



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
ELECTION PETITION NO.1 OF 2013

NICHOLAS KIPTOO ARAP SALAT.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

WILFRED ROTICH LESAN.....2ND RESPONDENT

ROBERT SHUNET (RETURNING OFFICER, BOMET COUNTY).....3RD
RESPONDENT

KENNEDY ONCHAYO.....4TH RESPONDENT

WILFRED WAINAINA5TH RESPONDENT

PATRICK WANYAMA.....6TH RESPONDENT

MARK MANKO.....7TH RESPONDENT

ABDIKADIR SHEIKH.....8TH RESPONDENT

RULING

The 2nd respondent was on 4/3/13 elected as the Senator for Bomet County. He was declared the winner after garnering 115,931 votes. The petitioner came second with 98,036 votes. The later challenged the results and filed this petition in which he sought a declaration, amongst other orders, that the respondent was not validly elected. His contention was that he was the one who had been validly elected.

During the pre-trial conference, the petitioner indicated that he would call 4 witnesses. In the petition he had sworn a supporting affidavit and got 8 witnesses (MICHAEL KORIR, RICHARD SIGEI, RICHARD KIPNG'ENO MOSONIK, DAVID MUTAI, RICHARD KIPLANG'AT SIGEI, JACKSON CHERUIYOT RONO, DAVID MUTAI AND ALFRED KIPRONO BETT) to each swear an affidavit to support the case. During trial he testified and got only ALFRED KIPRONO BETT AND RICHARD SIGEI to testify. He then closed his case and asked that he would only rely on the sworn affidavits of the rest of the witnesses. MR. ARUSEI for the 2nd Respondent and MR. YEGO for the 1st and 3rd to 8th respondents took objection to the turn of events, saying that they were entitled to cross-examine all the rest of the petitioner's witnesses who had not testified. They opposed the petitioner's reliance on the

witnesses' affidavits without cross-examination. Parties made arguments around the issue.

The petitioner's advocate MR. ORINA contended that the petitioner was entitled to decide which witnesses he would present for oral testimony; that there had been no prior request by the respondents to cross-examine the rest of his witnesses; and that the petitioner's closed case could not be re-opened. The respondents argued that, first, the petitioner was bound by the undertaking he made during the pre-trial conference to call four witnesses; and that for the rest of the witnesses they had the right to cross-examine them on their affidavits which contained contentious matters.

Rule 12(6) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 reads as follows:-

“The provisions of Order 19 of the Civil Procedure Rules, 2010 L.N 151/2010) and the Oaths and Statutory Declarations Act (Cap.15) shall apply to affidavits under this rule.”

Order 19 rule 2(1) of the Civil Procedure Rules provides that:-

“Upon any application, evidence may be given by affidavit, but the court may, in the instance of either party, order the attendance for cross-examination of the deponent.”

The other relevant provision is in rule 12(2)(c) of the Elections (Parliamentary and County Elections) Petition Rules which reads as follows:

“The affidavit under sub-rule (1) shall 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 issue.”

Courts have in the past sought to interpret the provisions of Order 19 rule 2(1). In the case of **KIBAKI .V. MOI & ANOTHER (Election Petition No.1 of 1998)**, the High Court in dismissing an application for cross-examination of a deponent held thus:

“In the exercise of its ordinary jurisdiction, the High Court is vested with the discretionary power to allow the cross-examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed, cross-examination will not be ordered.”

Azangalala, J (as he then was) in **HUDSON ENTERPRISES LTD. V. KENYA COLD STORAGE (FOODS) LTD. & 14 OTHERS (2006) eKLR** followed the decision in **KIBAKI .V. MOI & ANOTHER (Supra)**, and while dismissing an application for cross-examination, observed that:

“Under this provision (Order XVIII Rule 2 (1), the right to cross-examine a deponent on his affidavit is discretionary. Like all judicial discretions it has to be exercised judicially and not whimsically or capriciously. In the case at hand the circumstances are such that I had to decline the application. All the complaints made by the Plaintiff can be established by means other than cross-examination of WILFRED NYASIMI OROKO.”

Further afield, in **IRISH BANK RESOLUTION CORPORATION LTD. V. QUINN (2012) 1 EHC 510** Kelly, J held that:

“I am satisfied that there is jurisdiction to make the order sought. In my view, the discretion of the court ought to be exercised in favour of the making of the orders sought. I am of the opinion that the Plaintiffs have demonstrated sufficient grounds for the making of such an order by reference to the material contained in the Respondents' disclosure affidavits when examined in light of the complaints made in the affidavit of Mr. Woodhouse. I am also satisfied that cross-examination is necessary to “fill the vacuum”.”

