



**REPUBLIC OF KENYA**

**IN THE PRINCIPAL MAGISTRATES COURT AT KAPENGURIA**

**ELECTION PETITION NO 2 OF 2017**

**IN THE MATTER OF ELECTION FOR THE MEMBER OF COUNTY ASSEMBLY OF  
MASOOL WARD, SIGOR CONSTITUENCY, WEST POKOT COUNTY**

**THE ELECTION ACT NO. 24 OF 2011 AND THE ELECTION (PARLIAMENTARY AND  
COUNTY ELECTIONS) PETITION RULES, 2013 THE CONSTITUTION OF KENYA**

**BETWEEN**

**WILSON PKERER CHEKERUK.....PETITIONER**

**AND**

**1. LOPORNA PYATICH LONYANGATODO.....1<sup>ST</sup> RESPONDENT**

**2. JUMA AMACH DANIEL ( RETURNING**

**OFFICER, SIGOR CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**3. INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....3<sup>RD</sup> RESPONDENT**

**RULING 1**

The petitioner by a notice of motion dated the 28<sup>th</sup> day of September 2017 brought an application under rules 4, 5, and 20 of the elections( Parliamentary, and County elections) Petitions Rules and Article 159 of the constitution of Kenya seeking the following orders:-

1. Leave be granted for extension of time for filing of the petitioner's further and/or additional witness affidavits in support of the petition herein.
2. Cost of the application

The same was premised on the grounds that the alleged witnesses were not available at the time the petition was being filed and the petitioner was not able to get in touch with them owing to their pastoralist way of life, as they kept moving from one place to the other in search of pasture for their livestock. And that the same happened immediately after the voting exercise came to an end.

The said application was opposed by all the respondents in this case.

The 1<sup>st</sup> respondent opposed the same through a replying affidavit deponed on the 17<sup>th</sup> day of October indicating that election petition in nature have timelines and that as far as this particular petition is concerned hearing dates had already been set. He went further to state that no sufficient reasons have been established by the petitioner to warrant grant of the orders sought, and that the intended action is meant to introduce new complaints in two polling stations namely:-

- Surumpen Nursery school polling Station
- Kokorosion Manyatta Mobile polling Station

He urged the court not to allow an amendment through the back door as the same would be prejudicial to the respondent if the same is allowed.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents also opposed the same through an affidavit deponed on the 25<sup>th</sup> October 2017 and argued that the petitioner failed to take advantage of section 76(4) of the Election Act 2011 to seek leave of the Court to file a supplementary affidavit before the lapse of 28 days of filing the petition. And that the principle of extension of time is that the Petitioner should proffer reasons for delay as a basis for the prayer which in this case is unfulfilled. They argued that the applicant has not given any plausible reasons for the delay in filing a further affidavit to this court. According to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents the application is untenable as it seeks to introduce fresh allegations which if admitted will alter the nature, character and scope of the petition.

All the parties agreed to canvass the application by way of written submissions to which each party complied. The main issue here is whether the applicants has met the threshold for grant of leave to file further and or additional witness affidavit.

The petitioner submitted that Rule 20 of the elections Petitions Rules allows for extension of time and that the major reason that the delay was caused was due to pastoralist lifestyle enjoyed by the communities in West Pokot. That the witnesses had gone missing after the elections held on the 8/8/17 and could not be traced when the timeline for filing the petition had expired. He urged the Court to use its discretion to allow the said application. In respect of the scope and or nature of evidence of the additional evidence of the additional witness affidavits and / or further affidavit of petitioner he argued that the affidavits filled alongside the application shows the nature and scope of the evidence of the additional witness affidavits intended to be filed and the further affidavits to be filled by the petitioner herein. As to the petitioner other further affidavit the same is prompted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents affidavits annexing form 36A's that involved Surumpen Nursery School Poling Station Code No. 035 and Kokorosion Manyatta Mobile Poling Station Code No. 041 which he argued did not amend the petition as alleged.

The 1<sup>st</sup> Respondent submitted that the further affidavits intended to be introduced is belated afterthought and should not be allowed. And that the Petitioner was seeking to amend his petition through the back door as he is intending to introduce complaints in two new polling stations Surumpen Nursery School Poling Station and Kokorosion Manyatta Mobile Poling Station which are not mentioned in his petitions. According to him the law requires that a petitioner presents his evidence and that of his witnesses at the time of presenting the petition and that was 28 days after the declaration of the results, and that the Court has discretion to extend the time where sufficient cause has to be shown by the applicant and that the evidence would be such as not to amend the petition, through the back door. He also argued that the deponent does not explain how he came to know that the unnamed witnesses had not voted or even that they had moved away. He relied on the High Court Decision sitting in **Machakos HC EP NO 4 of 2013 WAVINYA NDETI V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 4 OTHERS**. Where application seeking to file further evidence was rejected by the Court.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that Article 87(2) of the Constitution and the Elections Act 2011 Provides that such petitions should be filed within 28 days after the declaration of the results by the Independent Electoral and Boundaries commission. Further the petitioner shall at the time of filing the petition file the affidavit sworn by the witnesses. That it is not in dispute that Rule 19(1) of the Elections

