



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

KAKAMEGA LAW COURTS

ELECTIONS PETITION NO.7 OF 2013

**IN THE MATTER OF THE ELECTION OF THE MEMBER OF NATIONAL ASSEMBLY FOR
LUANDA CONSTITUENCY**

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011, NO. 24 OF 2011

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2013**

BETWEEN

AURTHUR KIBIRA APUNGU.....1ST PETITIONER

JULIUS ABRAHAM SIKALO OCHIEL.....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER,

LUANDA CONSTITUENCY.....2ND RESPONDENT

CHRISTOPHER OMULELE.....3RD RESPONDENT

RULING

1. The Petitioners filed a Notice of Motion application dated 3/5/2013. The application is brought under O. 50 R. 6, O.51 of the Civil Procedure Rules, Rules 4(1), 12 and 20 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. The Petitioners seek orders that:

1. *Spent.*
2. *The Court be pleased to grant leave to the Petitioners to file affidavits by witnesses out of time.*

3. *All the ballot boxes in respect of Parliamentary elections for Luanda Constituency be delivered to the custody of the Court.*
4. *Costs of the application be in the cause.*
2. The application is premised on the grounds that the delay in filing the affidavits was beyond the control of the Petitioners and it was not premeditated. The proposed affidavits by witnesses are necessary for the court to adjudicate and determine the issues arising in the petition. The said affidavits are necessary to facilitate the just, expeditious, proportionate and affordable resolution of the petition and finally that there shall be no prejudice occasioned to the Respondents if the prayers sought are granted.
3. The application is supported by an affidavit of the 1st Petitioner sworn on the same date. Therein he deposes that he presented the petition on 8/4/2013 and that the Respondents were served by way of publication through the Daily Nation Newspaper on 20/4/2013. It was his disposition that he was not able to file affidavits by witnesses in the petition within the time prescribed by law for reasons that the said witnesses reside in different parts of the country and there were many logistical challenges encountered in tracing their whereabouts despite the exercise of due diligence. He deposed that having traced the whereabouts of the witnesses, it was important to be granted leave of the court to file the affidavits of the witnesses as required by law.
4. It was the 1st Petitioner's disposition that since neither of the Respondents had filed and served a response to the petition, no prejudice would be occasioned if the prayers sought are granted. He deposed further that the grant of leave to file the affidavits of witnesses herein is necessary in order to facilitate just, expeditious, proportionate and affordable resolution of this petition by the court. The 1st Petitioner concluded that he had sought these orders at the earliest opportune time and therefore there has been no delay caused in filing this application. In respect to the ballot boxes, the 1st Petitioner deposed that he was apprehensive that there is a likelihood that the same may be subject to manipulation and tampering with to the detriment of the Petitioners, if they remain in the possession of the 1st Respondent.
5. This application was opposed by the Respondents who filed Grounds of Opposition. The 1st and 2nd Respondents' Grounds of Opposition is dated 30/5/2013, stating their intention to oppose the Petitioners' application on grounds that the application lacks merit and has no grounds or sufficient grounds to justify the delay in filling the affidavits.
6. The 1st and 2nd Respondents also filed a Replying Affidavit sworn by Moses Kipkogei on 13/5/2013. He deposed that the Petition is guided by strict timelines and requirements stipulated by the Constitution, Elections Act and the applicable regulations set out to facilitate expeditious determination and disposal of election petitions. The Respondents' further submitted that the requirement to file all the affidavits alongside the petition was so as to set out the entire case to enable the Respondents appropriately respond to all issues as pleaded. He deposed that that the Respondents had already filed their responses to the petition. He further deposed that the proposed affidavits by introducing new issues would necessitate all Respondents amending their respective responses and filling additional affidavits.
7. The deponent reiterated that the Petitioners' application is incompetent and made in bad faith for the same is a belated attempt to introduce additional evidence and issues, and that no sufficient reasons have been given by the Petitioners to warrant the grant of the reliefs sought in the application and that the Petitioners have not discharged the burden set in law for the exercise of the Court's discretion for extension of time. Moreover, the Court is already out of the timeline set for compliance with Rule 17 of the Election Rules. Thus any attempts to reopen the filling of pleadings would interfere with the timelines required under the electoral laws.
8. The 3rd Respondent filed grounds of opposition dated 9/5/2013, in which he stated that the application is misconceived, incompetent and abuse of court process. He further deposed that the

