



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**ELECTION PETITION NO. 1 OF 2017**

**BETWEEN**

**WAVINYA NDETI.....1<sup>ST</sup> PETITIONER**

**PETER MATHUKI.....2<sup>ND</sup> PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC) .....1<sup>ST</sup> RESPONDENT**

**THE MACHAKOS**

**COUNTY RETURNING OFFICER .....2<sup>ND</sup> RESPONDENT**

**ALFRED NGANGA MUTUA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 10<sup>th</sup> August 2017 the 3<sup>rd</sup> respondent Dr. Alfred Nganga Mutua was declared by the 1<sup>st</sup> respondent Machakos County Returning Officer to have been validly declared as the governor for Machakos County following the general election held on 8<sup>th</sup> August 2017. The 1<sup>st</sup> petitioner Wavinya Ndeti contested for the seat and came second. Her running mate was the 2<sup>nd</sup> petitioner Peter Mathuki. The two filed this petition on 5<sup>th</sup> September 2017 to challenge the conduct of the election and the declaration. The 1<sup>st</sup> petitioner filed a supporting affidavit along with the petition. In the affidavit she annexed various affidavits sworn by the witnesses she intended to call in the petition. She did not file these witness affidavits on 5<sup>th</sup> September 2017.

2. Under **rule 12(3)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** –

**“Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.”**

Further, under **Rule 12(4)** of the **Rules**,

**“A petitioner shall, at the time of filing of the petition, file the affidavits sworn under sub-rule (3).”**

3. I accept that these witness affidavits, because they were not filed, were not independent of the 1<sup>st</sup> petitioner's supporting affidavit and cannot, therefore, be the basis upon which the witnesses can be called to testify, or be cross-examined. This issue was dealt with by the Supreme Court in **Raila Odinga & 2 Others –v- IEBC & 3 Others [2013]eKLR** in which the following observation was made:-

**“This is an unusual way of availing affidavits as “annextures” or “evidence”; they are not independent affidavits filed to stand on their own, as evidence in the particular proceedings. We would understand if an affidavit which is sworn in other proceedings in the past, is annexed as evidence of that affidavit. However, to have several affidavits sworn for the purpose of current proceedings and annexed as evidence is most unusual, if not strange, in our view.”**

In short, the witness affidavits annexed to the 1<sup>st</sup> petitioner's supporting affidavit filed on 5<sup>th</sup> September 2017 were not filed, have no probative value and are, therefore, expunged from the record.

4. Come the following day, on 6<sup>th</sup> September 2017, the petitioners now filed (and this has been confirmed by the Deputy Registrar who showed the payment receipts) all these witness affidavits. This issue of the filing of these witness affidavits on 6<sup>th</sup> September 2017, a day after the filing of the petition, was not raised by any of the respondents until 5<sup>th</sup> December 2017 when the petitioners' first witness Christopher Mutinda Mutua (PW2) took the stand to testify. Mr. Kimani Muhoro for the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed his testimony on the basis that he could not be allowed to testify on his affidavit which had been annexed to the 1<sup>st</sup> petitioner's supporting affidavit filed along with the petition on 5<sup>th</sup> September 2017. Secondly, he could not be allowed to testify on the basis of his affidavit that had been filed on 6<sup>th</sup> September 2017, as the filing had been done out of time and without leave. It was counsel's submission that under **rule 12(4)** this affidavit ought to have been filed along with the petition. Further, that **rule 19(2)** ousts the jurisdiction and discretion of the court from extending time within which to file witness affidavits. It was argued that, once the petition was filed the petitioner could not be granted leave to file affidavits of witnesses. **Rule 19(2)** provides that extension and reduction of time (under **rule 19(1)**) shall not apply in relation to the period within which a petition is required to be filed, heard and determined. **Rule 19(1)** provides as follows:

**“Where any act or omission is to be done within such time as may be prescribed in these Rules and ordered by an election court, the election court may, for the purposes of ensuring that injustice 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.”**

5. The last submission by Mr. Muhoro was that **rule 15(2)** could not be used by the petitioners to oppose the objection, because the objection questioned the competence of the witness to testify and this could only have been raised during the trial. Indeed the petitioners relied on this rule as one of the grounds to oppose the objection. The rule provides that:

**“An election court shall not allow any intercounty application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.”**

6. It is notable that the pre-trial conference in this petition was held on 18<sup>th</sup> October 2017.

7. The 3<sup>rd</sup> respondent joined the 1<sup>st</sup> and 2<sup>nd</sup> respondents in this objection, and relied on the same grounds. Their counsel relied on **Raila Odinga** case, and also on the High Court decision in **David Wamatsi Omusotsi –v- The Returning Officer Mumias East Constituency and 2 Others [2017]eKLR** and **Francis Mwangangi Kilonzo –v- IEBC and 2 Others, HC Election Petition No. 2 of 2017 at Machakos**.

