



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NYAMIRA**

**ELECTION PETITION NO. 02 OF 2017**

**IN THE MATTER OF ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE ELECTIONS (GENERAL) REGULATIONS 2012 AND ELECTIONS (PARLIAMENTARY & COUNTY PETITION RULES 2017)**

**IN THE MATTER OF THE MEMBER OF COUNTY ASSEMBLY ELECTIONS FOR MAGWAGWA WARD IN NYAMIRA COUNTY HELD ON 8<sup>TH</sup> AUGUST 2017**

**HESBORN ARAO NYAKUNDI=====PETITIONER**

**AND**

**FRED NYACHAE OMAYIO=====1<sup>ST</sup> RESPONDENT**

**MARJORIE P. OWUO=====2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC)=====3<sup>RD</sup>RESPONDENT**

**RULING**

This is a ruling in respect of the 1<sup>st</sup> Respondent's application dated the 26<sup>th</sup> day of September, 2017 and also the Petitioner's application dated the 5<sup>th</sup> day of November, 2017.

According to the 1<sup>st</sup> Respondent/Applicant, he has brought an application to strike out the petition dated and filed in the Chief Magistrate's Court at Nyamira on 6<sup>th</sup> September, 2017.

It was brought forth by way of a Notice of Motion under Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

***The Applicant/1<sup>st</sup> Respondent is seeking the following orders: -***

**1. THAT** the petition dated and filed in the Chief Magistrate's Court on 6<sup>th</sup> September, 2017 be struck out.

**2. THAT** the costs of this application be provided for.

This application is premised on all the grounds which are on the face of the application and on all the reasons contained in the supporting affidavit of Fred Nyachae Omayio dated the 26<sup>th</sup> September, 2017

and all the factors contained in the 1<sup>st</sup> Respondent/Applicant's written submissions dated the 30<sup>th</sup> October, 2017 plus the law as laid down in all the legal authorities cited and duly relied upon by the Applicant/1<sup>st</sup> Respondent vide the list and bundle of authorities dated the 29<sup>th</sup> October, 2017.

The gist of the Applicant/1<sup>st</sup> Respondent's reasons for his application as duly submitted by Mr. Omoke the learned counsel for the Applicant/1<sup>st</sup> Respondent was that the petition filed on the 6<sup>th</sup> September, 2017, was not served in accordance with Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules 2017, to wit, that the 1<sup>st</sup> Respondent was not served either directly or by substituted service through advertisement in a Newspaper of national circulation as required under Rule 10 (1) (a) and (b).

That the 1<sup>st</sup> Respondent was seized of the matter through a Gazette Notice No. 9060 (Vol. CXIX No. 137) published on 15<sup>th</sup> September, 2017 through which the Chief Justice Hon. David Maraga assigned election disputes to various Judges and Magistrates in accordance with the jurisdiction of the dispute involved and category of the elective post.

That the Petitioner deliberately failed to adhere to the mandatory statutory provisions and for requirement of Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules 2017.

That in the circumstances, the court lacks the jurisdiction to entertain the petition herein and the same should be struck out.

The 1<sup>st</sup> Respondent's/Applicant's learned counsel was emphatic that the 1<sup>st</sup> Respondent was neither served directly nor by substituted service as required by Rule 10 1 (a) and 1 (b) of the Elections (Parliamentary and County Elections) Petition Rules 2017.

That the 1<sup>st</sup> Respondent filed a response to the petition though he had not been served by the Petitioner. The 1<sup>st</sup> Respondent's learned counsel buttressed his submissions with the provisions of Article 87 (1) (2) and (3) plus section 77 of the Elections Act which deals with service of the petition.

That in this case service upon the 1<sup>st</sup> Respondent was improper because the Petitioner served the 1<sup>st</sup> Respondent through the Clerk of Nyamira County Assembly yet the said County Clerk is not the 1<sup>st</sup> Respondent's authorized agent and there is no stamp of the said Nyamira County Assembly to verify that the 1<sup>st</sup> Respondent was indeed served.

