



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT NYERI**  
**ELECTION PETITION NO.1 OF 2017**

**OMARI WANJIKU ESHA.....APPLICANT**

**-VERSUS-**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT**

**MILLICENT CHEROTICH.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

The petitioner, Omari Wanjiku Esha, moved to court on 4.9.2017. She was seeking the following prayers:

- a) A declaration that the said MILLICENT CHEROTICH was not validly elected/nominated as Member of County Assembly Nyeri County representing ethnic minority.
- b) A declaration that the election/nomination of MILLICENT CHEROTICH was illegal unlawful and void and the same should be invalidated as the Constitution does not provide for ethnic reflection in County seats.
- c) A declaration be made that the Petitioner OMARI WANJIKU ESHA was validly nominated as Member of County Assembly Nyeri County to represent Minority category in the said Assembly.

There are 3 Respondents to the petition.

1. The Independent Electoral and Boundaries Commission
2. The Jubilee Party
3. Millicent Cherotich

On 8.9.2017, the 1<sup>st</sup> Respondent entered on Appearance and on 13.9.2017 they lodged their Notice of address of Service.

On 13.9.2017 when the matter was scheduled for directions, an affidavit of service sworn by one Samuel Wachira Mbutia was filed. He shows how each Respondent was served.

On this 13.9.17 Mr.Muhoho Advocate appeared for the Petitioner and Mr.Mberia appeared for the 1<sup>st</sup> Respondent. There was no appearance by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The matter was then fixed for pre-trial conference on 27.9.2017. On this 27.9.2017, we again had Mr.Muhoho for the petitioner and Mr.Mberia Advocate present for the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had not entered any Appearance or filed any document.

Mr.Muhoho requested 1 day to respond to the 1<sup>st</sup> Respondents response and the matter was fixed for 5.10.2017. On the 5<sup>th</sup> of October 2017, Mr.Njogu Kathungu appeared for the 1<sup>st</sup> Respondent. There was Mr.Gichuki for the Petitioner and Mr.Macharia for the 3<sup>rd</sup> Respondent. The matter did not proceed as there was the issue of which court should hear the party list nominations.

The 3<sup>rd</sup> Respondent then filed the present application by way of a Notice of Motion dated 16.10.2017. It was brought under Article 159 (2) (d) of the Constitution of Kenya 2010, Rules 4(1) and (2) and 5 of the Elections- (Parliamentary and County Elections) Petition. She was praying that she be granted leave to file and serve her response out of time.

The application was based on the grounds that:

1. **THAT** the law required the 3<sup>rd</sup> Respondent to file a response to the petition within 14 days upon being served with the petition.
2. **THAT** the period within which to file the response has already lapsed and the petition herein is at the pre-trial stage.
3. **THAT** the delay in filling the response by the 3<sup>rd</sup> Respondent is not deliberate and has been occasioned by delay in obtaining some of the vital documents in support of her election as a nominated member of the County Assembly of Nyeri.
4. **THAT** the 3<sup>rd</sup> Respondent has a plausible defence elucidating inter-alia that she was validly nominated as a member of County Assembly of Nyeri representing the minority seats.
5. **THAT** none of the parties herein will be prejudiced by the orders sought herein and will indeed accord the court an opportunity to determine the real issues in controversy between the parties herein.
6. **THAT** this Honourable Court has the discretion to determine any failure to comply with the Elections (Parliamentary and County) Election Petition Rules 2017 which discretion shall be exercised in accordance with Article 159(2) (d) of the Constitution of Kenya,2010.

The application was also supported by the Affidavit sworn by I.P Macharia Kariuki on 16.10.2017. Basically, the 3<sup>rd</sup> Respondents arguments, are that she has a plausible defence, and it took her some time to get all her documentation in order. That granting the Application will not prejudice the petition.

The Application was strongly opposed on the grounds that it is not clear, why the 3<sup>rd</sup> Respondent wants the court to exercise its discretion. This is because, they are talking of time to gather documents and yet they have not said they were not served on time.

