



REPUBLIC OF KENYA

High Court at Machakos

Petition 4 of 2013

WAVINYA NDETI.....
PETITIONER

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC).....1ST RESPONDENT

ISAAC HASSAN (RETURNING OFFICER OF THE NATIONAL TALLYING CENTRE)
.....2ND RESPONDENT

THE MACHAKO COUNTY RETURNING OFFICER3RD
RESPONDENT

ALFRED NGANGA MUTUA4TH
RESPONDENT

MUTUA KATIKU5TH
RESPONDENT

RULING NO. 2

Introduction

1. The issue for consideration is whether I should grant the petitioner’s request for leave to tender additional evidence in form of additional witness affidavits.

The application

2. By a Notice of Motion dated 20th May 2013 the petitioner seeks leave to file affidavit evidence which she states is intended to rebut some of the allegations raised in the respondents’ depositions.

3. The application is supported by the petitioner’s own affidavit sworn on 20th May 2013 to which are annexed five affidavits of the proposed witnesses namely; **Victor Muindi, Tairus Ndambuki Musyoka, Patrick Musila Mwea, Patrick Mulwa Kiingi and Grace Katumbi Nzyoka.**

4. Mr Kinyanjui, learned counsel for the petitioner, submits that the evidence could not have been filed at the time of filing petition as the affidavits constitute responses to the respondent’s affidavits. He relied on **rule 17** of the *Elections (Parliamentary and County Election) Petition Rules, 2013* (“the

Rules”), for the proposition that the court has power to admit further affidavits and evidence. He contended that no prejudice would be occasioned to the respondents as they would have the opportunity to cross-examine any of the deponents under **rule 12** of the **Rules**.

5. The petitioner’s case is that it is in the interests of justice that she be granted leave to tender the additional evidence in order to complete her case. Mr Kinyanjui summed the reasons as to why this court should grant the application as follows: First, the court has jurisdiction to grant leave. Second, because it is fair and just to do so. Third, because it will enable court determine issues at the pre-trial and lastly the respondents will not suffer any prejudice if the affidavits are admitted.

The responses

6. The Motion was opposed by all the respondents. The respondents contend that the court lacks jurisdiction to allow such an application as there is no provision in **the Rules** that permits the petitioner to file further affidavits rebutting the respondents’ replying affidavits.

7. Mr Muhoro, learned counsel for the 1st, 2nd and 3rd respondents’, opposition was threefold. First, the grant of leave would occasion prejudice to the court as it had a limited time to dispose of the petition. Second, that the affidavits were not ‘*further affidavits*’ within the meaning of **the Rules** but sought to introduce new evidence. Third, that admission of the affidavits would require the respondents to respond and this cycle would compromise the determination of the petition on time. He submitted that **rule 17(1)(i)** of **the Rules** only gave room for filing and serving of ‘*further affidavits*’ and not ‘*new affidavits*.’ Counsel concluded by submitting that the petitioner would not be prejudiced as she had the right to cross-examine the respondents’ witnesses.

8. Mr Kilonzo Jnr, learned counsel for the 4th and 5th respondents, associated himself with Mr Muhoro’s submissions. He emphasized that admitting the new evidence would further tilt the scales against the respondents who were already prejudiced by the statutory timelines that afford the petitioner more time to file the petition as compared to the time allowed for the respondents to make their responses. Learned counsel noted that under **Article 87(2)** of the Constitution and **section 76** of the **Elections Act, 2011 (“the Act”)**, the petitioner has 28 days within which to prepare her case while the respondents only had 14 days within which to file their responses. Counsel further submitted that both **the Act** and **the Rules** did not envision filing of further affidavits and that **the Act** was worded in deliberate terms to avoid delay that was the norm in the past where delays would be occasioned by parties seeking further and better particulars.

9. Mr Kilonzo Jnr discounted the petitioner’s reliance on the provisions of **rule 17** saying that the application was premature as the rule addressed pre-trial conference directions and since no pre-trial conference had been held, the application could not be allowed. Counsel associated himself with the sentiments of the Supreme Court in the **Raila Odinga & 2 others v Independent Electoral and Boundaries Commission & 3 others, SCK Petition No. 5 of 2013 [2013]eKLR** where the court declined to permit the filing of a further affidavit by the petitioner.

Determination

Whether court has jurisdiction

10. The first question for consideration is whether **the Rules** permit the Court to grant leave to file further or additional affidavits.

11. **Rule 12** and **17** of **the Rules** provide for the filing of further or additional affidavits. **Rule 12** of **the Rules** provides as follows:

12. (1) A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness who the Petitioner intends to call at the trial.

(2) The affidavit under sub-rule (1) shall—

(a) state the substance of the evidence;

(b) be served on all parties to the election petition with sufficient copies filed in court; and

(c) form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by the Petitioner on any contested issue.