To buttress his submissions Mr. Omoke Advocate for the 1<sup>st</sup> Respondent/Applicant relied on the law as laid down in all the legal authorities filed on the list and bundle of authorities dated the 29<sup>th</sup> October, 2017 and the contents of paragraph 17, pages 25 to 26 pages 39 and 40 of the 1<sup>st</sup> Respondent's list and bundle of authorities Mr. Omoke Advocate for the 1<sup>st</sup> Respondent invoked the law regarding service of the petition as observed in the case of **ONALO =VRS= LUDEKI & others (2008) 2 KLR 508**, in which case the court held inter-alia, that.....

The whole substratum of the petition had been washed away because the petition had not been served personally upon the 2<sup>nd</sup> Respondent within the time prescribed by the law that the same was defective and that made the said court strike out the petition accordingly.

In the British case of **CRAIG =VRS= KANSSEN (1943) 1 KB 256**, it was held that: -

Failure to serve process where service of process is required renders null and void an order made against the party who should have been served. Failure to effect service was fatal. It could not even be cured by waiver because no waiver can give validity to annulity." See the case of **QUITON =VRS= RADCLIFF (1873 74) 9 LRC 189 at 193 per Keating J.**

The 1<sup>st</sup> Respondent's/Applicant's learned counsel Mr. Omoke also relied on the law as laid down in the

case of **AYUB JUMA WAKESI =VRS= MWAKWERE CHIRAU ALI and 2 others (2008) eKLR** *Sergon* in which case, the High Court Judge held inter-alia; that; if the petition is not properly served on all the Respondent's named, then the entire petition will be rendered incompetent.

That is a precise outline of the 1<sup>st</sup> Respondent's reasons in support of his application. Mr. Malanga, Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents supported the application dated the 26<sup>th</sup> September, 2017. He relied on the grounds of affirmation dated the 29<sup>th</sup> September, 2017, and on all the reasons contained in their written submissions dated the 27<sup>th</sup> October, 2017 and their list of authorities dated the 27<sup>th</sup> October, 2017.

Mr. Malanga, Advocate representing both the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondent's associated himself with the submissions of Mr. Omoke Advocate for the 1<sup>st</sup> Respondent. He urged the court to make a determination on the issues stated under paragraph 5 (a) and 5 (b) of the 2<sup>nd</sup>& 3<sup>rd</sup> Respondent's written submissions. The said issues are: -

5. (a) Whether there was any or proper service of the petition on the Respondents?

5 (b) Is failure of effective service upon the Respondent's fatal to the petition?

The 2<sup>nd</sup>& 3<sup>rd</sup> Respondent's learned counsel in his oral submissions was emphatic that the Petitioner did not effect proper service to the Respondents because he did not serve the Respondents as appropriately provided by the relevant statutory law, vide Article 87 (3) of the Constitution, Section 77 (2) of the Elections Act No. 24 of 2011 (Elections Act), and Rule 10 of Elections (Parliamentary and County Elections Petitions Rules 2017 (hereinafter the "rules").

The 2<sup>nd</sup>& 3<sup>rd</sup> Respondents' learned counsel relied on the law as laid down in the case of;

**ROZAAH AKINYI BUYU =VRS= IEBC & 2 Others (2014) eKLR**, in which case at page 4 paragraphs 31 and 32 of this authority, the learned Judge, held inter-alia; that .....

Failure to serve the petition upon the Respondents went into the root of the petition and the petition could not stand when there was failure to serve the same.

It was the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents' learned counsel further submission that failure by the Petitioner to effect proper service upon the Respondents renders the petition fatally defective. He urged this court to consider the premises in paragraphs 9 all the way to 14 and proceeded to make a finding that this petition is defective because the Petitioner did not serve the Respondents. To buttress their grounds in affirmation to the 1<sup>st</sup> Respondent's application herein, the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents relied on the law as laid in the decided case of **ROZAAH AKINYI BUYU =VRS= IEBC & 2 OTHERS (2014) eKLR**.

