



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

THE ELECTIONS ACT 2011

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION

PETITIONS) RULES 2017

ELECTION PETITION NUMBER 1 OF 2017

JEREMIAH NYANGWARA MATOKE.....PETITIONER

VERSUS

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. THE RETURNING OFFICER

3. ALFAH MIRUKA ONDIEKI.....RESPONDENTS

RULING

1. At the pretrial conference held on 19th October, 2017, directions were, by consent, taken that the petition would be canvassed through the adoption of the affidavits filed by the parties herein and their witnesses as their evidence in chief after which the said witnesses would be subjected to cross examination. When the petition came up for hearing for the first time on 20th November 2017, Mr. Omogeni, learned senior counsel for the 3rd respondent and Miss Olando, learned counsel for the 1st and 2nd respondent raised preliminary objections to the affidavits filed by the petitioner and in turn, Mr. Oonge, learned counsel for the petitioner opposed the preliminary objections and took issue to their validity and timing. This ruling therefore relates to the preliminary objections raised by the parties at the first hearing.

2. The 3rd respondent's main objection was in respect to documents which were attached to the petitioner's affidavit as annexures but were neither marked nor executed by a commissioner for oaths. He highlighted a total of 6 documents appearing on pages before page 53, 57, 58, 59, 122 and 171 and submitted that the said pages contained blank commissioner for oaths stamps without any signatures, serialization, dates or reference to the petitioner's affidavit as exhibits. He further stated that annexure 'JMN7' and a document titled 'the Elections Operations Handbook' were improperly on the court record as they had not been marked as exhibits to the petition. In sum, the 3rd respondent's case was that all the documents that had been attached to the petitioner's affidavit without proper marking and execution by a commissioner for oaths ought to be expunged from the court record together with the paragraphs of the affidavit that made reference to them.

3. The 3rd respondent also objected to paragraphs of the petitioner's affidavit that made reference to Form 34A while arguing that Forms 34A were irrelevant to this petition as they relate to a presidential election and not a parliamentary election that was the subject of the petition before the court. He therefore maintained that the said paragraphs were defective and needed to be struck out of the court record. He further objected to paragraphs of the petitioner's affidavit that were not supported by any annexure and submitted that such paragraphs were hollow and similarly needed to be struck out. The 3rd respondent further sought orders to strike out paragraph 16 (ii)-(vii) of the petition while submitting that the said paragraph introduces 7 polling stations which had not been referred to in that paragraph. He stated that the same problem was replicated in paragraph 18 of the affidavit which he also urged the court to strike out.

4. The 3rd respondent further highlighted anomalies in paragraph 14 and 18 of the petitioner's affidavit which made reference to a ward and argued that Form 35A does not refer to a ward but to a polling station. He urged that the said paragraphs be struck out as there can never be Forms 35A in a ward which instead have Forms 36.

5. The 3rd respondent also objected to the petitioner's claim at paragraph 17 of the affidavit which referred to Forms 35A that had not been stamped yet no annexures were attached to support the said paragraph. He argued that the said paragraph was therefore a shell which should be struck out.

6. The 3rd respondent stated that there was an anomaly at paragraph 18 of the petition in which reference is made to forms 35As which were alleged to have incorrect results which in paragraph 22 of the affidavit referred to annexure "JMN4" that makes reference to a totally different anomaly.

7. The 3rd respondent further stated that the Forms 35A referred to at paragraph 25 of the affidavit as annexure "JMN7" were non-existent and there was no such annexure and thus argued that the said paragraph ought to be struck out.

8. It was the 3rd respondent's case that all the paragraphs that had anomalies were defective and inconsistent. He also took issue with the fact that the petition served on him had a total of 183 pages yet the bundle of documents served on the 1st and 2nd respondents had a total of 179 pages and argued this meant that parties would be prejudiced during the hearing of the petition if some pages were missing thereby rendering the whole petition defective.

9. The 3rd respondent cited the case of **Walter Enock Nyambati vs. IEBC and 2 Others. Nyamira H.C.E.P. 1 OF 2017** among other authorities in support of his objection.

10. Miss Olando advocate for the 1st and 2nd respondents objected to paragraph 20 and 24 of the petitioner's affidavit on the basis that the said paragraphs referred to annexures "JMN3" and "JMN6" respectively yet those annexures were non-existent on the file contrary to the cardinal principle that the annexures be exhibited she maintained that the said paragraphs ought to be struck out. Miss Olando further objected to paragraphs of on the affidavit of the petitioner's witness, Ben Mayaka, which, she claimed referred to annexures that were neither marked nor signed by a commissioner for oaths. On the same affidavit of Ben Mayaka, Mr. Omogeni, counsel for the 3rd respondent referred to paragraph 2 wherein the deponent had averred that he was the petitioner's Chief Agent during the elections and observed that the deponent did not attach any proof of his appointment as a chief agent so as to entitle him to make the averments contained in the said affidavit. He referred to the decision in **Dickson Mwenda Kithinji vs. Gitarau Peter Munya & 2 Others [2013] eKLR** and **Regulation 85 (1) (e) of the Election (General Regulations) 2012** wherein the qualifications to be a chief agent were discussed and urged the court to strike out the said affidavit of Ben Mayaka on the basis that his evidence was not

admissible.

