REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NUMBER 6 OF 2013

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 1(1), 2, 3(1), 10(2); 21, 23, 33(1)(A); 48: 81(a); 82(2): 86: 87(2) & 3; 88(4); 91(1)(d), (e), (f), (g) and (h); 91(2)(b) and (e); 105(a) & (2); 165(3)(a) and (e) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 2(1)(A);(B) of the sixth SCHEDULE OF THE CONSTITUTION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF: THE ELECTION ACT, 2011 (ACT NO. 24 OF 2011 AS AMENDED

AND

IN THE MATTER OF: LEGAL NOTICE NO. 126 OF 2012, THE ELECTIONS (GENERAL REGULATIONS 2013)

AND

IN THE MATTER OF: A PETITION BY

HASSAN MOHAMED HASSAN. ..... 1ST PETITIONER

ABDIKARIM NUNOW AMIN. ..... 2ND PETITIONER

VERSUS

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

FESTUS NGEERAH (RETURNING OFFICER). ..... 2ND RESPONDENT

ABDKAIR ORE AHMED. .....3RD RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated 26th June, 2013 filed by the Petitioners. It seeks orders that: -

1. ***Leave be granted to the Petitioners to call one ANTIPAS NYANJWA, a Forensic Document examiner as a witness in this petition.***

2. ***The said ANTIPAS NYANJWA be allowed to produce his Report in relation to this matter and be examined by the Respondent in relation to the Report.***

3. ***Costs be in the main cause.***

The application is based on the grounds on the face of the application which include the ground that the need to call the witness arose much later after the petition was filed when Forms 35 and Forms 36 were accessed and perused by the Petitioner.

The application is also supported by an affidavit sworn by the 1st Petitioner, Hassan Mohamed Hassan, on 26th June, 2013. In the said supporting affidavit, the 1st Petitioner swears that upon perusing the forms 35's and 36's and noticing some anomalies thereon, the Petitioners through their Advocate, referred the forms to the above mentioned forensic handwriting examiner for his opinion. That the resultant report became relevant to the petition before the court; hence the need by the Petitioners to wish to call the expert as a witness in this petition. The Petitioners conceded in their supporting affidavit that although the potential witness ought to have sworn an evidence affidavit, which he did not swear, the court he said should nevertheless allow him to attend court to give evidence on his report.

The application was vigorously opposed by the Respondents. The replying affidavit was sworn by a Senior Legal officer of the 1st Respondent Commission. The 1st Respondent argued that the application before the court is incompetent and bad in law for being brought after the petition pretrial conference was done with and therefore contrary to Rule 17(1) and 17(2) of the Election petition Rules. The 1st Respondent also asserted that the application coming just before the full trial starts, is an abuse of process as it attempts to litigate the petition in piece meal. Thirdly, the 1st Respondent asserts that the evidence intended to be brought into the petition, is not about or in relation to any grounds contained or pleaded in the petition. If allowed therefore, the Respondents argue, the evidence will introduce a new ground to the Petition and will thus contravene the Elections Act and Rules by amending them. The Respondents also argue that introduction of the new evidence sought to be introduced will prejudice them. It will force them to seek a similar expert witness and evidence which will require the court to delay starting the trial in the next five days as already scheduled.

I have perused the application and the material in support and in opposition to it. I have considered the arguments in submissions from both sides. Clearly this is an application brought under Rule 12(4) of the Election petition Rules. It is important however to appreciate the import of Rule 12(1) which provides the method of introducing evidence by Petitioner in support of a petition he files: -

"12(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.

2) The Affidavit under sub-rule (1) shall

a) state the substance of the evidence;

b) be served on all parties to the election petition with sufficient copies filed in court and

c) form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by the Petitioner on any contested issues.

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 the rule.

4) A witness for the Petitioner who fails to deliver 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 sub-rule (4) unless sufficient reason is given for the failure."

