



REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATES' COURT AT MANDERA

ELECTION PETITION NUMBER 3 OF 2017

MUKTAR BISHAR SHEIKH.....PETITIONER

VS

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

RETURNING OFFICER [MANDERA WEST CONSTITUENCY].....2ND RESPONDENT,

HASSAN ROBOW MOHAMMED.....3RD RESPONDENT

RULING

1. INTRODUCTION

The petitioner herein was running for the seat of member of county assembly Lagsure ward Mandera west constituency in the general elections held on the 8th of August 2017 that were conducted by the Independent Electoral & Boundaries Commission hereinafter referred to as the '1st Respondent'. The 2nd respondent was the returning officer for that constituency. The 3rd Respondent is the one who was the duly elected member of the county Assembly for Lagsure Ward after the tallying of results.

2. The petitioner was dissatisfied with the results and he filed this petition under the constitution, the Elections Act 2011 and the elections [parliamentary & County] petitions Rules 2017. The petition was said to be supported by an affidavit of the petitioner dated 6th September 2017 and annexures thereto marked as MBS-1, MBS-2, MBS-3, MBS-4, MBS-5, MBS-6, MBS-7 and MBS-8.

3. The 3rd respondent through his advocates on record M/S Kinoti & Kibe Company Advocates filed a Notice of Motion dated 9th of November 2017 seeking for orders that:-

- The Honorable court be pleased to strike out and expunge from the record, the supporting affidavit of Muktar Bishar Sheikh filed on the 6th of September 2017 in support of the petition herein.
- The Honorable court be pleased to strike out and expunge from the record the following affidavits annexed to the petitioners' supporting affidavit marked as MBS-4 to wit the affidavits of Mohammed Edin Ibrahim, Adan Hussein Mohammed, Dayow Abdulahi and Adan Sheikh Muktar all sworn on the 29th of August 2017.
- The Honorable court be pleased to strike out and expunge from the record the following affidavits annexed to the petitioners' supporting affidavit as annexures marked MBS-5 to wit the affidavits of Mohammed Hassan Omar, Mohammed Orionur, Zeituna Yussuf, Moulud Salad Mohammed, Najma Alinur Yarrow, Nur Sheikh Nur, Nurow Ibrahim Kerrow, Issack Eden Kontoma, Issack Abbey, Mohammed Abdi Sheikh, Mohammed Adan Ibrahim, Mohammed Aliow Maalim, Hassan

Adan Mane, Hassan Omar Abdi ,Hassan Abdi Ahmed ,Hussene Hassanow, Fatuma Hassan ,Fatuma Sheikh Alio ,Habiba Alio Mamo ,Hadija Abdullah Hirrow, Hamdi Abdikadir Abdulla, Amina Mohammed Abdinoor, Anoy Osman Abdi ,Asha Alio, Barwaqa Abdulla Issack, Bathrudin Issack Kassim, Nurow Issack Alio, Rashid Hassa Hussein, Rukia Billow ali , Saadia Hassan Apata, Safia Aliyow Moahammed, Shamsa Maalim Farah, Shukri Abdulahi Abdula, Suldan Ibrahim Ibren, Zuldana Ibrahim Hassan, Abdiaziz Hussein Yarrow, Abdikadir Eminur, Adikarim Adan Hassan, Aliyow Shamo, Abdi Hassan Kullow, Abdullah Maalim Abdi, Adan Hussein Mohammed, Adan Maalim Bulle and Ahmed Abdi Abdulahi all sworn on the 29th August 2017.

- That the Honorable Court be pleased to strike out the petition herein dated 5th September 2017.
- That the 3rd Respondents costs of the application and the petition be borne by the petitioner.

The application is premised on the grounds on the face thereof and is supported by the affidavit of Hassan Robow Mohammed the 3rd Respondent.

GROUND OF THE APPLICATION.

The grounds of the application are that the petition herein is incurably defective as the petitioners' supporting affidavit filed on the 5th of September 2017 in support of the petition was not sworn before an officer authorized by law to administer oaths. It was not commissioned in accordance with the law. That the affidavits sworn by various persons annexed to the affidavit of the petitioner are mere exhibit and not witness affidavits within the meaning of rule 12 of the election petitions rules 2017. That the impugned affidavits are not independent affidavits and so cannot stand on their own as independent evidence in these proceedings. That the petitioners' breach of sections 4,5 and 6 of the Oaths and Statutory Declarations Act CAP 15 laws of Kenya and Order 19 of the Civil Procedure Rules constitutes fundamental breach of substantive and procedural law which is not curable or excusable under rule 4 of the election petition Rules 2017 and Article 159 of the constitution . That the reliefs sought are necessary to remedy the unadulterated breaches of express statutory provisions of the law and abuse of the Court process by the petitioner herein and further that it is fair and just that the orders sought be granted.

