



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

ELECTION PETITION NO 2 OF 2017

DAVID KIPSANG KETERPETITIONER

VERSUS

JOHANA KIPYEGON NGENO1ST RESPONDENT

LILIAN OKOTH (RETURNING OFFICER) ...2ND RESPONDENT

INDEPENDENT ELECTORAL.....3RD RESPONDENT

& BOUNDARIES COMMISSION

RULING

1. This ruling is in response to the application of Mr. Bosek to expunge paragraphs 6 and 7 of the petitioner's affidavit together with annex marked "DK 2" which is a copy of the police charge sheet and annex marked "DK 3", which is a letter from IEBC addressed to both the petitioner and the 1st respondent. The expungement is sought on the basis that the copy of the police charge sheet and the copy of the letter from IEBC are not certified copies of the originals. And for that reason, they contravene section 80 of the Evidence Act [Cap.80] of the Laws of Kenya

2. Counsel for the 1st, 2nd and 3rd respondents placed reliance on Rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017. It is their contention that the affidavit should depone and specify the matters that are within the personal knowledge of the deponent namely the petitioner. Furthermore, they have also contended that the petitioner should have pointed out the sources of his information for those matters that are outside his knowledge. Additionally, they have contended that the matters deponed to in paragraphs 6 and 7 are outside the knowledge of the petitioner. Finally, they have contended that the charge sheet does not relate to him as he is not the complainant or the accused person. It is for these reasons that they have applied for expungement of paragraphs 6 and 7 of the petitioner's affidavit together with the two annexes.

3. Mr. Manyange for the petitioner has opposed the application. He has submitted that the application raises weighty issues of law and that expunging those paragraphs may amount to draconian measures. He has further submitted that the application is ill-timed, because it should have been raised during the pre-trial conference stage.

4. Furthermore, Mr. Manyange has submitted that this court sitting as an election court exercises special jurisdiction, which is conferred upon it by the Election Act No. 24 of 2011 and the rules made there under

namely the Elections (Parliamentary and County Elections) Petitions Rules of 2017. He contended that the Elections (Parliamentary and County Elections) Petitions Rules of 2017 in Rule 12 have imported the Oaths and Statutory Declarations Act [Cap. 15] Laws of Kenya and Order 19 of the 2010 Civil Procedure Rules. It is therefore his submission that section 80 of the Evidence Act (Cap 80) Laws of Kenya does not apply to election matters. He has also contended that the petitioner was present in respect of the matters he has deponed to in paragraphs 6 and 7 of his affidavit. Additionally, he has contended that the omission to state in specific terms that he was there in paragraphs 6 and 7 are errors that are curable in terms of Order 19 rule 7 of the 2010 of the Civil Procedure Rules. Finally, he has submitted that the respondents have not been prejudiced.

5. In the light of the foregoing matters, I find the following to be the issues for determination.

1. Whether or not the provisions of section 80 of the Evidence Act are applicable in the instant matter.
2. Whether or not the errors and irregularities in the petitioner's affidavit are curable in terms of Order 19 rule 7.

6. Issue No. 1

From the submissions of all participating counsel and the authorities cited by Mr. Manyange, I find that the Elections Act and the rules made there under provide a comprehensive code in respect of the form and admissibility of the affidavit evidence. Rule 12 (14) has imported for usage the provisions of Order 19 of the 2010 Civil Procedure Rules in matters of elections. It has also imported into its usage the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya. In the circumstances, section 80 of the Evidence Act is inapplicable in the instant matter. In the circumstances, I find that section 80 of the Evidence Act does not apply in the instant application.

7. Issue No. 2

I find from the Petitioner's affidavit evidence in paragraph 6 that he participated in the meeting of 31/7/2017, from which arose the events that gave rise to the charge sheet which is marked as "annex DK2". I also find that the letter which is marked as annex "DK 3" was addressed to the Petitioner and the 1st Respondent. I therefore find from the totality of this evidence that any errors or irregularities which did not strictly comply with the provisions of section 5 of the Oaths and Statutory Declarations Act and Order 19 of the 2010 of the Civil Procedure Rules are curable. In the instant application, the petitioner may be cross-examined on those issues having been present in the meeting that gave rise to the matters complained of, as he is still in the witness stand.

8. The upshot of the foregoing is that the objection by counsel for the 1st Respondent which is supported by counsel for the 2nd and 3rd respondents is hereby dismissed in its entirety.

Ruling delivered in open court this 5th day of December, 2017 in the presence of Mr. Manyange for Petitioner and Mr. Bosek and Ms Okoth for the 1st Respondent and Mr. Gathii and Mr. Masolia for the 2nd and 3rd Respondents.

J. M. Bwonwonga

Judge

5/12/2017



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