



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA

ELECTION PETITION NO 10 OF 2017

IN THE MATTER OF ELECTIONS ACT NO 24 OF 2011 AND THE REGULATIONS

AND

IN THE MATTER OF ELECTION FOR COUNTY ASSEMBLY FOR [PARTICULARS WITHHELD] WARD

AND IN THE MATTER OF ELECTION BY

P L A.....PETITIONER

VERSUS

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

HENRY LUMITI

(RETURNING OFFICER, SHINYALU CONSTITUENCY).....2ND RESPONDENT

E S C.....3RD RESPONDENT

RULING

The substantive matter herein is a petition by the petitioner challenging the election of the 3rd Respondent as the Member of County Assembly (MCA) for [particulars withheld] Ward. The Petitioner's case has been heard and the same closed on 10/11/2017. Similarly the 3rd Respondent's case was heard and the same concluded on 10/11/2017. That of the 1st and 2nd Respondents concluded on 17/11/17. The Petitioner has now brought an application seeking the following orders:

- a) That the honourable court be pleased to summon for examination (an cross-examination as may be deemed fit) a witness by the names E S M Deputy Presiding Officer [particulars withheld] Primary School as pertains the birth certificate to child A A C and in the alternative
- b) That the honourable court be pleased to adopt the official birth certificate for the said A A C earlier attached and presented before court for record
- c) There be further and other orders as court may deem fit
- d) That costs be in the cause.

Petitioner's Case

The Petitioner has sworn an affidavit in support of the said application. He deposes that in his petition he attached a notification of birth for a child A A C 'whose paternity has been key subject of issue in these proceedings.' He goes further to depose that in pursuant to the said birth notification, he has since obtained a certificate of birth whose production in evidence was objected to and according to him the court did not resolve the issue. He goes further to state that a certificate of birth is a public document. He further states that the person she seeks her attendance in court could not be called as the Petitioner's witness citing spouse privilege in regard to the 3rd Respondent. He contends that the court has jurisdiction to grant the orders sought.

Through counsel, the Petitioner filed written submissions. Counsel urges that there is an issue of conflict of interest which existed at the time of pre-trial but which was not concluded as pertains the relationship between the Deputy Presiding Officer [particulars withheld] one E S M and the paternity of her daughter A A C vis-à-vis the 3rd Respondent. A notification of birth was filed alongside the petition and a certificate of birth subsequently obtained. Counsel is of the view that the said certificate of birth should be admitted in evidence giving the following reasons;

The said certificate of birth is a public document whose authenticity has not been contested

The petitioner could not call the said E S M due to spouse privilege

The issue of conflict of interest can only be resolved if the said E S M is called as a witness or the certificate of birth is admitted in evidence

Counsel cites the case of **Mohamed Ali Mursal v Saadia Mohamed & 2 Others [2013] eKLR** and a book by GV Odunga.

1st and 2nd Respondents' Case

Counsel for the 1st and 2nd Respondents has filed submission seeking the dismissal of the Petitioner's application. Counsel has given four reasons why E S M cannot be summoned to testify. First the parties have closed their cases and the law does not have a window for re-opening parties' cases once the same are closed. Second the application is of interlocutory nature and the same is time barred on the basis of Rule 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (hereinafter Election Petition Rules, 2017). Third Rule 4 and Rule 15(2) should be read together and not isolation so as to achieve the purpose intended by the legislature.

On the alternative prayer of admitting the certificate of birth for A A C, counsel urges that the certificate of birth is a strange document which did not form part of the petition. He goes further to state that the court has already pronounced itself on the admissibility of the said certificate of birth and if aggrieved the only remedy available to the Petitioner is to appeal.

Other grounds are that the court lacks jurisdiction given the provisions of Rule 15(2) of the Election Petitions Rules 2017. Second the said E S M has not filed a sworn affidavit and as such cannot be called as a witness. Third, the Petitioner has not laid a basis for the calling of E S M as a witness. Lastly the rules of evidence prohibit admissibility of the said certificate of birth. Counsel has cited and attached for the court's reference eight decided cases.

3rd Respondent's case

The 3rd Respondent filed a Replying Affidavit. In the said affidavit he deposes that the application by the Petitioner is of interlocutory nature which cannot be brought at this point in time in light of what is provided under Rule 15(2) of the Elections Petitions Rules. Further, it is only the court which can summon a person to testify and that right is not available to parties in an election petition. Further, the

issue of admissibility of the certificate of birth is *res judicata*.

