



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ELECTION PETITION NO. 1 OF 2017

HON. MARY EMAASE OTUCHO.....PETITIONER /RESPONDENT

VERSUS

HON. GEOFFREY OMUSE.....1ST RESPONDENT/ APPLICANT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....2ND RESPONDENT

RULING

The applicant/1st respondent has moved this court by way of Notice of Motion dated 18th September 2017 pursuant to section 80 of the Elections Act, Rules 4, 5 & 19 of the Elections (Parliamentary and County Elections) Petition rules, 2017, Article 159 of the Constitution of Kenya and all enabling provisions of the law for orders in the following terms:

1. That the time limited by the Elections (Parliamentary and County Elections) Petition rules, 2017 for filing of a response to the petition and the replying affidavit thereof by the 1st respondent/applicant be extended and the response to petition and the affidavits filed by the 1st respondent on 14th September 2017 be deemed to have been filed within time.
2. That the costs be provided for.

The application was opposed and the petitioner/respondent prayed for its dismissal.

The applicant has contended that the failure to file a response within the requisite time was informed by an error of the legal position on filing. The contention is that when the time within which to file a response was reduced from 14 to 7 days, it escaped the notice of the applicant's counsel and only realized of the change at the time of the purported filing. The time was amended by a gazette notice dated 24th July 2017.

Section 80(d) of the Elections Act in respect to an election court states that the court is enjoined to:

decide all matters that come before it without undue regard to technicalities

Whereas Rules 4&5 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provide

as follows:

4. (1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.

(2) An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).

Objective of these Rules.

5. (1) The effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159 (2) (d) of the Constitution.

(2) A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and, for that purpose, to participate in the processes of the election court and to comply with the directions and orders of the election court.

In opposition, the petitioner has argued that the timelines are constitutional and that they are “cast in stone”. I was referred to several authorities and Constitutional as well as Statutory provisions while being urged to dismiss the application.

I do agree with the Petitioner that the Election Act and Rules are borne by the Constitution. This being the case, the genetic traits of the Constitution must be seen in the form and in the character of the said statute and rules. Article 87(1) of the Constitution of Kenya provides:

Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

Since the framers of the constitution were very particular on timelines, it was not left at the discretion of parliament. The first block on which to build on was provided for. In Article 87(2) it provides:

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.

The Supreme Court in **GATIRAU PETER MUNYA vs. DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR** the Supreme Court observed as follows:

...the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81(e) and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.

I have looked at the other cited decisions and I have come to the conclusion that contrary to the contention by the petitioner, Rule 19 (1) of The Elections (Parliamentary and County Elections) Petitions Rules, 2017, gives discretion to the court to expand time in the interest of justice and fair play. This is what it provides:

(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 determined.

My interpretation of the same is that if sufficient reasons are given, the court may expand time for filing a response but not the petition or the time within which to hear and determine a petition. This is in agreement with Article 159(2) of the constitution which provides:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

Having listened to counsel on record, perused the cited authorities I am satisfied that the application is merited. Safe to add that it is a wrong procedure to have filed the application without leave of the court and only seek the court to ratify the same. The proper approach would have been to attach a draft response for court's perusal. Since no prejudice will be suffered by any party, I will ignore the erroneous procedure adopted. The application is therefore allowed and the response is deemed as filed on payment of the requisite fees. If need be, the petitioner is given seven days to file an answer. Costs be in the petition.

DELIVERED and SIGNED at BUSIA this 23rd day of October, 2017

KIARIE WAWERU KIARIE

JUDGE