(Parliamentary and County Rules Elections) Petitions Rules, 2017 provides Court with discretion for extension or reduction of time within which an act is to be done, however the Court should address itself on the following issues while exercising its discretion:-

1. Whether the document and evidence were available to the petitioner at the time of preparation and filing of the petition and the basis of the introduction of the new material.
2. Whether the evidence sought to be introduced have an effect on the nature and character of the petition
3. Whether the Respondents stands to be prejudiced should the petitioner be granted leave as prayed
4. Whether the petitioner has laid foundation/ basis for extension of time.
5. Whether the extension of time promotes timely settling of electoral disputes under Article 87(1) and Article 159 (2) (b) and (e) of the constitution.

Further the 2<sup>nd</sup> and 3<sup>rd</sup> respondent argued that the petitioners conduct by introducing additional evidence without providing any basis is an abuse of the Constitutional and statutory timelines.

In relying on the authority of **Mrima J in Kitale Election Petition No 1 of 2017 Robinson Simiyu Wanga and Another Vs IEBC and 2 others** while referring to the Court of Appeal decision in **Michael Njenga Mutotho vs Jane Njeri Wanjiku Kihara and 2 others [2008]KLR10** dismissed an application for leave to file further affidavits holding as follows:

*“...Election petitions are special pleadings. They have detailed procedure and by law they must be determined expeditiously. The legality of person’s election as a person’s representative is in issue. Each minutes counts...”*

They further submitted that the petitioner is seeking to add additional evidence which will prejudice other parties. He relied on the decision of **Nicholas Kiptoo Arap Korir Sala v IEBC and 7 others [2015] eKLR petition number 23 of 2014**. And the case of **Republic vs Chief Justice of Kenya and 6 others Ex- parte Moiwo Mataiya Ole Keiuwa Nairobi HCMCA No. 1298 of 2004 [2010] eKLR**.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent further argued that in **Chris Munga N Bichange Vs Richard Nyagaka Tongi and 2 others [2015]eKLR** while referring to the decision of **Raila Odinga Vs IEBC** pronounced itself as follows:-

*“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 introduced and relied upon. If it is small and 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 evidence is such 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 filling of the further affidavit and or admission of additional evidence.”*

They concluded that the petitioner additional affidavits were meant to add fresh allegations and patch up his case. And that the petitioner has not laid any basis to warrant the Court to admit the further affidavits.

Having gone through the application, the responses and the submissions of the parties herein. And further noting the prayers sought in the application as regards the Petition itself it is important to look at the provision pursuant to which the application is brought, the same is brought pursuant to the following provisions Rules 4, 5 and 20 of the Election (Parliamentary and county elections) Petitions Rules 2017.

Rule 4 states thereof :

*“(1). The objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.*

*(2). An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in the Rules, seek to give effect to the objective specified in sub-rule (1)*

Rules 5 states thereof:

*“ (1) the effect of any failure to comply with these Rules shall be determined at the Court’s discretion in accordance with the provisions of Article 159 (2) (d) of the Constitution.*

*(2) ...*

Thus the petitioner is seeking leave for extension of time for filing petitioner’s further and/ or additional witness affidavits in support of the petition. Article 87(2) of the constitution provides that:-

*“Petitions concerning an election, other than a presidential election, shall be filled within twenty eight days after the declaration of the election results by the independent Electoral and boundaries Commission”*

Further section 76 (1) (a) of the Election Act reiterates:-

*“A petition-*

*(a) To question the validity of an election shall be filed within twenty eight days after the date of the declaration of the results of the election and served within fifteen days of presentation”*

Under rules 12(7) (8) states:-

*(7) A respondent shall, at the time of filing the response to a petition, file the affidavits sworn under sub-rule (6).*

*(8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules*

Thus an election Court has discretion to allow the filing of further affidavits and admit new or additional evidence. However, an election court will not grant an application for the adduction of new or additional evidence where the grant of such an application will prejudice the other parties to the dispute or undermine the constitutional imperative of timely resolution of electoral disputes. In the Supreme court decision of ***Raila Odinga vs Independent Electoral and boundaries Commission and 3 Others Supreme Court Election Petition No. 5 of 2013*** the Court stated:

*“...The parties have a duty to ensure they comply with their respective timelines, 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 a 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 filing of further affidavits and/or admission of additional evidence....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*

*amendments of the petition thereby possibly giving rise to significant new facts and/ or allegations leading to a serious departure from the original case.”*

The court seem to suggest that in nature of election petitions litigation, the court should adhere to the following guidelines for determining application for the filing of further affidavits and admission of new and/or additional evidence:-

1. 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.
2. 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 evidence
3. The parties to an election petition should strive to adhere to the strict timelines set out in Election Disputes Resolutions laws
4. Admission of new evidence must not unfairly disadvantage the other parties to an election petition.

