



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NUMBER 7 OF 2013

HEARD BEFORE THE HIGH COURT OF KENYA AT NAIROBI

**IN THE MATTER OF THE ELECTIONS ACT, ACT NO. 24 OF 2011 AND THE
SUBSIDIARY LEGISLATION THERETO, THE ELECTIONS (PARLIAMENTARY AND
COUNTY ELECTIONS) PETITION RULES, 2013**

AND

**IN THE MATTER OF ELECTIONS FOR THE NATIONAL ASSEMBLY SEAT OF MANDERA
NORTH CONSTITUTENCY**

AND

IN THE MATTER OF THE PETITION BY BASHIR HAJI ABDULLAH

BETWEEN

BASHIR HAJI ABDULLAHI. PETITIONER

VERSUS

ADAN MOHAMMED NOORU. 1ST RESPONDENT

BILLOW ADAN KEROW. 2ND RESPONDENT

EKONIT KOMOL JOHN

(The Returning Officer Mandera North Constituency)..... 3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION. 4TH RESPONDENT

CONSOLIDATED RULING

The applications before the court are six in number. They include: -

- a. **Petitioner's Notice of Preliminary Objection dated 4th May, 2013 which on its face does not seek any specific relief after pointing out the fact that the 2nd Respondent has so far failed to enter appearance using the Form and manner contemplated under Rule 7 of the Elections (Parliamentary and County Election) Petition Rules.**
- b. **Petitioner's Notice of Motion dated 4th May, 2013 against the 1st and 2nd Respondent's, and seeking the striking out of the 1st and 2nd Respondent. Response to the Petition on the grounds that the same were filed in time but served out of time or that they were filed and served out of the prescribed times.**
- c. **Petitioners Notice of Motion dated 9th May, 2013 against the 3rd and 4th Respondents, seeking the striking out of the 3rd and 4th Respondents responses to the petition on the ground of the same having been served upon the Petitioner, out of the prescribed time.**
- d. **The 1st Respondent's Notice of Motion against the Petitioner dated 7th May 2013 seeking extension of time within which the 1st Respondent should have served an Answer to the Petition and also seeking that the filed Responses in form of affidavits be deemed as timely filed.**
- e. **The 2nd Respondent's Notice of Motion against the Petitioner dated 7th May, 2013, seeking extension of time within which 2nd Respondent's should have filed and served his Answer to the Petition and also seeking that the 2nd Respondent's Response dated 26th April, 2013 and served on the same day, be deemed to be a proper answer to the petition and to be deemed to have been timely filed.**
- f. **The 3rd and 4th Respondents' joint Notice of Motion against the Petitioner dated 8th May, 2013, seeking extension of time within which they should serve their Response to the petition and also seeking an order deeming the filed Response as properly and timely filed.**

Before the above applications were fixed for hearing, the parties agreed that the applications raised mainly, issues touching on timelines within which the mentioned petition pleadings were required to be filed. That the applications invoked the court's jurisdiction to extend time and whether time should or not be extended. The parties accordingly agreed that the applications be consolidated or be prosecuted and be defended together. Court allowed parties to put in written submissions and highlighting of the same was done on 3rd May, 2013.

I have perused the written and oral submissions which I have carefully considered.

I will start with the issue of the Preliminary Objection. The Petitioner asserted that the 2nd Respondent has never filed his Appearance as required under Rule 7 of the Elections (Parliamentary and County) Election Petition Rules, 2013. The rule requires that a person in an election should immediately file with the Registrar of the High Court nearest to his Constituency a Notice in writing signed by him or his agent appointing an advocate to handle his petition in case one is filed, or stating if the elected person will act in person. The Notice should contain his address in Kenya to which any notices or papers may be sent.

In this case there was no dispute that the 1st Respondent had not complied with the above direction and the failure may probably have inconvenienced the Petitioner. Since the 1st Respondent did not dispute this allegation, and since the rule does not specify any sanction against the party who did not comply with the Rule, this court will order the 1st Respondent to comply with Rule 7 aforesaid.

The next issue is that that 1st and 2nd Respondents failed to file and serve their Answer to the petition in the form prescribed by rule 14 of the hereinabove mentioned Rules. The Petitioner stated that the 1st and

2nd Respondent instead of filing an Answer, filed what they termed “**Affidavit in Reply**” which is totally unknown to the prescribed Rules. The Petitioner also stated that the Affidavit in reply failed to contain the facts and information properly envisaged to be contained in an Answer, thus depriving the Petitioner proper and full particulars in answer to the petition. The Petitioner further asserted that the Respondent deliberately defied the mandatory requirement of rule 14 in deviating from the form of the Answer prescribed by the Rules. The result was that the Petitioner was denied the facts and information required to be in the “**Answer**” and is thus prejudiced. He called for the striking out of the “**Affidavit in Reply**”. The Petitioner in addition submitted that the “**Affidavit in Reply**” contained no adequate information or facts but was in a form of general traverse or mere denials. He finally also argued that the said affidavit was in any case required to be accompanied by an independent “**Answer**” stating the defence to the petition while an affidavit contained the full substance of the pleadings in the Answer.

The 1st and 2nd Respondents did not deny that there should have been filed an Answer to the Petition as well as the supporting affidavits containing the substance of the matters pleaded in the Answer. They instead argued that the “**Affidavit in reply**” contained both the pleadings in response to the petition as well as the substance of the evidence supporting the Answer. They admitted that failure to strictly follow the requirement of Rule 15 under which the Answer and the accompanying affidavit should be filed, was due to pressure of time. They submitted that their deviation from the proper format was small and that the leave sought should be forgiven for the sake of doing justice to the Respondents. They further said that the court should apply the spirit of Rule 20 of the said Rules and Article 159(2) (d) as well as Section 72 of the Interpretation and General Provisions Act, Cap 2 whose purpose is to enable the court not to be prevented to do justice by mere technicalities.

