



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**ELECTION PETITION NO. 10 OF 2017**

**LANGAT DONNIE KIPTOO ARAP.....PETITIONER/ RESPONDENT**

**-VS-**

**1. SIKUKU MARTIN SIMOTWO, CONSTITUENCY RETURNING**

**OFFICER, LANGATA CONSTITUENCY.....1<sup>ST</sup> RESPONDENT**

**2. THE INDEPENDENT ELECTORAL**

**& BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**3. ABDI OSMAN KHALIF.....3<sup>RD</sup> RESPONDENT/ APPLICANT**

**RULING**

1. The 3<sup>rd</sup> Respondent moved this Court under Certificate of urgency vide the Notice of Motion application dated 19<sup>th</sup> October 2017 under the provisions of Articles 47,50,159 and 258 of the Constitution, Section 76 of the Elections Act , The Elections (Parliamentary and County Elections) Petition Rules , 2017 , Order 51 Rule 1 of the Civil Procedure Rules 2010 and all the enabling provisions of the Law. The prayers sought are :

***a) Spent***

***b) The Supplementary Affidavit sworn by the Petitioner LANGAT DONNIE KIPTOO ARAP dated 4<sup>th</sup> October 2017 and further affidavits sworn by JACQUELINE BASIYE , KEVN BASIYE and EDWARD MWAKIMA be struck out.***

***c) THAT costs of this Application be provided for.***

2. In a nutshell, the 3<sup>rd</sup> Respondent states that there are certain paragraphs in the above mentioned Supplementary affidavits which introduce new causes of action that were never pleaded in the Petition filed on 5<sup>th</sup> September 2017. The 3<sup>rd</sup> Respondent refers to the Petitioner's Supplementary affidavit which allegedly introduces allegations of failure to ensure transparency in the recruitment of Pos, DPOs, Clerks ; manipulation of the order of vote counting; failure to display declared results at the polling station ; gross discrepancies in voters who voted for the MCA and other positions and failure of the Police to prosecute the IEBC officer for election offences. As for the Further Affidavit of JACQUELINE BASIYE , it is

alleged that she introduces claims of violence, intimidation and harassment of voters perceived not to be supporters of the 3<sup>rd</sup> Respondent at paragraph 7 and claims that the presiding officer failed to take into account some of the spoilt votes on numerous occasions and continued to count them as valid in the 3<sup>rd</sup> Respondent's favour thus showing a collusion between the 2<sup>nd</sup> Respondent's officers and the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent also refers to the Further Affidavit dated 4<sup>th</sup> October 2017 and sworn by one KEVIN BASIYE at paragraphs 7, 8,9, 10 ; and the Further Affidavit of EDWARD MWAKIMA at paragraphs 7, 8, 9, 10, 11, 12, and 13 which he claims introduces new causes of action outside the Petition. The 3<sup>rd</sup> Respondent relies on the case of ELECTION PETITION NO. 1 OF 2017 HASSAN NOOR HASSAN –VS – IEBC & ALI ROBA where the Honourable Ochieng, J struck out the Petitioner's affidavits for introducing new causes of action never pleaded in the Petition. According to the 3<sup>rd</sup> Respondent, the offending paragraphs amount to amending the Petition through the back door and should not be allowed to stand.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents support this application and did not file any response.

4. The Petitioner opposes the application and relies on the Grounds of Opposition dated 23<sup>rd</sup> October 2017 and filed on 24<sup>th</sup> October 2017. According to the Petitioner, the application is mischievous , bad in law and an abuse of the court process . It is contended that pleadings have been closed and no leave was sought to bring this application . He prays for its dismissal. He further submits that the supplementary affidavits are consistent with the Petition and it would be draconian to strike them out without giving the parties an opportunity to ventilate their cases on merits. He states that the Applicant has failed to prove the alleged inconsistencies and the application ,if allowed, will open floodgates of other applications hence frustrate the requirement of expediency in the hearing of this Petition. According to the Petitioner, the authority cited is not applicable to this case.

## **5. Court's Analysis**

I have carefully considered the application and opposing arguments. Oral submissions were made before me by Ms Awuor Advocate appearing for the 3<sup>rd</sup> Respondent/ Applicant, Mr. Theuri, Advocate appearing for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Mr . Akello , Advocate for the Petitioner/ Respondent herein. I have also perused the court record and in particular, the Petition dated 5<sup>th</sup> September 2017 and its supporting affidavit, the Supplementary Affidavit sworn by the Petitioner LANGAT DONNIE KIPTOO ARAP dated 4<sup>th</sup> October 2017 and further affidavits sworn by JACQUELINE BASIYE , KEVN BASIYE and EDWARD MWAKIMA .

The issue for determination is whether the averments in the Supplementary and Further affidavits filed by the Petitioner introduce new causes of action and should therefore be struck out.

This Court has the discretion to allow the filing of additional affidavits and to admit new evidence under the provisions of Rule 15 (1) (h) of the Elections (Parliamentary and County Elections ) Petitions Rules. However, such discretion must be exercised judiciously. Further, there ought to be an application to adduce new or additional evidence made within 28 days of the declaration of the results of the election. In the present case, the Petitioner's further affidavit clearly raises matters not pleaded in the Petition and does raise new causes of action which requires the Respondent to respond to. The Court allowed the parties to file further affidavits during the Pre-trial on 9<sup>th</sup> October 2017 . However, there was no request to introduce new facts or evidence outside the Petition. As was stated in the case of RAILA ODINGA – VS- IEBC & 3 OTHERS , SUPREME COURT PETITION NO. 5 OF 2013, the Court should not allow any adduction of new or additional evidence which is not only prejudicial to the other parties , but also changes the nature of the Petition and makes it difficult for the other party to respond. The strict timelines provided by the Constitution must be observed by all parties and the Court will not entertain any application or procedure that seeks to delay the hearing of the Petition.

**I therefore find merit in the application . The offending paragraphs in the Further Affidavit of JACQUELINE BASIYE , the Further Affidavit dated 4<sup>th</sup> October 2017 and sworn by one**

**KEVIN BASIYE at paragraphs 7, 8,9, 10 ; and the Further Affidavit of EDWARD MWAKIMA at paragraphs 7, 8, 9, 10, 11, 12, and 13 and the Petitioner’s Further affidavit sworn on 4<sup>th</sup> October 2017 are hereby struck out with costs.**

**Orders accordingly.**

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Before Hon. A.M. Obura (Mrs), SPM

Court Assistant:.....

Parties:.....for Petitioner / Respondent

.....for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

.....for 3<sup>rd</sup> Respondent/Applicant

Ruling delivered in open court this **31<sup>st</sup>** Day of **October 2017**.

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