The same position is reiterated in the High Court decision in ***Wavinya Ndeti vs independent Electoral and Boundaries commission and 4 others*** and the decision in ***Joel Makori Onsando Kunga and Anor vs independent Electoral and Boundaries commission and 4 others***.

In the application's further affidavit sworn on the 11<sup>th</sup> October 2017 pursuant to leave of court on 10-10-2017, the petitioner states that:

*“I intend to adduce further evidence to support the claim that many voters were turned away and never given a chance to vote and elect a candidate of their choice...the presiding officers of the respective polling stations refused/ neglected to use the alternative method for them to vote hence an irregularity and/or malpractice and unprofessional conduct on the part of the 3<sup>rd</sup> Respondents agents...such voters whose biometric data failed to be captured by the KIEMS kit/Gadgets are:-*

1. Nakwalima Lomerli....Amolem Primary School Mobile Polling station Code No. 047.
  2. Erew Achomolee Lokirio....Lokarkar Primary School Mobile Polling Station Code No. 040
  3. Selina Chesongol Karukoluk .... Lokarkar Primary School Mobile Polling Station Code No. 040
- ...in some polling stations e.g Surumpen Nursery School Polling Station Code No. 035 Strangers were allowed into the voting room and signed as agents...”*

The petitioner according to the application has stated that he is adducing further evidence to strengthen the petition, a position that Respondent refutes claiming that all that the applicant is doing is to amend the petition through the back door, which if the court allows will definitely change the scope and nature of the petition and furthermore the strict timelines would not be met since they will also seek to reply to the allegations and they would be greatly prejudiced.

I have looked at the petition at great length, the main allegations are that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent allowed strangers in the voting room as purported nominated agents in Lokarkar Primary School Mobile polling Station, Akiriamet Primary school mobile polling station and Kalas Manyatta Polling Station, the Petitioners agents were kept out of the polling station who therefore did not witness the opening of voting and did not witness the voting by assisted voters e.g Simboi Nursery school mobile polling station, Amolem primary school mobile polling station and Akiriamet Primary School Mobile polling Station, that 2<sup>nd</sup> and 3<sup>rd</sup> Respondent opened the polling stations late and closed early especially at Amolem primary school mobile polling station.

Apart from the allegations in the further affidavits intended to be introduced outstandingly is the allegations in respect of Amolem primary school mobile polling station that was captured in the Petition in paragraph 6 thereof, the rest are new issues that are intended to be brought into the petitions involving polling Stations hitherto mentioned in the petition but on totally different complaints. The question is if the new issues are allowed will the timely conclusion of the case here be achieved, owing to the fact that dates for hearing the Petition has already been set? And secondly, whether allowing the new evidence at this stage in time will prejudice the Respondents?

Looking at the decision of the **High Court in Kitale Election Petition No 1 of 2017 Robinson Simiyu Wanga and anor vs Independent Electoral and boundaries commission and 2 others** the court was faced with a similar scenario as to whether the extension of time will promote timely resolution of electoral disputes under article 87(1) and 159 (2) (b) and (e). relying on the Court of appeal decision in **John Michael Njenga Mututho vs Jane Njeri Wanjiku Kihara and 2 others [2008] KLR 10** which the court stated:-

*“...Election petitions are special pleadings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a person’s representative is in issue. Each minute counts....”*

I so hold the same view, by allowing this application and bearing in mind that its new evidence that forms the bulk to be introduced this court will be treading on very delicate ground. The High Court in **Robinson Simiyu Wanga and anor (Supra)** stated:-

*“ ...in allowing the application the Respondents will have no option but act within extremely limited timelines as we rush against time. That will not be fair and realistic as the witnesses will have to be identified, sought for and availed for swearing the affidavits. This will no doubt require ample time which time may not be available and as such the Respondents Constitutional right to fair hearing will be curtailed. That, will visit an injustice and prejudice to the Respondents and the provision of Article 159 (2) (d) of the constitution do not come to aid of the applicants.”*

Thus, having considered the submissions by all the parties together with authorities cited and the reasons given hereinabove the application dated the 28<sup>th</sup> day of September 2017 fails and the same is dismissed with costs. Ordered accordingly.

**Ruling read in open court on the 20th day of November 2017**

in the presence of:-

**V.O ADET**

**SENIOR RESIDENT MAGISTRATE**

**20.11.2017**

1. Mr. Changorok holding brief for Mr. Onyancha for the Petitioner
2. Mr. Kiarier for the 1<sup>st</sup> Respondent.
3. Mr. Kiarier for the 2<sup>nd</sup> Respondent
4. Mr. Kiarie for the 3<sup>rd</sup> Respondent
5. Job / Nicholas – court assistant