



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Election Petition No. 6 Of 2013

THE ELECTIONS ACT, 2011

JUSTUS GESITO MUGALI M'MBAYA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

DANIEL LENARUM, RETURNING OFFICER,

SHINYALU CONSTITUENCY.....2ND RESPONDENT

ANAMI SILVERSE LISAMULA.....3RD RESPONDENT

RULING

1. The 3rd Respondent to the Petition filed an application dated 29th May 2013 seeking orders that:
 1. The affidavits of Justus Gesito M'baya, Joab Mwamto, Syphrose Mulama, Samuel Bashir Cherolyi, Fred Mushukami Shijenje, Micheal Isiaho Amalemba, Ezekiel Mbiya Imbwaga, Danstone Itenya Imbwaka and Kizito Lulinda Muhembele all sworn on 17th May 2013 be struck out for having been filed out of time and in contravention of the Court's direction made on 14th May 2013.

In the Alternative:

2. Paragraphs 65 to 85 of the Petitioner's further affidavit sworn on 17th May 2013 as it purports to be a further response to the response to the petition, a situation that is untenable in law and contrary to the rules on pleadings, Election Rules, Evidence Act and O. 19 of the Civil Procedure Rules.
3. Paragraph 13 of the Petitioner's further affidavit sworn on 17th May 2013 be struck out for introducing matters that are extraneous to the petition and is a misconceived attempt to amend

the petition.

4. Paragraphs 14, 15 and 16 of the Petitioner's further affidavit sworn on 17th May be struck out for being argumentative and based on matters not within the knowledge of the Petitioner.
 5. The annexures annexed to the Affidavit of the Petitioner sworn on 17th May 2013 offend the Provisions of O. 19 of the Civil Procedure Rules and ought to be struck out.
 6. Paragraphs 18, 19, 20, 21, 22, 23, 27, 28, 29, 42, 47, 49, 52 and 53 of the Petitioner's affidavits sworn on 17th May are scandalous, prejudicial and oppressive to the 3rd Respondent and are liable to be struck out.
 7. The Exhibits annexed to the Petitioner's affidavit sworn on 17th May 2013 offend O.19 of Civil Procedure Rules and Evidence Act and should be expunged from the record of this Court.
 8. The affidavit of Joab Mwamto ought to be struck out, the manner in which the said deponent purports to produce annexure "JMI" which is contrary to the Evidence Act.
 9. The Affidavit of Samuel Bashiri Cherolyi does not disclose the source of his information and the same ought to be struck out for offending O. 19 of the Civil Procedure Rules.
2. The application is premised on grounds that the affidavits are filed in contravention of the Court Order. The 3rd Respondent also avers that affidavit evidence, save in interlocutory applications, cannot contain matters of hearsay. It is the 3rd Respondent's contention that O. 19 of the Civil Procedure Rules prescribe the manner in which annexures are to be produced before Court and that the said order precludes production of scandalous, prejudicial and oppressive evidence. O. 19 also provides that the source of any information in an affidavit must be specifically divulged. The 3rd Respondent avers that there is no provision on the law of pleadings in election petitions for filing of an affidavit in response to a response to petition nor is such a pleading permissible. Lastly, that the depositions of Joab Mwamto contravenes the provisions of the Evidence Act.
3. The 1st and 2nd Respondents also filed grounds in support of this application, dated 17th June 2013.
4. This application was opposed by the Petitioner who filed a Replying Affidavit dated 5th June 2013. The Petitioner deposed that most of his witnesses reside in Kakamega County and only became available to swear an affidavit on Friday 17th May 2013 which was then filed on Monday 20th May 2013. The Petitioner deposed further that pursuant to the Order of the Court on 14th May 2013, he filed further affidavits which were responses to the responses made by the Respondents. The Petitioner contends that he did not introduce new facts and allegations that would have led to a serious departure from the original case. The Petitioner maintains that he was responding to the witness affidavit and merely reiterating that which is in the petition. Therefore, he deposed, that the matters cannot be said to be extraneous and as such are relevant to the petition as they show a few instances of irregularities that occurred in the tallying and/or declaration of results and casts serious doubt on the credibility of the election results, the subject matter of this petition.
5. The Petitioner denied claims that the annexures and paragraphs do offend the provisions of Order 19 of the Civil Procedure Rules. The Petitioner submitted that in any event, the 3rd Respondent is at liberty to cross-examine the witnesses for purposes of ascertaining admissibility or otherwise of the affidavit and annexure.
6. This application was canvassed by way of written submissions. The Petitioner filed his submissions dated 11th June 2013 wherein he reiterated that the annexures and affidavits aforementioned did not offend O. 19 of the Civil procedure Rules and that they in fact contain facts that support the petition. The Petitioner also reiterated that the delay of one day in filing

affidavits was inadvertent and not aimed at obstructing the cause of justice.

