



IN THE HIGH COURT OF KENYA AT KISUMU

SIAYA ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION FOR

UGENYA CONSTITUENCY

BETWEEN

**DAVID OUMA OCHIENG.....
.....PETITIONER**

AND

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST
RESPONDENT**

**ISAIAH NABWAYO, THE RETURNING OFFICER GENYA
CONSTITUENCY.....2ND RESPONDENT**

**CHRISTOPHER ODHIAMBO KARANI.....3RD
RESPONDENT**

RULING

The 3rd respondent's application

1. By a Notice of Motion dated and filed on 25.9.17, brought under Article 159 of the Constitution, Section 80 (1) (d) of the Elections Act (*hereinafter referred to as the Act*) and rule 4(1); 19(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, (*hereinafter referred to as the rules*) and all enabling provisions of the Law, the 3rd respondent, **Christopher Odhiambo Karani** seeks the following orders:

- 1) That this Honourable Court be pleased to enlarge and extend the time for the 3rd respondent to file his response to the petition***
- 2) That the 3rd respondent's response to the petition dated 22.9.17 and filed on 27.9.17 be deemed as duly filed and served***
- 3) That costs of this application be provided for***

2. The application is based on the grounds among others:-

- a) The petitioner filed the petition herein on 4th September 2017***
- b) The 3rd respondent was not served with the petition***

c) The petitioner placed an advertisement by way of substituted service on the Standard Newspapers on 7th September, 2017

d) The 3rd respondent fell sick on 6th September, 2017 and was admitted in hospital until 13th September, 2017

e) The 3rd respondent also came to learn from a friend about this petition on 14th September, 2017

f) The enlargement of time is necessary for fair and proper determination of the real issue in controversy

g) This application and the response to the petition have been timeously made

3. The application is also supported by 3rd respondent's affidavit sworn on 23rd September, 2017 and filed on 27th September, 2017 in which he reiterates the grounds on the face of the application and gives further details in respect thereof.

4. Attached to the supporting affidavit is a copy of letter of confirmation of his admission and discharge from Alfarooq Hospital dated 6th September, 2017 marked **COK-1**. In his supplementary affidavit sworn on 12th October, 2017 and filed on 16th October, 2017, the 3rd respondent reiterates that he was not personally served with the petition. Attached to the affidavit is a copy of letter dated 11th November, 2017 **COK-2 (6)** stating that he was treated at Alfarooq Hospital on 6th September, 2017 not as an inpatient but an outpatient.

Petitioner's Case

5. The petitioner opposed the application through his replying affidavit sworn on 2nd October 2017 and his further affidavit sworn on 4th October, 2017. In the replying affidavit, he depones to the facts relating to service and for purposes of this application, I shall set out the relevant facts as follows:

a. That the petition was filed on 4th September, 2017

b. That the 3rd respondent was served on 8th September, 2017 by way of advertisement through the Standard Newspapers at page 21 as exhibited by a copy of the newspaper marked **D.O.O.1**

c. That on 6th September, 2017, the petitioner gave the 3rd respondent's telephone number 0725-088259 to Daniel Achach Omoro who informed him that he had talked to the 3rd respondent on 6th and 7th September, 2017 regarding service of the petition

d. That by 15th September, 2017, the respondents had not filed their responses as required by Rule 11(1) of the Rules

e. That the 3rd respondent filed a response to the petition on 27th September, 2017 and served it on 28th September, 2017, a clear 12 days late

f. That the 3rd respondent has not given satisfactory reasons for failure to file his response in time

6. To the further affidavit, the petitioner attached a letter **D.O.O 2** dated 3rd October, 2017 from Alfarooq Hospital indicating that the 3rd respondent was not treated at the facility and that the letter dated 6th September, 2017 marked **COK-1** indicating that he was admitted on 6th September 2017 and discharged on 13th September 2017 was not issued by the facility.

