



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT NAROK
ELECTION PETITION NUMBER 3 OF 2017
IN THE MATTER OF THE ELECTIONS ACT 2011
IN THE MATTER OF ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES 2017
IN THE MATTER OF ELECTION FOR MEMMBER OF COUNTY ASSEMBLY SUSWA
WARD
KAPUSIA OLE SALONI.....PETITIONER
VERSUS
JAMES KIPAS LANGUES.....1ST RESPONDENT
CONSTITUENCY RETURNING OFFICER NAROK EAST
CONSTITUENCY CHRISTINE OTIENO....2ND RESPONDENT
THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. The Application before the Court is the Petitioner's/Applicant's Notice of Motion Application dated 9th October, 2017 and filed on 10th October, 2017. The application is brought under Rule 19 of the Elections (Parliamentary and County Elections) Petition Rules 2017 (Hereinafter the "*Election Petition Rules*"), and Article 159 of the Constitution and all enabling provisions of the Law. The Application seeks the following orders:

- a. That the Honorable Court do admit the Witness affidavits filed herein out of time*
- b. That the witness statements filed herein out of time be deemed to be properly filed and be entered as Court records for purposes of the Petition.*
- c. That the costs of this application be provided for*
- d. That the Honorable Court grants any other order that it may deem fit.*

2. The application is supported by the affidavit of the Petitioner, Kapusia Ole Saloni sworn on 9th October, 2017. The grounds on which the application is based are in the body of the Application. The Applicant contends that it is in the interest of justice that the witness affidavits of PARMERS OLE MURIONGO, SANKUI OLE MUTUTUA, JOEL TUANEI TENE, MUKUE OLE AND DENIS KUITAMET OMERAE be admitted as part of the Court record. This based on the ground that rule 15(1), (e) and (h) as read with rule 19 of the Election Petition Rules allows the Court to extend time for filing of pleadings in election petitions. The Petitioner further ground is that the drafter of the rules, while conscious of rule 12 were cognizant that due to the nature of election petitions, it may not be possible to get all the evidence and therefore a Petitioner, may be given an opportunity to file further documents and witness statements.

3. On 5th October, 2017, when this matter came up for pre-trial directions, I directed the Petitioner to file and serve a formal application herein within 5 days and simultaneously file written submissions. The Petitioner filed the formal application and submissions on 10th October, 2017 within the time directed. The 2nd & 3rd Respondents filed a replying affidavit on 18th October 2017 opposing the application. The affidavit is sworn by Christine Otieno, the Returning Officer, Narok East. As at the date of delivery of this ruling, the 1st respondent response to the application was not on record. The 2nd & 3rd Respondents submissions are also not on record. However, On 5th October, 2017, Ms. Karanja, counsel for the 2nd and 3rd respondents had sought to oppose the application and I will consider her oral submissions which are on record.

APPLICANT'S SUBMISSIONS

4. The Applicant's Counsels submits that the Petition herein was filed within the time limit provided for filing of elections petitions which is 28 days after the declaration of the results of the election. The results of the election of Member of County Assembly, Suswa Ward was made on 9th August, 2017 and the Petition herein was filed on 6th September, 2017. Counsel urges that rule 19(1) of the Election Petition Rules allows the Court to extend time for filing o submissions or the period that the Petition is to be heard. Counsel submits that Rule 19(1) provides;

"Where any act or omission is to be done within such time as may be prescribed in these rules or ordered by an election court, the election court may, for purpose of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired"

5. Counsel further submits that Rule 19(2) of the Election Petition Rules provides circumstances that an extension may not be granted, as thus;

"Subrule (1) shall not apply in relation to the period within which a petition is required to be filed, heard and determined"

6. The Applicant's Counsel further submits that Rule 15(1)h of the election petition rules provide that during the pre-trial, the Court ***"May give directions as to the filing and serving of any further affidavits or the giving of additional evidence"***

7. It is the Petitioner's case that despite the provisions of Rule 12(3) of the Rules, the drafters of the rules were conscious that after a Petition is filed, the Petitioner may come across new evidence and witnesses(es) that he would not procure at the filing of the Petition. Counsel urges that the Court should pursue substantive justice and in the democratic interest of the voters allow the Petitioner an opportunity to present all the evidence he has in the prosecution of the Petition.

