



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ELECTION PETITION NO. 4 OF 2017**

**IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE  
ELECTION (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND  
COUNTY) PETITION RULES 2017**

**AND**

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

**BETWEEN**

**NAHASHON AKUNGA .....PETITIONER/RESPONDENT**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ROBERTY ISAAC SIDNEY NAMULUNGU..2<sup>ND</sup> RESPONDENT**

**HON. JANET ONG'ERA .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. This ruling is in respect of the Notice of Motion 26<sup>th</sup> September 2017 and filed on the 27<sup>th</sup> September, 2017 in which Nahashon Akunga (hereinafter, the petitioner) seeks orders:

- 1. That this court be pleased to grant the petitioner leave to file a supplementary affidavit and adduce more evidence touching on the issues raised in the petition.**
- 2. That costs for this application be in the cause.**

2. The application is anchored on six (6) grounds enumerated on the face thereof viz;

- a) The Petitioner filed the Petition on 5<sup>th</sup> September 2017 challenging the victory of the 3<sup>rd</sup> Respondent.**
- b) The Petitioner was under strict timelines to file the Petition and in the race to beat the deadline, the Petitioner/Applicant inadvertently failed to attach two annextures referred to in**

## **the Petition and the Supporting Affidavit**

**c) The Petitioner is not introducing new grounds of Petition but adding more information to the existing grounds.**

**d) For the court to arrive at a just and expeditious disposal of the Petition, the information to be added is crucial.**

**e) That the Respondent stands to suffer no prejudice if application is allowed as they will have a corresponding right to address the issues added.**

**f) That in the circumstances it is in the interest of justice to allow this application.**

It is further premised on the supporting affidavit sworn by the petitioner on 26<sup>th</sup> September, 2017.

3. The gist of the application, the supporting grounds and affidavit is that in the race to beat the deadline of the strict timelines set the Petitioner failed to attach 2 annexures referred to in the Petition and supporting affidavit.

4. It is urged that the Petitioner is not introducing new grounds to the Petition but just adding more information to existing grounds.

5. The information sought to be added is crucial for a just and expeditious disposal of the petition and no prejudice will be occasioned to the respondents as they shall have a corresponding right to address the issues added.

6. The specific information left out is indicated in the affidavit in support to be;

1. The list of polling stations where some candidates obtained similar number of votes in 2 streams of the same polling station (Referred to in the supporting affidavit as annexure “AN7”) together with the form showing the anomalies.

2. The list of polling stations where the voters register was manipulated referred to as annexure “AN3” which is not comprehensive and it is sought that a supplementary affidavit be allowed (a copy of which is annexed).

7. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents response is vide the replying affidavit sworn by Robert Isaac Sidney Namulungu on the 9<sup>th</sup> October 2017 and filed on the 17<sup>th</sup> October 2017.

9. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ case that the Petitioner had sufficient time, a whole 28 days to prepare their Petition and all the documents to be relied on at the hearing of the Petition from the date of declaration of the results on 11<sup>th</sup> August, 2017 and they did.

10. It is urged that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have filed their response to the Petition directed to answer the Petition as filed and served.

11. It is deposed that it is already inordinately late for the Petitioner herein to file an application for further documents as he had enough time to do so before filing the Election Petition in court.

12. The petitioner is accused of seeking to add more polling stations which clearly indicates introduction of new evidence to which the 1<sup>st</sup> and 2<sup>nd</sup> respondents will be unable to respond to in the limited timelines.

13. No valid reason has been availed nor any basis laid for the introduction of other polling stations which were not included at the time of filing the Petition. This is a fishing expedition and introduction of new evidence.

14. The response by the 3<sup>rd</sup> respondent is found in her replying affidavit sworn on the 11<sup>th</sup> October 2017.

15. It is the 3<sup>rd</sup> Respondent's case that the Petitioner seeks to add more polling stations where the voter register was purportedly manipulated. The supplementary affidavit introduced annexes the new polling stations marked "AN1" and "AN2" not included in the Petition and further under paragraph 18, a summary of these polling stations with the alleged anomalies is annexed as "AN3". In essence, it is stated, the Petitioner wants to fundamentally change his Petition.