7. The 3rd Respondent filed his submission dated 14th June 2013. The 3rd Respondent deposed that O. 19 of the Civil Procedure Rules was not an excuse to contravene the Evidence Act and that inadmissible evidence is not rendered admissible simply because it is introduced through an Affidavit. He submitted that Affidavits made on the basis of information or belief ought to be struck out if they did not disclose the source of information or basis or belief. The 3rd Respondent reiterated that affidavits introduce matters that are extraneous to the Petition, are argumentative, scandalous, prejudicial, and oppressive and liable to be struck out. The 3rd Respondent cited the cases of Ng'ang'a & Anor v Owiti & Others (2008) 1 KLR 749; Bare & 13 Others v Maendeleo Ya Wanawake Organization (2004) 2 KLR 455 and Bombay Flour Mills v Chunbhai M. Patel (1962) EA 803

Determination

8. I have carefully considered the application in light of the prayers sought, the submissions and the law applicable.

Prayer No. 1

9. When parties appeared before me on 14th May 2013, I gave directions as to the filing of further or additional affidavits and applications they deem necessary. I gave the Petitioner leave to file additional affidavits within 3 days. The Petitioner did indeed file additional affidavits but the same were filed on Monday 20th May 2013 at Kakamega Civil Registry. The 3rd Respondent now seeks to have the affidavits struck out for having been filed out of time. The Petitioner has pleaded that the delay in filing the affidavits was because the deponents thereto reside in Kakamega County and were only available to swear the affidavits on Friday 17th May 2013. Therefore, he stated, the delay was not intentional and thus excusable. The 3rd Respondent on the other hand, maintains that the affidavits were filed in contravention of an order of this Court and therefore should be struck out. I have considered the reasons advanced by the Petitioner in filing the additional affidavits one day late. I am satisfied that the delay was inadvertent on the part of the Petitioner. Besides, the 3rd Respondent has not demonstrated any prejudice that has been occasioned to him for filing these additional affidavits one day late. In the circumstances, I find that this ground is not sufficient to strike out the said additional affidavits. Consequently, prayer No. 1 of this application is denied.

Prayers 2, 3, 4, 5, 6 and 7

10. The Respondent seeks to have expunged from the Court record paragraphs 13 – 16, 18 – 23, 27 – 29, 42, 47, 49, 52, 53 and 65 – 85 of the Petitioner's Affidavit sworn on 17th May 2013. He also wants the documents annexed thereto expunged. The grounds for seeking these prayers have been stated above in this ruling.
11. This court, on 14th May 2013, granted both the Petitioner and Respondents leave to file further or additional affidavits. Corresponding leave was also granted to any party to respond to the further and/or additional affidavits filed. Pursuant to the said Order, the Petitioner filed an affidavit, the subject matter of this application. The content of the said affidavit is a response to the responses to the petition filed by the Respondents. I have perused the said affidavit, and I do not see any new issues introduced that depart from the petition. A response to a response to the petition may not be provided for in the electoral laws, however, this Court pursuant to Rule 17 (letter i) of the

Election Rules has the discretion to allow the filing of further or additional affidavits, which might as well be, a response to a response to the petition. These prayers are devoid of merit, and accordingly fail.

Prayer 8

12. The 3rd Respondent avers that the affidavit of Joab Mwamto does not meet the requirements of Section 65 of the Evidence Act, in that, the evidence marked "JM1" sought to be produced does not meet the said provision. The deponent, Joab Mwamto in his affidavit deposes that he is the maker of the photograph, annexure "JM1". Expunging his affidavit at this stage will result to his evidence been locked out, which in my view, is prejudicial to the petitioner. The objection to the evidence sought to be produced by Joab Mwamto is best placed during the hearing of the petition in the event that he does not satisfy the requirements of S. 65 of the Evidence Act. On that basis, I decline to grant prayer 8 of the application.

13. This application lacks merit and is therefore dismissed with costs to the Petitioner.

Dated, Signed and Delivered at **Nairobi** this 21st day of June 2013

E.K.O. OGOLLA

JUDGE

In the Presence of:-

Dr. Khaminwa & Mr. Wachira for the Petitioner

Mr. Mukele Moni for the 1st and 2nd Respondents

Ms. Ngeresa for the 3rd Respondents

Teresia - Court Clerk

Legal Researcher: Jackie Kibogy



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