- documents sought to be filed introduce new evidence and issues of law that are inconsistent with and contradict the petition. Moreover the new evidence will be prejudicial to the 3rd Respondent as he cannot rebut the allegations within the strict timelines stipulated by the Election Rules. The 3rd Respondent contended that the delay in filing the proposed affidavits is inordinate and the reasons given for such delay insufficient. The 3rd Respondent stated that 30 proposed affidavits which refer to 30 individuals, if allowed will greatly and unnecessarily increase costs, delay hearing thereby obstructing his right to access justice. The 3rd Respondent maintained that the introduction of the evidence sought to be filed is an afterthought, mischievous and made in bad faith.
9. The application was canvassed by way of written and oral submissions. The Petitioners filed skeleton submissions dated 31/5/2013 wherein they reiterated that leave to file affidavits ought to be granted to ensure a just and proportionate determination of the dispute. They submitted that there would be no prejudice occasioned to the Respondents if leave was granted and further that nothing stopped the Respondents from amending their responses or filing new affidavits. It was the Petitioners' submission that due diligence mandated the Respondents to have sought instructions, in respect to the proposed affidavits, from the time the application was filed on 3/5/2013. In respect of the delivery of ballot boxes to the custody of the court, the Petitioners submitted that, the said prayer had not been opposed.
10. Mr. Mungai, counsel for the 1st and 2nd Respondents made oral submissions on behalf of the 1st and 2nd Respondents. Counsel submitted that Section 76(4) of the Elections Act provides that any amendment to a petition must be made within the stipulated time which is 28 days. Counsel referred to the decision in the case of **Clement Kungu Waibara & Another v Hon. Francis Kigo Njenga & 3 Others E.P. (Nairobi) 15/2013**. Counsel submitted that the application was time barred because the 28 day mark lapsed in April 2013.
11. The 3rd Respondent filed submissions dated 30/5/2013. He submitted that the Petitioners' application was casually made as there was no effort made by the Petitioners to reveal to the Court the challenges encountered that caused the delay in filing affidavits. Further, it is submitted that the intended witnesses have their postal address as 5476 – 00200 Nairobi which suggests that they indeed reside in Nairobi County and could easily be found contrary to the assertions by the Petitioners that the witnesses reside in various parts of the country. The 3rd Respondent contended that the Petitioners were not being truthful in the matter, and that discretion of this Court is granted to litigants who come to Court with clean hands.
12. The 3rd Respondent submitted that the proposed affidavits introduced other issues of irregularities in 13 more polling stations that have not been pleaded in the petition, and in particular paragraph 12 of the petition which outlines 12 polling stations complained of. The 3rd Respondent maintained that the Petitioners' application amounted to amending the petition. The 3rd Respondent also stated that the effect of filing affidavits would occasion prejudice as it would take time for him to adequately respond to 30 affidavits whereas they had no luxury of time in view of the strict timelines stipulated by the electoral laws. The 3rd Respondent relied on the Supreme Court decision in Petition No. 4/2013 where the Court determined that the non-compliance by the Petitioners to strict timelines may prejudice the Respondents, and for that reason, the affidavits filed out of time ought to be struck out.
13. In respect to the delivery of ballot boxes to the custody of the court, the 3rd Respondent referred to the contents of the 1st and 2nd Respondents' affidavit sworn by Moses Kipkoge on 13/5/2013 wherein at paragraph 10, he affirmed that the 1st Respondent has all the intentions of complying with the provisions of Rule 21 of the Election Rules which gives it a timeline to deliver ballot boxes to the Registrar of the Court.

Determination

14. I have carefully considered the application in light of the prayers sought, the submissions and the law applicable. The Petitioners seek two orders in this application. First, they seek leave to file additional witness affidavits out of time and secondly, an order that all ballot boxes for the parliamentary elections for Luanda Constituency be delivered to the custody of the Court. I will start with the latter. The Petitioners deposed that they were apprehensive that the ballot boxes in respect of parliamentary elections for Luanda constituency may be subject to manipulation and tampering with to their detriment, if they remain in the possession of the 1st Respondent. Counsel for the 1st and 2nd Respondents notified the Court that the 1st Respondent was willing and ready to have the ballot boxes delivered to the custody of the court before the stipulated time as prescribed in Rule 21(a) of the Election Rules. However, the 1st Respondent would only take such action upon the direction of the Court. Rule 21(a) provides:

“The Commission shall deliver to the Registrar –

the ballot boxes in respect of that election not less than forty-eight hours before the date fixed by the Court for the trial;”