11. Mr. Oonge for the petitioner opposed to the preliminary objection raised by the respondents on the basis that the petitioner was not notified of any such objection and was thus a victim of ambush. The petitioner argued that the issues raised by the respondents ought to have been addressed during the pre-trial conference and not at the hearing stage when the petitioner had already been put in the witness stand.

12. In further submissions on behalf of the petitioner, Mr. Nyaberilearned counsel submitted that all the documents that the respondents had complained about were documents that had been supplied to the petitioner by the 1st and 2nd respondent and were therefore in their domain. He maintained that the petitioner's affidavit was properly before the court having been signed and commissioned by a commissioner for oaths. He further argued that any errors appearing on the said affidavit were typographical errors that did not go to the substance of the petition.

13. On the discrepancies in the number of pages of the petition, the petitioner argued that the hearing of the case had barely commenced and that the aspect of the actual number of pages of the petition could be corrected before the case is concluded as courts had in numerous instances allowed parties to harmonize their documents when such a need arose. He urged the court to note that the errors complained about could be cured by the provisions of **Article 159 of the Constitution** which mandates the court to dispense substantive justice free from procedural technicalities.

14. In respect to the reference to Form 34A, the petitioner stated that it was clear that the instant petition was in respect to a parliamentary election in which case, the relevant form is Form 35A and that reference to Form 34A was a typographical error. He also argued that the documents referred to in "JMN4" were not intended to mislead the court as the said documents had been admitted by the 1st and 2nd respondents.

15. The petitioner's case was that his affidavit was properly sworn and distinguished it from the affidavit in the **Walter Nyambati** case (supra) which was struck out because it had a defective jurat having been attested to by an advocate who lacked the capacity to commission it.

16. The petitioner further argued that the objections raised by the respondents were not on pure points of law, but were mainly on facts contained in the affidavit which did not go to the substance of the petition. He maintained that failure to mark a few annexures which were referred to in the affidavit was a minor omission which does not affect the validity of the said affidavit. He also submitted that the issue of a letter of appointment of the chief agent was an issue of fact and not law as the respondents will have a chance to cross-examine the witness over the same during the hearing. The petitioner stated that the alleged anomalies raised by the 1st and 2nd respondents had been admitted in their response and therefore, the objections were an afterthought which should be disregarded.

17. In a further rejoinder, Mr. Omogeni submitted that the petitioner had ample prior notice of the objections as 3rd respondent had in his response to the petition indicated his intention to have the petition and affidavit struck out.

18. I have considered the submissions made by all the parties herein and the authorities they cited. I consider the issues for determination to be as follows:

a) **Whether the preliminary objections are merited.**

- b) **Whether the unmarked and unattested annexures should be expunged from the court record.**
- c) **Whether the alleged errors/anomalies noted in certain paragraphs of the petition and the affidavits in support thereof should result in the striking out of the said affidavits or sections thereof.**

19. On the merit of the preliminary objection, I am guided by the decision in the celebrated case of **Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Ltd Civil Appeal No. 9 of 1969 (1969) EA 696** wherein it was held:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

20. In the instant case, the petitioner took issue with the timing of the objection and noted that he was not made aware of the same in time or at all and that it therefore amounted to an ambush that should not be entertained by the court. In a rejoinder the 3rd respondent maintained that he had indicated, in his response filed in court, that he would seek the striking off of the petitioner's affidavit for the anomalies cited. He further argued that objections on points of law can be raised at any point of the proceedings without any notice.

21. I note that the issues raised in the preliminary objection relate to the validity of affidavits and whether this court has the jurisdiction to entertain a defective affidavit. I find that the preliminary objection is properly presented as the validity of an affidavit and jurisdiction of the court are points of law which can be raised at any stage of the proceedings with or without notice. In this case, I note that the petitioner was notified of the intended objection through the 3rd respondent's response. Courts have on numerous occasions held that points of law can be raised at any time in the proceedings and more so if they relate to the jurisdiction of the court. I therefore find that there was nothing wrong in the timing and the raising of the objection just when the hearing had commenced.

