



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO. 8 OF 2017

HABIL NANJENDO BUSHURUPETITIONER

VERSUS

THE IEBC.....1ST RESPONDENT

BEDI IYADI NANCY.....2ND RESPONDENT

(THE CONSTITUENCY RETURNING OFFICER BUTERE CONSTITUENCY)

MWALE NICHOLAS SCOTT TINDI.....3RD RESPONDENT

ANDREW TOBOSO.....4TH RESPONDENT

RULING NUMBER 2

The Application

1. After delivering the ruling on the 4th Respondent's Notice of Preliminary Objection dated 26.09.2017, by which I dismissed the Preliminary Objection, Mr. Amasakha, counsel for the 4th Respondent, and Mr. Ngome on behalf of Mr. Akusala for the petitioner, made oral applications asking the court to grant them leave to file additional affidavits before the hearing of the petition commences on 20.11.2017. Mr. Amasakha proposes to file a supplementary affidavit to be sworn by the 4th Respondent in addition to two fresh affidavits. Mr. Ngome informed the court that the petitioner proposes to file three additional affidavits, in support of the petitioner's case.

Responses to the Application

2. The two applications were opposed by Mr. Rono, counsel for the 1st and 2nd Respondents and Mr. Busiega for the 3rd Respondent. The gist of the opposition is that filing of additional affidavits is not a matter of right especially because, both counsel argued, the applicants had not laid a basis for the application. It is also submitted that the petitioner and 4th Respondent seem to be going on a fishing expedition in search of evidence. It was also contended that the request for leave was coming too late in the day and the same should be dismissed.

Reply by Applicants

3. Mr. Ngome urged the court to look at the Petitioner's application through the lenses of Article 159 of the Constitution 2010 so that it is not carried away by technicalities which are likely to cloud its view of

the substantive justice that should be done to parties. Regarding the strict time lines within which election petitions are to be heard and determined, counsel submitted that if the application for leave is granted the affidavits sought to be filed can be filed within seven days of the order granting leave. Counsel also submitted that the intended additional affidavits will greatly assist the court in reaching a fair and balanced decision in this matter.

4. On his part, Mr. Amasakha submitted that Rules 4 and 12(9) of the Elections (Parliamentary and County Elections) Petition Rules 2017 (The Rules) give this court the power to allow applications for filing of additional affidavit evidence. Further that allowing the application will not in any way prejudice the 1st, 2nd and 3rd Respondents. He prayed for the orders.

The Law

5. Article 87(2) of the Constitution of Kenya and Section 77(1) of the Elections Act forbid the court from extending the Elections Disputes Resolution (EDR) timelines set out therein. This was the holding of the court in the case of said *Buya Hiribae vs Hassan Dukicha Abdi & 2 others, Mombasa Election Petition No. 7 of 2013 and Simon Kiprop Sang – vs – Zakayo K. Cheruiyot & 2 others Election Petition (Nairobi) NO. 1 of 2013*. However, Rule 19(2) of the Rules empowers election Courts to extend the timelines prescribed by the Rules. Because of the great importance attached to the issue of extension of time, it is useful at this stage to set out the provisions of Rule 19 of the Rules:

“19(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections 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 omission 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 determine.”

6. Rule 12(9) of the Rules also gives power to the election Court, either on its own motion or on the application by any party to the petition, to direct a party or witness to file a supplementary affidavit.

Analysis

7. From the foregoing provisions, I am satisfied that the applicants herein are entitled to the leave sought to file supplementary and additional affidavits with a view to facilitating the just, expeditious, proportionate and affordable resolution of the matters in controversy in this petition. In my humble view, no prejudice shall be suffered by the 1st, 2nd and 3rd respondents if the leave sought is granted.

Conclusion

8. In the circumstances of this case, the application made by the petitioner and the 4th Respondent be and are hereby allowed. Leave is accordingly granted to the applicants to file affidavits as follows:

(1) The Petitioner is granted leave to file three additional witness affidavits.

(2) The 4th Respondent is granted leave to file a supplementary affidavit by the 4th Respondent and two additional witness affidavits.

(3) All the affidavits shall be filed and served upon all the other parties within Seven (7) days from the date of this ruling, that is on or before 31.10.2017.

(4) Costs of these applications shall await the outcome of the petition.

Orders accordingly

Ruling delivered, Dated and signed in open court at Kakamega this24thday of
.....October2017

RUTH N. SITATI

JUDGE

In the presence of:-

M/S Akusala & Co (absent).....for Petitioner

Mr. Busiega for Mr. Rono (present).....for 1st and 2nd Respondents

Mr. Busiega (present).....for 3rd Respondent

M/S Amasakha & Co (absent).....for 4th Respondent

Mr. Polycap Mukabwa.....Court Assistant