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| Case Number:   | Election Petition 6 of 2017  |
| Date Delivered:  | 17 Jan 2018  |
| Case Class:  | Civil  |
| Court:   | High Court at Nairobi (Milimani Law Courts)  |
| Case Action:   | Ruling   |
| Judge:   | Margaret Waringa Muigai  |
| Citation:  | Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2018] eKLR  |
| Advocates:   | Mr. Gitonga & Ms Marienga for Petitioner Mr. Wanjohi for 1st Respondent Mr Olaha for 2nd & 3rd Respondents |
| Case Summary:  | -  |
| Court Division:  | Civil  |
| History Magistrates:   | -  |
| County:  | Nairobi  |
| Docket Number:   | -  |
| History Docket Number:   | -  |
| Case Outcome:  | leave not granted  |
| History County:  | -  |
| Representation By Advocates:   | Both Parties Represented   |
| Advocates For:   | -  |
| Advocates Against:   | -  |
| Sum Awarded:   | -  |
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELECTION PETITION NO 6 OF 2017**

**IN THE MATTER OF PARLIAMENTARY ELECTION FOR**

**TARBAJ CONSTITUENCY (WAJIR COUNTY)**

**BETWEEN**

**IDRIS ABDI ABDULLAHI.....PETITIONER**

**VERSUS**

**AHMED BASHANE.....1ST RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (IEBC)....2ND RESPONDENT**

**RETURNING OFFICER**

**TARBAJ CONSTITUENCY.....3RD RESPONDENT**

**RULING (6)**

The 1<sup>st</sup> Respondent through Counsel raised an objection before hearing of the Petitioner's witnesses and stated that the affidavits sought to be relied on except from the one filed by Abdullahi Duale Dakat filed on 5<sup>th</sup> September 2017 are copies served to them and filed in Court contrary to **Section 65 (1) of the Evidence Act Cap 80**. There is no original affidavit filed and served and a copy is not primary evidence. There is no original copy to authenticate the copies. No explanation has been given on why originals are not in the Court file. The Petitioner through Counsel did not apply to the Court during Pre-Conference & Interlocutory Applications for leave to file original affidavits as required by **Rule 15 (h) & (i) of the Elections ( Parliamentary & County Election Petition Rules ) 2017**. For these reasons, the photocopies are inadmissible as they are not affidavits and cannot be permitted to be part of the record. The witnesses cannot be permitted to testify without affidavits as required under **Rule 12 Sub rule 8 of Elections ( Parliamentary & County Election Petition Rules) 2017**.

The 2nd & 3rd Respondents through Counsel associated themselves with objection by 1<sup>st</sup> Respondent and added that they were served with 2 affidavits not stamped by Court and similarly served with photocopies of affidavits as served to this Court. They are also not commissioned. Relying on **Rule 12 Subrule (3) & (4) Elections (Parliamentary & County Election Petition Rules) 2017**, the 2 affidavits are not properly on record as they were not properly filed. Further, **Rule 12 Subrule 14 of Elections (Parliamentary & County Election Petition Rules) 2017** requires that affidavits must conform to **Oaths & Declaration Act (Cap 14) and Order 19 of Civil Procedure Rules 2010**.

The Petitioner through Counsel conceded the affidavits filed in Court and served to Counsel for the Respondents are copies but the original affidavits are available in Court to exchange and regularize the Court record. The affidavits were filed with the Petition within the requisite period in Garissa Law Courts, and the exchange of copies with original affidavits would be replacement and not introduction of new evidence. On the issue of stamping of documents the Petitioner filed the petition and affidavits in Court and they were stamped. Those that were not stamped, the Petitioner cannot be held responsible for the Court's administrative process. The petitioner relied on **Rule 15 (2) of Elections (Parliamentary & County Election Petition Rules) 2017** that provides;

***An election Court shall not allow any Interlocutory application to made on conclusion of the Pre-Trial Conference, if the Interlocutory Application could have, by its nature, been brought before commencement of hearing of the petition.***

The hearing of the petition commenced and we have heard oral evidence. No application on the issue of affidavits was raised until now. The affidavits are properly on record and can be replaced with originals.

The 1<sup>st</sup> Respondent reiterated that it is too late to replace copies of affidavits with originals. It was for the Petitioner to make timely application at Pre Conference stage to replace the copies of affidavits filed and served.

