



**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.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER**

**SAMBURU COUNTY.....2<sup>ND</sup> RESPONDENT**

**LENOLKULAL MOSES KASAINIE.....3<sup>RD</sup> RESPONDENT**

**R U L I N G(4)**

The application dated 13/10/2017 was filed by the petitioner who prays that the petitioner be allowed to file additional supplementary affidavits in further support of the Petition and that the affidavits be filed outside the stipulated time.

The grounds upon which the application is made are that the said affidavits contain evidence that will go a long way in guiding the court to arrive at a just decision since the deponents played a major role in the elections; that the deponents of the affidavits were threatened and warned not to record statements and they feared for their lives and went into hiding and hence the delay; that the respondents will not suffer any prejudice.

The application was further supported by the affidavit of the petitioner in which he deponed that he wishes to file affidavits of Elizabeth Lemeteki an agent at Leirr Polling Station, Anderson Lekesike, agent for Kanu Parliamentary candidate Leirr Polling Station and Noolkerin Lalaikipiania voter at the Leirr Polling Station; that the three were present during the voting and it was not possible to get their statements without undue delay for fear of their lives till they were traced and assured of their safety. Counsel made reliance on Rule 15(1)(h) which empowers the court to give directions on filing of further affidavits or give additional evidence and that it should be read with Rule 19(1) to extend time for filing of the affidavits to avoid injustice to the petitioner.

The application was opposed. Mr. Karanja, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that such application would ordinarily not be opposed but the petitioner has not stated what kind of evidence they intend to bring, or what part of the petition they intend to support. Counsel relied on the case of Joel

**Makori v IEBC** where the court held that such application would lead to mischief.

In **Wavinya Ndeti v IEBC**, where the court said that such affidavits would be an attempt to sneak in new evidence whose effect would be to amend the pleadings; that they had asked counsel to serve them with the said affidavits but they failed to do so.

Mr. Mwangi, learned counsel for the 3<sup>rd</sup> respondent adopted Mr. Karanja's submissions and added that the application seeks to widen the scope of the petition as there is no disclosure of the nature of the evidence to be tendered.

I have given due consideration to this application. Under Rule 12(9) the court may on its own motion or on application by any party to the petition, direct a party or witness to file a supplementary affidavit. Under Rule 15(1)(h) during pretrial, the court may give directions as to the filing and serving of any further affidavits or the giving of additional evidence. Further to the above, under Rule 19 of the Rules, the court can extend or reduce the time of doing any act for purposes of doing justice to the parties. Whereas the court has a wide discretion under Rule 15 and 19 to allow the filing of further affidavits, the affidavits should not be allowed to raise new issues or depart from the petition but clarify issues already raised in the petition. The said discretion has to be exercised judiciously.

In this case, the petitioner has not alluded to the kind of evidence that the affidavits are going to include or what part of the petition the affidavit will be supporting.

I would have expected the petitioner to file draft affidavits with the application as was done in **E.P.6/2017 Apungu Arthur Kubira v IEBC E.P.6/2017 (Kakamega)** and the court allowed the filing of further affidavits. In **Wavinya Ndeti v IEBC & 4 others, 2013 KLR, J. Majanja** observed that further evidence contained in further affidavits could be in addition to existing evidence or it could be entirely new evidence but that as far as the new evidence assists the court in the fast disposal of the matter, it may be allowed.

In **Raila & 2 others v IEBC** the court held that additional evidence should not be allowed to change the nature and character of the petition.

The court has no idea what kind of evidence the petitioner seeks to introduce. However, this court cannot lose sight of the objectives of these Rules as set out under Rule 4 which is, to facilitate the just, expeditious, proportionate and affordable resolution of Election Petitions. The court also bears in mind Rule 5 and 19 and the court should do its best to elevate substantive justice over procedural technicalities. In that spirit I allow the application the petitioner's application to enable ***Elizabeth Lemeteki, Anderson Lekesike and Noorkerin Lalaikipian*** to file and serve their respective affidavits within 5 days hereof. The order will not be without conditions which the petitioner should comply with:

***1. That the affidavits should not introduce new evidence or evidence that will tend to change the nature and character of the petition but should conform to the pleadings in the petition failing which they will be struck out.***

***2. Costs to the respondents.***

**Dated, Signed and Delivered at NYAHURURU this 22<sup>nd</sup> day of November, 2017.**

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**R.P.V. Wendoh**

**JUDGE**

**Present:**

Mr. Mombo for petitioner

Mr. Karanja for 1<sup>st</sup> & 2<sup>nd</sup> respondents

Mr. Mwangi & Ms. Peinan for 3<sup>rd</sup> respondent

Soi – Court Assistant