



REPUBLIC OF KENYA

High Court at Malindi

Election Petition 7 of 2013

ELECTION FOR THE SENATOR OF KILIFI COUNTY

BWANA MOHAMED BWANA.....PETITIONER

VERSUS

SILVANO BUKO BONAYA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

SHAKILA ABDALLA MOHAMED.....3RD RESPONDENT

RULING

The applicant Shakila Abdalla Mohamed who is the 3rd Respondent herein in her application dated 22/04/13 seeks for leave to file a further affidavit and to file additional evidence affidavits. This application is brought under **Rule 15(6)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**. The grounds in support of the application are embodied on the face of the application and in the supporting affidavit sworn by the applicant on the 22/04/13. The application was filed on behalf of the applicant by her counsel A. O. Hamza & Co. Advocates.

On the 2nd May 2013, one Joseph Munyithia filed a notice of change of advocates. He took over the matter from Hamza & Co. Advocates. The application was therefore argued by Mr. Munyithia.

The applicant contends that she was under very strict timelines to file the response to the petition which lapsed before she could get hold of all her witnesses. She says that most of her witnesses do not live in Lamu area where the disputed election took place. It was also not possible to get an advocate to represent the applicant immediately. The counsel became available only two days before the expiry of the 14 days allowed by the law for filing the response. It was through relentless effort that the applicant managed to respond to the petition on time but was not able to include all the witnesses.

The petitioner vehemently opposed the application relying on his grounds of opposition filed by his advocates Kilonzo & Aziz Company Advocates. He contended that the application is frivolous, vexatious and an abuse of the process of the court. The applicant has failed to give the names of her witnesses whom she says were her agents during the disputed election. The delay has not been sufficiently explained by the applicant and the same is an abuse of the due process of the court.

On the issue of delay, Mr. Munyiithia for the applicant argued that that the constituency in question has very poor infrastructure and the area very remote which explains the difficulties the applicant faced in trying reaching her witnesses. Some witnesses were not available at the time the applicant needed them. For the court to achieve a just and expeditious disposal of this petition, it is important that parties place all the relevant evidence before it. Mr. Munyiithia submitted that this application was filed only five days after the date for filing the response expired. The applicant acted without delay which is a mitigating factor on her side.

Mr. Kilonzo argued that the failure to disclose the identities of the witness and the nature of the evidence was not in good faith on part of the applicant. The applicant failed to show sufficient reasons for the delay and does not therefore deserve the orders sought. The counsel relied on the **Supreme Court Presidential Election Petition No.1 of 2013 of Raila vs. Uhuru Kenyatta & Others** arguing that the court should not allow additional evidence due to the strict timelines of disposing of election petitions.

It is important to examine the law on the timelines regarding petitions. The petitioner is required to file the petition within 28 days from the date of gazettelement of the election results. The petition must be accompanied by an affidavit evidence of the petitioner and those of his witnesses. The Respondent is required to be served with the petition within 14 days from the date of filing as provided for by **Rule 13**. Upon service, the Respondent has 14 days to file his response together with the evidence affidavits. Of particular relevance to this application is **Rule 14 (4), (5) and (6)** which provide:

“R14

(4) Subject to sub-rule (5), a witness shall not give evidence for the Respondent unless an affidavit sworn by the witness, setting out the substance of the evidence, in sufficient copies for the use the court and the Petitioner, is filed with the response as required by this rule.

(5) A witness for the Respondent who fails to file an affidavit under sub-rule (2) or (4) shall not be permitted to give evidence without the leave of the court.

(6) The court shall not grant leave under subrule (5), unless sufficient reason is given for the failure to file an affidavit.”

The Rules state in mandatory terms that a witness who has not filed an affidavit evidence shall not be allowed to give evidence without leave of the court. For the court to grant that leave, the party seeking leave must give sufficient reasons as to the failure to file the affidavit within the time allowed by the rules. Leave is, therefore, not automatic. It places an obligation on the party seeking it to satisfy the court that he deserves the orders sought.

Unlike the position in the repealed **National Assembly Elections (Election Petition) Rules, 1993** which did not require that pleadings be filed together with the evidence affidavits, the position has now changed. The **Elections (Parliamentary and County) Rules, 2013** in tandem with the **Civil Procedure Rules, 2010** call for more vigilance on part of the parties. Under the **Elections Act, 2011** evidence affidavits shall be filed together with pleadings. The **Act** and the rules have put in place strict timelines for certain activities. The mischief which parliament intended to cure was to ensure that with compliance of the set time limits. Unlike the provisions of the repealed law, the parties are required to strictly comply with the timelines to facilitate the court achieve the six (6) months timelimit of hearing and determining election petitions. The lack of set timelines in the repealed law caused a lot of inconvenience to petitioners who had to wait for the whole parliamentary term or beyond to have their petitions heard. This mode of operation rendered any remedy granted at the conclusion of the delayed petition useless due to want of time. A respondent who was not validly elected could serve a full term in parliament. There was no provision in the law for compensation of the aggrieved party. There is no doubt therefore that the set timelines for hearing and determining petitions was long overdue were long overdue.

