



REPUBLIC OF KENYA

High Court at Bungoma

Election Petition 3 of 2013

MUSIKARI NAZI KOMBO.....PETITIONER

Versus

MOSES MASIKA WETANGULA.....1ST RESPONDENT

INDIPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....2ND RESPONDENT

MADAHANA MBAYAH.....3RD RESPONDENT

RULING

Striking out of specific paragraphs in an affidavit

[1] Immediately the Petitioner had completed giving his evidence on 5.6.2013, Mr Eric Gumbo, counsel for 2nd and 3rd Respondent applied for the following paragraphs in the Petitioner's Supporting Affidavit to be struck out:

- a) Paragraphs 14, specifically (I), (III), (IV), (VI), and (XIII) - on stealing of ballot boxes
- b) Paragraph 15
- c) Paragraph 18
- d) Paragraphs 25,26,27,29,34,37,39,40, and 42 (g),(h),(i) and (l).

[2] He submitted that these paragraphs are oppressive, scandalous, irrelevant and not supported by any evidence whatsoever. He asked the court to be guided by its earlier ruling on paragraph 22 of the petitioner's affidavit, and apply the thresholds enunciated in that ruling on what constitutes oppressive, scandalous and vexatious averments in a pleading. He reminded the court that an averment that is not supported by evidence falls within the category of those allegations that are scandalous, vexatious and oppressive. The said paragraphs should be struck out for they offend the law.

[3] Ochieng Oduol supported the application by Eric Gumbo.

DETERMINATION BY COURT

[4] Through an earlier ruling in these proceedings, I restated the legal dimensions on what constitutes scandalous, offensive and irrelevant allegations in an affidavit. Below, I reproduce the relevant parts of that ruling:

“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”. (Justice Ojwang (as he then was) in the case of ***Joseph Gitau & 2 others v Ukay Estate Ltd NBI HCCC NO 813 OF 2004***)

[5] I continued:

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.”... That: “a pleading is scandalous if matters charge the opposite party with bad faith or misconduct against him or anyone else.”a matter is scandalous if it is immaterial or unnecessary which contain imputation on the opposite party.

And further:

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. ...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.

[6] I also said in that ruling that such application should be looked at within the entire petition and the evidence of all the witnesses as filed, and tested in cross examination and re-examination. This approach has been adopted in law due to the fact that striking out a pleading or a part of it is a draconian act which completely forecloses the right of the affected party from seeking legal redress on the affected matter. See the famous case of case of **DT Dobie Coopers** and other cases on this subject. This harshness produced by such an action is what dictates upon the court to exercise extreme caution in its discretion to strike out a pleading or a paragraph in a pleading or affidavit. Care should be taken by the court not to engage in an extravagant exercise that would result into an insidious change and harm to the essential core and character of the petition. Thus, I should strictly scrutinise the impugned paragraphs against all possible effects the striking out of those paragraphs will occasion to the proceedings, especially where evidence or a scintilla of it exists in the documents on record.

[7] In that context, I have perused the pleadings and the proceedings so far had and make the following observations and findings:

a) That paragraphs 14, 15, and 18 finds extensive support in the evidence of the Petitioner and the other witness who have filed affidavits, and or testified. Whether that evidence will ultimately prove those allegations to the required standard of proof, is another matter altogether. It is to be determined at the end of the trial. I find and hold that they are not scandalous, oppressive or irrelevant.

b) The first part of paragraph 14(xiii) which makes an allegation of stealing of ballot boxes is scandalous and irrelevant as it is not supported by any evidence whatsoever either in the affidavit by the Petitioner or by the other witnesses. It is also not tending to prove anything in the petition. It has no probative value. I strike out that part. Except the part that relates to hacking and or cutting of seals on sealed ballot boxes finds support in the evidence of several witnesses. Once again, this should not be taken to mean that those allegations have been proved already. That will be determined by the court upon conclusion of the petition by weighing the evidence tendered on the scales of standard of proof.

c) With regard to paragraphs 25,26,27,29,34,37,39,40,and 42 (g),(h),(i) and (l), there is specific evidence by witnesses who have filed affidavits, which is tending to support the allegations in those paragraphs. The Petitioner has even specified the particular witness and affidavit that supports the respective allegations. I will, therefore, decline to strike out those paragraphs. I must repeat however, that the Petitioner will still be required to prove those allegations to the set standards of proof in the trial.

[8] Those will be the orders of the court. It is so ordered.

Dated, signed and delivered in open court in Bungoma this 10th day of June, 2013

F. GIKONYO

JUDGE

IN THE PRESENCE OF:

In the presence of:

Khisa: CA

Petitioners: Ndambiri and Ngaria for Petitioner

Respondents: Ochieng Oduol, H. Wasilwa, Makokha, Masinde and Ouma for 1st Respondent, Rric Gumbo for 2nd and 3rd Respondents.

COURT: Ruling read in open court.

F. GIKONYO

JUDGE