



**Odinga & another v Independent Electoral and Boundaries Commission & 2 others
(Presidential Election Petition 1 of 2017) [2017] KESC 33 (KLR) (27 August 2017) (Ruling)**

*Raila Amolo Odinga & another v Independent Electoral
and Boundaries Commission & 2 others [2017] eKLR*

Neutral citation: [2017] KESC 33 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PRESIDENTIAL ELECTION PETITION 1 OF 2017

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,
JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

AUGUST 27, 2017

BETWEEN

RAILA AMOLO ODINGA 1ST PETITIONER

STEPHEN KALONZO MUSYOKA 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**CHAIRPERSON, INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION 2ND RESPONDENT**

H.E. UHURU MUIGAI KENYATTA 3RD RESPONDENT

*((Under Article 50 of the Constitution of Kenya, Section 24 and 31 of the
Supreme Court Act, Rule 10, 12 and 17 of the Supreme Court (Presidential
Election Petition) Rules and all other enabling provisions of the law))*

The Supreme Court has jurisdiction to retain documents filed and served out of time in a presidential election petition.

Reported by Amazon Koech and Beryl Ikamari

***Electoral Law** - presidential election petition - service of the petition and close of pleadings - admission of documents filed and served out of time - whether the Supreme Court could retain in the court record documents filed and/or served out of time by the petitioner in a presidential election petition - Supreme Court (Presidential Election Petition) Rules 2017, rules 10 and 12.*



Brief facts

The instant application sought to strike out and/or expunge from the court record documents which were not served by the petitioner upon the 3rd respondent. It also sought to expunge from the record documents that were filed out of time.

Issues

Whether the court could retain in the court record documents which were filed and served out of time.

Held

1. The application was solely based on the ground that the documents and annexures in question were filed and/or served out of time contrary to rule 10 as read together with rule 12 of the Supreme Court (Presidential Election Petition) Rules 2017.
2. The documents and annexures in question were not only in support of but inextricably linked to the petition filed on August 18, 2017. They had already been referred to in Dr. Nyangwasi's affidavit in support of the petition which was filed and served in time together with the petition. The documents and annexures in question were filed on August 20, 2017, long before the commencement of the formal hearing of the petition.
3. The applicant did not claim or demonstrate that the filing of the documents and annexures in question would introduce new evidence, or change the character of the petition. The retention of the documents and annexures in question on the court record would not jeopardize or undermine the ability of the court to hear and determine the petition within the constitutional time limit of 14 days.
4. The rules of the court had to be adhered to by all litigants at all times to ensure the orderly and expeditious conduct and disposal of disputes that came before it. However, in the interests of justice, the court's inherent jurisdiction would be invoked in favor of retaining the documents and annexures in question on the court record.

Application dismissed.

Orders

Documents and annexures in question were to be served upon the applicant not later than 9. am on Monday, August 28, 2017.

Citations

Cases

None referred to

Statutes

Kenya

Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rules 10, 12 - (Interpreted)

Advocates

None mentioned

RULING

1. This is an application by way of notice of motion dated August 25, 2017, seeking to strike out and/or expunge from the court record documents which were not served by the petitioner upon counsel for the 3rd respondent. The documents sought to be expunged from the record on grounds that they were not served are:



- (a) Prof Kaloki's affidavit referred to at paragraph 22 of the 1st petitioner's affidavit sworn on August 18, 2017
 - (b) Dr Nyagasi Oduwo's further annexures marked as (DNO-1) being a copy of the blank form 34 A for Ruai Girls Secondary School Polling Station in Kasarani Constituency.
 - (c) Dr Nyagasi Oduwo's annexures labeled 'Meru' marked as (DNO-2A) in support of the averments contained at paragraph 12-69 of his affidavit.
 - (d) Dr Nyagasi's annexures labeled 'Trans Nzoia' (DNO-3N) in support of the averments contained at paragraphs 70-137 of his affidavit.
2. In particular, the applicant seeks to expunge from the court record the following documents on ground that they were filed out of time:
- (a) Volume 60 of the documents in support of the petition dated August 18, 2017;
 - (b) Volume 61 of the documents in support of the petition dated August 18, 2017;
 - (c) Volume 62 of the documents in support of the petition dated August 18, 2017 and;
 - (d) Volume 63 of the documents in support of the petition dated August 18, 2017.
3. The grounds upon which the application is based are that; the documents in question were filed out of time and that they have not been served upon the applicant herein. It is the applicant's argument that failure to file and serve the applicants with the impugned documents is in breach of rule 10 of the *Supreme Court (Presidential Election Petition) Rules*; which provides that the petitioner shall, within two days of filing the petition, serve the petition upon the respondent. The applicant contends that the failure to file and serve on time offends rule 12 of the *Supreme Court (Presidential Election Petition) Rules*. This rule provides that pleadings shall be closed upon filing a response. It is the applicant's submission that it's constitutional right to a fair hearing has been infringed and or violated by the failure on the part of the petitioners to comply with the provisions of the law.
4. Mr Ngatia, counsel for the 3rd respondent submitted that the documents and annexures in question have not been served to date, thus seriously prejudicing the 3rd respondent's capacity to respond to the contents therein.
5. In opposition to the application, the petitioners herein, contend that the application by the 3rd respondent seeking to strike out and/or expunge the documents in question was itself filed out of time and is therefore incompetent and/or improperly before the court. Secondly, the petitioners argue that the annexures and documents sought to be expunged are public records and commonly available to all the parties to these proceedings. Accordingly, no prejudice would be occasioned to the applicant if the said documents were retained on record. The petitioners also submit that the documents allegedly filed out of time are not pleadings and therefore are not bound by the limitations of time under the applicable rules. Finally, the petitioners submit that the documents allegedly not served upon the respondents may have been inadvertently omitted and can be availed to the respondents.
6. In response to the petitioners' claim that the 3rd respondent's application was itself filed and served out of time, Mr Ngatia contends that contrary to such a claim, the application was filed in time but could not be served on time as the offices of counsel for the petitioner were closed when the former attempted to effect service.
7. Having considered the application, the affidavits in support thereof, and the submissions of counsel for both parties, we have arrived at the following conclusions:



1. The application is solely based on the ground that the documents and annexures in question were filed and/or served out of time contrary to rule 10 as read together with rule 12 of the *Supreme Court (Presidential Election Petition) Rules 2017*.
 2. The documents and annexures in question are not only in support of, but inextricably linked to the petition filed on August 18, 2017.
 3. The documents and annexures in question had already been referred to in Dr Nyangwasi's affidavit in support of the petition which affidavit was filed and served in time together with the petition.
 4. The documents and annexures in question were filed on August 20, 2017, long before the commencement of the formal hearing of the petition.
 5. The applicant herein has not claimed nor demonstrated that the filing of the documents and annexures in question seek to introduce new evidence, or change the character of the petition.
 6. The retention of the documents and annexures in question on the court record would not in our view jeopardize or seriously undermine the ability of this court to hear and determine the petition within the constitutional time limit of 14 days.
8. It is the applicant's contention that failure to serve the said documents and annexures in time will seriously prejudice his ability to respond to the contents therein, thus undermining his right to a fair hearing. The applicant's assertion is not an idle one. Indeed, the rules of this court must be adhered to by all litigants at all times to ensure the orderly and expeditious conduct and disposal of disputes that come before it. However, in view of the findings and conclusions we have made, and in the interests of justice to all parties in this petition, we are inclined to invoke our inherent jurisdiction in favour of retaining the documents and annexures in question on the court record. By the same token, in order to safeguard the applicant's right to a fair hearing, we direct that the documents and annexures in question be served upon the applicant not later than 9.am on Monday, August 28, 2017.

Orders:

- (i) The notice of motion dated August 25, 2017 is hereby dismissed.
- (ii) Costs to abide the cause.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 2017.

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DK MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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PM MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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MK IBRAHIM

JUSTICE OF THE SUPREME COURT

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J BOJWANG
JUSTICE OF THE SUPREME COURT

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SC WANJALA
JUSTICE OF THE SUPREME COURT

.....

NS NDUNGU
JUSTICE OF THE SUPREME COURT

I LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