SUBMISSIONS

3rd respondent's submissions

7. Counsel for the applicant/3rd respondent restated the provisions relating to service of petitions under Article 87(3) of the Constitution and Section 77 of the Elections Act and submitted that since election petitions are of great importance to the parties concerned and the general public, the law gives preference to personal service. 3rd respondent relied on *Rozaah Akinyi Buyu v IEBC & 2 others [2014] eKLR* where the Court of Appeal cited with approval *Kagunyi v Gathua & Anor, Civil Appeal No. 6 of 2004* and rendered itself thus:-

“... election petitions are of such importance to the parties concerned and to the general public that unless parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service”.

8. It was submitted that the petitioner had not demonstrated his inability to effect personal service before resorting to advertisement. To this end, the 3rd respondent cited *Rozaah Akinyi Buyu v IEBC & 2 others (Supra)*, where the court pronounced itself thus:

“The law on service of election petitions in our jurisdiction has therefore developed, shifting from the position where only personal service was permitted to the new position where a petitioner who can show that he has been unable to serve a petition on a respondent has an opportunity to use substituted service through advertisement”.

9. The court was urged to be guided by the holding in *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another, High Court (Nairobi) Civil Case No. 810 of 2001* where the court held thus:-

The rules of procedure are not an end in themselves and are only a means to an end. The end being the determination of disputes on their substantive merits. Accordingly, legal and procedural technicalities ought not to be elevated to a fetish or enforced in a manner that defeats the ends of justice (Articles 22 (3) (b) and 159 (2) (d) of the Constitution and ignore procedural technicalities in favor of determination of disputes on their substantive merits.

10. The court was further urged to enlarge time for the filing of the response to the petition on the ground that the reasons for failing to comply were not foreseeable. To this end, the 3rd respondent relies on *Raila Amolo Odinga & another v IEBC & 2 others Petition No. 5 of 2013 [2013] eKLR* where the learned Judges held:-

“The period for the filing, prosecution and determination of a Presidential Election was only 14 days from the time of filing the petition which was a very tight, short and limited period. The background to the setting of the strict time lines ought to be known to most Kenyans as there was a purpose for it and the intention of the People of Kenya and of Parliament ought to be respected. The parties in the petition had a duty to ensure that they complied with their respective time lines, and the court ought to adhere to its own. There must have been a fair and level playing field so that no party or the court lost the time that they were entitled to and no extra burden should have been imposed on any party or the court as a result of omissions, or inadvertences which were foreseeable or could have been avoided”.

11. It was submitted further that this court has discretion to extend time under 19(1) of the Rules and that sufficient grounds had been established as was held in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others [2013] eKLR*.

Petitioner’s submissions

10. Petitioner submitted that the question of time is a substantive matter of law under Article 87(2) of the Constitution and Rule 11(1) of the Rules, 2017 and that this had been emphasized in the case of *Harun Meitamei Lempaka v Lemanken Aramat vs. Lempaka & 2 Others [2014] eKLR* where the Supreme Court rendered itself thus:-

“We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, is marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court’s decisions in the Joho case and the Mary Wambui case”.

11. The petitioner further submitted that Article 159(2) (d) of the Constitution does not afford the 3rd respondent the leeway to ignore rules of procedure and cited ***Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR*** where the Supreme Court observed:

“We have discussed the application of Article 159 already (See the Law Society case above). In Raila Odinga v. I.E.B.C & others (2013) eKLR, this Court observed further:

“Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

12. The petitioner urged the court not to exercise its discretion in favor of the 3rd respondent on the ground that he has perjured himself by uttering a false document in support of his allegation that he was sick. To this end; the petitioner relied on the case of ***Lucy Wanjiru Njunge & 2 Others V Job Mwangi Macharia & 9 Others Civil Suit No. 158 of 2005*** where Hon. D. Musinga, J (as he then was) stated:-

“The first two plaintiffs openly lied under oath and actually committed perjury by stating that they were not parties to the suit HCCC No. 142 of 2005 while indeed they were. An affidavit cannot be amended by counsel’s verbal word that a technical omission was made by her and seek to exonerate the deponents from any fault yet they are the ones who swore to the truth of their depositions. I hold that the verifying affidavits are improper and bad in law and must be struck out which I hereby do”.

