



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT GARISSA

ELECTION PETITION NO 5 OF 2017

**IN THE MATTER OF ARTICLES 1, 3, 38, 81, 86, 90, 91, 177 (1) (B), 177 (3) OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 34, 35, 36, 37 & 75 (1A) OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL REGULATIONS), 2012

AND

**IN THE MATTER OF THE ELECTION (PARTY PRIMARY AND PARTY LISTS)
REGULATIONS, 2017**

AND

**IN THE MATTER OF THE KENYA GAZETTE NOTICE NO 8752 VOLCXIX NO 131 OF 6TH
SEPTEMBER 2017**

**IN THE MATTER OF THE PARTY LIST NOMINATION FOR GENDER TOP-UP FOR
GARISSA COUNTY ASSEMBLY**

BETWEEN

HAMDİ AHMED ALI.....PETITIONER

AND

VICTORIA CHERUTO LIMO.....1ST RESPONDENT

INDEPENDENT ELECTION AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

RULING

This is the ruling on whether leave should be granted to the 2nd Respondent Commission to file its response to the petition out of time.

The brief background of the case is that the petition herein was filed on the 26th day of September 2017. The 2nd Respondent Commission was served on 28th September 2017. The 1st Respondent filed her response on 10th October 2017. The case was then fixed for pre-trial direction on the 19th October 2017. By that time, the 2nd Respondent had not filed its response to the petition. This was clearly after the time stipulated by the law. Mr Ibrahim, Advocate for the 2nd Respondent Commission, sought more time to file the response on behalf of the 2nd Respondent. The said application was opposed by Mr Mwalimu, Advocate for the Petitioner.

In his submissions, Mr Mwalimu submitted that the Election (Parliamentary and County Election) Petition Rules 2017 provide timelines within which a petition ought to be filed and served. Specifically, Rule 12 stipulates that a petition ought to be served within seven days after filing. He submits that the petition was filed on 26th September 2017 and served upon the 2nd Respondent on 28th September 2017 within prescribed seven days period. He argues that under Rule 13, the 2nd Respondent ought to have filed the response within 14 days after service of the petition and served the same within seven days after filing the response. He posits that the 2nd Respondent had 21 days within which to file and serve the response. He submits further that Rule 19 provides for enlargement of time, but, the said Rule is specific that enlargement of time shall not apply to the period within which a petition is to be filed, heard and determined. He urges that Rule 11(8) provides that a Respondent who has not filed a response as required under this rule shall not be allowed to appear as a party in the proceedings of the petition. In his view, the word shall in Rule 11 (8) implies that the court has no jurisdiction to enlarge time.

In reply, Mr Ibrahim submits that in every Rule quoted by Mr Mwalimu is correct to the extent that within every Rule the 2nd Respondent Commission has to be a Respondent in all petitions. He argues that the Commission has a very important role to play in every petition being the sole body constitutionally mandated to manage elections. He submits that they did file a notice of appointment before the expiry of the stipulated 14 days period. He argues further that Rule 19 grants the court mandate and discretion to grant leave to file an election document out of time. The only test being that it is just or it will not occasion injustice. He argued further that the only limitation to this discretion is at Rule 19 (2). He asks the court to take judicial notice of the fact the Commission has been having a number of petitions, and therefore, in certain cases it may delay instructing one of its panel of lawyers. He posits that giving the Commission seven more days to file a response will not cause any injustice to the Petitioner since the petitioner is seeking some orders which only the Commission can implement.

I have carefully considered the rival submissions by Counsels for Petitioner and the 2nd Respondent Commission. In my view, the issue here is just one, that is, whether the court has jurisdiction to enlarge the time within which the 2nd Respondent commission can file its response to the petition. In my view, the answer to this question lies in Rule 19 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. Rule 19 specifically provides for extension and reduction of time. It provides as follows:

19 (1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by the election court, the election court may, for 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.

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

Clearly, Rule 19 does grant the court the discretion to extend time where time is prescribed either by the rules, or by the court itself, save for matter relating to the period within which a petition is required to be filed, heard or determined. In this case, the period sought to be extended is the period within which to file responses to the petition. In my view, the present application does not fall within the exception provided by Rule 19 (2). The test under this Rule is, whether the extension of the time is for the purpose ensuring that injustice is not done to any party. To able to determine whether injustice will be occasioned to any party, it is important to look at the circumstances of each party and the prejudice or injustice they will suffer if time was extended in favour of the 2nd Respondent Commission. I would agree with Mr Ibrahim

that the 2nd Respondent Commission is in a very peculiar position being the only body mandated by the constitution to conduct elections. Indeed, Rule 9 does provide that the 2nd Respondent Commission shall be a respondent in all petition.

In my view, this is very deliberately being the only body mandated to conduct election. Certainly, there are orders of this court that only the 2nd Respondent Commission can implement. Undoubtedly, it will be very unjust to lock it out then expect it to implement orders issued against it without having had say in these proceedings. Indeed, substantive justice demands that every party be heard and the case be determined on merit.

In the circumstances, I am persuaded to allow the application by the 2nd Respondent. Accordingly, I grant them leave to file their response within seven days from date hereof.

DATED, SIGNED and DELIVERED this 2nd day of November.2017

J.J.MASIGA

SENIOR RESIDENT MAGISTRATE