Case Number:	Election Petition 3 of 2013
Date Delivered:	04 Jun 2013
Case Class:	Civil
Court:	High Court at Bungoma
Case Action:	-
Judge:	
Citation:	MUSIKARI NAZI KOMBO v MOSES MASIKA WETANGULA & 2 others [2013] eKLR
Advocates:	-
Case Summary:	***Civil Practice and Procedure****-striking out the contents of an affidavit-circumstances in which the contents of an affidavit would be struck out for being scandalous and oppressive-whether allegations, based on information received by the deponent from other persons, of intimidation, threats and harassment carried on against an election candidate\'s agents, in the context of an election petition, were scandalous and oppressive-Constitution of Kenya, 2010; article 33, Evidence Act (Cap. 80); section 63(2), Civil Procedure Rules 2010, order 19 rule 6.*
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

High Court at Bungoma

Election Petition 3 of 2013

MUSIKARI NAZI KOMBO.....PETITIONER

versus

MOSES MASIKA WETANGULA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

MADAHANAH MBAYA.....3RD RESPONDENT

RULING

Striking out a paragraph in an affidavit

[1] The Respondents through their counsels Mr. Ochieng Oduol, Mr. Wasilwa, Masinde and Makhoha, for the 1st Respondent, and Mr. Erick Gumbo for the 2nd and 3rd Respondents, applied for;

…Paragraph 22 of the Supporting Affidavit by the Petitioner sworn on 8th April 2013 and filed on the same day, to be struck out for being scandalous and oppressive.

[2] The paragraph reads:

22 – That it is within my knowledge and I have information from several eye witnesses and which information I verily belief (sic) to be true that the 1st Respondent on massive and widespread scale engaged in acts of intimidation, threats and harassment of my supporters and agents either directly by himself or through his agents and/or servants. At Kitayi RC Primary School and at Baraka Primary School acts of threats and intimidation were witnessed by several people and my campaign agents.

[3] As this is a joint application by all the Respondents I shall simply put down the reasons advanced in support of the application which are:

a) That the paragraph is scandalous and oppressive to the 1st Respondent.

b) That the Petitioner has not backed the allegations in paragraph 22 with evidence.

c) That the allegations in paragraph 22 are so grave and disparaging yet they have not been substantiated.

d) That these allegations are pure conjecture, postulate, hearsay and blatant lies for which the Petitioner should be penalized under section 80 (1) (a) of the Elections Act.

e) That the allegations in that paragraph amount to an abuse of the process of the court as it is unsubstantiated information placed before the court.

f) That the paragraphs infringes on the right and reputation of the 1st Respondent; an act that is prohibited under Article 33(3) of the Constitution.

g) That the paragraph offends section 63 (2) of the Evidence Act which requires oral evidence to be direct evidence. It also embodies Order 19 of the CPR on affidavits.

h) That the paragraph militates against the overriding objective of the court provided under Rule 4 of the Elections Rules, 2013.

[4] Counsels for the Respondents eminently reinforced their arguments in support of their application and cited provisions of the Constitution, Statute law (Evidence Act and Elections Act,) and rules made thereto. Mr. Wasilwa quoted Article 33 of the Constitution on freedom of expression, which he said is exercised subject the limitation placed by Article 33 (3) of the Constitution.

[5] Counsels for the Respondents particularly Mr. Wasilwa argued that section 63 (2) of the Evidence Act requires that the person who should give oral evidence is the one who saw, heard or perceived the matter he is speaking to. He further submitted that the said section is an embodiment of Order 19 of the Civil Procedure Rules, and affidavit evidence is limited to facts which the deponent is able to prove on his/her own personal knowledge, belief and information.

[6] In sum, the Respondents are of the view that the said paragraph 22 is scandalous and oppressive and should be struck out.

[7] Mr. Gumbo in his explication of what is not just under the overriding objective, submitted that what is just need not be scandalous or oppressive but must be relevant. The paragraph was offending this rule and should be struck out.

PETITIONER'S CASE

[8] Mr. Ndambiri for the Petitioner opposed the application. He says that the application as presented is scandalous, vexatious and an abuse of the process of court. To him, the application is founded on allegations that the witness has given untrue and incorrect information which should be struck out.

[9] He further argues that paragraph 22 of the Petitioner's affidavit relates to the 1st Respondent and others. He referred the court to the words *either by himself or through his agents and/or servants*. The allegations in paragraph 22 are merely information that was given to the Petitioner by eye witnesses who will be called as witnesses to give evidence on what they witnessed. He gave the example of

Joseph Wafula and Martin Wepukhulu who have extensively talked of threats, harassment and intimidation of voters by the DC Kimilili. He submitted that, according to these witnesses, the said DC came with other people, and it is only fair if the court allowed them to testify on those matters in their affidavits.

[10] Since these witnesses have not testified, he urged, it is premature for the respondents to have applied and more so condemn the Petitioner for lying. According to Mr. Ndambiri the truth will be revealed when all the witnesses have testified on the matters in paragraph 22.

[11]. He did not stop there. Mr. Ndambiri submitted that paragraph 22 should not be looked at in isolation of all the other averments and the evidence provided by the Petitioner. It must be weighed against the totality of the entire petition. He prays for the court to allow the Petitioner an opportunity to prove the allegations in paragraph 22.

COURTS RENDITION

[12]. This is an application is for striking out a single paragraph of the Supporting Affidavit by the Petitioner sworn and filed on 8.4.2013. It is grounded on the fact that the depositions in the paragraph are scandalous, oppressive and irrelevant and should be struck out from the proceedings.

The issue

[13]. The question I am called upon to decide is whether paragraph 22 of the affidavit of the Petitioner filed on 8.4.13 is scandalous, oppressive and irrelevant and should be struck out.

