



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE’S COURT**  
**AT KERUGOYA**  
**ELECTION PETITION NUMBER 1 OF 2017**  
**IN THE MATTER OF THE ELECTION OF THE MEMBER**  
**OF THE COUNTY ASSEMBLY FOR THIBA WARD**  
**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, 2017**  
**BETWEEN**  
**JOSEPH KIRAGU MUTHURA.....PETITIONER**  
**VERSUS**  
**PIUS NJOGU KATHURI.....1<sup>ST</sup> RESPONDENT**  
**JULIUS MAINGI MUTHUSI.....2<sup>ND</sup> RESPONDENT**  
**INDEPENDENT ELECTIONS &**  
**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Two applications were canvassed before me for determination. Parties herein agreed that the two applications be argued simultaneously.
2. The first application dated **4<sup>th</sup> October, 2017** was filed by the Petitioner under the provisions of **section 3A** of the **Civil Procedure Act** and **Rule 13(1)** of the **Elections (Parliamentary and County Elections) Petitions Rules 2017** and principally seeks that the response papers filed by the **1<sup>st</sup> Respondent** and his witnesses be struck off for being filed out of time. The application is predicated on the following grounds:

a) That the 1<sup>st</sup> respondent was served with the petition and the affidavits of the petitioner and his witnesses on 13<sup>th</sup> September, 2017.

b) That as per Rule 13(1) of the Elections (Parliamentary and County elections) Petition Rules 2017, the 1<sup>st</sup> Respondent and his witnesses were supposed to file and serve their papers within a period of not more than fourteen days upon service of the petition.

c) That the fourteen days lapsed on 27<sup>th</sup> September, 2017, yet the response was filed on 29<sup>th</sup> September, 2017. As per Order 50 Rule 2 of the Civil Procedure Rules, the papers 2 days late and without leave of the court.

3. The application by the 1<sup>st</sup> Respondent dated **9<sup>th</sup> October, 2017** is brought under **section 3A of the Civil Procedure Act, section 80 of the Elections Act and Rules 4, 5 and 19(1) of the Elections (Parliamentary & County Elections) Petition Rules 2017**. The application seeks enlargement of time within which the 1<sup>st</sup> Respondent is to file his response to the petition and the witness affidavits and further that the response to the petitioner and affidavits by his witnesses filed on **29<sup>th</sup> September, 2017** be deemed as duly filed. The 1<sup>st</sup> Respondent also seeks that the Petition filed herein by the petitioner in respect to the general elections conducted on **8<sup>th</sup> August, 2017** for the seat of Member of the County Assembly **Thiba Ward** of the **Kirinyaga County** be declared as fatally defective in law and be struck off accordingly. The application is supported by the affidavit of **PIUS NJOGU KATHURI** sworn on **9<sup>th</sup> October, 2017** and is predicated on the following grounds:

1. That the petition documents herein were left at the reception of a hotel in Mombasa County where the 1<sup>st</sup> Respondent was attending an induction seminar for elected members of the County Assembly and it is not until much later that the existence of the petition was brought to his attention.

2. That the 1<sup>st</sup> Respondent was required by the relevant and election rules to file his response plus witnesses statements within 14 days which expired on 27<sup>th</sup> September, 2017.

3. That is not until the 29<sup>th</sup> September, 2017 that the 1<sup>st</sup> respondent managed to file his response and witnesses affidavits hence a period of 2 days had elapsed.

4. That the 1<sup>st</sup> Respondent diligently carried out his duties but was later due to unavoidable circumstances whereby he experienced challenges to contact his witnesses and prepare their evidence since they are not from the same area.

5. That the Honourable Court has wide discretion to enlarge time and admit documents filed under the circumstances to meet the interest of justice.

6. That the petition filed herein is fatally defective and incompetent in law and does not constitute basis for an election petition since the affidavits in support were attested by a person not authorized by law to practice as such by virtue of not holding a practicing certificate since 2011.

4. The two applications were canvassed simultaneously. I have considered the affidavits in support and opposition and the oral submissions by learned counsels **Mr. Maina Kagio** for the Petitioner, **Mr. Kahiga Kiguru** for the 1<sup>st</sup> Respondent and **Mr. Joe Gathungu** for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

5. I will first deal with the first limb of the application dated **9<sup>th</sup> October, 2017** which impugns the petition itself for being fatally defective.