16. On advice of his counsel, the 3<sup>rd</sup> Respondent depones that it is inordinately late for the Petitioner herein to file an application seeking leave of court to introduce new evidence as new areas under grounds not covered in his Petition would necessitate the filing of an amended response.

17. This is an obvious amendment to the Petitioner's Petition since the Petitioner is seeking to introduce new polling stations not pleaded in the Petition.

18. It is urged that parties are bound by their pleadings and any evidence outside the pleadings must be rejected or disregarded. Considering the timelines stipulated under the **Elections Act 2011**, it is impracticable to again file a response.

19. The Petitioner is accused of wanting to amend the Petition as an answer to the response the 3<sup>rd</sup> respondent has filed.

20. Am urged to follow the finding in **Walter Mburu –vs- Abdul Shakoor & 3 Others CA No. 195 of 2002 [2015] eKLR** where it was stated that taking of additional evidence is at the discretion of the court and that there has to be exceptional circumstances to justify the introduction of additional evidence.

21. The application is seen as a fishing expedition.

22. Directions were given that the application be disposed off by way of written submissions.

### **The Applicant's Submissions:**

23. The applicant submits that the application is brought under Rule 4 (1) and 2, 15(1) (c) and (h) of the **Elections (Parliamentary and County Elections) Petition Rules 2017**. It is emphasized that the mere fact that Rule 15(1) (h) talks about giving directions on filing any further affidavit has been interpreted to mean that the drafters of the rules knew that because of the strict timelines within which Petitions must be lodged, the Petitioner will most likely leave out some materials.

24. I am referred to the decision in **Bwana Mohamed Bwana –vs- Silvano Buko Bonaya & 2 Others [2013] eKLR** where the need to do justice was buttressed.

25. It is submitted that the material sought to be added is small and limited. No new evidence is being added only additional polling stations that had issues already raised in the Petition and supporting affidavit. Reliance is placed on the Supreme Court decision in **Raila Odinga & 5 Others –vs- IEBC and & 3 Others [2013] eKLR** quoted in **Bwana Mohamed** case (Supra) in which the court stated:-

**“The other issue that the court must consider when exercising its discretion to allow further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter.”**

### **The 3<sup>rd</sup> Respondent's Submissions:**

26. Counsel for the 3<sup>rd</sup> respondent has reproduced the provisions of Article 87(2) of the Constitution which makes proviso for the enactment of legislation to establish mechanisms for timely settling of electoral disputes, setting the timelines within which to file Petitions other than a Presidential Petition within 28 days of declaration of results and mode of service of such a Petition.

27. The above provisions are reflected in the Legislation enacted being Section 76 (1) of the **Elections Act 2011**.

28. From the above, it is submitted that the question of what a petition is and what it includes has been answered by the Supreme Court of Kenya in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR** when the court held that:

**“In the process the learned trial Judge made a wrong statement of law relating to pleadings to the effect that annexures to any affidavit cannot be said to be pleadings and this statement led the Court of Appeal to wrongly conclude that the said annexures had been expunged from the court record.”**

29. It is submitted that Rule 15 (1) (c) and Rule 15(1) (h) should be read together with Rule 15(1) (j) (which the Petitioner is accused of skillfully and carefully omitting) but these Rules cannot override Statute law. The Rules are not meant to allow parties to whimsically start fishing for new evidence outside the 28 days Constitutional and Statutory timelines.