Counsel for the 3rd Respondent has also filed written submissions which reiterate and expound on the depositions of the 3rd Respondent's Replying Affidavit.

Issues

From the submissions by parties, I have singled out the following issues which call for determination;

1. Whether the issue of admissibility of the birth certificate for A A C is *res judicata*
2. Whether the application is time barred by the operation of Rule 15(2) of the Elections Petitions Rules, 2017
3. Whether the Petitioner shall suffer prejudice if E S M is not compelled to attend court and be examined (and cross-examined as it may be deemed fit)

Determination

Is the issue of admissibility of the birth certificate for A A C *res judicata*? In its simplest meaning the term *res judicata* means already determined by a court. To the 3rd Respondent the answer is in the positive. To the Petitioner, the court actually never made a determination on the admissibility or otherwise of the said certificate of birth.

The Petitioner's position regarding this issue made me go back to the proceedings and note that on 12/10/2017, the court granted leave to lay a basis for filing of an affidavit titled 'Affidavit of Rejoinder by the Petitioner.' The said affidavit had as an annexure of a certificate of birth for one A A C. The Petitioner never did that and we proceeded for hearing. At the time of testifying, the Petitioner sought to introduce the said certificate of birth in evidence but the same was objected to by the respondents. The objection was upheld.

We can re-look at the orders sought by the Petitioner. He seeks that one E S be summoned for examination as pertains the said birth certificate. In the alternative the Petitioner seeks an express order for the said birth certificate to be admitted as part of the Petitioner's evidence. In my view the court has not made a determination on the admissibility or otherwise of the said birth certificate. At the first instance in the ruling made on 12/10/2017, the court granted the Petitioner leave to lay a basis for the introduction of the said certificate of birth. When the Petitioner was testifying he sought to produce the said certificate of birth but he was stopped and reminded of the order given on 12/10/2017. Might it then the Petitioner is abiding by the order of the court at this point in time? If that be the case then the second issue becomes relevant.

Rule 15(2) of the Elections Petitions Rules, 2017 provides as follows;

An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.

Careful reading of the above rule does not completely bar filing of interlocutory applications after pre-trial. Can be said that the nature of the instant application could have not possibly been made before the commencement of the hearing? I make reference to paragraph 3 of the petition and specifically grounds (b), (c), (d) and (e) thereof which mention one E S M. In my understanding of the said grounds, the Petitioner alleges conflict of interest between the said E S M and the 3rd Respondent having sired a child together one A A C. In their respective responses, the respondents never listed the said E S M as a witness. Even when it had been made clear to him by the respondents that they would not be calling E S M as a witness, the Petitioner (going by his submissions roman iii outlining the basis of the application)

still expected 'the respondents particularly the 1st respondent' to call the said E S M. It is my considered view that the Petitioner ought to have then brought to the attention of the court at the pre-trial conference of his desire to have the said E S M compelled to attend court and be examined. The Petitioner failed to do so even when he was granted leave at the pre-trial conference. In fact in the **Mohamed Ali Mursal Case** (supra), the petitioner therein had filed a check list where he indicated that he would be calling a handwriting expert.

The same reasoning can be applied to the certificate of birth. The production thereof having been contested by the respondents at pre-trial conference, the Petitioner was granted leave to file an application laying a basis for its production. Again he failed to do so.

Now on the last issue as to whether the Petitioner would suffer prejudice if the prayers sought are not granted. Again I go to paragraph 3 of the petition. The said paragraph outlines the grounds upon which the petition is based. The issue of conflict of interest has been brought out with the mentioned person being a Deputy Presiding Officer of a polling station in [particulars withheld] Ward. Evidence has so far been adduced and it is now upon the court to gauge the weight thereof. The issue of certificate of birth may distract us and we be mistaken to be conducting a paternity suit as opposed to an election petition involving 9,147 registered voters. I therefore do not see any prejudice the Petitioner would suffer if I disallow the prayers he seeks.

CONCLUSION

In conclusion therefore, I dismiss the Petitioner's application dated 18/11/20017. Costs shall abide the outcome of the petition.

Dated and signed this 01st day of December 2017.

E. MALESI

S.R.M

Ruling delivered in open court this 01st day of December 2017

In the presence of:

Mr Ombaye for the 3rd Respondent & h/b for Mr Oluoch for the 1st & 2nd Respondents

Mr Ombito for the petitioner present

C.A- Jacklyne