THE PETITIONERS' RESPONSE

The petitioner though served and was well aware of the application did not file any response in opposition to the application. The petitioner never filed his submissions to the application as agreed by all the parties on 3rd November 2017. The 1st and 2nd Respondents did not file any response to the application. Basically the application was not opposed.

SUBMISSIONS

The Advocates for the 3rd Respondent/Applicant filed written submissions in support of the application together with the Authorities they relied on to support their case on 10th November 2017. The petitioner was to file his submissions on or before 17th November 2017. He did not file any. no submissions were filed for the 1st and 2nd Respondents. In his written submissions the 3rd Respondent through his Advocates submitted that the petitioners' supporting affidavit violates the provision of sections 4&5 of the Oath and Statutory Declarations Act . That there is no competent affidavit in support of the petition herein. That all the purported witness affidavits are annexures to the incompetent supporting affidavit of the petitioner . They are nothing more than exhibits and documents which the petitioner intends to rely on within the contemplation of rule 12(10) of the election petition rules. That under rule 12(12) of the election rules, the said affidavits cannot form part of the record of the hearing of the purported witnesses' evidence for purposes of examination in chief . He cited the case of **ISMAIL SULEIMAN & 9 OTHERS –vs-RETURNING OFFICER ISIOLO COUNTY & OTHERS (2013) eKLR** where the affidavits were found in violation of section 5 of the Oaths and Statutory Declarations Act were struck out and it was held that the petition without the witness affidavits was an empty shell bound to fall. He also cited **ODINGA & 5 OTHERS –vs-INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (I.E.B.C) & 4 OTHERS (2013)** where the Supreme court held that:-

'The so called affidavits of witnesses are annexed to the so called affidavit of the petitioner. The question is whether these annexures are affidavits for the purposes of an election petition?. Rules 12(3) and (4) of the elections petition rules require each of the persons whom the petitioner intends to call as a witness to swear an affidavit to be filed with the petition .According to rule 12 (12) ,such affidavits form part of the record of the hearing and may be deemed to be the deponents evidence for the purposes of cross examination. Rule 8 states that a witness shall not give evidence (except with the leave of the court) unless the witness has sworn an affidavit. The annexures in question can only be considered as the evidence of the deponent,in these case the evidence of the petitioner .The people mentioned were supposed to swear their independent affidavits to make their own evidence independent of the evidence of the petitioner. What is contained in the evidence of the petitioner is not their evidence .They cannot be cross examined on the evidence of the petitioner. There are thereby no affidavits on record that can form the basis of the evidence of witnesses for the petitioner. The petitioner has used an unusual way of availing affidavits as annexures or evidence as there were various further affidavits filed through the affidavit in reply which were not independent affidavits filed to stand on their own as evidence in the particular proceedings. Such affidavits evaded payment of filing fees and their probative value was questionable. The affidavits and the supporting affidavit of the petitioner are not commissioned .The affidavits are hereby struck out and expunged from the record'

In **DICKSON MWENDA KITHINJI vs GATIRAU PETER MUNYA &2 OTHERS (2014) eKLR** it was held that:

'Rule 8(4)b of the election petition Rules provides that an election petition shall be supported by an affidavit of the petitioner containing grounds on which reliefs is sought. The plain reading of this rule is that an affidavit in support of the petition is a mandatory requirement'

ANALYSIS AND DETERMINATION

The issues for determination are:-

1. Whether the petition complied with the mandatory provisions of rules 8 and 12 of the election (parliamentary and County)petitions Rules 2017
2. Whether non - compliance of the mandatory provisions of rules 8 and 12 of the election petition rules can be cured under the law or excused by the court and
3. Whether the petition herein can stand as it is.

The grounds of the application are twofold-first that the supporting affidavit of the petitioner is not sworn before a commissioner for Oaths and secondly that there are no independent witness affidavits in support of the petition. The affidavits of the proposed witnesses are not independent evidence on their own as they are put in as annexures to the alleged affidavit of the petitioner.

THE UNCOMMISSIONED AFFIDAVIT

Blacks' Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit. In this case the purported supporting affidavit is not commissioned. That document cannot be called an affidavit as known in law. It is incompetent. The same cannot be used to support a petition as required by rule 8 (4) of the election (Parliamentary &County) Petition Rules 2017.