## **LAW**

From the issues raised the relevant legal provisions are as follows;

### **Article 159(2) CONSTITUTION OF KENYA**

***2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles-***

***a) Justice shall be done to all, irrespective of status;***

***b) Justice shall not be delayed;***

***c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)***

***d) Justice shall be administered without undue regard to procedural technicalities; and***

***e) The purpose and principled of this Constitution shall be protected and promoted.***

### **ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017**

#### **12. Affidavits Generally**

.....

***3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.***

***4) A petitioner shall, at the time of filing the petition, file the affidavits sworn under sub rule (3)***

**5) A response to the petition under rule 11 shall be supported by an affidavit sworn by the respondent**

**6) Each person who the respondent intends to call as a witness at the hearing, shall swear an affidavit.**

**7) A respondent shall, at the time of filing the response to a petition, file the affidavits sworn under sub-rule (6)**

**8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules.**

**9) The election court may, on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.**

**10) An affidavit shall-**

**a) State the substance of the evidence**

**b) Be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and numbered consecutively**

**c) Contain a list of exhibits and copies of any documents which the deponent intends to rely on**

**11) Each affidavit shall be served to all parties to the petition**

**12) An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination-in-chief**

**13) Every deponent shall, subject to the election court's direction, be examined –in-chief and cross-examined.**

**Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits**

**14) The Oaths and Statutory Declarations Act (Cap 15) and Order 19 of the Civil Procedure Rules, 2010 (L.N.No.151/2010) shall apply to affidavits under these Rules.**

**CIVIL PROCEDURE RULES 2010: ORDER 19 (Rule 4-8)**

**4) Every affidavit shall state the description, true place of abode and postal address of the deponent. And if the deponent is a minor shall state his age.**

**5) Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.**

**6) The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.**

**7) The court may receive any affidavit sworn for the purpose of being used in any suit**

**notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality**

## **DETERMINATION**

Once Witness affidavits are filed they form part of the record of the Election Court and are the witness's respective evidence for examination in Chief in the proceedings.

The objection raised by the 1<sup>st</sup> Respondent is borne by the Court record. Although the affidavits were filed with the petition within the requisite period; except for 1 they are copies, and not commissioned but they are signed with the Court's stamp.

Witness affidavits must comply with Rule 12 Subrule 14 of the **ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017 which in the instant case they do not fully comply.**

The issue of filing, service and form of documents ought to have been raised and canvassed by all parties during the Pre – Conference session(s) in Compliance with Rule 15 of **Rule 15 (2) of Elections (Parliamentary & County Election Petition Rules) 2017** but none of the parties raised any issue or apply to regularize documentation in these proceedings. Since the same has been raised at

this juncture, then it ought to be resolved to pave way for hearing and determination of the petition.

This Court has heard from the defaulting party the reasons for the copies filed in Court and served to the Respondents. They filed the Petition in Garissa High Court and were not in control of stamping of the said affidavits by the Court. They have original affidavits that can be readily exchanged and replaced.

This Court has considered that in line with **Article 159 (2) COK 2010** that justice should be administered without undue regard to procedural technicalities and **Order 19 CPR 2010 Rule 7** that grants the Court discretion to admit an affidavit as part of the Court record inspite of defect by misdescription, irregularity and/or technicality;

Although **Rule 12 Subrule 8 of Elections (Parliamentary & County Election Petition Rules) 2017** allows the election Court to grant leave to a witness to testify without filing an affidavit; no such application was made and no reasons advanced for the Court to consider this option and therefore such leave is not granted.

## **ORDER**

From the above, after considering submissions of all parties and relevant legal provisions this Court exercises judicial discretion and grants leave to allow and admit the copies of affidavits if replaced with original ones so as to proceed with the hearing. To avoid similar objections/applications, parties may **REPLACE ONLY** and **INFORM THE COURT** the documents in the Court Record for want of **FORM OR LEGIBILITY ONLY**. This will allow expeditious hearing of the Petition in line with the statutory time lines.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 17<sup>th</sup> JANUARY, 2018.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE:**

**MR. GITONGA & MS MARIENGA FOR PETITIONER**

**MR. WANJOHI FOR 1<sup>ST</sup> RESPONDENT**

**MR OLAHA FOR 2<sup>ND</sup> & 3<sup>RD</sup> RESPONDENTS.**



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