[14]. These three words “scandalous, oppressive and irrelevant” carry the answer to this question; they are the grounds for striking out an affidavit under rule 6 of Order 19 of the CPR. I must, however, admit these words have been sufficiently decided upon before innumerous cases which I do not wish to multiply.

[15]. But let me borrow from a summary by Justice Ojwang (as he then was) in the case of ***Joseph Gitau & 2 others v Ukay Estate Ltd NBI HCCC NO 813 OF 2004*** quoting from other older cases on when a matter would be considered scandalous that:

“Allegations in a pleading are scandalous if they state matters which are indecent, or offensive or made for mere purpose of abusing or prejudicing the opposite party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party, or make any charge of misconduct or bad faith against him or someone else”.

[16]. On this subject see also the cases of ***Blacke V. Albion life Ass. Society*** **(1876) LJQB 663*; Marham v Wermer, Beit & Co* (1902) 18 TLR 763*; and Christie v Christie* (1973) LR 8 ch. 499*.**

[17] I should add that matters that are necessary but otherwise accompanied by unnecessary details would be scandalous. *“But they may not be scandalous if relevant and admissible in evidence in proof of the truth of the allegations in the plaint or defence so that when considering whether the matter is scandalous, regard must be had to the nature of the action.”* See ***Black v. Albion Life assurance society*** on these further circumscriptions on the scope of the subject. See further the case of

Marham V. Wesner, Beit & co. That: *"a pleading is scandalous if matters that charge the opposite party with bad faith or misconduct against him or anyone else."*

[18]. ***Christie v. Christie*** .....a matter is scandalous if it is immaterial or unnecessary which contain imputation on the opposite party.

[19]. Many cases have recapitulated these principles which I believe are not in doubt now.

[20]. Nonetheless, it provides an occasion for a decision to be made on the subject in this election petition under the new Constitution, Elections Act and Rules made thereunder.

Impugned paragraph not confined to Respondents

[21]. The impugned paragraph makes allegations on intimidation, threats and harassment of the supporters and agents of the petitioner by the 1st Respondent *either by himself or through his agents and/or servants.* The paragraph should, however, be seen within the entire context of the petition and all evidence before the court. The paragraph may seem very scandalizing on the face of it because it alleges very serious matters of a criminal nature. But, the kind of impleading in an election petition is such that allegations of malpractices and election offences are not only permissible, but, is a legal requirement under the Elections Act. Indeed, the law requires the election court, on satisfaction to the required standards that a person may have committed election offences, to make a recommendation to the Director of Public Prosecutions (DPP) for prosecution of the offenders. In an election petition criminally culpable acts should be pleaded. It will not, therefore, be a tenable thought in the structure of our electoral laws to say acts of intimidation, threat and harassment of supporters and agents of the Petitioner as pleaded in paragraph 22 are, *per se* scandalous, oppressive or irrelevant.

[22] But it should be understood that, the law still requires such allegations to be made within the law; that is to say, within the legal thresholds I have stated herein above as a way of preventing prejudice to, unfair charge on or infringement of a person's rights. The allegations or averments in an affidavit should also not be irrelevant; having no probative value; not tending to prove or disapprove a matter in issue. See the ***Black's Law Dictionary***, 17th Edition. One more requirement; the averment should be supported by evidence within the affidavit itself or by some other person in the proceeding, in this case, by a witness through an affidavit filed in court in accordance with the Elections (Parliamentary and County Elections) Petition Rules, 2013.

[23] Does paragraph 22 of the affidavit by the Petitioner sworn on 8th April, 2013 in so far as it relates to the 1st Respondent, meet these thresholds" Before I answer this question with finality, I should first state the following; that the said paragraph also relates to other people, agents and or servants of the 1st Respondent who may have committed the alleged acts of intimidation, threats and harassment of supporters and agents of the Petitioner. There is evidence on record which tend to speak to the allegations against other people, agents and or servant of the 1st Respondent which should be given an opportunity through plenary trial. I do not wish to analyze the particular evidence, its strength or otherwise in order to avoid making any prejudicial statements. In taking this decision, I am alive to the nature of these proceedings, which are not purely private claims but public-election disputes where the public have substantial interest. I am also guided by the fact that, striking out the entire paragraph will take away a substantial ground of the petition, and the public will never have the opportunity to have those allegations of intimidation, threats and harassment of supporters and agents of the Petitioner, determined by the court properly, effectually and completely as it ought to be.

[24] It is now clear the direction the court is taking in determining this matter. I revert to those matters

against the 1st Respondent as a person. I have perused the record, and I do not find evidence that tends to prove the allegation that the 1st Respondent personally committed acts of intimidation, threats and harassment of supporters and agents of the Petitioner. The Petitioner himself said so in cross-examination. The affidavits of Joseph Wafula and Martin Wepukhulu refer to other people but not the 1st Respondent, who committed the alleged intimidation, threats and harassment of supporters and agents of the Petitioner. I will, therefore, in the interest of justice strike out that part of paragraph 22 of the affidavit of the Petitioner sworn on 8th April, 2013, in so far as it relates to the 1st Respondent. The other part relating to the agents and or servants of the first 1st Respondent remain to be proved at the trial. See the case of *NBI HC ELECTION PETITION NO 2 OF 2013 STEVEN KARIUKI V GEORGE M. WANJOHI & 2 OTHERS.*

Dated, signed and delivered in Bungoma this 4th day of June, 2013

F. GIKONYO

JUDGE

IN THE PRESENCE OF:

Ochieng Oduol, H. Wasilwa, Makokha for 1st Respondent

Ndambiri and Ngaira for Petitioner

Ngumbo for 2nd and 3rd Respondents

COURT: Ruling delivered in open court.

F. GIKONYO

JUDGE