



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**THE ELECTIONS ACT 2011**  
**ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION)**  
**PETITIONS RULES 2015**  
**ELECTION PETITION NUMBER 1 OF 2017**

**JEREMIAH NYANGWARA MATOKE.....PETITIONER**

**VERSUS**

- 1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**
- 2. THE RETURNING OFFICER**
- 3. ALFAH MIRUKA ONDIEKI .....RESPONDENTS**

**R U L I N G**

1. This ruling relates to an application dated 4<sup>th</sup> October 2017 filed pursuant to **Article 159 and 35 of the Constitution, Section 80 (1) (d) and (3) of The Elections Act No. 24 of 2011, rule 9 and rule 11 (8) of the Elections (Parliamentary and County Elections) Petitions Rules**. In the said application the petitioner/applicant seeks orders that:

- 1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents to be compelled by way of an order of mandatory injunction to provide and supply to the petitioner certified copies of forms 35As and Polling Station Diary (PSD) for each polling station within our Bomachoge Chache constituency.**
- 2. This honourable court do issue an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to preserve, maintain and keep in safe custody all but not limited to original forms 35A, 35B, Polling Station Diaries (PSD) for all polling stations for Bomachoge Chache constituency, KIEMS KITS and the website in respect of Bomachoge Chache constituency pending the hearing and determination of this petition/ scrutiny or further order of the court.**
- 3. That leave be granted to the petitioner to file supplementary affidavits in support of the petition herein.**
- 4. Costs of this application be in the cause.**

2. The application is supported by the petitioner's affidavit sworn on 4<sup>th</sup> October 2017 wherein he avers that upon perusing the replying affidavit of one Amos Nyongesa Chilai sworn on 15<sup>th</sup> September 2017,

he noted that the several forms 35As that were attached to the said replying affidavits have several inconsistencies such as lack of serial numbers, signatures of agents and were not stamped thereby making him draw the conclusion that the said forms had been tampered with and were therefore not authentic, verifiable or accurate. He deposes that the forms supplied to him by the 1<sup>st</sup> respondent via email were materially different from those that were supplied at the polling stations and that this is what formed the basis of his application to be supplied with the certified copies of all the original forms 35As and a further prayer for leave to be allowed to file a further affidavit so as to present such evidence as shall be received from the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

3. He outlined the details of the inconsistencies and discrepancies between the forms 35As and those annexed to his affidavit in support of the Petition. He further avers that he has engaged the services of an expert to analyze the data supplied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and sought leave to be allowed to file the expert's report and/or affidavit.

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application through the replying affidavit of Amos Nyongesa Chilai dated 8<sup>th</sup> October 2017 who deposes that the 1<sup>st</sup> respondent has in compliance with the Elections Act and Elections (Technology) Regulations, kept all election materials used in the election of Member of Parliament for Bomachoge Chache constituency in safe custody. He also states that all the annexures to the 1<sup>st</sup> and 2<sup>nd</sup> respondents replying affidavit in response to the petition are authentic and true copies of the forms used to declare the results. He further states that the applicant is barred from adducing any new evidence after the lapse of 28 days from the date of declaration of election results.

5. He also states that the applicant had not laid any proper basis for grant of the orders sought in the motion which he maintained was misconceived and unmerited.

6. The 3<sup>rd</sup> respondent opposed the application through his affidavit sworn on 9<sup>th</sup> October 2017 in which he avers that the applicant had ample time to gather evidence before filing the instant petition and therefore it was already inordinately late for the petitioner to seek leave to file a further affidavit. He deposes that it is quite outrageous that the petitioner has decided to engage an expert to analyze data relating to his petition contrary and outside the provisions of **Article 87 (2) of the Constitution** that allows a petitioner a period of 28 days after the declaration of results to prepare and file his petition.

