



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION NO. 8 OF 2017

**IN THE MATTER OF THE ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY OF
EMBAKASI EAST CONSTITUENCY BETWEEN**

FRANCIS WAMBUGU MUREITHI.....PETITIONER

VERSUS

OWINO PAUL ONGILI BABU1ST RESPONDENT

NICHOLAS K. BUTTUK2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION3RD RESPONDENT

RULING

1) The subject matter of this ruling are four applications. The petitioner filed two of the aforesaid applications, namely the motion dated 20.9.2017 and the other dated 26.9.2017. The 1st respondent filed the motion dated 23.9.2017 while the 2nd and 3rd respondents jointly filed the motion dated 2nd October 2017. When the aforesaid motion came up for interpartes hearing, this court gave directions to have them argued together.

2) Francis Wambugu Mureithi, the petitioner herein, took out the motion dated 20.9.2017 in which he sought for the following orders:

1. THAT this honourable court be pleased to order that this petition proceed as undefended and/or unopposed.

2. THAT this honourable court be pleased to grant an order that the petition is conceded.

3. THAT the costs of this application be met by the respondents.

3) When served with the motion, Paul Ongili Owino Babu, the 1st respondent filed a replying affidavit to oppose the aforesaid motion. Nicholas Buttuk and Independent Electoral Boundaries Commission being the 2nd and 3rd respondents filed the replying affidavit of Nicholas Buttuk to oppose the motion.

4) The petitioner also took out the motion dated 26th September 2017 whereof he sought for the following orders:

1. THAT the response(s) to the petition filed on 20th of September, 2017 and 25th September, 2017 by the 1st, 2nd and 3rd respondents be and are hereby struck out.

2. THAT the costs of this application be provided for.

The aforesaid motion is also supported by the affidavit sworn by the petitioner.

5) When served, the 1st respondent filed a replying affidavit he swore to oppose the motion, while the 2nd and 3rd respondents filed the replying affidavit of Nicholas Buttuck to resist the motion too.

6) On the other hand, the respondents each filed an application in which they sought for near similar orders. The 1st respondent took out the motion dated 23rd September 2017 in which he sought for the following orders:

1. THAT this application be heard contemporaneously with the application dated 20th September 2017 filed by the petitioner.

2. THAT the honourable court be pleased to extend the time for the filing of a response to the petition dated 5th September 2017.

3. THAT consequent upon prayer 2 above, the honourable court be pleased to deem the response filed by the 1st respondent on 20th September 2017 as properly on record.

4. THAT the costs of and occasioned by this application be in the cause.

The motion is supported by the affidavit sworn by the 1st respondent.

7) When served, the 2nd and 3rd respondents did not respond to the 1st respondent's motion. However, Mr. Odhiambo, learned advocate for the 2nd and 3rd respondents indicated that the 2nd and 3rd respondents supported the 1st respondent's motion. The petitioner filed grounds of opposition to oppose the application.

8) The 2nd and 3rd respondents on their part took out the motion dated 2/10/2017 in which they sought for the following orders:

1. THAT this application be heard contemporaneously with the application dated 20th September 2017 and application dated 26th September, 2017 filed by the petitioner.

2. THAT the honourable court be pleased to extend the time of filing of the responses to the petition dated 5th September, 2017.

3. THAT subsequent to and or consequent to prayer 2 hereinabove, the response to the petition dated 23rd September, 2017 and the replying affidavit to the petition and witness affidavit is support to the response as filed by the 2nd and 3rd respondents on the 25th September 2017 deemed to be properly filed and fully on record.

4. THAT costs of this application be provided for.

9) The aforesaid motion is supported by the affidavit of Nicholas Buttuk. When served with the aforesaid motion neither the petitioner nor the 1st respondent filed any response to the same.

10) Learned counsels appearing in this matter were invited to make oral submissions. The substantive matter in this dispute is the petition filed by Francis Wambugu Mureithi in which he is seeking for inter alia, that the election of Owino Paul Ongili Babu as the member of the National Assembly of Embakasi East Constituency declared as null and void. It is the submission of Mr. Lagat, learned advocate for the petitioner, that the petition was served upon the respondents on 8/9/2017 vide a newspaper advertisement of the same date but the respondents failed to file an answer to the petition within 7 days from the date of service as required under Rule 11(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017. It was pointed out that as of 20th September 2017, twelve days had lapsed from the date of service yet the respondents had not filed their notices of address of service nor their responses to the petition. The petitioner therefore invited this court to make inference that the respondents had conceded to the petition having tendered no excuse for the failure to comply with the Election Rules.

