



REPUBLIC OF KENYA



**Ayiera v Kimwomi & 3 others (Election Petition E002 of 2022)
[2022] KEHC 16952 (KLR) (29 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION E002 OF 2022
K KIMONDO, J
DECEMBER 29, 2022**

BETWEEN

DENNIS OMWENGA AYIERA PETITIONER

AND

NYARIBO AMOS KIMWOMI 1ST RESPONDENT

JAMES GESAMI 2ND RESPONDENT

COUNTY RETURNING OFFICER, NYAMIRA 3RD RESPONDENT

IEBC 4TH RESPONDENT

RULING

1. The petitioner’s notice of motion dated December 2, 2022 is two-pronged: Firstly, that “all reference in the proceedings involving the participation of the 1st and 2nd respondents or their counsel be expunged from the records”. Secondly, that the respondents be “prohibited from participating in the proceedings forthwith”.
2. The grounds are that the 1st and 2nd respondents having opted not to testify or call any witnesses, their Response to the petition is no longer supported by a valid affidavit under Rule 12 (5) of the *Elections (Parliamentary and County Elections) Petition Rules* 2017 (hereafter the Petition Rules). He argues that by dint of Rule 11 (8), the two respondents are not allowed to participate in the proceedings.
3. Those arguments are buttressed by the deposition of the petitioner sworn on December 2, 2022. The petitioner is particularly aggrieved that counsel for the 1st and 2nd respondents cross-examined him and all his 13 witnesses. He thus “reasonably expected” that he would in turn have opportunity to test the affidavit evidence of the 1st and 2nd respondents. By failing to take to the stand, he argues, their affidavits “were not adopted by the court” and accordingly, there is no competent Response.



4. Learned counsel for the petitioner also filed brief submissions with a list of precedents and a separate digest of the authorities. The key decisions included *Christopher Odhiambo Karan v David Ouma Ochieng & another*, Supreme Court Petition 36 of 2018 [2018] eKLR. But special emphasis was laid on the Court of Appeal decision in *Sumra Irshadali Mohammed v IEBC & another* Election Petition Appeal 22 of 2018 (unreported). As I will discuss shortly, the latter judgment went on further appeal to the Supreme Court in *Mwathe Julius Musili v IEBC & another*, Petition 16 of 2018 [2018] eKLR.
5. The motion is opposed by all the respondents. The 1st and 2nd respondents filed a reply as well as skeleton submissions. The 3rd and 4th respondents did not file a formal reply but I nevertheless heard them on points of law. The pith of the objections is that the applicant has misapprehended the Rules and precedents; that the motion is belated; and, that the prayers do not lie.
6. On December 19, 2022, I heard further submissions from all the learned counsel for the disputants.
7. My view is as follows. The determination I am about to make is made with great circumspection because the court is as yet to hear the final submissions on the main petition and render its judgment.
8. But I can safely say as follows: At the time the instant motion was filed, the petitioner, his 13 witnesses and 7 others called by the 3rd and 4th respondents had all testified. The partial scrutiny of election materials ordered on November 25, 2022 was ongoing under the superintendence of the Deputy Registrar. By the time I heard the present motion, the scrutiny exercise had been concluded. In fact, directions on filing and hearing of the final submissions on the main petition have been taken.
9. The motion was thus presented a little wee late. The 1st and 2nd respondents indicated to the court as early as November 9, 2022 that neither of them nor any other witness would take to the stand. The 3rd and 4th respondents' first witness (DW1) then started his testimony. It was thus open to the petitioner to take the present objections at the earliest opportunity. But they chose not do so until the tail-end of this petition.
10. The Petition Rules are subsidiary legislation made pursuant to section 96 (1) of the *Elections Act*. But they have the same effect as if they had been enacted under the parent Act. See *Christopher Odhiambo Karan v David Ouma Ochieng & another* [supra]. However, it also a truism that the Rules are outranked by the Act and cannot by any stretch of imagination override Article 50 of *the Constitution* that guarantees the right to a fair trial.
11. I agree with the petitioner that Rule 11 (8) provides in mandatory terms that if a respondent does not file a Response, he shall not participate in the proceedings. This is well captured in *Christopher Odhiambo Karan v David Ouma Ochieng & another* [supra] where the appellant's application for extension of time within which to file a Response was disallowed by the election court. The Supreme Court agreed with the two superior courts that the petitioner was rightly excluded from participating at the trial.
12. The circumstances are quite different here. By a considered ruling (Ruling No. 2) of October 12, 2022, I ordered as follows-

Time is hereby extended for the 1st and 2nd respondents to file and serve their response dated September 23, 2022 together with the two annexed affidavits of Hon. Nyaribo Amos Kimwomi and Richard Okiega Nyabate out of time; and, to the intent that they will be deemed to have been filed and served within the required time. However, the application by the 1st and 2nd respondents to extend the time for another lot of 23 affidavits filed on September 27, 2022 is disallowed.



