



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
ELECTION PETITION NO.1 OF 2017

LESRIMA SIMEON SAIMANGA.....PETITIONER

- V E R S U S -

INDEPENDENT AND ELECTORAL

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER SAMBURU COUNTY.....2ND RESPONDENT

LENOLKULAL MOSES KASAINIE.....3RD RESPONDENT

R U L I N G(6)

The Notice of Motion dated 11/12/2017 was filed by the petitioner who seeks the following orders:

- 1. That the court do allow the petitioner file additional supplementary affidavits to further support the petition;***
- 2. That the court do allow the petitioner to file the said affidavits out of the time stipulated in the Election rules.***

The application is premised on grounds found on the face of the application, and the petitioner's affidavit in support of the Notice of Motion.

The grounds are inter alia, that the petitioner's previous witnesses have withdrawn their statements under duress and undue influence as a result of threats to their lives and their family members; that the affidavits sought to be filed contain material that will guide the court to enable it arrive at a just decision since the deponents played major roles during the elections; that the affidavits could not be provided without undue delay because the deponents' lives were threatened and they were cautioned not to give statements with respect to the petition; that fearing for their lives, they went into hiding; that the respondents will not suffer any prejudice if the orders are granted.

The petitioner further deposed that the affidavits sought to be filed do not introduce new evidence that would change the nature and character of the petition.

The petitioner annexed the two affidavits for which he seeks leave of the court to file out of time. One of the deponents, **Loseiku Lotitoiya** deposed that he was an agent for ANC at Maralal Social Hall polling Station, Samburu West Constituency. He alleges that after one hour the agents discovered that there was stuffing of ballot boxes for the Governor and Women Representative; that he raised the issue with police

who arrested the presiding officer and one of the clerks who were whisked away and he is aware of an ongoing court case against the presiding officer, because of irregularities regarding 12 forms.

The second affidavit sought to be admitted out of time is that of **Lekula Ltosilan** who was an agent for NASA at Leirr Polling Station at Baawa; that the station was opened at 5.30 a.m.; that the presiding officer was guiding and assisting those who could not read or write; that voting continued till after 6.00 p.m.; that he signed Form 34A as an agent for NASA presidential candidate and he left. He did not sign other forms for any other candidate. He was surprised to see his name and signature on Form 37A of Leirr Primary School.

In addition, Mr. Mombo submitted that although Regulation 15(2) of the Election Petition Rules bars the filing of any interlocutory application that could have been filed earlier before the pretrial, that the Rule gives an exception in that the court can only refuse the application if the petitioner had an opportunity to raise the issues and yet failed to do so. His view is that the petitioner could not have known that his witnesses would change their minds. Counsel relied on the decisions of: (1) **Grace Adhiambo Akumu v IEBC EP.2/2017 (Kisumu)**; (2) **Raila Odinga v IEBC EP.5/2013**; (3) **Clement Irungu Waibara v Anthony Kibe EP.1/2017(Kiambu)**. Similar issues of additional affidavits were raised in the above matters.

Mr. Mombo also invoked Article 159 of the Constitution and urged the court to apply **Gitarau Munya v IEBC EP....2013** and disregard technicalities.

Mr. Karanja, learned counsel for the 1st and 2nd respondents raised a six (6) point preliminary objection:

- 1. That the application violates the mandatory provision of Rule 15(2) of the Petition Rules, 2017 that an election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference;***
- 2. That the leave is sought at a late stage with the sole intention to mutate the petition and gravely prejudice the 1st and 2nd respondents who will not have a real chance or any chance at all to respond to the proposed affidavits that the petitioner wishes to admit;***
- 3. That a witness affidavit is a crucial document because it contains the substance of the evidence on which the petition is founded. This is the evidence that must be brought to fore at the earliest opportunity possible to, inter alia, alert the respondents of the case against them and more importantly enable them reply to the petition substantively, from an informed point of view;***
- 4. That allowing the application as sought will roll back the statutory schedule for completion of the Petition herein because the respondents will need almost the same amount of time taken by the Petitioner to answer to the new issues raised;***
- 5. That the leave sought seeks to introduce new evidence after the respondents have responded to the Petition, the net effect of the order, if allowed, is to amend the petition outside the stipulated mandatory 28 days as provided under Article 87(2) of the Constitution and Section 76(1) of the Elections Act;***
- 6. That the application herein is res judicata the leave granted on the 22nd day of November, 2017 to file further affidavits as the issues raised herein were within the knowledge of the petitioner and belonged to the subject of litigation, and which the petitioner while exercising reasonable diligence should have brought forward at the time.***