22. On the second issue of annexures, **Rule 9** of the **Oaths and Statutory Declarations Rules** requires that annexures should be sealed and stamped. The said rule stipulates as follows:

"All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with the serial letters of identification."

23. In the case of **Abraham Mwangivs. S. O. Omboo & Others HCCC No. 1511 of 2002** Hayanga J (*as he then was*) quoted **Order 41 of the Rules of Supreme Court of England** that dealt with forms of affidavits and exhibits. That **Order 41** divided exhibits into documents and non documents and maintained that fly papers are misleading and fraught with uncertainty. He held:

"Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed."

24. Similarly, in the case of **Francis A. Mbalanya vs. Cecilia N. Waema [2017] eKLR**, the annexures had not been marked completely. The judge held that:

“The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with... in the instant case, the law has provided in mandatory terms the manner in which evidence by way of annexures can be received by court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents. However, considering that the supporting affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the supporting affidavit and the application.”

25. Further, in the case of **Fredrick Mwangi Nganga vs.Garam Investments & Another [2013]= eKLR** where an annexure was only marked “A” the court stated:

“As a consequence of all the above, I find that although the court has power to allow an amendment to the plaintiffs said Notice of Motion dated 14th June 2013 under the provisions of order 8 Rules 5 as well as Section 100 of the Civil Procedure Act, the fact that the plaintiff has breached Rule 9 of the oaths and Statutory declarations rules necessarily means that his application to amend must fail. As I see it, the only option is to withdraw the same and field a fresh application. Further, as I have refused the plaintiff’s application dated 14th June 2013 as currently drawn and presented does not support the interim orders sought therein and the same are lifted accordingly.”

26. Another decision addressing the matter of annexures to affidavits was made by Judge Mutungi in the case of **Solomon Omwega Omache & Another v Zachary O Ayieko & 2 others [2016] eKLR**, where he stated as follows:-

“Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner’s stamp. Are they really exhibits” I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistant’s lack of attention and due diligence.”

27. In the instant case, the petitioner argued that the error or failure to mark and seal the annexures could be cured by the provisions of **Article 159(2) (d) of the Constitution**. I disagree with this argument because annexures form a very critical part of an affidavit as it is the documentary evidence on which the petition is anchored for which the attestation and marking of exhibits are a mandatory statutory requirement and not a mere procedural technicality.

28. In the case of **Abdul Aziz Juma vs.Nikisuhu Investment & 2 Others ELC. No. 291 of 2013 Mutungi J.** held:

“Article 159 of the Constitution was never intended to override clear provisions of statute unless such provisions of the statute had been found and held to be unconstitutional. Acts of Parliament... make provisions for the application of the law and the Constitution demands of the courts to protect the Constitution, the law and the Acts enacted by Parliament. In my view, Article 159 of the Constitution cannot be resorted to where there are clear and express provisions of the law.”

29. I concur with the findings of Mutungi J. in the above cited **Abdul Aziz Juma case (supra)** as the

clear rules must be adhered to lest our courts sink to a state of anarchy. Taking a cue from the above decision, I similarly find that all the documents that were highlighted by the 3rd respondent as annexures to the petitioner's affidavit appearing just before page 53, 57, 58, 59, 122 and 171 of the petition bundle, that contained a blank stamp of attestation that was neither signed, dated or marked as exhibits are fly documents which are hereby expunged from the record. For purposes of clarity, I find that all the documents that are attached to the petitioner's affidavit that are neither marked nor signed as exhibits are hereby expunged from the record.

30. I have however perused the court record in respect to the annexures to Ben Mayaka's affidavit that were highlighted by Miss Olando as having been unmarked and unexecuted and I note that the annexures that were filed in court were duly marked and signed by the commissioner for oaths as exhibits. A similar observation is made in respect to annexure "JMN7" to the petitioner's affidavit. The objection raised in respect to the said annexures is therefore dismissed.

31. Turning to the issue of other errors noted on the affidavits and the petition is the question of whether the said errors should result in the striking out of the pleadings or the sections thereof. The said errors can be summarized as follows:

- a) **Reference to Form 34A in the paragraph 8 of the supporting affidavit when form 34A refers to presidential elections and not parliamentary elections that is the subject of this petition.**
- b) **Introduction of new polling stations in the affidavit that are not referred to in the petition.**
- c) **Reference to a ward instead of a polling station.**
- d) **Reference to incorrect forms and annexures that are reference of nonexistent.**
- e) **Sections of affidavits that are not supported by any annexures.**

32. On reference to Form 34A instead of Form 35A and reference to a ward instead of a polling station, I note that these are errors that can be classified as typographical errors as they do not go to the substance of the case. I say so because from the outset in the pleadings, it is clear that the election that is the subject of this petition is for the position of a Member of Parliament. Under the circumstances, I find that reference to Form 34A instead of 35A and to a ward instead of a polling station is a slip or error that is curable and that does not prejudice any of the parties to the petition. In any event reference to such forms is a matter of evidence and not law and I find that this point of objection does not fall within the true realm of a preliminary objection that should be on pure points of law.

