



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT KAKAMEGA

ELECTION PETITION NO. 6 OF 2017

BARLEX SAMUEL JUMA PIUS.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....1ST RESPONDENT

CONSTITUENCY RETURNING OFFICER

OF INDEPENDENT, ELECTORAL AND

BOUNDARIES COMMISSION

(LUGARI CONSTITUENCY CHEVUYWA).....2ND RESPONDENT

GODFREY BARASA WAMBULWA.....3RD RESPONDENT

RULING

The ruling is in respect of the second application dated 10.11.2017 and filed on 14.11.2017 brought by the 3rd respondent pursuant to Article 87(1) and (2) of the Constitution of Kenya 2010, S.76 of Elections Act No. 24 of 2011, R.15(I)(h) of the Elections (Parliamentary and County Elections) Petition Rules 2017, S.3A CPA and all enabling provisions of the law seeking orders as follows:

1.

2. That this Honourable court be pleased to strike out the further affidavit of Barlex Samuel Juma Pius dated 24.10.2017 and all annexures thereto which include, among others, the annexed affidavits of Ronald Maurice Sikuku and Taracha Wanduku dated 24.10.2017 all of which were filed on 30.10.2017. Supposedly on the basis of a leave of court granted on 9.10.2017.

3. The costs of this application be provided for.

The application is predicated on grounds set out on the face of the application inter alia that petitioners advocate sought leave of the court to file a further affidavit in support of the petition on 9.10.2017, a request which the election court acceded to and directed that the further affidavit and any other correspondences were to be filed by 18.10.2017, however, the petitioner filed the further affidavit on 30.10.2017, which is 12 days after expiry of dateline which the court had granted; that despite the fact that the election court has discretion to allow the filing of affidavits and admit new or additional evidence

on application for the adduction of new and additional evidence must be made within 28 days of the declaration of the results where the new or additional evidence, if admitted and acted upon would have the effect of amending the election petition; that the admission of the further affidavit and the two affidavits annexed thereto which have been filed in support of the petition will prejudice the other parties to the dispute and undermine the Constitutional imperative of timely resolution of electoral disputes; that unless the application is allowed, the further affidavit in addition to the two other affidavits annexed to the further affidavit will introduce massive evidence which would in effect change the nature and scope of the petition and affect the 1st – 3rd respondents ability to respond to the said evidence, and will therefore unfairly disadvantage the 1st – 3rd respondents thereby gravely prejudicing them.

The application is supported by the attached affidavit sworn by the 3rd respondent dated 10.11.2017.

The 1st and 2nd respondents filed a replying affidavit by one Kipkemboi Lagat Japheth dated 21.11.2017 sworn in support of the application and in which he depones that the petitioner was granted leave by the election court on 11.10.2017 to file and serve further affidavit to the petition within 7 days but filed further affidavit 30.10.2017; that when leave was granted to the petitioner it was very specific that the petitioner was to file further affidavit but not further witness evidence; that an election court shall not allow new evidence and further witness at this juncture that affects the respondent's ability to respond to the said evidence and the affidavit by Richard Maurice Sikuku and Taracha Wanduku ought to have been filed together with petition allowing the same will be prejudicial to the respondents who are unable to respond and new evidence will automatically change the scope of the petition.

The application is opposed on the strength of a replying affidavit sworn by the petitioner on 21.11.2017 in which he depones that on 9.10.2017 leave was granted to both parties to file further affidavit but no time limit was placed on the parties to do so; that he had to wait and be served with the replying affidavit to his application dated 9.10.2017 before respondent to all issues raised by the respondents in response thereto and in response to the petition; that as regards the affidavits attached to his further supporting affidavit, in his petition first he mentioned that he had annexed a witness affidavit of Ronald Maurice Sikuku but it was inadvertently not filed which is annexed, secondly, in the petition one of his witnesses Johnson Mukonji witness affidavit on page A-20 paragraph 5(b) mentioned that the 3rd respondent agent/supporters assaulted one James Enos Manyasi the treatment notes annexed prove this fact and is not new evidence, and thirdly, the 3rd respondent witness one Mildred Naliaka alleged that Taracha Wanduku was bribing voters the affidavit of Taracha Wanduku responds to these allegations. The petitioner should submit that this application is not meritorious and it should be dismissed with costs. However, in the unlikely event that this Hon. Court finds otherwise, may it exercise its discretion under the relevant rules to admit the affidavits sought to be expunged.

By consent entered by learned counsel on behalf of the parties, it was agreed that the application be canvassed by way of written submissions. I have considered the submissions. I have considered the submissions and perused the pleadings and I have reached the following findings and conclusions:

On submissions made on behalf of the respondents herein that this court acceded to the petitioner's application made on 9.10.17 for leave to file a further affidavit and directed that the same and any other correspondences be filed by 18.10.17, however, the petitioner filed the same on 30.10.17, which is twelve (12) days after the expiry of the timeline which the court had granted, the petitioner argue that no specific order was issued giving the petitioner seven (7) days to file his further affidavit, which ought to have been filed by 18.10.17, and it is thus clear that the allegation that the affidavit filed on 30.10.17 was filed out of time by 12 days and without leave is baseless and ought to be dismissed.

A perusal of the court record reveal that though the court, in advertently, failed to indicate on record that the further affidavit and any other correspondence be filed within seven (7) days from the date thereof, it is on record that it directed that matter be mentioned on 23.10.17 within which time the parties were expected to have filed and exchanged the said documents and it is therefore fallacious for the petitioner to assert that no time limit was placed on the parties. The date 23.10.17 was the deadline which the court had granted for filing and exchanging correspondences and by filing further affidavit on 30.10.17 the

petitioner was in violation of the court's directions and filed the same out of time and his action amount to abuse of the court process.