That is a very brief outline of the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents reasons in support of the 1<sup>st</sup> Respondent's application dated the 26<sup>th</sup> September, 2017.

In opposing the 1<sup>st</sup> Respondent's application (supra), the Petitioner/Respondent filed a replying affidavit dated the 27<sup>th</sup> October, duly sworn by the Petitioner.

The Petitioner's learned counsel submitted inter-alia that the Respondents have not challenged the averments in the Petitioner's replying affidavit dated the 27<sup>th</sup> October, 2017 and the process server's affidavit dated the 27<sup>th</sup> October, 2017 and duly deposed by one LUKAS OGUTU. The Petitioner's learned counsel also submitted that Article 87 of the Constitution was not invoked in the 1<sup>st</sup> Respondent's application.

According to the Petitioner/Respondent's learned counsel, he contended that the Petitioner effected

service upon the 1<sup>st</sup> respondent in consonance with Section 2 of the Elections Act, because the Petitioner served the 1<sup>st</sup> Respondent's Nyamira County Assembly Clerk.

Coupled with the foregoing premise, is the fact that the process server indicates in paragraph 5 of his affidavit of service that he called a certain phone number which belongs to the 1<sup>st</sup> Respondent and he was informed about the service.

The Petitioner's learned counsel further submitted that the Petitioner served the 1<sup>st</sup> Respondent and the Respondents responded accordingly, though belatedly. He further urged this court to invoke the provisions of Section 80 (1) (d) of the Elections Act, Article 159 (2) (d) of the Constitution and Article 159 (1) (e) of the Constitution to deny the 1<sup>st</sup> Respondent's application on the sole ground that this court should protect and promote the provisions of the Constitution, procedures and technicalities notwithstanding.

To buttress his submissions, the Petitioner's learned counsel relied on the law as laid down in all the 4 decided cases contained in their list of authorities dated the 9<sup>th</sup> November, 2017.

Relying on the law regarding on the issue of technicalities as observed by the learned Judges in the Petitioner's cited legal authorities, Mr. Bosire, Advocate for the Petitioner was emphatic that justice should not be sacrificed because of strict adherence to procedural technicalities.

In response to Mr. Bosire's submissions, Mr. Omoke, Advocate for the 1<sup>st</sup> Respondent urged this court to uphold the application dated the 26<sup>th</sup> September, 2017 with costs to the 1<sup>st</sup> Respondent/Applicant, on the sole ground that this court should consider the question of technicalities in great detail and as per the decisions by the Court of Appeal in all the cases contained in the Respondent's bundle of authorities specifically at pages 4 to 8 and the law as laid down in the case/election petition No. 5 of 2013, vide; ***Raila Odinga & 5 Others =VRS= IEBC others Supreme Court of Kenya; Petitions Nos. 3, 4 & 5 of 2013 eKLR pages 4, 10 & 11*** in which the court laid down some important principles in that insistence on constitutionally decreed timelines does not amount to paying undue attention to procedural technicalities.

The 1<sup>st</sup> Respondent's learned counsel further submitted that the overriding objective of the Election Rules does not allow a disregard of the law, as provided by the statutes and the Constitution.

Mr. Omoke, Advocate for the 1<sup>st</sup> Respondent did submit further that the Nyamira County Assembly Clerk was not an authorized agent of the 1<sup>st</sup> Respondent.

He also submitted that the 1<sup>st</sup> Respondent will suffer prejudice because he was not served at all.

That the mode of service described in the affidavit is so defective and the evidence of the 1<sup>st</sup> Respondent is not required to challenge it. The 1<sup>st</sup> Respondent's counsel was emphatic that the Clerk of the Nyamira County Assembly should be considered as a stranger to the 1<sup>st</sup> Respondent for the purposes of this petition.

