



IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO. 4 OF 2013

LESIT J.

THE ELECTION ACT, 2011 THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

IN THE MATTER OF HE ELECTION OF THE COUNTY GOVERNOR OF THARAKA NITHI COUNTY

THE PETITION OF

M'NKIRIA PETKAY SHEN MIRITI.....PETITIONER

V E R S U S

**RANGWA SAMUEL MBAE.....1ST
RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....
....2ND RESPONDENT**

**SAMUEL MUCHERU.....3RD
RESPONDENT**

RULING

1. The application is a Notice of Motion dated 11th June 2013. It has been brought under Rule 17(i) of the Elections (Parliamentary and County Elections) Petition Rules.
2. The application seeks court's leave to allow the Petitioner introduce additional evidence vide the affidavits sworn by DICKSON MICHENI and PAUL KATHENYA MITAMBO, both which are attached to this application.
3. The application is premised on four grounds:
 1. **The additional evidence will assist the Court determine the matter. This evidence was not available to the Petition at the time of filing the petition.**
 2. **The additional evidence is in line with the main grounds of the petition and confirms voter bribery and election malpractices.**
 3. **The Respondents will suffer no prejudice as they will have the occasion to cross examine the witnesses on their evidence.**
 4. **It is only fair and just that the further evidence be admitted. The application is brought timeously and in good faith.**

4. Rule 17 provides in part:

17.(1) 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—

i. give directions as to the filing and serving of any further affidavits or the giving of additional evidence;...

5. This provision gives room for the court to issue directions as to the manner in which any evidence not filed by the time the pre-trial conference is held is to be dealt with. It was noted by Ogolla J. in **Arthur Kibira Apungu & Others v. IEBC & Others Kakamega Election Petition 7 of 2013:**

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.

6. The Supreme Court Presidential Election Petition Rules 2013 has identical provisions on pre-trial conference. Rule 10 of these rules provides:

10. (1) The Court shall, at the pre-trial conference—

...

(f) give directions in regard to the filing and service of any further affidavits or the giving of additional evidence;

7. At page 10 of the ruling delivered by the court in **Raila Odinga & Others v. IEBC & Others (2013) eKLR** on the Petitioner's further affidavit, the Supreme Court observed as follows:

...the Petitioner could have applied for leave to be allowed to file further affidavits and/or additional evidence at the Pre – trial Conference. Of course it would be prudent for one to file such an application before the date of the Pre-trial Conference, so that it is before the Court, in time.

8. The rules require that the Petitioner files a Petition which is accompanied by an affidavit together with the affidavits of each of the witnesses that they intend to rely on at the trial. The requirement for introduction of the filing of affidavits together with Petitions is to obviate the need to request further particulars, with the result that the Respondents are clear on the case that they are required to respond to. Indeed the Supreme Court in its ruling on the Petitioner's affidavit in reply

delivered on the 26th of March stated at page 9:

The parties have a duty to ensure they comply with their respective time – lines, 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, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

9. The decision whether or not to allow the application should be guided by the fact that the Constitution has set a limited time frame for the hearing and determination of election dispute. Article 105 (2) of the Constitution and Section 75 (2) of the Elections Act make it clear that an election Petition filed to challenge a County or a Parliamentary Election must be heard and determined within 6 months of filing. The timing of the application is therefore very important; hence the observation by the Supreme Court that such an application should ideally be filed before the pre-trial conference.
10. In this case the application has been filed after the Pre-trial. The Petitioner had applied to be granted leave to bring the application during the Pre-trial Conference which was held on 7th June, 2013. The application was filed on the 14th June, 2013, before the hearing commenced on 24th June, 2013. The court needs to consider whether there is a delay in bringing the application and if so, whether the delay is inordinate or in excusable. I do find that the court granted the Petitioner leave to file his application to bring additional evidence and that the application was brought without undue delay.
11. The affidavits sought to be filed are annexed to the application to allow the court to assess the evidence sought to be introduced, its probative value and also the likelihood of prejudice to the other side. What the court needs to determine is whether or not what is sought to be introduced through the additional evidence would be such as to change the nature of the case and lead to a departure from the original case as set out in the first pleadings. The Supreme Court in the **RAILA CASE**, supra, had this to say on the nature of the evidence:

Secondly, from what has been deposed by Mr. Ong’wen and Mrs. Ongera in their respective affidavits, the additional facts and evidence, in our view, tend to introduce such new matters as would change the character and nature of the Petition. This may lead to amendment/s of the Petition thereby possibly giving rise to significant new facts and/or allegations leading to a serious departure from the original case. We hold that if we allow the 7 affidavits to remain on record, the same will be prejudicial to the Respondents. This will amount to a miscarriage of justice, and we cannot allow it in the circumstances.

12. The circumstances surrounding the case before the Supreme Court have led to this case being distinguished when a High Court is considering an application of this nature. This is because, unlike the Supreme Court which had only 14 days to hear and determine the Petitions filed to challenge the Presidential Election, the High Court has 6 months from the date in which the Petition is filed to hear and determine the Petition. This was noted by Kimondo J. in **Kakuta Maimai Hamisi v. Peris Pesu Tobiko & 2 Others (supra)**. In paragraph 14 of his ruling on an application to file replying affidavits out of time, he observed:

Unlike the Supreme Court in a presidential election, this court has 6 months to determine a Petition from the date of its filing.

13. The same distinction was made by Ogolla J. in **Kakamega Petition 7 of 2013 Arthur Kibira Apungu & Others v. IEBC & Others** stated at page 10-11:

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.”

14. The court went on to state that the critical issue to determine was whether or not it could admit affidavits whose effect would be to amend the Petition. He cited with approval the position adopted by Majanja J in **Wavinya Ndeti v. IEBC & Others Machakos Petition 4 of 2013** that the evidence referred to in Rule 17 (i) could be in addition to existing evidence or it may be entirely new evidence. He quoted Majanja J. as follows:

“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.

15. I have considered the additional evidence sought to be introduced. The affidavit of DICKSON MICHENI introduces new allegations of malfeances against the 2nd Respondent which had not been pleaded in the Petition. It has also introduced a new Polling Station, Kimoro, not earlier pleaded whether in the Petition or the supporting affidavit. That means there is a clear introduction of new issues and pleading of a new case which, if allowed will necessitate the Respondents to swear new affidavits in order to respond to these allegations. That will not only result in a delay in the disposal of this Petition but will also prejudice the Respondents adversely.
16. I have considered the affidavit by PAUL KATHENYA MITAMBO. This affidavit has also introduced new evidence of alleged election offences against the Respondents and in new Polling Station. The effect of this affidavit is to introduce new and fresh allegations of election offences and collaboration against the Respondents. If allowed the Respondents will have to adduce new evidence in form affidavits to rebut the same. That will not only translate to delay in finalising this Petition but will also highly prejudice the Respondents.
17. The two affidavits filed by the Petitioner went beyond this court order and introduced new matters which had the effect of materially changing the position of the Petition. I find that the evidence adduced in this two affidavits is not necessary for the just determination of the matters in dispute and that it does not allow the court to give effect to the overriding objective of the Rules. I find that it has changed the nature of the Petition by introducing new and contentious issues. I find that the interests of justice demanded that Petitioner ought not to be allowed to file the additional

evidence.

DELIVERED IN OPEN COURT AT MERU THIS 1^S DAY OF JULY 2013.

LESIT, J

JUDGE.