



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE’S COURT AT HOMA BAY**  
**ELECTION PETITION NO: 1 OF 2017**

**ODONGO VICTOR ROBERT.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT**

**THE RETURNING OFFICER KAGAN WARD EZEKIEL JUMA OTIENO....2ND  
RESPONDENT**

**ONYANGO PHILEMON.....3RD RESPONDENT**

**RULING**

Mr. Odeny counsel for the petition has raised two preliminary objections as follows:

1. That the responses by the respondents were not filed in accordance with the rules and therefore they should be expunged from the court record and the matter to proceed.
2. That the 3rd respondent’s response has been filed against a person called Odongo Vincent who is not a petitioner.

I have considered the preliminary objection and the responses by the respondents.

To start with, I have to defend what the term preliminary objection means and the implication thereof.

From the legal point of view, a preliminary objection is a term which is used in the context of international law. It is an objection raised in a case before a court or tribunal and if such objection is upheld, then it will render further proceedings before the tribunal or court impossible or unnecessary. An example of a preliminary objection is the objection to the jurisdiction of a court.

In the case of Mukisa Biscuits Manufacturing Company Ltd(1969)EA 698, the court held that “ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

It therefore goes without say that a preliminary objection must be on matters of law and not matters of fact.

I have perused the reasons by the petitioner herein. I have also considered the response by the respondents. I have further perused the decisions relied by the petitioner. The aim and purpose of the Elections Petition rules that:-

i) The overriding objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the constitution and the Act.

ii) The court shall in the exercise of its powers under the Constitution and the Act or in the interpretation of any law of the provisions in these rules, seek to give effect to the overriding objective specified in sub-rule(i).

iii) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and to that effect, to participate in the process of the court and comply with the directions and orders of the court. The duty of the court is therefore to give effect to the overriding objective of the elections Act which is to facilitate the fast, expeditious, proportionate and affordable resolution of the election petitions. The obligation has to be shared by all the parties and their advocates.

The petitioner raised an issue that the responses by the 1st 2nd and 3rd respondents did not comply with the rules and therefore should be expunged from the record. The petitioner does not however demonstrate to the court how prejudiced he will be if a particular paragraph or sentence has been omitted in the response. My position is that the objection is on a mere want of form and therefore does not qualify to be a preliminary objection by dint of the Mukisa Biscuits case. In any case the objection is about an affidavit which and not the petition itself.

On the second issue about the 2nd and 3rd respondents mentioning the name Odongo Vincent instead of Odongo Victor Robert, I do make a finding that that amounts to an error which does not go to the substance and merits of the case. We are all aware that what is before this court is petition No.1 of 2017 and the petitioner and respondents are well known.

By dint of section 80-1(d) and Article 159 the errors can be overlooked, and are corrected so as to enable the court to proceed to the merits if the case.

The matter before court is an election petition with a lot of public interest and to sustain the orders sought by the petitioner will be a draconian measure based on a technicality of want to form.

Accordingly I do dismiss the preliminary objection by the petition and proceed to make the following orders:-

1. That the petitioner's preliminary objection is dismissed with no orders as to costs.
2. That the 1st, 2nd and 3rd respondents' responses to the petition are accordingly treated as responses to the petition by dint of section 80-1(d) of the Election Act and Article 159 of the constitution of Kenya.
3. That the petitioner's supplementary affidavit dated the 28th day of October is deemed to have been properly filed and served.

That all the responses bearing the names Odongo Vincent Robert to be amended to read Odongo Victor Robert.

That the matter do proceed to full hearing today.

T. OBUTU SPM

Ruling delivered this 1st day of November 2017.

Mr Odeny for Petitioner

Miss Gugi for 1st Respondent

Miss Maumo for 2nd and 3rd Respondent

T. OBUTU SPM

1/11/2017