LEGAL NOTICE NO. 128 OF 2ND NOVEMBER, 2012**

**AND**

**IN THE MATTER OF: THE ELECTIONS(PARLIAMENTARY AND COUNTY ELECTIONS)**

**PETITION RULES, 2013 (LEGAL NOTICE NO. 44 OF 22ND FEBRUARY, 2013)**

**AND**

**IN THE MATTER OF : THE ELECTION FOR THE GOVERNOR OF MERU COUNTY**

**IN THE GENERAL ELECTION HELD ON 4TH MARCH, 2013**

**BETWEEN**

**IN THE MATTER OF: THE PETITION DUNCAN CHEGE GATHOGO**

**BETWEEN**

**DICKSON MWENDA KITHINJI.....PETITIONER**

**VERSUS**

**GATIRAU PETER MUNYA.....1ST RESPONDENT**

**I.E.B.C.....2ND RESPONDENT**

**FREDRICK NJERU KAMUNDI/COUNTY RETURNING OFFICER,  
MERU COUNTY.....3RD RESPONDENT**

**02.05.2013**

Before Hon. J. A. Makau, J

C/clerk Kathurima/Peninah

Mr. M. Kariuki & Mr. Muthomi for applicant/petitioner

Mr. Gachugi h/b for Mr. Omogeni for 1st respondent

Mr. Nyaburi for 2nd and 3rd respondents

Petitioner – present

1st respondent –absent

2nd and 3rd respondents –absent

**MR. MUTHOMI ADVOCATE**

The application dated 26<sup>th</sup> March, 2013 is now spent and would serve no useful purpose in pursuing the same any further. We apply to abandon it.

On our second application dated 25<sup>th</sup> April, 2013 is also spent as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have today morning supplied us with Forms 35 and 36. We are not pursuing it any further. It may be marked as withdrawn.

There is an application by 2<sup>nd</sup> and 3<sup>rd</sup> respondents dated 15<sup>th</sup> April, 2013, we shall respond upon the same after the same is canvassed.

There is an application filed today by 1st respondent seeking to have the security for costs already deposited to be enhanced. We shall deal with the same after it is canvassed by the 1<sup>st</sup> respondent.

**MR. GACHUGI ADVOCATE**

I am not ready with the applications dated 15<sup>th</sup> April, 2013 as I have not been served with the same.

**MR. NYABURI ADVOCATE**

I am ready with the application together with all other applications.

**MR. GACHUGI ADVOCATE**

I apply for adjournment to enable me respond to the application dated 15<sup>th</sup> April, 2013. We have been served this morning.

**MR. NYABURI ADVOCATE**

The application is simply seeking for an extension of time so that the answer to the petition and replying affidavit for 2nd and 3rd respondent which have already been filed and served can be deemed as duly filed. No prejudice to the 1st respondent if the application were to proceed to hearing.

## **MR. MUTHOMI ADVOCATE**

Application for adjournment is opposed as this is not an application to do with the 1<sup>st</sup> respondent whatsoever. Secondly the application is about extension of time and not sort of an application which is amenable to 1<sup>st</sup> respondent to make depositions of facts by 1<sup>st</sup> respondent. It is not necessary in law and logic for the 1<sup>st</sup> respondent to be allowed to respond to the application. Thirdly it is law in this country under the Election Act that Election Petition be heard on priority basis. That is why this court is supposed to drop all other matters and deal with the petition. The reasons for seeking adjournment are without basis. The Counsel was not dispatched from Nairobi to come and seek adjournment. I urge court to reject the application for an adjournment.

## **MR. GACHUGI ADVOCATE**

My application is with merits and I seek that I be granted an adjournment.

## **J. A. MAKAU**

### **JUDGE**

### **RULING**

This petition was set down for hearing of petitioner's applications dated 26<sup>th</sup> March, 2013 and 25<sup>th</sup> April, 2013, and 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application dated 15<sup>th</sup> April, 2013 seeking extension of time for filing and service of answer to the petition and replying affidavit.

