



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT NAROK

ELECTION PETITION NUMBER 3 OF 2017

IN THE MATTER OF THE ELECTIONS ACT 2011

**IN THE MATTER OF ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES 2017**

IN THE MATTER OF ELECTION FOR MEMBER OF COUNTY ASSEMBLY SUSWA WARD

KAPUSIA OLE SALONI.....PETITIONER

VERSUS

JAMES KIPAS LANGUES.....1ST RESPONDENT

CONSTITUENCY RETURNING OFFICER NAROK EAST CONSTITUENCY

CHRISTINE OTIENO.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. The Application before the Court is the 1st Respondent's/Applicant's Notice of Motion Application dated 15th October, 2017 and filed on 23rd October, 2017. The application is brought under Sections 2(2), 63(2) and 107 of the Evidence Act CAP 80 Laws of Kenya, the Oaths and Statutory Declarations Act CAP 15 Laws of Kenya, Rule 12 of the Elections (Parliamentary and County Elections) Petition Rules 2017 (Hereinafter the "*Election Petition Rules*"), and Order 19, Rules 3 and 6 of the Civil Procedure Rules. The Application seeks the following orders:

- a) *That paragraphs 3,5,6,7,8,9 and 10 of the Petition dated 6th September, 2017 be struck out*
- b) *That paragraphs 5, 13,15,16,18,19 and 20 of the Petitioner's supporting affidavit deponed on 6th September, 2017 be struck out;*
- c) *That the 1st Respondent be awarded the costs of this application.*

2. The application is supported by the affidavit of the 1st Respondent Hon. Kipas Lengues sworn on 16th October, 2017. The grounds on which the application is based are in the body of the application. The Applicant contends that the above cited paragraphs generally offend the rules of pleading, affidavit drafting and evidence and the paragraphs do not disclose any reasonable cause of action and are oppressive and an abuse of the process of the Court. In particular, it is averred that the impugned paragraphs of the Petition and the Petitioner's supporting affidavit make baseless, unsubstantiated, oppressive, scandalous, frivolous and vexatious claims of voter bribery against the 1st Respondent and allegations that the 1st Respondent colluded with the 3rd Respondent's officers to deny the Petitioner's agents entry to polling stations and other allegations which cannot be substantiated.

3. The Petitioner filed a replying affidavit on 1st November 2017 opposing the application. As at the date of delivery of this ruling, the 2nd and 3rd Respondent's response to the application was not on record. The 2nd & 3rd Respondents submissions are also not on record. Ms. Karanja for the 2nd and 3rd Respondent had indicated that they may not be opposing the application. The Petitioner, in opposition to the application, avers that Paragraphs 3 and 5 of the Petition are properly pleaded. The allegations of bribery in the said paragraphs are competently pleaded and the 1st Respondent has the opportunity to cross-examine on these issues at the hearing. The Petitioner contends that the averments at paragraph 3 and 5 are further explained at paragraph 5 of his Supporting Affidavit whereby he has alleged that there was voter bribery perpetrated by the 1st Respondent at a specific polling station being Suswa Primary School and the said paragraphs provide grounds which this Court can be called upon to determine.

4. It is further contended that paragraphs 15, 16, & 18 of the Petition are competently pleaded and sworn. The Petitioner avers that Paragraph 6 relates to entry into polling stations, paragraph 7 relates to an agent who was denied entry. Paragraph 8 relates to a specific polling station. Further, it is averred that the Affidavits of Denis Kuitaet Omerae, Parmeres ole Muriongo, Joel Tuanei Partoip, and Kasankui Ole Mututa provide the supporting testimony and evidence to the pleadings at the said paragraphs. The Petitioner further avers that the issue of transfer of voters is properly pleaded as supported by the averments at paragraphs 19 and 20 of the supporting affidavit. The Petitioner avers that the said paragraphs do not in any way indicate any breach of the rules of pleadings or otherwise and that the paragraphs listed by the Petitioner as being offending have extensive support in the supporting affidavit and witness affidavits. The Petitioner avers that the 1st Respondent is delving into the issues that can be well dealt with at the substantive hearing and that the Court should strive to look at the Petition in its entirety.

APPLICANT'S SUBMISSIONS

5. The Applicant's Counsel appreciates the trite principle of law that striking out of pleadings is a draconian measure and refers to the dicta of Madan JA in ***D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR*** where Madan J stated that courts will only resort to striking out pleadings as a matter of last resort and when the impugned pleadings are so hopeless to be incapable of being resuscitated by amendment.