13. It follows that at that point in time, the 1st and 2nd respondents had a valid Response and were entitled to participate in this petition and to cross examine the petitioner and his witnesses. The elephant in the room is whether they lost that right after they failed to testify or call any witness; or, whether their Response was then uprooted.
14. I find, firstly, that there is no express rule in the Rules that states that a respondent who has filed a Response must testify or that the affidavit in support of the Response must be adopted to sustain the Response. The affidavit sworn by Hon. Nyaribo Amos Kimwomi (1st respondent) was made in support of his Response. It is imperative to distinguish it from the witness affidavit of Richard Okiega Nyabate. The latter was a witness and the consequences of not taking to the stand are clear. *Sumra Irshadali Mohammed v IEBC & another* [supra].
15. Another important fact to keep in mind is that the Returning Officer in *Sumra Irshadali Mohammed v IEBC & another* [supra] was not a party to the petition but only lined up as a witness. That is why there was an issue whether his non-joinder made the petition incurably defective. In the instant case, the 1st and 2nd respondents are parties; and, their Response and supporting affidavit were admitted by the election court.
16. Having failed to testify, the petitioner’s counsel’s interpretation of Rule 12 (5) is that the affidavits were not adopted and consequently, the Response was bereft of support and fell through.
17. My view is different. There is a long line of authorities in election disputes that confirm that once an affidavit is filed, it remains on the record of the court unless it is struck out. See generally *Abmed Abdulabi Mohammed & another v Mohammed Abdi Mohammed & another*, Nairobi High Court Election Petition 14 of 2017 [2018] eKLR.
18. I thus find that that the failure by the 1st or 2nd respondent to testify only affects the admissibility of the evidence contained in their depositions and their probative value.
19. Like I stated, the petitioner relied largely on the Court of Appeal decision in *Sumra Irshadali Mohammed v IEBC & Another* [supra]. In the material paragraph, the learned judges held-

It is clear to us and as rightly held by the trial court, that the R.O did not appear to give evidence, despite the fact he had filed a lengthy replying affidavit. It means therefore there was no response to the Petition, consequently it cannot be said that the appellant did not discharge the burden of proof. Having adduced oral and 36 documentary evidence before it, we do not know what else the appellant was required to do. The trial court did put a high and unreasonable premium on the absence and failure of the R.O to adduce evidence. The burden shifted the moment the issues raised by the appellant were not answered. These were of such a nature, the same required an answer or rebuttal. We think the appellant discharged both the legal and evidential burden of proof. [underlining added].

20. My view is that the petitioner misconstrued the word “response” in the underlined quote by equating it with the pleading known as a Response in Rules 11 (8) and 12 (5) of the *Rules*. A close reading of the words at the end of that paragraph clearly show that the learned judges of appeal meant that by the respondent failing to testify, there was no rebuttal or answer to the petitioner’s case and the latter had thus discharged both his legal and evidential burden. It bears repeating those words-

The burden shifted the moment the issues raised by the appellant were not answered. These were of such a nature, the same required an answer or rebuttal. We think the appellant discharged both the legal and evidential burden of proof. [underlining added].



21. I am very well guided on that point by the Supreme Court decision in *Mwathe Julius Musili v IEBC & another* [*supra*] which was a further appeal against the decision of the Court of Appeal above. The learned judges of the Supreme Court addressed the question of failure by a respondent (in that case the IEBC) to call evidence in an election petition. They held-
- (86) On this principle, when a party – in this case the IEBC – fails to produce the witness (Returning Officer), the Court may infer that the testimony would have been unfavourable to the IEBC. The absence of the Returning Officer inevitably weakens the IEBC’s response and evidence.
- (87) However, a Court may look the other way if the reason given for the absence of the Returning Officer is satisfactory and credible. Such, however, was not the case in the instant matter. Both Superior Courts found the replying affidavit inadmissible. In our view, this was an entirely proper finding on the issue of the probative value of the Returning Officer’s affidavit. Now such a finding begs one question: what was the effect of this finding, as a factor in the disposal of the case. [Underlining added]
22. The learned judges of the Supreme Court answered their question as follows-
- (91) The evidential burden therefore shifted to the 1st respondent, to show that this was not so. The evidence relied on by the 1st respondent was its replying affidavit sworn by its employee: the Returning Officer. This evidence was held to be of no probative value by the Superior Courts. In the circumstances, we are in agreement with the Appellate Court: it cannot possibly be concluded that the 1st respondent discharged its evidential burden. [Underlining added]
23. I stated earlier that the final submissions on the petition have not been taken. The less I comment about the two decisions above, in relation to the evidence in the instant petition, the better. The point to be made however is that the decision by the Supreme Court does not support the submissions by the petitioner.
24. Rather, and as I have pointed out, failure by the respondents to testify goes to the root of admissibility and the probative value of the averments in the 1st and 2nd respondents’ affidavits. It does not call for the draconian action to bar their participation in the trial in which they are named as respondents; or, justify the extreme measure of expunging their participation from the record.
25. For all those reasons, the petitioner’s notice of motion dated December 2, 2022 is dismissed. Costs shall be in the petition.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF DECEMBER 2022.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of:

Messrs Mokuwa, Omwanza, Maeche and Mokaya for the Petitioner instructed by Nchogu Omwanza & Nyasimi Advocates.

Messrs Anyoka, Ligunya, Kamwaro and Ms. Maina for the 1st & 2nd respondents instructed by Anyoka & Associates Advocates.



Messrs Muyundo and Amimo for the 3rd & 4th respondents instructed by D. W. Muyundo & Associates Advocates.

Ms. Anita, Ms. Aminah & Mr. Terer, Court Assistants.