30. It is further submitted that Rules cannot predominate the Constitution or Statute Law and reliance is place on the decision in **Charles Kamuren –vs- Grace Jelagat Kipchoim & 2 Others [2013] eKLR** where the court held:-

**“Canons of interpretation of statute dictate that where there is a conflict between the provisions of an Act of Parliament and subsidiary legislation, the provisions of the Act must prevail. In addition, under Section 31(b) of the Interpretation and General Provisions Act, Cap 2, no subsidiary legislation shall be inconsistent with the provisions of an Act. That in essence means that the provisions of Section 76 (1) (a) of the Elections Act as relate to the time for service of an election petition override the provisions of rule 13 (1) of the Petition Rules. We believe that there was an oversight on the part of the Rules Committee in providing a period of fourteen days in the Rules.”**

31. As regards extension of time the following passage from the **Charles Kamuren** case (Supra) is quoted:

**“The time frames stipulated under Section 76(1) (a) of the Election Act are peremptory and an election court has no power to vary them. A petition must be filed within twenty eight days after the date of publication of the results and should also be served within fifteen days of presentation of the petition. We agree with the learned trial Judge that Rule 20 only provides for extension of time for matters whose time is prescribed by the Rules or by the court but not those prescribed by the Act.”**

32. Counsel quotes from the decision in **Raila Odinga** case (Supra) to show the importance of timelines. The court stated:-

**“The requirement of such a disciplined trial-framework fully justifies the unlimited exercise of the court’s discretion in making orders that shape the course of the proceedings. Thus, in the instant case, the court did dismiss two applications, in rulings made during the pre-trial conference. One of these was for an order production of certain documents; the other was in respect of a “Notice to Produce” a marked voter register found at the numerous polling stations right across the country. The court also made an order to exclude from the**

proceedings a “further affidavit” which had just been filed by the 1<sup>st</sup> petitioner; the said affidavit sought to introduce new material well after the filing of the petition.”

33. On timelines of filing Petitions vis-à-vis adducing new evidence, counsel for the 3<sup>rd</sup> respondent submits that **NONE** of the polling stations particularized in the application dated 26<sup>th</sup> September 2017 is in the Petitioner’s Petition dated 4<sup>th</sup> September 2017. This, it is stated, is **NOT** additional evidence neither further evidence **BUT** new evidence.

34. I am referred to the decision in **Philip Munge Ndolo –vs- Omar Mwingi Shimbwa & 2 Other [2013] eKLR** where the court in striking out the Petitioner’s prayer to introduce further affidavits and new evidence observed as follows:-

**“The leave granted to the Petitioner to file further affidavits under Rule 17 (1) (i) cannot amount to a carte blanche for the Petitioner to adduce new evidence.”**

35. In regard to Article 87(2) of the Constitution the court had this to say:-

**“87(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.**

**“Article 87(2) envisages that at the time of filing the petition all matters sought to be disputed and/or raised are included therein. To allow introduction of new witnesses (outside of the original list) and new allegations would be tantamount to extending this 28 day constitutional time limit. Likewise, Rule 10(1)(c) of the Election Rules require a petitioner to clearly set out the grounds and specifics for the petition. As such, this type of omnibus/general allegations cannot be deemed to be admissible.”**

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Submissions:-**

36. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents opens the submissions with a summary of what the issues for determination are viz;-

**1. Whether the petitioner should be granted leave to file further affidavit which introduces new evidence.**

**2. Whether the new evidence will change the character of the Petition.**

37. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ case that the Petitioner prays to be allowed to introduce new polling stations which he has not disclosed and in counsel’s view this is new evidence being introduced which requires more time to respond to, hence impractical, given the limited Constitutional timelines provided for, for the hearing of this Petition. The application is fishing for evidence.

38. The Petitioner is accused of failing to state the number of polling stations and the identity of the stations intended to be introduced and this would prejudice the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who would wish to respond to the new evidence.

39. No reasons are offered why the Petitioner did not follow the laid down procedure to file his Petition with all the evidence and there is no room for the introduction of any new evidence.

40. The application is dismissed as a fishing expedition which is an abuse of the court process.

41. It is further urged that the matters sought to be introduced ought to have been included in the Petition and the same cannot be introduced by way of an affidavit. Reliance is placed on the case of **Gakenia –vs- Kimani & Others, Election Petition No. 1 of 1992 at Nyeri.**

42. I have considered the application, the supporting affidavit, the replying affidavits and the respective submissions and authorities cited by counsel. I have perused in great detail the main Petition and the responses thereto with a view to understanding the nature of the Petition and the bearing the outcome of this application would have on this matter.