On the other hand, Mr. Malanga Advocate for the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents submitted further that Article 159 (2) (d) of the Constitution cannot cure this petition because service upon the Respondent was defective and that defective service cannot be cured. He also submitted that the issue on service is not a mere reference to a procedural technicality.

Relying on the above stated reasons, the Respondents' learned counsels urged this court to allow the 1<sup>st</sup> Respondent's application dated the 26<sup>th</sup> September, 2017 with costs to the Respondents.

## **ANALYSIS & CONCLUSION**

This court has considered the 1<sup>st</sup> Respondent's application dated the 26<sup>th</sup> September, 2017, the contents of the supporting affidavit thereof, the 1<sup>st</sup> Respondent's list and bundle of Authorities, the grounds of affirmation of the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents' Notice of motion, the 1<sup>st</sup> Respondent's skeletal submissions dated the 30<sup>th</sup> day of October, 2017 and submissions of the counsel, as herein stated above.

The court has on the other hand considered the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' grounds of affirmation of 1<sup>st</sup> Respondent's notice of motion dated 29<sup>th</sup> September 2017 as earlier pointed out herein, the 2<sup>nd</sup>& 3<sup>rd</sup> Respondent's written submissions and their list of authorities dated the 27<sup>th</sup> October, 2017 plus the oral submissions tendered forth by Mr. Malanga Advocate.

I will not repeat what the pleadings contain and what the Advocates told the court in my conclusion herein. However, this court has keenly considered the premises tendered forth by Mr. Omoke for the first Respondent and Mr. Malanga for the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents on the one hand and the averments of the Petitioner/Respondent's replying affidavit dated the 27<sup>th</sup> October, 2017, the averments of the process server's affidavit dated the 27<sup>th</sup> October, 2017, all the premises contained in the Petitioner's submissions dated the 9<sup>th</sup> November, 2017 and the law as laid down in all the decided cases contained in the Petitioner's list of authorities, dated the 9<sup>th</sup> November, 2017 and counsels submissions. Having considered the application and response, and in the light of all the parties pleadings as herein-above stated, this court has a duty to determine the following issues as duly framed by the Respondents.

These issues are: -

1. Whether the petition ought to be struck out for lack of any proper service.
2. Who should bear the costs of this application? Because I had stated earlier a brief outline of what the parties' counsels submitted before court. I will not repeat what they said or what is in the pleadings at this stage.

Having said the above, it is my humble finding that after this court has considered the Respondent's premises in support of the 1<sup>st</sup> Respondent's application on the one hand and the Petitioner's reasons against the 1<sup>st</sup> Respondent's application, on the other hand, this court is of the considered finding that the Petitioner/Respondent has cogently proved the fact that he served the 1<sup>st</sup> Respondent.

Though the 1<sup>st</sup> Respondent had stated that he learned of the existence of this petition late and filed his response hurriedly, it is clear that the 1<sup>st</sup> Respondent was indeed served with this application.

Failure by the Respondents to challenge the process server's affidavit dated the 27<sup>th</sup> October, 2017 has left this court with the only conclusion that the 1<sup>st</sup> Respondent was served by the Petitioner.

However, if there be any doubt as to whether the 1<sup>st</sup> Respondent was indeed served, this court is duly satisfied that that doubt is quite slight not to miscarry out justice against the Respondents. Coupled with the foregoing premise is the fact that the Respondents have already filed their responses to this petition. Due to that state of affairs in this case, this court is of the considered view that each party to this petition has an unfettered right to a fair, just and full hearing of this petition.

To achieve this right, this court will invoke the provisions of Article 159 (2) (d) of the Constitution 2010, which provides that in exercising judicial authority the courts and tribunals shall not be guided by the principle of administering justice without undue regard to procedural technicalities.

That being the position under the Constitution (supra) this court will appreciate the Respondent's averments and submissions, but to achieve substantive justice to all, the parties herein this court will invoke the law as laid down in the cases of;

**1. THOMAS MATWETWE NYAMACHE =VRS= IEBC & 2 OTHERS** High Court at Kisii Election Petition No. 8 of 2017 in this case, Justice H. A. Omondi stated that subsequent to that, the issue is a technical one which if were to be upheld would take us back to the bleak; days when election petitions would fail to see the light of the day on account of procedural technicalities.

