



REPUBLIC OF KENYA



**Ndago v Independent Electoral & Boundaries Commission & 2 others (Election
Petition 2 of 2022) [2022] KEMC 4 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 4 (KLR)

**REPUBLIC OF KENYA
IN THE KILIFI LAW COURTS
ELECTION PETITION 2 OF 2022
JM KITUKU, SPM
NOVEMBER 4, 2022**

BETWEEN

GAMBO SAMUEL NDAGO PETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

**JUMAA MUSA JUMAA - RETURNING OFFICER KILIFI SOUTH
CONSTITUENCY 2ND RESPONDENT**

NDUNDI HARON TETE 3RD RESPONDENT

RULING

1. There are three applications due for determination by this honourable court filed by each of the respective parties.

By consent of the parties the court directed the said interlocutory applications be heard at the same time (concurrently) and by way of written submissions.

I now proceed to consider each of the three applications.

A. Application dated 12.10.2022

2. This application is filed by the petitioner in the main petition.

It is brought pursuant to the provisions of order 53 of the Civil Procedure Rules 2010, section 1A, 1B, 3A & 63 of the *Civil Procedure Act*, Rule 12 and 14 of the *Elections (Parliamentary and County Elections) Petition Rules 2017*, section 80 of the *Elections Act* 2011 and all other enabling provisions of the law.

3. The applicant seeks that: -



- i. The 1st respondent be ordered to avail to court and all the parties all the forms 36a's and polling station diaries in respect of shimo la tewa ward for purposes of this petition.
 - ii. Costs of this application be in the cause.
4. The application is supported by an affidavit sworn by the applicant, Gambo Samuel Ndago on the 12th day of October, 2022 and premised on the grounds of the face of the motion.
 5. The 3rd respondent filed grounds of opposition on the 21st day of October, 2022 in opposition of the said application.
 6. When matter came for directions on the 21st day of October, 2022, the 1st respondent informed the court it was not opposed to the application and it actually had served the applicant with the requested document.
This position was confirmed by the applicant who actually told the court the application had already been compromised, after being served with the said document.
 7. Nevertheless, the 3rd respondent insisted the application must be heard on merits.
 8. The applicant's case is that the said documents are usually in the custody of the 1st respondent.
By the time he filed the petition, the said documents were not available.
Further, in their response to the petition, the 1st respondent did not avail all the form 36a's and polling station diaries, yet the said documents are critical in assisting the court to arrive at a fair and just determination of the dispute herein.
 9. On the other hand, the 3rd respondent submits that the applicant has to lay the basis for supply of the requested form 36a's and the polling station diaries, since he is not disputing the results of all the polling stations in mwanamwiga ward, and the application amounts to a fishing expedition.
 10. In any event, the 1st and 2nd respondent supplied all forms 36a's at the polling stations.

Analysis and Determination

11. I have read and analysed the pleadings, the submissions and the applicable law.
12. Section 80 of the *Elections Act* spells out the powers of an election court.
Section 80 (1) (d) provides that an election court, may in exercise of its jurisdiction, decide all matters that come before it without undue regard to technicalities.
That is equally a constitutional imperative under article 159 (2) (d) of *the Constitution* of Kenya 2010.
13. Further, section 4 of the *Elections (Parliamentary and County Elections) Petition Rules* 2017 set out the objective of the aforesaid rules "is to facilitate the just, expeditious proportionate and affordable resolution of election petitions".
As such, any order made by the court should be to facilitate and not to hinder the said overriding objectives.
14. It is not in dispute that the documents requested by the petitioner are in exclusive possession of the 1st and 2nd respondent.



15. Under Regulations 93 of the *Elections (General) Regulations 2012*, relating to the retention and inspection of documents, it provides as follows: -

“ 93 All documents relating to an election shall be retained in safe custody by the
(1) Returning officer for a period of three (3) years after the results of the elections have been declared, and shall then, unless the commission or the Court otherwise direct, be disposed of in accordance with the procedures prescribed by the commission subject to the *Public Archives and Documentation Service Act* (Cap 19)
2”

16. Under Rule 16 of the *Elections (Parliamentary and County Elections) Petitions Rules 2017*, on storage of ballot boxes and other election materials, it provides as follows: -

“ 16 on conclusion of the pretrial conference under rule 15 the election court may
(1) give directions on: -
a. The storage of the election materials, including ballot boxes, and documents relating to the petition.
b. The handling and safety of the election materials, or the time for furnishing the election materials to the election court.
(2)
(3) An election court may direct that the commission maintains the custody of all election materials in relation to a petition.
(4) Only the materials relating to a particular election may be furnished to an election court”.

