



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 4 OF 2017

**IN THE MATTER OF THE ELECTIONS OF WOMEN REPRESENTATIVE FOR KISII
COUNTY, COUNTY NO. 45 HELD ON 8TH AUGUST 2017**

NAHASHON AKUNGA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ROBERTY ISAAC SIDNEY NAMULUNGU.....2ND RESPONDENT

HON. JANET ONG'ERA.....3RD RESPONDENT

RULING

1. This matter came up for a pre-trial conference on the 4th October 2017. The main hearing of the Petition was slated for the 30th and 31st October 2017.
2. At the pre-trial it was indicated that the Petitioner would call 4 witnesses and take 1 hour. The 1st and 2nd Respondent were to call 1 witness and take 30 minutes and the 3rd Respondent was to call 3 witnesses and take 2 hours.
3. A glance at these time targets appears with benefit of hindsight, rather ambitious.
4. The matter duly took off and proceeded on 30th October, 2017 where the Petitioner's case was taken during the better part of the day.
5. Mr. Sunkuli for the Petitioner applied for adjournment in the afternoon. He stated:-

“I seek adjournment to tomorrow. We wish to call 2 other witnesses. One of them is said to be indisposed. The other witness I am informed is an IEBC official who was involved in the presidential vote and he took material to IEBC headquarters. The witnesses will be short.”

6. This application was strenuously opposed. Ms Karanja for the 1st and 2nd Respondent and whose client is the body mandated to oversee issues election stated that Mr. Sunkuli assertion that a witness had taken documents to Nairobi was untrue. The 2nd Respondent, she stated, was the head of the National tallying centre and it had been confirmed that all forms had been received.

7. Mr. Omogeni(Sc) opposed the application stating *inter alia* that the Court had warned about adjournments during pre-trials. The witness alluded to is not substantiated. He asserted that none of the Petitioner's witnesses was an IEBC official.

8. The replies apparently rattled the Petitioner. Mr. Sunkuli in rejoinder stated;-

“My instructions are incomplete. I am sorry the witness are not officials but are agents. This is a Court of equity..... We will try and ensure the witnesses come tomorrow.”

9. The Court reluctantly allowed the adjournment and allowed 2 extra hours for the Petitioner's case. The Court stated;

“No further indulgence will be available on the part of the Petitioner. Further hearing on 31/10/2017.”

10. Counsel holding brief for Mr. Omwanza for the Petitioner has now indicated that Mr. Omwanza has been unable to secure the 2 witnesses. An application has been filed seeking summons to enforce the witnesses attendance. That application was served as the proceedings herein proceeded.

11. There is again opposition by both counsels for Respondents on grounds *inter alia* that once a matter is set for hearing, the Law and Rules in petitions does not allow admittance of further applications. It is urged that it is objectionable that when one counsel was stating one thing at the bar, another was busy drafting an application and affidavits stating a different thing. The application as drawn ought to be struck out as the affidavit in support is not even commissioned.

12. I have applied my mind to the current application which in a sense is an application for adjournment based on the need to have the relevant witnesses summoned by Court and, to aid in that, an application has been filed.

13. As a Court, I am enjoined by Article 105 of the Constitution, the Election Act and the Rules made there under to ensure prudent management of the hearing of election petitions to meet the legal timelines set.

14. Indeed, the overriding objective of the rules is to facilitate a just, expeditious, proportionside, affordable resolution of election disputes under the Constitution and the Act (Elections Act).

15. **Rule 4 (3)** provides;

“Rule 4 (3); A party to an election petition or an Advocate for the party shall have an obligation to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

16. The Court granted a last adjournment to the Petitioner on 30/10/2017. At the time there was a firm assurance from the bar by an officer of this Court that the witnesses will be availed.

17. There was no indication whatsoever of the monumental challenges now exhibited in the bid to secure the witnesses as seen in the application that was lodged in Court today.

18. This begs the question of who between counsel before Court yesterday and counsel who drew the application is lying to the Court. If those challenges existed nothing would have been easier than Counsel who was present in Court yesterday laying bare those facts before the Court. As it were, he had his own reasons completely different from what is now deposed to as to why the witnesses were unable to come to Court, viz, one was sick, the other was IEBC official (later an agent).

19. This Court has power to summon any witness under Section 80 of Elections Act. However, I must be

quick to point out that the Court cannot possibly take over the management of case for parties.

20. The hearing dates for this Petition were fixed almost a month ago. In the intervening period, it behoved on all the parties, the Petitioner included, in conjunction with their counsel to focus on proper preparation for trial.

21. Such a focus would for example smoke out reluctant witnesses and necessary application for Summons to Witness be made in good time. Indeed no formal written application is necessary.

22. Such a step would ensure a smooth flow of proceedings and conformity with the Courts schedules as set at the pre-trials and ultimately aid in achieving the legal timelines that bind this Court.

23. At all times, the dignity of the Court and the sanctity of Court proceedings must be held in their rightful place. The 2 different positions taken by the counsels for the Petitioner herein do not seem to uphold these ethos.

24. Finally, I need to comment on the application filed. Even if the same was to be admitted and allowed it would be tantamount to side stepping the Court's clear orders on a last adjournment in this matter. This would be an abuse of the Court process.

25. Again, the applications flight path is beset with insurmountable boulders. I need not belabour the fact that an uncommissioned affidavit is not an affidavit. Even the very wide powers under Article 159 cannot cure this malady. The application is left bare and even if I was to admit it, it would bear no fruit.

26. Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 among other things, requires of this Court to dispose off with interlocutory applications during the pre-trial conference.

Rule 15 (2) provides;

“Rule 15(2); An Election Court shall not allow any interlocutory application to be made on conclusion of pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.”

27. Had the Petitioner diligently prepared for trial, the need to have summons on witnesses would have been realized and necessary application made in time.

28. The cumulative effect of the above is that no room for adjournment exists given the orders of Court of 30/10/2017 and the attempt to circumvent those orders by the filing of the application dated 30/10/2017 must be resisted and rejected outright.

29. With the finding that this matter is to proceed for trial as scheduled today.

Dated, Signed and Delivered in Kisii this 31st day of October, 2017.

A. K. NDUNG'U

JUDGE