**2. WILLIAM KINYANYI ONYANGO =VRS= IEBC & 2 OTHERS (2013) eKLR** in which case, the court held that Election Petition Rules are intended to be hand maidens of justice and not tyrannical mistresses prancing about unreasonably when what is being contested is clear to all parties involved.

**3. CAROLINE MWELU MWANDIKU =VRS= PATRICK MWEU MUSIMBA & 2 OTHERS (2013) eKLR**

**4. NICHOLAS KIPTOO ARAP SALAT =VRS= IEBC & 6 OTHERS (2013) eKLR** in which case justice OUKO J, in the majority judgement stated inter-alia

“... That is why the Constitution..... premises substantive justice....”.

Having considered the above stated premises, this court will exercise its judicial discretion to the effect that the parties herein have an unconditional right to access justice before this court. Consequently, this court will proceed to dismiss the 1<sup>st</sup> Respondent’s application dated the 26<sup>th</sup> September, 2017 with an order that each party do bear own costs for the said application.

Those shall be the orders of this court in respect of the 1<sup>st</sup> Respondent’s application dated the 26<sup>th</sup> September, 2017.

Orders accordingly.

**M. O. WAMBANI – CM**

**21/11/2017**

This ruling is hereby dated at Nyamira this 21<sup>st</sup> day of November, 2017.

**M. O. WAMBANI – CM**

**21/11/2017**

The second ruling is in respect if the Petitioner/Applicant’s application dated the 5<sup>th</sup> day of November, 2017.

It was brought forth by way of a notice of motion (under Rule 4 (1) and (2), 15 (1) (c) and (h) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and all enabling provisions of the law.

The Applicant/Petitioner is seeking the following orders: -

**1. THAT** this Honourable court be pleased to grant the Petitioner leave to file four (4) further witness affidavits and adduce more evidence in support of the petition.

**2. THAT** costs for this application be in cause.

This application is premised on all the grounds which are on the face of the application and on all the factors contained in the supporting affidavit of HESBORN ARAO NYAKUNDI deposed on the 5<sup>th</sup> day of November, 2017. All these factors were buttressed by the contents of all the annexures “DSN 1”

“DSN 2” A00-1” “A00-2 “MKO-2” plus all the reasons contained in the detailed oral submissions tendered forth by Mr. Bosire Advocate, the learned counsel for the Applicant/Petitioner, plus all the laws laid down in the authorities relied on by the Applicant.

The gist of the reasons for this application are that;

Though the Petitioner filed the petition on the 7<sup>th</sup> day of September, 2017 challenging the declaration of the 1<sup>st</sup> Respondent as a duly elected Member of County Assembly, Magwagwa ward, but he has come across more crucial evidence proving breach of the Constitutional principles of elections.

The Applicant/Petitioner has pleaded that he was under strict timelines to file the petition and one of the grounds for his application is breach of the principles of elections set out under Article 86 of the Constitution.

The Applicant’s learned counsel, Mr. Bosire was emphatic in his submissions that the Petitioner/Applicant had a short time to analyze voluminous documents and gather all pieces of evidence from potential witnesses across the entire ward.

That these are witnesses who are willing to testify on the evidence mentioned in paragraph 8, 9, 10 and 11 of the Applicant’s supporting affidavit dated the 5<sup>th</sup> November, 2017 which is in support of this application.

That the evidence to be added through an affidavit is brief and specific to an issue and will not delay the hearing.

To buttress his submissions, the Applicant/Petitioner’s learned counsel relied and thus invoked the law as provided by Rule 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 in its entirety, and the provisions of Article 86 of the Kenyan Constitution 2010, plus the law as laid down in the Election petition at the Eldoret in the case of ***KIPKEMEI TUM =VRS= HELLEN TUM***.