17. Since the materials requested by the applicant are election materials, and in view of the petition herein, I see no prejudice that the 3rd respondent will suffer if certified copies of the requested election materials are provided to the parties, and even to the court.

(See *Justus Mangumbu Omiti v Independent Electoral And Boundaries Commission (IEBC) & ANOR* (2017) EKLR).

I further direct all the election materials be in the custody of the 1st & 2nd respondent and the parties are at liberty to affix their own seals in addition to the seals by the 1st & 2nd respondents.

Parties at liberty to apply.

(See also *Chris Munga N Bichange & 2 other v IEBC & 2 other* (2017)).

Since the materials have been supplied to the petitioner, I direct the same to be served upon the 3rd respondent and the court within 7 days of this order.

B. Application dated 7.10.2022 and filed in court on the 14.10.2022

18. The application is filed by the 3rd respondent and is premised on the provisions of rule 12 (14) and 15 (2) of the *Elections (Parliamentary and County Elections) Petition Rules 2017*; section 17 of the *Oaths and Statutory Declaration Act*, Cap 15 Laws of Kenya, rule 7 of the Oaths and Statutory Declaration



Rules, section 60 of the [Evidence Act](#), Chapter 80 Laws of Kenya, rule 62 (1) (c) and (4) of the [Elections \(General\) Regulation, 2012](#) and all other enabling provisions of the Law.

19. The applicant seeks that: -
 - a. This honourable court do strike out the affidavit of Justin Chome Genya, Jumaa Kahindi Kaingu, Robert Owino Dundo, Celestine Pendo Kalama, Michael Chombo Tunje, Emmanuel Eleazar Wanzia and Khadija Mahad Isaak.
 - b. The honourable court do declare that the petitioner's supporting affidavit is incompetent and bad in law as it does not conform to the election rules thereby rendering the entire petition incompetent.
 - c. Costs of the application be provided for.
20. The application is supported by the affidavit of Ndundi Haron Tete, the 3rd respondent/applicant sworn on the 7th October, 2022 and premised on grounds set out on the body of the said motion.
21. The 1st and 2nd respondents supported the application.
22. the petition opposed the application via a replying affidavit he swore on the October 17, 2022.
23. The gist of the 3rd respondent's application is that the named persons, though alleging were agents of the petitioner, did not annex proof of the same in their affidavits. As such, they do not qualify to give evidence in support of the petition.
24. Secondly, the affidavit of the petitioner in support of the petition is not in compliance with rule 12 (2) (b) (c) and (d) of the [Elections \(Parliamentary & County Election\) Petition Rules 2017](#); and ought to be struck out.

In the absence of an affidavit in support of the petition, the petition will be rendered incompetent, and equally amenable to be struck out.
25. In response, the petitioner reiterates the deponents of the respective affidavits were agents of the petitioner and has annexed documents in support thereof.
26. Further, the petitioner's supporting affidavit is compliant with the law and should be admitted for hearing.
27. In brief oral rejoinder, Mr Ababoukar submitted that by introducing the documents in the replying affidavit, the petitioner is now introducing new evidence which was not part of the pleadings when the petition was filed, and that is contrary to section 76 of the [Election Act](#), as it is outside the 28 days provided in Law.

Analysis and Determination

28. I have gone through the pleadings, the submissions and the applicable law.

The issues for determination are: -

 - i. Whether the affidavit of Justin Chome Genya, Jumaa Kahindi Kaingu, Robert Owino Dundo, Celestine Pendo Katana, Michael Chombo Tunje, Emmanuel Elazer Wanzia and Khadijah Mahad Isaak should be struck out?
 - ii. Whether the annexure to the replying affidavit by the petitioner amount to new evidence, and therefore offends section 76 of the [Election Act](#)?