(3) Subject to sub-rule (4), a witness shall not give evidence on behalf of the Petitioner unless an affidavit is filed in accordance with this rule.

(4) A witness for the Petitioner who fails to file an affidavit as required by this rule shall not be allowed to give evidence without the leave of the court.

(5) The court shall not grant leave under sub-rule (4), unless sufficient reason is given for the failure to file an affidavit.

(6) The provision of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.

12. **Rule 17 of the Rules**, which contemplates the filing of further affidavits and additional evidence, provides as follows;

17. (1) Within seven days after the receipt of the last response to a petition, the court shall schedule a pre-trial conference with the parties in which it shall—

(i) give directions as to the filing and serving of any further affidavits or the giving of additional evidence;

12. **Rules 12 and 17(1)(i)** by reference to the words “grant leave” and “give directions” respectively, in my view, give room for filing of any further affidavits or additional evidence. This evidence may be in addition to existing evidence or it may be entirely new evidence. Whatever the situation, these provisions enable the court to admit additional or new evidence in so far as it assists in the just disposal of the matter (See also **Philip Mukwe Wasike v James Lusweti Mukwe & 2 others, Bungoma Petition No.5 of 2013 (Unreported)**).

Whether Court should grant leave

13. Although the Court is entitled to admit new, further and or additional evidence through affidavits, it is not a matter of right. The discretion conferred on the court must be exercised judicially in furtherance of the overall purpose of **the Rules** which is to achieve a just and expeditious trial. In **Bwana Mohamed Bwana v Silvano Buko Bonaya, Election Malindi Petition No. 7 of 2013 (Unreported)**, Hon. Justice Muchemi observed that, “The Rules state in mandatory terms that a witness who has not filed an affidavit evidence shall not be allowed to give evidence without leave of the court. For the court to grant that leave, the party seeking leave must give sufficient reasons as to the failure to file the affidavit within the time allowed by the rules. Leave is, therefore, not automatic. It places an obligation on the party seeking it to satisfy the court that he deserves the orders sought.” [Emphasis mine]

14. The question as to whether or not to admit additional evidence must be weighed heavily against other important factors necessary for a just and expeditious trial. This is especially so where the determination of the election petition is within strict timelines. The court also ought to guard against a party’s attempt to sneak in fresh evidence in the guise of ‘additional evidence’ or ‘further evidence’ where the effect is to amend pleadings and set the cause of action on an entirely different path. That is why in the **Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others (Supra)**, the Supreme Court observed in part, “...the additional facts and evidence, in our view, tend to introduce such new matters as would change the character and nature of the Petition. This may lead to amendment/s of the Petition thereby possibly giving rise to significant new facts and/or allegations

leading to a serious departure from the original case.”

15. Just as this kind of litigation must come to an end on a date certain, there must be an end to the exchange of depositions. It is the duty of the court to reign in on the ceaseless back and forth that would ensue if the exchange in filing of affidavits was not closely supervised by the court. This now takes me to the essence of witness affidavits.

16. Under the old regime of rules, the ***National Assembly Elections (Election Petition) Rules, 1993***, witness affidavits were to be filed no less than 48 hours before the time fixed for trial. **Rule 18** of the former rules provided that each affidavit be filed in a sealed envelope and opened by the election court when the witness who has sworn the affidavit is called to give evidence. This situation has now changed and **rule 12** of ***the Rules*** requires that witness affidavits be filed together with the pleading. **Rule 15** of ***the Rules*** makes similar provision with regard to the respondents’ witnesses. There are good reasons for the departure from the past regarding the filing of witness affidavits. The evidence that a party wishes to rely on is brought to the attention of the opponent way in advance to enable an informed preparation of the defence thereby diminishing the element of ambush. The other advantage obtained by the disclosure of evidence in advance is that it ensures that parties do not shift goal posts as and when they wish and that they will be bound by the pleadings hence saving on time.

17. Whether or not to grant leave must be decided within the context of the overriding objectives of ***the Rules*** enshrined in **rules 4** of the ***Rules*** which is, “*to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.*” The court or any party appearing must be mindful of duty bestowed by **Rule 5** of ***the Rules*** which obliges the court and the parties to conduct the proceedings in such a way as to achieve, “(a) *the just determination of the election petition;*” and “(b) *the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.*”

18. The issue of filing further affidavits under the new regime of rules governing election petitions was addressed by the Supreme Court in ***Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others (Supra)***, where the learned judges stated that, “*we are of the view that the Court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right...The Supreme Court went on to add that, “However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time-lines established are made with special and unique considerations.”* (Emphasis added).

