



**Shafat v Independent Electoral and Boundaries Commission (IEBC) & 2 others
(Election Petition E002 of 2022) [2022] KEMC 6 (KLR) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 6 (KLR)

**REPUBLIC OF KENYA
IN THE GARISSA LAW COURTS
ELECTION PETITION E002 OF 2022
HM NYABERI, CM
NOVEMBER 15, 2022**

BETWEEN

SALAH HASSAN SHAFAT PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

IBRAHIM ABDI FARAH 2ND RESPONDENT

HASSAN DAHIR NOOR 3RD RESPONDENT

RULING

1. This petition went through pre-trial conferencing and was certified ready for hearing between 14th and November 18, 2022.
2. When the petition came up for hearing today November 14, 2022, the Petitioner Salah Hassan Shaft, PW1 and Salah Mohamed Abdi Bulle, PW2 testified and were cross examined accordingly. They admitted in their evidence to have appeared before Mr. Shabaan Alex Commissioner for the administration of Oath for their affidavits.
3. The learned counsel Mr. Mohamud for the 1st and 2nd respondent made an oral application by way of a preliminary objection that the affidavits by PW1, PW2 and the other witness affidavits in support of the petition offend section 4 (1) of the *Oaths and Statutory Declaration Act*. That the affidavits have been commissioned by Shaban Alex an Advocate who has a direct interest of the proceedings. That the affidavits are bad in law and should be struck out and the petition should suffer the same fate.
4. The learned counsel Mr. Ndegwa for the 3rd respondent in a rejoinder reiterated the preliminary objection made by the learned counsel for the 1st and 2nd respondent. They rely on the authority in the case of *Stephen M. Mogaka v IEBC & 2 others* (2017) eKLR and *Kenya Federation of Labour &*



another v AG and 2 others (2014) eKLR; and *Caltex Oil (Kenya) Ltd v New Stadium Station Ltd & another* (2002) KLR where the court struck out affidavits in contravention of section 4 of the *Oaths and Statutory Declaration Act* for being commissioned by an Advocate and Commissioner for Oaths in conflict with interest.

5. The learned counsel for the 3rd Respondent further submits that article 159 (2) (d) cannot save this irregularity. It is not a technicality. Once the affidavits have been struck out, the petition cannot stand alone. It should be struck out.
6. The learned lead counsel for the petitioner Mr. Masake in his response submit that he was aware that the affidavits or documents were commissioned using his stamp but they are more than one Advocate in the law firm. He is holding brief for Mr. Mosota for the petitioner. If the court find that the commissioning of documents offends provisions of section 4 (1) of the *Oaths and Statutory Declaration Act*, then only the affidavits of witness who have testified should be expunged from the proceedings.
7. In quick response, Mr. Mohamud submits that the facts are clear that the witnesses appeared before the lead counsel representing the petitioner. If the stamp was used in his absence, it means there was no administration of an Oath. Whereas Mr. Ndegwa submits that there is admission that all the affidavits were commissioned by use of his stamp. It is not essential that the other witness have not taken their stand in the dock.

Analysis and Determination

8. Section 4 (1) of the *Oaths and Statutory Declaration Act* provides that:-
 1. A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:
9. Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.
10. It is quite apparent from the above provision that a Commissioner for Oaths can commission any document provided that such a Commissioner for Oath shall not exercise any of the powers given by the law to commission documents in proceedings in which is an Advocate for parties or concern in the matters or clerk to any Advocate or in which he is interested.
11. In the authority relied by the 3rd respondent, the court struck out affidavits filed in contravention of section 4 (1) of the *Oaths and Statutory Declaration Act*.
12. In the instant petition, the learned counsel Mr. Masake by his own admission confirmed to the court that his commissioning stamp was used to commission documents. Besides, that they are more than one Advocate in the law firm. If at all the affidavit for the witness who have testified offends section 4 of the *Oaths and Statutory Declaration Act*, they may be expunged.
13. In the case of *Lee Njiru v JK Lokorio & another* (2019) eKLR, the facts thereof were that; the verifying affidavit in support of the claimant was commissioned by an Advocate in the same practice under the same law firm representing the claimant. The court found that the Advocate contravened the



mandatory provisions of section 4 (1) of the *Oaths and Statutory Declaration Act* which cannot be covered by article 159 of the *Constitution*.

14. There is no dispute that the petitioner, PW1 and PW2 appeared before the learned lead counsel Mr. Shabaan for administration of an Oath. Likewise, I have also observed from the affidavit of the rest of the Petitioner witnesses are commissioned by one and the same commissioner. The learned Advocate commissioner has conceded to the issue raised by the Respondents. Going by the above authorities, this court is of the same view that the Petitioner's affidavit sworn on 30/8/2022, PW2 affidavit sworn on 1/9/22 and all the petitioners' witnesses are expunged and struck out from the court records.
15. Pursuant to Rule 12 (1) (a) and (b) of the *Election (Parliamentary and County Elections) Petition Rules, 2017* which provides that a petition shall be supported by an affidavit. The petition herein therefore is left without a foundation. Consequently, the petition is struck out with costs to the respondent to be determined by the court. Right of appeal 5 days.

RULING DELIVERED, SIGNED AND DATED THIS 15TH DAY OF NOVEMBER, 2022.

HON. H.M. NYABERI

CHIEF MAGISTRATE

In the presence:

Mr. Masake acting alongside with Mr. Kipyegon Advocate for the Petitioner

Mr. Mohamud Advocate for the 1st and 2nd Respondents

Mr. Ndegwa Advocate for the 3rd Respondents