43. I have considered the Constitution and the applicable laws.

44. The issues for determination are:

**1. Whether the Petitioner should be granted leave to file a supplementary affidavit and adduce more evidence touching on this Petition.**

**2. Who should bear the costs of this Petition?**

45. In answer to Issue No. 1 above, it is incumbent upon this court to consider the applicable law both under the Constitution, Statute and within the Rules, the nature of the evidence intended to be added and whether it changes the character of the Petition, the impact of the intended evidence on the responses by the Respondents, the need to have further responses by the respondents should the application be allowed and the effect of such admission on the legal timelines set for the hearing and disposal of Election Petitions.

46. In doing so, I have to keep in mind that Election Petitions are special proceedings and I place heavy reliance on the Supreme Court decision in **Raila Odinga and 2 others –vs- IEBC and 3 Others [2013] eKLR** where the court stated:-

**“The parties have a duty to ensure that they comply with their respective timelines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court as a result of omissions or inadvertences which are foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, content and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”**

47. It is important at this juncture to examine what the law is on filing of Election Petitions in Kenya. Article 87(2) and 105 (2) and (3) of the Constitution of Kenya 2010 provide:

**“87(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.**

**“105(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.**

**(3) Parliament shall enact legislation to give full effect to this Article.”**

48. Parliament pursuant to Article 105(3) of the Constitution enacted the **Elections Act, 2011**. Section 76 of the **Elections Act** provides:

**“76.(1) A Petition-**

**(a) To question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation.”**

49. Rule 12 of the **Elections (Parliamentary and County Elections) Petition Rules** stipulates the contents of a Petition. It is the total sum of the material to be presented to a Petition court within the 28 days provided for in Section 76 of the **Elections Act**. Rule 12(9) provides:

**“12.(9) The election court may, on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.”**

50. Rule 4 gives the overriding objective of the Rules which is to facilitate the just expeditious proportionate and affordable resolution of Election Petitions.

51. Rule 15 (1), (c), (h) and (j) provides:-

**“15(1) Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall-**

**(c) determine interlocutory applications;**

**(h) give directions as to the place and time of hearing the petition;**

**(j) make such other orders as may be necessary to prevent unnecessary expenses.**

52. From the above, there exists no ambiguity, first, in regard to the time allowed by the Constitution and Statute within which an Election Petition of this nature should be determined and secondly in Statute (Elections Act) in regard to the days within which a Petitioner is to file a Petition and thirdly in the Rules (Rule 12) in regard to the contents of a Petition.

53. Therefore, an application like the one before court seeking the filing of a supplementary affidavit invites the exercise of the discretionary powers of the court.

54. The nature of evidence intended to be introduced is as per paragraph 6 and 7 of the Petitioner’s affidavit in support of this application, a list of polling stations where some candidates obtained similar number of votes in two streams of the same polling station “marked AN7” and addition of polling stations to annexure “AN3” to the affidavit supporting the Petition.

55. I shall reproduce the relevant depositions in the affidavit supporting the Petition to lay bare the nature of that evidence and bring clarity as to the effect of the additional evidence now sought to be introduced on the Petition as a whole:

**“Para 28: That I prepared a summary of the polling stations with varying number of registered voters (Attached herewith is a copy of the summary which I now mark “AN3”. A bundle of copies of the relevant forms containing the anomalies is marked (“AN4”).”**

**“Para 56: That I prepared a summary of polling stations with coincidences (attached herewith is a copy of the summary which I know now mark “AN7”. A bundle of copies of the relevant forms containing the anomalies is marked “AN8”).”**

56. This is the evidence served on the Respondents and they have responded to it.

57. The Petitioner’s case is that in the haste to meet the deadline, he inadvertently left out some information.

58. Yet this is a petitioner who had a whole 28 days to prepare and file the Petition.

59. If the alleged omitted list in paragraph 56 of the affidavit in support of the Petition is admitted and if the list of polling stations in paragraph 28 of the affidavit in support of the Petition is amended to add more polling stations, my considered view is that the character of the Petition will change.

