



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 3 OF 2017

MUTISYA ALBANUS PAULPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

THE RETURNING OFFICER (MACHAKOS

TOWN CONSTITUENCY).....2ND RESPONDENT

MUNYAKA VICTOR KIOKO3RD RESPONDENT

RULING OF THE COURT

1. The 1st, 2nd and 3rd Respondents learned counsels have raised an objection to the filing of supplementary affidavit and certificates by the Petitioner on the grounds that they not only offend the Election Petition Rules but that they are an attempt to introduce amendments to the Petitioner’s Petition through the back door in that no leave of court had been sought and further that the Respondents shall stand prejudiced since the same goes to the root of the Petition which is the subject of the dispute herein. Counsels for the Respondents therefore have urged this court to order the said pleadings be struck out.

2. Learned counsel for the Petitioner submitted that leave had been granted on the 13/10/2017 when the parties entered into a compromise whereby the 1st and 2nd Respondents Application dated 2/10/2017 was allowed with leave being granted to both the Petitioner and Respondents to file supplementary affidavits. The Petitioner’s counsel went on to submit that Rule 19 of the Election (Parliamentary and County Elections) Petition Rules 2017 as well as Rule 5 of the same Rules allows this court discretion to admit the said pleadings in order to do justice to the parties. Counsel also sought reliance in Article 159 (2) (d) of the Constitution.

3. I have considered the oral submissions by learned counsels for the parties herein. The issue for determination is whether or not the Petitioner’s Supplementary Affidavit and certificates dated 27/10/2017 and filed on even date should be struck out as requested by the Respondents. In order to determine this issue, there is need to have a look at the record of proceedings of 13/10/2017 and the relevant Election (Parliamentary and County Elections) Petition Rules 2017. The record of 13/10/2017 reveals that parties herein took directions to the effect that the 1st and 2nd Respondents Application dated 2/10/2017 seeking leave to file supplementary list of witnesses and accompanying affidavits and affidavits in support be deemed as filed was allowed with leave being granted to the Petitioner and 3rd

Respondent to file Supplementary affidavits if need be within 3 days upon being served by the 1st and 2nd Respondent. It was further directed that 1st and 2nd Respondent were to file and serve replying affidavits to the Petitioner's Application dated 9/10/2017 within 3 days and that the said application dated 9/10/2017 was to be heard on the 30/10/2017. It seems the 1st and 2nd Respondent abandoned the need to file a supplementary list of witnesses as earlier indicated but went ahead to file within time a replying affidavit to the Petitioner's Application dated 9/10/2017. In the same vein the Petitioner upon being served with the said Replying affidavit proceeded to file the Supplementary Affidavit now sought to be struck out for want of leave of court. The Petitioner also has filed two certificates alongside the said supplementary affidavits. I shall revisit these two issues subsequently.

4. The Elections (Parliamentary and County Elections) Petition Rules 2017 gives an election court discretion to allow the filing of further affidavits and admit new or additional evidence. (See Rule 15(1) (h). Also Section 80(1) (d) of the Elections Act No. 24 of 2011 provides that an election Court has power to decide matters that come before it without undue regard to technicalities and this seems to resonate with the provisions of Article 159(2)(d) of the Constitution of Kenya 2010 which dictates that justice shall be administered without undue regard to procedural technicalities. Again the above Petition Rules 2017 vide Rule 19 thereof allows for extension and reduction of time as follows:-

Rule 19 (1) *where any act or omission is to be done within such time may be prescribed in these Rules or ordered by an Election 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 omissions shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.*

(2) *Sub-rule (1) shall not apply in relation to the period within which a Petition is required to be filed, heard or determined.*

However an Election Court's leeway is curtailed by Section 76(4) of the Elections Act No. 24 of 2011 which provide that amendments to an Election Petition must be made within the time prescribed for challenging the relevant Petition and which should be within 28 days of the declarations of the results of the election. Hence an Election court will not grant an Application for the adduction of new or additional evidence where the grant of such an application will prejudice or undermine the Constitutional imperative of timely resolution of electoral disputes. Hence a party may not be permitted to introduce amendments whose import is to change the character of the election Petition and to prejudice or disadvantage other parties to the election petition disputes.

5. Now I revisit the issue of the supplementary affidavit and certificates filed by the Petitioner. As regards the Supplementary affidavit dated 27/10/2017 I find the Petitioner was indeed responding to the 1st and 2nd Respondents replying affidavit to the Petitioner's Application dated 9/10/2017. The said Application seeks for an order of scrutiny amongst other prayers. I have perused the said supplementary affidavit and find the same is not intended for the Petition but in support of the application for scrutiny and is a reply to the 1st and 2nd Respondents replying affidavit dated 16/10/2017. There is absolutely no prejudice occasioned to the Respondents if the said supplementary affidavit is admitted. Even though leave was not sought by the Petitioner, I shall exercise my discretion and grant leave and proceed to admit same as properly filed. The Respondents shall be given leave to file reply if need be within a reasonable period. Suffice here to add that there is need to bring forth all the issues in controversy raised in the Application dated 9/10/2017 so that they may be adequately thrashed.

6. As regards the issue of the two certificates dated 27/10/2017 I find the same appear to be in furtherance of the Petitioner's Petition and are for all intents and purposes intended to amend the Petition. Indeed they are further evidence in support of the Petitioner's claim that certain photographs had been taken and which are alleged to involve several persons including the 3rd Respondents herein. The Respondents have vehemently opposed the introduction of the said certificates by the Petitioner at this stage of the proceedings and have maintained that the same touch on their response and answer to the Petition and therefore go to the root of the Petition. The Respondents believe that the Petitioner is trying to amend the

Petition through the back door. As the said certificates have been filed outside the statutory period of 28 days from the date of the declarations of the results, I find the same clearly offend the provisions of Section 76 (4) of the Elections Act No. 24 of 2011. The Petitioner has not given any reasons for the late amendments. Since Section 76(4) of the Elections Act is couched in mandatory terms, I find the admission of the two certificates at this stage would clearly amend the Petition which would prejudice the Respondents in a major way. The only recourse is to have the two certificates struck out. The same are hereby ordered struck out and to be expunged from the record.

7. In the result, the Respondents objections are allowed in the following terms:-

(1) The Petitioner's Supplementary Affidavit dated 27/10/2017 is admitted and is deemed as duly filed.

(2) The Respondents are granted leave to file further replying affidavit if need be within three (3) days from the date hereof.

(3) The Petitioner's two certificates dated 27/10/2017 are hereby ordered struck out and are expunged from the record.

(4) The submissions filed by the parties herein are deemed as duly filed.

(5) Parties are directed to proceed to highlight their submissions on the 6/11/2017.

Dated, signed and Delivered at MACHAKOS this 31st day of October, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Makundi/Kituku for the Petitioner

Kaluu for Anyoka for the 1st and 2nd Respondent

Nyamu for Mbobu for the 3rd Respondent

Kituva - Court Assistant