That on 30<sup>th</sup> April, 2013 the 1<sup>st</sup> respondent filed an application seeking the petitioner herein to be ordered to increase the amount paid as security for costs of the petition from Kshs.500,000/- to Kshs.2,000,000/-. The application was served today.

The Advocates for petitioner, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are all ready with the applications set down for hearing today including the 1<sup>st</sup> respondent's application filed today. The learned Advocate for 1<sup>st</sup> respondent Mr. Gachugi, has applied for an adjournment on the grounds that the application dated 15<sup>th</sup> April, 2013 was served upon him today in the court and he needs time to file a response.

The learned Advocate for 2<sup>nd</sup> and 3<sup>rd</sup> respondents Mr. Nyaburi has strongly opposed the application and stated his application is simple and is only seeking extension of time to file answer to the petition and replying affidavit and the respondents have already served the application. He urged no prejudice would be occasioned to the 1<sup>st</sup> respondent if the application were to proceed.

The learned Advocate for the Petitioner Mr. Muthomi is equally opposed to an adjournment. He submitted that first the application has nothing to do with 1<sup>st</sup> respondent. That secondly, the application is about extension of time and not sort of an application amenable to 1<sup>st</sup> respondent to make depositions of facts. He argued that it is not necessary in law and logic for 1<sup>st</sup> respondent to be allowed to respond to the application. Lastly he submitted no prejudice will be occasioned to 1<sup>st</sup> respondent if the application were to proceed to hearing.

The petitioner has as regards his applications dated 26<sup>th</sup> March, 2013 and 25<sup>th</sup> April, 2013 argued that the same have been spent. The first application dated 26<sup>th</sup> March, 2013 has been overtaken by events, whereas as regards application dated 25<sup>th</sup> April, 2013, the relevant forms have been supplied by 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In view of the said applications having been spent and petitioner having sought to have them marked as abandoned, the same are hereby marked as having been abandoned.

On 1<sup>st</sup> respondent's application for adjournment, the court appreciates the fact that the 1<sup>st</sup> respondent was served in court, however, the issues raised in 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application are issues of law, to which the 1st respondent can respond without having filed a replying affidavit.

This is an election petition and not an ordinary civil claim. The Election Petitions are supposed to be heard and determined within a specified period, hence the need to have matters heard and determined without undue delay.

Section 4(1) (3) of the Elections(Parliamentary and County Elections) Petition Rules 2013 provides:-

***“ The overriding objective of these Rules is to facilitate the just, expeditious, proportionate resolution of Election Petition under the Constitution and the Act.”***

2.....

***3. A party to an Election Petition or an Advocate for the party shall have an obligation to assist the court to further the overriding objective, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”***

Under Section 5(1) of the Elections (Parliamentary and County Election) Petition Rules, 2013 it is provided:-

***“For the purposes of furthering the overriding objective provided in Rule 4, the Court shall and all parties before it shall conduct the proceedings for the purpose of attaining the following aims:-***

**(a). the first determination of Election Petition and**

**(b) The efficient and expeditious disposal of an election petition within timelines provided by the Constitution.”**

Having considered the nature of the application and the grounds in support of the application for adjournment and grounds in opposition and the relevant law, I am satisfied that the application for an adjournment is only intended to delay just determination of this petition within the timelines provided in the Constitution and the relevant Act.

I therefore reject the application for adjournment and direct that applications dated 15<sup>th</sup> April, 2013 and 30<sup>th</sup> April, 2013 do proceed to hearing today.

DATED, SIGNED AND DELIVERED AT MERU THIS 2<sup>ND</sup> DAY OF MAY, 2013.