6. Counsel further submits that it is trite law that pleadings that do not disclose any reasonable cause of action are liable for striking out as they neither attract relief nor assist the court in the determination of a matter before it. Counsel urges that the Petitioner at paragraphs 9 & 10 of the Petition and paragraphs 19 & 20 of the supporting affidavit makes bizarre, unsubstantiated, oppressive and scandalous allegations against the 1st respondent and in particular that the 1st Respondent "*managed to transfer voters massively to Suswa ward against their wishes*". The said allegation, it is contended, is baseless and does not disclose any cause of action since it is the constitutional mandate of the 3rd Respondent to register voters, maintain the register of voters and transfer voters' registration particulars upon request by the voters themselves. Counsel submits that it is a trite principle of law that "*he who asserts must prove*" and the Petitioner has not provided any evidence in support of his claims.

7. The Applicant's Counsel further submits that the Petitioner has not adduced any proof of the allegation

of bribery. Further, the allegation that the 1st Respondent in collusion with the officials of the 3rd Respondent, denied the Petitioner's agents access to the polling stations is couched in broad terms which are not substantiated and none of the agents allegedly denied access have deposed an affidavit in support of the allegations.

8. Counsel relies on the case of *Musikari Nazi Kombo V Moses Masika Wetangula & 2 others*[2013] eKLR where Gikonyo J, quoting Ojwang J (*as he then was*) in the case of *Joseph v Ukay Estate Ltd Nbi HCCC No. 813 of 2004* held that allegations are scandalous if they state matters which are indecent, offensive, or made for the mere purpose of abusing or prejudicing the opposing party. The court, in the case of *Musikari Nazi Kombo*(supra), appreciated the nature of allegations raised in Election Petitions and Gikonyo J stated;

“But it should be understood that, the law still requires such allegations to be made within the law; that is to say, within the legal thresholds I have stated herein above as a way of preventing prejudice to, unfair charge on, or infringement of a person’s rights. The allegations or averments in an affidavit should also not be irrelevant; having no probative value; not tending to prove or disapprove a matter in issue. The averment should be supported by evidence within the affidavit itself or by some other person in the proceedings, in this case, by a witness through an affidavit filed in court in accordance with the Elections (Parliamentary and County Elections) Petition Rules, 2013.”(underlining for emphasis)

PETITIONER’S/RESPONDENT’S SUBMISSIONS

9. The Petitioner’s Counsel submits that the Application lacks merit and is the subject of theorizing about procedure and the conduct of election Petitions. Counsel submits that Petitioner has pleaded and provided evidence including the filing of witness affidavits. Counsel urges that 1st Respondent has made lofty statements in paragraphs 7-20 of the supporting affidavit to his notice of motion without providing any cogent support to the application. It is contended that there is no substance in the said affidavit to warrant the dislodging of this Petition and this Application is a complete waste of the valuable judicial resource of time.

10. Counsel further submits that the 1st Respondent has demonstrated the lack of diligence in dealing with this matter. He states that the Application was made despite the 1st Respondent being served with the further witness affidavits filed herein, which affidavits answer his allegations. Counsel urges that the 1st Respondent cannot purport to draft the Petition for the Petitioner and that the grounds of the Petition are based on the facts on the ground and if the 1st Respondent disputes the same, he should counter the same during the substantive hearing of this Petition. It is further submitted that the averments in paragraph 2, 3 and 4 of the grounds in support of the application are speculative and only make allegations without properly considering the entire Petition as filed, including affidavits and other evidence attached. Counsel submits that the Application rides on events before further witness affidavits were filed.

ISSUES FOR DETERMINATION

11. I have considered the application in its entirety and the submissions filed by Counsel. The main issue for determination is whether paragraphs 3,5,6,7,8,9 and 10 of the Petition dated 6th September, 2017 and Paragraphs 5, 13,15,16,18,19 and 20 of the Petitioner’s supporting affidavit deposed on 6th September, 2017 are offensive, oppressive, scandalous, disclose no reasonable cause of action and an abuse of the court process and therefore liable to be struck out.

DETERMINATION

12. The Court is being asked to strike out several paragraphs in the Petition herein and in the supporting affidavit sworn by the Portioner. The power to strike out pleadings is a draconian measure which can only be employed as a last resort and only in the clearest of the cases. At this stage, the Court is not called upon to analyze the evidence and make a determination as to whether any allegation made has been

proved to the required standard of proof. As a general rule, a party providing facts to support any ground pleaded in the pleadings should be allowed to ventilate his/her claim and the opposing party granted an opportunity to contest the facts.

