



REPUBLIC OF KENYA



KENYA LAW
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**Abdisalan v Abdi & 2 others (Election Petition E007 of 2022)
[2022] KEHC 13929 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 13929 (KLR)

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

BETWEEN

IBRAHIM AHMED ABDISALAN PETITIONER

AND

SANEY IBRAHIM ABDI 1ST RESPONDENT

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

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

RULING

1. The petitioner/applicant approached this court vide a notice of motion application dated September 28, 2022 seeking the following orders;
 - A. The petitioner be granted leave of this honourable election court to file a supplementary affidavit in support of the petition dated September 8, 2022;
 - B. The annexed supplementary affidavit of Ibrahim Ahmed Abdisalan be deemed as duly-filed and properly on record,
 - C. The supplementary affidavit of Ibrahim Ahmed Abdisalan be deemed to have been filed within time.
 - D. Costs be in the cause.
3. The application is premised on the grounds set out in the application and the supporting affidavit.



Applicant's Case

4. The applicant's case is that he is seized of relevant and vital evidence that goes to the core of the matter at hand, that evidence being the 1st respondent's admission on August 14, 2022 at a press conference, that the member of national assembly elections-Wajir North Constituency held on August 9, 2022 were not fair, credible, transparent, accountable and /or accurate. The applicant contends that the admission was captured on video; and it falls in line with the petitioner's grievances before this court.
5. The petitioner was unable to produce the video evidence within the strict timelines for filing election petitions. Due to the prevailing pressure to beat the 28-day deadline, he inadvertently omitted the said video evidence. He maintained that the supplementary affidavit sought to be filed does not introduce any new claims/causes of action; but builds on matters that have already been pleaded in the petition and affidavits filed in support thereof.
6. The video evidence the applicant seeks to place on record is a video clip of the 1st respondent's interview with Citizen TV in which the 1st respondent complained of various malpractices around Wajir North Constituency which is the subject matter in issue. The video clip is publicly accessible to anybody as it is on Citizen tv's YouTube page- url <https://youtube.com/r7da6wg.bu4>. and in obtaining the video and presenting it to this court, the petitioner maintained that he had not interfered with the said video.
7. The petitioner submitted that rule 12 (9) of *Election (Parliamentary and County Elections) Petition Rules, 2017* grants this court the discretion to permit the filing of further evidence. Rule 15 of the *Election Petition Rules* mandates the election court to give directions on the filing/service of additional evidence at the pre-trial conference. He contended that the admission of the supplementary affidavit is not prejudicial, injurious or detrimental to any party in this proceedings. He submitted that all the other parties may be granted Leave to file any additional or supplementary pieces of evidence they may have in rebuttal.

1st Respondent's Case

8. The 1st respondent filed a replying affidavit dated October 11, 2022 in response to the application. He contends that the supplementary affidavit is inadmissible as it is calculated to introduce a new ground not previously pleaded and intends to expand the petition.
9. The 1st respondent's case is that the petitioner had 28 days to file the petition and any other documents and this was sufficient.. According to the petitioner/applicant in his application, the video evidence sought to be produced was published on August 14, 2022, two days before the declaration of results and has been publicly accessible to anybody. The petitioner had access to this information as of the date of filing of the petition and nothing precluded him from producing it as evidence in support of his petition or relying on the video as one of the grounds in support of the petition.
10. This honourable court has no discretion under rule 12(9) of the *Election (Parliamentary and County Election Petition Rules 2017* to allow the filing of additional evidence if the same seeks to introduce new grounds not pleaded in the petition or will unfairly disadvantage the other party. The supplementary affidavit proposes to introduce a new ground in support of the petition not previously pleaded. This is an attempt to file a new petition outside the permitted period in law.
11. The 1st respondent contended that he would suffer prejudice if the application is allowed and urged that the same be dismissed.