In this case, the evidence of the expert witness intended to be called during the hearing of the petition trial and in respect of whom leave is being sought under this application under sub-rule (4) aforestated, is evidence which is stated to have emerged much later after the petition was filed. Such evidence is said to be forensic evidence on handwritten signature entries in the Forms 35s and Forms 36s. The Petitioner stated that the handwriting expert examined the forms and wrote his reports later after the petition pretrial conference. They argued further that the actual need to introduce the expert evidence arose after they received the expert's report which could not have been available at the time of filing the petition.

Although the Respondents argued that the application should have been filed earlier, it is clear to me that the delay in filing the same was not inordinate. The reason to seek leave to introduce the evidence of the expert is also in my view, good and justified, noting that the petitioners would not have laid their hands on such evidence before they were given and examined copies of the Forms 35s and 36s. There is therefore, a good reason for the Petitioner's failure to file any relevant evidence from the said experts.

There is no doubt however, that this application was brought after the petition's pre-trial conference which took place on 13th May, 2013. While, as asserted by the Respondents, no interlocutory applications should be easily allowed after the petition hearing has properly started, it is not impossible to see a situation where such an application may rightly and necessarily be allowed to proceed. I think that no hard and first rules should be laid on this point as every case should be considered on its own circumstances. As concerns this application, it was brought and dealt with before the full trial of the Petition started and is therefore caught by the relevant rule.

The application cannot either amount to an abuse merely since it was brought and dealt with just before the full trial started. There is no demonstration by the Respondents that the application is attempting to litigate the petition piecemeal as the Respondents asserted.

The Respondents further argued that the evidence of the expert handwriting expert if allowed into the petition, would introduce a fresh ground of the petition which was not contained in the petition in its original form and content. I have however, examined the grounds forming the petition. In clause 18 and 19 the petitioner pleaded that the agents, including Petitioner and his agents, either signed or refused to sign Forms 35s. This put on focus any evidence which will confirm or otherwise not confirm the authenticity of the signatures on the forms. Forensic evidence to confirm or authenticate signatures or otherwise should therefore, have been anticipated by parties in the petition.

It is the view of the court therefore, that apart from the appropriateness or non-appropriateness of the prayers carried by this application, all the other objections and opposing grounds do not raise sufficient merit. I now however, turn to the substance of the prayers contained in the application to ascertain whether they were appropriate and complete.

The Respondents argued that the prayers are inappropriate and deficient and that even if the court were to allow the prayers, the same would not be legally capable of authorizing the Petitioners to introduce the expert evidence that they seek to introduce. The main prayers in this application as earlier tabulated are:-

1. ***Leave to call a forensic document examiner.***

2. ***The forensic document examiner to produce his written report and be re-examined on it.***

It is the Respondent's case accordingly that leave to file and serve an evidence affidavit introducing the experts report into the petition record to be cross-examinable under rule 12(1), is not only mandatory, but has not been sought in the application. That accordingly, even if the expert witness is granted leave to become a witness, he shall not be allowed to give his evidence under subrule (4) unless his evidence affidavit has been filed, which is not now available unless leave is sought and granted. On the other hand, the petitioners argued that a witness allowed late to give evidence under Rule 12 (4), need not file any affidavit but will give oral evidence and be cross-examined on oral evidence.

I have carefully considered the above arguments. The way I understand the provisions of Rule 12, is this: a Petitioner must at the time of filing his/her election petition, file a sworn affidavit of the evidence which the witness will give at the trial of the petition. Such affidavit evidence becomes part of the record of the trial the moment it is so filed. Because it is already sworn evidence, it effectively becomes the evidence-in-chief of the witness and also become the basis of cross-examination by the Respondent and re-examination by the Petitioner after the witness adopts it during the trial.

It appears to me and it is my view and finding, therefore, that without such a deposition on the petition record, a potential witness need not be granted leave as he has no chance of testifying in an election petition. Indeed sub-rule (3) of Rule 12 so confirms. It says that "**a witness <u>shall not</u> give evidence on behalf of the Petitioner unless an affidavit is filed in accordance with this rule."** The exception to the above interpretation is the subjection of sub-rule 3 above to sub-rule (4) and (5) to which I now turn.

