



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
PETITION NO.1 OF 2017

LESRIMA SIMEON SAIMANGA.....PETITIONER

- V E R S U S -

INDEPENDENT AND ELECTORAL

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER

SAMBURU COUNTY.....2ND RESPONDENT

LENOLKULAL MOSES KASAINIE.....3RD RESPONDENT

R U L I N G (1)

The application before me is dated 12/10/2017. It was filed by the petitioner pursuant to Articles 19, 20, 22, 23(3), 27(1), 48 and 50 of the Constitution, Rule 11 and 36 of the Elections (Parliamentary and County Elections) Petition Rules 2017 and other enabling provisions of law.

The applicant seeks an order that this court do order the striking out and expunging from the records of this court, for want of service within the statutorily prescribed time, the responses and/or affidavits, together with the annexures therein as filed by 1st, 2nd and 3rd respondents. The grounds upon which the application is founded are *inter alia*, that the responses by the respondents were filed outside the time stipulated by the law; that the petition was lodged in court on 6/9/2017 within the time allowed by the law and was served by way of advertisement in the newspaper; that the responses to the petition should have been filed and served on the petitioner within 7 days of service; that the responses and affidavits were filed outside the stipulated time without the leave of the court, are improperly on record and prejudicial to the petitioner. The petitioner filed an affidavit reiterating the same grounds.

Mr. Mombo, counsel for the petitioner submitted that the advertisement was in the newspaper on 12/9/2017, and it had instructions that the petition should be collected from Nanyuki High Court; that the 1 – 2nd respondents were served in Nairobi the on same day whereas the 3rd respondent could not be traced; he urged that the petitioner complied with the law which provided that service will be direct or through an advertisement in the newspaper; that the respondents should have filed the responses by 19/9/2017 but failed to do so till 6 days later on 25/9/2017. Counsel also submitted that on 18/9/2017, there was a mention at Nanyuki High Court where counsel for the respondents attended, meaning that they were aware of the filing of the petition and if they required more time, they should have raised the issue then. Counsel relied on the decision of **Bashir Haji Abdulahi v Aden Mohamed Nooru EP.7/2013 (Garissa) KLR** where the court held that parties should not act in ignorance of the Rules.

The 1st & 2nd respondents opposed the application and filed the application dated 18/10/2017. By that application, the 1st and 2nd respondents to the petition seek an order that the time for filing of their responses and affidavits under Rule 11(1), 12(5), (6) and (7) of the Elections (Parliamentary and County Elections) Petition Rules 2017 be extended up to and including 26/9/2017 and the documents which have been filed in court be deemed as having been duly filed within time.

The application was supported by grounds found in the application and the affidavit of their counsel, Mr. Karanja, who admitted that the 1st and 2nd respondents learnt of the filing of the petition through a newspaper advertisement; that the 1st & 2nd respondents tried twice in vain to get the petition from the petitioner's advocates' offices till they visited Nanyuki High Court; that due to the myriad of allegations raised in the petition, the 1st & 2nd respondents needed time to collate and collect evidence from the witnesses who were from the different parts of Samburu County.

Mr. Karanja further submitted that the notice in the advert was defective and grossly misleading as it referred to summons but not the petition and that the notice allowed the respondents 5 days to respond instead of the 7 days and that in law that was not proper service. In response to the mention on 18/9/2017 before Nanyuki High Court, counsel urged that the in Nanyuki Court could not have given any directions as this matter had been gazetted to be heard by this court at Nyahururu.

Counsel submitted that the delay of 6 days was not inordinate and Regulation 11 gives time the court discretion because if it was intended to be mandatory the word 'shall' would have been used as it is used under Regulation 10. It was further argued that if the responses were struck out, the electorate of Samburu would suffer injustice and nobody should be condemned unheard.

Counsel relied on the following decisions:

(1) Joshua Mutoto v Werunga Joyce Namunyaki and others Elect. Pet.10/2013 (Kitale) where the court held that the court has power to extend time in order to ensure that injustice is not done to any party;

(2) Mwamlome Hame Tchappu Mbwana v Juma Boy and others E.P.5/2013 (MSA); where court held as in the above case.

(3) Raila Odinga IEBC E.P.5/2013 the court said that granting of an application to strike out responses would result in disposing of the entire case or the respondents at a preliminary stage which cannot be justified if the scales of justice are weighed in favour of all the parties;

The 3rd respondent also opposed the application by the petitioner to strike out the responses to the petition and filed an application dated 18/9/2017 in which he seeks extension of time to file his response to the petition and to admit into the record the 3rd respondent's response to petition filed on 25/9/2017. The said application is founded on grounds found in the application and the affidavit of the 3rd respondent, Lenolkul Moses Kasaine.

