



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S

AT KANGUNDO

ELECTION PETITION NO. 1 OF 2017

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE TALA TOWNSHIP
ELECTION, 2017**

AND

**IN THE MATTER OF ARTICLE (1), (2); 2(2); 3(1); 4(2); 10; 21(1); 23; 38(3); 47(2); 48; 81(A) &
(E); 82(2) (B); 84; 86; 87(2) & (3); 88(5); 165(3) (A) AND €; & 180(1) OF THE CONSTITUTION
OF KENYA**

AND

IN THE MATTER OF SECTION 75, 80, 83 OF THE ELECTIONS ACT, 2011

AND

IN THE ELECTIONS ACT, 2011 (1CT NO.24 OF 2011) AS AMENDED

AND

**IN THE MATTER OF LEGAL NOTICE NO.128 OF 2012, THE ELECTIONS (GENERAL)
REGULATIONS, 2012**

AND

**IN THE MATTER OF LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS (REGISTRATION
OF VOTES) REGULATIONS, 2012**

AND

IN THE MATTER OF PARLIAMENTARY AND COUNTRY

ELECTIONS PETITION RULES, 2017

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) AMENDMENT REGULATIONS, 2017

AND

IN THE MATTER OF A PETITION BY

BONIFACE MUISYO NGLIPETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

RETURNING OFFICER, TALA TOWNSHIP2ND RESPONDENT

KAMITU ALEX3RD RESPONDENT

R U L I N G

This ruling arose from the objection raised by learned Counsels; *Mr. Nyamu* and *Miss Maitai* for the 1st and 2nd and 3rd Respondent respectively.

This election petition came up for pre-trial on the 27th September 2017 on which date the parties gave their draft issues which court had to consider and come up with agreed issues. The parties further by consent fixed the hearing scheduled for 24th October 2017.

On the 24th October 2017, before the matter could proceed for hearing the two learned counsels above raised objection arguing this court to strike out further affidavit filed on the 29th October 2017 by the Petitioner herein on the following grounds:-

- 1. That the said further affidavit has introduced new evidence against the express commitment by the counsel for the petitioner when leave was granted for him to do so.**
- 2. That paragraph 3, 4, 5 and many more mention issues which are not contained in the petition.**
- 3. That the said further affidavit amounts to amending the petition through the back door.**
- 4. That the further affidavit mentions about the results and who declared it which is not captured in the petition hence it goes against Rule 8 of the Election, Parliamentary and County Election Act 2017.**
- 5. That this is an abuse of the court process and amounts to pulling the carpet from the Respondents feet.**
- 6. That the said further affidavit is attached to a document which has not been produced as the same is generated from the internet and there is no certificate of authenticity.**

In his response the learned counsel for the Petitioner, *Mr. Airo*, stated that what is contested is a further affidavit filed on the 29th September 2017 and served on the same date. That the court had its last pre-trial on the 9th October 2017 and the Respondent did not find it fit to raise the issues on the pre-trial date only to wait till the matter is scheduled for hearing.

That they ought to have raised the objective at the pre-trial date. He refers the court to **Rule 15 (2)** of the **Election Act**. That pre-trial was closed on the 9th October 2017 and the court directed the parties to prepare for a hearing today. That undue indolent cannot be pardoned by the court, the court opened its door to the parties to raise any objection and the door having been closed on the 9th October 2017, it

cannot be re-opened. He further submitted that the attached document is a public document and not something from mass.

In a short reply by **Mr. Nyamu**, he stated that surprisingly his colleague **Mr. Airo** has not touched on the issues of amending the petition by the filed further affidavit. That the Respondent have not delayed on raising the issues as the hearing has not commenced. That the Petitioner is in breach of the condition granted when the leave was sought.

The Respondents prays that the court do proceed to disallow the use of the further affidavit.

The first issue this court must deal with is whether the said further affidavit dated 29th September 2017 is properly before court. The second issue as whether the said affidavit introduces new evidence and if the answer is yes, what is the effect?

In answer to the first issue, this court had its first sitting on the 27th September 2017 on which date the learned counsel for the Petitioner sought leave of this court to file further affidavit which was not opposed by the counsel for the Respondents. The leave was therefore granted by consent. It therefore answers the first issue in affirmative. The further affidavit is therefore properly before this honourable court.

The 2nd issue is whether the said further affidavit filed by the Petitioner pursuant to order of this court dated 27th September 2017 introduces new evidence.

The counsel for the Respondent has pointed out to this court on several paragraphs e.g. paragraph **3, 4, 5** to mention but a few and what they contain particularly the results of the petition and who declares it.

The counsel further stated that the said affidavit is attached with a document which has never been introduced to this court. It is their contention that allowing this affidavit to be used is to allow the amendment of the petition without following procedure of amendment as laid down in the rules.

I have personally read the petition together with the further affidavit. I do concur with the concern raised by the learned counsel for the Respondents. The counsel for the Petitioner made a commitment before this court that he would not introduce new evidence. This has been breached. Allowing the said affidavit to be relied on would be against the law.

It is not true that the respondent were late in raising the objection. The matter has not taken off and it is at this particular time that such issues must be tackled.

Upon considering the objection and the reply and taking into account the applicable law, I am of the view that the objection has merit. I will proceed to allow it and strike out the further affidavit dated 29th September 2017 and filed on the same day.

No order as to costs.

D. ORIMBA

SENIOR PRINCIPAL MAGISTRATE

31.10.2017

31.10.2017

Before Hon. D. Orimba – SPM

Court Assistant Makena

For Petitioner – Mr. Hassan holding brief Airo

For 1st Respondent – Miss Maitai

2nd Respondent – Miss Maitai

3rd Respondent – Mr. Ombati holding brief for Mr. Nyamu

COURT

Ruling read in open court in the presence of all parties and their advocates.

D. ORIMBA

SENIOR PRINCIPAL MAGISTRATE

COURT

Hearing 27th, 28th and 29th November 2017.

D. ORIMBA

SENIOR PRINCIPAL MAGISTRATE

31.10.2017