15. At the time the counsels argued this application, I stated, and wish to reiterate the same, that a basis for the delivery of the ballot boxes prior to the stipulated time in the Election Rules must be laid before such order can be made. In that regard, it was not enough to have a party state that he/she is apprehensive that the ballot boxes could be manipulated by the Respondent merely because the boxes are in the Respondent’s possession. Such serious allegations must be justified and a good basis laid for the grant of such an order. Further, and more importantly, the security of the ballot boxes is not only a concern of the Petitioners, but also of the Court and the constituents of Luanda Constituency. Unless there was any proof that the said ballot boxes are at risk in the 1st Respondent’s possession, the same would be kept in its storage until the stipulated time as prescribed by Rule 21(a) of the Election Rules. In the circumstances, prayer 3 of this application is denied.

16. I now turn to the core prayer of the application, which is about the leave to the Petitioner to file additional witness affidavits out of time. Rule 12(1) of the Election Rules mandates the Petitioner to file an affidavit for each witness whom he/she intends to call at the trial. Filing of the said affidavits must be done at the time of filing the petition. Pursuant to sub-rule 4, a witness will not be allowed to give evidence, except with leave of court, if he fails to file an affidavit.

Rule 12

1. *“A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial;*

(4) A witness for the Petitioner who fails to file an affidavit as required by this rule shall not be allowed to give evidence without the leave of the Court.”

17. The Petitioners averred that they were unable to file all the witnesses’ affidavits at the time of presenting the petition. The reason advanced by the Petitioners is that there were logistical challenges in view of the said witnesses residing in various parts of the constituency. Thus, tracing them to swear affidavits before a commissioner for oaths presented difficulties. In that regard, Petitioners had to first obtain leave of court prior to filing the said affidavits, without which, the same would be rendered null and void, and possibly be struck off. The Petitioners contended that this application was filed at the earliest opportune time and even before the Respondents filed their responses to the Petition. They maintained that the purpose of these affidavits were to enable the Court arrive at a just, expeditious, proportionate and affordable resolution of this petition.

18. The Respondents, on the other hand, submitted that the essence of the rule requiring the Petitioner to file witness affidavits alongside the petition was so as to afford the Respondents adequate time to respond to all the allegations. The Respondent also stated that the Petitioners did not attempt to

elaborate the logistical challenges other than alleging that the witnesses reside in various parts of the constituency. The Respondents contended that the proposed affidavits were an attempt to amend the issues for determination in the petition and in effect amend the petition. The Respondents stated that the proposed affidavits introduced 13 new polling stations and other issues of irregularities that had not been pleaded in the petition.

19. Whether or not to grant leave for filing witness affidavits out of time is a matter for the discretion of the Court pursuant to Rule 20 of the Election Rules. The Rule affords this Court discretion to extend time where time has been stipulated by the Rules or granted by Court. This is to ensure that injustice is not occasioned to any party. Rule 20 reads:

“Where any matter is to be done within the time provided for in these Rules, or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done on such terms or conditions as it may consider fit even though the period initially provided or granted may have expired.”

20. The critical issue that arises now is whether the Court can admit affidavits, whose effect will be to amend the petition. Rule 17 of the Election Rules provides for pre-trial conference and prohibition of delayed interlocutory applications. This rule, in my view, is a measure to safeguard the adjudication process of an election petition from interlocutory applications made after the commencement of the hearing. The rule also ensures that both the court and the parties narrow down to the contested issues and adopt the best and practical way of resolving the disputes. Sub-rule (i) thereto, permits the Court to admit the filing of further affidavits or additional evidence. Rule 17 (i) provide:

“Within seven days after the receipt of the last response to a petition, the court shall schedule a pre-trial conference with the parties in which it shall – give directions as to the filing and serving of any further affidavits or the giving of additional evidence”

21. Majanja J. in the case of **Wavinya Ndeti v IEBC & 4 Others Machakos EP No. 4/2013** took the view that the evidence referred to in Rule 17(i) could be in addition to existing evidence or it may be entirely new evidence. The Judge held, *“Whatever the situation these provisions enable the court to admit additional or new evidence in so far as it assists in the just disposal of the matter.”* I concur with the Honorable Judge that the aim of these rules is to ensure the furtherance of the overriding objective as provided in Rules 4 & 5 of the Election Rules.

22. I have noted that the 3rd Respondent placed a reliance on the Supreme Court case of **Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR**. I am guided by the principles therein, particularly on matters the Court should consider when granting leave for filling further affidavits.

“The parties have a duty to ensure they comply with their respective timelines, and the Court must adhere to its own. There must be a fair level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party by the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided. 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. 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.”

23. Notably, the circumstances at the Supreme Court were different from those that obtain in this

petition. Unlike the parliamentary and county election petitions whose adjudication period is 6 months, the timeline stipulated to adjudicate over a presidential election petition is limited to 14 days. Consequently, introduction of a further affidavit in such an instance would present an unlevelled playing field to the other parties. The Supreme Court also intimated that each case must be considered on its own merits in regards to the nature of the additional evidence.

24. It is noteworthy that even if the Court has discretion to grant leave to extend time, such discretion ought to be exercised judiciously in furtherance to the purpose of the Rules, which is the just and efficient disposal of an election petition. Have the Petitioners given sufficient ground to warrant this Court to grant the orders? This application was filed on 3/5/2013 a little over 3 weeks after filing the petition. Indeed, it was filed before any of the Respondents filed their responses. I have looked at the witness affidavits that the Petitioners intend to file. These affidavits do not raise new issues that depart from the petition. In my view, some of the affidavits merely elaborate the alleged malpractices on the part of the Respondents, whereas some affidavits make reference to specific polling stations that in the petitions were referred to as “*various polling stations*”. I also find that there will be no prejudice occasioned to the Respondents as they will be given sufficient time to respond to the said affidavits.

25. As stated hereinabove, I must exercise my discretion judiciously in determining this application in order to safeguard the interest of all the parties to this petition. I have allowed the proposed affidavits to be filed out of time. However, having gone through each of the proposed affidavits, I have taken note that not all of them deserve to be given the light of day. The observations I have made are that the allegations contained in the said 30 affidavits can be categorized into three groups. The first group comprises of the allegations of either bribery or refusal to act on the part of the provincial administration, and here the affidavits of the following affidavits come to mind:

- i. *Sammy Kweyu*
- ii. *Ruth Ong’ayo Onyanchi*
- iii. *Woodson Nicanory Indiya*
- iv. *David Otole Otieno.*

26. The second category comprises of allegations against the officials of the 1st Respondent or its officers. The affidavits in this category comprises of those deponed to by:

- i. *Gladys Karani*
- ii. *Margaret Olindo Juma*
- iii. *Eliphas Ngota Olupanda*
- iv. *Benson Amukowa Andoli*
- v. *Ishmail A. Otieno*
- vi. *Rose Ambaso*
- vii. *Judith E. Anyiso Ngah*
- viii. *David Otindo (who has sworn 2 affidavits instead of one which should comprise the contents of the 2 affidavits)*
- ix. *John Akwale*
- x. *Simeon Amboye Olembo*
- xi. *Samuel N. Terah*
- xii. *Wycliff Ominde*

27. The third category comprises of affidavits whose probative value is highly doubtful, being purely speculative and in many instances repetitive of issues already deponed to in the other affidavits. This category comprises of affidavits deponed to by:

- i. *Christopher Umukhango*
- ii. *Sauline Akinyi*
- iii. *Hellen Asande*
- iv. *Maxmilla Lithemu*

- v. *Joash Otundo Kabala*
- vi. *Flora Shisia*
- vii. *Adam Kutai*
- viii. *Margaret Olocho*
- ix. *Tabitha Ondiso*
- x. *Violet Mmbone*
- xi. *Daniel Noah Lubwayo*
- xii. *Harun Odera*
- xiii. *Isaac Muchilwa*
- xiv. *Alexander A. Lubukha*

28. In that regard, I make orders as follows:

- a. *As regards the 1st and 2nd categories stated hereinabove, the Petitioners must choose not more than 10 witness affidavits to address those issues.*
- b. *As regards the 3rd category, the order and direction which appeals to the proper sense of justice is to have all those affidavits under that category disallowed for their probative value is highly speculative, and does not advance the proper adjudication of this petition in light of the strict timelines that we have.*
- c. *The Petitioners will within 4 days from the date of this ruling to file and serve not more than 10 additional witness affidavits.*
- d. *The Respondents shall have corresponding leave to file responses within 10 days from the date of service of the additional affidavits.*
- e. *Costs of this application shall be for the Respondents.*

DATED, READ AND DELIVERED AT NAIROBI

THIS 20TH DAY OF JUNE 2013.

E. K. O. OGOLA

JUDGE

In the Presence of:-

Mr. Muyondo for the Petitioners

Mr. Mungai for the 1st and 2nd Respondents

Mr. Tollo for the 3rd Respondent

Teresia - Court Clerk

Legal Researcher - Jackie Kibogy