**J. A. MAKAU**

**JUDGE**

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

1. Mr. Muthomi Advocate and Mr. M. Kariuki Advocate for the petitioner

Mr. Gachugi Advocate h/b for Mr. Omogeni Advocate for the 1st respondent

Mr. Nyaburi Advocate for 2nd and 3rd respondents

C/clerk Penina/Kathurima

**J. A. MAKAU**

## JUDGE

### MR. NYABURI ADVOCATE

Notice of Motion for hearing is dated 15<sup>th</sup> April, 2013. Application is seeking the answer to petitioner and Replying affidavit by 2<sup>nd</sup> and 3<sup>rd</sup> respondents be deemed as duly filed. Petition was served upon 2<sup>nd</sup> respondent on 4/4/2013 under Rule 15 of Petition Rules 2013. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents should have filed their answer on 18/4/2013, however it was filed on 22/4/2013 a delay of about 3 days. This court has jurisdiction to extend time under regulation 20. We submit the delay of 3 days is not inordinate. We have given explanation for the delay. We rely on supportive affidavit of Abdi Mohammed. We have explained he was disposed of and unavailable. I rely on affidavit and annexures.

No prejudice would be occasioned to petitioner. I have looked at the Replying Affidavit by the petitioner and it discloses no prejudice. If application is rejected the 2<sup>nd</sup> and 3<sup>rd</sup> respondents would be prejudiced in a matter of public interest of people of Meru. We pray the application to be allowed.

J. A. MAKAU

## JUDGE

### MR. MUTHOMI ADVOCATE

Application is opposed. I rely on Rule 14(1), (3) of the Elections(Parliamentary & County Elections) Petition Rules, 2013. The respondent having not complied cannot claim that the petitioner won't be prejudiced.

Rule 20 of petition Rules, 2013 is not applicable to the respondent. I refer to the case of **NJERU – V- MUTURI & OTHERS (No.2) (2008) 2KLR(EP) 461** in which it was held:-

***“1. Where time was of the essence as was the case here and further, where the statute provided the time within which the petition was to be presented and served, the court had no jurisdiction to extend time. It followed therefore that the service was invalid.”***

In the case of **kinyanjui v Goko(Returning Officer, Electoral Commission of Kenya) & Another(2008) 2 KLR (EP)** it was held:

***“2. A petition had to be served in accordance with the Rules, there was no room for substituted service or any other mode of service outside what was provided. Service on the 3rd respondent's secretary was not provided for by the rules. There was no valid service on the 3rd respondent.”***

***Further in the case of OSOGO V SHIKANGA & 2 OTHERS 2 KLR(EP) it was held:-***

***“4. the court had no jurisdiction to extend time under Section 15 of the National Assembly and Presidential Elections Act and also no discretion under Section 95 of the Civil Procedure Act.”***

The court insisted on timeline and based on that the application ought to be rejected. Application filed after expiry of time should not be granted. We have to ask ourselves what is the scope of Rule 20 of Petition Rules, 2013. We look at the case law and we find there is no single case in which time has been extended.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents knew the implication of not filing the petition in time. Further the reasons given by 2<sup>nd</sup> and 3<sup>rd</sup> respondent save not sufficient to allow the application? In absence of the officer there were other officers who would have made the affidavit. We submit the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should have filed their application in time. The delay is inordinate and unjustified.

**J. A. MAKAU**

**JUDGE**

**MR. GACHUGI ADVOCATE**

I support the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application dated 15<sup>th</sup> April, 2013. I rely on Rule 20 of the Petition Rules 2013. Nothing in these rules limits inherent powers of court to ensure no injustice is done to any party.

**J. A. MAKAU**

**JUDGE**

**MR. NYABURI ADVOCATE**

I have looked at the authorities supplied to this court. In the case of **NJERU – V- MUTURI & 2 OTHERS**. In the case of **KINYANJUI –V- GOKO & OTHERS, OKORA-V-NYARANGI & ANOTHER and finally OSOGO-V-SHIKANGA & 2 OTHERS**. I wish to make the following observations. That in all these decisions these rulings were made under the National Assembly and Presidential Election Act. That Act was repealed and is not the current law that regulates Election Petitions. No revealing in that Act there was a similar rule to Rule 20 of the Election Act, 2013. They do not reflect the correct position as regards law as of now. Rule 20 of Election Rule, 2013 gives this court discretion to extend time and there is nothing stating that application must be made before expiration of the period.

