



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI.

CORAM: R. MWONGO, PJ.

ELECTION PETITION NUMBER 5 OF 2017

IN THE MATTER OF: ARTICLES 2, 10, 38(2), 50(1), 88(4) OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: INDEPENDENT ELECTORAL & BOUNDARIE

IN THE MATER OF: THE ELECTIONS ACT NO.24 OF 2011 IN THE MATER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017

IN THE MATER OF: THE ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY FOR RUARAKA CONSTITUENCY (NO.281)

IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS LEGAL NOTICE NUMBER72 OF 2017.

IN THE MATTER OF: INTERNATIOANAL CONVENTIONS AND/OR GOOD PRACTICE.

-BETWEEN-

ELIZABETH ONGOROAMOLLO.....PETITIONER

-VERSUS-

FRANCIS KAJWANG TOM JOSEPH.....1ST RESPONDENT

KAREN WACHERA MWANGI.....2ND RESPONDENT

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING ON APPLICATION NO 4

1. This ruling concerns the Petitioner's application dated 12th October, 2017 seeking leave to file a further affidavit. The application is contained within Application No 5 of even date in respect of election materials. Pursuant to directions issued at the Pre Trial conference on 9th October, 2017, it was agreed by consent that each application would be treated separately and determined according to its precedence of filing.

2. At the hearing of the applications indicated at the Pre-Trial conference on 19th October, 2017, it was also agreed by consent that Applications Nos. 1 and 3 be, and were, allowed with costs.

3. The prayers sought in the present application No 4 are as follows:

“4. That this Honourable Court grants leave to the Petitioner to file a Further Affidavit of Silas Rabah who was the Petitioner’s Chief Agent in the 8th August, 2017 election.

5. That the Further Affidavit of Silas Rabah annexed hereto be admitted to the record and the same be deemed as properly filed and served”

4. The grounds on which the affidavit is sought to be admitted include: to enable the Petitioner file the proper appointment letters of some of the Petitioner’s agents; that due to the strict timelines for filing the petition and due to mix-up these letters were mistakenly omitted; that the mistakes of counsel should not be visited on the Petitioner; that the application will not expand the scope of the petition; and that no prejudice will be suffered by the respondents.

5. The Petitioner annexed the proposed Further Affidavit of Silas Rabah to the Petitioner’s supporting affidavit. Annexed to the affidavit of Silas Rabah are six Amani National Congress letters of appointment of agents. The appointees are Joyce AtienoOduor, Paul Omina, Neville Ochieng’, Gaetano Musumba, Eunice JumaOnege, and Raphael OtienoAdero, respectively. Each of these appointees also deponed affidavits in support of the petition, and will therefore be witnesses of fact at the hearing.

6. Each annexed appointment letter, which is signed and dated 5th August 2017, reads:

“TO WHOM IT MAY CONCERN

I, Hon Elizabeth OngoroAmollo Masha, vying for the RUARAKA PARLIAMENTARY SEAT on the Amani National Congress (ANC) ticket under NASA coalition do hereby appoint..... (Name)....of ID No.....as my polling agent for.....Polling station for the 2017 General Election.

Signed at.....thisday of2017”

7. The Petitioner’s counsel submitted that the previous affidavit of Silas Rabah had appointment forms which were not signed and the attached forms were intended to rectify that omission. That the appointment is an internal party affair which the Chief Agent is responsible for overseeing, and that the Chief agent is therefore an appropriate and acceptable deponent to produce all letters of appointment.

8. Opposing the application, the 1st Respondent pointed out that they would not have so opposed except for two reasons: First, that the appointment letters were not being produced by the maker; and second, that the original affidavit of Silas Rabah had not attached any unsigned agent appointment letters. In those circumstances, counsel argued, the affidavit would serve no useful purpose. He urged dismissal of the application.

9. Under **Rule 15(1)(h) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, it is in the discretion of the court, at any time after the Pre-Trial conference, to ***“give directions as to the filing and serving of any further affidavits or the giving of additional evidence”***.

10. In this case, having carefully perused the annexed affidavit of Silas Rabah, I am not satisfied that its admission would add any value to the determination of the petition herein. There are several reasons for this position. First, the annexed appointment letters are not drawn or signed by Silas Rabah, and there would be questions, as already indicated by the 1st Respondent, as to how he would then produce them. Second, in response to the court’s query as to the authorship of the letters, counsel at bar admitted that they were signed by the Petitioner’s husband who was the chief campaign manager. Counsel was unable

to say why the author could not depose an affidavit to produce the appointment letters.

11. In my view, allowing admission of the said documents through Silas Rabah, the proposed deponent, would be counterproductive because: first, as the 1st respondent has already indicated, there will be a challenge of on the question of authorship or veracity; secondly, there will be needless waste of time in arguing on authorship which will consume precious time away from the substantive hearing of the petition hence prejudicing the overall conclusion of the proceedings.

12. Clearly, the correct person to produce the said appointment letters would be either the Petitioner who is indicated therein as the appointer, or the person who signed the letter. There would be no inhibition in admitting them under those circumstances.

13. Accordingly, I dismiss this application with costs.

Dated and Delivered at Nairobi this 30th Day of October, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

.....for the Petitioner

.....for the 1st Respondent

.....for the 2nd & 3rd Respondent

Court Clerk.....