60. It will give rise to a wider scope and extent of the complaint which inevitably the Respondents would have to inquire into and respond further.

61. There is no disclosure of any and or sufficient reason to explain the omissions. It is not enough to attribute the omissions to the race to beat the statutory deadlines. If the court were to entertain the applications of this nature on the ground of **“omissions arising from the race to be at time”**, this would open a pandoras box and defeat the clear provisions of law setting clear timelines within which to file petitions and the contents of such a petition.

62. It is important for the Respondents to know with precision where an irregularity or misdeed took place. The Respondents have already responded. Allowing the application as sought would require more affidavits from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents after thorough inquiry. I disagree with counsel for the applicant in his submissions that there is no introduction of new grounds to the Petition but adding more information. The addition of more polling stations cannot be said to be giving more information.

63. The Petitioner having already read the rebuttals by the Respondents, the seeking to add polling stations affected would appear to give credence to the Respondents assertion that the Petitioner is on a fishing expedition. The Petitioner should not be allowed to construct their case as it progresses.

64. Rule 12 (1) subrule 9 provides that the election court may, on its own motion or on the application by any party to the Petition, direct a party or witness to file a supplementary affidavit. Rule 15(1)(h) mandates the court to give directions as to the filing and serving of further affidavits or giving of additional evidence.

65. To that extent, the application before court is properly so. But even having in mind the overriding objective of the rules as stated in Rule 4, that is, **“to facilitate the just, expeditious, proportionate and affordable resolution of Elections Petitions”**, care must be taken to ensure strict adherence to the Constitution and the relevant Statute.

66. In a situation where allowing additional evidence may impact adversely on the timelines set, then this court must reject an application like the one before court.

67. As stated earlier, the additional evidence sought would require elaborate inquiry and response vide multiple affidavits by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and possibly even by the 3<sup>rd</sup> Respondent.

68. This would certainly call for considerable time for response. The Supreme Court in **Raila Odinga & 5 Others –vs- IEBC and 3 Others [2013] eKLR** stated:-

**“The other issue that the court must consider when exercising its discretion to allow further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspect of the matter.”**

69. I do not agree with counsel that listing of more polling stations is a small issue and limited. As explained earlier, these are issues for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to address polling station by polling station, requiring the gathering of officers manning those stations, verifying the data and coming up with affidavits.

70. This will surely call for time and may in the end result in affecting the timelines set under the Constitution and the **Election Act**.

71. In the case of **John Michael Njenga Mututho –vs- Jane Njeri Kihara and Others [2008] 1KLR**

**10**, the Court of Appeal observed that Election Petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously, the legality of a person's election as a people's representative is in issue and that each minute counts. This court must treat an Election Petition as such and guard against giving any lee way that might disrupt the expeditious disposal of the Petition.

72. Having perused the annexures to the intended supplementary affidavit, I am satisfied that the nature, context and extent of new material intended to be produced is not small or limited, (see **Raila** Case (supra)) and the same will require detailed inquiry by the Respondents (especially the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) and responses involving several witnesses who manned the stated polling stations in the list intended to be introduced and the additional polling stations mentioned.

73. In the end, such a step will distort the timelines for the disposal of this Petition. The omissions or inadvertences which are cited here were foreseeable and could have been avoided. Pressure to meet the deadline set in law for filing Election Petitions is not in my view a sufficient ground for the admission of additional evidence.

74. Consequently, I find and hold that the application dated 26<sup>th</sup> September 2017 and filed on 27<sup>th</sup> September 2017 has no merit. The same is dismissed.

75. Costs shall abide the result of the petition.

**Ruling dated, signed and delivered at Kisii this 30<sup>th</sup> day of October, 2017.**

**A. K NDUNGU**

**JUDGE**

**In the presence of:**

Mr. Sunkuli for the Petitioner

Ms. Karanja for the 1<sup>st</sup> Respondent

Ms. Karanja for the 2<sup>nd</sup> Respondent

Omogeni Senior Counsel for the 3<sup>rd</sup> Respondent

R. Okumu court assistant

**A.K. NDUNGU**

**JUDGE**