



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MOMBASA
ELECTION PETITION CASE NO. 2 OF 2013

1. MWANGI KIMWELE
2. SAID MANGALE KOMBO JUMA ATHUMAN LUBAMBO
3. JUMA ATHUMAN LUBAMBO
4. CHARLES MWADIME KIRIDIA
5. HUMPHREY KALAMA FONDOSON.....PETITIONERS

VERSUS

1. KIBWANA SALEH BAYA
2. NEEMA KARISA
3. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENTS

RULING

On 22.7.2013, Mr. Lumatete counsel for the petitioner indicated that he was unable to trace the 3rd petitioner, Juma Athumani Lubambo who was said to have taken up employment outside Mombasa. He could also not avail other witnesses.

Mr. Buti objected to the possibility that affidavits of the 3rd petitioner and that of the remaining witnesses being admitted in evidence. He argued that as a petitioner the 3rd petitioner is a mandatory witness as per rule 10 (3) (b), Rules 11 (1) and 12 (1) of the elections (parliamentary and county elections petition Rules 2013.

Miss Ngugi for the 2nd and 3rd petitioners associated herself with Mr. Buti's position.

I will first consider the position of the 3rd petitioner who is said to be unavailable. As the one of the petitioner the 3rd petitioner is hereby a mandatory witness whose evidence is subject to it being cross-examined by the respondents. So he must first testify in court. On the other witnesses. Rule 12(1) of the Election Rules states.

"A petitioner at the time of filling the petition. File an affidavit sworn by each witness whom the petitioner intends to call at the trial.

The term calling a witness means availing him/her for the purposes of being cross - examined and if need be re-examined. So that they can expound or clarify on a substance of facts that are contained in the affidavit This is very important especially on the contested issues.

In the case of Peter Gichuki Kurigar versus independent Electoral

Boundaries Commission and 2 others [2013]eKLR HC Nyeri Election petition no. 3/13.

The court had this to say on Rule 12(1) above

"It is apparent from this rule that it is only those affidavits for witnesses that the petitioner intends to call that are relevant. It is logical that an affidavit of a person the petitioner has no intention of calling as witness is irrelevant and has no place under rule 12 (1) of the rules. I have not found any other place in the rules where such an affidavit can fit. Without the requisite legal backing such an affidavit would be a strange document to the petition and would not form part of the record of the trial contemplated under rule 12(2) (c) further to admit affidavits which have not been tested on Cross examination would therefore highly prejudice the respondent where adverse allegations have been made.

I therefore order that the petition as by 3rd petitioner who is unable to come to court to be cross-examined and re-examined by counsel

Cannot stand on just documents. It has not been proved and for this

reason I hereby dismiss the 3rd petitioner petition as against the respondent with costs to the respondents. I also consequently order the affidavits of

Musiwa Hassan Ali

Victor Musee Owino

Riwa Mwangolo be expunged from the records.

J. Gandani -SPM

29/7/2013

Read in Open court this 29.7.2013 in the presence of Mr. Buli Mr. Luma tete and Miss Ngugi

Before J. Gandani -SPM

Court clerk Jebel

Buti

For our case I have 2 witnesses. suggest we proceed on

31/7/2013

J. Gandani -SPM

2917/2013

Lumatete

We can take 2 days.

Ngugi

No objection

Court

Hearing on 31/7/2013 at 11.00 a.m and 1.8.2013 at 9.00 a.m.