



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 CONSTITUENCY.....2ND RESPONDENT

CHARLES MUTAVI KILONZO.....3RD RESPONDENT

RULING

1. On 30th November 2017 Mr. Makundi for the Petitioner Francis Mwangangi Kilonzo was cross-examining the 2nd respondent Nicholas Kilimi who was the Returning Officer for Yatta Constituency during the general election held on 8th August 2017. It was in the election that the 3rd respondent Charles Mutavi Kilonzo was declared the member of the National Assembly for Yatta Constituency. He received 17,888 votes. The petitioner received 11,350 votes. He was dissatisfied, hence the petition.

2. In the cross-examination counsel kept making reference to Polling Day Diaries that were kept by the various presiding officers on the election day. Mr. Okuta for the 1st and 2nd respondents and Mr. Mungata for 3rd respondent objected to the reference on these Diaries since they were not pleaded to in the petition and neither had any affidavit sworn in support to the petition made reference to the same.

3. The court ruled that the petitioner was bound by what he sought to prove in the petition as supported by the affidavits that had been filed to further his case. It was held that since the Diaries had not been referred to either in the petition or the supporting affidavits, counsel could not seek to expand his client's case by extracting evidence from the Diaries; that cross-examination could not be used to enlarge the petitioner's petition.

4. It is at that point that Mr. Makundi applied for leave to file a supplementary affidavit to introduce the Diaries for all the polling stations so that he would then be allowed to question the witness, (and the others) on them. Under **rule 2 of the Elections (General) (Amendment) Regulations, 2017**, Polling Day Diaries contain a record by the presiding officer (who is in charge of a polling station) of all the happenings on election day, from the time the station is opened upto the handing over of the election results to the constituency returning officer. There is no dispute that by application dated 7th September 2017 the petitioner had applied to be supplied with election materials, which included the Diaries for all the polling stations. He was granted the prayer on 4th November 2017. The supply of such election

materials used in the gubernatorial election for Machakos County had earlier been granted to the petitioner challenging the election of the governor for Machakos County in **High Court Election Petition No. 1 of 2017**. To be able to access the Diaries, the petitioner herein had to seek the convenience of the parties in the gubernatorial election petition. This is why the Diaries were not availed to the petitioner until 28th November 2017. By this time hearing was on-going. The petitioner had closed his case, and the 1st and 2nd respondents opened theirs. The petitioner's case was that it was this late submission of the Diaries that had made it impossible for him to file an affidavit introducing them as part of his case. Mr. Makundi argued that the inclusion of these Diaries in his client's case could assist the court to determine the petition in a just manner, and that no prejudice would be suffered by the respondents.

5. Mr. Okuta for the 1st and 2nd respondents and Mr. Mungata for the 3rd respondents, relying on **rule 15(2) of the Elections Parliamentary and County Elections) Petitions Rules**, opposed the application, arguing that this was an interlocutory application being made long after the pre-trial conference and where it had not been shown that the same could not, by its nature, have been brought before the commencement of the hearing. According to counsel, the Diaries were always available; the petitioner had slept on his rights and had only woken up during the cross-examination when he had been stopped to make reference to them (the diaries). Counsel took the position that it would be expanding the petition if evidence on the Diaries is introduced at this stage, since such evidence was neither in the petition nor in the affidavits sworn to support it; that, in any event, the petitioner had closed his case and he could not be allowed to re-open it. Mr. Mungata relied on the decisions in **Mutisya Albanus Paul –v-s IEBC & 2 Others. HC Election Petition No. 2 of 2017 at Machakos** and **Joseph Obeiro Ndiege –vs O.D.M. & Another [2017]eKLR** for the submission that an election petition is a special jurisdiction matter with set rules and parameters, requiring all issues to be raised in pleadings, and that since the petitioner had not adduced the issue of these Diaries in the petition he would not be allowed to introduce fresh aspects of his case.

6. I have considered the nature of the petition, request for leave to file a supplementary affidavit, and the submissions by counsel on the same. The court is alive to the fact that the Diaries were not made subject of the petition, the supporting affidavit or the various witness affidavits all sworn to support the petitioner's case. What has to be decided is whether, at this stage of the case, the court can allow the petitioner to file a further affidavit on an issue not pleaded in the petition; whether, at this stage of the petition, the petition should be allowed to bring additional evidence.

7. The pretrial conference was conducted on 18th October 2017. Hearing commenced on 8th November 2017. The petitioner gave evidence and called four witnesses. He closed his case, saying that, at an appropriate time, he would seek to recall one of the witnesses. The 1st and 2nd respondents began their case, and it was during the cross-examination of the 2nd respondent that the issue at hand arose.

8. It is true that all interlocutory applications are supposed to be made on conclusion of the pretrial conference (**rule 15(2)**). If a party in the petition wishes to bring an interlocutory application after the conclusion of the pre-trial conference, he has to show that the application, by its nature, could not have been brought before the commencement of the hearing of the petition. This **rule** has to be considered in light of the **rule 19(1)** that provides that –

“19(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election court, the election court may, for the purpose of ensuring that injustice is not done by 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.”

9. Further **rule 5(1)** of the **Rules** provides that

“5(1) 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) of the Constitution commands the court in the following terms:-

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

10. The Supreme Court in **Raila Odinga and 2 Others –v- IEBC and 3 Others [2013] eKLR** considered the exercise of the court’s discretion in dealing with the question whether or not to allow a party to file a further affidavit. It stated as follows:-

“The parties have a duty to ensure that they comply with their respective timelines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, no extra burden should be imposed on any party, or the court as a result of the omissions or inadvertences which are foreseeable or could have been avoided. The other issue that court must consider when exercising its discretion to allow a further affidavit is the nature, content and extent of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of the discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

11. It has to be considered that Yatta Constituency had 169 polling stations, and therefore 169 Polling Day Dairies were prepared by the respective presiding officers. The petitioner is therefore asking for leave to file an affidavit in which he will introduce 169 Dairies. This will mean that leave be granted to the respondents to respectively file affidavits to respond to the evidence case, to be able to recall him and the witnesses he called. It is considered that leave is sought to introduce in the Dairies. To be able to appropriately defend the evidence in the Diaries, the 2nd respondent, for instances, will have to contact the presiding officers who prepared them. The introduction of this new evidence may require the re-opening of the petitioner’s substantial evidence that was not alluded to in the petition and affidavits, evidence that will change the nature and character of the petition and put the respondents to detailed inquiry to be able to respond, a scenario that will materially distort the timelines for the disposal of this petition. An election petition is a special proceeding complete with strict timelines governed by the Constitution, the **Elections Act, and the Rules and Regulations** made thereunder. Any exercise of discretion must bear in mind this special character of the proceedings.

12. It is for the foregoing reasons that I will not grant the petitioners application for leave to file a supplementary affidavit to introduce the Polling Day Diaries.

13. I ask that costs do abide the petition.

DATED and DELIVERED at MACHAKOS on the 11TH day of DECEMBER 2017.

A.O. MUCHELULE

JUDGE