13. In the case of *Dev Surinder Kumar Bij v Agility Logistics Limited [2014]eKLR* it was held, inter alia, that;

“For a pleading to be dismissed pursuant to the provision of Order 2 Rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable action as against the Defendant”

14. In the case of *Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others [2013] eKLR*, the Court (Achode J) while considering whether to strike out an Election Petition, quoted the case of *D.T. Dobie Company (Kenya) Limited v Muchina [1982]KLR1* where the Court stated;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it”

15. I have perused the Petition, the Petitioner’s supporting affidavit and the further witness affidavits which were filed with the leave of the Court. I deem it necessary to consider all the impugned paragraphs and determine whether they should be struck out as urged by the applicant. Paragraphs 3, 4 and 5 of the Petition raise allegations of voter bribery. In particular, it is alleged and pleaded that the 1st Respondent, during the voting exercise, walked along the queue bribing voters with Kshs 500. It is further alleged that the officers of the 3rd Respondent and police officers failed to take any action. The Petitioner at paragraph 5 of the supporting affidavit has deponed to wide spread cases of voter bribery.

16. This Court takes cognizance of the fact that bribery is an election offence and which, if proved, may influence the choice of the voters and ultimately impeach the fairness and integrity of the voting exercise. It is incumbent on the Petitioner to plead facts and demonstrate, through witness affidavits, the evidence that *prima facie* discloses the offence of bribery of voters. The Petitioner, in his supporting affidavit, having made specific allegations of voter bribery, I find that the allegation ought to be tested in a full trial and not dismissed summarily. I, therefore, decline to strike out the paragraphs relating to voter bribery. In this regard, I am guided by the decision of Ogolla J in the case of *Justus Gesito Mugali M’mbaya v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR*, where the Judge stated:

“However, the contents of paragraphs 25, 26 and 27, in my view, amount to election offences within the purview Part VI of the Elections Act. As an Election Court, I am directed by S. 87 of the Elections Act, to make and send a report in writing to the Director of Public Prosecution, Commission and the relevant speaker indicating whether an election offence has been committed by any person in connection with the election. This report is done at the conclusion of the hearing of a petition after it has been proved that such person is guilty of an election offence. In effect, such determination can only be done upon trial and after the 3rd Respondent has proved the allegations contained in the said paragraphs. In that regard, I decline to expunge paragraphs 25, 26 and 27 of the witness affidavit.”

17. Paragraphs 6, 7 and 8 raise allegations that the Petitioner’s agents were denied access at various polling stations which allowed the 1st Respondent and the officials of the 3rd respondents commit election malpractices. Paragraph 7 identifies one of the agents denied access. I have perused the Petitioner’s further witness affidavits which were filed with the leave of the Court. In the affidavits sworn by PARMERS OLE MURIONGO, KASANKUI OLE MUTUTUA, JOEL TUANEI PARTOIP, DENIS KUITAMET OMERAE AND MUKWE OLE LESALON on 9th October, 2017 and filed on 10th October, 2017, the deponents aver to specific instances of alleged denial of access to the various polling stations. I decline to expunge the said paragraphs and paragraphs 15 to 18 of the supporting affidavit to enable the

allegations to be adjudicated fully during the trial.

18. Paragraphs 9 and 10 raise issues relation to alleged transfer of voters to Suswa ward without their consent and who were thereafter influenced to vote for the 1st respondent. The Petitioner, at Paragraph 20 of the supporting affidavit, has averred that some of the voters demanded to know why they had been transferred to the Suswa Primary polling station. In paragraph 7 of the affidavit sworn by Mukwe Ole Lesalon on 9th October, 2017 similar issues have been averred.

19. The Respondents have filed responses and denied the material allegations raised in the Petition. Counsel for the applicant submits that none of the agents allegedly denied access have deponed an affidavit in support of the allegations. It appears that the 1st Respondent/applicant did not make any reference to the further affidavits filed by the Petition pursuant to the leave granted in a ruling delivered by this Court on 19th October, 2017. I note from the record that the Respondents have since filed further affidavits in answer to the allegations raised by the Petitioner's witness. With reasonable circumspection, I resist the invitation to analyze the evidence on record to determine whether the Petitioner has discharged the evidentially standard of proof. This is an exercise to be undertaken after full trial after the witnesses are subjected to cross examination. Election disputes are *sui generis* in nature and raise significant public interest and the Court should lean towards full adjudication of the issues on merit where specific allegations of election malpractices have been raised. It is my finding that the Petitioner has sought to support the averments pleaded in the Petition through the various affidavits filed and the pleadings raise triable issues.

20. In view of the foregoing, it is my finding that the impugned paragraphs are not scandalous, frivolous and vexatious and the Respondents have an opportunity to adduce evidence to controvert and disapprove the allegations raised. I find the application not merited and dismiss the same with costs to the Petitioner.

RULING DATED AND DELIVERED THIS 3rd DAY OF NOVEMBER 2017

H.M. NG'ANG'A

SENIOR RESIDENT MAGISTRATE

IN OPEN COURT IN THE PRESENCE OF:

FOR PETITIONER: MR. MANYANGE

FOR 1ST RESPONDENT: PRESENT IN PERSON

FOR 2ND & 3RD RESPONDENTS: NO APPEARANCE

COURT CLERK: SHADRACK KASASO