



REPUBLIC OF KENYA

High Court at Machakos

Petition 2 of 2013

THOMAS MALINDA MUSAU.....1ST PETITIONER

STEPHEN NDAMBUKI MULI.....2ND PETITIONER

JOHN NTHULI MAKENZI.3RD PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

LEONARD OKEMWA (RETURNING OFFICER)2ND RESPONDENT

STEPHEN MUTINDA MULLE.....3RD RESPONDENT

RULING

Today’s date was fixed for the Pre-trial Conference. Prior to commencement of the Conference, **Mr. Laichena**, Counsel for the petitioner notified the court that he had filed a witness’s statement. It was his submission that at the time of filing the petition the witness was not available. He asked the court to accept the person as a witness.

The Oral application was opposed by counsels for the Respondents. **Mr. Munge** counsel for the 1st and 2nd Respondents respectively argued that no clear reason had been given pursuant to Rule 12 of the Elections Act to move the court to grant the order sought. It was his argument that the court could only allow such an application if leave had been sought by the Petitioner. He also urged the court to take into consideration the timeline within which the petition is to be heard.

Mr. Kiugu counsel for the Respondent associated himself with sentiments of **Mr. Munge**. He called upon the court to consider the fact that the respondent had responded to the petition based on affidavits on record. He faulted the Petitioner for filing the document without leave of the court and called upon the court to strike out the affidavit.

Mr. Laichena in a response thereto was in agreement that indeed the court was late in hearing the matter as two (2) months out of the stipulated six (6) months within which the petition was to be heard and concluded had already been spent. He however absolved the Petitioner from blame by arguing that he had not contributed to the delay. His argument was that he could not have sought leave of the court without filing the affidavit. He alluded to a provision in the pre-trial check-list that allowed filing of further

affidavits.

Rule 12(1) (3) (4) and (5) of the Elections (*Parliamentary and County Elections*) Petition rules, 2013 provide as follows:-

“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

3) Subject to sub-rule (4), a witness shall not give evidence on behalf of the Petitioner unless an affidavit is filed in accordance with this rule.

4) A witness for the Petitioner who fails to file an affidavit as required by this rule shall not be allowed to give evidence without the leave of the court.

5) The court shall not grant leave under subrule (4), unless sufficient reason is given for the failure to file an affidavit.

It is a mandatory for a petitioner to file an affidavit of every intended witness at the time of filling of the petition. According to sub-rule (5) of the Rules, the Court has the discretion of granting leave to a witness to give evidence if there are sufficient reasons to move it in regard to failure to file an affidavit.

Further affidavits can be filed with leave of the court. The court has the discretion of giving such directions during the Pre-trial Conference [*see Rule 17 (1) (i) of...*]

In his address counsel for the Petitioner simply notified the court that he had filed an affidavit. The said affidavit indeed has a stamp impression of the High Court of Kenya, Machakos. It is indicated it was ‘received’. Counsel stated that the said intended witness was not able to sign the affidavit due to non-availability. The Petitioner had a period of one (1) month, two (2) weeks from the time the petition was filed to locate **Mr. Moffat Muia Maitha** to have him sign the affidavit. It has not been divulged where exactly he had gone. If he had travelled there must be proof to that effect. This is a case where credential proof would have been required. It would have been in a form of an interlocutory application which would have been dealt with during the Pre-trial Conference. This would have given the respondents an opportunity to respond thereto. The upshot of the above is that the Petitioner’s counsel notification that an affidavit had been filed did not amount to seeking leave to file an affidavit.

The said affidavit is therefore irregularly on record. In the circumstances I decline to grant the order sought as there are no sufficient reasons to warrant this court granting requisite leave. The affidavit filed herein is therefore struck out. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **MACHAKOS** this 2ND day of **MAY, 2013** at **10.30AM**.

L.N. MUTENDE
JUDGE

IN THE PRESENCE OF:

CC- Collins

Mr. Laichena for petitioner

Mr. Munge for the 2nd and 1st Respondents

Mr. Kiugu & Ms Kioko for the 3rd Respondent

L.N. MUTENDE
JUDGE