With regards to the respondents submissions that despite the fact that the election court has discretion to allow filing of further affidavits and admit new or additional evidence the same should be hinged on the set laws and laid down procedures of law and further that though leave was granted to the petitioner by this court it was specific that the petitioner was to file further affidavit but not further witness statement yet the same filed by the petitioner has two affidavits annexed thereto of Richard Maurice Sikuku and Taracha Wanduku, which introduce new and additional evidence, the petitioner maintain that he had to wait and be served with the replying affidavit to his application dated 9.10.17 before responding to all issues raised by the respondent in response thereto and in response to the petition; that there is no new and massive evidence adduced which will automatically change the nature and scope of the petition and that it is not correct to allege that additional evidence must be made within 28 days of declaration of result and that that is a misapprehension of the law.

The timelines of election petition are set out in the constitution and the Election Act 2011. Article 87(1) and (2) of the constitution provides that:-

“87(1) Parliament shall enact legislation to establish mechanism for timely settling of electoral disputes.

(2) Petitions concerning an election other than a presidential election, shall be filed within twenty eight days after the declaration of the election results by the independent Electoral and Boundaries Commission.”

And S.76(1) (a) of the Elections Act 2011 provides that any petition intent on questioning the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation. These provisions of the law underscore the constitutional objective of timely resolution of electoral disputes and the courts are enjoined to strictly enforce requirements relating to prescribed timeline in election petitions. In the instant petition election results were declared 8.8.17 and leave to file the further affidavit was granted on 9.10.17 and the further affidavit was to be filed by 23.10.17 but was actually filed on 30.10.17 out of time in violation of court directions.

Turning to the power to admit new or additional evidence, the court was referred to the case **Raila Odinga Vs Independent Electoral and Boundaries Commission and 3 Others** Supreme court Petition No. 5 of 2013 where the Supreme court enunciated guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence as follows:

a) The admission of additional evidence is not an automatic right. Instead, the election court has a discretion on whether or not to admit the evidence;

b) Further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondents ability to respond to the said evidence;

c) The parties to an election petition should strive to adhere to the strict timelines set out in EDR laws; and

d) Admission of new evidence must not unfairly disadvantage the other parties to an election petition.

Having gone through the further affidavit and all annextures thereto, I am of the considered opinion that they introduce new evidence which in effect change the nature of the petition and affects the respondents ability to respond to the said evidence; will interfere with timely resolution of election disputes as set out in the constitution and statute; and, unfairly disadvantage other parties to the petition.

Further, on the issue of filing affidavits as annextures, the supreme court in **Raila Odinga Vs IEBC**

(Supra) warned thus:

“This is an unusual way of availing Affidavits as “annextures” or “evidence” they are not independent affidavits filed to stand on their own, as evidence in the particular proceedings. We should understand if an affidavit is sworn in other proceedings in the past, is annexed as evidence of that affidavit. However, to have several affidavits sworn for the purpose of current proceedings and annexed as evidence is most unusual, if not strange, in our view.

Firstly, such affidavit evade payment of the filing fees and, secondly, their probative value come into question....”

I am guided by the holding in the above cited case and find that the filing of affidavits as annextures by the petitioner herein is an anomaly that should not be entertained.

The upshot of the foregoing analysis is that I find merits in the application dated 10.11.17 and accordingly strike out the further affidavit of Barlex Samuel Juma Pius dated 24.10.17 and all annextures thereto.

Costs in the cause

Orders accordingly

Ruling delivered/signed by me in the presence of all parties, M/s Olel Advocate for petitioner, M/s Luyali Advocate for 1st and 2nd respondent and Ndalila Advocate for 3rd respondent.

B.OCHIENG - CM

In line with the Ruling dated 13.12.2017, I do hereby make the following orders with regards to prayer 5 on scrutiny.

1. That the scrutiny will be conducted for the 10 polling stations listed here below:

1. Vuyika Polling Station
2. Makonge Polling Station
3. Makhukhuni Polling Station
4. Kivaywa Polling Station
5. Misenwa Polling Station
6. Muhoma Polling Station
7. Lumani Polling Station
8. Chenjeni Polling Station
9. Nambilima Polling Station
10. Chepusai Polling Station

2. That the Election Materials to be scrutinized are:

1. All forms 36 As from the 10 polling stations
2. Form 36 B

3. Copies of form 36 As contained in the ballot boxes in respect of the 10 polling stations

4. Polling day dairy

5. Copies of the result in each of the 10 polling stations

3. All the election materials and records in respect of all the 10 poling stations for election of MCA Cheveywa Constituency currently in the custody of the 1st and 2nd respondents be immediately secured by each party to the petition placing their own seals thereon.

4. The scrutiny exercise shall be undertaken and overseen by the Deputy Registrar of this court be assisted by duly vetted Judicial Staff who will be authorized in writing to participate.

5. The 1st and 2nd Respondents shall prove adequate and secure transport for the election materials from the IEBC to the court where a room shall be secured for the exercise.

6. Each party to the petition shall authorize and deputize in writing two agents to observe the exercise.

7. The parties themselves shall not be allowed into the room where the scrutiny exercise shall take place.

8. On 5.1.2018 the above materials be retrieved and opened in the presence of the parties agents and representatives for the scrutiny exercise to start at 8.30 a.m.

B. OCHIENG, CM

18.12.2017

Order – mention on 8.1.2018 for taking directions.

B. OCHIENG, CM

18.12.2017