I have carefully considered the submissions above from both sides. The aim and purpose of the Elections (Parliamentary and County Elections) Petitions Rules, 2013 is provided in rule 4 thereof which states: -

“(i) 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

ii) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (i)

iii) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the process of the court and comply with the directions and orders of the court.”

Clearly the court’s obligation and duty in the exercise of the jurisdiction given to it under the Elections Act as sanctioned by the Constitution, is to give effect to the overriding objective of the Election Petition Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of the election petitions. That duty and obligation is not left to this court alone. On the contrary, it is to be shared by all the parties and their advocates involved in the election petition. They have an obligation to assist the court not only to further the overriding objective but also to achieve it.

I understand the provision to mean that the conduct of a party or his/her advocate in respect to a petition, from the whole beginning until there is a final determination of the same, must be full compliance with the said Rules. The party or counsel is accordingly obliged to read, understand and comply with the Rules. A Petitioner would not feel safe or comfortable and would not indeed be compliant to the Rules if he proceeded to draft and file a petition without first carefully reading the act and these Rules. Nor would a Respondent who is served with an election petition, rush to file a response in court without first properly perusing the Rules, to appreciate what is expected of him/her in the Response. Parties to a petition should accordingly avoid acting in ignorance of the requirements of these Rules.

The 1st and 2nd respondents herein claimed that they failed to file proper Answers to the petition because they were under serious work pressure. They submitted that they filed in place of the “**Answer**” a

document called **“Affidavit in Reply”**. However, if they had time to draw the said **“Affidavit in Reply”**, what prevented them from drafting and filing proper Answers. In my view, they either defied the requirements of the Rules after perusing them as they were expected to do before responding, or did not bother to peruse the Rules to understand what was expected of them. In either case, their conduct amounted to professional negligence or recklessness. In deciding to file a document called **“Affidavit in Reply”** which is clearly foreign to the Rules, they did not stop to appreciate the consequences of their act to themselves as professionals or to the parties they were hired to represent.

Be that what it may, the purport of the applications before the court is to seek extension of time so that the documents they filed late may be accepted into the record of this petition to enable the Respondents to have locus to defend the petition. They cited Rule 20 of the Elections Petitions Rule, 2013 as giving the court the power to extend time. It says: -

“Where any matter is to be done within such time as 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 with such conditions as it may consider fit even though the period initially provided or granted may have expired.”

Clearly, this court has power to grant extension after being satisfied that there are good reasons to do so for the purpose of preventing injustice being done to the party or even generally in the matter before it.

In this case the delay in filing the Answers to the petition, has been sufficiently explained and is minimal. This indeed is also the case with the 3rd and 4th Respondents. Apart from or aside of failure to file proper **“Answer”**, the court believes that the **“Out of Time”** documents should be admitted to enable the Respondents have locus to defend the Petition. The court will accordingly make extension of time orders.

But the situation is not that simple in this case. This is because the 1st and 2nd Respondents, and indeed even the 3rd and 4th Respondents, did not file **“Answers”**. They filed documents called **“Affidavit in Reply”** or **“Responses”**. They submitted that the same are the Answers which combine with affidavits required to be in support to the Answers. Mr. Kilukumi agreed that the Respondents should have filed **“Answers”** separate from the affidavits in support of the Answers. They sought indulgence to first admit those **“Affidavits in Reply”** and then treat them as Answers besides being affidavits in support.

I have considered the request by Mr. Kilukumi for the 1st and 2nd Respondents. As far as the court can see, the 3rd and 4th Respondents are similarly affected. The conclusion I reach, therefore, is that the court will decline Mr. Kilukumi’s prayer. Instead the court will treat the Respondent’s affidavits as supporting affidavits to the answers which have not so far been filed. The court will at the pain of costs allow the Respondents who have not filed **“Answers”** to do so. That will allow the said Respondents to have the locus to defend the petition effectively. This will give them their day in court apart from allowing the court trial of the petition to proceed smoothly and probably without hitches.

In conclusion, the Petitioner sought the striking out of the Respondents **“Affidavits in Reply”**. The court has considered those prayers in the face of the Respondents application to allow them to file their pleadings outside the prescribed times. The court has in its wide power and discretion under aforesaid Rule 20, agreed to extend the time to file Answers instead of striking out the responses. In the circumstances the court takes the course represented by the following orders: -

ORDERS

- 1. The Petitioner’s Preliminary Objection and applications dated 4th May, 2013 and 9th May, 2013 are hereby dismissed.**
- 2. The Respondents “Answers” in the form of “Affidavits in Reply” are admitted and will be treated as affidavits in support of the Respondents “Answers”.**

3. **The Respondents who have not filed their “Answers” shall file and serve their Answer(s) within 7 days.**
4. **All Respondents who have not complied with Rule 7 of the Election Petition Rules 2013, shall do so within 7 days.**
5. **Costs of all the 5 applications shall be borne by the four Respondents, equally in any event.**

Dated and delivered at Nairobi this 17th day of June, 2013.

.....

D A ONYANCHA

JUDGE

PRESENT

No appearance for Petitioner

Nabwayo/Kilukumi for 1st and 2nd Respondents

Mungai for 3rd and 4th Respondents