Notwithstanding the provision for timelines, the doors of justice cannot be shut for a party who fails to comply provided he can satisfy the court that he had a sufficient cause. **Rule 17** provides the manner in

which the pre-trial conference shall be held. The conference is required to be held seven (7) days after pleadings have closed. Yet **Rule 17(1) (i)** provides that one of the things to be done by the court is to **“give directions as to the filing and serving of any further affidavits or the giving of additional evidence.”** This subrule refers to a situation where the court may direct or the parties may desire to call additional evidence for the purpose of meeting the ends of justice. Rule 4(1) provides that **“the overriding objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.”**

In the Election Petition of **Robert Nelson Ngethe vs. Mbogori Njeru & Another (2006) eKLR** the court observed:

“In giving directions on the filing of further affidavits or giving additional evidence, the court may consider the significance and effect of that additional evidence.”

The petitioner in that case claimed that some documents and materials were lost by the Electoral Commission (ECK) and that the loss prejudiced the petitioner's case. None of the parties had given particulars of the said documents and materials in their pleadings. The court then directed the petitioner to file a further affidavit giving particulars of the lost materials. From the further affidavit of the petitioner, the court was able to hold that in the absence of the said materials, **“the case could not be heard and determined in a fair and just manner.”**

Under the current law, which has hardly been tested, the only decision in existence is that of the Supreme Court of Kenya of **Raila Odinga, Moses Kiarie Kuria & Others vs. Independent Electoral and Boundaries Commission, Uhuru Kenyatta & Others Election Petition No. 5 of 2013**. One of the petitioners in that case **Raila Odinga** sought for inclusion of additional evidence which was contained in a 900 page affidavit. The court made the following observation:

“The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced 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.”

The Supreme Court is vested with the jurisdiction to hear and determine presidential election petitions within a period of 14 days. The court considered the set time limit for hearing the petition and the time required by the opposite parties to file replying affidavits to the massive affidavit and said:

“However, if the new material is so substantial involving not 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 its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

In the petition before me, this court has a limit of six (6) months to hear and determine the petition. It is not in dispute that this court has more but still limited time in comparison with the Supreme Court. The affidavit of the applicant does not disclose the nature and the extent of the evidence of the witness. The issue which arises is whether the failure to disclose the said particulars should be used to deny the respondent the opportunity to include additional evidence. In view of the overriding objective of these rules as set out in **Rule 4** and the provisions of **Rule 15(6)** and **Rule 17(1)(i)**, I find that the intention of Parliament was not to deny the respondent that opportunity. In regard to the nature of the evidence which is said to be that of the applicant's agents, such evidence is expected to relate to matters relating to the conduct of the disputed election, the counting and, the tallying of the votes and also the declaration of the results. This would of course be relevant evidence and of significance to the determination of the petition. The applicant would be placed on a level ground in defending her position as the elected Woman Representative of the county. The applicant's counsel said that the evidence affidavits are ready and only awaiting filing should the application be granted. The applicant did not disclose the content, nature and extent of the further affidavit and the evidence affidavits of the witnesses. It is important that a party discloses the said details in order to make the job of the court easier in determining the application. Going

by the Supreme Court Presidential Petition of **Raila Amolo Odinga** where the petitioner presented a massive affidavit, courts must exercise caution in admitting additional evidence whose nature, content and extent has not been disclosed. A bench mark must be set to limit some wordy parties who are likely to overwhelm the court with enormous pleadings and affidavits.

It is also important to note that it is in the discretion of the court to allow or to refuse additional evidence. It is in the interest of justice that all parties are given fair hearing in any suit. The court has a duty to exercise proper control in the proceedings to ensure that judicial time and other resources are properly utilized. The benefit of all these aspects is to ensure expeditious and efficient disposal of cases thereby enhancing the quality of justice. In exercising its discretion the court has the power to limit the length of the proceedings in a suit.

The explanation of the applicant was that she was not able to get a counsel to represent her in good time and that she was hampered by the poor infrastructure in the constituency. There was no evidence on oath to counter these averments from the petitioner. The fact that the application was filed expeditiously, that is, within five days from the time of filing the response, is an indication of good faith on the part of the applicant. I have carefully considered the reasons explaining delay of filing all the evidence when the response was filed. I find the reasons satisfactory and that no prejudice will be suffered by the petitioner should additional evidence be allowed. In exercise of its discretion, this court allows the application on the following conditions:

- 1) That the application's further affidavit and affidavit evidence of the witnesses being agents of the applicant in the disputed election be filed within three (3);**
- 2) That the number of witnesses be limited to not more than five and the evidence be restricted to the disputed polling stations.**
- 3) That the further affidavit of the applicant and the evidence affidavits of the witnesses will not be more than three typed pages of Ms Word font 14 including the heading and the jurat of the affidavit.**

The costs of this application shall be costs in the cause.

**F. MUCHEMI
JUDGE**

Ruling dated and delivered this **21st** day of **May 2013** in the presence of the parties and their counsels Mr. Mwangunya holding brief for Mr. Munyithia for the applicant and Mr. Kilonzo for the petitioner and Wetangula for the 1st and 2nd respondents.

**F. MUCHEMI
JUDGE**