In making the determination the court followed the decision of O'Donovan, J in **DIRECTOR OF CORPORATE ENFORCEMENT .V. SEYMOUR (2006) 1EHC 369** in which he stated as follows:

“In my view, it is axiomatic that, when in the course of applications to the court which are required to be heard and determined on affidavit, as is the situation in this case, it becomes apparent from the affidavits sworn in those proceedings that there are material conflicts of facts between the deponents in those affidavits, the court must, if requested to do so, consider whether or not to direct a plenary hearing of the proceedings or that one or more of the deponents should be cross-examined on his or her affidavit. This is so because it is impossible for a judge to resolve a material conflict of fact disclosed in affidavits. However, while it seems to me that where it is debatable as to whether or not the cross-examination of a deponent on his or her affidavit is either necessary or desirable, the court should bend towards permitting the cross-examination. At the end of the day it is within the discretion of the court as to whether or not such a cross-examination should be directed and that discretion should only be exercised in favour of such cross-examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine.”

Back to the facts of this petition. The court has to bear in mind that the petition has to be heard and determined within 6 months from the date of filing. The Rules require that when filing a petition, the petitioner has to support it with affidavit evidence. All the witnesses he intends to call have to each swear an affidavit regarding the matters in question. The petition is then served along with the affidavits. The respondent should swear an affidavit in response. If he has witnesses they should each swear an affidavit. The respondent and his witnesses are rebutting the evidence of the petitioner and his witnesses, unless there is a concession. No witness will be allowed to testify unless he has put in an affidavit. The court can ideally resolve the petition on the affidavit evidence. This is why at pre-trial conference each side will indicate whether it will call any of the witnesses who have sworn affidavits to orally testify. Either the petitioner or the respondent may indicate that he wants to cross-examine a particular witness on the opposite side. In that case, there will be opportunity to re-examine the witness. In all these, the court and the parties will bear in mind the overriding objective: the need for a just, efficient and expeditious disposal of the petition. It is with this background in mind that the court should decide the present application. The authorities cited should be read with the above considerations in mind.

In my view then, the provisions of Order 19 rule 2(1) of the Civil procedure Rules and rule 12 (2)(c) of the Elections (Parliamentary and County Elections) Petition Rules should be interpreted to mean that the cross-examination of a deponent is not mandatory, but the court may, in the exercise of its discretion and on application by either party, order that a deponent be cross-examined. In the exercise of such discretion, the court should seek the demonstration by the applicant that there are sufficient grounds for making an order for cross-examination. Such demonstration should be by reference to the material contained in the affidavit whose deponent is sought to be cross-examined to show that the affidavit contains disputed matters when examined against the affidavit by the respondent. Where no sufficient basis has been laid the request to cross-examine should be declined.

In the instant case, the petitioner promised to call 4 witnesses but called only two, apart from himself, and closed his case. In my view, even as he promised to call 4 witnesses, it was still within his right to reduce the number. He knows his case best and how to achieve his intended result. At the time he was closing his case there was no indication from the respondents that they wanted any of the uncalled witnesses to be cross-examined.

Secondly, it was during the pre-trial conference that parties were required to indicate the number of oral witnesses they were going to call. It was at that conference that the respondents should have indicated that they wanted the petitioner to avail any particular witness for cross-examination. That should have, among other things, enabled the petitioner to arrange to avail the witness. Even before then, the respondents would have at that point demonstrated why it was necessary to cross-examine such witness. To ask for the witness now means the petitioner re-opens his case and the matter is adjourned for him to go and bring those witnesses!

In other words, the application is being brought late in the day. But more important, I did not hear either MR. ARUSEI or MR. YEGO point to any aspects of the affidavits of the witness they were seeking and compare with respondents' affidavits as a way of demonstrating that there were matters that were in

dispute and that the only way the court was going to resolve them was by cross-examination. Now that the application they were making was not a formal one in which the issues in contest would have been pointed out, it was necessary that they take the court through the affidavits to be able to point out matters they considered contentious.

Lastly, unlike the petitioner who has closed his case, the respondents are still calling oral evidence. They still have the opportunity, through their witnesses, to effectively deal with the issues they consider to be in contention and about which the petitioners' witnesses have sworn affidavits.

In conclusion, no proper or sufficient basis has been laid and therefore the request to cross-examine the petitioner's witnesses is declined. Costs shall abide the outcome of the petition.

Dated, signed and delivered at Kericho this 8th day of July, 2013.

A.O. MUCHELULE

JUDGE