**J. A. MAKAU**

**JUDGE**

### **RULING**

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents through an application dated 15<sup>th</sup> April, 2013 brought under Article 159(2) (d) of the Constitution of Kenya, 2010, Section 80(1),(d) and 80(3) of the Election Act and Rules 15 and 20 of the Elections(Parliamentary and County Elections) Petition Rules, 2013 seek that court do extend the time for filing and service of the answer to petition and replying affidavits by 2<sup>nd</sup> and 3<sup>rd</sup> respondents and that the answer to the petition and replying affidavits filed in court out of time be deemed as duly filed. The application is based on the grounds on the face of the application and is supported by affidavit of Abdi Sheikh Mohammed dated 19<sup>th</sup> April, 2013.

The application is opposed. The petitioner swore an affidavit in opposition dated 20<sup>th</sup> April, 2013.

When the application came up for hearing I heard oral submissions of Mr. Nyaburi learned Advocate for 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Mr. Muthomi appearing jointly with Mr. M.Kariuki, learned Advocate for the petitioner and Mr. Gachugi, learned Advocate for the 1st respondent. I have considered the said oral submissions very carefully, the authorities relied upon by the advocates for the petitioner as well as the relevant provisions of the law relied upon by the parties.

The delay in filing the answer and replying affidavit is mainly due to the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' Returning Officer, Tigania East Constituency Mr. Abdi Sheikh Mohammed, had been taken ill and the respondents could not make sufficient answer to the petition and replying affidavit in absence of an affidavit of the said officer as most of the allegations in the petition touched on Tigania East Constituency . Mr. Abdi S. Mohammed in his affidavit has confirmed having been taken ill and that he was not available when 2<sup>nd</sup> and 3<sup>rd</sup> respondents needed him to make an affidavit. This fact has not been

controverted by the petitioner in his replying affidavit. The delay in filing answer and replying affidavit is of three days. Three days in failing to file answer and replying affidavit is not inordinate delay.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have filed the answer and replying affidavit and have shown diligence in their moving to court to seek extension of time.

Under Article 159(2), (d) of the Constitution of Kenya, courts are obliged to administer justice without undue regard to procedural technicalities.

Further under Section 80(1) (d) of the Election Act Courts are obliged to decide all matters that come before it without undue regard to technicalities.

Under the Elections(Parliamentary and County Elections) Petition Rules 2013 it is provided Under Rule 14 and 20 as follows:-

***“Upon being served with an Election Petition under Rule 13, the respondent may oppose the petition by filing and serving a response within a period of not more than fourteen days upon service of the petition.”***

Under Rule 20 it is provided:-

***“Where any matter is to be done, within one time provided for in these rules or granted by court, the court may, for purposes of ensuring there is no injustice is done to any party, extend the time within which the thing shall be done on such terms and conditions as it may consider fit even though the period initially provided as granted may have expired.”***

In view of the foregoing court has discretion to grant or not to grant extension of time for the purposes of ensuring that no injustice is done to any party. This is an election matter in which the members of public and more specifically the people of Meru County have interest in having the same determined fairly and in accordance with the provisions of law. Justice demands that no party should be condemned unheard and that each party to a suit be offered an opportunity to adduce evidence and challenge evidence. I find by refusing to grant this application would amount to doing injustice to all parties concerned. The delay in filing answer in time has been explained and the same is not inordinate. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have shown their desire to have this matter disposed expeditiously by having filed their answer and replying affidavit together with their application dated 15<sup>th</sup> April, 2013.