19. The Supreme Court then went further to consider the factors that ought to be taken into account when granting leave in the following terms, “*The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided. The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.*”

20. Although the Supreme Court expunged the petitioner’s affidavit containing 839 pages of a further affidavit, the circumstances in that case were unique and limited to the nature of the Presidential election petition. Even though the Court declined to admit the evidence it noted that each case must be considered on its own merit and that where the extent of the new evidence “*is small or limited so that the*

other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter.”

21. Has the petitioner ‘*provided sufficient reason*’ to enable this court exercise discretion in her favour? The petitioner’s witness depositions are made in response to the respondents’ position that there were no irregularities in the manner the elections was conducted. The affidavits are therefore geared towards detailing the irregularities that occurred at the polling stations. Permitting the filing of the additional affidavits will of course require the respondents to take time to look for rebutting evidence which will further lengthen the proceedings considering that we are halfway through the life of the petition yet the pre-trial conference has not been conducted. I also note that the affidavits mention other people who have not sworn affidavits including persons who are alleged to have committed elections offences. Granting leave for these affidavits to be considered as evidence will not only put the respondents to the task of seeking rebutting evidence but also put all those persons mentioned in the affidavits on notice that there are serious allegations made against them in the affidavits. In my view, the allegations that are made in the affidavits are the matters which ought to have been filed together with the petition. I therefore do not find sufficient reason to permit the inclusion of these affidavits.

22. The petitioner has alleged that she only seeks to respond to the allegations filed by the respondents. I have perused the five witnesses affidavits sought to be introduced and I make the finding that even though they are said to be replies to the respondents’ depositions, the affidavits in actual sense depone to issues which are generally covered in the main petition. I notice substantial content of the affidavits seek to top up already existing evidence. Each deponent gives a detailed account of events of the material day and depones to same election irregularities which have been pleaded in the petition and supporting affidavits. These matters, I find and hold, ought to have been set out in the petition considering that the petitioner had a 28 day head start before filing the petition precisely to enable her collect all the necessary evidence to prosecute the petition.

23. The petitioner has explained that she could not file the evidence earlier as she waited for the respondents’ responses. This contention is not reasonable especially in view of the contents of the affidavits as I have found seek to top up evidence on matter already pleaded and which could have been tendered at the time of filing the petition.

24. I also find that no prejudice will be occasioned to the petitioner if the affidavits are not admitted. On the contrary, admission of the material will only further distort the trial timetable hence compromising on the very overriding principle and duty under **rules 4 and 5 of *the Rules*** to expeditiously determine the matter which is a reflection of **Article 159(2)(b)** of the Constitution which obligates this court to expend justice without delay. I also do not see the evidence that is sought to be brought on board by the petitioners’ witnesses to be of such weight that failure to admit it would disadvantage the petitioner or weaken her case. Furthermore, the petitioner will have a chance to cross-examine the respondents’ witnesses as provided for under **rule 15(3)**.

25. Although the pre-trial date has not been set, it is worth noting that under **rule 17(1)** the pre-trial is supposed to take place 7 days after the receipt of last response to the petition. The pre-trial conference is an opportunity for the court to dispose of matters set out under ***the Rules*** including disposal of all interlocutory applications. It does not prevent the court from dealing with applications before the conference. It is indeed preferable to dispose of all contested application before the conference and this is why I directed the petitioner to file the application for consideration before the conference which has now been delayed.

26. I will, however, only admit the petitioner’s own affidavit sworn on 20th May which includes the highlights of the failure of tallies annexed as “WNN1” in the form of tables. As these constitute summary of her evidence on the election results, they will assist the court and the parties appreciate her case.

Disposition

27. The upshot of this is that the application for leave to file the affidavits of Victor Muindi, Tairus

Ndambuki Musyoka, Patrick Musila Mwea, Patrick Mulwa Kiingi and Grace Katumbi Nzyoka is denied.

28. I therefore make the following orders;

(a) The petitioner shall file and serve on the parties the affidavit setting out her analysis of the election results as evidenced in annexure “WNN1” in her affidavit sworn on 20th May 2013 within three (3) days from today.

(b) Save to the extent set out in (a) above, the Notice of Motion dated the 20th May 2013 is dismissed.

(c) The petitioner shall bear the respondents’ costs of the application.

DATED and DELIVERED at MACHAKOS this 10th day of June 2013

D.S. MAJANJA
JUDGE

Mr Kinyanjui instructed by J. Harrison Kinyanjui and Company Advocates for the petitioner.

Mr Muhoro with him Dr G M Kakuli instructed by Kimani Muhoro and Company Advocates for the 1st, 2nd and 3rd respondents.

Mr Mutula Kilonzo Junior instructed by Kilonzo and Company Advocates for the 4th and 5th respondents.