- iii. Whether the supporting affidavit of the petitioner is not compliant with the Law, and if yes, if it should be struck out together with the Petition?
29. I have looked at the petition and the impugned affidavits.
- The issue by the 3rd respondent is that the deponents did not annex evidence that they were agents of the petitioner, and the affidavits should be struck out.
30. My view is as follows: -
- Under rule 15 (1) of the *Election (Parliamentary and County Elections) Petitions Rules* 2017, an election court can, during the pretrial,
- (e) give an order, where necessary, for furnishing of further particulars.
31. As was set out in the case of *John Michael Njenga Mututho v Jayne Njeri Wanjiru K Hara & 2 other* (2008) Eklr Koome J) (As she then was) held: -
- “The request and answer to the particulars is meant to prevent surprise and unnecessary expenses and to ensure a fair and effectual Trial...”.
32. In this case, what the 3rd respondent ought to have done is to request for particulars and not to apply for the striking out of the said affidavits.
- In the case of *Philiph Osore Ogutu v Michael Aringo & 2 other* (2013) eKLR, the court held that: -
- “.....where the evidence is unclear, then a party can on application to court seek and obtain better particulars of that evidence from the adversary..”.
33. That position was expounded further in the case of *Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 others*;
- “.....A request for particular will be allowed if it is shown such request is for something certain, compulsory, inevitable, obligatory, requisite or urgent...and it is not an avenue for an applicant to challenge the legality of the petition without the court having the benefit of hearing the complaints raised thereof..”.
- I hold the view that the 3rd respondent should have applied for better particulars, and not for the expurging from the record the affidavits.
34. My second view is that the 3rd respondent cannot challenge the admissibility or otherwise of the affidavits at this stage and by way of an application.
- Rule 12 (3) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017 requires that each person who the Petitioner intends to call as a witness, at the hearing, shall swear an affidavit.
- Under sub rule 10, such an affidavit shall contain the substance of the evidence, and contain a list of exhibits and copies of any documents which the deponent intends to rely on, and shall be deemed as the deponent’s evidence for purposes of an examination in chief.
35. Clearly therefore, it is for the deponent of an affidavit to know which documents and exhibits he or she intends to rely on.
- Whether those documents or exhibits have any evidential value can be raised during cross-examination, and the court will make a determination.



The issue of Locus Standi of the deponent cannot be challenged by way of an application.

Further by its nature, an election petition has a public interest element.

36. It is therefore erroneous for an election court to refuse to consider the contents of an affidavit and documents annexed thereto on such a technicality.

(See *Dickson Mwenda Kithinji v Gitarau Peter Munya & 2 others* (2013) eKLR).

37. That said, I agree with the 3rd respondent that the petitioner cannot introduce the documents in the manner he did, that is, through a replying affidavit.

He must seek leave of the court, and after hearing the parties, the court will consider such an application depending on its own merits.

Whether that application will amount to adduction of new evidence/or grounds and therefore an amendment to the petition will be determined after hearing all the parties.

38. I expurge from the record the documents annexed to the petitioner's replying affidavit filed in court on the October 18, 2022.

Consequently, I dismiss prayer 1 of the 3rd respondent's application dated October 7, 2022.

39. On the petitioner's supporting affidavit, rule 8 (4) (f) of the *Elections (Parliamentary and County Elections) Petitions Rules* 2017 provides that: -

“The petition shall be supported by an affidavit sworn by the petitioner, containing the particulars set out under rule 12”.

40. 3rd respondent contend that the petitioner's supporting affidavit does not contain: -

- (i) The date when the election in dispute was conducted rule (12 (2) (b)).
- (ii) The result of the election, if any, however declared Rule (12 (2) (c)).
- (iii) The date of the declaration of the results of the election,

As such, it should be struck out.

41. Having perused the affidavit in support of the petition, i agree it does not comply with the above rules.

Is that non-compliance fatal?

From my research, there are two schools of thought over this issue.

In the High Court, one school of thought holds that the requirement of rule 8 are not mere technical requirement, but they are substantive and go to the root of the petition. Non-compliance leads to striking out of the Petition.

(See *Jimmy Mkala Kazungu v IEBC & 2others* (2017) eKLR, *Mbaya Sayeed Omsiritsa v Nanay Iyadi & 20 others* (2017) eKLR).

42. The other school holds the view is that unless the Petition is so hopelessly defective, that it cannot communicate all the prayers and complaints of the petitioner, the court should do substantive justice by ensuring the petition is heard on merits.

(See *Martha Wangari Karua v Iebc & 3 Others* (2017) eKLR, *Samuel Kazungu Kambi v Nelly Ilongo & 2 others* (2017) eKLR).



43. However, the Supreme Court settled the law in the case of *Lemanker Trannat v Haron Maitamei Lempaka & 2 others* (2014) eKLR, where it held:-

“A court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, as in the case of article 87 (2) and 45 (1) (a) of *the Constitution* may exercise a discretion to ensure procedural failings that lend itself to come under article 159 is cured”.