11) Mr. Awele, learned advocate for the 1st respondent argued to oppose the motion. The learned advocate heavily relied on the 1st respondents averments. It is the 1st respondent's submission that he learned of the filing of the petition through the social media and that he was formally served on 26th September 2017 and that he managed to respond to it six days from the date of service. The 1st respondent avers that he was informed on phone by one of his aides on 11.9.2017 that a petition against election had been advertised in newspapers of 8th September 2017. Upon receipt of the information, the 1st respondent stated that he immediately called the petitioner's advocate to physically serve him or his advocate but he could not reach him. It is also stated that the 1st respondent attempted to call the petitioner's advocate on 12.9.2017 but his calls were not received forcing the 1st respondent to cut-short his countryside trip to travel back to Nairobi and managed to collect the petition on 13.9.2017 and was unable to fix an appointment with his lawyer until 15.9.2017. The 1st respondent's advocate eventually filed a notice of address of service on 18.9.2017. The 1st respondent also averred that his advocate was unable to answer to all the issues raised in the petition in view of the large number of witnesses who were willing to record their statements. The 1st respondent managed to serve the petitioner's advocate with the replying affidavits and the documents on 20th September and 21st September 2017 respectively. It is the submission of the 1st respondent that the delay in filing his response was not deliberate but inadvertent due to his failure to see the newspaper advertisement. The 1st respondent beseeched this court to exercise its discretion to extend time in his favour instead of treating the petition as undefended.

12) The 2nd and 3rd respondents stated that a copy of the petition was physically served upon the 3rd respondent on 16th September 2017 and their advocates received instructions on 17.9.2017 and by 25.9.2017 they filed their responses to the petition believing that they had done so in the stipulated time. The 2nd and 3rd respondents aver that they did not see the newspaper advertisement made on 8/9/2017, which meant time to file a response to the petition lapsed on 15.9.2017.

13) The 2nd and 3rd respondents averred that the failure to see the advert was inadvertent and due to the numerous number of petitions filed against them. They too beseeched this court to exercise its discretion in their favour to extend time to file their responses to the petition out of time.

14) I have carefully considered the grounds set out on the face of the motion dated 20th September 2017 plus the facts depend in the supporting affidavit. I have further considered the rival oral submissions. It is not in dispute that pursuant to the provisions of Rule 11(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 that a respondent is required to file a response to a petition within 7 days from the date of service. It is also not in dispute that this court has the discretion to extend time limited to do something or take a step by the rules and or by the court.

15) Having set out the relevant provisions guiding this court, the question which has to be answered is whether or not the respondents have established good grounds to enable this court exercise its discretion in their favour.

16) The aforesaid question may be answered by considering the arguments made in favour and against the

two motions filed by the respondents.

17) In the motion dated 23rd September 2017, the 1st respondent has asked this court to extend time for filing a response to the petition dated 5.9.2017. The 2nd and 3rd respondents have too taken out the motion dated 2nd October 2017, in which they too sought for similar orders as those prayed for by the 1st respondent. It is the submission of the 1st respondent that the failure to file his response with the time stipulated by the Rules was as a result of circumstances beyond his control. First, it is said that the 1st respondent did not see the newspaper advert until his aide brought the same to his attention. It is also stated that it took time to prepare a comprehensive response to the numerous issues raised in the petition. The 2nd and 3rd respondents have also stated that they did not see the newspaper advertisement therefore they were unable to file their responses on time. They submitted that the delay was inadvertent and not negligent. The petitioner opposed the aforesaid motions by filing grounds of opposition. This mode of response by the petitioner poses a challenge because the affidavit averments remains uncontroverted. It is the submission of the petitioner that the court should not aide a party who has intentionally delayed in filing and serving court processes prescribed by the rules. It was also submitted that the delay is inordinate and inexcusable.

18) Having considered the material placed before this court together with the oral submissions made by learned counsels, I am convinced that the applications made by the respondents may be treated as direct responses to the applications made by the petitioner. I have already set out the sort of orders sought for by the petitioner in the motion dated 20.9.2017 and 26.9.2017. The petitioner has beseeched this court to strike out the responses filed by the respondents and thereafter proceed to treat the petition as undefended in view of the respondents' failure to file their responses in time and or not at all. The respondents have stated that they did not see the newspaper advert and that even after they were physically served it took them time to prepare their responses. The respondents' averments were not controverted by way of affidavit evidence by the petitioner. I am satisfied that I should exercise my discretion in favour of the respondents. I am convinced that they have given plausible reasons as to why they did not respond to the petition within the time prescribed by the rules. I have no reason not to believe the respondents' assertion that they did not see the newspaper advert of 8/9/2017. I am also convinced that due to the many issues raised in the petition which needed to be answered gave rise to inadvertent delay. If I grant the orders sought by the petitioner, it will mean that the entire petition will be decided without giving the respondents a right of hearing. I find the respondents' delay in filing their responses to the petition not contumelious nor inordinate. The delay is excusable and has been properly explained.

19) For the above reasons and in broad interest of justice, the petitioner's motions should be disallowed and those of the respondents allowed.

20) In the end and for the avoidance of doubt, I make the following orders:

i. The petitioner's motions dated 20.9.2017 and 26.9.2017 are hereby dismissed with each party bearing its own costs.

ii. The 1st respondent's motion dated 23.9.2017 and that of the 2nd and 3rd respondents dated 2nd October 2017 are allowed. Consequently, time to respondent to the petition dated 5/9/2017 is extended hence the responses so far filed by the 1st respondent filed on 20.9.2017 and that of the 2nd and 3rd respondents filed on 25.9.2017 are deemed to be properly filed and served.

iii. Each party to meet its own costs of the aforesaid motions.

Dated, Signed and Delivered in open court this 18th day of October, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent