



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
ELECTION PETITION NO. 7 OF 2017
IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 201 LAWS OF KENYA,
THE ELECTIONS (GENERAL) REGULATIONS MADE THEREUNDER
AND THE POLITICAL PARTIES ACT NO.11 OF 2011

AND

**IN THE MATTER OF: ELECTIONS OF MEMBER OF NATIONAL ASSEMBLY, DADAAB
 CONSTITUENCY**

BETWEEN

ABDIKHEIR ABDULLAHI DUBOW.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...1ST RESPONDENT

ISAACK MUHUMED MOHAMUD,

RETURNING OFFICER

DADAAB CONSTITUENCY.....2ND RESPONDENT

MOHAMED DAHIR DUALE.....3RD RESPONDENT

RULING

1. On the 6th of September 2017 the Petitioner Abdikheir Abudullahi Dubow filed a petition against the Respondents. The 3rd Respondent filed his response to the petition on the 15th of September 2017. The 1st and 2nd Respondents filed their response to the petition together with a Notice of Motion dated the 25th of September 2017 seeking to be allowed to file a response to the petition out of time. The response is dated the 19th of September 2017 and the application is supported by the affidavit of Julius Otieno Olaha the advocate of the 1st and 2nd Respondents. The 1st and 2nd Respondents filed replying affidavits of Mohamed Mohamud Gurhan, Daudi Hussein Mohamed, Saadia Dahir Noor, and Fatuma Yussuf Ali on the 9th of October 2017 which they had sought leave to file out of time. The application was opposed

by the Petitioner. The 3rd Respondent did not oppose the application.

2. Oral submissions were made in court. The 1st and 2nd Respondents submitted that by reason of the multiple petitions being filed at the same time it has been wrought with administrative exigencies and had to ensure that the manifold of petitions served on it are allocated to different advocates. That in the process the petition was assigned to an advocate who was not comfortable with handling the same by reason of difficulty of having to travel to Garissa for the same. That the petition was then sent back to the 1st and 2nd Respondents who assigned it to Garane and Somane advocates who agreed to handle the petition. That it was also an uphill task trying to get hold of the election official who was in charge of the conduct of the election in Dadaab Constituency to answer to the allegations made therein and depose of the affidavit. That the officer honoured the numerous summons made to him and travelled to Nairobi and they were able to respond hence the delay. That neither the Petitioner nor the 3rd Respondents will be prejudiced if the application is granted, that the quest for justice by the parties herein should be not quelled by procedural impropriety. That the petition can only be determined properly to its logical conclusion on merit if the application is allowed and matters germane to the petition placed before the court for determination. The applicant relied on Article 159 (2) of the Constitution and urged the court to grant their application.

3. The Petitioner in opposing the application submitted as follows; Rule 11 (1) of the Election Petition Rules (2017) provides that upon being served with the petition the Respondent may oppose the petition by filing and serving the response within 14 days. That Rule 11 (8) states that a Respondent who has not filed a petition as required under the rule shall not be allowed to appear or act in person. The court was asked to take note that the word shall is used and therefore the court should not allow the application. That Rule 11 (4) of the said Rules does not aide the applicant. That Article 159 of the Constitution deals with technicalities and in their view justice should not be delayed.

4. In response Mr. Olaha relied on Rule 19 (1) of the said rules arguing that the drafter of the said section were aware of situations that could arise like the one the 1st and 2nd found themselves in. That by sheer mistake and justifiable cause the 1st and 2nd Respondents due to the timelines that were not strict could not respond to the petition without having to procure the affidavits.

5. I have considered the submissions by the parties on the 1st and 2nd Respondent's application. Rule 11 (1) provides as follows; *"upon being served with a petition in accordance with rule 10, a Respondent may oppose the petition by filing and serving a response to an election petition within fourteen days"*. Rule 11 (8) provides that; *"A Respondent who has not filed a response to a petition as required under this rule shall not be allowed to appear or act as a party in the proceedings of the petition"*. The 1st and 2nd Respondents have sought to rely on Rule 19 (1) which provides for extension and reduction of time. The said rule provides as follows; *"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, extent 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 be expired"*. The main purposes and aim of the rules is provided under Rule 4 which states as follows; 4 (1) *"The Objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions"*. 4 (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)"*.

6. An Election court has an obligation to exercise its discretion as provided under the Election Act and Rules and Constitution. The overriding objective of the Rules is to facilitate the just expeditious proportionate and affordable resolutions of elections petitions. The 1st and 2nd Respondents have explained the reasons for the delay. They were served within time but had difficulties in getting counsel to prepare a response within time and also they had difficulties in getting the deponent of the affidavit in response. They also stated that they had pressure of work and only managed to file their responses on the dates indicated. Rule 19 (1) gives the court discretion to extend time for an act of omission that was to be

done within a specific time. The 1st and 2nd applicant 's application seeks leave to be allowed to file their response to the petition out of time including the affidavits presented in court on the 9th of October 2017 to enable them defend the petition. Rule 19 gives this court power to extend time if satisfied that the reasons given are reasonable. The delay has been sufficiently explained and is not inordinate. The Petitioners will not suffer any prejudice. The 1st and 2nd Respondents need to be a part of this petition in order to facilitate a just, expeditious, proportionate and affordable resolution to the election petition before this court. This court therefore allows the 1st and 2nd Respondents application to file their response out of time. Their response filed on the 28th September 2017 shall be deemed as the 1st and 2nd Respondent's response to the petition. The affidavits filed by the 1st and 2nd Respondent s on the 9th of October 2017 shall be part of their response to the petition. Costs shall be in the cause.

Dated, signed and delivered this 17th Day of **October 2017**.

R. E. OUGO

JUDGE

In the presence of:

Mr. Githinji h/b For Mr. Noor For the Petitioner

Mr. Olaha For the 1st and 2nd Respondents

Miss Lipwop For the 3rd Respondent

Ms. Charity Court clerk