Further that the 3<sup>rd</sup> Respondent has not annexed any draft defence or response which would enable the court to determine whether they have raised triable issues and finally failing to put in a response cannot be described as a mere technicality.

### ***The Law***

Rule 11 (1) of the Election (Parliamentary and County Election) petition Rule 2017 states that upon being

served with a petition in accordance with Rule 10, a Respondent may oppose the petition a response to an election petition within 7 days.

SubRule (4) states:

**“Unless otherwise ordered, by the election court, every response to a petition shall be served within 7 days of filing the response.”**

Rule 8 – A respondent who has not filed a response to a petition as required shall not be allowed to appear or act as a party in the proceedings to the petition.

Rule 19 of the said Rules deals with extension of time. Sub rule I stated that:

**Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election 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 when the period prescribed or ordered by the court has expires.**

Rule 9 (2) states that:

**Sub rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.**

Rule 5 (1) deals with the compliance of the Rules and it states that:

**The effect of any failure to comply with these Rules shall be determined at the court’s discretion in accordance with the provisions of the Article 159 (2) (d) of the Constitution.**

A wide interpretation of Rule 19, above cited means the court has discretion to extend time, for filing a response as it is not one of the circumstances which are provided for by subsection 2 to wit filing, hearing and determination.

The Election courts have had occasion to apply this section. In particular I have noted **Malindi Election Petition No.1 of 2017 Rishad Hamid Ahmed -Vs- Independent Electoral and Boundaries Commission and 2 others 2017 eKLR**

In his ruling, dated 13.10.2017 the Hon.Justice W.Korir allowed such an application. He cited the case **Salat -Vs- IEBC and 7 others 2014 KLR** which laid down the grounds which a court should consider in exercising its discretion to extend time for filing an Appeal. The Court had stated that:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court,
2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case by case basis;
4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;
5. Whether there would be any prejudice suffered by the respondents if the extension of time was granted;

6. Whether the application had been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

The court has also considered the two rulings delivered by the Supreme Court of Kenya in the Presidential Petition No.1 of 2017 between **Raila Amolo Odinga & Stephen Kalonzo - Vs - I.E.B.C and 2 others** which were delivered on 25.8.2017 and on 27.8.2017. The 1<sup>st</sup> Respondent IEBC had sought orders to expunge from the court records documents which had been filed out of time and the court struck out both Applications save in the interest of Justice to all parties.

In the instant case, the 3<sup>rd</sup> Respondent has explained that she needed time to gather all her documentations. This was contained in Affidavit in support of the Application which was also attacked by the petitioners Advocate as it was deponed to by an Advocate. The court is however not convinced that the anomaly is fatal.

Taking all factors into considerations, the court is convinced that allowing the 3<sup>rd</sup> Respondent to file the response, out of time, would go a long way towards ensuring that the ends of justice are met. This is more so as the 3<sup>rd</sup> Respondent will be directly affected by the outcome of this petition. She may have been indolent but the court is inclined to give her a chance.

The petitioner and the court will be unconvinced but that inconvenience can be compensated. The court will therefore allow the Application on the condition that:

- 1) The 3<sup>rd</sup> Respondent files her response to the petition by the close of business on 27.10.2017. She should also serve the petitioner and other Respondents on that same date.
- 2) The 3<sup>rd</sup> Respondents meets the costs of this present Application.
- 3) The petitioner and 1<sup>st</sup> Respondent have leave to respond to the said response by 30.10.2017.
- 4) Pre-trial directions on 31.10.2017.

**Dated, signed and delivered in open court at Nyeri this 24<sup>th</sup> day of October,2017.**

**W.KAGENDO**

**CHIEF MAGISTRATE**

Delivered in the presence of;

for the petitioner – Mr.Muhoho

1<sup>st</sup> Respondent- Mr.Macharia holding brief for Mr.Kathungu

2<sup>nd</sup> Respondent- No appearance

3<sup>rd</sup> Respondent- Mr.Macharia