For his arguments, the counsel relied on the decisions in

- (1) M'nkiria Petkay Miriti v Rangwa Samuel & IEBC EP.4/2013 (Meru);***
- (2) Anders Bruel v Nyambura Musyimi HCC.374/2012 (NRB);***

(3) Benjamin Ogunyo Andama v Benjamin Andola Andayi EP.8/2013 (Kakamega).

The 3rd respondent also opposed the application and relied on his replying affidavit dated 19/12/2017. Learned counsel Mr. Mwangi submitted that the application is time barred by virtue of Rule 15(2) of the Election Petition Rules in that the Form 37A that Lekula Ltosilan denies having signed at page 180 of the petition and the allegations of forgery should have been raised when the petition was filed. Similarly, Form 37A referred to by Loseiku Lotitoyia is found at page 177 of the petition and was available at the time of filing the petition; that the delay in bringing the application after over 140 days has not been explained.

It was also urged that the affidavits offend Section 75 of the Elections Act as they seek to introduce new evidence and which will be prejudicial to the respondents. Counsel relied on the decisions in Sammy Ndung'u Waity & another v IEBC & another EP.2/2017 (Nanyuki); (2) Ferdinard Ndungu Waititu v IEBC EP.1/2013(Nairobi).

I have duly considered all affidavits filed herein, authorities cited and counsel's oral submissions. The applicant does admit that indeed this application has been made after the pretrial conference under Rule 15(1) of the Election Petition Rules, 2017. The question is whether the order sought can be availed under R.15(2) of the Election Petition Rules. The Rule reads as follows:

"15(2) An election court shall not allow any interlocutory application to be made on conclusion of the pretrial conference. If the interlocutory application could, by its nature have been brought before the commencement of the hearing of the petition."

The applicant alleges that there exists exceptional circumstances in this case in that, the petitioner's witnesses have been threatened and have declined to swear affidavits. In a ruling delivered by this court on 22/11/2017 a similar application made during pretrial granted the applicant leave to have three witnesses file supplementary affidavits. The said witnesses never filed any affidavits. The allegation by the applicant that his witnesses have been threatened and/or intimidated was made when this petition was first placed before this court, but so far, no evidence of the said threats has been laid before this court. No report has been made to the police regarding the alleged threats. These allegations of threats remain unsubstantiated.

I have further considered the draft affidavit of Loseiku Lotitoyia which alleges stuffing of ballot boxes, arrest of the presiding officer of Maralal Social Hall Polling Station and an ongoing criminal case. Form 37A of the said polling station is annexed at page 177 of the petitioner's affidavit. The draft affidavit of Lekula alleges forgery of his signature on Form 37A. The form is at page 180 of the petition. These are matters which were not new to the applicant. They existed at the time of filing of the petition. These witnesses should have filed affidavits at the time the petition was filed because these grievances, if at all, existed, then, there are no exceptional circumstances that exist that the applicant has alluded to e.g. death, or illness that has made it impossible for witnesses to testify.

Whether the affidavits introduce new evidence to the petition. In Raila Odinga & others v IEBC & others (2013), the Supreme Court considered the petitioner's application to file further affidavits and stated:

".....Secondly, from what has been deposed by Mr. Ong'wen and Mrs. Ongera in their respective affidavits, 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 possibly giving rise to significant new facts and/or allegations leading to a serious departure from the original case. We hold that if we allow the 7 affidavits to remain on record, the same will be prejudicial to the respondent. This will amount to a miscarriage of justice and we cannot allow it in the circumstances."

