



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HEARD IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO.9 OF 2013

ABDINASIR YASIN AHMED 1ST PETITIONER

UBAH ABDULLAHI SANEI.....2ND PETITIONER

YUSUF SULEIMAN AHMED3RD PETITIONER

VERSUS

AHMED IBRAHIM ABASS.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION2ND RESPONDENT

GEORGE CHEGE3RD RESPONDENT

RULING

1. Rule 15 Sub Rules (4), (5) and (6) of the Election (Parliamentary and County Elections) Petition Rules, 2013, (hereinafter “the Elections Petition Rules”) provides:-

***“15. (4) Subject to Sub-rule (5), a witness shall not give evidence for the Respondent unless an affidavit sworn by the witness, setting out the substance of the evidence, in sufficient copies for the use of the court and the Petitioner, is filed with the response as required by this rule.*”**

(5) A witness for the Respondent who fails to file an affidavit under Sub-rule (2) or (4) shall not be permitted to give evidence without the leave of the court.

(6) The Court shall not grant leave under Sub Rule (5) unless sufficient reason is given for the failure to file and Affidavit” (Emphasis added)

2. On 3rd June, 2013, pretrials were undertaken in this matter. Part of the pretrial directions given read.

“(3) (b) The 1st Respondent reserved the right to call two police officers as witnesses at the appropriate time.....”

4. Number of witnesses

a. Petitioner – 10 witnesses

b. 1st Respondent – 16 witnesses

c. 2nd and 3rd Respondent – 10 witnesses

d. Total - 36 witnesses

5. There will be no testimony on evidence in chief which is already on record. The witness shall attend for cross examination.”

3. On 16th July, 2013, after the 1st Respondent had called his 15th witness, Mr. Kanjama, learned Counsel for the 3rd Respondent made an application under Rule 12 (5) (sic) of the Election Petition Rules to be granted leave to call one Mohamed Bedel an Administration Police Officer to attend and testify although his Affidavit witness had not been filed. Mr. Kanjama submitted that since his client had given notice at the pretrial conference that he will be calling two (2) police officers and that the said officers had already had their statements produced in these proceedings through the Further Affidavit of Ahmed Ibrahim Abass, and for the reason that Mr. Mohamed Bedel is an Administration police officer and therefore a public servant, sufficient reason had been given for the court to exercise its jurisdiction under Rule 12 (5) [Counsel meant Rule 15(5)] of the Election Petition Rules. Counsel observed that the said Rule cannot be read in isolation. It has to be read in conjunction with Rule 4 of the Election Petition Rules. Counsel therefore urged the court to allow Mr. Mohammed Bedel to testify without him having filed any Affidavit.

4. Mr. Anzalla, learned Counsel for the Petitioner opposed the application. He submitted that although the 1st Respondent had, at the pre-trial conference, reserved the right to call two (2) police officers, he had not filed the Affidavits of the said police officers as at the time the application was being made although substantial time had lapsed. In his opinion, the letter relied on by the 1st Respondent as giving notice of the intention to call the police officer without having filed his Affidavit could not be said to be due notice. In his view therefore, no sufficient reason had been given to warrant the grant of the leave sought.

5. Having carefully considered the respective Counsel’s submissions and the law, my view is as following:- Rules 12 and 15 of the Elections Petition Rules are very categorical. No witness of either party to an Election Petition can be allowed to testify at the trial unless he has already caused to be filed his affidavit. The purpose of this rule in my view is to avoid litigation by ambush. A party in an Election Petition must be put on notice or must know the nature of the case and evidence he is to face at the trial. The other purpose for the rule is to lessen the time of trial by having the Affidavit witness to be admitted as evidence in chief and to have the witnesses only cross-examined on their Affidavits and re-examined. This is in line with the new

constitutional and legal requirement that election petitions **MUST** be determined within six (6) months of the declaration of the results. It is a sound requirement.

6. The only exception to the foregoing rule is where there is sufficient reason when a court can allow a witness who has not filed an Affidavit to attend and testify. Has the 1st Respondent given any sufficient reason for the application he is making" I agree with Mr. Anzalla that although at the pre-trial conference the 1st Respondent had reserved the right to call two (2) police officers as their witnesses, their or Mohammed Bedel's Affidavit has not been filed over six (6) weeks later. Allowing that witness to attend and testify might delay the trial as he will have to give his evidence in chief then be cross examined and re examined. That probably might defeat the purpose of Rule 15.
7. Be that as it may, Mr. Kanjama urged the Court to read that rule with Rule 4 of the Election Petition Rules. I have considered the overriding objective of the rules under Rule 4. It is to deliver justice. I have also considered that as early as 3rd June, 2013, the 1st Respondent had indicated of his intention to call two police officers as witnesses. The court is aware that it gave very strict timelines for filing of Affidavits and discovery. The court is also aware that getting Affidavits from public servants on matters touching on their official duties requires bureaucratic clearance which sometimes takes quite a long time to secure. Mr. Kanjama alluded to the appertenant delays that dissuaded his client from seeking to have those Affidavits filed. I am also alive to the fact that the statement of the said Mohamed N. Bedel dated 22/5/2013 was produced in evidence through the Further Affidavit of the 1st Respondent filed in Court of 3rd June, 2013. Indeed, when the 1st Respondent was being cross examined by Mr. Issa, he was questioned, amongst others, about that statement.
8. To my mind therefore, the Petitioners have at all times since 3rd June, 2013 been on notice as to the likelihood of Mr. Mohamed Bedel attending and testifying. They have also had notice of the nature of the evidence he intends to testify on through his aforesaid statement. That being the case, it cannot be said that the Petitioners are being ambushed or they will suffer any prejudice. However, as to the spirit of expeditious disposition and/or determination of the petition, I doubt if it will be achieved if the 1st Respondent's request is acceded to. I think there would be a delay which might run contrary to the constitutional and statutory requirement for expeditious disposal of the petition.
9. In this regard, I have placed the requirement for expeditious disposition of the petition and the 1st Respondent's request to be allowed to tender his last witness to testify without an affidavit on the scales of justice. My view is taking into consideration all the circumstances of this case, the prospective witness being a civil servant and considering that this petition is being tried against strict timelines of which the parties are aware, my view is that sufficient reason has been given to warrant the grant of the leave sought. Justice demands that the court admits as much evidence as it is legally permissible if that will enable the court to do justice to the Ijara electorate. I note that the 1st Respondent still has some time to his credit. To shut out his request will be sacrificing justice at the altar of technicality. Justice should never be sacrificed at the altar of technicality or the tyranny of time if it will not prejudice the rights of any of the parties. The Petitioners will have an opportunity to cross examine the witness as they wish.
10. Accordingly, I am of the view that sufficient reasons have been advanced to warrant the grant of the application sought. Mohammed Bedel will testify as R1W16 without having filed any Affidavit.
11. It is so ordered

DATED and **DELIVERED** at Nairobi this 19th day of July, 2013.

.....

A. MABEYA

JUDGE



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