8. It is further contended that the witness affidavits are in support of the grounds pleaded in the Petition relating to ejection/denial of entry to polling stations, bribery of voters, the inaction of election officials against electoral malpractices, and massive voters transfer as pleaded at Paragraphs 3, 4, 6, 7 and 9 of the

Petition. Counsel urges that the petitioner has not sought to plead new grounds that would vary the nature of the Petition.

9. Counsel relies on the case of **Arthur Kibira Apungu & Another v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR** where the Court stated:

“These affidavits do not raise new issues that depart from the Petition. In my view, some of the affidavits merely elaborate the alleged malpractices on the part of the Respondents, whereas some affidavits make reference to specific polling stations that in the Petition were referred to as “various polling stations”. I also find that there will be no prejudice occasioned to the Respondents as they will be given sufficient time to respond to the said affidavits”

10. Counsel further submits that the further affidavits will enable the respondents file substantive responses and the real issue will be tried to enable the Court make a fair determination. This will enable the Court pursue substantive injustice pursuant to Article 159 (2) (d) and (e) of the Constitution and the overriding objective of the rules pursuant to, and in terms of Rules 4(1) (2) and Rule 5(1) of the Rules.

2ND AND 3RD RESPONDENT’S SUBMISSIONS

11. On 5th October 2017, Ms. Karanja, Counsel appearing for the 2nd and 3rd Respondents, opposed the application. Counsel argued that the Petitioner ought to have filed the affidavits with the Petition and a question would arise as to why the affidavits were not filed. Counsel submitted that Rule 12(4) of the election Petition Rules is very clear and by the Petitioner trying to file any new evidence, this will be prejudicial to the 2nd and 3rd Respondents.

12. In the Replying affidavit, the 2nd Respondent avers that the Petitioner has had sufficient time, being a whole 28 days after the declaration of the results and what he is seeking is filing fresh evidence. This, it is contended, will be tantamount to a fishing expedition and will be prejudicial to the respondents who have already filed their responses to the Petition

ISSUES FOR DETERMINATION

13. I have considered the application in its entirety and the submissions by Counsel. The main issue for determination is whether the Court should grant the Petitioner leave to file further affidavits in support of the application and deem the affidavits filed as properly filed.

DETERMINATION

14. Rule 12(1), (2), (3) and (4) of the Petition Rules govern the filing of affidavits in the Election Petitions at the time of filing of a petition. Rule 12 provides:

“12 (1) A petition shall be supported by an affidavit which shall—

(a) set out facts and grounds relied on in the petition; and (b) be sworn personally by the petitioner or by at least one of the petitioners, if there is more than one petitioner.

(2) An affidavit in support of a petition under sub-rule (1) shall state—

(a) the name and address of the deponent;

(b) the date when the election in dispute was conducted;

(c) the results of the election, if any, however declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, acting for the petitioner which shall be the address for service.

(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).”

15. Rule 12(4) provides that a Petitioner shall, at the time of filing the Petition, file the witness affidavits. A witness who has not filed an affidavit in compliance with the rules cannot have his evidence admitted. Mr. Manyonge, Counsel for the Petitioner submits that Election Petition Rules allows the Court to extend time for filing o submissions or the period that the Petition is to be heard. Counsel submits that Rule 19(1) provides;

“Where any act or omission is to be done within such time as may be prescribed in these rules or ordered by an election court, the election court may, for purpose of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired”

16. Counsel also submits that Rule 15(1)h of the election petition rules provide that during the pre-trial, the Court **“May give directions as to the filing and serving of any further affidavits or the giving of additional evidence”**

17. Under Rule 12(9) of the election petition rules, the Court may, on its own motion or on application by any party to the petition, direct any party or witness to file a supplementary affidavit. Rule 12(9) provides;

“(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.”