8. The response by the petitioners through their counsel Mr. Gitonga and Mr. Willis Otieno was that on

5<sup>th</sup> September 2017 the court received the petition and all the accompanying documents, which included these witness affidavits, and stamped them. Fees on them was assessed. The petitioners paid for the petition and the 1<sup>st</sup> petitioner's supporting affidavit. On 6<sup>th</sup> September 2017 they prepared a separate bundle of only the witness affidavits and paid for them at the registry. They did not think that there was anything procedurally wrong with what had happened, but that, in case the procedure adopted was wrong, they asked the court to invoke **rules 5(1), 15(2) and 19(2)** of the **Rules** and **Article 159(2)(d)** of the Constitution and find that whatever mistake that had been done as regards the filing was curable. It was submitted on behalf of the petitioners that since the witness affidavits filed on 6<sup>th</sup> September 2017 were served simultaneously with the petition and the 1<sup>st</sup> petitioner's supporting affidavit, and that the affidavits were therefore filed well before any responses had been filed, no prejudice had been occasioned to the respondents, and therefore the affidavits should remain on record. On the other hand, if the affidavits are expunged this will deny the petitioners critical evidence that was contained therein. The petitioner sought leave, in the event that it was found that affidavits ought to have been filed along with the petition, to deem the affidavits as properly filed.

9. **Rule 5(1)** that the petitioners relied on states that:

**“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.”**

**Article 159(2)(d)** provides that: -

**“justice shall be administered without undue regard to procedural technicalities;”**

10. It is material that the constitutional and statutory period for the filing of this gubernatorial petition was 28 days following the declaration of the results on 10<sup>th</sup> August 2017. The last date was on 8<sup>th</sup> September 2017. The petition was filed on 5<sup>th</sup> September 2017, and served by advertisement on 8<sup>th</sup> September 2017. By 8<sup>th</sup> September 2017, therefore, the petitioners' witness affidavits, which had been filed on 6<sup>th</sup> September 2017, were on record. When, following the advertisement, the respondents went to the registry to collect the petition, affidavits, and all accompanying documents, they collected these impugned affidavits. When they filed the respective responses they had with them these affidavits and reacted to them. In terms of prejudice, therefore, none was suffered. On the other hand, the petitioners will be denied the use of these affidavits, and the calling of the witnesses who swore them to testify, if they are excluded from the record, as is sought by the respondents. That would certainly prejudice the petitioners in their quest to prove their petition.

11. Ideally, the petitioners required leave to file the witness affidavits on 6<sup>th</sup> September 2017. **Rule 19(2)** does not help the respondents because the petitioners were still within time. But, now that they filed the petition on 5<sup>th</sup> September 2017 without filing the witness affidavits they ought to have sought leave to file them on 6<sup>th</sup> September 2017. This court has no jurisdiction to extend the election petition timelines set out in the Constitution or the **Elections Act, 2011**. However, the court can extend the procedural timelines prescribed in the **Rules** or fixed by discretion of the court (**rule 19(1)**).

12. It is also considered that the reading of **rule 9** and what happens during the pre-trial conference under **rule 15**, the court may, on its motion or upon request by any of the parties to the petition, order the filing of any or further or supplementary affidavit or the giving of any additional evidence.

13. In the case of **Njonjo Mue & another –v- The Chairperson of IEBC and 4 Others [2017]eKLR** the Supreme Court was faced with a situation where the 3<sup>rd</sup> respondent brought an application seeking to strike out and expunge from the record affidavits and annexures filed on 7<sup>th</sup> September 2017 in support of the presidential petition which had been filed on 6<sup>th</sup> November 2017. 6<sup>th</sup> November 2017 was the last day for the filing of the petition, and therefore the affidavits and annexures filed on 7<sup>th</sup> November 2017 had been filed out of time, and without leave. In dismissing the application to strike out, the court held as follows:

**“10 (a) Rule 7 of the Supreme Court (Presidential Election Petition) Rules, 2017 requires a petition filed therein to conform to the provisions of the First Schedule which provides that a petitioner shall lodge, together with the petition, at least eight (8) copies of the petition and all documents which accompany it.**

**(b) .....**

**(c) In this case however, as at the end of the 6<sup>th</sup> November, 2017, which was the last day for filing the presidential petition, there were two complete sets of petitions filed together with all the accompanying documents.**

**(d) Whereas we acknowledge that the petition served upon the 3<sup>rd</sup> respondent contained some volumes of documents which were received by the Registry on 7<sup>th</sup> November, 2017, the said documents were served on the 3<sup>rd</sup> respondent within time and above all, the court appreciates that the two sets of the Court’s copies had all the documents in place.**

**(11) Flowing from the above, we find that the 3<sup>rd</sup> respondent will suffer no prejudice if we admit the contentious documents as properly filed .....**”

14. It is notable that the 1<sup>st</sup> respondent who has brought the instant application was a party in the Supreme Court case and opposed the application to strike out the affidavits and documents. Their counsel submitted before that court that -

**“the late filing of the documents in issue is excusable.”**

15. In conclusion, although the filing of the impugned witness affidavits on 6<sup>th</sup> September 2017, when the petition had been filed on 5<sup>th</sup> September 2017, is deprecated, it is considered that substantial justice will be best served in this petition by the dismissing of the application by the 1<sup>st</sup> and 2<sup>nd</sup> respondents seeking to strike out the affidavits.

16. Consequently, the application is dismissed. The request by the petitioners to deem the witness affidavits filed on 6<sup>th</sup> September 2017 to be properly on record is allowed.

17. There shall be no orders as to costs.

**DATED and DELIVERED at MACHAKOS on the 14<sup>TH</sup> day of DECEMBER 2017.**

**A.O. MUCHELULE**

**JUDGE**