6. The petition filed by the petitioner dated **6<sup>th</sup> September, 2017** was supported by a supporting affidavit sworn by **JOSEPH KIRAGU MUTHURE** dated also on **6<sup>th</sup> September, 2017**. This affidavit was

attested to by **ROBINSON N. MUGO Advocate & Commissioner for Oaths** of P.O. Box 2236-10104 NYERI. Witness affidavits of **JACKSON MWANGI GATHUNA, ESTHER WAWIRA KABURA, GRACE MUTHONI KARIUKI, CYRUS NJAGI MUGO, JOSEPH MURIUKI MUCHOMBA, SUSAN WAWIRA KAGO, AGNES WANJIRU NG'ANG'A and LILIAN WAWIRA WACHIRA** in support of the petitioner were also attested to by the same advocate.

7. In paragraph 18 of the 1<sup>st</sup> Respondent's affidavit it was averred that **ROBINSON NDATA MUGO** Advocate was not qualified by virtue of not having a valid practicing certificate and he annexed a letter from the Law Society of Kenya signed by **FLORENCE MUTURI** dated **19<sup>th</sup> September, 2017** confirming that the said **ROBINSON NDATA MUGO** last took out a practicing certificate in the year 2011. There is no challenge to the alleged inactive status of the advocate who commissioned the impugned affidavits from the petitioner or the advocate himself and I am persuaded that **ROBINSON NDATA MUGO** has no valid practicing certificate for the year 2017 and was therefore not empowered to administer oaths on **6<sup>th</sup> September, 2017**.

8. Learned counsel for the 1<sup>st</sup> Respondent argued that the affidavits attested to by **ROBINSON NDATA MUGO** were invalid and therefore the petition was for striking out. He was supported in this argument by learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. While **Mr. Kagio** for the petitioner argued that all the impugned documents were drawn and filed by him. **Mr. Kahiga** cited the Ugandan case of **PROF. SYED HUQ vs THE ISLAMIC UNIVERSITY OF UGANDA, SUPREME COURT OF UGANDA AT MENGO, CIVIL APPEAL NO. 47 OF 1995** where the majority decision by **Wambuzi, CJ** and **Karokora, JSC** held that documents drawn, signed and filed by an advocate who is unqualified are illegal and void ab initio. **Tsekooko, JSC** in a minority decision held a different view that such documents should not be illegal and invalid simply because the advocate who signed them does not have a valid practicing certificate.

9. In **NATIONAL BANK OF KENYA LTD vs ANAJ WAREHOUSING LTD [2015] eKLR** our Supreme Court validated a document executed by an advocate who did not have a practicing certificate on the basis that there would be unjust enrichment if the document was invalidated and stated as follows:

**The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.**

10. In the instant case, **ROBINSON NDATA MUGO** is still an advocate and has not been struck off the roll of advocates and there is some latitude to excuse the affidavits attested to by him considering that the affidavits were drawn by **Mr. Maina Kagio** advocate whose capacity, competence and validity in legal practice has not been questioned. The affidavits after being drawn by **Mr. Maina Kagio** needed to be attested to by an independent person and the petitioner and his witnesses found themselves at the mercy of **ROBINSON NDATA MUGO** who could not volunteer to them information that he was not licensed to practice as an advocate and therefore was not empowered to administer oaths at that particular time. The Supreme court also considered the situation the petitioner and his witnesses must have found themselves in and observed as follows:

**In these circumstances, how does the citizen's position rest If he or she were to walk into an advocate's office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate's practising certificate? Would he or she be in breach of the law if after the service, it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it**

**turns out that the advocate did not possess a current practising certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.**

11. The petitioner and his witnesses cannot shoulder any blame for the attestations. They trusted the Commissioner for oaths. It will also not be in the interest of justice to block the petitioner from having his day in court so that the issues he has raised can be decided on merit. This is one case where the court is called upon to invoke the oxygen principle which was imported into the Election Rules 2013 and maintained in Rule 4 the Election Rules 2017. Rule 4 provides as follows:

**(1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.**

**(2) An election 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 objective specified in sub-rule (1).**

12. The Court Of Appeal in Civil Appeal (Application) No. 228 of 2013 while dealing with the issue of striking out an election petition rendered itself as follows:

In the Nigerian case of **Dr. Chris Nwebueze Ngige V. Peter Obi and 436 Others** [2006] Vol. 18 WRN 33 the Court of Appeal in that country emphasized the need to sustain, rather than strike out pleadings in election matters in the following words:-