7. He states that it will be totally impractical for the respondent to file a response based on the new materials that the petitioner seeks to introduce going by the strict timelines stipulated under **Article 87 (1) 92) of the constitution, Section 75 of The Elections' Act 2011 and the provisions of the Elections (Parliamentary and County Elections) Petitions Rules.**

8. He further avers that it will be extremely prejudicial to his case if the application was allowed because he had already filed a response based on the evidence already placed before the court by the petitioner and states that the application amounts to a fishing expedition which is an affront to the spirit and letter of the Constitution which envisages a speedy and efficient resolution of electoral disputes.

9. When the application came up for hearing on 10<sup>th</sup> October 2017, parties agreed by consent as follows:

**a) That prayer 3 of the application be granted by allowing the petitioner or his agent to place extra seals on the ballot boxes for all the polling stations in BomachogeChache constituency in the presence of agents or representatives of the 3<sup>rd</sup> Respondent on 6<sup>th</sup> October 2017 at 10 a.m.**

**b) Prayer 2 be dispensed with as the forms 35As are part of the record and the petitioner be at liberty to test their veracity during cross- examination.**

**c) Prayer 4 be canvassed by the parties.**

10. Counsel then presented their arguments in respect to prayer 4 of the instant application as follows:

11. Mr. Oonge, learned counsel for the applicant submitted that the prayer for leave to file a supplementary affidavit to the petition had been necessitated by the contradictory documents that had been filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents which documents were totally different from the documents that had earlier been supplied to the applicant by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He maintained that **Section 80 (1) (d) of the Elections Act and Rule 19 (1) of the Elections (Parliamentary & County Elections) Petitions Rules** grants the court the jurisdiction to enlarge time and grant the orders sought so as not to impede justice.

12. Miss Olando, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, submitted that applicant had ample opportunity to engage an expert before filing the petition and therefore, the applicants reason in the application that he had engaged an expert whose further affidavit he needed to file was not plausible. She further submitted that no reason had been given for the long delay in engaging the services of an expert. It was Mrs. Olando's case that the filing of a further affidavit in this case was not a procedural technicality, but was rather, an issue that goes to the substratum of the petition. She referred to the Election Disputes Resolution Bench Book write up on further affidavits and submitted that it frowns upon a petitioner who seeks to file a further affidavit or adduce further evidence after the expiry of 28 days after the declaration of election results. She maintained that filing a further affidavit after the expiry of 28 days will therefore be tantamount to adducing new evidence after the expiry of the 28 days' time limit, a scenario that will prejudice the respondent who had already made a response to the petition.

13. It was also the 1<sup>st</sup> and 2<sup>nd</sup> respondent's case that the alleged discrepancies in forms 35As were issues which can best be canvassed on cross examination during the hearing and not through a further affidavit.

14. Mr. Omogeni learned Senior Counsel for the 3<sup>rd</sup> respondent submitted that the application is frivolous and grounded on issues that can be dealt with during cross examination. He argued that the court may not be able to meet its timelines in determining this petition if the application is allowed. He echoed the 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel's submissions that the petitioner had ample time and the forms 35As for analysis before filing the petition and that the application was therefore a clear attempt to mislead the court.

15. It was therefore the 3<sup>rd</sup> respondent's case that allowing the application will set a bad precedent that would allow parties to approach court in a casual manner contrary to the intention of the provisions of the laws governing election petitions in this country.

16. He referred to the provisions of **Rule 12 (1) and (3) of the Elections (Parliamentary and County Elections) Petitions Rules** and argued that if the petitioner's intention was to present an expert witnesses affidavit, then the time to do so was at the time he filed the petition. He further contended that jurisprudence dictates that a party should annex the nature of evidence he intends to present in court so as not to present evidence that takes a different direction from the case that is already before the court and that no material had been availed to show that the further affidavit will be limited only to issues already before the court.

17. I have considered the application dated 4<sup>th</sup> October 2017 and I note that after the parties agreed on the granting of prayers 2 and 3 thereof, the only prayer for determination is prayer 4 in which the applicant seeks orders that he be granted leave to file a supplementary affidavit to the petition.

