



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION NO 6 OF 2017**  
**IN THE MATTER OF PARLIAMENTARY ELECTION FOR TARBAJ CONSTITUENCY**  
**(WAJIR COUNTY)**

**IDRIS ABDI ABDULLAHI.....PETITIONER**

**VERSUS**

**AHMED BASHANE.....1ST RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT**

**RETURNING OFFICER TARBAJ CONSTITUENCY.....3RD RESPONDENT**

**RULING (5)**

During the hearing of the Petition, the Petitioner, PWI relying on his petition filed on 5<sup>th</sup> September, 2017 with regard to irregularity of Forms 35A deposited in Paragraphs 27-30 of the Petition, the Petitioner testified as follows;

The Forms 35A did not have IEBC stamps and did not have names and signatures of the Presiding Officers, the Petitioner's agents did not sign the forms and no reasons were given. Later, he discovered that Forms 35A and Forms 35B did not have similar information but differences in terms of entries.

**OBJECTION**

The 1<sup>st</sup> Respondent through Counsel objected to the Petitioner's reference to the Forms 35A annexed to the Supplementary Affidavit filed on 17<sup>th</sup> October, 2017 specifically with regard to Paragraph 12 where the Petitioner included 45 Polling stations specifically and had not made the specific allegations about them in the Petition.

The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents through Counsel supported the objection by the 1<sup>st</sup> Respondent and stated in the Petition, the Petitioner averred that numerous forms did not bear the particulars and signatures of agents significant number of Forms 35A were not executed by Presiding Officers and that some Forms 35A do not bear authentic stamp of the 2<sup>nd</sup> Respondent.

**REPLY**

The Petitioner through Counsel objected to the objections on the following grounds; In the Petition; that

they pleaded specifically irregularities of Form 35A in Paragraphs 27-30 whereupon the 1<sup>st</sup> Respondent filed response on 18<sup>th</sup> September, 2017 the 1<sup>st</sup> Respondent replied with regard to Paragraphs 26, 27 & 28 of their response filed on 18<sup>th</sup> September 2017.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents vide their response to Petition filed on 20<sup>th</sup> September, 2017 also responded to the allegations in Paragraphs 27 & 28 of their response. This means that the Respondents went through all forms 35A and found them all duly signed and stamped and with names of Presiding Officers and agents.

The affidavit by the 1<sup>st</sup> Respondent at Paragraph 36 & 37 deposes that all Form 35A were duly executed.

Therefore the issue that the Petitioner's Petition was not specific and detailed with particulars of the polling stations that did not have properly executed Form 35A cannot arise. The Respondents are not prejudiced as they were put on notice and had ample time to verify and inspect the documents that are in possession of the 2<sup>nd</sup> Respondent.

The Supplementary Affidavit filed on 17<sup>th</sup> October, 2017 was filed with leave of the Court. The Petition was in compliance of **Rule 8 1(e) of the Elections (Parliamentary & County) Regulation 2017**. The provision requires that the petition shall state the grounds on which the petition is presented.

Therefore the fact that the irregularities in Form 35A were not particularized/specified does not offend **Rule 8 (1) (e) of Election Rule 2017**. It is an afterthought and the Respondents are not prejudiced as they were notified and had ample time and opportunity to file responses which they did, 1<sup>st</sup> Respondent's Further affidavit filed on 7<sup>th</sup> November, 2017 and the Reply by the 3<sup>rd</sup> Respondent filed on 13<sup>th</sup> November, 2017. The Petitioner prayed for orders of scrutiny in all polling stations and recount in the 5 polling stations. The word '**All**' as defined in the Oxford dictionary refers to "**Whole quantity**" and since all forms are deemed to have been signed then the annexed documents to the Supplementary Affidavit should be admitted.

In reply to the issues raised by the Petitioner, they relied on **Section 76 of the Elections Act No. 24 of 2011**; the Petition is filed within 28 days and served within 15 days. The issue of jurisdiction is that the Petition and affidavit were filed with generalized matters on the issue of interference with Forms 35A.

In Paragraph 12 of the Supplementary Affidavit, the Petitioner deposed that he had in his custody the said forms from 12<sup>th</sup> August, 2017. It is not indicted why when filing the Petition on 5<sup>th</sup> September, 2017 the said forms were not attached.

Secondly, the Petition did not comply with **Rule 8 1 (e) and Subrule 4 (b) of the Election (Parliamentary & County) Petition Rules 2017**. The Petition shall be supported by an affidavit sworn by the Petitioner containing the Particulars set out under Rule 12 of the Rules.

The Petition ought to be complete by the time it is filed and once filed one cannot delve into what ought to have been included in the said petition.

