



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 2 OF 2017

FRANCIS MWANGANGI KILONZO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER

YATTA CONSTITUENCY2ND RESPONDENT

CHARLES MUTAVI KILONZO.....3RD RESPONDENT

RULING

1. On 7th September 2017 the petitioner Francis Mwangangi Kilonzo filed this petition to challenge the declaration that the 3rd respondent Charles Mutavi Kilonzo had been validly elected as member of the National Assembly for Yatta Constituency during the general election held on 8th August 2017.

2. The hearing of the petition begun on 6th November 2017. The petitioner gave evidence. On 8th November 2017 his chief agent Samwel Mulei begun testifying. He was shown his affidavit which he swore on 7th September 2017 which he adopted as evidence. When he was led to say that he had sworn another affidavit on 27th September 2017 Mr. Nyamu for the 3rd respondent took objection. He objected to the witness's reference to the affidavit as it had not been filed. The affidavit, titled "supporting affidavit", was an annexure to the affidavit sworn by the petitioner in support of the application dated 27th September 2017, and filed on the same day. The application sought that the materials for Yatta Constituency National Assembly election be delivered to court by the 1st and 2nd respondents (Returning Officer and the Independent Electoral and Boundaries Commission, respectively), and that the court grants

“leave to the petitioner/applicant to file a supplementary affidavit as per the attached copy and the same to be deemed as duly filed and served in response to issues raised in the respondents replies herein.”

The annexed affidavit of Samwel Mulei was the proposed affidavit that the petitioner was seeking leave to file. Further, the annexed affidavit annexed to it a photograph that had allegedly been taken by him on 10th August 2017 at 10.00 a.m. It also annexed an affidavit by one Titus Ngungi Joseph sworn on 27th September 2017 and a video clip allegedly taken by him on 10th August 2017 at 2.00 am. Mr. Nyamu

objected to the affidavit by Titus because it was not formally filed, and took objection to the photograph and video clip because they did not have certificates to authenticate them.

3. I asked counsel for the parties to each file written submissions on the objection, and to subsequently address the court on the same. The written submissions were filed and the counsel addressed the court on 10th November 2017.

4. Mr. Kituku for the petitioner relied on **rule 15(2)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** to argue that the 3rd respondent could not competently raise objection to the affidavits, photograph and video clip because such objection was barred by the **rule** as it was being brought after the pre-trial conference. In my view, this is not a valid point as this is not an interlocutory application. What is challenged is the admissibility of the impugned annexed affidavits, photograph and video clip. Mr. Nyamu for the 3rd respondent and Mr. Okuta for the 1st and 2nd respondents pointed out, and I agree with them, that the affidavits of Samwel Mulei and Titus Ngungi Joseph sworn on 27th September 2017 were not formally filed, even after the leave had been sought by the petitioner. It is required by **rule 12(4)** that an affidavit for a witness in an election petition be formally filed in court. A witness cannot purport to rely on affidavit which has not been formally filed. It is further material that the petitioner did not, during this objection, seek leave to formally file the impugned affidavits and/or annexures. No evidence can be based on the affidavits and annexures, and no cross examination can be based on the same.

5. Further, Mr. Nyamu and Mr. Okuta relied on the decisions in **Raila Odinga & 5 Others –v- IEBC and 6 Others [2013]eKLR** and **David Wamatsi Omusotsi –v- Returning Officer Mumias East Constituency & 2 others, Election Petition No. 9 of 2017 at Kakamega** to submit that the said affidavits of Samuel Mulei and Titus Ngungi Joseph were not independent affidavits, independent from the affidavit of the petitioner, leave alone the fact that they had not been formally filed. That is true.

6. Mr. Kituku argued that he had successfully sought that the affidavits be deemed to be duly filed and served. He was making reference to prayer 7 of the petitioner’s application dated 27th September 2017. The petitioner’s prayer 7 sought –

“leave to the petitioner/applicant to file a supplementary affidavit as per the attached copy and the same to be deemed as duly filed and served”

If leave to “file” was granted, did the petitioner file the supplementary affidavit? He did not.

7. It was further submitted by the respondents that the video clips and photograph were inadmissible because they had not complied with **sections 78, 78A and 106B** of the **Evidence Act (Cap.80)**. Reliance was placed on the decision in **William Odhiambo Oduol –v- IEBC & 2 Others [2013]eKLR**. Mr. Kituku’s submission was that the photographs and video clip were admissible under the **Act**.

8. The video clip evidence falls under **section 106B** of the **Evidence Act**. It is electronic evidence. The same can only be admitted subject to the satisfaction of the conditions in **106B(2)** and **(4)**. There has to be an accompanying certificate under **section 106B(4)**, and the certificate was to satisfy the conditions in **section 106B(2)**. Without the certificate, the video clip would not be admissible (**Republic –v- Barisa Wayu Matuguda [2011]eKLR**).

9. As regards the photograph, **section 78A(1)** makes it admissible and the court is asked to estimate the weight to be attached to it under **section 78A(3)**. However, the photograph is annexed to the annexed affidavit of Samwel Mulei which has not been formally filed, and therefore not properly on record.

10. In conclusion, I find that the supplementary affidavit of Samwel Mulei sworn on 27th September 2017, and annexed to the affidavit of the petitioner sworn on 27th September 2017 in support of his application dated 27th September 20217 and filed on the same day, to be inadmissible and improperly on record and is hereby expunged. Similarly, the affidavit of Titus Ngungi Joseph sworn on 27th September

2017 and annexed to the annexed affidavit of Samwel Mulei sworn on 27th September 2017 shall for the same reasons be expunged from the record.

11. The petitioner cannot seek to invoke the provisions of **rule 5(1)** or **Article 159(2)(d)** of the Constitution because he was granted leave to file these witness affidavits and he did not and because, as a consequence, the affidavits are illegally on record.

12. The objection by Mr. Nyamu is sustained. The petitioner shall pay costs of the same.

DATED and DELIVERED at MACHAKOS on the 17TH day of NOVEMBER 2017.

A.O. MUCHELULE

JUDGE