44. In this case, the petition already discloses all that information missing in the supporting affidavit. its communicating to the court.

I therefore decline to strike out the petitioner’s affidavit in support of the petition.

Consequently, prayer (ii) of the application dated October 7, 2022 by the 3rd respondent is dismissed.

The end result is that the application is dismissed with costs in the cause.

(C) Application dated 14th October, 2022

45. This application is by the 1st and 2nd respondent and is brought pursuant to the provisions of article 50 & 159 (2) of *the Constitution* 2010; section 80 (1) (d) of the *Elections Act* No 24 of 2011, rules 4, 5 (1), 12 (a), 15 (c) and 19 (1) of the *Elections (Parliamentary and County Elections) Petitions Rules* 2017.

The applicant seeks that: -

- a. The court be pleased to grant leave to the 1st and 2nd respondents to file and serve three (3) further witness statements sworn by the 1st respondent’s presiding officers.
- b. The court be pleased to make any further or other orders as will meet the ends of justice.
- c. The costs of the application be provided for.

46. The application is supported by an affidavit sworn by Godfrey Mutubia, advocate for the applicant, and premised on grounds appearing on the body of the application.

47. The third respondent did not oppose the application.

The petitioner opposed the application via a replying affidavit he swore on the October 24, 2022.

48. The applicant’s case is that at the time of preparing the response to the petition, the witnesses were not available to record their affidavits.

That the evidence by the proposed witnesses is material and crucial in assisting the court to decide on the credibility of the elections and results thereto.

49. On the other hand, the petitioner states that the said witness affidavits are not annexed to the application and the court is unable to know the contents of the said affidavits to enable it exercise its discretion.

50. Further, the time of filing of new affidavits has lapsed and this court has no jurisdiction to admit new witnesses after the pre-trial conference.

51. Lastly, the affidavit is sworn by an advocate on matter touching on an election petition, and which is very controversial.

52. I have read and analysed the pleadings, the submissions and the law applicable.



Under rule 15 (1) (h) of the *Elections (Parliamentary and County Elections) Petitions Rules* 2017, an Election Court has discretion to allow the filing of further Affidavit and admit new or additional evidence.

(See *Evans Odhiambo Kidero & 4 other v Ferdinand Ndungu Waititu & 4 other*(2014) eKLR).

53. Such leave will be granted if it assists the Court in the just disposal of the matter, and it will not have the effect of amending the petition, or that which change the nature of the Petition.

(See *Wavinya Ndeti v Iebc & 4 Other* (2013) Eklr); *Benjamin Ogunyo Andama v Benjamin Andala Andayi & 2 other* (2013) eKLR).

54. The Supreme Court in *Raila Odinga v Iebc & 3 other* (2013) eKLR laid down the following guidelines for determining applications for the filing of further Affidavits and admission of new evidence:-

- i) The admission of additional evidence is not automatic. The election court has a discretion on whether or not to admit the new evidence.
- ii) Further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondents ability to respond to the said evidence.
- iv. Admission of new evidence must not unfairly disadvantage the other parties to an election petition.

55. I therefore don't agree with the petitioner that every addition of new evidence or further affidavits would amount to amending the pleadings, which then must be done within 28 days of the declaration of the results by dint of section 76 (4) of the *Election Act*.

Court has discretion to allow such new evidence subject to the limitations afforded.

56. That said, I agree with the petitioner that before exercising its discretion to allow filing of new evidence or the further affidavits, the same should be annexed to the application.

How else then will the court know the impact of the said affidavits if they are not annexed to the application?

Discretion cannot be exercised in a vacuum.

(See *Abmed Abdullahi Mohamad & another v Mohamed Nodi Mohamud & 2 others*(2017) eKLR) where the court held that to establish the content, nature and extent of the proposed further affidavits, a party should annex the proposed affidavits.

57. In this case, the applicant did not annex the said further affidavits.

Actually, they were irregularly filed in court on the October 31, 2022 and without leave.

58. Consequently, I make a finding that though this court has discretion to grant the orders sought by the 1st and 2nd respondents, it cannot exercise such discretion in a vacuum.

Failure to annex the further affidavit to the application was fatal, and the application is dismissed with cost to the petitioner.

DATED AT KILIFI THIS 4TH DAY OF NOVEMBER, 2022.

HON. J. M. KITUKU

SENIOR PRINCIPAL MAGISTRATE

4/11/2022