**“Election petitions are by their nature peculiar from the point of view of public policy. It is, therefore, the duty of the court to endeavour to hear them without allowing technicalities to unduly fetter their discretion”**

In considering an application for striking out an election petition or an appeal arising from an election petition, the court concerned must bear in mind the fact that an election petition is not a matter in which the only persons interested are the candidates who competed against each other in the elections. The public are substantially interested in its outcome and that is an essential part of the democratic process. For instance, in this matter 115,931 citizens who voted for the 2<sup>nd</sup> respondent and 98,036 who voted the appellant are entitled to a fair judicial process in the determination of the election dispute all the way to this Court.

13. All in all I do not find merit in the application seeking to strike out the petition dated 6<sup>th</sup> September, 2017 for the aforesaid reasons.

14. On the prayer for enlargement of time to file response the 1<sup>st</sup> Respondent explained the reason for the delay in his affidavit. He averred that he was served on **13<sup>th</sup> September, 2017** while attending an induction in Mombasa as a Member of the County Assembly and he had to travel back to Kirinyaga County where he started looking for witnesses who could record affidavits but was not able to get them on time as his chief agent **SAMUEL WAWERU NJOKA** was not reachable on his phone.

15. Counsel cited several authorities to buttress his submission on enlargement of time. They are **JOSEPH KAROBIA GICHERU vs MICHAEL GACHOKI GICHERU NYERI CIVIL APPLICATION NO. 55 OF 2011**, **GEORGE KIRIANKI LAICHENA vs MICHAEL MUTWIRI NYERI CIVIL APPLICATION NO. 277 OF 2010** and **ALBERT MAGU MUSA vs REPUBLIC NYERI CRIMINAL APPLICATION NO. 1 OF 2008**. All these authorities were dealing with notices of appeals filed out of time. The common thread, though, in all of them is the unfettered discretion of the court to enlarge time. Counsel also relied on **Rule 19(1)** of the **Elections Rules 2017** which allows an election court to extend time. The Rule provides as follows:

**(1) Where any act or omission is to be done within such time as may be prescribed in these**

**Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.**

16. **Mr. Kathungu** for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's supported the application of the 1<sup>st</sup> Respondent for enlargement of time and submitted that this court has unfettered discretion to extend time while **Mr. Maina Kagio** opposed the application and distinguished the authorities cited in support as they are all premised on Rule 4 of the Court of Appeal Rules. But as stated hereinbefore, the common thread running through the authorities is the unfettered discretion of the court to extend time. Even in election petitions, the court still retains its unfettered discretion to extend time where the other party will not suffer prejudice except where the Constitution or the Elections Act has expressly barred extension due to strict timelines. There are a number of authorities where Election Courts extended time. In **Mombasa Election Petition No. 5 of 2013 KALIMBO NAVEED vs BOY JUMA BOY & OTHERS Justice Ochieng** extended time, where the response had been filed without the leave of the court, rendering himself thus:

**The Petitioners have not even suggested that they would suffer any injustice due to the extension of time. On the other hand, if the Responses were struck out, the Respondents would become lame ducks, literally. They would have absolutely no material of a factual nature, that they would rely upon, in answer to the Petition. I am therefore convinced that the extension of time, as granted, was in the interest of justice for all the parties.**

17. Having considered the authorities cited and, again, buoyed by the Oxygen principle I will exercise my discretion and extend time and deem the response filed by the 1<sup>st</sup> Respondent on **29<sup>th</sup> September, 2017** to be duly filed and properly on record.

18. In the result I will dismiss the application dated **4<sup>th</sup> October, 2017** and partially allow the application dated **9<sup>th</sup> October, 2017** in terms of prayer (1) and dismiss prayer (2) of the application.

19. There shall be no order as to costs.

**DATED, SIGNED and DELIVERED at KERUGOYA this 27<sup>th</sup> day of October, 2017**

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**S.M.S. SOITA**

**CHIEF MAGISTRATE**

**KERUGOYA**

**In the presence of:**

**Mr Maina Kagio.....For Petitioner**

**Mr Kahiga.....For 1<sup>st</sup> Respondent**

**Mr Kathungu.....For 2<sup>nd</sup> & 3<sup>rd</sup> Respondent**

**Court Assistant: KABUTA**

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**S.M.S. SOITA**

**CHIEF MAGISTRATE**

**KERUGOYA**