Mr. Bosire, Advocate for the Applicant/Petitioner was emphatic that the application and the supporting affidavit is anchored on the petition already filed so the Petitioner/Applicant is not introducing new evidence to the petition.

Consequently, the Respondents will not be prejudiced if the Petitioner’s application dated the 5<sup>th</sup> November, 2017 is allowed. In opposing the said application, the 1<sup>st</sup> Respondent filed grounds of opposition dated the 13<sup>th</sup> day of November, 2017 and duly filed in court on the 14<sup>th</sup> day of November, 2017.

The 1<sup>st</sup> Respondent relied on all the reasons contained in their grounds of opposition, the law as laid down in all the cited cases contained in the 1<sup>st</sup> Respondent’s list and bundle of authorities dated the 13<sup>th</sup> day of November, 2017 and duly filed in court on the 14<sup>th</sup> day of November, 2017, plus all the reasons contained in the detailed oral submissions tendered forth by Mr. Omoke, Advocate.

It is the 1<sup>st</sup> Respondent’s contention that the Petitioner’s instant application was filed and served out of the time ordered by court and the same is therefore incompetent for being in violation of an express court order.

That the material sought to be introduced before the court, was within the Applicant’s knowledge all along and no cogent and reasonable explanation or justification or basis has been provided as to why the Applicant/Petitioner is seeking to bring out evidence at this belated juncture. That the Applicant does not give cogent reason why he did not engage sufficient labour to analyze the voluminous amount of information he alleges to have had at the time he was filing this petition. That the delay and failure to file the proposed material/affidavits on time should not be excused.

That the Petitioner is seeking to bring on record entirely and completely new evidence as the same were not raised, anchored or particularized in the main petition filed before court.

The 1<sup>st</sup> Respondent's learned counsel, Mr. Omoke, brazenly, submitted, inter-alia, that the Petitioner is barred from adducing evidence which departs from the contents of his petition and further barred from adducing any new evidence after the lapse of 28 days from the date of declaration of results.

That the 1<sup>st</sup> Respondent stands to suffer serious prejudice if the orders sought are granted as the same have the effect of amending and expanding the substratum of the petition outside the prescribed time and seriously affects his right to a fair hearing in this petition.

That the evidence the Petitioner seeks to introduce is inadmissible as it is based on conjecture, speculation, hearsay and the same is irrelevant to the petition in its current form.

That the averments in the application and its supporting affidavits contain extraneous information not pleaded in the petition and the same ought to be expunged forthwith.

The 1<sup>st</sup> Respondent's learned counsel buttressed his submission with the law as laid down in the decided case of

- 1. WAVINYA NDETI =VRS= IEBC & 2 OTHERS Election Petition No. 4 of 2013 eKLR Page 1 – 7.**
- 2. JOHANA KIPKEMEI TOO =VRS= HELLEN TUM (2014) eKLR page 8 – 12.**
- 3. RAILA ODINGA & 5 OTHERS =VRS= IEBC & 3 OTHERS, Supreme court of Kenya, Petition Nos. 3, 4 and 5 of (2013) eKLR – Page 4, 10 & 11.**
- 4. PHILIP OSORO OGUTU =VRS= MICHAEL ONYURA ARINGO & 2 OTHERS (2013) eKLR – Page 13 – 22.**
- 5. MARTHA WANGARI KARUA (2017) eKLR page 23 – 33.**

In both the Johana and RailaOdinga cases, supra, the court declined to allow additional evidence filed outside the contemplation of the Rules. The High Court at Busia in the case of Philip OsoroOgutu determined, inter-alia that "...there can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected outright or disregarded."

And the fact an election petition must be determined, expeditiously was clearly observed in the election petition of Hon. Martha WangariKarua (supra).

The 1<sup>st</sup> Respondent's learned counsel relied on the provisions of Article 87 (2) of the Constitution which provides that election petitions are to be filed after 28 days after the declaration of the election results.