13. Additionally, the petitioner submitted that exercise of discretion is a matter of equity as was stated in the case of ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR*** where the Supreme Court held that a party who seeks an ***“extension of time being a creature of equity . . . can only enjoy it if he acts equitably: he who seeks equity must do equity.”***

14. Further to the foregoing, the petitioner submitted that the 3rd respondent had not explained the whole period of delay. He cited ***County Executive of Kisumu v County Government of Kisumu & 8 others [2007] e`KLR*** where the Supreme Court reiterated the principles for extension of time laid down in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (Supra)***, thus:-

“In an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. The underlying principles that a Court should consider in exercise of the discretion to extend time are:-

i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

iii. The Court’s exercise of its discretion to extend time, is a consideration to be made on a case to case basis;

iv. Where there is a sensible reason for the delay, the delay should be explained to the satisfaction of the Court

v. Whether there will be any prejudice suffered by the respondents if the extension is granted;

vi. Whether the application has been brought without undue delay; and

vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

15. On the issue of application of the overriding objectives, the petitioner submitted that the 3rd respondent had not brought himself within the limited latitude of equitable favor. He cited **Raila Odinga & 5 others v IEBC & others (Supra)**, where the Supreme Court stated that,

“It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The rules and timelines established are made with special and unique considerations.”

16. I have considered the notice of motion in the light of affidavits on record and submissions for both parties and I have summarized the issues for determination into two.

1. Whether the petition was served

2. Whether the court should exercise its discretion to enlarge time in favor of the 3rd respondent

1) Whether the petition was served

17. Counsel for the 3rd respondent agreed with the statement of law that the petitioner was required to serve the petition personally or by advertisement. In this case though, he submitted the petitioner failed to demonstrate his inability to effect personal service before resorting to advertisement.

18. Service of election petitions is dealt with at Article 87 of the Constitution which provides as follows;

(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

19. The provisions of Article 87 of the Constitution are reiterated in section 77 of the Act which provides;

(1) A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.

(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

20. Article 87 of the Constitution and Section 77 of the Act provide for the time of filing and mode of service of the petition. The word **OR** in Section 77 (2) of the Act provides the petitioner with **two options** of effecting service of the petition; direct or personal service or service through advertisement in a newspaper with national circulation. Service by advertisement is an option and not a last resort when the petitioner has exercised due diligence in effecting personal service and had failed to effect personal. The term, “*personal service*” in section 77 of the Act refers to “*direct service*” which is the term used at **Article 87(3)** of the Constitution (see **Abdikham Osman Mohamed and Another v IEBC and Others Garissa EP No. 2 of 2013/2013** and **Steven Kariuki v George Mike Wanjohi and Others Nairobi EP No. 2 of 2013 [2013]**).

From the foregoing; I find and hold that the 3rd respondent’s submission that the petitioner had not demonstrated his inability to effect personal service before resorting to advertisement is therefore without merit.

21. I further find and hold that service on the 3rd respondent by advertisement was effective service within the provisions of Article 87(3) of the Constitution and section 77 of the Act.

2) Whether the court should exercise its discretion to enlarge time in favor of the 3rd respondent

22. The 3rd respondent avers that he fell sick on 6th September, 2017 and was admitted in hospital until 13th September, 2017. The copy of letter of in support of the alleged admission and discharge from Alfarooq Hospital shows that it was issued on 6th September 2017. Upon being served with a letter marked **D.O.O 2**, dated 3rd October, 2017 from Alfarooq Hospital disputing that he was treated in that facility, the 3rd respondent brought in another letter dated 11th November, 2017 **COK-2 (6)**, stating that he was treated at the said hospital on 6th September, 2017 not as an inpatient but an outpatient. The 3rd respondent thus changed his line of argument and in his submissions reiterated that he was treated not as an inpatient but as an outpatient.

23. The grounds on the face of the application that the respondent was admitted at Alfarooq Hospital on 6th September, 2017 and discharged on 13th September, 2017 are at variance with his submissions. This court is unable to reconcile the reason behind the 3rd respondent’s claim that he was admitted in hospital while he was not. The 3rd respondent’s change of line of argument from being treated as an in-patient to being treated as an outpatient leads this court to an inference he was not sick as alleged. From the foregoing; I find and hold that the contents of the letters dated 3rd October, 2017 marked **D.O.O 2** and 11th November, 2017 marked **COK-2 (6)** are plainly untrue.