33. Similarly, on the issue of reference to incorrect forms, sections of affidavits not supported by exhibits and to annexures that are non-existent, I also find that these are not points of law that should be canvassed in a preliminary objection but are facts which should be raised and clarified during cross-examination. It is worthy to note that the burden of proof will be on the petitioner to prove his case to the required standards and whether or not he will be able to do so is a matter of evidence that cannot be determined at this preliminary stage.

34. On the issue of the introduction of new polling stations in the affidavit that are not referred to in the petition, I find that in all cases, a petition included, a party is bound by his own pleadings. In this case, the allegation on new stations and the purpose/relevance of their introduction in the affidavit can similarly only be addressed during the hearing and final submissions.

35. Lastly, there was the claim that the petitioner's bundle of documents served on the 3rd respondent had discrepancies in the pagination as it was alleged that the bundle served on the 3rd respondent had 183 pages while the one served on the 1st and 2nd respondent had 179 pages and the one filed in court had 182 pages. The 3rd respondent claimed that he would be prejudiced because some pages could have been missing from the documents served on him. He referred to the decision in the **Walter Nyambati case (supra)** wherein the court expunged un-served documents from the record on the basis that such a discrepancy was prejudicial to the parties. In the instant case, the 3rd respondent has not stated that he received less pages compared to the ones filed in court or that there were documents that he was not served with. The petitioner, on his part, submitted that the anomaly in pagination would be rectified if the court could allow him time to regularize his position. My finding is that as opposed to the circumstances in the **Walter Nyambati case (supra)** wherein the applicant was specific on the actual number of documents that he had not been served with, in the instant case, the 3rd respondent did not indicate the actual documents that he was not served with. It is not clear if the defect was in the numbering of the pages or in the lack of service with the relevant documents. In any case, I note that the 3rd respondent appears to have been served with more pages than those submitted in court and therefore I find that the issue of his being prejudiced due to lack of service with certain documents does not arise.

36. Turning to the issue on the objection on the failure by one Mr. Ben Mayaka to attach a copy of his letter of appointment as a chief officer for the petitioner, the 3rd respondent argued that such a failure was fatal to the deponent's affidavit which he stated, was inadmissible in evidence and needed to be struck out. The 3rd respondent referred to the case of **Dickson Mwenda Kithinji vs. Gitarau Peter Munya & 2 Others [2013] eKLR** wherein the court set out the conditions to be met for a person to be an agent in an election and struck out an affidavit of a witness who alleged she was an agent without proof of a letter of appointment. My take is that the circumstances in the **Dickson Mwenda Kithinji case (supra)** are different from the circumstances of this case as in the cited case the affidavit was struck off after the hearing of the case and not at a preliminary stage. My humble view is that this is not a pure point of law and I find that it would be premature and preemptive to strike off the said affidavit at this point before taking the evidence of the said Ben Mayaka.

37. Before I conclude this ruling, I wish to observe that, having regard to my findings in this ruling, the preliminary objections raised by the respondents do not fully comply with the description of a preliminary objection as envisaged in the **Mukisa Biscuits case (supra)** because the said objections do not have the effect of finally determining or disposing of the petition as not all the annexures to the petitioner's affidavit were unmarked. My humble view is that the objections raised by the respondents only relate to certain sections of the affidavit that they sought to strike out and certain annexures that they wanted to be expunged from the record without necessarily dealing a fatal blow to the said affidavits or petition. My humble view is that the shortfalls or errors noted in the affidavits could properly be dealt with during the cross examination when the viability or strength of the petition will be tested.

38. In conclusion I find that the petitioner, will at the hearing of this petition, be limited to refer only to those annexures that are properly marked as exhibits. In this regard I note that the petitioner's affidavit has a total of 7 annexures that are properly marked as exhibits and I therefore find that any other document attached to the affidavits that do not bear exhibit marks must be rejected. The upshot of this ruling is that save for the objection to the annexures that are not duly marked, dated and attested to by a commissioner for oaths, which are hereby expunged from the record, the rest of the objections raised are hereby dismissed with a further order that costs of the objection shall abide the outcome of the petition. Consequently, direct that the petition proceeds for hearing.

Dated, signed and delivered in open court this 21st day of November, 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Oonge and Mr. Nyaberi for the Petitioner
- Mr. Miss Olando for the 1st& 2nd Respondents
- Mr. Omogeni for the 3rd Respondent
- Omwoyo: court clerk



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