I do agree with the respondent that indeed the affidavit of Lekula introduces an allegation of forgery of Form 37A at Leirr Primary School Polling Station. Similarly, in the draft affidavit of Loseiku, new

evidence is introduced at paragraph 4 where it is alleged that there was stuffing of ballot boxes of the Governor and Women Representative. There are also new allegations of arrest and prosecution of the presiding officer at paragraphs 5 – 7. Those are new facts which had not been pleaded anywhere in the petition. If the court were to allow the application, it would change the character and nature of the petition and, the respondent would need time to respond to these allegations. As rightly pointed out by the respondent, grant of the orders would amount to amending the petition outside the stipulated 28 days allowed under Section 76 of the Elections Act and Article 87(2) of the Constitution. That would be prejudicial to the respondents. Also see ***Benjamin Andama case*** and ***Petkay Miriti***, the courts declined to allow further affidavits which sought to introduce new complaints or dispute which were not pleaded in the petition.

Directions were taken for hearing of the petition and this petition comes up for hearing on 16th and 17th January, 2018. Allowing the application would require that the respondents do respond to the affidavits. Due to the strict time lines within which petitions have to be heard (Section 75(2) Election Act) and considering the time left, it would not be practicable for this court to vary the dates set for the hearing of the petition. In ***Sammy Waity's case (Supra) J. Kasango*** considered a similar application and declined to grant the order for reasons that since the hearing dates had been set, granting the application to file further affidavits would cause a delay.

Whether the application is *Res judicata*:

Section 7 of the Civil Procedure Act defines *Res judicata* as “***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***”

From the above definition, I do agree that the matter is *res judicata*. The issue is whether the applicant can be allowed to file further supplementary affidavits after the pretrial. The court considered a similar application at pretrial conference and allowed the application on 22/11/2017. The application is between the same litigating parties over the same issue. The applicant should have included all the witnesses he intended to call in the earlier application. The doctrine of *res judicata* is designed to guard against abuse of the court process by parties seeking litigating the same matters over and over again. The doctrine was best explained in ***Henderson v Hernderson (1943)67 ER 313***:

“.....where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

The rationale behind the doctrine of *res judicata* is based on public interest, that litigation must come to an end and protect a party from facing repetitive litigation as well as save the court's precious time. I must point out that interlocutory applications are deemed to be suits for purposes of Section 7 of the Civil Procedure Act.

Whether this court can invoke Article 159 of the Constitution:

Article 159(2)(b) of the Constitution cautions the court to guard against preventing injustice through delays. It embodies the maxim, justice delayed is justice denied. The courts have an obligation to see to it that litigation is terminated within a reasonable time frame. In this case, Section 75(2) of the Elections

Act sets the time within which petitions must be heard and determined. That time cannot be enlarged by the exercise of the discretion of this court. In this case, the applicant had the opportunity to file all the witnesses' affidavits when they first filed the petition. Another opportunity presented itself when the applicant made an application dated 13/10/2017 where the applicant sought to file additional supplementary affidavits and the court did grant the said application by its ruling of 22/11/2017. The applicant cannot come again so late in the day to seek the same prayer.

Secondly, Article 159(2)(d) bars the court from administering justice without undue regard to procedural technicalities. In the instant case, the applicant has not pointed to any procedural technicality. The court is guided by Constitutional provisions on management of electoral disputes, i.e. Article 87 as read with Section 75(2) of the Elections Act.

Mr. Mombo urged that if the court found any offending paragraphs, the same should be struck out but the affidavits to remain. As regards the affidavit of Loseiku Lotitoiya, the offensive paragraphs are No.4 – 7. Once struck off, nothing would remain of the affidavit.

Similarly, as regards the affidavit of Lekula Ltosilan, the offending paragraph is No.9. Once it is struck off, there would be no need to call the witness. It would not serve any purpose retaining the affidavits on record if the paragraphs were struck off the prayer by counsel cannot be granted.

In the end, I am satisfied that the Notice of Motion dated 11/12/2017 is without merit and it is hereby dismissed with costs to the respondents.

Dated, Signed and Delivered at NYAHURURU this 10th day of January, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mombo & Gilbert for petitioner

Mr. Karanja for 1st & 2nd respondents

Mr. Mwangi & Ms. Peinan for 3rd respondent

Soi – Court Assistant