He did support his submissions with the law as provided by section 76 of the Elections Act which provides for the timelines with which an election petition ought to be heard and determined.

Counsel also invoked the provisions of Rule 8 (2) of the Elections (Parliamentary and County) Petition Rules, 2017 and Rule 12 (2) € (3) (4) of the said Rules to support his grounds of opposition dated the 13<sup>th</sup> November, 2017.

That is a precise outline of the 1<sup>st</sup> Respondent's reasons against the Petitioner's application dated the 5<sup>th</sup> November, 2017. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the other hand did oppose the Petitioner's notice of motion dated the 5<sup>th</sup> November, 2017. They filed grounds of opposition dated the 13<sup>th</sup> day of November, 2017, and also relied on the law as laid down in the authority of **ISMAIL SULEMAN & 9 OTHERS**

**=VRS= RETURNING OFFICER ISIOLO COUNTY, IEBC & 4 OTHERS (2013) eKLR.**

Vide the list of authorities dated the 13<sup>th</sup> November, 2017 and duly filed in court on the 14<sup>th</sup> November, 2017. Plus all the reasons contained in the oral submissions offered by Mr. Malanga Advocate.

The crux of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' grounds of opposition are that the Petitioner's application dated the 5<sup>th</sup> November, 2017 should be dismissed with costs to the Respondents because it is an impermissible attempt to amend the petition as the purported new evidence sought to be adduced relates to matters that were never pleaded.

That under the Elections (Parliamentary and County Elections) Petition Rules 2017, witness affidavits form part and parcel of the petition and cannot be filed on their own. Coupled with the foregoing premises, Mr. Malanga Advocate associated himself with the submissions of Mr. Omoke, Advocate represent the 1<sup>st</sup> Respondent.

Mr. Malanga, the learned counsel for both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted further that this court should allow the Petitioner's application dated the 5<sup>th</sup> November, 2017 on terms that the Petitioner should not open new areas of contestations, but they should limit themselves to the issues raised in the petition.

Counsel was also emphatic that the court should take into account the fact that the officials who manned the elections were employed on temporary basis so they cannot be found to respond to the Petitioner's new evidence. That is a very brief outline of the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' grounds against the Petitioner's notice of motion date the 5<sup>th</sup> November, 2017.

This court has considered the Petitioner's pleadings and his Advocate's submissions in support of the application plus all the provisions of the law duly relied upon by the Petitioner. On the one hand; the court has further, considered the Respondents 1, 2 and 3 respectively, their grounds of opposition and all the pleadings in support of their grounds thereof, the provisions of the law and the law as laid down in all the legal authorities cited and relied upon by all the Respondents on the other hand.

I will point out that I will repeat all the premises the parties pleaded in their pleadings and all the reasons offered by all the learned counsels word by word in their well-reasoned submissions.

However, I have duly considered and have duly evaluated all the parties premises in respect of the Petitioner's application dated the 5<sup>th</sup> November, 2017 each in its entirety and this court has come up with the considered finding that;

One, the parties in this petition have an unfettered right to a fair, just and full hearing of this petition to enable each party ventilate all the issues and/or evidence each party wishes to adduce and/or rely on.

To achieve this very important right, this court must mill the wheel of justice with caution, because this is a petition filed by a party that feels aggrieved and he is thus seeking relief from the court.

Secondly, it is in the principal of justice and as enshrined in the Kenyan Constitution 2010 that disputes should go to trial and disputes be decided justly and fairly.

It is in the light of the aforesaid premises that this court is of the considered view that though the Respondents opposed the Petitioner's application dated the 5<sup>th</sup> November, 2017 and they relied on the Provisions of Rule 12, (3) (4) (9) of the Elections (Parliamentary and County) Petition Rules 2017 but this court will invoke the Provisions of Rules 12 (8) (9) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 which provides that;

Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit is sworn by the witness is filed as required under these Rules. Under Rule 12 (9) of the

said Rules 2017 (supra) it is provided that;

Rule 12 (9) – the Election court may on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit. It is in the light of these provisions that this petition outlines this court is satisfied that the Petitioner has offered plausible, cogent, reasonable grounds why the application ought to be allowed.

