



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT GARISSA

ELECTION PETITION NO 4 OF 2017

BETWEEN

KAMILA MUTHOW SALAT.....PETITIONER

AND

SALIMA HAWACHU FARID.....1ST RESPONDENT

FORD KENYA PARTY.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

This is the Ruling on the 3rd Respondent preliminary objection raised orally in this court on the 19th December 2017. The main ground in support of the preliminary objection is that the affidavit filed on the 6th August 2017 in support of the Petitioners petition is not dated.

In his submissions, Mr Lesaigor, Advocate for the 3rd Respondent, argues that the said affidavit does not comply with the Election (Parliamentary and County) Election Petition Rules (herein referred to as the Rules). He submits that, Rule 12 of the the said Rules, does adapt the Oath and Statutory Declarations Act (Cap 15) and Order 19 of the Civil Procedure Rules 2010. He submits further that, section 5 of the the Oaths and Statutory Declarations Act stipulates that an affidavit must be dated. This in his view is a mandatory provision which goes to the substance of the petition. He posits that in view of the above provision of the law, the only option available to the court is to strike out the petition as it cannot be cured by Article 159 (2) (d) of the Constitution of Kenya 2010. He urges the court to be guided by judgement in **DAVID WAMATSI OMUSOTSI-VS-RETURNING OFFICER MUMIAS EAST CONSTITUENCY & 2 OTHERS [2017] e KLR.**

In support of Mr Lesaigor's submissions, Ms Lumala, Advocate for the 1st and 2nd Respondent urges the court not to rely on the Petitioners affidavit in support of the petition. She points out that the petition was purportedly filed on 6th August 2017, whereas, the petition itself is dated 6th September 2017. In her view, this is an indication of lack of seriousness by the Petitioner. She cites the judgement in **SANDEEP SINGH BENAWARE-VS-SHIMMERS PLAZA LTD & ANOTHER [2007] e KLR** wherein the court held that dating an affidavit is not a cosmetic requirement. In the absence of such dates, the court is left to guess when the affidavits were made and hence their worthlessness both in law and fact. She argues that failure to comply with section 5 of the Oath and Statutory Declarations Act rendered the affidavit defective. In her view, the issue of dating the affidavit goes to the substance of the petition. She urges that the petition is not supported by an affidavit therefore it needs to be struck out.

In reply, Mr Otieno, Advocate for the Petitioner submits that the preliminary objection is an afterthought since it was not raised during the pre-trial conference. He further urges that it ought to have been brought by way of a formal application. His view is that the preliminary objection goes against Article 159 (2) of the Constitution which stipulates that justice shall not be delayed. He submits that the objection is meant to delay justice. He also cites Article 159 (2) (d) which does stipulate that justice shall be administered without undue regard to legal technicalities. In his view, the present objection is merely a technicality. He submits there are varying decisions with regards to Order 19 of the Civil Procedure Rules, therefore, the issue should have been raised in a formal application to enable the parties to address the same properly. In reply to the issue raised on the difference between the date the petition was filed and the date of the petition itself, Mr Otieno reiterated that petition was filed on the 6th September 2017. The stamp on the face of the petition originates from the court, therefore, the error was made by the court registry. He submits further that the Petitioner raises fundamental questions of law which the Respondents want addressed through technicalities. He urges the court to resist such attempts. He argues that substance will always prevail upon form. He submits that the petition was properly and duly signed with the supporting affidavit referring to annexure which are duly dated and signed. In his view, the annexures form part of the body of the petition. Mr Otieno relies on **ELECTION PETITION NO 1 OF 2017, RAILA ODINGA & ANOTHER-VS- I.E.B.C & OTHERS**. He urges the court to deem the petition and the affidavit in support thereof as duly filed and allow matter does proceed for hearing.

I have carefully considered the preliminary objection by the Advocate for the 3rd Respondent. I have also put into consideration the submissions by the Advocates for all parties and the authorities cited by them. In my view, the issue for determination here is only one, and that is, whether the affidavit in support of the petition is fatally defective, and therefore, ought to be struck out, and by extension, the petition itself.

Rule 12 (14) of the Election (Parliamentary and County Elections) Petition Rules provides that :

12 (14). The oaths and Statutory Declaration Act (Cap 15) and Order 19 of the Civil Procedure Rules 2010 shall apply to affidavits under this rules.

Clearly, the above rules do adapt the the Oath and Statutory Declaration Act and Order 19 of the Civil Procedure Act. Therefore, to arrive at a decision, it would be important to see what the said provision of law stipulate in relation to the objection raised by the 3rd Respondent.

Section 5 of the Oath and Statutory Declaration Act (Cap) provides that:

Section 5. Every Commissioner for Oaths before whom any oath or affidavit is taken under this Act shall state truly in the Jurat or attestation at what place and on what date the oath or affidavit is taken.

Section 5 appears to be mandatory. However, in my view it ought to be read together with other provisions of the law. Rule 12 (14) of the Rule does also mention Order 19 of the Civil Procedure Rules . Clearly, the intention here was that the two provisions of law be read together. It would be a great mistake to read section 5 of the Oath and Statutory Declaration Act and ignore Order 19 rule 7 of the Civil procedure Rule. This has the potential of occasioning great injustice. Order 19 rule 7 provides as follows:

O.19 rule7. The court may receive any affidavit sworn for the purposes of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in title or other irregularity in form thereof or any technicality.

Order 19 does grant the court discretion to receive affidavits, their technical defects notwithstanding. The only test would then be, whether the defect is decriptive, on the title, form or technicality. Article 159 (2) (d) of the Constitution more or less puts the matter to rest. But this is not to say that legal procedures be overlooked. Rather, the test that our superior courts have set forth is, whether the said defect goes to the substance of the case. The question then to be determined in this case would than be, whether the omission of the date in the jurat goes to the substance of this petition. In my view, not at all. The body of the affidavit would probably go to the substance of the petition, but not the date, especially considering

that all annexures to the affidavit were duly dated and signed. I would agree with the Advocate for the Petitioner that the said annexures form part of the petition. I have looked at the authorities cited by the Respondent's Advocates. I find that the **DAVID WAMATSI OMOSOTSI** case (supra) is clearly distinguishable in that, the petitioner did not file the affidavits for his witnesses at all. This is clearly in contravention of the rules. It also goes to the substance of that case. Whereas, the **SANDEEP SINGH BENAWRA** case (supra) was determined during the Pre-Article 159 era. The law has since developed, and, emphasis is now on substantial justice.

The other issue raised was about the date on the petition and the date it was filed. I have perused the record and I have confirmed the petition was filed on 6th September 2017. The error emanated from the court registry, not the Petitioner or her Advocates.

Having said that, I find that the preliminary objection is premised on a legal technicality which does not go to the substance of the petition. Therefore, it would be unjust to strike out the affidavit and by extension the petition itself. Hence, the preliminary objection is overruled.

DATED, SIGNED and DELIVERED this 10th day of January 2018

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J.J.MASIGA

SENIOR RESIDENT MAGISTRATE