18. I have considered the arguments advanced by all the parties in respect to this prayer and I note that even though **Rule 15 (1) (h) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** grants an election court the discretion to allow the filing of further affidavits and admit new or additional evidence, the said application for adduction of new and additional evidence must be made within 28 days of the declaration of the results of the election where the new or additional evidence, if it were to be admitted and acted upon, would have the effect of amending the election petition. **Section, 76 (4) of the Elections Act** stipulates as follows:

### **Presentation of petitions**

**“(4) A petition filed in time may, for purposes of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the court within the time within which the petition questioning the return or that election upon that ground may be presented.”**

19. The law on adduction of new or additional evidence was discussed and settled by the Supreme Court case of in the **Raila Odinga Vs Independent and Electoral and Boundaries Commission and 3 others, Supreme Court Petition No. 5 of 2013** wherein it was held that an election court will not grant an application for the adduction of new or additional evidence where the grant of such an application will prejudice other parties to the dispute or undermine the constitutional imperative of timely resolution of electoral disputes.

20. In the said **Raila Odinga case** (supra), the supreme Court gave guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence which guidelines have been condensed in the Bench Book on Electoral Disputes Resolution as follows:

- **The admission of additional evidence is not an automatic right. Instead, the election court has a discretion on whether or not to admit the evidence;**
- **Further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondent’s ability to respond to the said evidence;**
- **The parties to an election petition should strive to adhere to the strict timelines set out in EDR laws; and**
- **Admission of new evidence must not unfairly disadvantage the other parties to an election petition.**

21. In the instant case, the applicant states that his prayer to be allowed to file a further affidavit has been necessitated by the discrepancies appearing in the forms 35As that had been supplied to him by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, which he contended, he had hired an expert to analyze and make a report in respect thereof to court.

22. The respondents, on their part argue, that the reasons advanced by the applicant for seeking to file a further affidavit were neither convincing nor acceptable because he (applicant) already had ample time of 28 days after the declaration of the impugned election results to engage the services of the intended expert.

23. It is noteworthy that the applicant did not disclose the nature of expert evidence he intends to tender before this court through the proposed further affidavit so as to enable this court, in exercising its discretion, to discern whether or not the new evidence to be introduced will have the net effect of changing the character of the petition or affect the respondents’ ability to respond to it. Furthermore, the applicant did not explain, to the satisfaction of this court or at all, the reasons for his delay in availing the said evidence within the given time frame of 28 days after the declaration of the election results, bearing in mind the strict timelines given to court in determining election petitions.

24. This court is in total agreement with the submissions of counsel for the respondents that allowing the instant application will create a dangerous precedent in which parties will take the liberty to belatedly approach the court in a casual manner and without full disclosure of the intended new evidence, a practice or eventuality that may jeopardize the speedy and efficient determination of election petitions. Needless to say, the respondents’ apprehension that the evidence to be introduced in the intended new affidavit may jeopardize their case cannot be wished away or overlooked.

25. The instant petition was filed on 5<sup>th</sup> of September 2017 and this means that as at the time of delivering this ruling on 19<sup>th</sup> October 2017, more than 1 and ½ months has already been spent out of the 6 months period that this court is supposed to have heard and determined the entire petition. My take is that it is as a result of the strict timelines provided for by the law for determining electoral disputes that the law makers deemed it fit to fix strict timelines within which pleadings have to be filed and in this case, I find that the application for adduction of further evidence through the filing of further affidavit is not only

unmerited but will also contravene the clear provisions of Constitution and the Elections Act.

26. In conclusion therefore, I find that the instant application is unmerited and the order that commends itself to me is the order to dismiss it with further orders that costs shall abide the outcome of the petition.

**Dated, signed and delivered in open court this 19<sup>th</sup> day of October, 2017**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Oonge for the Petitioner

Mr. Miss Olando for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Mr. Omgeni for the 3<sup>rd</sup> Respondent

Omwoyo: court clerk