Rule 8(4)b provides that a petition shall be supported by an affidavit sworn by the petitioner containing particulars set out under rule 12.The plain reading of rule 8(4)(b) is that an affidavit sworn by the petitioner in support of the petition is a mandatory requirement.

In **M’Nkiria Petkay Shen Miriti Vs-Ragwa Samuel Mbae & 2 others (2013) eKLR** , it was held that the provision of rule 8 are not mere technical requirements but are substantive and go to the root of the issues in an election petition .

In **Dickson Mwenda Githinji Vs Gatirau Peter Munya & 2 others (2014) eKLR** the court of Appeal held that:-

The requirement of rule 8(4)b that an election petition must be supported by an affidavit sworn by the petitioner containing grounds on which relief is sought is mandatory

In **Odinga & 5 others Vs IEBC &4 OTHERS (2013)eKLR** the supreme Court struck out and expunged from the record affidavits put in by the petitioner which had not been commissioned.

This court is bound by the decisions of the High court, The Court of Appeal and the Supreme Court. Guided by the decisions of the superior courts hereinabove cited, I find that the purported supporting affidavit filed by the petitioner in support of the petition herein is not an affidavit as known in law and the same cannot be allowed to remain on record and ought to be struck out and expunged from the record. Accordingly the unsworn statement filed by the petitioner allegedly as a supporting affidavit to the petition herein be and is hereby struck out and expunged from the court record.

THE ANNEXED AFFIDAVITS OF PROPOSED WITNESSES

The question is, whether the affidavits annexed to the incompetent supporting affidavit of the petitioner are affidavits for the purpose of an election petition?. Rules 12 (3) and (4) of the election (Parliamentary and County) petition Rules 2017,require each of the persons whom the petitioner intends to call as a witness ,to swear an affidavit to be filed with the petition .According to rule 12 (12) such affidavits form part of the record of the hearing and may be deemed to be the evidence of the deponents for purposes of cross examination. The annexures in question therefore can only be considered as the evidence of the petitioner and not the evidence of the people mentioned in the so called affidavit of the petitioner. The people mentioned were to swear their own independent affidavits to make their own evidence independent of the evidence of the petitioner. What is contained in the evidence of the petitioner is not their evidence .They cannot be cross examined on the evidence of the petitioner. There are therefore no affidavits on record that can form the basis of the evidence of witnesses for the petitioner. This petition has no witnesses. The affidavits of the proposed witnesses are annexed to the incompetent supporting affidavit of the petitioner .They are like Ticks attached to the Hide of a sick cow. When the sick cow dies, it dies with them.

In **Odinga & 5 others Vs IEBC & 4 Others (2013)eKLR** the supreme expunged from the record such affidavits which were put in as annexures of the petitioner .The court stated thus:-

‘The petitioner has used the unusual way of availing affidavits as annexures or evidence as there were various further affidavits filed through the affidavit in reply which were not independent affidavits filed to stand on their own as evidence in particular proceedings. Such affidavits evaded payment of filing fees and their probative value was questionable. The affidavits and the supporting affidavit of the petitioner are not commissioned. The affidavits are hereby struck out and expunged from the record’.

This court is guided by the above decision. Accordingly the affidavits of the proposed witnesses annexed to the incompetent affidavit of the petitioner be and are hereby struck and expunged from the court record.

In the foregoing I find the petition filed herein is not supported by an affidavit of the petitioner as required by rule 8 (4)b of the election petitions Rules 2017.It does not contain independent affidavits of witnesses as required under rule 12 (3) and (4) of the said rules. The petition herein does not comply with the mandatory provision of the law . A petition filed without the said documents is defective and the defects are such that they cannot be cured by Article 159 of the constitution or excused by the court without

abrogating the Law. I allow the application by the 3rd Respondent dated 9th November 2017. What remains of the petition is a shell which on its own cannot stand. It is incompetent. The petition is accordingly struck out.

COSTS

The application dated 9th November 2017 was not opposed. The applicant will bear his own costs of the same. On the petition the petitioner shall bear the costs incurred by all the Respondents in defending the petition.

These shall be the orders of the court.

Hon Peter Nyagaka Areri

Senior Resident Magistrate

Signed, Dated and delivered this 11th day of December 2017 in open court

In the presence of:-

Mr. Mungata for the 3rd Respondent and also holding brief for Mr. Odhiambo for the 1st and 2nd Respondents

N/A for Prof. Ojienda for the Petitioner

C/A Mr. Hassan Suleiman