24. Having said that, I have to consider the import of the 3rd respondent’s allegation that he did not see the advertisement by which the petition was served. The provisions of Article 87(3) of the Constitution and Section 77 of the Elections Act do not place a duty on the petitioner to prove that the 3rd respondent saw the advertisement. Having discharged his obligation of serving the petition by way of advertisement as by law provided; the burden that the 3rd respondent did not see the advertisement lay on him. He has failed to discharge that burden. This court therefore finds and holds that the 3rd respondent was aware of the service of the filing of the petition against him but took no immediate action to defend it.

25. Filing of responses to petitions is dealt with by rule 11 of the Rules which provides thus:-

“(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”.

26. The rule does not make it mandatory for a respondent to file a response. A respondent who opts to file a response **must** however file and serve it within 14 days from date of service of the petition. The petition herein was served on 8th September, 2017 and the 3rd respondent ought to have filed and served his response not later than 22nd September, 2017. The response was however filed out of time.

27. The guiding principles that a court should consider in exercise of its discretion for the determination of applications for extension of the time were laid down by the Supreme Court in **Nicholas Kiptoo Arap**

Salat v IEBC & 7 Others (Supra).

28. As stated hereinabove, the response by the 3rd respondent was filed out of the time. Other than that the response was filed late, the reason for delay advanced by the 3rd respondent as demonstrated hereinabove is based on falsehoods. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. The 3rd respondent has come to court with unclean hands. I am persuaded by the holding in **Nicholas Kiptoo Arap Salat v IEBC & 7 Others (Supra)** that the 3rd respondent cannot enjoy an equitable right since he has not acted equitably:

29. The court was urged to ignore procedural technicalities in favor of determination of disputes on their substantive merits. The issue in question is whether the situation that the 3rd respondent finds himself can be salvaged under the provisions of Article 159 (2) (d) of the Constitution. In **Raila Odinga & 5 Others -V- IEBC & 3 Others(Supra)** the Court stated:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a Court of law to administer justice without undue regard to procedural technicalities. The article simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.

30. Having found that the application by the 3rd respondent is based on falsehoods, this court declines the invitation to ignore procedural technicalities in his favor.

31. This court was urged to apply the principle of the overriding objectives. On overriding objectives, the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides thus:-

4. (1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.

(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).

In **Nicholas Kiptoo Arap Korir Salat -V- IEBC & 6 Others (Supra)**, it was stated:

“I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, even headed, fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”

32. The 3rd respondent had a duty to comply with the rules. Where he did not comply; he had a duty to give a reasonable explanation to the satisfaction of the court. The 3rd respondent has not complied with the rules in order to achieve the clear objectives of the Oxygen Rules particularly in electoral disputes which must be determined within strict timelines. He has not brought himself within the limited latitude of equitable favor. The rules cannot therefore aid him.

33. Elections petitions are inherently suits in public interest. (See **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (Supra)** and public interest should be a consideration for extending time

34. In **Republic v Independent Electoral and Boundaries Commission & 3 Others ex parte Coalition**

for Reform and Democracy, High Court (Nairobi) Miscellaneous Civil Application No. 637 of 2016 the court while considering public interest held thus:-

“There can never be public interest in breach of the law”.

35. For the reasons given earlier in this ruling, I find and hold that extension of time in this case will not be in public interest. It is the public interest that there be compliance with the Constitution and the legislation and rules made thereunder.

36. **Orders**

1. In the end, the Notice of Motion dated and filed on 25.9.17 for extension of time to file response to petition is considered and found to have no merit and it is disallowed with costs to the petitioner.

2. The 3rd respondent’s response filed on 27th September, 2017 is hence struck out with costs to the petitioner as prayed in the petitioner’s notice of motion dated 2nd October, 2017 and filed on 3rd October, 2017.

DATED AND DELIVERED THIS 16TH DAY OF NOVEMBER 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Petitioner - Mr. Achach instructed by the firm of Sagana, Biriq & Co. Advocates

1st & 2nd Respondents - Mr. Olendo instructed by the firm of Ogenjo,Olendo & Co. Advocates

3rd respondent - Mr. Mugoye instructed by the firm of Mugoye & Associates Advocates