



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE’S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC. ELECTION PETITION NO. 3 OF 2017

JANE CHEMUTAI KOSKEI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

JUBILEE PARTY OF KENYA.....2ND RESPONDENT

R U L I N G

The First Respondent has filed two (2) Applications. The First Application is dated **19th December, 2017**. In the first application, the 1st Respondent/Applicant seeks for extension of time to file a response to the Petition. The Applicant relies on the supporting affidavit of **Salome Oyugi** and grounds on the face of the application which are that the 1st Respondent/Applicant was served with the Petition on **13th November 2017**. The Applicant filed Notice of Address but failed to file a response to the Petition.

The Applicant argues that they inadvertently failed to do so as they were engaged in other ongoing Election Petitions in Siaya and Kisumu which Election Petitions were running concurrently both in Siaya and Kisumu. That failing to file the response to the Petition was an oversight on the part of counsel for the 1st Respondent/Applicant and that mistake of counsel should not be visited upon the 1st Respondent/Applicant who has a tangible response.

Secondly, the 1st Respondent/Applicant contends that the foregoing notwithstanding the Petitioner is to blame for serving them way out of time on 13/11/2017 without seeking leave of Court for extension of time noting that the required time within which to serve had lapsed. That there is no tangible explanation given as to the inordinate delay of two(2) months. that the reasons given by the Petitioner that there were technical issues in regard to payment of deposits is not viable at all. That payment was made fifty (50) days later without leave of the Court. The Applicant urged the Court to allow the Petition.

The first application was opposed by the Petitioner’s counsel who relied on her Replying Affidavit which was filed on 3/1/2018. That no plausible grounds have been raised by the Applicant to warrant this Court to grant the application. That is not plausible and or viable for the Applicant to contend that he had several other Election Petitions in Siaya and Kisumu which were running concurrently. That the 20 Election Petitions alleged have not been documented and the cited 2 Election Petitions are not contained in the Replying Affidavit. Secondly, that each case has equal importance and the Applicant should have handled the instant petition with equal measure or urgency he was handling the alleged other petitions

filed elsewhere.

Thirdly, that Rule 10(3) of the Election (Parliamentary County Election) Rules are vivid on the issue of timelines, which are that a Notice of Address should be filed five (5) days from the date of service. That the 1st Respondent were served with the Petition on 13/11/2017. They were to file Notice of Address on 18/11/2017.

The Petitioner avers that there is no proof exhibited that the notice of address was ever served upon the Petitioner.

That the response was to be filed within seven (7) days. That no plausible reason has been advanced as to why the same was not served.

Thirdly, that it is not enough reason for the counsel for 1st Respondent to contend that failure to serve was his mistake hence same should not be visited upon the 1st Respondent.

The Petitioner argued that the application does not satisfy the principles upon which extension of time can be granted. They urged the Court to dismiss the application with costs to the Petitioner.

I have considered the 1st Respondent's application and the reply by the Petitioner. It is not in dispute that the 1st Respondent has failed to file response.

Rule 10(1)- Election Petition Rule provides interalia;-

(1) Within fifteen (15) days after the filing of a petition the Petitioner shall serve the petition on the Respondent.

Rule 11(1)- Upon being served with a petition in accordance with Rule 10, a Respondent may oppose the petition by filing a response to an election within seven (7) days.

Rule 11(5) – The response to a petition shall respond to each claim made in the petition.

In the instant petition, it is evident that the Petition was filed on 12th September 2017 and served on 13/11/2017 which was well over the required 15 days within which the same was to be served. Further upon being served, the Respondent upon being served filed notice to address but did not file a response hence this application.

The 1st Respondent has given reason for the delay which are opposed by the petitioner. The bottom line is that both the Petitioner and 1st Respondent have not come to Court with clean hands, hence there should be no blame game.

The Petitioner cites technical issues occasioning delay in serving the 1st Respondent. On the flip side the 1st Respondent cites being overwhelmed with other Election Petitions elsewhere. The 1st Respondent engaged counsel who inadvertently failed to file a response.

It is trite law that mistake of counsel should not be visited upon the litigant. Having made the afore observation, I find that the application by the 1st Respondent has merit same is allowed.

(a) The 1st Respondent is granted leave of seven (7) days to file its response and serve it upon the Petitioner who upon receipt should file response if need be within seven (7) days.

SECOND APPLICATION

The application is dated **19th December, 2017** by the 1st Respondent which seeks for orders;

(1)That the Petition be struck out on the ground that it failed to enjoin people whose nomination to County Assembly of Laikipia is being challenged.

(2)That the petition should be struck out for failure of the Petitioner to serve the Respondent within the stipulated period of seven (7)days.

The applicant relied on her supporting affidavit and on grounds on the face of the application and on the oral submissions in Court.

The application was opposed by the Petitioner who relied on the Replying Affidavit and the oral submissions made in Court.

In regard to prayer (2), in view of the Ruling in the first application, I deem this prayer (2) spent. In respect to the 1st prayer of striking out the petition on the ground that Petitioner has failed to enjoin people whose nomination to County Assembly of Laikipia is being challenged, the same application has been prematurely brought to Court by the 1st Respondent. First and foremost, 1st Respondent has not even filed their response to the petition. This in effect amounts to one saying I have come to Court with unclean hands but your hands are also unclean, or saying the house is untidy even before entering the house.

In a nutshell at this stage, I do not wish to get into the nitty gritty issues of why the petition should be struck but it suffices to say the application has been prematurely brought to Court. The 2nd application is not viable at this stage. The same has no merit at this stage. Same is dismissed with orders that costs be in the cause.

HON. G.A. MMASI (MRS)

SENIOR PRINCIPAL MAGISTRATE

12/1/2018

Ruling read on this 12th day of January, 2018 at Milimani Commercial Court.

In the presence of:-