The authorities referred to me can be distinguished as they dealt with service of petitions under the National Assembly and Presidential Election Act which Act has since been repealed. The authorities do not reflect the current position as regards law under Rule 20 of the Elections(Parliamentary and County Elections) petition Rules 2013 as regards extension of time.

In the circumstances the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' application dated 15<sup>th</sup> April, 2013 is allowed. I extend the time for filing and service of the answer to the petition and replying affidavits by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The answer to petition and replying affidavits filed in court out of time be and are hereby deemed as duly filed.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are given 2 days to file and serve affidavits sworn by their witnesses whom the 2<sup>nd</sup> and 3<sup>rd</sup> respondents intended to call at the trial(if any). Costs of the applications shall be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY, 2013.

**J. A. MAKAU**

**JUDGE**

**MR. GACHUGI ADVOCATE**

I intend to withdrawal our application dated 30th April, 2013. On security being enhanced.

**MR. MUTHOMI**

I have no objection.

**MR. NYABURI ADVOCATE**

I have no objection.

COURT

Application dated 30th April, 2013 on increasing the amount paid as security for costs of the petition from 500,000/= to Kshs.2,000,000/= on application by the Advocate for 1<sup>st</sup> respondent be and is hereby marked as withdrawn.

Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY, 2013.

**J. A. MAKAU**

**JUDGE**

**MR. GACHUGI ADVOCATE**

Application dated 30<sup>th</sup> April, 2013 seeks annexed affidavits of the petitioner's witnesses be struck out as under paragraph 1(a)-(j). simply as the relevant annexures have not been attached. Under paragraph 1(a)-(d). under paragraph (e) the persons mentioned cannot be specifically ascertained.

***Under (f) annexure not attached and is hearsay.***

***Under (g). Wide spread violence not proved***

***Under (h). annexure not authenticated***

***Under (i). Votes not proved in excess, and***

***Under (j) Votes not proved in excess.***

The application is based on grounds on face of the application. The Petitioner is relying on people who cannot be ascertained. I rely on affidavit in support. I pray that the affidavit be struck out. It is fair and in the interest of justice that the affidavits are struck out.

**MR. MUTHOMIADVOCATE**

This application should not be allowed as the petitioner is equally guilty of failing to annex all exhibits mentioned in his affidavit; such as an affidavit by one Nelson Kimathi, is incomplete from paragraph 8 to

12 on page 3 of that affidavit which is part of the record before court.

The documents described as oaths of secrecy have not been annexed by 1<sup>st</sup> respondent. We can if this application is allowed have theirs struck out.

The applicant assumes that each and every item of evidence must be said in affidavit. This is not possible. I refer to Rule 12(2) (a) of the Petition Rules. Affidavit to state the substance not evidence. If anything is missing the issue can be availed at the trial.

The deponents shall be cross-examined and evidence they would give would be part of the evidence. I prefer that we should not pay due regard to the technicalities. We are ready to avail the missing documents without much due regard to technicalities. Civil Procedure Rules do not apply to this petition but only Order 19 of the Civil Procedure Rules.

**J. A. MAKAU**

**JUDGE**

**MR. NYABURI ADVOCATE**

I leave the matter to the court's discretion.

**MR. GACHUGI ADVOCATE**

I concede that my affidavit by one Watson Kimathi has few annextures and Paragraphs missing.

Rule 12(1) Petition Rules, 2013 obligates the petitioner to file at the time of filing the petition affidavits sworn by each intended witness.

**J. A. MAKAU**

**JUDGE**

**COURT**

Ruling on 3/5/2010 at 10.00 a.m.

**J. A. MAKAU**

**JUDGE**

**RULING**

The 1st respondent through and application dated 30th 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 annexture, 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 annexture "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 annextures 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 1st 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 GULAMTTURSSEIN & 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 1st 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 2nd and 3rd respondent

petitioner – present

1<sup>st</sup> respondent – absent

2nd and 3rd 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**