Mr. Mwangi, counsel for the 3rd respondent associated himself with submissions made by 1 and 2 respondents' counsel. It is the 3rd respondents contention that when the petition was advertised he was out of the country and he attached an electronic ticket in support thereof; that he had to consult his agents before filing a response; that in any event, the petition was never served on him till he saw it in the court and that the petitioner is not deserving of the orders to strike out responses because he too did not strictly comply with rules of service of the petition.

Mr. Mwangi invoked Article 159(1) of the Constitution and urged that the court should not dwell on technicalities but do substantive justice by extending time; that an election petition is litigation of great public importance and the interests of justice would be in favour of affording all parties a right to be heard. All the respondents urged the court to dismiss the petitioner's application and instead allow their

applications dated 25/9/2017.

I have considered the parties' grounds, affidavits and arguments in the relevant applications. I have also considered the authorities relied upon by the parties. It is not in dispute that the petitioner placed an advertisement in the Standard Newspaper of 12/9/2017, serving the election petition under consideration in accordance with Rule 10(b) of the Rules 2017. A copy of the said notice was shown to the court as it had not been annexed to the application.

Rules 10(1) & 11 provide as follows:

“10.(1) Within seven days after the filing of a petition, the petitioner shall serve the petition on the respondent by:

(a) Direct service; or

(b) An advertisement that is published in a newspaper of national circulation.

11. (1)(2)

(1) 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.

(2) The response to a petition under sub-rule (1) shall be in Form 4 set out in the First Schedule.”

Rule 11 of the Election (Parliamentary & County) Petition Rules 2017 was amended and requires a response to a petition to be filed within 7 days.

The respondents have complained that the said notice was defective in that it referred to filing of summons and allowed the respondent only 5 days to reply instead of the 7 days.

I have seen the advertisement and it clearly indicates that it is '***SERVICE OF ELECTION PETITION BY ADVERTISEMENT***'. The parties were properly named thereon. Although the word '***Summons***' is used, it also provides that both summons and the petition will be obtained at the High Court of Kenya at Nanyuki. Although the 5 days indicated in the notice was indeed a defect, it was not so serious as to be misleading. It was clear that a petition had been filed, nothing barred the respondents from filing their responses within the 7 days stipulated in the law because the court would be guided by the statutory time allowed in the Rules. In my considered view, the defects in the advertisement were not so serious as to mislead and it is deemed to be a proper advertisement for purposes of serving the petition. The defect in the advertisement was no reason for the respondents to delay in filing their responses.

One of the reasons given by the 3rd respondent for failing to reply in time was that he had traveled out of the country. Before the amendment of the Rules on service, it was common practice for persons who had won elections and who may have anticipated a challenge to their election to go underground or travel out of the court's jurisdiction to avoid service of the petition. That mischief was cured by introducing service of the petition through advertisement under Rule 10(b). I do not know whether the 3rd respondent by leaving the country at a time when there was likelihood of challenge to his victory was meant to defeat service because the reason for his travel at the time was not disclosed. Service of the petition is now by way of direct service under Rule 10(a) or advertisement under Rule 10(b) and service was proper.

Rule 19 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 justice 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.”

Rule 19 empowers this court to extend or reduce time for doing anything for purposes of ensuring any injustice is not done to a party.

The Supreme Court in *Raila Amollo Odinga v IEBC Supra* and *Wavinya Ndeti v IEBC, 2017*, said, whereas the court’s emphasized the need for the courts to adhere to timelines in Election Petitions, yet the court has to exercise its discretion judiciously wherever it is required to do so.

In this case, if the court were to deny the respondents an opportunity to file their responses out of time, it would mean that the petition would proceed undefended meaning that a good number of the Samburu County electorate would be unheard and hence locked out of the seat of justice.

Rule 5 provides as follows:

“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.”

These Rules are meant to ensure that justice is done to all parties to an election petition without undue regard to technicalities. In this case, the delay of 6 days to prepare the responses was not inordinate and besides, the petitioner did not allude to any prejudice that they are likely to suffer if the responses are not struck out. The respondents will not occasion any delay because they have already filed draft responses.

The upshot is that I decline to grant the petitioner’s application dated 12/9/2017 and dismiss it. Instead, I do allow the respondents applications dated 18/9/2017. The responses to the petition dated 25/9/2017, filed by all the respondents be and are hereby deemed to be duly filed and served.

Costs to be in the cause.

Dated, Signed and Delivered at NYAHURURU this 22nd day of November, 2017.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mombo for petitioner

Mr. Karanja for 1st & 2nd respondents

Mr. Mwangi & Ms. Peinan for 3rd respondent

Soi – Court Assistant