2nd & 3rd Respondent's Case

12. The respondents opposed the application vide grounds of opposition and a replying affidavit, both dated October 7, 2022. The application was opposed on the grounds that it expands the scope of the petition beyond the issues pleaded in the petition and is prejudicial to the respondents. further, that the notice of motion introduces criminal motive through a conspiracy theory by the 2nd and 3rd respondents without providing any evidence or adducing evidence which is speculative and unhelpful to this honourable court.
13. The respondents contended that election security planning and deployment is a critical part of election operations to ensure that votes express their democratic rights in accordance with the constitution and express the political rights embodied under article 38 of the Constitution.
14. The 2nd Respondent contended that as the returning officer he undertook the preparatory steps necessary to ensure security in the designated constituency tallying centre. Further, that given the challenging circumstances prevailing in Wajir county and specifically Wajir North Constituency, the security provided was sufficient.
15. After completing substantial part of the tallying of the result declarations received from the presiding officers in relation to the election of member of national assembly for Wajir North Constituency, violence erupted which overwhelmed the security officials and made it impossible to complete the tallying process at the tallying centre. The imminent escalation of violence put in jeopardy the entire electoral process including election materials for election of the president, member of national assembly, senator, governor, woman representative and members of county assembly.
16. The 2nd respondent sought advice from the 3rd respondent, and was advised to take measures to safeguard election materials and the lives of election officials including evacuation to Bomas of Kenya where he made the declaration. Contrary to the averments by the petitioner, there was no calculated scheme involving the 2nd or 3rd respondents to undertake illegal tallying of results. At the time of evacuation, the tallying process had virtually concluded. Further that the petitioners' conclusion based on the purported interview by the 1st respondent, pointing to alleged conspiracy is speculative and does not reflect the events at the tallying centre. The supporting affidavit by the petitioner and the further affidavit are speculative and seeks to widen the scope of the petition. The respondents asked that the further affidavit be dismissed as it is unhelpful.
17. The respondents however took the position that if the court allows the notice of motion the replying affidavit be admitted as a further affidavit by the 2nd respondent and form part of the response to the petition in reply to the proposed further affidavit.

Issues for Determination

18.
 - a. Whether the proposed supplementary affidavit expands the scope of the Petition
 - b. Whether the respondents will be prejudiced by the supplementary affidavit

Whether the proposed supplementary affidavit expands the scope of the petition

19. I have perused the application and its contents. The applicant seeks to have the video evidence in his supplementary affidavit filed on the grounds that it goes to the core of the matter at hand. The video clip



in question is that of the 1st respondent expressing himself on the election that took place on August 9, 2022 in Wajir North Constituency.

20. Whereas the respondents are apprehensive that the same expands the scope of the petition, they have not relayed the extent of this expansion of grounds. The petition contains allegations that there were irregularities and improprieties that affected the integrity of the election. The said video evidence which I have had the opportunity to examine speaks to this issue and does not introduce any other grounds. The polling stations mentioned in the supplementary affidavit are also mentioned in the petition thus the contents of the supplementary affidavit are within the scope of the petition.
21. As far as the court is concerned any allegation is subject to section 107 of the *Evidence Act* before making determinative findings. The court is alive to the fact that electronic evidence is governed by section 106B(4) of the *Evidence Act* and the evidence adduced in the affidavit will be subjected to the requirements of section 107 of the *Evidence Act* at an appropriate time.

Whether the respondents will be prejudiced

22. The respondents will not be prejudiced by the introduction of the evidence by the applicant. The 2nd and 3rd respondents in their grounds of opposition dated October 7, 2022 asked this court to deem the replying affidavit dated October 7, 2022 be deemed as duly filed and form part of their response to the petition in response to the proposed further affidavit. This court finds that the same will avert any prejudice that would have arisen and hereby deems the same as duly filed.
23. Rule 19 of the *Elections (Parliamentary and County) Petition Rules 2017* provides;
 - (1) Where any act or omission is to be done within such time as may be prescribed in these rules or ordered by an elections court, the election court may, for the purposes 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.
24. Rule 12 (9) of the *Elections (Parliamentary and County) Petition Rules 2017* 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.
25. This court therefore has the discretion to allow for the filing of supplementary affidavits. In the premises the application dated September 28, 2022 succeeds and is hereby allowed.
26. The supplementary affidavit dated September 28, 2022 is deemed as duly filed. The 1st and the 2nd respondent are granted leave to file a further affidavit in response to the same.

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

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R. NYAKUNDI

JUDGE

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