## **DETERMINATION**

The Court considered the oral submissions of parties to the objection raised to reliance of the annexed Form 35As to the Supplementary Affidavit of 17<sup>th</sup> October, 2017 and wishes to address the matter as follows;

1. On 6<sup>th</sup> October, 2017, this Court granted the Petitioner leave to file Supplementary Affidavit filed on 17<sup>th</sup> October, 2017 by dint of **Rule 9 of the Elections (Parliamentary & County Elections) Petition Rules 2017**.

2. The Supplementary Affidavit annexed 5 Form 35As and List of Results of all Polling Stations. The Respondents filed Replying Affidavits to the Supporting Affidavit on 7<sup>th</sup> November, 2017 and 13<sup>th</sup> November, 2017 respectively.

3. On 24<sup>th</sup> October, 2017 the Petitioner filed further bundle of documents that were illegible and included missing annexures. A bundle of 48 Form 35As and Form 35B. (Clearly adding on new documents to the Court record that were not filed and deemed illegible as alleged).

4. All these were undertaken after the statutory period of filing petition and supporting affidavit within 28 days after declaration of results and served within 15 days as provided by **Section 76 of the Election Act 2011**.

**Section 76 (4) of the Elections Act 2011** provides that an amendment of the Petition with leave of the Court may be granted for purpose of questioning a return or an Election upon an allegation of election offence but filed within the requisite period of filing the Petition.

5. An Election Petition may be amended by Court's discretion to allow new and additional evidence as provided by **Rule 15 (1) (h) of Elections (Parliamentary & County Elections) Petition Rules 2017** during the Pretrial Conferencing proceedings but such new and additional evidence must be filed within the requisite period of 28 days.

6. The annexures to the Supplementary Affidavit and the replacement of illegible documents without leave of Court amounts to new and additional evidence filed outside the statutory period. All these documents ought to have been annexed to the Petition at the time of filing the same in Court.

7. This Court cannot exercise judicial discretion in exercise contrary to statutory provisions under **the Section 76 Elections Act 2011** and therefore the said annexures cannot form part of these proceedings as they were filed out of time.

8. Although the Court granted leave to file Supplementary Affidavit the same, it was not addressed as to content and the Court could not anticipate or speculate what would be filed as Supplementary Affidavit suffice was to grant the opportunity for one to file Supplementary Affidavit without disclosure of its contents.

9. In **RAILA ODINGA VS INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS Supreme Court Petition No. 5 of 2013** the Supreme Court gave the following guidelines for determining applications for filing for the Affidavits and admission of new and additional evidence;

*a) The admission of additional evidence is not an automatic right, instead the Elections Court has discretion on whether or not to admit the evidence;*

*b) Further affidavits must not seek to introduce massive evidence which would in effect change the nature of the Petition or affect the Respondents ability to respond to the said evidence;*

*c) The parties to an election Petition should strive to adhere to the strict timelines set out in EDR Laws; and*

*d) Admission of new evidence must not unfairly disadvantage the other parties to an election petition.*

10. In **Election Petition No. 2 of 2017 High Court of Kerugoya HON. M. KARUA AND HON. JOSEPH GACHOKI GITARI VS IEBC AND 3 RESPONDENTS** the Court stated thus;

*“Where one party, is prejudiced by expanding the scope of the petition in the exercise of Courts discretion, it would not be doing so judicially. It would amount to miscarriage of justice. The 3<sup>rd</sup> & 4<sup>th</sup> Respondents would be exposed to new grounds causes and evidence in form of affidavits. I am of the view that filing further affidavits will prejudice the Respondents while at the same time amount to amendment of the petition through the back door after gathering material not pleaded (particularized in the petition)...*

*In giving directions for filing of further affidavits, the Court may consider the significance and effect of new and additional evidence”.*

11. In the instant case, although the Court granted the leave to file further /supplementary affidavit the content of the same was not alluded to or agreed upon. The filing of annexures to the Supplementary Affidavit and incremental annexures vide letter of 24<sup>th</sup> October, 2017 is certainly to amend the Petition out of the statutory period. At no point in the proceedings in the Court record was the issue of 50 polling stations mentioned until for the first time on 23<sup>rd</sup> November, 2017. Reference to the Petition Prayer (s), use of the word “All” does not mean all polling stations but all ballot papers at the polling stations; these polling stations are not named or specified. The word polling stations is subject to various interpretations; the 5 Polling Stations or any or other not named polling stations.

Finally prayers sought are not automatically granted, they can be postponed, amended, granted etc and this is at the conclusion of proceedings. At this stage the prayers cannot aid this Court that scrutiny sought or all forms are with regard to all polling stations.

12. All parties to an election petition are bound by pleadings; the Petition and affidavit in support and the Response/Reply and affidavits. Any other information is as granted by this Court. In this instance the Form 35As annexed to the Supplementary Affidavit and the replacement for illegible forms are not relied on or allowed in evidence. The Court shall rely on annexures only to the Petition and Supplementary Affidavit on only what is in the Petition.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 14<sup>TH</sup> DECEMBER, 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE:**

**ALL COUNSEL AND PARTIES.**