Resultantly, this court will proceed to allow the Petitioner’s application dated the 5<sup>th</sup> November, 2017 with costs to the Respondents. The said costs shall be in the cause.

Those shall be the orders of this court.

Orders accordingly.

**M. O. WAMBANI – CM**

**21/11/2017**

Ruling dated at Nyamira this 21<sup>st</sup> day of November, 2017.

**M. O. WAMBANI – CM**

**21/11/2017**

**21<sup>st</sup> November, 2017**

Before Hon. M. Wambani – CM

The Petitioner – Present

The 1<sup>st</sup> Respondent – Present

The 2<sup>nd</sup> Respondent – Absent

The 3<sup>rd</sup> Respondent – Absent

C/c – Nyabonyi

Court – Interpretation/Language – English/Kiswahili/Ekegusii by Court Clerk Nyabonyi.

Mr. Bosire for the Petitioner

Mr. Omoke for the 1<sup>st</sup> Respondent

Mr. Malanga for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

**Court**

The rulings both written, dated, signed on the 21<sup>st</sup> day of November, 2017 be and are hereby delivered in open court, in the presence of the Petitioner, the 1<sup>st</sup> Respondent, the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents Mr. Bosire for the Petitioner, Mr. Omoke for the 1<sup>st</sup> Respondent, Mr. Malanga for the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents.

**M. O. WAMBANI – CM**

21/11/2017

**Court**

Rulings be and are hereby delivered accordingly.

**M. O. WAMBANI – CM**

21/11/2017

**Mr. Omoke for the 1<sup>st</sup> Respondent**

I pray for certified copies of the typed proceedings and the Ruling to enable us appeal. I pray for 7 days to lodge an appeal. Mention on 29/11/2017 for further orders. I will begin with the Memorandum of Appeal.

**M. O. WAMBANI – CM**

21/11/2017

**Mr. Malanga for the 2<sup>nd</sup>& 3<sup>rd</sup> Respondents**

I pray for corresponding leave to file further affidavit. It will take me 2 weeks to get my witnesses.

**M. O. WAMBANI – CM**

21/11/2017

**Mr. Bosire for the Petitioner**

I concede to the Respondents' prayers. We can take a date for directions. I pray for corresponding leave to respond to the Respondent's affidavits.

**M. O. WAMBANI – CM**

21/11/2017

**Mr. Omoke for the 1<sup>st</sup> Respondent**

I pray for 21 days or 14 days to respond to the Petitioner's affidavits since I will be preparing for the appeal. The Petitioner should not have leave to correspond.

**M. O. WAMBANI – CM**

21/11/2017

**Mr. Malanga**

We oppose to the Petitioner's prayer to correspond.

**M. O. WAMBANI – CM**

21/11/2017

**Mr. Bosire**

Will abandon any prayer for leave to correspond.

**M. O. WAMBANI – CM**

21/11/2017

**ORDER**

Proceedings and the ruling herein be typed and certified copies thereof be supplied to the parties as appropriate.

**M. O. WAMBANI – CM**

21/11/2017

**ORDER**

Leave to appeal be and is hereby granted to the 1<sup>st</sup> Respondent as prayed.

**M. O. WAMBANI – CM**

21/11/2017

**ORDER**

The Petitioner's prayer for corresponding leave be and is hereby marked as abandoned.

**M. O. WAMBANI – CM**

21/11/2017

**ORDER**

Leave be and is hereby granted to the Respondents i.e. the parties as prayed.

**M. O. WAMBANI – CM**

21/11/2017

**ORDER**

The 1<sup>st</sup> Respondent be and is hereby granted 14 days as prayed.

**M. O. WAMBANI – CM**

21/11/2017

**ORDER**

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be and are hereby granted 14 days from the date hereof.

**M. O. WAMBANI – CM**

21/11/2017