



**Abdisalan v Abdi & 2 others (Election Petition E007 of 2022)
[2022] KEHC 13926 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 13926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
ELECTION PETITION E007 OF 2022
RN NYAKUNDI, J
OCTOBER 21, 2022**

**IN THE MATTER OF THE ELECTION ACT, NO. 24 OF THE LAWS OF
KENYA AND ELECTIONS GENERAL REGULATIONS, 2012 AND ELECTION
(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017**

AND

**IN THE MATTER OF THE MEMBER OF THE NATIONAL ASSEMBLY ELECTIONS
FOR WAJIR NORTH CONSTITUENCY, CODE NO.033, HELD ON 9TH AUGUST, 2022**

BETWEEN

IBRAHIM AHMED ABDISALAN PETITIONER

AND

HON. SANEY IBRAHIM ABDI 1ST RESPONDENT

**THE RETURNING OFFICER, WAJIR NORTH CONSTITUENCY 2ND
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

RULING

1. By a Notice of Motion dated October 3, 2022 the Petitioner/Applicant seeks orders **That:** -
 1. The Petitioner be granted leave of this Honourable Court to file a Supplementary Affidavit in support of the Petition dated September 8, 2022.
 2. The Annexed Supplementary Affidavit of Ibrahim Ahmed Abdisalan be deemed as duly filed and properly on record.



3. The Supplementary Affidavit of Ibrahim Ahmed Abdisalan be deemed to have been filed within time.
4. Costs shall be in the Cause.
2. The application is premised on the grounds therein and it is further supported by the affidavit by Ibrahim Ahmed Abdisalan, the Petitioner sworn on October 3, 2022.

The Petitioner/Applicant's Case

3. The Petitioner's case is that in the general elections conducted on August 9, 2022, he contested for the Member of National Assembly- Wajir North Constituency. Having been dissatisfied by the conduct of the election by the Respondents herein, the Applicant moved to Court vide Election Petition No E007 of 2022 challenging the declared outcome.
4. The Applicant deposed that he has raised various grounds in the petition including; irregular, unlawful and/or illegitimate tallying. The Applicant maintains that he has on several occasions requested the 2nd and 3rd Respondents to furnish him with copies of the said Result Declarations Forms 35A but the same were not remitted.
5. The Applicant contends that despite raising grounds of illegal and or irregular tallying, the 2nd and 3rd Respondents failed to attach the Result Declaration Form 35A used to declare the outcome. The Applicant contends that instead, the 2nd Respondent has placed on record two different Form 35B with two different set of results; one which purports to reduce the Applicant's tallying/correct results, despite the Returning Officer being functus officio.
6. The Applicant contends that the two Forms 35B (Serial No GE2022008033FORM35B05 and GE2022008033FORM35B18 have contradictory vote tallies with respect to the Applicant's votes being 6,437 votes and 6,237 votes respectively.
7. The Applicant deposed that on September 26, 2022, through his Counsel, he wrote to the IEBC seeking to be supplied with Forms 35A and he was supplied with the true copies of the Forms 35A.
8. The Applicant now seeks to place on record the said Forms 35A and argues that the said forms will aid the Court in determining whether the tallying was properly done or not.
9. The Applicant has prepared a Supplementary Affidavit adducing the aforesaid forms as annexures. The Applicant maintains that the said affidavit does not introduce any new claims but rather is on matters that have already been pleaded in the petition.
10. The Applicant argues that Rule 12 (9) of the *Election (Parliamentary and County Elections) Petition Rules, 2017* grants this Court the discretion to permit the filing of further evidence. The Applicant further argues that Rule 15 of the said rules mandates an election Court to give directions on the filing/ service of additional evidence at the pre-trial conference.
11. According to Applicant, the Respondents will not suffer prejudice if leave was to be granted.

1st Respondent's Case

12. In response to the application, the 1st Respondent Hon. Saney Ibrahim Abdi filed a Replying Affidavit dated October 11, 2022. He contends that the Notice of Motion application dated September 28, 2022 seeking leave to file a Supplementary Affidavit introducing all the Form 35As for the polling stations in



Wajir North Constituency can only form part of the Petitioner's/Applicant's documents but cannot be used by the Court to determine the petition.

13. The 1st Respondent deposed that pursuant to Rule 16 of the Elections (Parliamentary and County) Petition Rules 2017, the 3rd Respondent is the only party mandated to produce certified copies of Forms 35A that were used in the elections for Wajir North, Member of National Assembly which will be used by the Court in the hearing and determination of the petition.
14. The 1st Respondent argues that by seeking to file all the Forms 35A used in the election for Wajir North Member of National Assembly, the Applicant intends to expand the scope of the petition and introduce a new prayer of re-tallying which was not pleaded in the petition.
15. The 1st Respondent urge the Court to dismiss the Applicant's application dated October 3, 2022.

2nd & 3rd Respondents Case

16. In response to the application, the 2nd and 3rd Respondents filed Grounds of Opposition dated October 7, 2022. In a nutshell in the grounds of opposition, the 2nd and 3rd Respondents argue that this instant application seeks to expand the scope of the petition beyond the issues which were pleaded in the petition. The 2nd and 3rd Respondents argue that the application is in contravention of Article 87(2) of the *Constitution* which sets the time limit for filing of a petition challenging the election result. The 2nd and 3rd Respondent argue that this Court lacks jurisdiction to entertain an application that is beyond the issues that were pleaded in the petition. The 2nd and 3rd Respondent argue that this instant application is an abuse of Court process.
17. The 2nd and 3rd Respondent also filed a Replying Affidavit dated October 7, 2022 sworn by one Mathew Kamau Thiga in which he deposed that he has been informed by his Advocates on record this Court of October 4, 2022 directed that the 2nd and 3rd Respondents do supply the Court with certified copies of all Result Declaration Form 35As and 35B used to declare the result for the Wajir North Member of National Assembly election held on August 9, 2022. He deposed that the 2nd and 3rd Respondents have since taken steps to comply with said Court order and will in due course supply the Court with Certified copies of the Result Declaration Forms which will form part of this Court's record.
18. According to the 2nd and 3rd Respondents, the forms purportedly obtained by the Applicant from them and proposed to be adduced through the Further Affidavit of the Petitioner dated October 3, 2022 can only be used by the Petitioner for purposes of verification of the forms which would be supplied to the Court in view of the aforementioned order.
19. The 2nd and 3rd Respondents maintain that the Applicant's application and the proposed affidavits are unprocedural. The 2nd and 3rd Respondents argue that the aforementioned Court order now sufficiently settles the matter.

Determination

20. The only issue for determination is:

Whether the Petitioner Applicant should be granted leave to file a Supplementary Affidavit Election Petitions are special proceedings and I place reliance on the *Supreme Court decision in Raila Odinga and 2 others –vs- IEBC and 3 Others [2013] eKLR* where the Court stated: -

' The parties have a duty to ensure that 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 are 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, content 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.'

21. At this juncture, it is important at this juncture to highlight the laws governing elections in Kenya. Articles 87(2) and 105 (2) and (3) of the Constitution of Kenya 2010 provide:

' 87(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

'105(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

(3) Parliament shall enact legislation to give full effect to this Article.'

22. Parliament pursuant to Article 105(3) of the Constitution enacted the Elections Act, 2011. Section 76 of the Elections Act provides:

1. '76.A Petition-

(1) (a) To question the validity of an election shall be filed within twenty-eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation.'

23. Rule 12 of the Elections (Parliamentary and County Elections) Petition Rules stipulates the contents of a Petition. It is the total sum of the material to be presented to a Petition court within the 28 days provided for in Section 76 of the Elections Act. Rule 12(9) provides:

12. (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.'

24. Rule 4 gives the overriding objective of the Rules which is to facilitate the just expeditious proportionate and affordable resolution of Election Petitions.

Rule 15 (1), (c), (h) and (j) provides: -

15(1) Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall-

(c) determine interlocutory applications;

(h) give directions as to the place and time of hearing the petition;

(j) make such other orders as may be necessary to prevent unnecessary expenses.



25. The Applicant seeks to file a Supplementary Affidavit adducing certified copies of Forms 35A and Form 35B that were used in result declaration for Wajir Constituency in the election for the Member of the National Assembly held on 9th August. The Applicant maintains that he has been seeking the said information from the 3rd Respondent and has now been furnished with certified copies of Form 35A and Form 35B that he now wishes to produce as evidence in Court. In opposing this instant application, the 2nd Respondent argued that the said forms can only be supplied by the 2nd and 3rd Respondents and thus the ones supplied by the Applicant can only be used by him during the verification process. The 2nd and 3rd Respondents also argue that in light of the orders of this Court rendered on October 4, 2022 the said issue is now settled.
26. An election Court has the 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 admission of new or additional evidence where such orders will prejudice the other parties in 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.'
27. While appreciating that a Petitioner in an election petition is restricted to prove only what has been pleaded in the petition, it is my view that the supplementary affidavit by Petitioner seeking leave to introduce the Forms 35A and Forms 35B that were used in the result declaration for Wajir North Member of National Assembly does not expand the scope of the petition but only looks to elucidate on issues already raised in the petition.
28. From the foregoing, I am satisfied that the Applicant is entitled to the leave sought to file the supplementary affidavit dated October 3, 2022 with a view to facilitating the just, expeditious, proportionate and affordable resolution of the matters in controversy in this petition. In my view, no prejudice shall be suffered by the Respondents if the leave sought is granted. The petition is yet to be set down for hearing and thus no delay will be occasioned in light of the strict timelines provided for Section 75(2) Election Act.
29. The court is satisfied that the Notice of Motion dated October 3, 2022 is meritorious and it is hereby allowed.



DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

.....

R. NYAKUNDI

JUDGE

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Omwanza Ombati, Mr Onderi and Benjamin Ondigi for the petitioner

Issa Mansour, M/S Agwata Kwamboka and Chelagat for 1st respondent

Mr Owour, Nabil Orinna and Rebecca Mogire for 2nd and 3rd respondent