Sub-rules (4) and (5) donate discretion to the petition court to consider an application by a Petitioners witness who had failed to deliver an evidence affidavit at the time of filing the petition, to give evidence, with the leave of the court upon the court being given sufficient reason for the failure to file the affidavit at the time of filing the petition.

The issue that immediately arises if the court grants leave to the Petitioner to call such a late witness and evidence, is this; should the court allow the witness to adduce his late testimony orally and without an affidavit deposition of such evidence on the record? The Applicants/Petitioners asserted strong **"Yes"**. They argued that that is the implication of sub-rule (5) of Rule 12. They asserted further that once the court grants leave to the witness to give evidence, then there is nothing stopping the witness from immediately testifying orally after being sworn.

That is not how the respondents viewed the provision. They believed that once the court grants leave to the witness, the witness in compliance with Rule 12 (1) and (3) must and should have also obtained leave to file an evidence affidavit upon which the witness will be cross-examined and re-examined.

I have agonized over the issue. As earlier herein indicated, it is my view and also now my finding, that no party witness in a petition should be allowed to testify unless his evidence affidavit is on and is part of the record of the trial. The proper approach by a petitioner who wishes to apply to the petition court for leave to call a late witness is not only to obtain leave to call such witness but also to obtain a

conjunctive leave to file a witness evidence affidavit. The supporting affidavit to the application should annex the evidence affidavit for court's quick perusal and satisfaction that the content thereof is within the scope of the grounds of the petition.

The purpose of Rule 12 is clearly to shorten the manner and time of bringing sworn evidence of the parties onto the petition trial record. Instead of letting the court spend much valuable time in recording and bringing on the record the evidence-in-chief of the parties, the Rule strictly requires and achieves to bring on record, all such sworn relevant evidence. The process greatly saves trial time because the trial effectively starts with the adoption of the said affidavit evidence and proceeds straight away to cross-examination. In that way, the provisions of Rule 12 succeed to compel the parties in the election petition to participate in the processes of court concerning the resolution of their petition's litigation. The parties, therefore, have a legal obligation to assist the court to further the overriding objective under the Constitution and Elections Act, which is, to facilitate the just, expeditious, proportionate and affordable resolution of the election petitions. To that end the court and the parties must conduct and attempt to conduct petition court proceedings, as much as that can be achieved, within time lines prescribed by the law. Where therefore the court senses that a party's conduct through negligence or recklessness or by deliberation, is intended to contravene or subvert the said overriding objective, it will resist by making corrective orders as may be just and fair.

In this case before me, the Petitioners have applied for leave to call a witness whose evidence affidavit is not in the trial record. They have properly and satisfactorily explained the reason why the witness's evidence affidavit is not in the trial record. They have however failed to seek a conjunctive leave to file and serve such affidavit so that the additional witness intended to be called, can rely and be cross-examined and re-examined on it if allowed to testify. That means that even if the additional witness is brought aboard, he cannot be able to testify in the manner provided by law as earlier hereinabove stated. That also means that to grant this application will necessitate a fresh application seeking a further leave to file the evidence affidavit, as envisaged under Rule 12 (1), (3), (4) and (5). Such process will require the court to hear such additional application even after the trial takes off and is in progress. This also means that allowing this application to call the additional witness will not be of any immediate practical befit to the petitioners without a further leave to file the relevant evidence affidavit. Such an order would be barren and a court does not act in vain. Clearly the Petitioners in drawing this application in the manner they did, acted negligently. A suitable order to such conduct, as provided under Rule 5 (2), is accordingly to refuse and dismiss this application with costs. Orders are made accordingly.

DATED and DELIVERED at Nairobi this 10th day of July 2013

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D A ONYANCHA

JUDGE