



REPUBLIC OF KENYA



**Walubengo v Independent Electoral and Boundaries Commission & 2 others (Election  
Petition E002 of 2022) [2022] KEHC 16091 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16091 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
ELECTION PETITION E002 OF 2022**

**WM MUSYOKA, J**

**NOVEMBER 24, 2022**

**IN THE MATTER OF ELECTION FOR THE MEMBER OF  
NATIONAL ASSEMBLY OF WEBUYE WEST CONSTITUENCY**

**BETWEEN**

**KELLY BARASA WALUBENGO ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**RETURNING OFFICER, WEBUYE WEST CONSTITUENCY .... 2<sup>ND</sup>  
RESPONDENT**

**SITATI DANIEL WANYAMA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Mr. Oloo has raised an issue relating to 2 individuals that the petitioner proposes to call as witnesses, that is to say Hezron Ford Nyongesa and Shabani Simiyu Makokha. They had filed statements which Mr. Oloo and Mr. Wasilwa say were not served on them until a few hours to today's proceedings.
2. Mr. Nyaribo counters this by stating that Mr. Wasilwa had cross-examined the previous witnesses on the statements of these 2 proposed witnesses and that 1<sup>st</sup> and 2<sup>nd</sup> respondents had referred to those statements in their response. He further states that the issues raised all within the realm of technicalities, which the court should overlook based on Article 159 of *the Constitution*.
3. The law on witness evidence is Rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules 2017. Rule 12 (3) requires that each person that he petitioner intends to call as witness should file an affidavit; and, Rule 12(4) requires that that affidavit be filed together with the petition. Rule 12(10) details what ought to be contained in an affidavit filed in an election petition.



4. It is clear that any person intended to be called as a witness by the petitioner, ought to swear an affidavit, which is then filed together with the petition, and served thereafter together with the petition.
5. With regard to the 2 proposed witnesses, Hezron Ford Nyongesa and Shabani Simiyu Makokha, the record reflects that they executed separate witness statements on 6<sup>th</sup> September 2022. I am told that these witness statements were not served together with the petition, indeed they were not served until last night and this morning, yet the 2 witnesses were proposed to take to the witness stand this morning.
6. It has not been explained why the petitioner choose to have these 2 witnesses execute witness statements rather than swear affidavits, yet the Rules are very clear on what ought to be done. My reading of the Rules is that a person becomes qualified to take to the witness stand upon the swearing an affidavit in accordance with the Rules. It is a condition precedent. An affidavit and a witness statement are not one and the same. One is a statement on oath, the other is not. Consequently, Hezron Ford Nyongesa and Shaban Simiyu Makokha do not qualify to be witnesses in this matter.
7. Can I admit the witness statements and allow the proposed witnesses testify, despite the non-compliance with Rule 12 of the Elections (Parliamentary and County Elections) Petitions rules 2017?
8. Rule 12(9) says “Except with 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.” It would appear that the court can exercise discretion, and allow a witness who has not sworn such an affidavit to testify. However, leave of court is required, and sufficient cause ought to be shown. In this case, leave of court has not been sought, for the petitioner did not raise the issue, and it has come up only because the 1<sup>st</sup> and 2<sup>nd</sup> respondents raised it. The petitioner has not sought leave to call these witnesses, despite not having sworn and filed affidavits. Secondly, the petitioner has not sought to show sufficient cause, why affidavits were not sworn and filed, and served, in the first places, and why it would be important to hear the witnesses nonetheless. The petitioner, therefore, has not sought to persuade me to exercise discretion in his favour, along the lines of Rule 12(9).
9. Various constitutional provisions were cited to justify overlooking the anomaly of not filing affidavits. I do not think these constitutional provisions were designed to override rules of procedure. Procedure is the handmaiden of justice. Procedure is to be overlooked only in cases where there is sufficient cause. Where none is sworn, *the Constitution* cannot help the party, who has chosen to ignore the set procedures. Hardship caused by disability or excusable inadvertence can cure the anomalies, but not otherwise.
10. Time is of the essence in these election petitions, pre-trials were conducted in October 2022, and these dates for hearing were set then. The petitioner had all time to familiarize himself with the applicable law and procedures. He had enough time to correct the position, or to obtain the relevant leave of court of law to show sufficient cause.
11. I am not persuaded that there is any sufficient cause for me to allow the 2 witnesses testify, for they do not qualify to take to the witness stand, having failed to file the affidavits envisaged in rule 12 of the Rules.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**WM MUSYOKA**

**JUDGE**