18. The above rule grants the election Court jurisdiction to allow any party to file supplementary affidavit at the pre-trial stage as read with Rule 15. In the case of **Joel Makori Onsando Kunga & Another v Independent Electoral and Boundaries Commission & 4 others [2017] eKLR**, , the High Court stated:

“Further under Rule 15(1) (h) of the Elections Petition Rules 2017, the Court may during pre-trial conference give directions on filing and serving further affidavits or giving additional evidence. Commenting on the impact of this rule, Majanja J in the case of Wavinya Ndeti Vs IEBC and 4 Others (Machakos) [2013] eKLR opined that the said evidence could be in addition to existing evidence or it could be entirely new evidence. He was of the view that as far as the new evidence assists the Court in the just disposal of the matter, it may be allowed. This was further elaborated by Ogola J in Arthur Kibira Apungu & Another vs IEBC & 2 Others [2013] eKLR that filing of further affidavits can be allowed as long as they do not raise new issues which depart from the Petition and if the affidavits simply amplify issues already raised in the Petition.”

19. In **Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others, Supreme Court Petition No. 5 of 2013**, the Supreme Court gave the following guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence:

a. the admission of additional evidence is not an automatic right. Instead, the election court has a discretion on whether or not to admit the evidence;

b. further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondent’s ability to respond to the said evidence;

c. the parties to an election petition should strive to adhere to the strict timelines set out in EDR laws; and

d. admission of new evidence must not unfairly disadvantage the other parties to an election petition.

20. I have perused the affidavits sought to be filed out of time. The affidavit of DENIS KUITAMET OMERAIE sworn on 9th October, 2017 raises issues of agents of the Petitioner been denied entry at the polling station which led to irregularities being committed. This was raised under paragraph 6 of the Petition. The affidavit of MUKWE OLE LESALON also raises issues of denial of access of agent at the polling station and voters transfer, which grounds have been pleaded in the Petition. This also applies in the affidavit sworn by PARMERES OLE MURIONGO, KASANKUI OLE MUTUTUA and JOEL TUANEI PARTOIP all sworn on 9th October, 2017.

21. I have considered the averments in the affidavits. The witnesses substantially raise issues pleaded in the Petition which involve denial of access of the Petitioner's agents at the various polling stations within Suswa ward, transfer of voters and the conduct of the elections which were not transparent and fair.

22. I find that the affidavits do not materially depart from the grounds pleaded in the Petition filed. It would be in the pursuit of substantive Justice, in accordance with Article 159 of the Constitution, to allow the Petitioner file the further affidavits and allow the Respondents ample time to file further responses. The respondents will not be prejudiced as the Court will allow them time to file further responses. The further evidence will also be tested through cross examination. This would enable the court appreciate and consider all material evidence in order to reach at a fair and just determination. This would be in accordance with the overriding objective of the Court to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions as stipulated under Rule 4 of the Election Petition Rules.

23. I find the application merited and allow the same in the following terms; -

a. I grant leave to the Petitioner to file further witness affidavits

b. The affidavits of PARMERES OLE MURIONGO, KASANKUI OLE MUTUTUA, JOEL TUANEI PARTOIP, DENIS KUITAMET OMERAIE AND MUKWE OLE LESALON all sworn on 9th October, 2017 and filed on 10th October, 2017 are hereby deemed to have been properly filed with the leave of the Court.

c. The Respondents are hereby granted corresponding leave to file and serve any further witness affidavits in further response to the Petitioner's further affidavits within 14 days of the date hereon.

d. The Court shall not grant any further extension of time to file supplementary affidavits and the matter shall be fixed for hearing in view of the strict timelines.

e. The costs of this application shall be costs in the cause.

Orders accordingly.

RULING DATED AND DELIVERED THIS 19th DAY OF OCTOBER 2017

H.M. NG'ANG'A

SENIOR RESIDENT MAGISTRATE

IN OPEN COURT IN THE PRESENCE OF:

FOR PETITIONER: MR MAANYANGE

FOR 1ST RESPONDENT: MR KILELE H/B FOR MR OMWANZA

FOR 2ND & 3RD RESPONDENTS:MS KARANJA

COURT CLERK: SHADRACK KASASO